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#### **Publication Date**

2007-09-14

# Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991

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## Abstract

Levels of private litigation enforcing statutes are critically determined by legislative choice. I set out a theoretical framework for understanding how legislators purposefully influence the potential economic value of statutory claims, thereby establishing a market for enforcement consistent with legislative preferences. To test the theory, I examine the effects of the Civil Rights Act (CRA) of 1991, which increased the value of employment discrimination claims under the CRA of 1964, and find that the law increased the number of claims filed. The origins and legislative history of the law also reveal that Congress utilized economic incentives as a policy instrument to purposefully increase private litigation, with a high degree of self-consciousness, in the course of conflict with other political actors over control of civil rights policy.

## Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991\*

The main goal of this article is to empirically assess the capacity of legislators to control levels of private litigation enforcing statutes by influencing the economic value of claims through statutory design. Examining the effects of the Civil Rights Act (CRA) of 1991, which increased the monetary value of claims under the employment discrimination prohibitions of Title VII the CRA of 1964, I find that legislators did indeed ratchet up the mobilization of private enforcers using market incentives. This empirical finding cuts in a different direction than the only past study to examine a very similar question. Moreover, the genesis and legislative history of the CRA of 1991 make abundantly clear that Congress utilized economic incentives for private enforcement as a policy tool, with a high degree of self-consciousness. Spurred to action by a series of decisions issued by a Republican controlled Supreme Court which reduced the value Title VII claims, civil rights interest groups and their allies in a Democratically controlled Congress responded by statutorily increasing the value of claims for the express purpose of mobilizing private enforcers. The subsequent rise in Title VII litigation thus reflected the preferences of a majority coalition in Congress manifested in the course of ideological conflict with the Supreme Court over civil rights policy.

Parts I.A and B set out the theoretical framework for understanding private statutory enforcement litigation as a policy tool utilized by legislators, Part I.C contrasts it with alternative theoretical perspectives, and Part I.D reviews past empirical research that might support or

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\* I thank Ira Katznelson, Charles Cameron, Greg Wawro, Robert Lieberman, Robert Kagan, Bert Kritzer, Tom Burke, Jeb Barnes, Mark Miller, the workshop at U.C. Berkeley's Center for the Study of Law and Society, and *JELS* anonymous reviewer for valuable feedback. I thank Avi Springer for superb research assistance.

disconfirm the competing theoretical perspectives discussed. Part II examines the origins, content, and legislative motivation behind the CRA of 1991. Part III lays out an empirical model of private enforcement of Title VII, and tests whether the CRA of 1991 had the effects predicted by the theoretical framework set out in Parts I.A and B. Part IV concludes.

## **I. Legislative Construction of Statutory Enforcement Markets**

The essential argument developed in this section is that legislators self-consciously construct markets for the enforcement of statutes using economic incentives (or *not* using them) aimed at potential plaintiffs and their attorneys. In order to systematically conceptualize the ways in which Congress does this, I draw theoretically on the longstanding model of rational litigant behavior elaborated in the law and economics literature, which emphasizes the ways in which legal rules and procedures surrounding substantive rights determine litigation levels by determining the economic value of claims (e.g., Cooter and Ulen 2004; Polinsky and Shavell 1998; Priest and Klein 1984; Posner 1973). Before sketching the law and economics model of the choice to litigate, it bears emphasis at the outset that, working within the framework of new institutionalism, I stress political rather than economic sources of statutory design.

### **A. Law, Economics, and New Institutionalism**

New institutionalist approaches to law and courts focus on the “interrelationship between human ‘institutions’ or ‘structures’ and the decisions and actions of political actors” (Smith 1988: 91). In this way, a new institutionalist understanding of law and governance endeavors to join the study of the structure of legal institutions with the behavioralist’s focus on micro-level individual action and choice (e.g., Epstein, Walker, and Dixon 1989). The notion that the sorts of rules and procedures that are the focus of much law and economics scholarship are selected and manipulated by legislators pursuing their electoral and policy goals in relation to competing

political actors is a familiar insight of new institutionalism, albeit in a different context than the mobilization of private litigants. Something like the basic logic of the law and economics model of the choice to litigate, but with a focus on rules and procedures creating opportunities to successfully participate in administrative policy-making, was integrated into a model of political decision-making by members of Congress endeavoring to control the bureaucracy, as McNollgast (1987) famously put it, by using “administrative procedures as instruments of political control” (see also McCubbins and Schwartz 1984; McNollgast 1989).

On this view, Congress responds to principal-agent problems inherent in delegation of authority to agencies by using administrative rules as mechanisms to harness the energies and resources of private actors to achieve the purpose of controlling agency policy-making. Legislators write laws so as to allow interested constituents points of entry into the administrative policy-making process, and it “stacks the deck” in favor of intended beneficiaries of legislation by specifying statutory procedures such as rules of standing, evidence, proof, and judicial review that make it more probable that the intended beneficiaries will prevail in agency proceedings or in court challenges to agency decisions. While this line of research recognizes judicial review provisions as instruments that Congress uses to police agencies (see especially Shipan 1997), it does not address the mobilization of direct enforcement against the objects of regulation. The oversight literature concerns the mobilization of private resources to control, for example, the Environmental Protection Agency and the Department of Labor, *not* to directly control Chevron’s emissions or Wal-Mart’s labor practices by suing them. The oversight literature is about “how to regulate the regulators,” and “*not* how to regulate society” (McCubbins and Schwartz 1984: 175, emphasis added).

In contrast, this article is focused precisely on the regulation of society through the use of direct enforcement by private litigants as an adjunct to, or as an alternative to, bureaucratic power. When utilizing private litigation to enforce directly against the regulated population, legislators are faced with a host of choices concerning who can be sued, by whom, when, in what courts, what rules of evidence, proof, liability, and fact-finding will apply, what relief a successful plaintiff will be entitled to, and who will pay the costs of enforcement. This system of rules has profound consequences for how much or how little private enforcement activity will take place under a statute. I refer to this system of rules as a statute's *private enforcement regime*. I draw upon the law and economics model of the choice to litigate as a framework for understanding how legislators construct private enforcement regimes.

#### **B. Legislators, Economics, and the Choice to Litigate**

The law and economics model of the choice to litigate contemplates that a prospective plaintiff will proceed with litigation when a case's expected monetary value (EV) if tried is positive, where EV is a function of the plaintiff's estimate of the expected monetary benefit of the case if she prevails (EB), the probability that she will prevail if the case goes to trial (p), and the expected costs of litigating the claim (EC). Thus,  $EV = EB(p) - EC$ , and the rational plaintiff will file suit if EV is positive. "Not every plaintiff with a cause of action can sue profitably," and thus prospective plaintiffs and their attorneys contemplating suit must ask, "[w]hen does it pay to file suit?" (Cooter and Ulen 2004: 390). When writing a statute, legislators determine when it pays to file suit. They do so by deciding whether and to what extent to construct a private enforcement regime. If legislators will utilize private litigation in implementation, each of the three terms in the equation used to calculate EV represent a distinct set of choices that legislators must make, and that together will strongly influence the levels of private enforcement.

*Expected costs* (EC) are the sum of the filing fee, which is generally quite small in the United States, attorneys' fees, and other costs of litigation, most significantly expenditures on the conduct of discovery such as for depositions and expert witness' fees. The standard "American rule" is that each party pays its own attorneys' fees and other costs of litigation, whereas the "English rule" (which prevails in Europe, and most of the rest of the world) provides that the loser pays most of the winner's fees and costs (Leubsdorf 1984; Pfenningstorf 1984). Congress sometimes departs from the default American rule in regulatory legislation and opts instead for a rule under which winning plaintiffs may recover the costs of enforcement, while similar recovery of fees and costs is not granted to winning defendants. Among the multiple potential arrangements for allocating responsibility for paying litigation expenses, the one-way plaintiff's shift creates the greatest incentives for plaintiffs to file enforcement actions (Shavell 1982; Zemans 1984; Kritzer 2002). The Supreme Court has referred to plaintiffs' fee shifts as "congressional utilization of the private-attorney-general concept," while noting that "under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation."<sup>1</sup>

*Expected benefits* (EB) are determined to an important extent by rules governing how much monetary damages a plaintiff will be able to recover, which directly increases EV, and with it the incentives for plaintiffs and their attorneys to file enforcement actions (Galanter and Luban 1993; Polinsky and Shavell 1998). Legislators have wide latitude to determine whether statutory cases, if won by plaintiffs, will be worth no money or a little money or a lot of money. In the absence of a contrary statutory provision, the general default rule is that successful

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<sup>1</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975).

plaintiffs are entitled to damages proportional to the harm or loss they suffered, not more (Galanter and Luban 1993: 1404; McCormick 1935). Congress can chose to depart from this default rule in a statute, for example, by capping damages even if this means holding recovery below actual damages, or it can allow double, triple, or punitive damages. Courts have recognized that statutory damages enhancements, allowing recovery of more than actual harm suffered, “are justified as a ‘bounty’ that encourages private lawsuits seeking to assert legal rights,”<sup>2</sup> “reward[ing] individuals who serve as ‘private attorneys general’,”<sup>3</sup> providing an “incentive to litigate” that is “designed to fill prosecutorial gaps.”<sup>4</sup>

*Probability of success* (p) is, of course, strongly influenced by the facts of each case – how strong the evidence is that the defendant violated the statute. But given a set of facts that present an arguable violation, the rules governing burdens of proof (who has to prove what), and standards of proof (to what degree of probability), can be potent determinants of p, and thus EV (Cooter and Ulen 2004, 431-32). Likewise for rules governing what evidence the parties are permitted to demand in the course of discovery and introduce at trial (Cooter and Rubinfeld 1994). And likewise for rules of liability, such as strict liability, joint and several liability, and individual liability (e.g., Kornhauser and Revesz 1994).

An example serves to illustrate the potentially potent effects of private enforcement regimes on incentives to litigate, as well as the cumulative effects of different attributes of private enforcement regimes. Consider a potential plaintiff who sustained \$1000 in actual damages due to an arguable violation of a statutory right. Based upon the evidence and default

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<sup>2</sup> *Smith v. Wade*, 461 U.S. 30, 58 (1983); see also *United States v. Snepp*, 595 F.2d 926, 941 (4<sup>th</sup> Cir. 1978); *TVT Records v. Island Def Jam Music Group*, 2003 U.S. Dist. LEXIS 15271 (S.D.N.Y. 2003).

<sup>3</sup> *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5<sup>th</sup> Cir. 1986).

<sup>4</sup> *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985).



burdens and standards of proof, the plaintiff estimates her probability of prevailing as .5. She estimates the costs of litigating through to final judgment as \$1000. Further, assume that only actual monetary damages are recoverable, and the American rule applies to litigation expenses (no shift). Under this scenario, Congress has elected to allow for private enforcement standing, but beyond simply allowing private litigants to enforce the statute, it has not particularly sought to affirmatively mobilize them. These facts, which are reflected in hypothetical 1 in table 1, yield an expected value of -\$500 such that the plaintiff will not file suit.

In hypothetical 2, the legislature included a treble damages provision, so that EB is now increased from \$1000 to \$3000, and EV is increased from -\$500 to \$500, rendering a positive incentive for the plaintiff to file suit. In hypothetical 3, in addition to the treble damages provision the legislature adds an explicit pro-plaintiff statutory burden of proof rule, which increases  $p$  from .5 to .8. This increase in the plaintiff's probability of success raises the expected value of her case to \$1,400. Finally, in hypothetical 4, Congress also adds a one-way plaintiff's shift to the statute, which has the effect of reducing EC from \$1000 to \$200 (since the plaintiff will be able to recover those costs if she wins, an outcome to which she assigns a probability of .8). This increases the expected value of the case commensurately, by \$800, to \$2,200. *Going from hypothetical 1 (a minimal private enforcement regime) to hypothetical 4 (a robust one), the expected value of the case, from the plaintiff's point of view, increases by a factor of 5.4.*

### **C. Alternative Theoretical Perspectives**

To be sure, on one level it is quite intuitive and unsurprising to claim that if you increase the expected value of claims there will be more of them. So what? However, there are alternative theoretical perspectives on sources of litigation that may render legislative

manipulation of the expected value of claims an ineffective tool for controlling the volume of litigation. The law and economics account of the choice to litigate is highly stylized, ignoring non-economic considerations at both the micro and macro-levels that, taken together, may raise doubts about its predictive value.

At the micro level of individual choice, the model ignores potential litigants' non-economic motives, such as utility derived from telling one's side of the story in a conflict (e.g., MacCoun 2005), or from litigation as a form of political participation and action (e.g., Giles and Lancaster 1989; McCann 1994), or disutility from feelings of embarrassment, a sense of victimization, or unpleasant personal confrontation that may flow from litigation (e.g., Bumiller 1988). An economically centered model may be particularly ill-suited to explaining civil rights enforcement claims (the type examined in this article), where both lawyer and client may be less motivated by monetary rewards than in other litigation contexts, such as tort (Eisenberg and Schwab 1988:744-45).

Further, bounded rationality and information scarcity may place serious constraints on potential litigants' and their attorneys' capacity to actually assess the value of claims, and acquire information about changes in the value of claims (Hirsch 2005). This consideration is driven home when one considers that potential plaintiffs frequently acquire information about the expected value of claims from the media, which focuses on rare outlier cases, creating expectations that are grossly distorted and have little to do with reality (MacCoun 2006). Finally, it bears emphasis that much of the literature attempting to explain litigation levels both in the United States and cross-nationally stress macro-historical causes such as shifts in political culture (e.g., Auerbach 1976; Manning 1977), and social and economic modernization (e.g., Friedman 1987; Wollschlager 1998). Together, the individual level effects of non-economic

motives, bounded rationality, and media distortion, coupled with the effects of broad gauged cultural and socioeconomic forces, may dilute the effects of legislative manipulation of expected value to the vanishing point.

#### **D. Past Empirical Research on Legislative Control of Expected Value**

Indeed, this expectation is consistent with the only study to empirically test the effects of a legislative effort to proactively mobilize litigants by increasing the expected value of claims. In a noted study, Eisenberg and Schwab (1988) evaluate the effects of the Civil Rights Attorneys Fees Act (CRAFA) of 1976, which created a plaintiffs' fee shifting provision to govern numerous already existing civil right statutes, including the CRA of 1871, which allows damages suits for violations of federal constitutional rights by state officers – so called constitutional tort actions. Eisenberg and Schwab expressly put the law and economics model of the choice to litigate to the test, and found, at best, “scant evidence” that the CRAFA of 1976 had any effect on the volume of constitutional tort filings (1988:760-61). They characterize their findings both as a surprising contradiction of commonly held beliefs, and a surprising contradiction of the firm predictions of a law and economics model of the choice to litigate (1988:780).

Eisenberg and Schwab's findings have potentially quite important policy implications. The CRAFA of 1976 was sought by civil rights interest groups and their allies in Congress with the express expectation that it would foster increased enforcement of the civil rights statutes being amended (Derfner 2005). As we shall see below, the same is true of the CRA of 1991. If statutory rules that determine the expected value of claims are actually not effective as tools for controlling enforcement levels, then this not only contradicts the theoretical underpinnings of private enforcement regimes, but also should have important implications for the design of regulatory implementation. Those who want to increase regulatory enforcement would be wise to look elsewhere than to statutory increases in EV.

However, for several reasons further research is needed before this conclusion is warranted. Eisenberg and Schwab theorize that perhaps increasing the value of EB would be a more effective method for mobilizing private enforcement than decreasing EC, which is the scenario they examined (1988: 780-81). While, theoretically, EC and EB have an interchangeable effect on EV, Eisenberg and Schwab suggest that in reality plaintiffs (as opposed to their attorneys) may be less aware of and responsive to fee shifting provisions (affecting EC) than the economic damages that may be awarded under a statute (affecting EB). Increasing EB rather than decreasing EC, they suggest, thus may be more likely to mobilize private enforcers. As yet, this suggestion has not been tested. In the CRA of 1991, the main vehicle for increasing EV came through increasing EB. In light of the policy significance of the issue, and the limits of past research, I turn to the CRA of 1991 with the aim of shedding further light on legislators' capacity to control levels of private enforcement of statutes by influencing the economic value of claims.

## **II. The Case of the Civil Rights Act of 1991**

The CRA of 1991 amended the private enforcement regime of Title VII of the CRA of 1964, the landmark legislation that prohibits discrimination in employment on the basis of race, national origin, gender, and religion. The CRA of 1991 is particularly well suited to test the theoretical framework set out in Parts I.A and B because it isolates important elements of the current Title VII's private enforcement regime in time from its underlying substantive rights. The law did not change the scope of Title VII's legal rights not to be discriminated against in the terms and conditions of employment, but rather only adjusted the procedural rules for adjudicating claims and the remedies available to successful claimants. This scenario provides two critical benefits from the standpoint of the present inquiry. First, when a right and its private

enforcement regime are enacted at the same time, as is typically the case, it is impossible to know what level of private enforcement would have obtained if the same right was embedded in a different private enforcement regime. Cases, such as the CRA of 1991, in which there was an existing set of substantive rights embedded in some particular private enforcement regime, and then a subsequent change in important elements of the private enforcement regime, provide a natural experiment in which the effects of the changed elements on filing rates can be evaluated. Second, because the rights in question were securely established, congressional debate over the law focused closely on the private enforcement regime itself, yielding considerable evidence regarding the motives of legislators and interest groups for supporting this form of regulatory enforcement.

#### **A. Overriding the Supreme Court**

The legislative momentum that culminated in passage of the CRA of 1991 in November of that year was initially triggered more than two years earlier, in May and June of 1989, by a series of five Supreme Court decisions interpreting Title VII handed down by a sharply divided Supreme Court.<sup>5</sup> This is a remarkably large number of Supreme Court decisions to be issued interpreting a single title of a single statute in less than two months. Most of the cases were decided by the new five justice majority, established the previous year with Reagan's appointment of Anthony Kennedy, who joined Justices Rehnquist, Scalia, White and O'Connor to form a new majority on numerous important civil rights issues. While attempts at a legislative

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<sup>5</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989); *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989).

override were underway in a Democratically controlled Congress, the Court issued an additional two employment discrimination decisions.<sup>6</sup>

There could be no mistaking the fact that the Supreme Court sought to cut back Title VII's private enforcement regime. Addressing rules governing burdens of proof, standards of evidence, standing, statutes of limitations, attorneys' fees, and expert witness costs, in each of the seven cases the court adjusted these elements of Title VII's private enforcement regime in the same direction – in favor of defendant-employers and to the detriment of women and minority plaintiffs. Not surprisingly, in committee hearings on the override legislation civil rights advocates excoriated the new Supreme Court majority as anti-civil rights, and they complained that the cases reduced Title VII plaintiffs' probability of success in litigation (p),<sup>7</sup> and increased their costs of litigation (EC),<sup>8</sup> in a manner that would reduce enforcement. It is not entirely clear how plausible it was to anticipate broad effects on enforcement levels, for the cases each addressed very distinct and not very large categories of claims (disparate impact claims, challenges to municipal consent decrees, seniority claims, etc.).

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<sup>6</sup> *Boureslan v. Arabian American Oil Company*, 499 U.S. 244 (1991); *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991).

<sup>7</sup> House Hearings, vol. 1, 2/20/1990, p. 42 (testimony of Benjamin Hooks, Executive Director, National Association for the Advancement of Colored People, Baltimore, Maryland); House Hearings, vol. 1., 2/20/1990, p. 101 (testimony of John Buchanan, Chairman, People for the American Way, Washington, D.C.); House Hearings, vol. 1, 2/27/1990, p. 521, 535 (testimony of John J. Curtin, President Elect, American Bar Association, Chicago, Illinois); House Hearings, vol. 1, 2/27/1990, pps. 596, 634, 637 (testimony of John E. Jacob, President and CEO, The National Urban League, New York, New York).

<sup>8</sup> Senate Hearings, 3/7/1990, p. 593 (testimony of Thomas Barr, on behalf of the Lawyer's Committee for Civil Rights Under Law); Senate Hearings, 3/7/1990, pps. 667-69 (testimony of E. Richard Larson, Vice President, Mexican American Legal Defense and Education Fund); House Hearings, vol. 1, 2/20/1990, pps. 219-20 (testimony of Julius Chambers, Director-Counsel, National Association for the Advancement of Colored People, Legal Defense and Education Fund, New York, New York); House Hearings, vol. 2, 3/13/1990, pps. 226-29, 232-40 (testimony of Marilyn Denny, Attorney, Hartford, Connecticut); House Hearings, vol. 2, 3/20/1990, p. 359 (testimony of Robert Joffe, an attorney who defended the consent decree in Martin); House Hearings, vol. 2, 3/20/1990, p.476-503 (testimony of Herbert Newberg, Esquire, Philadelphia, Pennsylvania); House Hearings, vol. 2, 5/21/1990, pps. 358-376, 392-400 (testimony of Charles Silver, Professor, University of Texas School of Law); House Hearings, vol. 3, 5/21/1990, p. 376-77, 382 (testimony of Gerald Birnberg, Partner, Williams, Birnberg, and Anderson, Houston, Texas).

In the CRA of 1991 Congress overrode a large majority, though not all, of the seven cases. Relative to those decisions, the 1991 amendments to Title VII statutorily specified new proof and evidentiary standards that sought to ease a plaintiff's burden in certain kinds of cases, enacted rules shifting a winning plaintiff's expert witness costs to defendants, clarified statute of limitations rules so as to make them more permissive toward plaintiffs in seniority claims, and restricted the scope of standing for individuals to challenge consent decrees benefiting racial minorities and women.<sup>9</sup> These provisions of the CRA of 1991 sought, manifestly, to restore aspects of Title VII's private enforcement regime, increasing a potential Title VII plaintiff's probability of success (p) and reducing her expected costs of litigation (EC) roughly to their levels prior to the summer of 1989.

However, by far the most significant changes wrought by the CRA of 1991 to Title VII's private enforcement regime went entirely beyond overriding the Supreme Court. Congressional Democrats and civil rights interest groups, once spurred to action by the Supreme Court decisions, also added new monetary incentives to Title VII's private enforcement regime meant to ratchet up enforcement activity. That is, the law sharply increased a Title VII plaintiff's expected benefits (EB). Prior to the amendments, aside from attorneys' fees, the only monetary relief available under Title VII was back pay. The amendments provided for punitive damages, and for compensatory damages for all economic losses resulting from discrimination (as opposed to back pay only), as well as compensatory damages for pain and suffering.<sup>10</sup> This change in available damages transformed claims that had previously lacked any monetary value because they did not involve back pay, such as claims based upon discriminatory harassment or

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<sup>9</sup> Civil Rights Act of 1991, Pub. L. 102-166.

<sup>10</sup> 42 U.S.C. § 1981a(a). The non-economic damages had graduated caps depending on the size of the employer.



discipline, into claims with potentially substantial monetary value, and claims that had previously involved only modest back pay stakes could now be worth much more.

In addition, and also of crucial importance to Title VII's new private enforcement regime, whereas Title VII plaintiffs previously had no right to a jury trial, the CRA of 1991 created a right to trial by jury for plaintiffs seeking compensatory or punitive damages.<sup>11</sup> Thus, under the amendments the liability determination of whether a plaintiff had been discriminated against, and, if so, the damages determination of how much money to award her, would be in the hands of a cross-section of the population rather than a federal judge (at the time most likely to be a white male Republican).

### **B. Legislative Intent**

The legislative history of the CRA of 1991 strongly confirms, consistent with the theoretical framework set out in Parts I.A and B, that Congress utilized economic incentives as a policy tool with a high degree of self-consciousness for the express purpose of mobilizing private enforcers. In enacting the CRA of 1991, Congress directed the legislation in significant measure at remedying an asserted under-enforcement of civil rights laws, which it sought to correct by increasing the expected value of Title VII claims to private litigants and their attorneys. Of course, identifying appropriate enforcement levels is a matter of political and policy judgment, and in the debates differences in this judgment broke down along sharply partisan lines. It bears nothing, however, that in support of their view congressional Democrats had before them a study completed the previous year by the Federal Courts Study Committee, appointed by Congress, which had concluded that “the monetary stakes in [employment discrimination] cases may be so small ... that, even with the potential to recover attorneys’ fees, claimants sometimes find it

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<sup>11</sup> 42 U.S.C. § 1981a(c).

difficult to litigate in Federal court because they cannot find counsel to take their cases.”<sup>12</sup> The study concluded, according to Senator Kennedy, that “there are scores of cases, which ... have some merit, that are not being brought because there are *inadequate incentives*, even with attorneys’ fees.”<sup>13</sup>

In reference to limitations on economic damages under existing law, the House Report stated that “the inability of discrimination victims to be made whole for their losses discourages such victims from seeking to vindicate their civil rights,” and this “deficiency in Title VII’s remedial scheme hinders ... [the goal] of encouraging citizens to act as private attorneys general to enforce the statute.”<sup>14</sup> The Report went on to characterize limitations on monetary recovery under Title VII, which the proposed legislation sought to remove, as “*significant disincentives to would-be enforcers*,” and as likely having “*a depressant effect on discrimination suits*.”<sup>15</sup> The Senate Report similarly stressed that attorneys will only represent plaintiffs if “*the civil rights market . . . adequately compensate[s] them*.”<sup>16</sup> There was a firm conviction among the bill’s supporters, in the language of the House Report, that the extent of monetary incentives for attorneys to enforce statutes can be regarded “as a fuel that makes the machinery of adjudication work. If the fuel runs out,” the Report continued, “the machinery does not function . . . .”<sup>17</sup> These views in the committee reports recapitulated what were pervasive themes in the testimony of

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<sup>12</sup> *Congressional Record*, 102<sup>nd</sup> Cong., 1<sup>st</sup> sess., 10/29/1991, p. 15341.

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> House Report, p. 39.

<sup>15</sup> House Report, p. 43 (emphasis added) (quoting *Denny v. Westfield State College*, 880 F.2d 1464, 1771-72 (1<sup>st</sup> Cir. 1989)); see also Senate Report, p. 30.

<sup>16</sup> Senate Report, p. 33 (quoting *Robinson v. Alabama State Department of Education*, 727 F. Supp. 1422, 1430-32 (M.D. Ala. 1989)(emphasis added)).

<sup>17</sup> House Report, p. 42 (quoting Professor Charles Silver’s hearing testimony).

interest groups and experts who supported the legislation in the committee hearings.<sup>18</sup> The CRA of 1991 was expressly calculated to ratchet up private enforcement of Title VII claims by ratcheting up their expected value to plaintiffs and their attorneys.

There is one additional aspect of the CRA of 1991 that is of potential importance to the empirical analysis. While the CRA of 1991 created new rights under Title VII for compensatory and punitive damages and trial by jury trial, race claims had long enjoyed those rights under the CRA of 1866. The CRA of 1866 conferred upon people “the same right ... to make and enforce contracts ... as is enjoyed by white citizens,”<sup>19</sup> language that was construed by the Supreme Court in 1975 to prohibit discrimination in private employment.<sup>20</sup> Federal courts have read the language “white citizens” as indicating that the law’s “clear purpose ... [is] to provide for equality of persons of different races,” such that it does “not cover discrimination based on religion, sex, or national origin” (Rydstrom 2007:§ 2[a]). While race has been construed broadly by courts to include “ancestry” and “ethnic characteristics,” such that it can overlap with national origin, claims that are clearly predicated on national origin are not covered by the CRA of 1866 (Rydstrom 2007). Thus, among claim types covered by Title VII, the CRA of 1991 created the greatest new benefits for gender and religion claims, which had never enjoyed compensatory or punitive damages or trial by jury. It also created these new benefits for the subset of national origin claims that could not be fashioned as race claims.

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<sup>18</sup> Senate Hearings, 2/27/1990, pps. 232-33 (testimony of Marcia Greenberger, Managing Attorney, The National Women’s Law Center); House Hearings, vol. 1, 2/20/1990, pps. 219-20 (testimony of Julius Chambers, Director-Counsel, National Association for the Advancement of Colored People, Legal Defense and Education Fund, New York, New York); House Hearings, vol. 1, 2/27/1990 p. 613, 635-38 (testimony of Antonia Hernandez, President and General Counsel of the Mexican-American Legal Defense and Education Fund, Los Angeles, California); House Hearings, vol. 2, 3/13/1990, pps. 21-29 (testimony of Nancy Kreiter, Research Director, Women Employed, Chicago, Illinois); House Hearings, vol. 2, 3/13/1990, p. 176 (testimony of Theodore Eisenberg, Professor, Cornell Law School, Ithaca, New York).

<sup>19</sup> Currently codified at 42 U.S.C. § 1981.

<sup>20</sup> *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

This is *not* to say, however, that the CRA of 1991 did not confer new benefits for race claims, but rather only that race claims gained less than the other categories. The CRA of 1866 has no administrative enforcement machinery, whereas by filing a Title VII complaint with the EEOC a claimant triggers an investigation and evaluation of the merits of a claim by the agency at no expense to the claimant. This process has the benefit of giving the plaintiff and/or her attorney a glimpse at the employer's contentions and evidence before deciding whether or not to commit to the serious and very costly path of full-blown federal litigation (Selmi 1996:44). Favorable administrative determinations can serve to encourage litigation by bolstering a claimant's confidence in her case, and increasing its attractiveness to potential counsel if she is unrepresented (Selemi 1996:43-44; Lieberman 2005:188).

Further, the EEOC, as a mission agency, has at times assisted claimants in obtaining private counsel, effectively cooperated with and aided private counsel, and been instrumental in developing pro-plaintiff legal doctrines adopted by courts applying Title VII (Lieberman 2005:187-91). The existence of this agency role in administering Title VII very likely helps to explain the apparently anomalous fact that there were a far larger number of race lawsuits under Title VII than under the CRA of 1866 even before the CRA of 1991 (Selemi 1996:45). The CRA of 1991, by coupling Title VII's pre-litigation administrative framework with compensatory and punitive damages and the right to a jury trial, thus gave race plaintiffs some new benefits that they did not previously enjoy under the CRA of 1866, though clearly to a lesser degree than gender, religion and national origin claimants.

### **III. An Empirical Model of Private Enforcement of Title VII**

#### **A. Dependent Variables: EEOC Charges**

Unfortunately, during most of the period relevant to assessing the effects of the CRA of 1991, the data on employment discrimination litigation maintained by the Administrative Office of the United States Courts is aggregated together across all protected classifications (e.g. race, gender, age, disability), and across all employment discrimination statutes (e.g., the CRA of 1866, the CRA of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act).<sup>21</sup> As a result, the most specific classification in the federal litigation data during most of the relevant period is “job discrimination,” which combines into a single statistic the number of employment discrimination claims asserted of every type and under every statute. Consequently, available data on employment discrimination litigation is far too over-inclusive to shed meaningful light on the effects of the CRA of 1991’s amendments to Title VII. The greatest confounding factor is that Title I of the Americans with Disabilities Act of 1990, which prohibits certain forms of employment discrimination based upon disability, became effective in July 1992. Thus, beginning in the summer of 1992 there was a surge of an entirely new type of employment discrimination litigation into the system based upon the creation of a new protected classification. It is not possible with existing data to assess of how much of any post-1991 increases in federal employment discrimination litigation is attributable to these ADA claims, and how much, if any, to increases in Title VII actions.

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<sup>21</sup> Beginning in the mid 1990s, the Administrative Office of the United States Courts began recording the statutes under which job discrimination suits were filed, but with such data only beginning in 1995 the effects of the CRA of 1991 on actual litigation rates obviously cannot be tested.

In the alternative, to measure the level of private enforcement efforts under Title VII I analyze the number of charges of discrimination filed with the EEOC.<sup>22</sup> As a legal precondition filing an action in court, prospective plaintiffs under Title VII are required to file a charge with the EEOC and give the commission an opportunity to conduct an investigation and conciliate, after which the complainant is entitled to proceed to court as a matter of right whatever the agency's determination.<sup>23</sup> Unlike federal litigation data, EEOC charge data is very fine grained, and is maintained separately for each statute administered by the agency, and for each claim type, and thus it permits one to isolate claims under Title VII, and among Title VII claims, to isolate claims on the basis of race, national origin, gender, and religion. Given that the CRA of 1991 had differential effects across Title VII claim types, with race claims getting the least new benefits, it is important to be able to disaggregate Title VII claims by protected classification in order to properly assess the effects of the law.

Moreover, EEOC charge filings have one advantage over actual lawsuit filings as a measure of private enforcement of Title VII. A substantial proportion of federal employment discrimination claims are settled after an EEOC charge is filed due to the *threat* of litigation, but without formal litigation actually being instituted. Indeed, it is well recognized that potential liability "in the shadow of the law," without formal legal action, profoundly shapes whether and how cases settle without litigation (Mnookin and Kornhauser 1979). Because EEOC filings reflect the fulfillment of a formal legal precondition to litigation, they capture both cases that ultimately enter litigation, as well as those that settle after the threat litigation is invoked. EEOC

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<sup>22</sup> The monthly reports from which this data was compiled were obtained from the EEOC's Office of Research, Information, and Planning.

<sup>23</sup> 42 U.S.C. § 2000e-5(e)(1).

filing data thus captures a wider range of relevant and consequential private legal mobilization than court filings.

I estimate separate models for each of six dependent variables for the period 1980 to 2002: (1) the quarterly count of charges filed under Title VII, as well as disaggregated models of the quarterly count of Title VII charges based upon (2) gender, (3) religion, (4) race, (5) national origin, and (6) retaliation against an employee for complaining of Title VII violations, which the statute prohibits.<sup>24</sup> The number of EEOC filings between 1980 and 2002 for each of these six categories is presented in figures 1 (all Title VII and race claims), 2 (gender and religion claims) and 3 (national origin and retaliation claims). Note that the number of each kind of claim is plotted of a separate vertical axis.

Title VII charges in general, and each substantive claim type (race, gender, national origin, and religion), experienced significant reductions in volume between the mid 1980s and the enactment of the CRA of 1991. Retaliation claims were relatively stable during this period. Gender and religion claims, which were the most unambiguous beneficiaries of the CRA of 1991, show strikingly visible increases coincident with enactment of the CRA of 1991, as do retaliation claims. The CRA of 1991's effects on race and national origin claims is less clear from the plots. While sharp and sustained increases are not visible, the precipitous decline in race cases in particular that had started in the mid 1980s ceased, and it appears possible that the CRA of 1991 contributed to the arrest of this decline. As discussed below, the theoretical and empirical scholarly literature establishes the need to control for a considerable number of other influences in order to isolate the CRA of 1991's effects.

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<sup>24</sup> See 42 U.S.C. § 2000e-3(a).

## **B. Independent Variables**

I test for the significance of the *CRA of 1991*, enacted in late November 1991, with a dummy variable that takes the value 1 in the first quarter of 1992 and afterward, and the value 0 before then. The statistical significance of this dummy will indicate whether there was a significant shift in the mean of each dependent variable after the law's enactment.

As discussed in Part II.A, civil rights interest groups complained that the Supreme Court decisions in May and June of 1989 would reduce enforcement activity by making it more difficult for plaintiffs to prevail. To account for this possibility I include a *SUPREME Court 1989-91* dummy variable that takes the value 1 from the third quarter of 1989 (the first period after the decisions were rendered), to the fourth quarter of 1991 (when the decisions were almost entirely overridden), and the value 0 otherwise.

I include a quarterly measure of *JUDICIAL Ideology* of the federal courts in order to account for the effects of judicial ideology on employment discrimination claiming behavior. Past empirical research has shown that in published opinions, across a wide range of policy areas at both the trial and appellate level, decisions reached by federal judges are predicted partly by the party of the presidents who appointed them (Sunstein et al. 2006; Rowland and Carp 1996), and specifically that federal Court of Appeals decision-making in employment discrimination cases is so affected, with appointment by Democratic and more ideologically liberal presidents being associated with greater likelihood of ruling in favor of employment discrimination plaintiffs (Songer, Davis and Haire 1994; Farhang and Wawro 2004). However, Ashenfelter, Eisenberg and Schwab (1995) do *not* find partisan effects when assessing whether federal trial judges' party affiliation influenced whether civil rights plaintiffs in front of those judges settled



or had judgment entered in their favor. Interpreting this finding, Ashenfelter et al. suggest that while a federal judge's ideology may affect decision-making in the kinds of close cases that produce published decisions, which are a very small fraction of all filings, in the mass of ordinary cases that compose the day-to-day docket of federal trial courts, "the law – not the judge – dominates the outcomes" (281).

As distinguished from this line of research, which assesses the influence of judge-level ideology on case outcome, here I seek to model the judiciary-wide effect of ideology on the level of claiming activity, a relationship which, as far as I know, has not been empirically tested. In order to do so I measure judicial ideology at the Court of Appeals level rather than the trial or Supreme Court level because each litigant is entitled to have any trial court decision reviewed by the Court of Appeals as a matter of right, whereas the overwhelming majority of cases have no meaningful prospect of obtaining Supreme Court review. Further, because of the Supreme Court's limited opportunity to extensively flesh out the meaning of particular statutes, and the trial court's lack of authority to issue decisions that bind in future cases, the large bulk of binding Title VII law comes from the Court of Appeals. The civil rights law that Ashenfelter et al. find is applied in ordinary day-to-day cases by trial judges in a non-ideological fashion is predominantly created in published Court of Appeals decisions, which past research as found to be strongly associated with judge-level ideology. Thus, the Court of Appeals is the most sensible level of the judicial hierarchy at which to measure the influence of judicial ideology on claiming behavior.

This hypothesized relationship between judicial ideology and filing levels, in addition to being an important control, is a matter of theoretical interest to the present analysis as well. We know from past research that there is a systematic relationship between Court of Appeals judges'

ideology and whether their published decisions favor plaintiff-employees or defendant-employers. These decisions create binding doctrine in the circuit. It is, accordingly, reasonable to expect movements in Court of Appeals ideology to be correlated with  $p$  (plaintiff's probability of success) in the equation  $EV = EB(p) - EC$ . The theoretical framework set out in section I.B contemplated that litigants and their attorneys are capable of meaningfully assessing  $p$ . And as we saw in the discussion of the enactment of the CRA of 1991, Democratic legislators and civil rights interest groups markedly increased the damages available under Title VII partly in response to what they regarded as an excessively conservative judiciary that they believed was making it too difficult for plaintiffs to prevail. Thus, aspects of the theoretical framework developed here, and actual decisions of pivotal actors in the lawmaking process, are predicated upon the assumption that potential plaintiffs are responsive in their enforcement decisions to movements in  $p$ . Including *JUDICIAL Ideology* in the model provides an opportunity to test whether this assumption has any grounding in actual litigant behavior.

There are no existing direct measures of the ideology of federal Court of Appeals judges. To measure the ideology of federal Court of Appeals judges, I use a combination of appointing presidents' and senators' common space NOMINATE scores (McCarty 2003; Poole and Rosenthal 1997),<sup>25</sup> allowing me to capture the effects of senatorial courtesy on appointments. I assign each judge the value of the president's NOMINATE score when an appointment is in a

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<sup>25</sup> The NOMINATE procedure is based upon a Downsian (1957) spatial theory of voting and creates estimates of the ideological positions of legislators on an interval scale based upon their pattern of roll call voting behavior. The common space ideology scale is standardized so as to render the scores comparable across chambers and over time. McCarty's (2003) presidential NOMINATE scores are based upon public positions taken by the president on roll call votes. Using this set of roll calls for each president, the president is then treated as a legislator for purposes of estimating his ideological position (see also McCarty and Poole 1995). McCarty's presidential scores are calculated using the DW-NOMINATE procedure on presidential positions taken on roll calls in the House. In order to make these scores comparable to the House and Senate common space scores, following McCarty and Razaghan (1999, 1133 n. 9), I regressed House common space scores on House DW scores and obtained the transformation equation, which I then applied to the presidential DW scores to move them into the common space. The common space presidential scores are correlated with the DW presidential scores at .9997.

state in which neither senator is from the president's party, and the senator's (or the average of the two senators') NOMINATE score(s) when an appointment is in a state in which one or both senators belong to the president's party. Giles, Pepper, and Hettinger (n.d.; see also 2001) demonstrate that incorporating senatorial courtesy in this fashion produces a better predictor of Court of Appeals judges' voting behavior than imputing only the president's NOMINATE score or party to a judge. The judiciary's ideological position is then measured with the average score of federal Court of Appeals judges. NOMINATE scores range between -1 and 1, with -1 being the most liberal score and 1 being the most conservative.

I include a quarterly measure of *BUREAUCRATIC Ideology* at the EEOC. There are competing theoretical predictions regarding the effects of this variable. Past research on the EEOC has shown that its performance is strongly influenced by the ideology of the president who appoints the agency's leadership. Wood (1990) demonstrates that under EEOC chairs appointed by more conservative presidents the agency completes investigations and resolves complaints more slowly, finds in favor of the person complaining of discrimination less frequently, and obtains settlements which include some benefit for complainants less frequently. Thus, increasing agency conservatism may depress filings. On the other hand, to the extent that a more conservative agency assumes a less interventionist enforcement posture, this may stimulate filings by leaving prosecutorial gaps that private enforcers will mobilize to fill. Further, lacking the authority to issue binding orders, the agency cannot impose an undesired final outcome on plaintiffs, who always remain free to pursue their claims de novo in court. I do not have firm expectations about which of these effects will predominate, if either does. I measure *BUREAUCRATIC Ideology* using presidential NOMINATE scores of appointing presidents for each EEOC chair.

I include several controls for delay, for if the prospect of recovery for plaintiffs is too remote in time they may be deterred from pursuing it – the old saw is that justice delayed is justice denied. There are two opportunities for delay in the Title VII framework: the first is administrative, since plaintiffs are required to “exhaust” the administrative process before they have a right to proceed to court, and the second is judicial. For similar reasons as those just discussed in connection with *BUREAUCRATIC Ideology*, agency delay theoretically could cut in two directions: claimant frustration with delay may depress filings on the one hand, and bureaucratic inaction may increase opportunities for private enforcement on the other. The effects of bureaucratic delay may be further mitigated by the fact that once 180 days have elapsed after filing an EEOC charge, complainants have a legal right to exit the administrative process and proceed to court even if the EEOC has not completed its investigation, such that administrative delay is effectively capped by law at 180 days. Thus, theory does not dictate firm predictions. Delay in the judicial process, on the other hand, while deferring benefits for successful plaintiffs, has no legal cap and no countervailing benefits. *BUREAUCRATIC Delay* is measured as the annual size the commission’s backlog of cases, calculated as the difference between the number of cases received by the EEOC and the number resolved each year, measured in 1000s. *JUDICIAL Delay* is measured annually as the average number of days from filing to final disposition for job discrimination cases on the federal docket.<sup>26</sup>

I account for the extent of public attention to the issue of job discrimination because it can disseminate information about legal rights and remedies and may thereby stimulate litigation (e.g., Galanter 1990: 377). *MEDIA coverage* of job discrimination is measured as the quarterly

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<sup>26</sup> The EEOC delay variable was compiled from the EEOC’s Annual Report, and the judicial delay variable was compiled from the ICPSR Federal Court Cases Integrated Data Base, examining cases given the job discrimination code.

number of stories on job discrimination in the *New York Times*, as categorized in the *New York Times Index*.

I also control for a number of economic and labor market variables. Past research has consistently found that higher unemployment rates are associated with higher rates of employment discrimination claims (Donohue and Siegelman 1991; Wakefield and Uggen 2004), and thus I include a quarterly measure of *UNEMPLOYMENT*. *WORKFORCE* size, measured quarterly in 100,000s of workers, accounts for variation in employment discrimination filings that merely reflects variation in the size of the workforce. Some past research has also found that the level of *EDUCATION* in a population significantly and positively predicts litigation filings (Yates, Brace, and Tankersley 2005), and I control for this with a variable reflecting the annual percentage of the population with at least four years of college. Following past research findings that higher levels of national wealth are associated with higher litigation levels (Giles and Lancaster 1989; McIntosh 1983), I include a control for annual *PER CAPITA GNP*.<sup>27</sup>

Finally, I include a linear time trend variable to ensure that in assessing pre and post CRA of 1991 enforcement levels I am not merely picking up a secular time trend. I also examined quadratic and cubic time variables to allow non-linear time trends, but they proved consistently insignificant. Descriptive statistics and expected signs for all variables are presented in table 2.

### **C. Empirical Analysis and Findings**

The dependent variables are a series of quarterly counts. Because the distribution of event counts is discrete, not continuous, and is limited to non-negative values, it is best modeled assuming that the errors follow a negative binomial rather than a normal distribution (Cameron

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<sup>27</sup> Bureau of Labor Statistics data was used for the unemployment, workforce size, and per capita GNP variables, and the education variable was obtained from U.S. Census historical tables on educational attainment (<http://www.census.gov/population/www/socdemo/educ-attn.html>).

and Trivedi 1998). Examining kernel density plots confirm that the distribution of each type of EEOC charge filing is strongly right-skewed. Because the count data is time series, in order to check for autocorrelation I examined a plot of the autocorrelation function of the residuals of each model (Cameron and Trivedi 1998; Tobias and Campbell 1998), which revealed first order autocorrelation. In order to account for autocorrelation in count data, Schwartz et al. (1996) and Katsouyanni et al. (1996) have developed an autoregressive count model which includes a specification of the autocorrelation in the model in the form of lagged residuals. The model's construction of the variance-covariance matrix is specifically designed to allow for overdispersion, where the variance of the series is greater than the mean, a condition that violates an assumption of a standard Poisson count model, and a condition that the dependent variables analyzed here show signs of having. This approach fits a log-linear model using iterative weighted least squares. Starting values for the parameters are obtained by running a Poisson regression, and the residuals are saved and incorporated into subsequent iterations of the model as explanatory variables for the number of lags specified (Tobias and Campbell 1998), in this case one. The Durbin-Watson test statistics for all models (reported in table 3 as "DW stat") indicate that this method eliminated the autocorrelation problem, and this was confirmed by examining a plot of the autocorrelation function of the residuals in each model. As a robustness check, I also ran ordinary least squares regressions, using the Prais-Winsten technique to address autocorrelation. The results were extremely similar, and I note the few significant differences in the discussion of results below.

Applying the Dickey-Fuller and Augmented Dickey-Fuller unit root tests to the raw series reveals that the dependent variables and some of the independent variables are non-stationary. Statistical analysis of the relationship between two non-stationary time series can

yield spurious results, making meaningful inference highly problematic. All of the non-stationary series analyzed here are integrated of order one (that is, they are rendered stationary by taking first differences). However, running regressions on period to period changes in variables (first differences), rather than levels of variables, changes the theoretical meaning of the hypotheses being tested and leads to loss of information, particularly regarding long run relationships (Kennedy 1994: 253-54). The central empirical question of this article is whether a permanent change in the level of the CRA of 1991 dummy variable from 0 to 1 had long run effects on the quarterly count of claims. Examining period to period differences in this key independent variable (which are 0 in every year except the transition year) sheds no light on this question.

The long run relationship between levels of non-stationary variables can only be estimated if they are integrated of the same order (as they are here), and the series are cointegrated. The core idea of cointegration is that even if series are non-stationary, there may be a long run co-movement between the variables such that a linear combination of them is stationary. The principle diagnostic technique for determining whether non-stationary series are cointegrated was developed by Engel and Granger (1987) and entails assessing whether the model residuals are stationary using the Augmented Dickey-Fuller test, but evaluating the test statistic against critical values computed by Engel and Granger. This test, known as the Augmented Engel-Granger test, shows that all modes reported in table 3 are stationary (the test statistic is reported in table 3 as “AEG stat”), such that t statistics are valid and spurious regression results are avoided (Gujarati 2003: 822).

The results of all six models are presented in table 3. The raw coefficients are not directly interpretable. In a poisson model, an x-unit change in an independent variable translates

into a change in the incidence rate of the dependent variable given by  $\exp(x_i\beta_i)$ . Given that there are six models, with twelve substantive independent variables in each, after discussing the statistical significance of an independent variable across all models, for the sake of parsimony I will focus on the Title VII model (aggregating across all claim types) when discussing the substantive impact. As table 3 reflects, the substantive effects of the independent variables tend to be quite stable across the models of each claim type. Unless otherwise indicated, all references to statistical significance below refer to 95% significance or better.

The *CRA of 1991* dummy is highly significant ( $p < .001$ ) and positive in every model: the law had the effect of increasing the mean quarterly number of charges of discrimination filed under Title VII as a whole, as well as under each claim type covered by Title VII (gender, religion, race, national origin, and retaliation). The substantive effects were quite substantial. The long run net effects of the law on charge filings under Title VII was to increase them by a factor of 1.58, or 58%. Consistent with the fact that race claims benefited less from the CRA of 1991 than the other Title VII classifications, the CRA of 1991 had a markedly lesser effect on race claims (a 1.36 factor increase) than on gender claims (a 1.83 factor increase), religion claims (a 2.30 factor increase), and national origin claims (a 1.81 factor increase).

Causal claims about changes before and after a point in time inevitably raise concerns that some other cause not specified in the model may really be doing the work. Perhaps I have failed to consider some broad social shifts, or legal changes affecting employment disputes, that occurred at about the same time as the CRA of 1991 and are the real cause of the increases in employment discrimination claims under Title VII. In order to evaluate this possibility, in ancillary analysis not reported here, I ran the same model with EEOC age discrimination charges as the dependent variable. The expected value of age claims was not affected by the CRA of



1991 (because the Age Discrimination in Employment Act incorporates the enforcement provisions of the Fair Labor Standards Act, rather than those of Title VII). If some other unspecified social or legal cause, coincident with the CRA of 1991, drove the increases in employment discrimination claims across the disparate categories of gender, religion, race, and national origin, then it likely would have had similar effects on employment discrimination claims based upon age. However the *CRA of 1991* dummy was insignificant in the age model by a huge margin ( $p=.776$ ). This suggests that the post CRA of 1991 increases in Title VII charges were not driven by broader social or legal factors affecting employment discrimination claiming in general, and it buttresses the inference that the true cause was the CRA of 1991.

These findings also have clear implications for filing levels under the Americans with Disabilities Act. When enacted in 1990, the ADA incorporated by reference the enforcement and damages provisions of Title VII of the CRA of 1964,<sup>28</sup> and thus when the ADA became effective in the summer of 1992 its provisions automatically incorporated the CRA of 1991's changes to Title VII. It is therefore obviously not possible to statistically analyze filing rates under the ADA before and after the CRA of 1991. However, the findings with respect to all other classifications covered by Title VII's enforcement provisions certainly suggest quite strongly that more claims are filed under the employment discrimination provisions of the ADA than would have been the case if the CRA of 1991 had not been enacted.

*SUPREME Court 1989-91* (the dummy representing the Supreme Court decisions overridden by the CRA of 1991) is significant in only one of the six models (retaliation), where it has the expected sign and the substantive effect was a 15% reduction in the predicted count. The decisions actually had no effect on aggregate charge filing levels under Title VII, nor under four

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<sup>28</sup> 42 U.S.C. § 12117(a).

of the five disaggregated models. Further, in the OLS robustness check, *SUPREME Court 1989-91* is not significant in any of the six models. To the extent that the constellation of decisions represented an effort by the Supreme Court to curtail private enforcement levels, they did not meaningfully have that effect. As suggested above, this is not entirely surprising, for the Title VII decisions were directed at fairly narrow categories of cases. Of course, the decisions may well have had important policy consequences that are not captured by the volume of claim filings, but that issue cannot be evaluated with the data presented here.

*JUDICIAL Ideology* is significant in five of six models, always with the expected sign, proving insignificant only in the religion model. A concrete example helps to put the magnitude of the effect in perspective. In advocating for the CRA of 1991, civil rights interest groups and their allies in Congress complained that the cumulative effect of the judicial appointments that came during the Reagan/Bush I years had produced a judiciary inhospitable to their cause.<sup>29</sup> Empirical research does confirm that Reagan appointed judges were significantly less likely to rule for civil rights plaintiffs than Carter appointed judges (Wines 1994: 715). The increase in *JUDICIAL Ideology* (toward greater conservatism) during the eleven year period from the time Reagan assumed the presidency in 1981 until the passage the CRA of 1991 at the end of Bush I's third year in office is associated with reducing predicted quarterly filings by approximately 29%. While certainly considerable, the magnitude of this effect on the volume of claims from over a decade of Republican appointments is only half of that achieved, in the opposite direction, by the single legislative event of the CRA of 1991. Eight years of Clinton appointments moved *JUDICIAL Ideology* back in a liberal direction, though by a lesser magnitude than the shift during the Reagan years, increasing the quarterly count of Title VII claims by about 16%.

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<sup>29</sup> E.g., Senate Hearings, 3/1/1990, pps. 237-238 (comments of Senator Metzenbaum); House Hearings, vol. 1, 2/20/1990 p. 219 (John Buchanan, Chairman, People for the American Way); House Hearings, vol. 3, 5/21/1990, pps. 350, 353 (testimony of Ben Reyes, Councilman, Houston City Council).

These significant effects of *JUDICIAL Ideology* provide corroborating evidence for the rational litigant model because they support the inference that plaintiffs and their attorneys are able to perceive movements of judicial ideology, and its effects on the behavior of judges and the doctrine they produce, and factor it into their assessment of their probability of success. The effects of *JUDICIAL Ideology* should be considered alongside the null findings on *SUPREME COURT 1989-91*. While the 1989 Supreme Court decisions that triggered the override legislation did not reduce the volume of Title VII charge filings, the long run ideological movement in the judiciary during the Reagan/Bush I years, of which the summer of 1989 was but a culminating moment in the domain of employment discrimination law, actually were having such effects.

*BUREAUCRATIC Ideology* is insignificant in every model. As suggested above, this might be explained by the fact that EEOC ideology may cut in opposition directions at the same time. On one hand, increased EEOC conservatism may lead plaintiffs and their attorneys to conclude that the agency will be more pro-employer at the administrative stage, and thus it may depress the number of claims filed. On the other hand, increases in EEOC conservatism may lead to lower levels of interventionist enforcement by the agency, which may open up more opportunities for private enforcement. It may be that each of these opposite effects is washing the other out, or it may be that neither are significant. The data do not allow me to adjudicate between these two scenarios.

The findings on the delay variables are mixed. *JUDICIAL Delay* is significant with the expected sign in three of six models, providing some indication that greater court backlogs discourage filings. *BUREAUCRATIC Delay* is significant and positive in three of six models, providing some support for the theory that lack of vigorous and expeditious enforcement by the

agency leaves prosecutorial gaps that are filled by private enforcers. However, with an OLS specification the *BUREAUCRATIC Delay* variable is insignificant in every model. On the whole, the judicial delay hypothesis is only weakly supported, and the findings regarding bureaucratic delay are quite inconclusive.

Other independent variables add significantly to the explanatory power of the models. A number of labor market variables proved to be important controls. *WORFORCE Size*, not surprisingly, is significant in five of six models, only proving insignificant in the religion model. *UNEMPLOYMENT* rate is significant and positively signed only in the national origin model, but it approaches significance (p values between .1 and .05) in the Title VII, religion, and race models, falling under the 10% significance threshold only in the gender and retaliation models. A 1% increase in the unemployment rate is associated in the long run with an increase in charge filings under Title VII by a factor of 1.02, or 2%. *PER CAPITA GNP* was insignificant in five of six models, and had the opposite of the expected sign in the sixth (gender). *EDUCATION* was significant in every model, indicating that a percentage increase in the share of the population with at least 4 years of college is associated with a long run increase in charge filings under Title VII by about 2.4%. *MEDIA Coverage* is significant with the expected positive sign in all models except religion. An increase of one standard deviation in the number of stories appearing in the *New York Times* on the topic of job discrimination (18.9) increases the predicated quarterly count of Title VII filings by a factor of 1.039, or about 4%. The time trend variable is significant and negative in every model.

#### **IV. Conclusion**

This article has presented strong empirical evidence that at times legislators purposefully and effectively mobilize private statutory enforcement by legislatively determining the economic

value of claims, in this case by making structural adjustments to what the Senate Report for the CRA of 1991 called the “civil rights market.” These findings cut in a different, though not incompatible, direction than the one past study to empirically assess a congressional effort to proactively mobilize private statutory enforcers. The findings suggest that, notwithstanding the multiple micro and macro-level influences on the choice to assert legal claims, the legislative manipulation of EV, as a policy tool, can have direct and substantial effects on levels of private enforcement activity.

There are quite a number of possible explanations for the divergence between this and past findings, and their variety suggest the need for and potential directions of future research. I identify only three possibilities here, though there are surely more. First, the Eisenberg and Schwab study examined the effects of decreasing EC by adding a plaintiffs’ fee shifting rule in the CRAFA of 1976, whereas the CRA of 1991’s successful mobilization was accomplished mainly by increasing EB in the form of compensatory and punitive damages. It may be that, as Eisenberg and Schwab hypothesized, prospective plaintiffs are more aware of remedies such as compensatory and punitive damages than they are of fee rules, and thus they may be more influenced by EB in their decision of whether to consult counsel in the event of a perceived violation. Second, it could be that the magnitude of the effect on EV by the CRAFA of 1976 was considerably smaller than the CRA of 1991’s effect on EV, and that this difference in magnitude is the real explanation for the opposite outcomes in the two studies. Third, given the strong growth in the frequency with which Congress enacted private enforcement regimes beginning in the 1970s (Kagan 2001), it could be that temporal learning effects were such that by 1991 potential plaintiffs and their attorneys were more cognizant of and responsive to changes in EV than they had been in the mid 1970s. What is clear is that far more empirical research is

necessary to arrive at a better understanding of the relative effects of different components of private enforcement regimes, and combinations of them. Such knowledge would have quite direct implications for statutory design.

More broadly, this article links the new institutionalist understanding of the ways in which statutory rules and procedures are selected and manipulated by legislators pursuing their electoral and policy goals in relation to competing political actors, with insights from the law and economics account of the choice to litigate, to provide a framework for understanding legislators and their constituents as central actors in determining levels (high or low) of private statutory enforcement litigation. In the case of the CRA of 1991, civil rights interest groups and their allies in Congress were spurred to action by Supreme Court interpretations of Title VII that did not comport with their preferences. They then seized the opportunity to push beyond a simple override and added new rules governing economic damages and the right to a jury trial under Title VII. For better or worse, the ensuing rise in Title VII litigation thus reflected the will of a majority in Congress, asserted in the context of ideological conflict with the Supreme Court.

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Figure 1

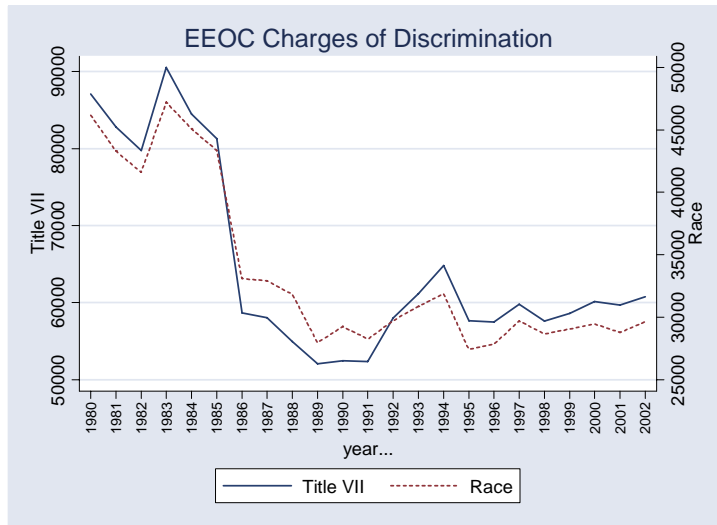


Figure 2

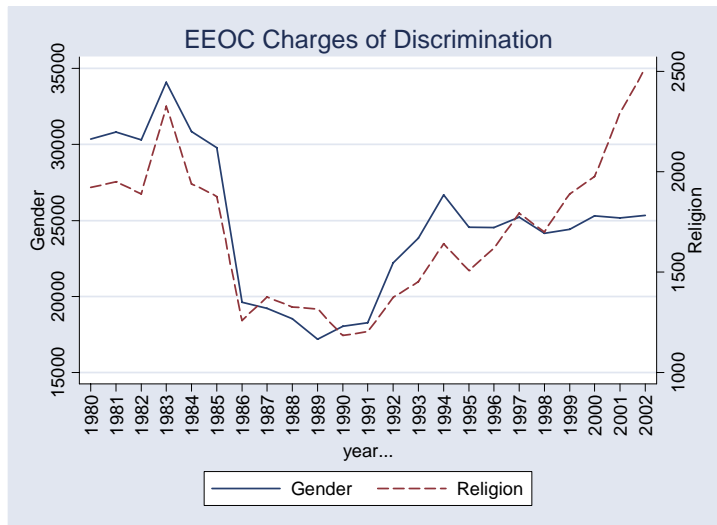


Figure 3

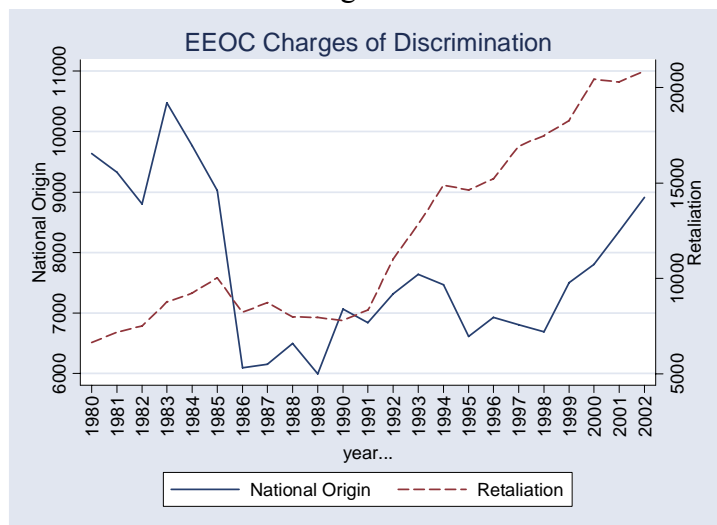


Table 1: Legislative Control of a Claim's Expected Value

Hypo	Expected Benefits	Probability of Success	Expected Costs	Expected Value
(1)	(actual damages) \$1000	(no statutory liability rule) .5	(American rule on fees) \$1000	-\$500
(2)	<b>(treble damages)</b> <b>\$3000</b>	(no statutory liability rule) .5	(American rule on fees) \$1000	\$500
(3)	(treble damages) \$3000	<b>(pro-plaintiff liability rule)</b> <b>.8</b>	(American rule on fees) \$1000	\$1,400
(4)	(treble damages) \$3000	(pro-plaintiff liability rule) .8	<b>(plaintiff's fee shift)</b> <b>\$200</b>	\$2200

Table 2: Descriptive Statistics and Expected Signs

	Mean	Min	Max	Std. Dev.	Sign
<b><u>Independent Variables</u></b>					
Title VII claims	16291	11875	24735	3175	
Gender claims	6169	4156	9376	1213	
Religion Claims	485	243	1910	277	
Race Claims	8469	5571	12952	1753	
Nat'l Origin Claims	1937	1367	2856	347	
Retaliation Claims	2977	1012	5508	1242	
<b><u>Dependent Variables</u></b>					
<i>CRA of 1991</i>	.462	0	1	.499	+
<i>SUPREME Court 1989-90</i>	.104	0	1	.307	-
<i>JUDICIAL Ideology</i>	.045	-.115	.173	.087	-
<i>BUREAU. Ideology</i>	.149	-.551	.666	.559	?
<i>JUDICIAL Delay</i>	463	390	579	53.74	-
<i>BUREAU. Delay (in 1000s)</i>	54	28.46	98.27	19.32	?
<i>MEDIA Attention</i>	31.79	12	105	18.94	+
<i>UNEMPLOYMENT</i>	6.28	3.67	11.17	1.53	+
<i>WORKFORCE (in 100,000s)</i>	1252	1032	1456	121	+
<i>PER CAP. GNP (in 1000s)</i>	28.50	22.61	34.97	3.97	+
<i>EDUCATION</i>	21.37	16.42	26.74	2.95	+

Table 3: Autoregressive Poisson Model of EEOC Charges, 1980-2002

	<b>Title VII</b>	<b>Gender</b>	<b>Religion</b>	<b>Race</b>	<b>Origin</b>	<b>Retal</b>
Constant	5.735*** (.914)	6.230*** (.994)	.263 (2.56)	4.490*** (1.010)	1.700 (1.238)	4.469*** (1.054)
CRA of 1991	.455*** (.061)	.603*** (.068)	.832*** (.185)	.311*** (.067)	.592*** (.083)	.313*** (.078)
Supreme Court 1989-91	-.034 (.041)	-.001 (.048)	.093 (.119)	-.080 (.045)	.098 (.055)	-.168** (.053)
Judicial Ideology	-1.650*** (.237)	-2.607*** (.260)	-1.098 (.688)	-1.187*** (.262)	-1.236*** (.319)	-1.638*** (.287)
Bureaucratic Ideology	.014 (.022)	.010 (.024)	-.034 (.063)	.010 (.025)	.039 (.030)	-.014 (.028)
Judicial Delay	-.002** (.001)	-.003*** (.001)	.008*** (.002)	-.001 (.001)	.001 (.001)	-.003*** (.001)
Bureaucratic Delay	.002* (.001)	.002** (.001)	.003 (.002)	.001 (.001)	.001 (.001)	.002* (.001)
Media Attention	.002*** (.001)	.002*** (.001)	.001 (.002)	.002** (.001)	.002** (.001)	.002* (.001)
Unemployment	.021 (.012)	.018 (.013)	-.056 (.034)	.024 (.013)	.037* (.016)	.023 (.015)
Workforce Size	.004*** (.001)	.004*** (.001)	-.002 (.002)	.005*** (.001)	.003** (.001)	.003** (.001)
Per Capita GNP	-.021 (.018)	-.061** (.020)	-.039 (.051)	-.001 (.020)	.002 (.024)	.004 (.022)
Education	.217*** (.032)	.219*** (.035)	.396*** (.092)	.187*** (.035)	.251*** (.043)	.149*** (.040)
Time	-.048*** (.006)	-.042*** (.007)	-.032 (.018)	-.049*** (.007)	-.047*** (.009)	-.023** (.007)
Lagged Residuals	.568*** (.096)	.576*** (.094)	.625*** (.088)	.520*** (.098)	.506*** (.104)	.506*** (.095)
AEG stat	-6.195**	-5.820**	-5.281**	-5.633**	-5.886**	-4.028**
DW stat	1.991**	2.052**	2.078**	2.037**	2.020**	2.063**
Adj. R <sup>2</sup>	.92	.91	.84	.92	.83	.97
N	92	92	92	92	92	92

Standard errors in parentheses; \*\*\* $p < .001$ , \*\* $p < .01$ , \* $p < .05$