

The Local Turn; Innovation and Diffusion in Civil Rights Law
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I
INTRODUCTION

Is the future of civil rights subnational? If one is looking for civil rights innovation, much of this innovation may be happening through legislation, regulatory frameworks, and policies adopted by state and local governments. In recent years, states and cities have adopted legislation banning discrimination in housing based on the source of an individual's income, regulating the consideration of arrest or conviction in employment decisions, and prohibiting discrimination in employment based on an applicant's credit history.

This deployment of subnational power is not new to civil rights. Many of the laws and regulatory frameworks that are now core to the national civil rights framework started at the state level. Before the landmark Civil Rights Act of 1964,¹ States such as Wisconsin, New York, Massachusetts, and California banned discrimination on the basis of race in employment and housing.² New York's administrative disparate impact standard was the precursor to the disparate impact standard that would eventually become ensconced in federal employment law.³ And more recently, the 1980s and 1990s saw proliferations of state antidiscrimination laws that prohibited sexual orientation discrimination, even as legislative protections stalled on the national level.⁴

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¹ Title VII, 42 U.S.C. §§ 2000e–2000e-17 (2012).

² See Susan Carle, *A New Look at the History of Title VII Disparate Impact Doctrine*, 63 FLA. L. REV. 251, 255 (2011); David F. 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, 1079 n.29 (2011).

³ See Carle, *supra* note 2, at 236.

⁴ See *infra* notes 14–21 and accompanying text.

What appears novel, however, is the number of these initiatives in recent years, and a context in which these state measures may not inevitably end with national civil rights legislation. Indeed, for reasons of both political economy and institutional design, some of the most innovative examples of legislation and regulation to advance equality are likely to permanently reside at the subnational level. Many of these innovations build on recent movements to use local regulatory to increase wages and work conditions for lower income workers,⁵ and these innovations address not just identity exclusion based on race or ethnicity but also exclusions based on socioeconomic status. The political economy that sustains their emergence and implementation depends on demographics and political cultures that are largely centered on cities and large metropolitan regions. In addition, some of the innovations proliferating at the state and local levels such as local first-source hiring, community-benefits agreements, and inclusionary zoning depend on regulatory powers exclusive to subnational governments.⁷

These proliferating state and local interventions present a different conception of civil rights than one centered on the promulgation of federal frameworks and the deployment of federal regulatory power. The aim of the civil rights project is typically national—the goal is to advance rights that belong to all citizens.¹⁰ That some states and localities are first-movers or

⁵ See U.S. Berkeley Labor Center, Inventory of U.S. City and County Minimum Wage Ordinances (“Before 2012, only five localities had minimum wage laws; currently 33 counties and cities do”), available at <http://laborcenter.berkeley.edu/minimum-wage-living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances/>.

⁷ See *infra* notes 61–77 and accompanying text.

¹⁰In the area of race discrimination and inequality, some scholars have advocated for increased focus on localities as potential “equality innovators” to counter the limits of constitutional jurisprudence in addressing structural racial inequity. See Robin A. Lenhardt, *Localities As Equality Innovators*, VII:2 STAN. J. CIV. RTS. & CIV. LIB. 265(2011) (advocating the adoption of local generated race-audits to understand historical and contemporary contributors to racial disadvantage and to develop solutions). Beyond civil rights, commentators have also encouraged “progressive federalism” which would require the federal government to set rights and standards, but allow state experimentation to address inequality. See RICHARD B. FREEMAN & JOEL ROGERS, *The Promise of Progressive Federalism*, in REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY 205-06 (Soss et al. 2010).

have legislation that is more expansive can be consistent with civil rights as a national project, In classic accounts of states and cities as laboratories of legislation and problem-solving, states and localities provide the regulatory models for nationally-adopted civil rights legislation. States and localities can also build support among citizens and political leaders to advance adoption of these initiatives at the national level.

But what if these initiatives are not in the service of an inevitable federal project of legislation and regulation? Today, one sees very little legislative activity at the federal level related to civil rights; all the interesting and important moves appear to be taken on by subnational governments. And amidst uncertainty about whether these initiatives will be adopted by the federal government and diffuse “vertically,” there is some evidence that these regulatory and legislative initiatives are spreading among jurisdictions.¹¹

The question then is whether the “local turn” in civil rights law can ever be a satisfactory equilibrium for those interested in advancing civil rights and equality law. This local approach raises questions concerning the mechanisms by which these innovations will spread from one locality to another, and whether localities will have the legal, regulatory, and financial power to advance a meaningful civil rights regime.

This article explores these questions and offers a cautiously hopeful account of these subnational innovations. As a practical matter, when large cities and metropolitan areas adopt these innovations, they are likely to have expansive demographic reach. Functionally, measures such as community-benefits agreements or inclusive zoning build on regulatory or legislative tools unavailable at the federal level. They thus expand the domains and points of intervention for advancing inclusion—diffusing civil rights norms to state and local actors. As a matter of political economy, these innovations, particularly those that address questions of economic

¹¹ See discussion *infra* Part II.

inclusion like bans on source of income discrimination and limitations on credit history, depend on local movements and local politics. These local movements are hard to sustain at a national level and can play a crucial role in the politics of implementation. Finally, because of these prior points, these subnational innovations are remaking the very nature of what we call the civil rights project. Whether or not these innovations are fully successful yet, they demand a serious look if one is concerned about expanding regulatory models of inclusion. These new state and local measures provide routes around the limitations of the federal civil rights model in addressing subtle bias and structural exclusion.

Part II of this article canvasses recent legislative and regulatory initiatives at the subnational level. This part provides an account of subnational innovation that follows what I call the “classic antidiscrimination framework” of federal law, but it expands the categories of prohibited discrimination. This part then examines those innovations that move beyond the classic framework by using novel forms of state and local regulatory power to advance inclusion across a range of domains. Examples include community-benefits agreements and inclusionary zoning. This part shows that much of this local innovation is attempting to fill in the gaps of what federal civil rights law currently covers by explicitly addressing barriers that go to economic and income-based exclusions.

Part III examines the political economy that is likely driving these innovations. It finds that these innovations are more than pragmatic attempts to advance reforms that have no hope of adoption at the national level: they also build on distinct capacities of states and localities. These capacities include the demographic and market power of large metropolitan regions, political support for adoption and implementation by local communities, and specific local government powers including procurement and zoning.

Part IV addresses the legal, political, and implementation challenges that these innovations nevertheless present, and offers thoughts on how to strengthen and diffuse the regime. These threats include preexisting and created preemption of state and local power by higher levels of government. This part finally develops an account of diffusion of civil rights innovation through regional economic competition, policy imitation, and the work of civil society and advocacy groups. It suggests how civil rights lawyering might help advance this local turn, and how federal regulation can support diffusion of inclusive innovation.

II SUBNATIONAL INNOVATION

Determining what goes into the box of civil rights is at the heart of the claim of subnational innovation. Classically our civil rights regulatory regime refers to those doctrines, laws, and regulations that prohibit discrimination based on particular forms of identity, such as race, ethnicity, gender, and sexual orientation. This part begins by offering examples of civil rights legislation at the state and local levels that build on this traditional civil rights framework. This part then considers another category of state and local innovation that is challenging our very notion of civil rights legislation as confined to prohibitory antidiscrimination legislation. Included in the box of “civil rights” legislation are those measures aligned with civil rights goal but that leverage state and local regulatory power to require regulated institutions to include historically excluded groups. .

A. EXPANDING ANTIDISCRIMINATION

First, are state and local measures that adopt the classic prohibitory antidiscrimination framework but that expand on categories absent in current federal law? This classic framework, typified by the 1964 Civil Rights Act, prohibits “discrimination” based on particular identity characteristics, and provided a set of remedies enforced by courts or administrative agencies to

promote enforcement and compliance.¹² The classic civil rights framework may also include attendant mechanisms for promoting compliance through education and technical assistance, but the framework operates primarily through litigation by private actors or administrative agencies, administrative adjudication. Even before the Civil Rights Act of 1964, states and localities adopted civil rights statutes that took this form. Indeed, significant portions of Title VII's fair employment provisions are modeled on earlier state legislation from New York.¹³

In recent years, subnational antidiscrimination efforts that take this form innovate not by deviating from this prohibitory or enforcement framework but by adding new categories to the existing framework. Indeed, many of these statutes simply add new categories to existing civil rights laws that prohibit discrimination based on race and gender.

1. Examples

The most prevalent are state and local laws prohibiting discrimination on the basis of sexual orientation or gender identity. While there exists no explicit federal legislative ban on discrimination in employment or other sectors based on sexual orientation, more than twenty states, the District of Columbia, and Puerto Rico currently prohibit discrimination in employment or public accommodations based on sexual orientation¹⁴ and an additional 185 cities and counties prohibit various forms of discrimination based on sexual orientation or gender identity.¹⁷

¹² See, e.g., Title VII, 42 U.S.C. § 2000e-2(a)(2) (2012). Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin.” *Id.*

¹³ See Carle, *supra* note 2, at 287 (detailing how federal law drew from the New York experience).

¹⁴ As of December 31, 2014, these states are California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington. See ACLU, Non-Discrimination Laws: State by State Information-Map, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map>.

¹⁷ See Movement Advancement Project, Local Employment Non-Discrimination Ordinances, www.lgbtmap.org/equality-maps/non-discrimination_ordinances.

Wisconsin was the first state to ban discrimination based on sexual orientation in both public and private sector employment discrimination when it enacted legislation in 1982.²¹ The 1990s saw the expansion of these protections by states and localities. Today, some form of protection against employment discrimination based on sexual orientation exists in high-population states such as California, Illinois, and New York, as well many large localities—Dallas, Houston, Miami-Dade, and Broward County—located in states lacking legislative protection.

In the last ten years subnational governments have expanded anti-discrimination protection to reach other categories unprotected by federal law. Specifically, states and localities have enacted legislation banning discrimination based on the source of an applicant's income in housing, prohibiting discrimination based on employment status, and limiting employers from taking into account an applicant's credit history or arrest and conviction record before making employment decisions. The most prevalent are state and local measures prohibiting differential treatment of those who have either been subject to arrest or conviction—known as “ban the box” or “fair-chance” legislation. In 1998, Hawaii became the first state to “ban the box,” forbidding employers from inquiring into an applicant's criminal history until after the employer has made a conditional offer of employment.²² ²³ Minnesota enacted a similar prohibition in 2009 covering initially only public sector hiring²⁴ (the state has since expanded it to encompass private sector

²¹ Wisconsin Fair Employment Act (WFEA), WIS. STAT. §§ 111.31–111.39 (2010). *See generally* William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination based on Sexual Orientation*, 22 WIS. WOMEN'S L.J. 91, 93 (2007) (noting that Wisconsin was the first state to adopt legislation banning discrimination on the basis of sexual orientation).

²² *See* HAW. REV. STAT. § 378-2.5 (2015). s The employer may then withdraw the conditional offer if the employer finds the applicant's conviction (if the conviction occurred within the prior ten years) bears a “rational relationship” to the duties and responsibilities of the job. *Id.*s

²³ *Id.*

²⁴ MINN. STAT. § 364.021 (2009).

employers²⁵), and since that time seventeen states and Washington, D.C. have adopted ban-the-box policies.²⁶ Some form of ban-the-box legislation has spread rapidly in recent years among city and county governments. Boston was the first city to adopt such a policy in 2004.²⁷ In the following five years, twenty-one cities and counties enacted similar legislation.²⁸ Since 2010, more than 100 cities and counties have adopted ban-the-box policies.²⁹

An increasing number of states and localities have also enacted prohibitions that prevent various forms of employment discrimination against the unemployed and those with poor credit,³⁰ often due to periods of unemployment and medical debt.³¹ Currently federal law prohibits employers from checking an applicant's credit without written consent, and allows employees various avenues to contest the accuracy of these reports.³² Ten states go further, forbidding inquiries into an applicant's credit history unless such inquiries are job related.³³ At

²⁵ See S.F. 523, 88th Leg., 2d Engrossment (Minn. 2014) (amending MINN. STAT. § 364.021).

²⁶ See MICHELLE NATIVIDAD RODRIGUEZ & NAYANTARA MEHTA, NAT'L EMP'T LAW PROJECT, BAN THE BOX – FAIR CHANCE GUIDE 15-27 (2015), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>

²⁷ See *id.* at 15.

²⁸ *Id.* at 15–27.

²⁹ *Id.* at 27–65.

³⁰ Definitions of poor credit history vary, but include those with poor credit scores, or who have carried long-term credit card debt.

³¹ See AMY TRAUB, DEMOS, DISCREDITED: HOW EMPLOYMENT CREDIT CHECKS KEEP QUALIFIED WORKERS OUT OF A JOB (2013) (survey of low and middle-income households with credit card debt finding that poor or declining credit is associated with job loss, lack of health coverage or medical debt); see also Robert Avery et al., *An Overview of Consumer Data & Credit Report*, FED. RES. BULL. (2003), <http://www.federalreserve.gov/pubs/bulletin/2003/0203lead.pdf>; Robert Avery et al., *Credit Report Accuracy and Access to Credit*, FED. RES. BULL. (2004), http://www.federalreserve.gov/pubs/bulletin/2004/summer04_credit.pdf; MICHELLE M. DOTY ET AL., THE COMMONWEALTH FUND, SEEING RED: THE GROWING BURDEN OF MEDICAL BILLS AND DEBT FACED BY U.S. FAMILIES (2008), http://www.commonwealthfund.org/~media/files/publications/issue-brief/2008/aug/seeing-red--the-growing-burden-of-medical-bills-and-debt-faced-by-u-s-families/doty_seeingred_1164_ib-pdf.pdf; MATT FELLOWES, BROOKINGS INST., CREDIT SCORES, REPORTS AND GETTING AHEAD IN AMERICA (2006), http://www.brookings.edu/~media/research/files/reports/2006/5/childrenfamilies-fellowes/20060501_creditscores.pdf.

³² See Fair Credit Reporting Act, 15 U.S.C. § 1681(b)(3)(B) (2012). Under the law if an employer makes an employment decision based on financial information in a background report, it must supply the applicant with specific information about the credit report and give the applicant the right to dispute the accuracy of the information. See *id.*

³³ The states are: Washington, WASH. REV. CODE § 19.182.020 (2007); Hawaii, HAW. REV. STAT. §§ 378-2.7, 378-2(8) (2009); Illinois, 820 ILL. COMP. STAT. 70/10 (2010); Oregon, OR. REV. STAT. § 659A.320 (2010); California,

least one city has enacted similar prohibitions: in 2015 New York City amended its human rights code to make it illegal for employers to ask about or use consumer credit information in making hiring and other employment decisions.³⁴

A handful of jurisdictions—New York City; Madison, Wisconsin; and the District of Columbia³⁶—ban employers from discriminating against the unemployed, whom some studies show face a steeper uphill battle in obtaining employment.³⁷ Oregon and Chicago limit employers from advertising jobs as off-limits to the long-term unemployed.³⁸ These various protections against the long-term unemployed are less prevalent than the credit check bans.³⁹ This may be because some of the more blatant practices (such as discriminatory advertising) have disappeared, that even sympathetic legislatures or advocates lack confidence in an enforcement apparatus that could effectively police such discrimination, or that legislators are

CAL. LABOR CODE § 1024.5 (West 2011); Connecticut, CONN. GEN. STAT. § 31-51tt (2011); Maryland, MD. CODE ANN., LAB. & EMPL. § 3-711 (2011); Vermont, VT. STAT. ANN. tit. 21 § 495i (2012); Colorado, COLO. REV. STAT. § 8-2-126 (2013); and Nevada, NEV. REV. STAT. § 613.570 (2013). As of September 2014, 26 states and the District of Columbia had pending bills to prohibit discrimination on the basis of credit history. *See Use of Credit Information in Employment 2013 Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/financial-services-and-commerce/use-of-credit-info-in-employ-2013-legis.aspx> (last visited November 27, 2015).

³⁴ Stop Credit Discrimination in Employment Act, N.Y.C. ADMIN. CODE §§ 8-102(29), 8-107(24) (2015). The legislation exempts certain categories of employers including police officers and other law enforcement personnel, national security professions, those with access to trade secrets, and employees with signatory authority to assets above \$10,000.

³⁶ *See* New York City, N.Y. Local Law No. 14 (June 11, 2013) (amending N.Y.C. ADMIN. CODE §§ 8-102(5), 8-107); MADISON, WIS. GEN. ORD. 13-00211 (Dec. 11, 2013) (amending Madison, Wis. Gen. Ord. § 39.03); Unemployment Anti-Discrimination Act of 2012, 59 D.C. REG. 13 (Mar. 30, 2012) (amending Human Rights Act of 1977, D.C. CODE §§ 2-1401.01, 2-1401.02, 1401.06, 2-1402.11(a)).

³⁷ *See generally* EXEC. OFFICE OF THE PRESIDENT OF THE U.S., LABOR FORCE PARTICIPATION RATE SINCE 2007: CAUSES & POLICY IMPLICATIONS 27 (2014), https://www.whitehouse.gov/sites/default/files/docs/labor_force_participation_report.pdf; Geoffrey C. Ho, et al., *The Stigma of Unemployment: When Joblessness Leads to Being Jobless* (Ins. for Research on Labor and Emp't, Working Paper No. 2011-08, 2011), <http://escholarship.org/uc/item/7nh039h1>.

³⁸ *See* Fair Employment Opportunity Act, 2012 Or. Laws 85, Or. Rev. Stat. § 659A.550; Chicago, IL., Amend. of Ch. 2-160 Mun. Code concerning Unlawful Discriminatory Alternatives (Mar. 14, 2012). [

³⁹ *See* Jeffrey Stinson, *Hiring Bias Against the Unemployed: Should There Be a Law?*, THE PEW CHARITABLE TRS. (Aug. 25, 2014), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/08/25/hiring-bias-against-the-unemployed-should-there-be-a-law>.

accepting employer arguments that gaps in employment are often a relevant factor in making employment decisions.⁴¹

Housing is another area in which subnational governments have expanded the categories of prohibited discrimination. As noted above, some states and localities prohibit discrimination based on sexual orientation or gender identity, categories not currently covered by federal fair housing law.⁴² A more recent subnational expansion has been housing protections based not on identity, but on the source of income. As of March 2015, twelve states and Washington, D.C. have enacted source of income (SOI) legislation that prohibits discrimination based on an applicant's status as housing voucher holder or recipient of disability income, or other social welfare system income.⁴³ In addition, thirty-eight cities and nine counties have adopted forms of SOI legislation.⁴⁴ While the earliest efforts (in Massachusetts and Urbana, Illinois) started in the 1970s, the growing trend toward adoption of SOI legislation is recent: since 2000 at least twenty cities and four counties have enacted such legislation.⁴⁵

2. Situating Trends

These interventions are expanding in areas where federal legislative protection has been unavailing. State and local measures continue to proliferate in the absence of federal legislation protecting individuals from discrimination based on sexual orientation and gender identity.

⁴¹ See Stinson, *supra* note 39, (noting that policy advocates think it may be too hard to figure out if employers are discriminating, and that as of that time the D.C. Office of Human Rights had “received no complaints of jobless discrimination” since the law passed in 2012).

⁴² The federal government does prohibit discrimination on the basis of sexual orientation by recipients of federal housing funds.

⁴³ The states are California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, Utah, Vermont, and Wisconsin. See POVERTY & RACE RESEARCH ACTION COUNSEL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM (2015), <http://www.pprac.org/pdf/AppendixB.pdf> (compiling a list of states that have enacted SOI legislation). Massachusetts became the first state to enact SOI legislation in 1971. *Id.* By 1980, two more states—Maine and Wisconsin—and Washington, D.C. had enacted such laws. See *id.* ¶

⁴⁴ The City of Urbana in Illinois was the first set to enact source of income legislation. *Id.* An additional eight cities enacted such protections in the 1970s and 1980s. *Id.*

⁴⁵ See *id.* at 21–39.

Source of income discrimination addresses a disjuncture in federal fair housing law: the central federal rental housing subsidy program for tenants, known colloquially as “Section 8,” is purely voluntary, not requiring landlords to accept it.⁴⁶

These initiatives also are made necessary by the challenges of addressing these forms of discrimination through existing federal identity categories. For instance, the Equal Employment Opportunity Commission (EEOC) and courts have interpreted Title VII to prohibit reliance on arrest or conviction records, or an applicant’s credit history, when it causes a disparate impact and is not job-related.⁴⁷ Gathering evidence and proving disparate impact is typically daunting. Indeed, the EEOC has had mixed results in pursuing disparate impact litigation based on credit history. As an example, the Sixth Circuit in 2014 rejected an EEOC suit alleging that the company’s use of credit checks had a disparate impact on African-American applicants, disputing the methodology that EEOC had developed for showing a statistically significant disparity.⁴⁸ Rather than relying on a practice’s disparate impact on an existing category (like racially disparate impact) these state and local measures take aim at the practice itself. This design may reflect either a legislative or advocacy perception of the limitations of disparate

⁴⁶ The federal Section 8 program provides rental assistance vouchers for low-income households. *See* Section 8 of the Housing Act of 1937, 42 U.S.C. § 1437f (2012); *see also* 24 C.F.R. § 982 (2012) (implementing regulations). Under the program the Department of Housing and Urban Development provides funds to local public housing authorities to distribute to qualifying tenants. Qualifying households receive vouchers for housing that allows them to pay 30 percent of their income for housing while the program pays the rest. The program is the largest federal program providing housing assistance.

⁴⁷ *See Enforcement Guidance, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, EEOC (Apr. 25, 2012), www.eeoc.gov/laws/guidance/arrest_conviction.cfm (issuing guidance on how employers might avoid disparate impact discrimination in the consideration of arrest and conviction records in employment decisions). Several courts have found that employment bans based on arrest and conviction may in some instances violate Title VII. *See, e.g., El v. Southeastern Penn. Transp. Autho.*, 479 F.3d 232, 244-45 (3rd Cir. 2007) (In the context of a 10 year statutory ban on precluding those convicted of violent crimes from job of transit drive, holding that “employers must justify criminal record exclusions by showing that the “accurately distinguish between applicants [who] pose an unacceptable level of risk and those [whof do not”); *but see id.* at 248 (but affirming summary judgment for employer as plaintiff had failed to provide necessary expert evidence on risk of recidivism).

⁴⁸ *See EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014).

impact theory, even where disparate racial and ethnic impact remains a motivating concern.⁴⁹ Or it may reflect a view that exclusion occurring from practices like credit checks are not limited to particular racial or ethnic groups.

In some of these areas, federal legislation could ultimately provide nationwide protections. For instance, the proposed federal Equality Act would prohibit discrimination on the basis of sexual orientation and gender identity in employment, housing, public accommodations, jury service, federal funding, and other areas.⁵⁰ Earlier versions of this effort which would have prohibited discrimination only in employment have been introduced in Congress almost every session since 1994 and nearly passed the Senate in 1996.⁵¹ In 2012, proponents broadened the bill and reintroduced it as the Equality Act. While it is not inconceivable that Congress could adopt the bill, the bill's latest introduction attracted more than 200 Democrat sponsors and no Republican sponsors.⁵² Federal regulatory intervention may be even more promising in the short term. The EEOC has recently held in a number of rulings that discrimination on the basis of

⁴⁹ See Jillian Jorgenson & Ross Barkan, *City Council Passes Bill Banning Credit Checks in Hiring*, OBSERVER (Apr. 16, 2015), available at observer.com/2015/04/city-council-passes-bill-banning-credit-checks-in-hiring/. (reporting N.Y. City Council Member Melissa Mark-Viverito statements that that credit checks are a “discriminatory practice” and have a disparate impact on particular racial and ethnic groups) [N.Y. City Council Member I. Daneek Miller (stating that “[R]ather than accept this discrimination which occurs primarily in communities of color, we should work to ensure that all . . . have an equal opportunity in the hiring process.”). *Why are Employers Checking Job Applicants' Credit Histories?*, THE NATION (Sept. 12, 2014), <http://www.thenation.com/article/why-are-employers-checking-job-applicants-credit-histories/>.]]

⁵⁰ See The Equality Act, H.R. 3185, 114th Cong. (2015).

⁵¹ See Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AMERICAN PROGRESS (July 19, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/>. ENDA failed the Senate by one vote in 1996. In subsequent years, ENDA never emerged from committee. *Id.*

⁵² See Equality Act of 2015, S. 1858, 114th Cong. (2015); *see also* Congress.gov, S. 1858, <https://www.congress.gov/bill/114th-congress/senate-bill/1858/cosponsors>); Equality Act of 2015, H.R. 3185, 114th Cong. (2015); *see also* Congress.gov, H.R. 3185, <https://www.congress.gov/bill/114th-congress/house-bill/3185/cosponsors>. According to the Washington Post, the bill stands “no chance of passage” in the current Republican-controlled Congress. *See* Juan A. Lozano & David Crary, *Showdown in Houston over LGBT nondiscrimination ordinance*, THE WASHINGTON POST (Oct. 25, 2015), https://www.washingtonpost.com/national/religion/showdown-in-houston-over-lgbt-nondiscrimination-ordinance/2015/10/25/0fabface-7b32-11e5-837b-2c3f2478487e_story.html.

sexual orientation and gender identity constitutes “sex” discrimination prohibited by Title VII of the 1964 Civil Rights Act.⁵³

The immediate political landscape at the federal level for other categories, such as SOI discrimination and discrimination on the basis of arrest or conviction status in employment is less promising. Although the EEOC has guidance indicating that in some instances making unjustified employment decisions on the basis of an individual’s arrest and conviction record may constitute unlawful disparate impact,⁵⁴ no serious legislative attempt has been offered to expand federal antidiscrimination directly to include these areas. There have been some proposed bills to address discrimination against the long-term unemployed and to regulate or prohibit credit checks in employment.⁵⁵ Legislative responses have expanded primarily at the state and local levels with no serious federal counterpart on the horizon.⁵⁶

⁵³ See Baldwin, 2015 WL 4397641 (EEOC July 15, 2015) (holding that complaint alleging discrimination based on sexual orientation lies within the Commission’s jurisdiction over Title VII claims raising sex discrimination); Macy, 2012 WL 1435995 (EEOC Apr. 20, 2012) (discrimination because an individual is transgender violates Title VII); Castello, 2011 WL 6960810 (EEOC Dec. 20, 2011) (holding that allegations that “sex-stereotyping” harmed the employment prospects of gay, lesbian and bisexual individuals were cognizable under Title VII).

⁵⁴ *Enforcement Guidance, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, EEOC (Apr. 25, 2012), www.eeoc.gov/laws/guidance/arrest_conviction.cfm (issuing guidance on how employers might avoid disparate impact discrimination in the consideration of arrest and conviction records in employment decisions).

⁵⁵ Several bills have been introduced at the federal level since 2011 to prevent discrimination against the long-term unemployed. See, e.g., Jobs! Jobs! Jobs! Act of 2015, H. R. 3555, 114th Cong. § 371 (2015) (entitled Fair Employment Opportunity Act of 2015); Pathways Out of Poverty Act of 2015, H. R. 2721, 114th Cong. § 1471 (2015) (entitled Fair Employment Opportunity Act of 2015); Pathways Out of Poverty Act of 2014, H.R. 5352, 113th Cong. § 1571 (2014) (section entitled “Fair Employment Opportunity Act of 2014”); Fair Employment Opportunity Act of 2014, S. 1972, 113th Cong. (2014); American Jobs Act of 2013, HR 2821, 113th Cong. § 371 (2013) (section entitled “Fair Employment Opportunity Act of 2013”); Fair Employment Opportunity Act of 2011, S. 1471, 112th Cong. (2011); Fair Employment Opportunity Act of 2011, H. R. 2501, 112th Cong. (2011). Since 2009, members of congress have introduced legislation to ban employers from checking the credit reports of most potential employees. See, e.g., Equal Employment for All Act of 2015, H.R. 3524, 114th Cong. (2015); Equal Employment for All Act of 2015, S. 1981, 114th Cong. (2015), Equal Employment for All Act of 2013, S. 1837, 113th Cong. (2013); Equal Employment for All Act, H.R. 3149, 111th Cong. (2009).

⁵⁶ The EEOC has attempted to bring disparate impact cases based on credit history to mixed success. See, e.g., *EEOC v. Freeman*, 961 F.Supp.2d 783 (D. Md. 2013) (granting summary judgment to employer in case involving claims of discriminatory impact of criminal and credit history background checks on minority applicants, holding that expert testimony was unreliable and that disparate impact was not caused by a specific employment practice).

These initiatives also respond to contemporary barriers stemming from the economic downturn and related trends—barriers fueled by mechanisms that are not simply reduced to “discrimination.” These problems include the crises of affordability in housing in cities and metropolitan areas and the blows of economic crises that increased long-term unemployment and left individuals with poor credit histories. The reforms also respond to problems stemming from mass incarceration including the need for meaningful avenues for reentry of prisoners and for mitigating the collateral consequences of policing and arrest practices.⁵⁷ In effect, these initiatives respond to a social and economic problems that are recent and urgent at the subnational level.

The proliferation of these civil rights statutes does not mean expanding the antidiscrimination framework is necessarily efficacious. These expansions deploy the antidiscrimination enforcement apparatus, with all of its limitations. They depend on the same strained mechanisms of court and administrative enforcement that plague other civil rights statutes. To the extent they require proof of intentional discrimination or disparate treatment, they raise the questions of proof that are present in current federal antidiscrimination law.⁵⁸ They risk confronting some of the same problems of court resistance to these claims, particularly if they strain the resources of courts. As with any measures that depend on private individuals to step forward and bring claims, rather than on litigation initiated by administrative agencies.

⁵⁷ See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820–26 (2015) (arguing that arrests themselves, regardless of whether they result in convictions, can lead to adverse consequences such as deportation and eviction).

⁵⁸ For discussions of the difficulties of bringing employment discrimination case, see Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J.L. & FEMINISM 119, 121–25 (2012) (discussing how the sharp division between disparate impact and disparate treatment prevents plaintiffs from addressing “structural” workplace practices that fit neither the fault based disparate treatment model or the strict liability based disparate impact model); see also David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (urging more explicit judicial recognition of “negligent discrimination” – a midpoint between theories of intentional discrimination and disparate impact type liability); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1366 (2009) (referring to the disparate treatment–disparate impact framework of Title VII as a “theoretical straitjacket with two arms”).

Complaint-driven enforcement of front-end discrimination, such as hiring and refusal to rent or sell, is often hard for victims to detect, and victims often lack incentives to pursue claims. These statutes do not increase administrative capacity to adjudicate claims (which might be less onerous for private plaintiffs) or for administrative agencies to initiate their own enforcement actions.

More normatively, one could argue that taking an additive approach to antidiscrimination by expanding the protected categories cheapens the antidiscrimination enterprise. Discrimination based on a critical unchangeable identity category such as race or gender may seem worthy of government intervention, but less so than prohibiting discrimination based on a fleeting status such as receipt of a voucher or a bad credit report. Of course, the existence and expansion of these categories speaks to a counter narrative of justification that the effects of economic crisis are collective problems that demand a collective response, or that patterns of economic inequality are more enduring than episodic.

One could also see the proliferation of state and local category-based prohibitory discrimination as insufficiently transformative. A better strategy might be to move away from all categories and instead reframe antidiscrimination law as an across-the-board protection for all workers. For instance, some scholars have argued that instead of forbidding termination on the basis of limited set of characteristics such as race and gender, governments should prohibit termination of any worker without a good reason—ensuring that “*all* employment decisions are made for ‘good cause.’”⁵⁹ One could go even further by abandoning the prohibitory antidiscrimination regime and devoting attention to expanding social welfare supports to encourage forms of inclusion. For instance, instead of investing in forms of employment

⁵⁹ RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* 226 (2011) (discussing but ultimately rejecting this proposal because of the potential costs to regulators and employers)

discrimination, governments could expand social insurance protections for the unemployed.⁶⁰ The efficacy and the value of the antidiscrimination approach relative to other forms of regulatory intervention may be uncertain. These are matters of consistent debate. Whatever the constraints, the preceding account reveals the continuing interest at the state and local level in expanding the antidiscrimination regime to additional categories.

B. Regulating Inclusion

The second type of intervention that is expanding at the state and local levels deploys a regulatory form that differs from the classic antidiscrimination framework by leveraging state and local regulatory power to advance inclusion. Some of these regulatory efforts are identity specific—explicitly addressing race and gender. Others are place-specific efforts to help local communities benefit from economic development, efforts that because of contemporary levels of racial and ethnic segregation often benefit low-income minorities. Examples include targeted hiring mechanisms such as first-source hiring and community-benefits agreements, as well as inclusionary zoning—which is experiencing increased attention by jurisdictions seeking ways to develop affordable housing and diminish racial and economic segregation. As noted below, because all of these do more than prohibit discrimination, they push the contours of what we typically consider civil rights. However, the regulatory innovations are aligned with the civil rights goals of integrating and providing opportunity to marginalized groups. They are not simply broad-based social welfare interventions, but mechanisms targeted at historically excluded groups.

Two sets of examples are offered—the first in employment, the second in housing. In employment, the key interventions are targeted hiring requirements, most commonly through

⁶⁰ *Id.* at 286 (stating that the better course is to “devote scarce resources to unemployment insurance and a robust social safety net to help cushion the blow of unavoidable employment dislocations.”).

first-source hiring and community-benefits agreements . First-source hiring is the requirement that local procurement contracts or other agreements hire workers from specific local communities for publicly funded projects.⁶¹ The aim is employment of local residents who typically have been excluded from employment opportunities because of a confluence of discrimination, lack of training, and the absence of social capital and networks.

A related strategy is the use of community benefits agreements CBAs, which are contractual agreements between community coalitions and an entity such as a corporation, institution, or prospective developer.⁶² CBAs are advanced by community groups seeking to leverage economic expansion to benefit locally affected communities. Typically, CBAs address wages, hiring, affordable housing, environmental standards (including green building and green space), and the creation of publicly accessible institutions such as parks and schools. Employment conditions and inclusion are among the most consistent features of these agreements. Specifically, many include targeted hiring requirements, which require hiring and training workers from particular communities or worker centers.⁶³ Cities, redevelopment agencies, and counties might be parties to these agreements.⁶⁴ Since the first CBA was

⁶¹ Greg Schrock, *Remains of the Progressive City? First Source Hiring in Portland and Chicago*, 51 URB. AFF. REV. 649, 650 (2015).

⁶² See Virginia Parks & Dorian Warren, *The Politics and Practice of Economic Justice: Community Benefits Agreements as Tactic of the New Accountable Development Movement*, 17 J. COMMUNITY PRAC. 88, 89 (2009); VIRGINIA PARKS ET AL., *THE MOBILITY AGENDA, COMMUNITY BENEFITS AGREEMENTS: POLICY FOR THE TWENTY-FIRST CENTURY ECONOMY* 4 (2008), <http://www.mobilityagenda.org/home/file.axd?file=2008%2F12%2FCBApaperfortheinternet.pdf>; Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUSING 113, 113–14 (2008).

⁶³ *Policy & Tools: Community Benefits Agreements and Policies*, PARTNERSHIP FOR WORKING FAMILIES, <http://www.forworkingfamilies.org/resources/policy-tools-community-benefits-agreements-and-policies> (last visited Nov. 28, 2015).

⁶⁴ See, e.g., *Policy & Tools: Community Benefits Agreements in Effect*, PARTNERSHIP FOR WORKING FAMILIES, <http://www.forworkingfamilies.org/page/policy-tools-community-benefits-agreements-and-policies-effect> (last visited Nov. 28, 2015) (describing a CBA in Pittsburgh, PA in which City, County, and Redevelopment Agencies are signatories).

developed in 1997 in Los Angeles, dozens of CBAs have been negotiated in cities through the United States, including New York, San Francisco, Pittsburgh, and Seattle.⁶⁵

Even where CBAs are contracts between community groups and private developers, they implicate regulation because municipal governments are often given the role of enforcing the terms of the agreements.⁶⁶ In addition, in recent years several municipal governments have required negotiation of a CBA as a condition for rezoning a parcel of land, tax credits, or of awarding a city contract.⁶⁷ In 2015, Twitter, Inc. and other technology companies signed a community benefits agreement in exchange for tax credits when they relocated to the rapidly gentrifying Tenderloin area of San Francisco.⁶⁸

The model of CBAs derives from state and local affirmative action programs in employment. However unlike affirmative action requirements, CBAs and first-source hiring do not define the benefited group in terms of race or gender. In part, this may be to avoid court challenges, but it also reflects a different approach centered on benefiting lower wage workers and residents in highly localized communities. In addition, more than setting hiring goals that effectively limit hiring to already-trained and easily employed workers, CBA and first-source hiring requirements typically encourage the hiring of hard to employ workers such as those with low levels of formal education, the long-term disabled, and those with prior involvement in the

⁶⁵ See Parks & Warren, *supra* note 62, at 91 (Finding that “between 1997 and 2008 between 17 and 50 CBAs have been negotiated in the United States”).

⁶⁶ See Parks et al., *supra* note 62, at 5.

⁶⁷ See, e.g., PARTNERSHIP FOR WORKING FAMILIES, *supra* note 64 (describing city and councilmember involvement in the Oakland Army Base Agreement).

⁶⁸ The agreements required support of non-profits and local schools, and purchasing from local small businesses. See Community Benefit Agreement 2015-2018, Memorandum of Understanding between City and County of San Francisco City Administrator and Twitter, Inc. (2015), sfgsa.org/Modules/ShowDocument.aspx?documentID=12590; See <http://sfgov.org/centralmarketcac/community-benefit-agreements-2013> (listing CBAs signed in 2013 between the City of San Francisco and six technology companies); Josh Sabatini, *Mid-Market Tech Companies Reach New Tax-Break Agreements*, Examiner (Jan. 5, 2015), available at <http://archives.sfexaminer.com/sanfrancisco/mid-market-tech-companies-reach-new-tax-break-community-agreements/Content?oid=2915898> (Recounting that the CBAs had their origin as part of tax-break established in 2011 to “soften the impacts of gentrification” while contributing to revitalization).

criminal justice system.⁶⁹ CBAs and first-source hiring also explicitly include linkages to training and other capacity building organizations.⁷⁰ In this way, these interventions respond to some of the limitations of the formalist assumptions that underlie antidiscrimination regimes by expanding the supports that enable workers to succeed. These supports may include meaningful training, child care, and transportation. Although CBAs often avoid exclusive focus on race and ethnicity, the diverse, large cities in which CBAs are typically deployed, coupled with the local politics undergirding their adoption have meant that workers of color and women are key beneficiaries.

In the area of housing, inclusionary zoning refers to a set of practices that seek to develop affordable housing in areas or neighborhoods where such housing has typically excluded such development. This may occur by state or local changes to zoning law that allow placement of affordable housing. More far-reaching are requirements of the inclusion of a certain percentage of affordable housing in each covered jurisdiction. Other inclusionary housing practices provide tax incentives or density bonuses to private developers to encourage the development of affordable housing in low-income developments. Inclusionary zoning is a tool for building affordable housing by leveraging market power or subnational power of land-use, but it also has explicit goals of reducing residential segregation on the basis of income, race, and ethnicity.⁷¹

⁶⁹ See PARTNERSHIP FOR WORKING FAMILIES, *supra* note 64 (describing the Kingsbridge Amory, Bronx, New York CBA requiring hiring of a particular percentage of targeted job applicants including but not limited to the underemployed and individuals living in designated areas surrounding the project).

⁷⁰ Parks et al., *supra* note 62, at 7 (“CBAs often stipulate that the developer contribute funds to support existing job training services or create new training services necessary for the development, to which a range of workers have access.”); see KINGSBRIDGE ARMORY COMMUNITY BENEFITS AGREEMENT, at A-9, <http://www.forworkingfamilies.org/sites/pwf/files/documents/Kingsbridge%20FINAL%20Exhibit%20A%20-%20Community%20Benefits%20Program.pdf> (requiring that the proposed project “engage the best in class hiring, referral and training agencies to identify and train qualified employees from the Bronx and New York City, with a priority to local residents”).

⁷¹ Victoria Basolo, *Inclusionary Housing: The Controversy Continues* 82 TOWN PLAN. REV. i, i (2011) (defining “inclusionary housing” as being “aimed at creating better communities by producing affordable housing and encouraging social inclusion” and defining “inclusion” as “racial and ethnic integration and income-mixing”).

The practice is not new, but it has become increasingly widespread in particular states.⁷² For instance, more than 100 cities and counties in California have enacted some form of inclusionary zoning.⁷³ New York City has for more than 20 years operated a voluntary inclusionary zoning program under which a developer can receive a density bonus in exchange for building a certain number of units of affordable housing.⁷⁴ The Mayor of the City recently proposed a mandatory inclusionary zoning program, which would require developers to set-aside a quarter of the units in new buildings as affordable housing in newly rezoned districts.⁷⁵

Inclusionary zoning raises a specter of issues that are beyond this article including the relative efficacy of market incentives, such as tax incentives and density bonuses,, mandatory requirements, and direct subsidies in creating affordable housing. It is also unclear whether inclusionary housing based on market incentives will provide sufficient affordable housing to buttress the loss of affordable housing due to gentrification and other pressures. In addition, the extent to which such initiatives are successful in diminishing racial—as opposed to economic—segregation depends on the structure of each particular program.⁷⁶ These questions will remain, but there is evidence of increased interest in inclusionary housing techniques because of the

⁷² Early adopters of inclusionary zoning in the 1970s include Montgomery County, Maryland and Fairfax County, Virginia. *See id.* at i–ii n.2 and accompanying text. Montgomery County’s inclusionary zoning program required developments of fifty or more housing units to include fifteen percent affordable to moderate-income housing, and provided a “density bonus” (allowing the development of more units than would normally be allowed under the zoning code). *Id.* at i–ii. Massachusetts in the 1969 adopted what became colloquially known as “anti-snob zoning,” which limited the ability of local governments to avoid the production of affordable housing within their jurisdiction. Connecticut and Rhode Island have similar laws. Spencer M. Cowan, *Anti-Snob Land Use Laws, Suburban Exclusion, and Housing Opportunity*, 28 J. URB. AFF. 295, 297, 308 (2006).

⁷³ *See* Basolo, *supra* note 71 at ii.

⁷⁴ *See* Furman Center, *Creating Affordable Housing Out of Thin Air: The Economics of Mandatory Inclusionary Zoning in New York City 2* (Mar. 2015), available at <http://furmancenter.org/thestoop/entry/report-examines-economic-potential-of-upzoning-to-produce-affordable-housin>.

⁷⁵ *See id.*; Mireya Navarro & J. David Goodman, *At Council Hearing on de Blasio’s Housing Plan, Many Voices Rise*, Feb. 9, 2016 (describing political and community debate over the mandatory inclusionary zoning plan which the City Council will vote on in March).

⁷⁶ *See, e.g.,* Constantine E. Kontokosta, *Mixed-Income Housing and Neighborhood Integration: Evidence from Inclusionary Zoning Programs*, 36 J. URB. AFF. 716, 736–38 (2014) (investigating whether inclusionary zoning programs encourage stable neighborhood and economic integration and finding that their ability to do so is dependent on initial socioeconomic and housing market characteristics).

rising cost of housing in many major cities and metropolitan areas.⁷⁷ Similarly, CBAs and first source hiring agreements hold promise as large companies risk contributing to gentrification, displacement and inequality in cities, but their success will depend on the adequacy of implementation and enforcement, and on whether the concessions given to companies outweigh the benefits for affected communities.

These examples of housing and employment regulation deviate in regulatory form and approach from the prohibitory antidiscrimination approach. First, they rely on a distinct set of subnational powers to advance inclusion. Inclusionary zoning and CBAs rely on state and local power over land use and zoning. Inclusionary zoning proposals also rely on state power to grant tax-exemptions or provide bonuses for certain forms of development. CBAs and first-source hiring draw on state and local government power over procurement—the ability to decide the terms in agreements with contractors in government-funded projects.

Second, like the antidiscrimination expansions above, these initiatives in housing and employment move beyond the traditional categories of race, ethnicity, and gender to advance economic inclusion. As a general matter, CBAs and first-source hiring requirements do not limit the targeted group to people of color or to women. Instead, they often seek to hire from a particular geographically defined area or those trained by specific organizations. The obvious advantage of this formulation is that these innovations do not trigger the legal limitations of affirmative action regimes, but the change is more meaningful than simply avoiding legal suit. The goal is often to benefit excluded communities defined less bluntly than by categories of race. These communities are often in geographic proximity to the planned development and are experiencing conditions of joblessness or disinvestment that are a confluence of multiple

⁷⁷ See *id.* at 717 (noting the “recent proliferation” of inclusionary zoning programs in the United States).

economic factors as well as racialized forms of disinvestment. These are communities that are often the manifestation of increasing levels of economic segregation.

These initiatives also depart from the classic antidiscrimination framework by inserting front-end requirements of inclusion into the design, rather than relying on complaints or administrative litigation. With effective monitoring by community and other groups this method can provide a potentially more effective and direct route to achieving inclusionary goals.

III SUBNATIONAL CAPACITY FOR INCLUSION

This part shifts away from the descriptive account to consider how these subnational innovations might alter our assumptions about state and local capacity to advance inclusion. In the realm of civil rights, the dominant conception is that the proper place for government intervention is national. The reasons for this are not hard to elucidate. If all citizens should have rights to not be treated arbitrarily with respect to employment, housing, voting, and so on, regional variation in affording those rights is unjustified. Historically and contextually the aim of the civil rights project of the 1960s was to create a national framework, sweeping in outlier states that were not willing to enforce basic civil rights protections. Even today, states and localities often appeal to federalism concerns to resist inclusionary measures, for instance most recently around gay rights, health care, and immigration.⁷⁹ Thus for pragmatic, as well as normative reasons, it would be hard to sustain an account that state and local governments should be the dominant location for advancing inclusion.

⁷⁹ See, e.g., Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 569, 591–95, 600–05 (2008) (detailing state and local participation in immigration regulation, typically considered the exclusive domain of federal law); see also Jay Michaelson, *Map: The States Still Fighting Gay Marriage*, THE DAILY BEAST (July 9, 2015), <http://www.thedailybeast.com/articles/2015/07/09/marriage-backlash-bring-it-on.html> (cataloguing states with officials opting out of marriage recognition for various reasons).

At the same time, the civil rights model has never been wholly national. Federal antidiscrimination law often borrowed models from state statutes. And while federal antidiscrimination statutes preempt conflicting state law, in key respects they incorporate state regulatory schemes into the enforcement regime.⁸⁰ Unlike in areas such as labor or immigration law, federal civil rights law eschews preemption of state laws that are more expansive or protective of civil rights.⁸¹ The resulting framework is one in which federal legislation provides a baseline, but states can go further. As a matter of ideal allocation of power, national federal civil rights law is often the end goal of civil rights expansion efforts, but state and local governments are posited neither as “rivals” nor as mere servants of a national project⁸². Rather, state and local law often exists because of the void (short- or long-term) created by the absence of federal policy, ushering in innovations meant to advance state and local conceptions of the civil rights project.

⁸⁰ For instance, under the Fair Housing Act, states with laws considered “substantially equivalent” to the Act can receive funding to investigate discrimination complaints. *See Substantial Equivalence Certification*, U.S. DEP’T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/partners/FHAP/equivalency (last visited Nov. 30, 2015).

⁸¹ *See* Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633 (2012) (“Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practice on account of age”); Title VII, 42 U.S.C. § 2000e-7 (2012) (entitled “Effect on State laws”); Title VII, 42 U.S.C. § 2000h-4 (2012) (entitled “Construction of provisions not to exclude operation of State laws and not to invalidate consistent State laws”); Americans with Disabilities Act (ADA), 42 U.S.C. § 12201(b) (2012) (“Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded under this chapter.”); *see also* Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 282–83 (1987) (explaining that limited preemption under federal antidiscrimination law “reflects the importance Congress attached to state antidiscrimination laws in achieving . . . the goal of equal employment opportunity”). The ADEA unlike Title VII and the ADA however requires state agencies to relinquish jurisdiction when a federal suit under the ADEA is brought. *See* Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429, 442 (1998) (noting that “[i]n contrast, parallel federal and state actions are not prohibited by either Title VII or the ADA”). For a discussion of preemption in the context of labor law regulated by the National Labor Relations Act, see Benjamin Sachs, *Despite Preemption Making Labor Laws in Cities and States*, 124 Harv. L. Rev. 1153 (2011). Sachs shows that despite preemption states and localities are developing new forms of labor organizing and worker protection, and that rather than preventing local involvement in labor regulation, preemption doctrine “rechannels and reshapes” this involvement. *Id.* at 1155.

⁸² *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1256, 1258 (2009) (describing two dominant visions of federal-state relationship in the federalism literature: one envisions states as “rivals and challengers to the federal government”, the other as “servants” that carry out federal programs).

What justifies emphasis on subnational expansion given its necessary limitations—the regional variation or the opt-in civil rights model it necessarily produces? One reason is the practical difficulties of securing federal legislative intervention. Building the political support for major legislation, and overcoming Madisonian⁸³ and post-Madisonian “vetogates”⁸⁴ that can impede passage of legislation (like the committee system and the filibuster),⁸⁵ is difficult in any case, and perhaps more so for civil rights legislation. Even as legislative and popular support for federal antidiscrimination protections on the basis of sexual orientation has grown, Congress has still not adopted protective legislation. Supporters have produced versions of what is now the Equality Act for the past twenty years.⁸⁶ Beyond these enduring difficulties, Congress has been particularly unresponsive to legislation in recent years due to gridlock and party polarization.⁸⁷

Beyond what one might call the negative pragmatic case stemming from such federal failure, this part suggests there lies a positive pragmatic case: distinct subnational capacity.

⁸³ See THE FEDERALIST NO. 10 (James Madison). Madisonian checks and balances include the bicameral legislature and the presidential veto.

⁸⁴ WILLIAM N. ESKRIDGE, JR. ET AL, CASES AND MATERIALS ON LEG. & REG.: STATUTES AND THE CREATION OF PUB. POL.’Y 53-55 (2014)

⁸⁵ See *id.* at 66-67 (detailing subconstitutional “vetogates” in the legislative process that make it easier to block than enact legislation); Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WILLIAM & MARY L. REV. 805, 815-817 (2010) (noting that rules that constrain the legislative process promote democratic principles but also sometimes create “vetogates” that impede legislative functioning); SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE: FILIBUSTERING IN THE UNITED STATES SENATE (1997) for an account of the modern filibuster.

⁸⁶ See *supra* notes 50–51 and accompanying text.

⁸⁷ See Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. OF POL. SCI. 85, 86 (2015) (reviewing literature on the causes of legislative stalemate and finding that partisanship and electoral competition is undermining Congress’s “broader problem-solving capacity”); Michael Barber & Norlan McCarty, *Causes and Consequences of Polarization*, in TASK FORCE ON NEGOTIATING AGREEMENT IN POLITICS 36–41 (Jane Mansbridge et al. eds., 2013) (summarizing evidence that polarization has reduced Congress’s capacity to legislate); *id.* at 41 (arguing that the most direct “effect of polarization-induced gridlock is that public policy does not adjust to changing economic and demographic circumstances”); Gary C. Jacobson, *Partisan Polarization in American Politics: A Background Paper*, 43 PRESIDENTIAL STUD. Q. 688, 691–97 (2013) (providing evidence that polarization among the electorate is a key driver of congressional polarization). For a recent review of the causes and consequences of gridlock and polarization, see generally SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (Nathaniel Persily ed., 2015). Indeed one can understand federal administrative innovation in recent years—such as interpreting Title VII prohibitions on sex discrimination to extend to discrimination on gender identity, extensions of discrimination protections on the basis of sexual orientation to federal contractors, and deferred deportation status of certain classes of undocumented immigrants—as driven by the inability to enact comprehensive legislative solutions.

Indeed some of the most innovative inclusive frameworks—those that extend beyond the antidiscrimination mode—rely on powers that are distinctive to states and localities.

To start, the demographic reach and economic power of large cities and counties forms part of the positive case for a focus on subnational inclusionary frameworks. Many of the counties and cities at the forefront of adopting inclusive legislation are large generators of economic activity, are densely populated, and are demographically racially and ethnically diverse. Simply, adoption by large metropolitan areas provides protections for millions of individuals. One can go further, as many urban theorists have, to posit cities and large metro areas as significant drivers of economic and potentially social innovation. Urban theorist Richard Florida has popularized the power of metro-ification of the United States, celebrating areas with relatively high-population density in which educated and highly skilled workers are clustered, thus driving innovation and economic growth.⁸⁸ Researchers have noted that young skilled workers are increasingly favoring cities in recent years. Conditions of economic growth provide the capacity for innovation around inclusion—where business is expanding, interventions like inclusionary zoning and CBAs are more possible. As Richard Schragger has described, cities depend on capital, but they also have assets such as land and location and they try to regulate capital in redistributive ways.⁸⁹ The CBA movement is motivated by the recognition that cities need capital, but capital often needs cities for its land, labor.⁹⁰ Cities provide the opportunity to

⁸⁸See generally RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS* (2002) (concluding that the key to economic growth is attracting creative workers that can transform society). ()

⁸⁹ See Richard Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482 (2009). Schragger's account and those of others challenge the limited city account that sees cities as dependent on capital and unable to control their economic futures. See PAUL PETERSON, *CITY LIMITS* 4 (1981) (discussing constraints on the power of cities); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980) (arguing that cities are insufficiently able to control their economic development because of limiting state and federal law).

⁹⁰See generally Parks & Warren, *supra* note 62, at 89 (explaining that CBAs exploit the “geographic constraints of a post-industrial service-sector economy (hotel beds cannot be globally outsourced to be made, sports areas demand real bodies to fill their seats, retailers increasingly seek the purchasing power of urban consumers) and the political

leverage economic expansion to force inclusion. Some of these cities and metropolitan areas with relative economic power also are places of economic inequality with substantial poverty rates.

With populations of need, many have economic incentives to provide remedies.

Beyond economic incentives, inclusive policies may result from accession to the political demands of groups representing workers, immigrants, people of color, and Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) groups.⁹¹ Certain cities and counties also provide ready clusters of those with a “taste” for equality, racial and ethnic integration, and economic and identity diversity.⁹² Inclusive policies can attract the very groups who then support the expansion and creation of additional forms of inclusion.⁹³ Localities also have urgent and “lived” experience with how structural inequity impacts particular groups, providing them both knowledge and urgency in crafting solutions.⁹⁴

The role of local political movements may be salient in the explanation of the emergence of inclusive policies. It also may be necessary for meaningful implementation. In different ways, CBAs, fair-chance laws, and inclusionary zoning depend on robust local community groups for effective enforcement and implementation.⁹⁵

process that attends these geographic constraints: service-sector enterprises that are the hallmark of new urban development *need* the city, securing the special purchase that urban politics and governance provides grassroots actors for contesting corporate power”).

⁹¹ See Justin P. Steil & Ion B. Vasi, *The New Immigration Contestation: Social Movements & Local Immigration Policy Making in the United States, 2000-2011*, 119 AM JUR. SOC. 1104, 1142 (2014) (describing conditions under which local community organizations and immigrant community leaders mobilized and created effective frameworks to advance inclusionary policies at the local level).

⁹² See Rodriguez, *supra* note 79.

⁹³ See Richard Florida, *What is it Exactly that Makes Big Cities Vote Democratic?*, CITY LAB (Feb. 19, 2013), <http://www.citylab.com/politics/2013/02/what-makes-some-cities-vote-democratic/4598/>. Some scholars credit the diffusion of inclusionary zoning policies to the strength of the fair housing groups in particular communities. See *infra* note 117.

⁹⁴ See Robin A. Lenhardt, *Localities As Equality Innovators*, VII:2 STAN. J. CIV. RTS. & CIV. LIB. 265, 273 (2011).

⁹⁵ See, e.g., Parks & Warren, *supra* note 62, at 99-100 (detailing the role of community and labor constituencies in securing CBAs).

This account is not inevitable. Cities and regions will diverge sharply in their economic capacity⁹⁶ and in their inclinations and capacities for inclusive regulation.⁹⁷ Expanding cities seeking to attract economic industry may be too beholden to economic interests to extract inclusionary concessions. Still, this account provides a possible explanation of the adoption of inclusive measures by subnational governments, as well as an argument for the potential strategic and practical benefits of concentrating on sub-national governments as a source of inclusionary innovation.

Beyond economic power and demographic conditions, many of the innovations also depend on powers that exist primarily at the subnational level. Indeed the most innovative inclusionary regulations—those that do not deploy the prohibitory antidiscrimination form—depend on these distinct subnational capacities. Subnational governments have powers over procurement, land use, and taxing that provide the mechanisms for CBAs, inclusionary rezoning, density and tax bonuses for inclusionary housing, and first-source hiring. Understanding these innovations as stemming from distinct subnational capacity allows moving from a pragmatic account of the value of state and local intervention to the potential of these interventions to reframe a civil rights project that has innovated little in terms of its regulatory tools. In the manner noted in part II, these interventions do not depend on the ex post,

⁹⁶ See *id.* at 102 (noting that CBAs work only “under conditions of economic and urban growth.”). And today cities are often shrinking instead of growing. See generally Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014) (examining the problem of insolvent cities).

⁹⁷ Localities with racially and ethnically diverse populations do not consistently advance inclusive policies. See Steil & Vasi, *supra* note 91, at 11 (finding that localities enacting “anti-immigrant” ordinances had often experienced an increase in the Latino population, and local anti-immigrant groups framed these increases as connected threats such as rising crime rates); Michael Selmi, *Race in the City: The Triumph of Diversity and the Loss of Integration*, 22 J.L. & POL. 49 (2006) (arguing that even as many cities have become composed of a mostly minority population, relatively elite whites have retained political power and may act in ways that benefit their interests) Social science has shown that local innovation policies are driven in part by the resources and revenues available to local government. Richard D. Bingham, *Innovation, Bureaucracy, and Public Policy: A Study of Innovation Adoption by Local Government*, 31 WESTERN POL. Q. 178, 200 (1978); Richard C. Feiock & Jonathan P. West, *Testing Competing Explanations for Policy Adoption: Municipal Solid Waste Recycling Programs*, 46 POL. RES. Q. 399 (1993).

prohibitory, court-centered regulatory mechanisms of antidiscrimination law.⁹⁸ Second, and relatedly, in expanding the points of intervention, they usher in a regulatory regime that moves away from antidiscrimination to social inclusion. This allows a focus on economic exclusion along with traditional identity categories. It also creates an embedded approach to equality—one in which institutions are targeting inclusion at the front end in the design of their projects and programs.⁹⁹ One might say that these interventions broaden the regulatory “architecture of inclusion.”¹⁰⁰ In this embedded approach, a broader range of government decisions and policies are reframed as potential sites for advancing inclusion.

IV

CHALLENGES AND STRATEGIES: PREEMPTION, VARIATION, AND DIFFUSION

Whereas part III made the case for subnational capacity, this part confronts the challenges for those seeking to “diffuse” these innovations—expanding state and local engagement in advancing inclusion and expanding specific laws.

A. Challenges

Part III has already alluded to a central challenge: economic capacity and political inclinations will vary in different localities. Another related challenge is legal incapacity. Some localities many not have the legal power over land use, procurement, or taxing that allows them to adopt these innovations. This is not fatal to the larger project. Subnational innovation often relies on a locality using the power it possesses, working within constraints. Lacking powers of tax, localities might channel inclusionary policies into zoning or procurement. Without power over licensing, a locality might use its power to certify, publicize, or inspect. These limitations

⁹⁸ As I have noted in other contexts, this is the predominant, but not the only framework at the national level. See Olatunde Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1362–69 (2012) (describing conditioned spending regimes that contain “equality directives”).

⁹⁹ See *id.* at 1369–70 (describing this feature).

¹⁰⁰ See Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006).

do however mean that subnational innovation may sometimes depend on expansion of subnational power, with thought given to creating the attendant mechanisms of oversight and transparency that justify enlarging these powers.¹⁰¹

Preemption by federal or state law may also be a problem. For instance, SOI laws have faced consistent legal challenges. Challengers have asserted that to the extent these laws require landlords to accept federal voucher recipients, they are preempted by federal law stating that landlords are not required to take section 8 vouchers.¹⁰² Preemption challenges have not proven successful in court likely because federal section 8 law gives states and localities a role in the program's design.¹⁰³ No other significant initiative mentioned in this article has faced serious federal preemption arguments.

A perhaps greater challenge to subnational capacity is the increasing issue of what one might call “manufactured preemption”: when local inclusionary legislation prompts state legislatures to enact policies that deprive local governments of existing powers. These moves – which have been extensively employed at the state level to preempt local minimum wage laws may reflect legitimate concern about which level of government is best suited to enact policies that risk generating economic externalities.¹⁰⁵ But many of these moves at the state level to

¹⁰¹ For example, historic constraints on cities are driven by concerns about corruption in the cities and their ability to be controlled by special interest groups.

¹⁰² See, e.g., *Att’y Gen. v. Brown*, 511 N.E.2d 1103, 1105–06 (Mass. 1987) (holding that that the Section 8 program “does not preclude State regulation” since “[t]he Federal statute merely creates the scheme and sets out the guidelines for the funding and implementation of the program by the United States Secretary of Housing and Urban Development (HUD) through local housing authorities.”).

¹⁰³ See *Montgomery Cty. v. Glenmont Hills Assocs. Privacy World at Glenmont Metro Ctr.*, 936 A.2d 325, 333–40 (Md. 2007) (holding that federal Section 8 program does not preempt the state’s source of income statute); *Franklin Tower One, L.L.C. v. N.M.*, 725 A.2d 1104, 1113 (N.J. 1999) (same); see also *Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 87–89 (D.D.C. 2008) (holding the source of income protections in D.C. Human Rights law were not preempted by the federal Housing Choice Voucher program).

¹⁰⁵ See Alan Blinder, *When A State Balks at a City’s Minimum Wage*, N.Y. Times (Feb. 21, 2016) (reporting on an Alabama State Senate proposal that would ban the state’s cities and counties from enacting their own minimum wages, and quoting the state representative sponsoring the legislation who questioned whether “cities are equipped to analyze and determine what the appropriate minimum wage is, and what those impacts are”).

preempt local power seem motivated by ideological opposition.¹⁰⁶ For example, Arkansas, Mississippi, and Arizona have adopted preemption bills banning local ordinances protecting LGBT people from discrimination.¹⁰⁷ Legislatures in Texas and West Virginia introduced measures in 2015 that would have similar preemptive effects.¹⁰⁸ The spreading “conscience” bills that would allow religious and conscience objections to forms of gay inclusion also have preemptive effects. For instance, Indiana’s Religious Freedom Restoration Act preempts local anti-discrimination ordinances.¹⁰⁹ These appeals by opponents to a higher level of government blunt the power that advocacy groups may have at the local level to advance inclusive policies. Local political movements may be able to advance inclusionary legislation at the city levels; but less politically amenable state legislatures can then curtail those powers.

For those seeking to advance inclusionary legislation, there are no simple solutions for these challenges. In some cases arguments about the merits of the subnational regulatory intervention, the “ideal” allocation of authority, or the functionally proper level of government for experimentation with inclusion may prevail over efforts by higher levels of government to

¹⁰⁶ One might call it “partisan preemption.” As Jessica Bulman-Pozen has shown, arguments about allocations of power are often driven by ideological and partisan interests. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014) (“Federalism provides the institutional terrain for disputes that are substantive in nature.”) This is not entirely new. Ideological or partisan proponents of regulation have long appealed to a higher level of government to adopt measures preempting actions by lower levels of government. And the Supreme Court placed constitutional constraints on the ability of a higher level of government to take power away from an existing decision-making body, such as local government, in such a way as to burden minority interests. See *Hunter v. Erickson*, 393 U.S. 385, 386, 393 (1969) (holding that an amendment to a city charter was unconstitutional because it prevented the city council from implementing an ordinance dealing with race, religious, and ancestral discrimination); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 461, 487 (1982) (finding a Washington state statute unconstitutional because it prevented the local school district from reassigning students to schools outside their neighborhoods for purposes of promoting integration). The broad contours of the “Hunter” doctrine were weakened by the Supreme Court’s 2014 decision in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (limiting *Seattle* and *Hunter* to cases involving intentional discrimination).

¹⁰⁷ Zack Ford, *Protecting LGBT People From Discrimination is Now Illegal in Arkansas*, THINK PROGRESS (Feb. 24, 2015), <http://thinkprogress.org/lgbt/2015/02/24/3626203/lgbt-protections-ban-arkansas-texas/>

¹⁰⁸ Michael G. Bare, *Preempting Civil Rights*, GRASSROOTS CHANGE (Apr. 3, 2015), <http://grassrootschange.net/preempting-civil-rights/>.

¹⁰⁹ *Id.*; see also HUMAN RIGHTS CAMPAIGN, 2014 STATE EQUALITY INDEX 15 (2015), <http://issuu.com/humanrightscampaign/docs/hrc-sei-2014-reportrev4/5?e=1357809/11205745>.

preempt. The success of policies in one location helps to mute arguments against adoption in another location. But it also may happen that these arguments about local power will not prevail. The debate will instead expose the instrumentalism that often undergirds arguments about allocation of power. In the end, the project of expanding inclusion is inevitably political, requiring building political support for adoption, as well as rebuffing potential challenges.

B. Horizontal Diffusion

Without discounting these challenges, this section offers a framework for encouraging greater diffusion of inclusionary initiatives. The central challenge posed by an account of subnational inclusionary innovation is how these innovations might spread. As a contained local intervention, they may have limited practical effect or utility. From an advocacy perspective, one would want promising models to be spread through adoption by the federal government, or adoption by other states and localities.

The familiar emphasis in antidiscrimination law is one of adoption by the federal government, a mechanism of vertical diffusion. A state or locality adopts a fair housing or employment law, and the federal government borrows this model in adopting its law or regulatory intervention. In this model of diffusion, state and local stakeholders may help expand the political base of support that then makes national policy possible.

Vertical diffusion is desirable for the reasons stated above, but both normatively and descriptively it cannot provide the only model for diffusion. For one, in the current legislative climate, the road to vertical diffusion may be long.¹¹⁰ Adoption of these models will depend on political constituencies and stakeholders that might more effectively be able to coalesce at the subnational level (for instance, those centered in cities, and some cases metropolitan areas). More, a positive aspect of these innovations is their reliance on a set of distinct subnational

¹¹⁰ See *supra* note 55, 83-87 and accompanying text (discussing barriers to enactment of legislation in these areas). [

powers including zoning, tax, and procurement. The model of diffusion then for many of these particular measures will be horizontal, meaning they will be adopted by various regions, or spread from one region to another. Even as to more traditional antidiscrimination laws, a regime of local, state, and federal laws is likely to be more effective in creating a climate of compliance. A conceptual framework for horizontal diffusion thus seems necessary.

Inclusive legislation might at least in theory be diffused horizontally through the mechanisms of diffusion that operate in other policy regimes. These may be for instance, through a race-to-the-top: California effect”¹¹¹, competition, or policy imitation. As an illustration of the “California effect,” when a large state requires a corporation to hire without regard to sexual orientation that corporation may adopt these antidiscrimination or inclusive practices in other branches or subsidiaries not located in the covered state. This mechanism of diffusion may be a less persuasive account for all inclusive regulation. For instance, mechanisms that involve local institutional actors (versus large, multistate players) and place-based interventions (like inclusionary zoning) may be less amenable to the “California effect.”

Another mechanism of diffusion might be competition in neighboring regions.¹¹² The theory would be that if inclusive policies generate positive policy effects such as more affordable housing or greater levels of employment, jurisdictions might adopt these policies so they can

¹¹¹ See, e.g., David Vogel, *Environmental Regulation and Economic Integration* 10-11 (1999) (defining “California effect” as the “upward ratcheting of regulatory standards” –initially adopted by one political jurisdiction -- “through market mechanisms”), available at

www.iatp.org/.../Environmental_Regulation_and_Economic_Integrat.pdf.

¹¹²For accounts of this dynamic of diffusion, see generally Charles S. Shipan & Craig Volden, *Policy Diffusion: Seven Lessons for Scholars and Practitioners*, 72 *PUBLIC ADMIN. REV.* 788, 789 (2012) (summarizing researchers who posit that regions adopt policies to compete for business and affluent residents); Frances S. Berry & William D. Berry, *State Lottery Adoptions As Policy Innovations: An Event History Analysis*, 84 *AM. POL. SC. REV.* 395, 410 (1990) (in a study of state lottery adoptions finding support that diffusion was the result of both internal political and economic characteristics of a state and number of neighboring states that had adopted lotteries); J.L. Walker, *The Diffusion of Innovations Among the American States*, 63 *Am. Pol. Sc. Rev.* 880 (1969). Some claim that competition will fuel a “race to the bottom” in the case of economic redistributive policies. See, e.g., PAUL E. PETERSON & MARK C. ROM, *WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD* (1990).

effectively compete for citizens or employers. There may also be competition for citizens or employers who desire these inclusive policies for their own sake. Anecdotally, some regions claim to have adopted “gay friendly” legislation because they seek to remain attractive to major corporations. Human Rights Campaign (HRC), a prominent LGBTQ advocacy group, explicitly appeals to competition in its work to expand antidiscrimination provisions and other inclusive municipal practices. HRC’s “Municipal Equality Index” rates cities on their inclusive policies, providing both a menu of policy and regulatory initiatives for inclusion, and allowing cities to compare themselves against others in their progress towards inclusive legislation and practices.¹¹³ HRC frames its case for municipal equality not only in terms of fairness but in the distinct language of regional competitiveness. Cities with vibrant gay and lesbian communities, HRC argues, have better economic outcomes, business climates, and attract the most talented and skilled citizens.¹¹⁴ Advocates of HRC’s approach assert that “cities are the real sources of innovation and economic growth” and “cities that do that best and lead in innovation, creativity and higher living standards, recognize that diversity and in particular LGBT inclusion is key to attracting talented people.”¹¹⁵

Whether this argument is an actual driver of municipal adoption of inclusiveness is not clear. And these are not arguments that will work for all policies. Narratives of competition may be most effective after an inclusionary policy has spread—an argument more persuasive for luring the later adopters than jumpstarting the initial set of early adopters. And not every inclusionary policy, particularly those affecting less economically enfranchised populations such

¹¹³ HUMAN RIGHTS CAMPAIGN & EQUAL. FED’N INST., MUNICIPAL EQUALITY INDEX: A NATIONWIDE EVALUATION OF MUNICIPAL LAW (2014).

¹¹⁴ *See id.* at 7 (“Cities are in constant competition for residents, business, and employees, and inclusiveness is an important factor that attracts all three.”).

¹¹⁵ *Id.* at 6.

as source of income discrimination or CBAs, will be easily framed in terms of its ability to enhance a city's magnetic appeal to skilled, affluent residents and business.

A final driver of diffusion may be policy imitation by learning.¹¹⁶ Regions may borrow inclusive policies and practices that are perceived to be effective and fair from other regions. This borrowing may happen when political and policy leaders look to other regions for models. Or the borrowing may happen through the work of advocates and community stakeholders.

The empirical literature on what mechanisms in fact fuel diffusion of the inclusive policies discussed in this article is scant. Two researchers studied the diffusion of inclusionary zoning practices in the San Francisco Bay Area.¹¹⁷ By 2007, 68 percent of San Francisco Bay Area jurisdictions had adopted some form of inclusionary zoning program.¹¹⁸ The researchers studied those programs adopted between 1980 and 2003 and (not entirely unsurprisingly) found that the cost of local housing and the share of democratic voters significantly predicted the likelihood of a jurisdiction adopting an inclusionary zoning program.¹¹⁹ Another strong predictor

¹¹⁶ This is of course the hope famously expressed by Justice Brandeis' oft-invoked state laboratories metaphor. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); see also Doni Gerwitzman, *Complex Experimental Federalism*, 63 *BUFF. L. REV.* 241, 241-44 (2015) (arguing that collective learning is more effective when states are conducting simultaneous experiments); Barry Friedman, *Valuing Federalism*, 82 *MINN. L. REV.* 317, 399-400 (1997) (providing an account of public problem solving through experimentation). For an empirical account of diffusion through learning, see Craig Volden, *States as Policy Laboratories: Emulating Success in the Children's Health Insurance Program*, 50 *AM. J. POL. SCI.* 294 (2006). Many have also critiqued the notion that state experiments promote innovation. See, e.g., Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 *EMORY L. J.* 1333 (2009) (arguing that state and local governments are unlikely to innovate at the optimal social level or to be successful in capturing the benefits of experimentation); Susan Rose Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 *J. LEGAL STUD.* 593 (1980) (arguing that incentives for states and localities to innovate are dampened by collective action and free rider problems).

¹¹⁷ See Rachel Meltzer & Jenny Schuetz, *What Drives the Diffusion of Inclusionary Zoning*, 29 *J. POL'Y ANALYSIS & MGMT.* 578 (2010). The paper examines inclusionary zoning programs that either "require or offer incentives for developers to set aside a certain percentage of the units within their market-rate residential developments at prices or rents affordable to specified income groups." *Id.* at 578.

¹¹⁸ See *id.* at 578-79.

¹¹⁹ See *id.* at 579 ("This suggests that [inclusionary zoning] adoption may reflect some communities' higher preferences for an active government role in economic regulation and redistribution"); *id.* at 597 ("[E]ven within a relatively liberal region of the country, we find that jurisdictions with more Democratic constituencies are more likely to opt for IZ programs.").

of adoption was the existence of an established affordable housing nonprofit organization.¹²⁰

These conclusions are consistent with studies in other contexts that show that strong advocacy groups within states and localities¹²¹ and interstate nonprofit networks can help support and spread policies among subnational governments.¹²² These conclusions have implications for federal regulatory architecture and lawyering as discussed in the next section.

C. Diffusers

Whatever the specific mechanisms at play, much of the empirical literature suggests that diffusion would be boosted by regulatory or advocacy intervention that takes seriously the project of horizontal diffusion. This section explores the implications for rethinking existing legal and regulatory regimes, specifically with regard to (1) federal regulatory architecture and (2) lawyering.

1. Regulatory Architecture

2.

If subnational governments are key players in inclusionary innovation, this has important implications for the design of the federal regulatory regime, which can play a role in fueling inclusionary policy.¹²³ The civil rights regulatory regime largely relies on mandatory rules imposed through antidiscrimination prohibitions and conditioned spending. Strains on the private attorney general regime and the limited efficacy of *ex post* enforcement regimes in addressing

¹²⁰ See *id.* at 579 (inferring that “places choosing to adopt [inclusionary zoning] are already sensitive to their affordable housing needs and have a nonprofit infrastructure in place to carry out the programs”); *id.* at 595 (finding that “if affordable housing nonprofits in a jurisdiction are on average 1 year older, the probability of [inclusionary zoning] adoption increases by 2 percent”); *id.* at 598 (qualitative case study of San Jose concluding that support for inclusionary zoning “reflects partisan affiliation by elected officials and residents, as well as the presence of affordable housing (and other liberally leaning) nonprofit organizations”).

¹²¹ See Charles R. Shipan & Craig Volden, *Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States*, 50 AM J. OF POL. SC. 825 (2006) (finding that the presence of strong state health lobby groups fueled moved of local antismoking policies to the state level).

¹²² See Steven J. Balla, *Interstate Professional Associations and The Diffusion of Policy Innovations*, 29 AM. POL. RES. 221, 240 (2001) (examining adoption of a health insurance intervention developed by a professional association and finding empirical support for the notion that “associations can affect policy diffusion”).

¹²³ See Steven J. Balla, *Interstate Professional Associations and the Diffusion of Policy Innovations* 29 AM. POL. RES. 221, 245 (2001) (summarizing research showing tht [p]olicy makers may receive information about, as well as incentives to adopt, innovations from the federal government).

structural exclusion point to the need for a greater focus on conditioned spending.¹²⁴ Spurring and supporting state and local innovation would require further retooling of the current spending and regulatory regime to provide spending carrots as well as traditional spending sticks, and to provide for greater dissemination of model interventions (be they the result of traditional conditioned spending or grant-making programs).¹²⁵

As a matter of design this emphasis would require a greater role for federal agencies that have grant-making and spending authority. Agencies like the Department of Labor and the Department of Housing and Urban Development can offer grant programs to encourage adoption of inclusionary legislation and initiatives. A key aspect of the current civil rights regime requires those who take federal funds to comply with federal rules and directives. With new insights on the possibility of state and local diffusion, one can expand this regime further. Why not also provide “carrots”—rewards or incentives—for state and local governments to experiment with model interventions or to adopt those with proven benefits? This might be accomplished through the creation of new grant programs, or through how federal agencies decide to choose grantees for existing programs. The federal regime would also incorporate mechanisms for spreading innovations, through study and analysis of programmatic efficacy and model interventions¹²⁶. This could occur in conventional conditioned spending programs, as well as in grant programs.

None of this redesign would be new in many areas of law and policy, but it would require a shift in how civil rights regulatory regimes and civil rights agencies typically operate. At the same time, these suggestions are not fanciful. There are indications that this regulatory shift is

¹²⁴ See Johnson, *supra* note 98, at 1362–63 (arguing that predominant focus on public and private enforcement ignores conditioned spending as a powerful form of regulatory intervention).

¹²⁵ Cf. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 419–32 (1998) (arguing that local experiments are enhanced by information pooling in which regional and national coordinating bodies share knowledge).

¹²⁶ See FREEMAN & ROGERS, *supra* note 10, at 223 (arguing that the federal government can support state laboratories of democracy by collecting data, evaluating state experiments, benchmarking, and disseminating the result of those experiments).

emerging. Three federal departments—the Department of Housing and Urban Development, the Department of Transportation, and the Environmental Protection Agency—have initiated a “partnership for sustainable communities” which awards funding to state and local efforts to build affordable housing, redesign transportation infrastructure, and promote environmental efficiency.¹²⁸ The Department of Labor has announced competitive grants to public–private partnerships to “develop and implement innovative, high-quality [] apprenticeship programs” that move workers into “high-growth occupations and industries.”¹²⁹ A key focus of the grant program is spurring partnerships that increase training opportunities for historically excluded groups including women, people with disabilities, and young men and women of color.¹³⁰ Another such grant program awards grants for innovative approaches to training low-skilled and historically excluded workers for employment in the technology industry.¹³¹ In addition to leveraging government funds to develop new strategies for inclusion, these approaches have the advantage of “pooling” agency resources to meet economic inclusion as well as antidiscrimination goals.¹³² For instance, in the area of employment this might include both providing skills training for workers and advancing inclusion of particular groups. In the area of

¹²⁸ See *PSC 2015 Priorities*, PARTNERSHIP FOR SUSTAINABLE CMTYS., <http://www.sustainablecommunities.gov/mission/about-us> (last visited Dec. 3, 2015) (describing 2015 goals as promoting using “agency resources to advance Ladders of Opportunity for every American and every community[;] helping communities adapt to a changing climate, while mitigating future disaster losses[;] [and] supporting implementation of community-based development priorities”).

¹²⁹ See *Opportunities*, DEP’T OF LABOR, <http://www.dol.gov/featured/cwip/opportunities> (last visited Jan. 10, 2016). (describing reward of up to \$100 million in grants financed by a user fee generated by the H-1B nonimmigrant visa program). The grants competition will “focus on public–private partnerships between employers, business associations, joint labor-management organizations, labor organizations, training providers, community colleges, local and state governments, the workforce system, non-profits and faith-based organizations.” *Id.*

¹³⁰ See *id.*

¹³¹ See *TechHire Grant Competition*, U.S. DEP’T OF LABOR, <http://www.dol.gov/dol/grants/funding-ops.htm> (last visited Dec. 3, 2015) (announcing \$100 million in grants “to support innovative approaches to moving lower skilled workers on the fastest paths to well-paying information technology and high growth jobs in industries like healthcare, advanced manufacturing, financial services, and other in-demand sectors.”).

¹³² See Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 211 (2015) (describing phenomenon of joint “structures capable of ends that no single agency could otherwise achieve”). Renan also provides some reasons to be cautious about the agency pooling approach from the perspective of administrative law and design. *Id.* at 284–85.

housing it might include both building affordable housing and advancing civil rights goals of nondiscrimination and integration.

3. Lawyering

An increased emphasis on state and local diffusion also has implications for the work of civil rights lawyers and advocates who have traditionally been focused on courts and federal legislative intervention. Whether inclusionary models diffuse through competition, imitation, or strong local advocacy groups, networks of local groups can likely help advance this process. Following the insights derived from studies of local diffusion,¹³³ established local groups can help promote policies in particular regions, as well as create networks to share implementation strategies and model legislative and regulatory design. Lawyers and advocates with a national focus can play roles as conveners and disseminators of information.

Groups associated with business interests have long created networks and structures to advance legislation at the state and local levels.¹³⁴ Groups advocating for civil rights and inclusionary legislation have in recent years started to enter the subnational domain as well.. National-level groups support and convene local advocates. The work may include gathering information, identifying and drafting model legislation, or writing reports and providing technical or legal assistance to local groups.¹³⁵ Groups like the National Employment Law

¹³³ See *supra* note 117 and accompanying text.

¹³⁴ One of the most prominent groups advocating for business interests is the American Legislative Exchange Council, founded in 1975. For scholarly examinations of the American Legislative Exchange, see generally Alexander Hertel-Fernandez, *Who Passes Business's "Model Bills"? Policy Capacity and Corporate Influence in U.S. State Politics*, 12 PERP. ON POL. 582 (2014) (describing history of the group and account of its role in promoting pro-business, anti-regulatory legislation across the states).

¹³⁵ See, e.g., RODRIGUEZ & MEHTA *supra* n. 27 (discussing the National Employment Law Project's work on "Ban the Box" legislation). Groups like National Fair Housing Alliance (a consortium of non-profit fair housing organizations and state and local agencies) and the Poverty Race Research Action Council (PRRAC) perform similar functions regarding "source of income" legislation. See, e.g., POVERTY & RACE RESEARCH ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM (2015), <http://www.prrac.org/pdf/AppendixB.pdf>. The Partnership for Working Families provides technical and legal assistance to promote community benefits agreements. See *Policy & Tools: Community Benefits Agreements and Policies*, PARTNERSHIP FOR WORKING FAMILIES,

Project gather information on new state and local fair employment laws, provide model legislation, and provide assistance on legislative strategy and implementation.¹³⁶ The Partnership for Working Families provides legal and policy support for community organizations seeking to develop and implement CBAs.¹³⁷ Another model is the one offered by HRC’s work on developing a “municipal equality index,” which provides a template for municipalities seeking to adopt LGBTQ-friendly policies and allows cities to be compared to one another.¹³⁸

It is important to emphasize that equality groups have traditionally not engaged in creating the interstate networks and state and local advocacy structures to advance state and local inclusionary frameworks. Taking horizontal diffusion seriously will require a change in their current emphasis. It will also require belief in what cannot yet fully be known—that the subnational level holds promise for promoting civil rights and inclusion.

V CONCLUSION

This article has taken an optimistic assessment of states and localities as potential sources of regulatory innovation to advance inclusion. This optimism is vulnerable to the charge that it rests on “opt-in” equality. But there are limitations to the federal regime we now have. Many of the most promising state and local measures are noteworthy because they supplement the federal antidiscrimination regime, *and* because they employ tools distinct to states and localities that are largely unavailable in federal law.

<http://www.forworkingfamilies.org/resources/policy-tools-community-benefits-agreements-and-policies> (last visited Dec. 3, 2015).

¹³⁶ See NELP, The Fair Chance/Ban the Box Toolkit <http://www.nelp.org/publication/the-fair-chance-ban-the-box-toolkit/>; Michelle N. Rodriguez, NELP, Best Practices and Model Fair Chance Policies, <http://www.nelp.org/publication/best-practices-model-fair-chance-policies/>.

¹³⁷ See Partnership for Working Families, <http://www.forworkingfamilies.org/resources/policy-tools-community-benefits-agreements-and-policies>.

¹³⁸ See *supra* note 113 and accompanying text.

In the end, state and local innovation might open the door to expanding the regulatory, legal, and policy mechanisms that advance meaningful equality and inclusion. Inclusionary regimes at all levels of government might do better to rely on a greater range of market and regulatory incentives and mechanisms to promote inclusion, including the use of grants, tax, and even “soft” regulatory interventions like ratings and certification. Even if one is not yet persuaded of the success of any particular initiative, an examination of these innovations allows us to imagine the possibility of new regimes that might better promote economic identity and social inclusion.