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The Evolution of Employment Discrimination Law in the 1990s: A Preliminary Empirical Investigation

by

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Abstract

Two major pieces of employment discrimination legislation were passed in the early 1990s: the 1991 Civil Rights Act and Americans with Disabilities Act. Using some simple regression models, we examine the effects of this legislation on the volume, content and outcomes of employment discrimination cases filed in federal courts. We find, first, that the volume of discrimination cases nearly doubled between 1992 and 1997, in contrast to a 10 percent decline during the previous 8 years, and despite a sharply falling unemployment rate that–in the past–would have substantially reduced the amount of litigation. We also observe a significant shift in the composition of suits filed, with race and age discrimination cases declining substantially as a share of the total and sex and disability discrimination cases increasing. We tie these developments, as well as changes in the relationship between plaintiff win rates and the business cycle, to changes in the law that diminish the importance of back-pay damages. We conclude by tentatively suggesting how the meaning of and protection afforded by employment discrimination law has changed over the past 35 years.

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I. Introduction

At least in the national discourse, these seem to be relatively quiet times for employment discrimination law. While specialists in the field recognize that there are always cutting-edge developments in particular areas–the law governing disabled workers is one current example–the field as a whole is not subject to the same kind of extended national scrutiny and debate as it was when Congress was considering the 1990 and 1991 Civil Rights Acts, or during the Clarence Thomas hearings.

Despite this lack of attention, however, we suggest that employment discrimination law has undergone some dramatic yet largely unrecognized changes since the start of the last decade, changes that are substantial enough to amount to a revolution, albeit a quiet one. For one thing, the number of employment discrimination suits filed in federal district courts doubled between 1992 and 1997. (Litigation volume reached a peak of more than 20,000 suits per year in 1995, and then fell by some 21 percent by 1997.) During the previous 8 years, by contrast, the volume of litigation had actually declined by some 10 percent.

Moreover, the explosive rise in the volume of litigation during the 1990s occurred against a backdrop of unparalleled economic prosperity and falling unemployment rates. This is significant because–as we demonstrated in a series of articles in the early 1990s–there has traditionally been a strong negative relationship between the volume of employment discrimination suits and prosperity the labor market (Donohue & Siegelman, 1991; Siegelman & Donohue, 1991; Donohue & Siegelman, 1993; Siegelman & Donohue, 1995). Indeed, as we show below, what was once a robust relationship between the volume of employment discrimination litigation and the unemployment rate has completely broken down during the last 10 years. This suggests that

more than a mere quantitative change has occurred: we don't just have a *lot* more suits being filed than 10 years ago, we seem to have an entirely different relationship between the volume of litigation and the rest of the economy.

Figure 1 provides compelling graphical evidence of this structural change. In the top half, it plots the number of employment discrimination suits filed in federal district courts during each calendar quarter from 1969 through 1997 (the circles), along with the predicted number of suits based on a simple model that utilizes only the lagged unemployment rate and a time trend as explanatory variables (the solid line). As can be seen, the model fits the actual data remarkably well during the period before the third quarter of 1991. At that point, however, the model appears to break down completely: while the sample regression model (estimated prior to 1992) would have predicted that the volume of litigation should have declined modestly as the unemployment rate fell (see bottom panel, which plots the de-trended unemployment rate), the actual number of suits skyrocketed over the next 5 years–more than doubling during this period despite a steady downward trend in the unemployment rate.

In addition to changes in the *number* of suits filed, it would be helpful to identify changes in the *composition* of litigation since 1991. Unfortunately, the case-filing data do not allow a direct identification of the type (race, sex) or basis (hiring, firing, harassment) being alleged. Information on charges of discrimination filed with the EEOC can be used as a rough supplement to the data on filed cases, however, and these data reveal a pattern that is roughly consistent with the importance of the 1991 Civil Rights Act as a source of the increased caseload.

Together, these structural changes cry out for an explanation. It would indeed be surprising if the underlying acts of discrimination rose 2.5-fold between 1992 and 1996. Has something

about the evolution of the law during this period made it more attractive for plaintiffs to bring certain kinds of suits that they would formerly not have chosen to file? Has it been the expansion of possible causes of action that has generated the increased caseload? Or perhaps an extra-legal story involving increased mobilization of potential plaintiffs lies behind the rise in litigation. In addition, the kinds of structural changes we document below raise significant questions about who employment discrimination law actually protects, from what kinds of discrimination, and how well.

In the rest of this paper, we attempt a preliminary assessment of the state of employment discrimination law in the 1990s, focusing not on the evolution of doctrine, but on the evolution of the law "in action"–on how people now use the law that is available to them. Section I begins by briefly sketching in the rules of employment discrimination law before 1990, stressing in particular the rules for calculating damages in discrimination suits. Our earlier work demonstrated that damages have traditionally played a vital role not only in determining the *number* of suits filed, but also the rate at which suits go to trial and the rate of plaintiff victories. Congress substantially changed the rules for calculating damages during the early 1990s, at least for some classes of suits, and a new basis for liability–disability discrimination–was added to the body of employment discrimination law. After describing these changes, we go on to evaluate their effects in Section II. We look at three different kinds of evidence: changes in the composition of the federal employment discrimination caseload after 1992; changes in the relationship between the business cycle (unemployment rate) and the volume and outcomes of employment discrimination litigation; and changes in the size distribution of awards to prevailing plaintiffs. Almost all of this evidence is consistent with our argument about the importance of the

1991 Civil Rights Act and the ADA, but there are qualifications and uncertainties that are unresolvable with the existing data. In the final section, we offer some speculations about the future of employment discrimination law.

II. Structural Changes in the 1990s

A. The Importance of Back Pay Before 1991

In a series of papers written in the late 1980s, we developed what then appeared to be a coherent economic account of the forces driving several aspects of employment discrimination litigation. This section briefly summarizes the theoretical and empirical insights that emerged from these papers as they applied to the world of employment discrimination litigation before the passage of the 1991 Civil Rights Act and the Americans With Disabilities Act.

Briefly put, the key to understanding a plaintiff's behavior in deciding whether or not to bring an employment discrimination claim in the first place–and, once the claim is filed whether or not to settle–is the way that damages are calculated.

Before 1992, damages in employment discrimination suits were largely limited to back pay. The basic pre-Civil Rights Act of 1991 rule was that "Title VII provides only equitable remedies; damages other than back pay are not recoverable." (Cox, 1987, p. 5-17; *DeGrace v. Rumsfeld*, *Harrington v. Vandalia-Butler Bd. of Educ*, *Pearson v. W. Elec. Co.*) Reinstatement, promotion, and changes in employment practices have also been available as remedies, but our data suggest that plaintiffs ask for and secure them through settlement or judgment *far* less frequently than they receive monetary settlements or awards (Donohue & Siegelman, 1991).

The Age Discrimination in Employment Act (ADEA) offers a limited version of punitive damages: conditional on a proof of willful violation of the statute, double recovery of actual

damages is available. (Cox, 1987, p. 23-14; *Fortino v. Quasar Co.*). Punitive and compensatory damages as such, however, were not available under the ADEA (Cox, 1987, p. 23-16). Suits under the Reconstruction Era Civil Rights Act, §1981, do allow for punitive damages in addition to back pay, but cover only discrimination on the basis of race.

Consider someone who lost her job because of a discriminatory firing, and was then unemployed for twelve weeks. Assume that she was initially making $500 per week, and that her new job pays the same salary as her old one. Her back pay damages simply are the difference between what she would have earned but for discrimination (12 weeks at $500/week = $6,000) and her actual earnings (in this case, zero) for the period during which she was unemployed. Hence, she will be entitled to $6,000 in back pay.[1]

Several important facts about employment discrimination litigation followed from this observation. First, back pay awards under the pre-1991 Civil Rights Act were usually small, and were positively related to a plaintiff's wage. A prevailing plaintiff who had been earning $5 per hour could expect to receive only $10,000 in back pay damages if discrimination caused her to be unemployed for a year after losing her job (as a result of discrimination). Even a very highly-paid employee could not expect to earn much more than $150,000 under similar circumstances.

Second, as our examples just indicated, the size of her back pay award depends on the length of time that the plaintiff was unemployed. Since the duration of unemployment spells tends to be longer in recessions–when the unemployment rate is high–and shorter during periods of economic prosperity, it follows that average awards were more generous in slumps than during booms. This in turn suggests that plaintiffs should have been more willing to bring employment discrimination cases during recessions: the rewards for doing so were larger than when the

economy was robust, while the costs were presumably the same.

Furthermore, if plaintiffs brought cases during recessions that they would not otherwise have brought, these recession-induced cases should have had a lower probability of plaintiff victory than those brought during booms. Suppose the risk-neutral plaintiff knows she will receive a back pay award of $10,000 if she prevails. Given costs of $1,000, she will only bring suit if the probability of victory is greater than 10%. But if the award size increases to $20,000, the plaintiff only requires a probability of victory of 0.05. By raising damages conditional on victory, a recession induces some low-probability plaintiffs–who would not otherwise have found it worthwhile to file suit–to come forward and do so. Hence, the average win rate should fall during recessions, as the mix of cases shifts to include those with lower win rates.

Our back pay-driven model yielded at least three empirically testable predictions:

> (1) the size of awards to prevailing plaintiffs should be larger for cases filed when the unemployment rate is high than for those filed when it is low;
> (2) the number of suits filed should rise during recessions and fall when the unemployment rate is low; and
> (3) the plaintiff win rate in tried cases should fall during recessions and rise when the economy is prosperous.

Using data obtained from the Administrative Office of the US Courts (AO) and supplemented by our own data collection, we were able to confirm all three of these predictions, and to reject various other alternative explanations for our findings, as summarized in Table 2.

B. Changes in the Early 1990s

1. The 1991 Civil Rights Act

Spurred in part by a number of Supreme Court decisions restricting the scope of federal employment discrimination law, and by complaints of inequitable treatment of sex discrimination

claims, Congress passed the 1991 Civil Rights Act.[2] The legislation modified many aspects of federal employment discrimination law, but the most important aspects are summarized in Table 3 and discussed briefly here.

The most significant changes wrought by the 1991 Civil Rights Act were designed to provide greater equity for sex and other non-race discrimination plaintiffs, who were considered to be at a disadvantage because they were not able to utilize § 1981. Thus, for so-called "ineligible cases," the 1991 Civil Rights Act expanded the realm of potential damages beyond back pay to include compensatory damages (e.g., for psychological distress, therapy expenses, medical bills) and punitive damages in cases of intentional discrimination (limited, however, by the size of the defendant firm).[3] This had the effect of turning disparate treatment employment discrimination cases into suits at law, rather than equitable actions (Back pay had been considered an equitable, rather than a legal, remedy.) As a result, the 7th Amendment's right to a jury trial in civil cases meant that Congress was forced to confer the right to jury trials at the same time it expanded damages. "Forced" may be the wrong verb, since the right to a jury trial was generally viewed with enthusiasm by plaintiff advocacy and Civil Rights groups, as we discuss below.[4]

Together, these changes meant that non-race discrimination plaintiffs were eligible for substantially higher awards than previously. Moreover, what was once the only monetary remedy–back pay–became just one part of a much larger array of potential damages that non-race discrimination plaintiffs were allowed to collect for the first time. Since there is unlikely to be a strong link between the size of non-back pay awards (e.g., for emotional distress) and the business cycle, we might expect to see that the volume and win rate in employment

discrimination cases would be less sensitive to the state of the economy after the 1991 Act.

2. The Americans With Disabilities Act

The 1991 Civil Rights Act (CRA) was not the only important piece of employment discrimination passed by Congress in the early 1990s. Passed a year earlier than the CRA, the Americans with Disabilities Act's employment provisions became effective six months after the 1991 CRA went into effect. A far-ranging piece of legislation, the ADA extended beyond employment to testing, architectural design, and many other areas of life. We focus on the employment provisions in Title I, whose effective date for firms with 25 or more employees was July 26, 1992. Those with 15-25 employees were given an additional 2 years before the Act was extended to cover them.

The ADA created two distinct causes of action for covered employees: first, it gave workers the right to be free of discrimination because of their disability, just as Title VII gave them the right to be free of discrimination because of their race or sex. Remedies were essentially the same as those under the post-1991 CRA Title VII.[5]

In addition, however, the ADA created an affirmative duty for employers to make "reasonable accommodations" to the needs of "qualified" employees with disabilities, defined as someone who has the "requisite skill, experience and education requirements of the employment position, and who, with or without reasonable accommodation, can perform essential functions of such position." §101(8). Hence, under the ADA, qualified disabled employees can require employers to make buildings more accessible (e.g., installing ramps instead of stairs), to modify work schedules (e.g., allowing part-time work), to install special equipment (e.g., specialized computer screens with larger type), to grant them more time to complete examinations or other

performance evaluations, and so on.[5]

In sum, both the ADA and the 1991 Civil Rights Act gave plaintiffs' expanded opportunities to seek remedies beyond back pay. For plaintiffs with disabilities, the reasonable accommodations requirement meant that they could for the first time force their employers to alter working conditions in a way that would allow them to keep their jobs. The 1991 Civil Rights Act granted some plaintiffs the right to compensatory and punitive damages that were previously unavailable to them.

Cutting in the other direction, we note that the Supreme Court held in 1992 that payments received in settlement of a backpay claim under Title VII were not excludable from the recipient's gross income under §104(a)(2) of the Internal Revenue Code, which allows for exclusion of "damages received on account of personal injuries." (*United States v. Burke*). This of course reduced the after-tax amount of Title VII damages, at least in those circuits that did not already follow this rule. It thus cuts in the opposite direction from the other changes discussed above that increased the size of expected awards to plaintiffs.

The net consequences of these developments are spelled out more fully, and tested against the existing evidence, below.

C. Data and Sample Partition Issues

Below we present data from the Administrative Office of the U.S. Courts (AO), which records all "Employment Civil Rights" cases filed in Federal district courts. The AO began tracking employment discrimination cases filed after January, 1969. Our previous dataset ended in June, 1989, but the data now extend through September, 1997. (We constructed a quarterly time series by simply counting the number of cases filed in each 3-month period starting on Jan

1, 1969. Outcome variables–how a case was decided–only became available for cases closing after 1978, and of course are not available for cases that were still pending as of September, 1997. There is reason to believe that such cases might differ systematically from those that had already closed. For example, most cases filed in 1995 had closed by 1998; those that had not might be unusually complex, unusually large, or otherwise atypical. In order to dampen the effect of this duration dependence, we eliminated all cases filed after 1996:3, one year before the data ended, in our analysis of win rates.)

In what follows, we use the number of "Federal Question" employment discrimination suits filed per calendar quarter as the measure of the employment discrimination caseload. (This measure excludes all suits in which the Federal government is either the plaintiff or the defendant. We omitted Federal-plaintiff suits because of a concern that government-litigated cases are likely to be different from garden-variety employment discrimination suits. Presumably the former have larger stakes, involve more complicated legal and factual issues and more time-consuming preparation, and focus on different subjects. We omitted cases in which the Federal government was a defendant because our previous research revealed that many of these are due process cases, with different procedures and remedies from those available to Title VII, ADA or § 1981 plaintiffs.) Since the dataset and its limitations have already been described at considerable length in our previous papers, we do not repeat that material here.

Our method for assessing the effects of the civil rights legislation of the early 1990s on the volume of suits filed or other aspects of litigation is quite simple. If these laws did have a significant effect on the volume of litigation (or its relationship to the business cycle or to the passage of time), we would expect to see a break or turning point in the time series at roughly the

time that the legislation went into effect. Our strategy, then, is to divide the period from 1969 and 1997 into two parts–one before and one after the new laws went into effect–and look for differences.

Since the laws did not go into effect at the same time, however, we have to decide the appropriate point at which to partition the sample. The effective date of the 1991 Civil Rights Act was November 21, 1991. The ADA went into effect in two phases: firms with 25 or more employees were covered as of July 26, 1992, while those with 15-24 employees were covered as of July 26, 1994. The second round added about 9 percent of the labor force which was employed at firms with 15-24 employees to the covered population (STATISTICAL ABSTRACT OF THE UNITED STATES (1997), Tables 621, 844 and 847) . We chose January 1, 1992, largely for convenience. This is the earliest possible reasonable date to divide the sample, and hence maximizes the number of observations in the second part of the sample, which is still substantially shorter than the first. It turns out that the results that follow are not sensitive to the choice of a later partition date, as Figure 1 suggests graphically.

III. Predicting the Effects of the New Laws: What Should We Look For & How Should we Look?

This section presents several different pieces of evidence on the effects of the early 1990s legislation. We examine a proxy for changes in the composition of the federal employment discrimination caseload after 1992, changes in the relationship between unemployment rates and the volume and outcomes of litigation, and changes in the size distribution of awards to prevailing plaintiffs. Almost all of this evidence is consistent with our argument about the importance of the 1991 Civil Rights Act and the ADA, but there are qualifications and

uncertainties that are unresolvable with the existing data.

A. Caseload Composition: A Shift in Favor of "New" Areas of Law

The simplest test for the effects of the new legislation would be to look at the growth in litigation by the type of discrimination alleged. For example, if much of the increase in litigation came from Age Discrimination cases, whose rules were not altered by the new laws, it would be difficult to attribute the observed growth to the statutes. By contrast, if we saw tremendous growth in claims alleging disability or sex discrimination, we would have a stronger case that the legislation of the early 1990's was responsible. Indeed, since disability discrimination claims were essentially not cognizable before 1992, *any* increase in disability claims must be due to the ADA, at least as a "but-for" cause.

Unfortunately, however, the AO data do not permit one to disaggregate "Employment Civil Rights" cases by the type of discrimination (age, sex, disability, race, etc.) being alleged. Hence, no direct test along these lines is possible. Instead, we have to rely on charges of discrimination filed with the EEOC. Except for cases raising only a § 1981 or Equal Pay Act claim, all employment discrimination cases that wind up in federal district court must first have been processed through the EEOC.[7] Unlike the Administrative Office of the US Courts, the EEOC does keep track of the type of discrimination alleged by the charging party, and these data thus provide a window on the composition of filed cases, even though historically only 10 percent of EEOC charges have gone on to generate a federal district court filing. (These data are naturally subject to sample selection problems, since the process by which a charge becomes a filed case is assuredly not random; hence, the picture derived from aggregate charge data at the EEOC may not accurately reflect the selected subset of claims that then go on to become filed cases in

federal district courts. Although our earlier work did not find any evidence of such selection, the ability to test for these problems is limited.)

Table 4 examines charges of discrimination with the EEOC for a number of different categories of employment discrimination claims. While we have noted that the overall caseload has risen despite the steadily dropping unemployment rate of the 1990s, Table 4 reveals that race and age discrimination charges filed with the EEOC actually experienced a *decline* in over the period from 1991 to 1996. Since the legislation offered little or no encouragement to these kinds of claims, these results are more in keeping with our earlier work which would have suggested that the booming economy would lead to a decline in the absolute numbers of cases. Conversely, sex discrimination charges grew by 31.2 percent, again consistent with the positive incentives created by the 1991 CRA. Finally, disability discrimination charges, which became legally cognizable for the first time in the 1990s, grew from a small number to 18,000 in 1996–a figure higher than the number of age discrimination cases and about 75 percent of the number of sex discrimination cases.

In conclusion, the large growth in federal district court filings of employment discrimination cases is substantially higher than the growth in discrimination complaints filed with the EEOC. Race and age discrimination charges filed with the EEOC were *declining* modestly in the early 1990s, while sex discrimination and disability charges with the EEOC were growing briskly. Still, the increase in the total number of federal court cases and federal court trials was far greater than the increase in the EEOC filings. The desire to get before a jury for the first time and to collect compensatory and punitive damages might explain the greater federal litigation concerning sex discrimination complaints since these options only became available with the

CRA of 1991. But this option was always available in race cases (because of section 1981) and age cases.

B. Weakened Business Cycle Sensitivity

1. The Volume of Litigation

As suggested earlier, both the ADA and the 1991 Civil Rights Act reduced the importance of back pay damages, albeit in different ways. The CRA expanded monetary remedies for a class of cases (predominantly allegations of sex discrimination) that had previously been eligible to collect only back pay damages. After 1991, sex discrimination plaintiffs could get punitive and compensatory damages, and could take their cases to a jury, rather than a generally less-sympathetic judge. The ADA's "reasonable accommodations" requirement meant that disabled plaintiffs could force employers to change the organization of the workplace to make it more conducive to their continued employment. This, too, reduced the importance of backpay damages in a plaintiff's assessment of the remedies available under employment discrimination laws.

By increasing the possible benefits available to plaintiffs, both statutes should increase the volume of litigation, at least in the short run, simply because some plaintiffs who would not have found it desirable to sue under the old rules would look at the enhanced damages under the new regime and conclude that litigation was worthwhile. Of course, the ADA also created a whole new cause of action that was not cognizable before its passage, and this alone should lead to an expansion of litigation.

Moreover, both statutes should attenuate the relationship between the business cycle and the volume and outcomes of employment discrimination litigation. As back pay becomes less important in the total package of damages available to plaintiffs, the link between plaintiffs'

decisions and the unemployment rate should grow correspondingly weaker. When back pay was all a plaintiff could get, business cycle-induced changes in the amount of back pay should have mattered much more than they do under today's rules.[8] In short, we would expect both statutes to generate more litigation and to diminish the importance of business cycle effects on the number of suits filed.

Tables 5 and 6 test these predictions by presenting some summary statistics and regression results for a simple model in which the volume of suits filed in quarter t depends on the number of quarters that have elapsed since Jan. 1, 1969 (as well as its square), and the unemployment rate in quarters t-1 and t-2. This was our standard model developed for the 1969-1989 data, and as evidenced by Figure 1, it fit the data for that period extremely well.

Table 6 takes a somewhat different approach from Figure 1. Rather than using the pre-1991 model to *forecast* the volume of suits in the post-1991 period, we estimated a different equation for each period, and then compare them. There are some telling differences in the relationships for the two periods. Most importantly, while there is strong evidence of a business cycle effect before 1992, the effect seems to vanish after that date.

Before 1992, a one percentage point increase in the unemployment generated about 145 additional employment discrimination suits two quarters later. Both the one- and two-quarter lagged values of the unemployment rate coefficient were positive and statistically significant during the first part of the sample. By contrast, there is no discernible relationship between unemployment and the volume of litigation during the period after 1991. During this period, a one percentage point increase in the unemployment rate was associated with 30 fewer suits per quarter (two quarters later). Moreover, the net measurement obscures the fact that one of the

estimated unemployment coefficients is positive while the other is negative, and neither is statistically significant in the post-1991 data. In other words, there is essentially no business cycle relationship apparent for the period after 1991.

Although a simple visual inspection of the table reveals the different business cycle relationships across the two periods, there are also several formal ways to test whether the unemployment (and other) coefficients in the pre- and post-1992 periods are statistically significantly different from each other. All of these tests demonstrate conclusively that the relationship between unemployment rates and the volume of suits filed are indeed different across the two periods.

Unfortunately, however, there is a technical problem with interpreting these results as evidence in support of our story about the effects of the legislative interventions in the early 1990s. Because unemployment followed an almost steady downward path between 1991 and 1997, the regression has a hard time accurately assigning responsibility for the rising number of suits during this period to either the time trend or the unemployment rate–the two factors are statistically almost indistinguishable, a classic multicollinearity problem.[9] Put another way, the observed increase in the correlation between unemployment rates and the Time Trend for the post-1992 data will *by itself* tend to produce large standard errors and statistically insignificant unemployment coefficient estimates for this period. This is precisely the same result we would predict on the basis of our story about the legislative interventions of the early 1990s. If business cycle effects on the volume of suits necessarily *appear* weaker after 1992, *regardless of whether they actually are*, it is hard to use this evidence in support of our explanation about the effects of the CRA and ADA.

2. Litigation Outcomes–Settlement and Win Rates Over the Business Cycle

a. Why Should The Business Cycle Influence the Win Rate?

The back pay mechanism linking the *volume* of litigation with the business cycle is simple: assuming that the costs of litigation are relatively invariant, an increase in plaintiffs' damages makes them more likely to pursue litigation, and higher unemployment rates cause longer durations of unemployment and larger awards to prevailing plaintiffs. The link between unemployment rates and the *outcomes* of litigation follows almost directly from this observation. When plaintiffs expect to receive higher damages *if they win*, they are willing to bring cases that have a lower probability of winning. For example, suppose a lawsuit costs $2,000 to bring, and the plaintiff will recover $20,000 in damages if she prevails. Then if she is risk-neutral, she will want to bring any suit whose chance of success is greater than 10 percent, since any such suit will have a positive net expected value. Now suppose that because of a recession, the plaintiff's damages if she prevails rise from $20,000 to $30,000. The plaintiff now requires only a 6.66 percent chance of success in order to make filing suit economically worthwhile. The additional cases brought forth by a rise in the unemployment rate should therefore have lower plaintiff win rates, and the average win rate for all cases filed during recessions should thus be lower than for cases filed when the unemployment rate is low. This link between the business cycle and the plaintiff win rate is not merely hypothetical. In earlier work, we demonstrated that, at least for the period before 1989, an increase in the unemployment rate did in fact call-forth cases with lower plaintiff win rates (Siegelman & Donohue (1995).) As summarized in Table 1, we found that an increase in unemployment from one standard deviation below to one standard deviation above its mean generated a fall in the plaintiff win rate of about 1 percent (0.6 percentage points). The

marginal cases brought forth by the increase in the unemployment rate had a win rate that was about 21 percent (4.5 percentage points) lower than the average for the baseline cases.

The connection between the business cycle and the *adjudication* rate–the rate at which filed cases go to trial rather than settling–is somewhat more complex and less intuitive.[10] Again, however, our earlier work demonstrated that in the period before 1989, the rate at which filed cases settle rather than going to trial did indeed increase during recessions, exactly as predicted by at least some models of settlement and litigation.

In sum, there is strong evidence that the business cycle influenced the outcomes of employment discrimination for cases filed before 1989. As we discussed earlier, the legislation of the early 1990s diluted the importance of back pay, and we would therefore predict that the effect of business cycles on litigation outcomes should be weaker after 1992 than it was before.

b. Empirical Evidence

Table 7 provides some evidence on what happened to the business cycle effects on outcomes of employment discrimination in the 1990s. In the period before 1992, a 1 percentage point increase in the unemployment rate raised the settlement rate by about 4 percent and lowered the plaintiff win rate by about one-tenth that amount, with both magnitudes statistically significant. After 1991, however, the business cycle relationships essentially vanish. Neither the win rate nor the settlement rate appear to be influenced by the unemployment rate at all: both coefficients change sign (a recession now appears to *raise* the plaintiff win rate!), but neither effect is statistically significant at even modest levels.

This evidence is entirely consistent with our theory. Unfortunately, however, the same problems discussed earlier with respect to the volume of litigation are present here as well. The

sharply lower variance in detrended unemployment rates during the post-1992 period means that the regression has lower power to detect any business cycle effects that do exist. Moreover, the shortened sample after 1992 exacerbates these problems. Hence, we might expect to see weaker business cycle effects *regardless* of the effect of the early 1990s legislation, merely as a result of reduced statistical precision in the estimates.

C. Award Sizes

The Administrative Office data contain a measure of the amount of damages awarded to prevailing plaintiffs, so some of our predictions about the effects of the early 1990s legislation on award sizes can be tested directly.[11]

Our analysis of the early 1990s legislation leads us to predict that smaller awards should fall as a proportion of the total, while larger awards should increase. The logic here is simple. Smaller awards are mostly back pay. But the import of both the CRA and the ADA is that more plaintiffs are eligible for awards beyond back pay, so we would expect the fraction of all awards that are 'small' to be declining. Larger awards will tend to include punitive and compensatory damages, and their share of all awards should increase under the new laws.

One might argue that the number of small award cases should fall absolutely, not just as a proportion of the total. After all, the economy has been increasingly healthy in the post-1992 period, and the declining unemployment rate should generate smaller back pay awards to prevailing plaintiffs. However, there are two reasons to be cautious here. First, despite the steady improvement in unemployment since 1992, the average post-1992 unemployment rate was only 0.5 percentage points lower than the average for the previous period. Moreover, non-random settlement may mean that smaller-award cases are not equally likely to settle.

Table 8 presents several aspects of the award size distribution that allow us to test our predictions against the available data. As predicted, small awards (for example, those under $25,000 in constant dollars) fall as a proportion of all awards during the post-1992 period. Awards under $25,000 comprised almost half (48.2%) of all awards to prevailing plaintiffs before 1992, while these small awards were only 39.9% of all awards in the subsequent period. The table also reveals that overall, more prevailing plaintiffs were getting larger awards: the larger the top award size, the more rapid the *growth rate* in average award size (in the last column). For example, the average award among those plaintiffs receiving less than $25,000 grew by only 2.2 percent in real terms, while the average award for those plaintiffs receiving less than $500,000 rose by more than 38 percent. (Awards between $1 million and $9.998 million are more likely to be multiple-plaintiff cases. Since we have no way of controlling for the number of plaintiffs in any given case, or to track changes in the number of plaintiffs per case over time, it is safest to focus on awards of less than $1 million.) And although it was still surprisingly small, the median award among awards less than $1 million also rose substantially after 1992: half of all awards before 1992 were smaller than $20,800, while the post-'92 median was $32,700, an increase of more than 57 percent.

D. California Filings

In many states, employment discrimination plaintiffs have a choice of filing a claim in state court under a state anti-discrimination statute or in federal court under Title VII. For some time, California employment discrimination law has offered plaintiffs expanded remedies (beyond backpay), coverage for disability discrimination, and the right to a jury trial. Even after the passage of the 1991 CRA, plaintiffs in California could have litigated the same causes of action

and obtained the same or better damages and remedies by suing under state law.[12] Hence, if the 1991 CRA were driving the growth in litigation, we might expect to see little or no increase in federal district court filings in California, since the legislation provided California plaintiffs with nothing more than they could have already obtained in state court.

Figure 2 plots the growth of federal district court filings in California and in the rest of the country. Contrary to our predictions, federal district court filings in California track those in the rest of the country very closely, even though the 1991 CRA did not provide any additional advantages for California plaintiffs. This may suggest that the allure of federal court is substantial for California plaintiffs even though on many dimensions, state employment discrimination law is more favorable than federal law.

IV. What Does It All Mean?

So there are a lot more suits than there used to be, awards to prevailing plaintiffs are up, at least in the larger size categories, and the business cycle no longer seems to have much of an effect on any aspect of employment discrimination litigation. So what? Are these more than just a set of technical findings or economist's *curiosa*? Here, we attempt some partial and tentative answers.

Like any other social phenomenon, Title VII was a product of its time. It was largely designed to address a particular problem–the inability of African-Americans to break into many jobs in many regions of the country because many employers simply refused to hire (or even to consider) them. That Title VII also addressed discrimination in firing and promotion, as well as discrimination on the basis of national origin, religion and (especially) sex is largely a result of political maneuvering and luck. The legislative history of the employment provisions of the 1964

Civil Rights Act makes it very clear that, in the minds of both its supporters and opponents, the chief "problem" against which it was directed was exclusion on the basis of race at the hiring stage. Other types of discrimination (e.g., on the basis of sex) were either not taken seriously or, in the case of firing, were not a serious problem because there were essentially no blacks in jobs other than at the lowest echelons of the employment structure.

While the evidence we present in this paper is limited in scope, it seems almost axiomatic that the civil rights legislation of the 1990s is a product of its time–*our* time–no less than its predecessor was. In this section, we succumb to the temptation to go beyond what the evidence clearly demonstrates and speculate about the meaning of employment discrimination law at the start of the new millennium. What, then, might our new employment discrimination law(s) say about us?

A. The Decline of Back Pay, and the Increasing Role of Juries in Deciding Cases and Setting Damages

In fashioning remedies for victims of employment discrimination, the drafters of Title VII faced a serious concern. The 7th Amendment gives either party the right to a jury trial in a civil case. Civil rights supporters were thus worried that defendants would elect a jury and–given the substantial opposition to civil rights (especially among Southern whites) and the under-representation of blacks on jury panels–would be able to escape any liability for their discriminatory behavior. The compromise that was reached was to limit damages to backpay: since this was considered equitable rather than legal relief, the 7th Amendment wouldn't come into play, preventing defendants from requesting a jury trial. Greater certainty of punishment was explicitly traded-off against lower monetary awards.

The text of the 1991 Civil Rights Act, and the behavior of the employment discrimination caseload in the 1990s, suggest that the problem of racist white juries refusing to sanction discriminatory employers no longer seems to be a serious concern. In fact, it is often employment discrimination *plaintiffs* who want a jury trial today, and Civil Rights groups such as the NAACP were strong supporters of the 1991 Civil Rights Act. Admittedly, many of the reasons had nothing to do with jury trials. It seems clear, however, that if the NAACP thought plaintiffs would be seriously disadvantaged by jury trials, they would have made this an issue. All this suggests that the anti-discrimination principle is more widely accepted than it used to be (a proposition for which there is abundant evidence from other sources), and that even Civil Rights groups recognize this fact.

B. The Decline of "Pure" Wage Discrimination and the Rise of New Damages

Thirty-five years ago, the paradigmatic case of employment discrimination was an employer's outright refusal to hire someone because of his or her race. Title VII recognized a simple remedy for this problem–the victim of discrimination was entitled to receive backpay damages equal to the difference between what she would have earned in the job she did not get, less the amount she actually earned (or could reasonably have earned) over the relevant time period. In a world where many firms–perhaps a majority–discriminated, a worker who was turned down by one firm would often have found it difficult to land an alternative job, since other employers were engaging in the same discriminatory practices as the firm that rejected her in the first instance.

Other things equal, therefore, the more pervasive is discrimination, the larger backpay damages will be, since victims of discrimination will have a more difficult time mitigating

damages on their own *via* the market when discrimination is widespread. Conversely, as the share of discriminators among all employers declines, the monetary cost to those job applicants who *do* experience discrimination should fall: when an applicant who is rejected by firm 1 because of her race can walk across the street to firm 2 and be hired immediately, firm 1's behavior imposes essentially no *monetary* cost on the applicant.

In Gary Becker's (1956) animus-based theory of discrimination, the amount of economic discrimination (measured as the wage difference between equally productive black and white workers) is set by the tastes of the least discriminatory employer. If there are any employers who do not have a discriminatory premium, there will be zero economic discrimination in the long run, since in equilibrium, all black workers will be able to work for these employers with no wage penalty at all. Becker's model predicts perfect segregation, but no loss in wages to black workers, and since it assumes away any dignitary harms to blacks, all the costs of discrimination are borne by the discriminators in equilibrium.

Becker's key conclusion–that in the long run discrimination is costless–rests on a crucial assumption that there are no dignitary or psychological harms (or search costs) borne by its victims. Rather than assuming them away, it seems more plausible to imagine that such costs will likely be felt even in a segregated Beckerian equilibrium, when a victim of discrimination suffers no loss in *earnings*. Consider the case of discrimination by taxicab drivers, for example. A recent study in Washington DC study revealed that blacks had to wait about 5.7 minutes to get a taxi to stop for them, while it took whites 4.5 minutes. (The study is unpublished, but the results are presented and critiqued in Siegelman (1999).) If we make the mistake of treating this as a purely monetary harm, we might value the 72 seconds of lost time at $12.50 per hour,

roughly the average wage. In that case, the monetary "cost" is a modest $0.25. But the *psychological* harms are quite likely to be substantially greater than this. The problem is not that certain persons can't get a cab at all, or have to wait for hours to get one. Rather, the harms seem to be much more connected to the loss of dignity that occurs when one is passed-over by a cab driver solely because of one's race.[13]

As the distinguished sociologist Orlando Patterson (1997) suggests, dignitary harms can increase–even as the amount of racism falls and the rate of integration rises–for 2 reasons. First, as blacks encounter whites more frequently, their possible exposure to discriminatory behavior will rise, even as the proportion of interactions that are discriminatory goes down. Second, members of traditionally disadvantaged groups now have an expectation of better treatment than they would have had 40 years ago. When these higher expectations are not met, persons affected by discrimination may experience psychological costs that would not have been felt at a time when discrimination was simply "the way things were."

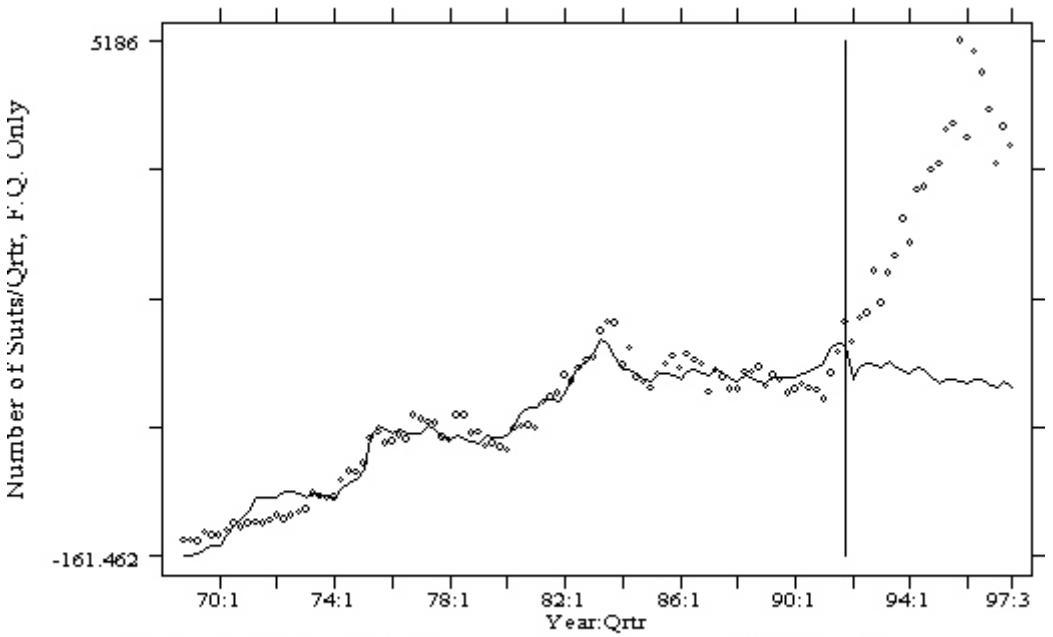
Returning to the employment context, if–as seems reasonable–the costs of discrimination are increasingly lost *utility* and dignitary harms, rather than lost income or earnings (Neal & Johnson (1998), we might need to start to thinking differently about what employment discrimination law should and actually does protect. Instead of compensating persons for lost earnings, we might want to broaden the scope of legally cognizable harms to include damages that are not recognized under the simple backpay model of Title VII. A modest movement in this direction already seems to be under way.

C. The Declining Relative Significance of Race Discrimination?

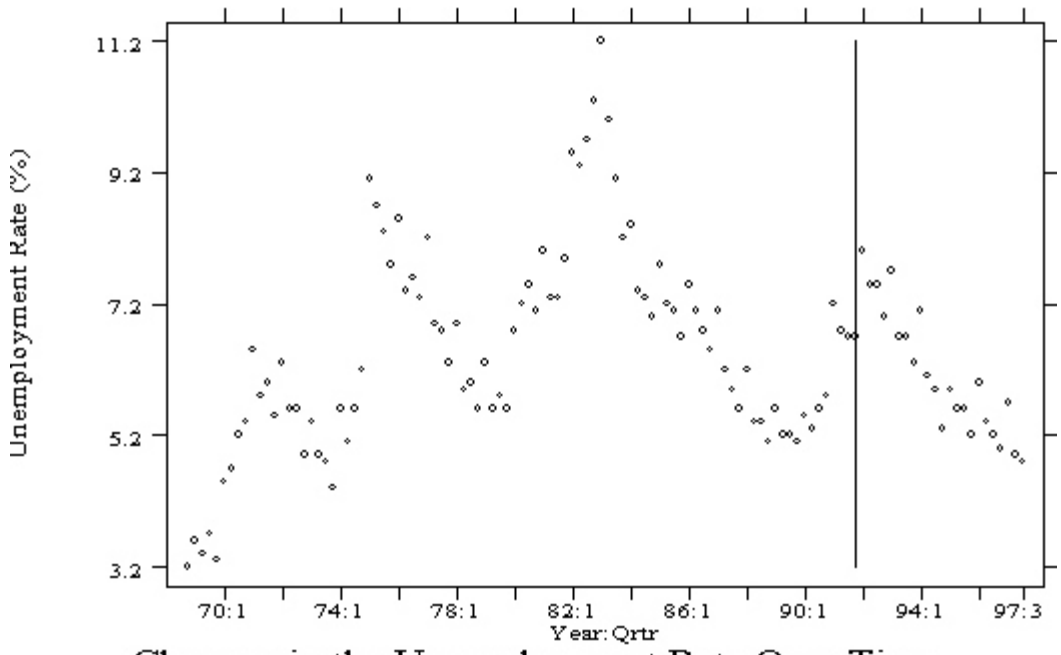
Race discrimination claims have apparently fallen–at least as a share of EEOC

complaints–and now constitute a plurality of such claims by a small and shrinking margin. Many other kinds of discrimination now compete for the attention of the media, for the sympathies of the voter, and for the government's scarce enforcement budget.

What should we make of this? On the one hand, it is a tribute to the power of the traditional civil rights model that it has been so widely adopted by other groups (women, the disabled, gays and lesbians, the elderly). It is difficult to be against civil rights for everyone. But the widespread adoption of civil rights rhetoric and civil rights remedies could come at a serious cost if it causes us to lose sight of the uniquely perfidious history of discrimination against African-Americans.



Actual, Fitted & Forecast Volume of Litigation



Changes in the Unemployment Rate Over Time

Figure 1

A Time Line of Significant Dates

Quarter:	82	86	92	95	103	111	115
Date:	1989:2	90:2	91:4	92:3	94:3	96:3	97:3
	Prev. Data Ends		1991 Civ. Rts Act Effective	ADA_1 Effective	ADA_2 Effective	Win Rate Data End	Filing Data End

Note: Title I of the ADA, covering employment, became effective for firms with 25 or more employees as of July 26, 1992. Coverage was extended to firms with 15 or more employees as of July 26, 1994.

Table 1: Effects of an Increase in the Unemployment Rate on Volume & Outcomes of Employment Discrimination Litigation, 1970-1989

	Cases/ Quarter	Settlement Rate	Win Rate
At Unemployment Rate = 6.04%	1367	61.3%	20.9%
For the Additional Cases Generated by Rise in Unemployment Rate to 8.66% (2 Std. Dev. Increase)	515	84.6%	16.4%
At Unemployment Rate = 8.66%	1882	67.7%	20.3%
Percent Change	+37.7	+10.4	-0.97

Source: Siegelman & Donohue (1995).

Table 2: Backpay Damages as the Link to the Business Cycle.
A Summary of Previous Findings

Damages	1 percentage-point ↑ in unemployment rate –> ↑ damages to prevailing pltfs by $2,000 - $3,000. Flanagan (1987) found identical effects using better-quality data on back pay damages under NLRA.
Volume of Suits	Counter-cyclical (↑ during recessions). Each 1% ↑ in unemployment rate ↑ number of suits filed by about 150 per quarter after lag of 3-6 months. Plaintiffs bring more suits when damages are higher.
Plaintiff Win Rate	Increases for cases filed during booms, falls during recessions Plaintiffs willing to bring lower-probability suits when awards, *conditional on winning*, are higher.
Settlement Rate	Increases for cases filed in slumps, falls during booms. Weaker cases brought during slumps tend disproportionately to settle, as predicted by, e.g., the Priest/Klein (1984) model.
Composition of Suits	Did *not* change over the business cycle, either by basis of discrimination (race, sex, etc.) or by type of discrimination (hiring, firing, etc.)
Suits Against US Gov' t	Increased during recessions (counter-cyclical), as did suits against pvt. defendants. But US gov't doesn't lay people off in recessions, so we are not observing a layoff effect
Lags	Lag between changes in unemployment and suit filing too short to be explained by layoffs. It takes at least 6 months to get through the EEOC, so if upturn in unemployment rate causes increase in filings with a lag of, e.g., 3 months, it can not be true that the effect is due to increased number of firings.
Discrimination	May rise during recessions, but suggests plaintiff win rates should also increase at such times, rather than falling.

Table 3: Summary of Changes Under 1991 Civil Rights Act

1. For Title VII cases ***not*** eligible under § 1981 (incl. sex discrimination complaints, esp. harassment, & retaliation), added non-back pay damages:	Allowed compensatory damages (e.g., for emotional distress) Allowed punitive damages (capped by firm size) Also allowed jury trials
2. Overturned *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)	§ 1981 *does* cover post-contract formation discrim., incl. firing
3. Misc. Other Provisions	Extended Title VII to Congressional employees; Overturned *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) (tightened standard for business necessity in disparate impact cases); Overturned *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (allowed damages in some "mixed-motives cases"); Overturned *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989) (lengthened filing period for challenges to discriminatory seniority systems); Allowed for recovery of expert witness fees by prevailing plaintiffs; Overturned *Martin v. Wilks*, 490 U.S 755 (1989) (expanded possibilities for challenging civil rights consent decrees)

Table 4: Numbers of Charges Filed w/EEOC, By Type of Discrimination, Selected EEOC Fiscal Years[a]

	FY 1992	FY 1996	FY 1999	% Change: '92-'96	% Change: '92-'99
Race Claims	29,548	26,287	28,819	-11.0	-2.5
% of Total	40.9	33.7	37.2		
Age Claims	19,573	15,719	14,141	-19.7	-27.8
% of Total	27.1	20.2	18.3		
Sex Claims	21,796	23,813	23,907	9.3	9.7
% of Total	30.1	30.6	30.9		
Retaliation Claims					
All Statutes	11,096	16,080	19,694	44.9	77.5
% of Total	15.3	20.6	25.4		
Title VII	10,499	14,412	17,883	37.3	70.3
% of Total	14.5	18.5	23.1		
Disability Claims	1,048	18,046	17,007	1621.9	1522.8
% of Total	1.4	23.2	22.0		
Other Claims	10,116	9,220	9,963	-8.9	-1.5
% of Total	14.0	11.8	12.9		
Total *Charges*	72,302	77,900	77,444	7.7	7.1
Total Claims[b]	103,676	123,577	131,414	19.2	26.8
Claims/Charge	1.43	1.58	1.70	10.5	18.9

Note: [a]Since charges can claim more than one type of discrimination (e.g., race and sex), Total Charges is the number of filed charges, not the total number of claims of discrimination.
[b]Total Claims is the actual column sum.

Table 5: Summary Statistics for Partitioned Sample
(Before and After Effective Date of 1991 Civil Rights Act)

	1969:1 - 1991:4			1992:1 - 1997:3		
Variable	Mean	Std. Dev.	Min, Max	Mean	Std. Dev.	Min, Max
Number of Suits	1182	647	0, 2270	3644	909	2054, 5186
Time	46	27	0, 92	104	6.8	93, 115
Detrended Unempl. Rate, -1[a]	0.0	1.12	-2.0, 3.6	0.0	0.4	-1.0, 0.8
Detrended Unempl. Rate, -2[a]	0.0	1.11	-2.0, 3.6	0.0	0.5	-0.8, 0.9
N	92			22		

Note: [a]Detrended Unemployment Rate is the residual from a regression of the lagged unemployment rate on Time and $Time^2$ with correction for AR(1) errors. Separate regressions were used for the two sample halves. The number following the minus means a lag of one or two quarters–that is, the unemployment rate in the quarter previous to the one in which the number of suits filed is being measured.

Table 6: Regression of Number of Employment Discrimination Suits per Quarter on Time and Detrended Unemployment Rates,[a] 1st and 2nd Halves of Sample

	1969:1 - 1991:4		1992:1 - 1997:3	
Variable	Coeff.	T-Stat.	Coeff.	T-Stat.
Time[b]	46.56	9.76	269.1	5.34
$Time^2$	-0.27	-5.43	-6.96	-3.16
Detrended Unempl. Rate, -1[c]	94.85	5.75	173.21	1.08
Detrended Unempl. Rate, -2[c]	49.63	3.01	-203.88	-1.33
Constant	-180.18	-1.90	1833.35	7.63
Summary Statistics				
Adjusted R^2	0.77		0.76	
Durbin-Watson	1.90		1.97	
$\hat{\rho}$	0.70		0.24	
N	92		22	

Notes: [a]Regressions estimated using Prais-Winston correction for AR(1) errors.
[b]Time and $Time^2$ are reset to zero for the 2nd period regression.
[c]Detrended Unemployment Rate is the residual from a regression of the lagged unemployment rate on Time and $Time^2$. Separate detrending regressions were used for the two sample halves.

Table 7: Effect of a One Percentage-Point Increase in the Detrended Unemployment Rate, Before and After 1992:[a]

Effect On:	1977:2-1991:4	1992:1 - 1996:3
Settlement Rate[b]	+3.9%	-5.4%
Win Rate[c]	-0.36%	+1.8%
N	58	18

NOTES:
[a]All estimates based on grouped logistic regressions w/separate time trends for each period. See note c of previous table.
[b]Both pre-1992 estimates statistically significant at 5 percent.
[c]Neither post-1992 estimates statistically significant at 10 percent.

Table 8: Average Real Awards in $1000s, by Award Size[a]
(for Cases Filed Before and After Effective Date of 1991 Civil Rights Act)

	58 Quarters from 1977:2-1991:4			18 Quarters from 1992:1-1996:3			% Change in Avg. Award
All Awards Less Than:	N	Mean Award	% of All Awards	N	Mean Award	% of All Awards	
$25,000	2,507	8.9	48.2%	756	9.1	39.9%	2.2
$50,000	3,216	14.9	61.9%	1,020	15.9	53.9%	6.7
$100,000	3,773	23.1	72.6%	1,276	26.7	67.4%	15.6
$200,000	4,162	34.1	80.1%	1,494	43.7	78.9%	28.2
$500,000	4,420	50.3	85.1%	1,665	69.6	87.9%	38.4
$9.999 Million[b]	5,153	528.6	99.2%	1,894	594	100.0%	12.4
All Awards (incl. 9999)	5,196	615.1	100.0%	1,894	594	100.0%	-3.4
Median for Awards Less Than $1 Million	4,602	20.8		1,713	32.7		57.2
	N	Rate		N	Rate	% Change in Rate	
Total Plaintiff Wins	7,095	20.5%		2,206	13.1%	-36.2%	
Adjudicated Cases	34,562	30.6%		16,886	23.7%	-22.6%	
Total Cases	112,845			71,213[c]		—	
Cases/Quarter	1946			3956		103	
Unemployment Rate	58	6.9%		18	6.4%	-7.2	

[a]Awards are not on a per plaintiff basis.
[b]"9999" may have been used to indicate missing values or "not-applicable."
[c]Includes 6,458 open cases not included in award size tabulations above.

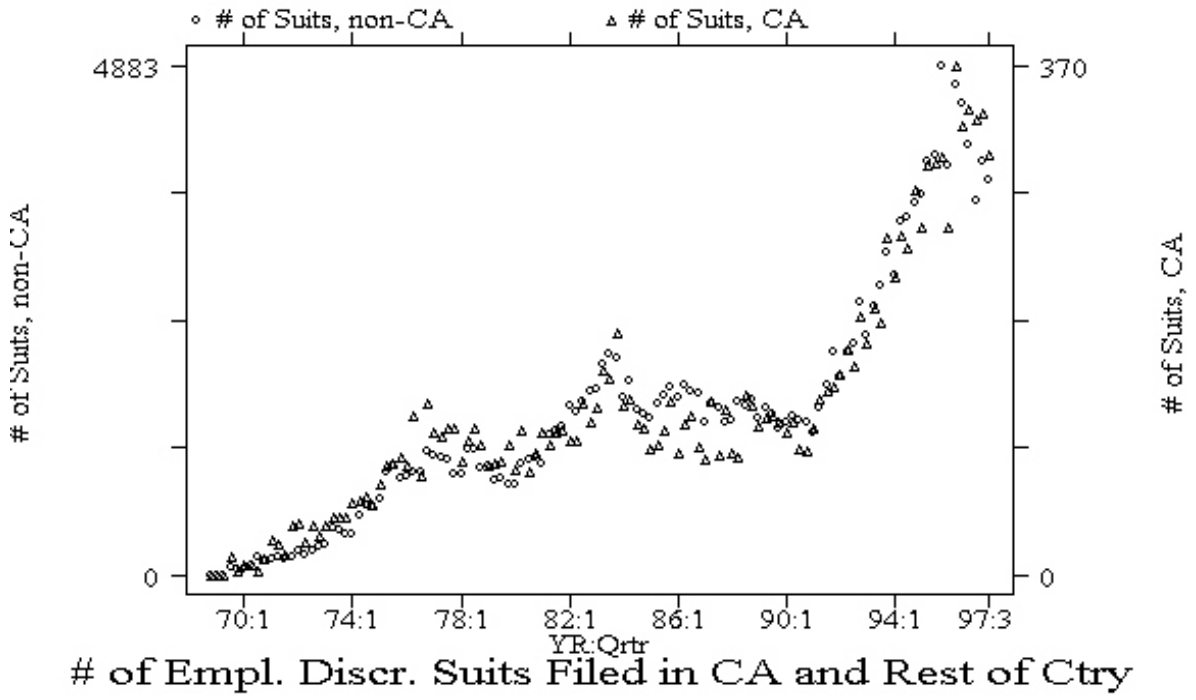

◦ # of Suits, non-CA
▵ # of Suits, CA
4883
0
370
0
# of Suits, non-CA
# of Suits, CA
70:1
74:1
78:1
82:1
86:1
90:1
94:1
97:3
YR:Qrtr
# of Empl. Discr. Suits Filed in CA and Rest of Ctry

Figure 2

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Murphy v. United Parcel Service, 527 U.S. 516 (1999)
Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).
United States v. Burke, 504 U.S. 229 (1992),

ENDNOTES

1. This is the simplest possible case, a stylized example designed to illustrate the basic forces at work. Further wrinkles include: what happens when the plaintiff takes a new job at a wage lower than her previous one; whether unemployment compensation is deductible from back pay awards (courts were divided on this issue during the period before 1991); whether awards are subject to federal income tax (again a circuit split, plus changes in the tax code); how to calculate the period over which back pay accumulates (see *Ford Motor Co. v. EEOC*, holding that a rejected offer of (re)employment from the original employer, without retroactive seniority, is sufficient to toll the accumulation of back pay), and so on.

2. *Ward's Cove Packing v. Atonio* (broadening business necessity defense in disparate impact claims), *Patterson v. McLean Credit Union* (restricting coverage of post-contractual discrimination under § 1981), *Price Waterhouse v. Hopkins* (restricting plaintiff's recovery in 'mixed-motive' disparate treatment cases), *Martin v. Wilks* (requiring joinder of adversely affected "outsiders" such as white employees in civil rights actions), *Lorance v. ATT Technologies* (requiring challenges to seniority system be filed within statutory 300-day period starting from the adoption of the seniority rules, not from when the rules had an effect on plaintiffs).

Since the mid-1970s, most *race* discrimination plaintiffs have had a choice of federal statutes under which they could challenge discriminatory practices. Such practices are forbidden under Title VII of the 1964 Civil Rights Act, but most are also prohibited under § 1981 of the 1866 Civil Rights Act, which bars discrimination on the basis of race (but not sex) in the "making and enforcement of contracts." (The Supreme Court held that the statute covered employment contracts in *Johnson v. Railway Express Agency*.) Section 1981 offers plaintiffs several important advantages over Title VII: fewer procedural hurdles (no requirement of a right to sue letter from the EEOC, looser statutes of limitations), the right to a jury trial, and expansive remedies beyond backpay (including compensatory and punitive damages). It does not, however, cover sex discrimination, nor does it recognize cases of race discrimination based on disparate impact theories.

The 1991 Civil Rights Act, which modified all these areas of law, became effective when it was signed by President Bush, on November 21, 1991.

3. "Ineligible" refers to those Title VII plaintiffs who could not *also* bring a §1981 claim of racial discrimination. See §102 of the 1991 Civil Rights Act, 42 U.S.C. §1981a (2002). These include plaintiffs claiming intentional discrimination on the basis of sex, religion, or national origin, by far the majority of which comprise sex discrimination claims. See Table 3.

4. Many of the other provisions in the 1991 Civil Rights Act were largely symbolic or of minimal importance to the overall volume and composition of the employment discrimination caseload. These include extending Title VII protection to Congressional employees, changing the interpretation of the statute of limitations for challenges to intentionally discriminatory seniority systems, and changing the definition of "business necessity" in disparate impact cases. Because of the preponderance of firing cases in the federal employment discrimination caseload, § 101 of the Act (overturning the Supreme Court's holding in *Patterson v. McLean Credit Union* that §

1981's antidiscrimination prohibition did not cover "post-contract formation" discrimination such as discrimination in firing) might be of greater importance than the other provisions discussed above.

5. The question of exactly what constitutes a disability under the ADA is complex and still subject to significant uncertainty. The statute speaks of persons with an "impairment" that "substantially limits" a major life activity, but the precise meaning of these phrases is still far from clear, even after a number of Supreme Court decisions. See, *Sutton v. United Air Lines*; *Murphy v. United Parcel Service*; and *Albertson's, Inc. v. Kirkingburg*.

6. The right to require reasonable accommodation by one's *current employer* is unique to the ADA, and is likely to be especially valuable for disabled employees, whose current employer may be their *final* employer in many cases. "Most disabilities occur among older adults who have little opportunity to change occupations or acquire new job skills. The late onset of disability implies that an employer had an opportunity to observe the worker's productivity prior to his becoming disabled and is better informed than other employers regarding his likely productivity as a disabled worker. Thus the pre-injury employer may be the only potential employer of a disabled worker. In many cases, the ability of a disabled worker to work is determined by whether or not his pre-injury employer is willing to provide accommodations for his functional limitations" (Burkhauser, 1990). In our earlier work, we found that before 1991, only 10 percent of employment discrimination plaintiffs were suing their current employer. We expect that this fraction rose after passage of the ADA, although we currently lack data on this question.

7. "All claims filed pursuant to Title VII of the Civil Rights Act of 1964 must be processed initially by the EEOC, as is also true for claims filed under the Age Discrimination in Employment Act and the Americans With Disabilities Act. See 42 U.S.C. § 2000e-5 (1988); 29 U.S.C. § 626(d) (1994) (Age Discrimination in Employment Act); 42 U.S.C. § 12117(a) (1988 & Supp. V 1993) (Americans with Disabilities Act). The only exceptions are for claims filed pursuant to 42 U.S.C. § 1981 (1988 & Supp. V 1993), which applies to race and national origin discrimination, and under the Equal Pay Act, 29 U.S.C. § 206(d) (1988). . . . Most § 1981 claims filed in federal court include a Title VII allegation, which means that the underlying claim was processed by the EEOC. As a result, approximately 85% of employment discrimination cases are initially processed by the EEOC." (Selmi (1996).)

8. Somewhat more formally, suppose that under the pre-1991 rules, damages were a function of the unemployment rate and other random factors, so that $D_0 = D(U,\epsilon_0)$, where U is the unemployment rate and ϵ_0 is other factors uncorrelated with the business cycle. By the rules for calculating backpay, $dD_0/dU > 0$, so that higher unemployment rates lead to higher damages. After the 1991 Civil Rights Act, $D_1 = D(U, \epsilon_1)$, where $\sigma^2_1 > \sigma^2_0$ is the variance of ϵ, the non-backpay component of damages. Since the variance of ϵ has increased due to the legislation, post-1991 damages, D_1, will depend less on changes in the unemployment rate than pre-1991 damages did: random variation in non-backpay damages will attenuate the measured effect of unemployment on damages after 1991, even though the *direct* effect of an increase in U will not have changed.

9. To solve the problem of multicollinearity, we detrended the unemployment rate by regressing it against a Time Trend and keeping the residuals from this regression. This guarantees that there will be no correlation between the detrended unemployment rate and Time. Having done this, however, the problem is that for the period after 1992, there is very little variation left in the unemployment rate once the trend has been subtracted-out. The bottom half of Figure 1 demonstrates this visually: post-1992 unemployment rates follow a downward trend very closely. Alternatively, consider Table 5, which compares the standard deviation of detrended Unemployment rates in the 2 sample periods: the second period standard deviation is one-third the size of the first.

The 'insufficient variance' problem was absent before 1992, since the economy experienced several complete business cycles during the first 92 quarters of our data set. There were thus periods of rising and falling unemployment, and there was plenty of variation "left" in detrended unemployment rates before 1992 after the time-trend had been netted-out.

While clearly undesirable from the perspective of national welfare, a significant recession is needed to be able to differentiate between the effects of unemployment and the mere passage of time after 1992.

10. The Priest/Klein model of the selection of disputes for litigation (Priest & Klein, 1984) predicts that settlement rates will increase when (a) employer/defendants have higher stakes in litigation than do employee/plaintiffs; and (b) the amount of damages increases. The first claim is arguably true of employment discrimination cases, since plaintiff win rates are so low. The second claim is true whenever a recession induces longer unemployment spells and greater backpay damages (Siegelman & Donohue, 1995).

11. The award size data are somewhat problematic, however. Our earlier research revealed that the data are subject to frequent miscoding, especially for larger awards. (The problem seems to be that clerks entered the award size directly, when it was supposed to be entered in thousands of dollars. Thus, an award of $2,000 should be coded as 2, but if it is instead entered as $2000, it will be read as $2,000,000 (Donohue & Siegelman, 1993 note 104). Since few plaintiffs will earn more than $10 million (except perhaps for some of the largest class actions), it probably makes sense to look only at those cases with awards of less than 9999 rather than including all awards, as in the next row. This conclusion is strengthened by the fact that there were no cases with awards of 9999 in the post-1992 period, presumably because coding errors decreased over time.

12. Indeed, informal conversations with several California lawyers who represent defendants in employment discrimination suits have strongly suggested that plaintiffs should always prefer to file in state court rather than federal court.

13. In the wake of a celebrated incident involving Danny Glover, the problems of race-based refusal of service by New York taxicabs attracted considerable attention in the press. The comments of many who were interviewed comport with the notion that dignitary harms, rather than financial losses, were especially on victims' minds. Chen (1999), quotes black residents the effect that "being bypassed hurt them to the core."