Private Litigation, Separation of Powers, and the Struggle Over Job Discrimination Enforcement, 1981-1991

Sean Farhang
U.C. Berkeley

Abstract

In the Civil Rights Act (CRA) of 1991, Congress increased the economic value of job discrimination lawsuits under Title VII of the CRA of 1964, thereby purposefully increasing the volume of private enforcement. This choice was driven by ideological conflict throughout the 1980s between congressional Democrats and the Reagan and Bush I administrations over civil rights policy in general, and over control over the EEOC in particular, as we all as ideological conflict between Congress and a federal judiciary that grew increasingly conservative on civil rights. Pointing to the executive branch's asserted refusal to adequately enforce Title VII, and the failure of congressional oversight to remedy the situation, civil rights advocates opted to mobilize private litigants, using economic incentives, to do what the agency would not. The episode powerfully illustrates how interbranch conflict in the American separation of powers system causes Congress to mobilize private litigants for policy enforcement.

In the Civil Rights Act (CRA) of 1991, a Democratically controlled Congress overrode a series of decisions by a new conservative majority on the Supreme Court that were clearly calculated to reduce litigation under Title VII of the Civil Rights Act of 1964, prohibiting job discrimination on the basis of race, gender, national origin, and religion. Beyond overriding the Supreme Court decisions that provoked the CRA of 1991, Congress also added substantial new monetary damages and the right to trial by jury for Title VII claims. Manifestly and openly, Congress' goal in crafting the CRA of 1991 was to increase private lawsuits under Title VII, a move congressional Democrats and civil rights groups justified on the ground that they were needed to compensate for deficiencies in civil rights enforcement by the Reagan and Bush I administrations in general, and the EEOC under the leadership of Clarence Thomas in particular. Ironically, in response to the Supreme Courts' effort to curtail private Title VII litigation, with the CRA of 1991 Congress in fact succeeded in triggering a sharp increase in private enforcement activity under Title VII, helping to propel job discrimination suits to their current status as the single largest type of non-prisoner litigation in federal court.[1]

This episode illustrates powerfully that the existence and extent of private litigation enforcing statutes in the United States – which is determined by the drafting and interpretation of the details of a statute's enforcement provisions -- is often the product of interbranch conflict within a separation of powers system. Separation of powers conflicts

[1] Sean Farhang, "Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991," Jurisprudence and Social Policy Program/Center for the Study of Law and Society Faculty Working Papers (2007) Paper 53; Federal Court Cases: Integrated Data Base, 1970-2000, maintained by the Inter-University Consortium for Political and Social Research (job discrimination cases are coded 442 on the "nature of suit" variable).

throughout the 1980s between Congress and the executive branch over civil rights policy, and between Congress and a Supreme Court that grew increasingly over the course of the decade to reflect presidential preferences on civil rights issues, straightforwardly produced the CRA of 1991 and the ensuing growth of private job discrimination litigation. While a number of scholars have theorized that American separation of powers structures, through a variety of causal pathways, encourage the use of private litigation in policy implementation,[2] as yet no supporting evidence has been adduced causally linking separation of powers structures with private litigation levels. Through a close analysis of the politics and motivations that produced the CRA of 1991, I present clear evidence that separation of powers conflicts were decisive in producing this legislative enactment explicitly calculated to increase private enforcement litigation. Before turning to the case of the CRA of 1991, I first sketch a theoretical framework for understanding how Congress mobilizes private litigants, and the way in which separation of powers conflicts provide incentives for it to do so.

PRIVATE STATUTORY LITIGATION AND SEPARATION OF POWERS

The Mechanism of Litigant Mobilization: Private Enforcement Regimes

Before turning to sources of the legislative choice to mobilize private litigants, it is necessary to specify the mechanism that Congress uses to do so. In order to systematically conceptualize the ways in which Congress mobilizes private litigants, I

[2] William Landis and Richard Posner, "The Independent Judiciary in an Interest-Group Perspective," *Journal of Law and Economics* 18 (1975): 875-901, 878-79; Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press, 2001); Thomas F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle Over Litigation in American Society* (Berkeley: University of California Press, 2002).

draw theoretically on the model of rational litigant behavior developed in the law and economics literature.[3] This model generally 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. Given the facts of a case, EB is determined largely by the rules governing damages under a statute,[4] EC is determined largely by rules governing who will pay litigation costs and attorney's fees in a case,[5] and p is significantly influenced, for example, by rules of proof, evidence, liability, and mechanisms of fact-finding.[6] The critical point is that when drafting a regulatory statute Congress, if it is going to allow private enforcement litigation at all, has wide latitude in selecting rules that substantially determine EB, EC, and p. This system of rules will have profound consequences for how much or little private enforcement litigation is actually filed under a statute. I refer to this system of rules as a statute's *private enforcement regime*.

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[3] Robert Cooter and Thomas Ulen, *Law and Economics*, 4th ed. (Reading: Pearson Addison Wesley, 2004), Chapter 10; Mitchell Polinsky and Steven Shavell, "Punitive Damages: An Economic Analysis," *Harvard Law Review* 111 (1998) 869-962.

[4] Marc Galanter and David Luban, "Poetic Justice: Punitive Damage and Legal Pluralism," *American University Law Review* 42 (1993) 1393-1463; Polinsky and Shavell, "Punitive Damages."

[5] Herbert M. Kritzer, "Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?" *Texas Law Review* 80 (2002) 1943-83; Frances Kahn Zemans, "Fee Shifting and the Implementation of Public Policy," *Law and Contemporary Problems* 47 (1984) 187-210.

[6] Cooter and Ulen, *Law and Economics*, 431-32.

It bears emphasizing where this mechanism of litigant mobilization stands in relation to a line of analysis in the oversight literature in political science that develops a model in which Congress endeavors to control the bureaucracy, as McNollgast famously put it, using "administrative procedures as instruments of political control."[7] Congress "stacks the deck" in favor of intended beneficiaries of legislation by specifying statutory procedures such as rules of standing, evidence and proof that make it more probable that the intended beneficiaries will prevail in agency proceedings, and it thereby harnesses the energies and resources of private actors to achieve the purpose of controlling agency policymaking. This literature is about "how to regulate the regulators," explain McCubbins and Schwartz, "*not* how to regulate society."[8] In contrast, my subject is precisely the regulation of society through the use of direct enforcement against the regulated population by private litigants as an adjunct to, or as an alternative to, bureaucratic power, not as a mechanism to monitor agencies.

To characterize the legislative mechanism of litigant mobilization as centrally economic is not conventional wisdom among social scientists studying law, who have paid relatively little attention to ordinary statutory enforcement actions filed against the regulated population by individual private plaintiffs represented by private counsel. While social scientists have shown a fairly keen interest, and rightly so, in litigation filed

[7] McNollgast, "Administrative Procedures as Instruments of Control," *Journal of Law, Economics, and Organization* 3 (1987) 243-77; see also Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *American Journal of Political Science* 28 (1984) 165-79; McNollgast, "Structure and Process, Politics and Policy: Administrative Arrangements and Political Control of Agencies," *Virginia Law Review* 75 (1989) 431-82; Charles R. Shipan, *Designing Judicial Review : Interest Groups, Congress and Communications Policy* (Ann Arbor: University of Michigan Press, 1997).

[8] McCubbins and Schwartz, "Congressional Oversight Overlooked," 175 (emphasis added).

or orchestrated by interest groups, and suits filed against government agencies seeking to enjoin or revise the policy decisions of administrators, such suits comprise only about 2 percent and 5 percent, respectively, of published federal court of appeals cases between 1960 and 2004.[9] Such litigation is aimed at shaping national policy, and while in some circumstances there may be economic motivations for the policies sought by organized interests, economic recovery in the suit itself is typically not a central issue.

However, the vast bulk of private litigation enforcing federal statutes (well over 90 percent) is prosecuted by a radically decentralized army of private plaintiffs and their private attorneys pursuing their private interests, though, no doubt, with large public consequences. Such ordinary litigation, by and large, will proceed only on the threshold judgment that the suit will not result in a net economic loss.[10] While the law and economics model of the choice to litigate is certainly stylized, ignoring the many non-economic determinants of the choice such as the satisfaction from telling one's side of the story in a conflict,[11] or the dissatisfaction of unpleasant personal confrontation,[12] the simplification of the law and economic model serves the present analysis. I endeavor to

[9] These figures come from a random sample of 1125 published federal Court of Appeals cases. Given that interest group litigation and challenges to agency policymaking are more likely to be high policy salience cases, and high policy salience cases are more likely to be published, these figures very likely significantly overstate the presence in aggregate federal filings of suits orchestrated by interest groups and suits challenging agency policymaking.

[10] Galanter and Luban, "Poetic Justice"; Earl Johnson Jr., "Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions," *Law & Society Review* 15 (1980) 567-610; Kritzer, "Lawyer Fees and Lawyer Behavior in Litigation."

[11] Robert J. MacCoun, "Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness," *Annual Review of Law and Social Science* 1 (2000) 171-201.

[12] Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Baltimore: Johns Hopkins University Press, 1988).

explain legislative choices of statutory design that influence the incentive structure facing potential plaintiffs and attorneys, and the economic value of claims can be readily influenced by legislators, while a plaintiff's psychological constitution cannot.

Congressional Choice of Private Enforcement Regimes under Separation of Powers

When Congress enacts a civil statute regulating some facet of economic or social life where compliance is mandatory (as opposed to incentive based regulation), it faces a choice between enforcement through bureaucratic machinery and the use of private enforcement regimes, or some combination of the two in a mixed approach.[13] This choice is situated within the institutional context of American's system of separated powers. In his foundational work on adversarial legalism, Robert Kagan argues that the large role of adversarial legal process in American public policy is rooted partly in the "weak" and "fragmented" character of American state structures, which are characterized partly by crosscutting institutional checks and the dispersion of authority across executive, legislative, and judicial branches. Adversarial legalism, according to Kagan, is driven in part by the mismatch between public demand for an activist state on the one hand, and a weak and fragmented administrative state on the other, which drives much policymaking into the courts.[14] Thomas Burke provides an important development of Kagan's work, emphasizing the extent to which the same "weak state" characteristics

[13] Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*, Rev. ed. (Philadelphia: Translation Publishers, 2002); Burke, *Lawyers, Lawsuits, and Legal Rights*; William N. Eskridge Jr., Phillip P. Frickey, and Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy*, 3rd ed. (Saint Paul: West Group, 2001), 1099; Morris P. Fiorina, "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?" *Public Choice* 39 (1982) 33-66.

[14] Kagan, *Adversarial Legalsim*, 15.

provide incentives for interest groups and policymakers to purposefully structure laws so as to encourage litigation as a policy instrument over implementation through bureaucratic means.[15]

The delegation literature in general, and the work of Terry Moe on congressional choice of bureaucratic structure in particular, provides a useful analytical frame for specifying the institutional dynamics through which the American separation of powers system produces high levels of private litigation to enforce public policy.[16] A central theme of Moe's work is that when creating agencies rational legislators in the United States make choices about agency structure and procedure meant to guard and insulate their preferences from political opponents who would subvert them in both the short and long run. A key source of potential subversion is by the president, who has distinct institutional interests, and potentially divergent ideological preferences. This same institutional competition between Congress and the president for control of policy creates incentives for Congress to enact private enforcement regimes.

Moe argues that, even aside from ideological differences between Congress and the president, there are fundamental institutional divisions which will give the two branches different preferences regarding the exercise of bureaucratic authority. As

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[15] Burke, *Lawyers, Lawsuits, and Legal Rights*.

[16] Terry M. Moe, "The Politics of Bureaucratic Structure," *Can the Government Govern?*, ed. John E. Chubb and Paul E. Peterson (Washington: Brookings Institution, 1989); Terry M. Moe, "Political Institutions: The Neglected Side of the Story," *Journal of Law, Economics, and Organization* 6 (1990) 213-53; Terry Moe and Michael Caldwell, "The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems," *Journal of Institutional and Theoretical Economics* 150 (1994) 171-95. The link between the delegation literature and the use of private litigation in implementation is discussed in Burke, *Lawyers, Lawsuits, and Legal Rights*, 2002:173-74, and Joseph L. Smith, "Congress Opens the Courthouse Doors: Statutory Changes to Judicial Review Under the Clean Air Act," *Political Research Quarterly* 58 (2005) 139-49.

compared to presidents, legislators are influenced more by particularistic than national interests and are more subject to interest group pressure, differences which can lead to divergent preferences over regulatory implementation.[17] Further, while legislators certainly have significant continuing power over agency actions,[18] presidents possess considerable capacity to unilaterally influence agency structure and behavior.[19] Thus, legislators and the interest groups that influence them strive to create agency structures calculated to implement their policy preferences while tightly constraining bureaucratic discretion so as to insulate it, to the degree possible, from presidential subversion.

To the extent that these structural dynamics are driving Congress' construction of the character and capacities of the American administrative state, the relationship should be intensified with increasing ideological conflict between Congress and the president. The more congressional and presidential ideological preferences diverge, the more likely the president will be to use his significant institutional resources to subvert implementation of congressional policy choices, and the more likely Congress will be to constrain and limit delegations of power to the bureaucracy. Empirical research strongly bears out this prediction. Epstein and O'Halloran find that under conditions of divided party government Congress enacts more detailed laws, thus limiting agency discretion in

[17] Moe, "The Politics of Bureaucratic Structure"; Moe, "Political Institutions: The Neglected Side of the Story."

[18] See, e.g., Barry R. Weingast and Mark J. Moran, "Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission," *Journal of Political Economy* 91 (1983) 765-800.

[19] Terry M. Moe, "Regulatory Performance and Presidential Administration," *American Journal of Political Science* 26 (1982) 197-224; Moe and Caldwell, "The Institutional Foundations of Democratic Government."

implementation, and places more structural constraints on the exercise of bureaucratic implementation authority.[20] Similarly, at the state level Huber and Shipan find that divided party government between the executive and legislative branches leads legislators to enact more detailed laws and thus to delegate less discretion to bureaucrats.[21]

This institutional logic for delegating less authority to the bureaucracy, and structurally constraining its exercise of the powers delegated, simultaneously motivates Congress to enact private enforcement regimes. To the extent that Congress has concerns about whether the president will enforce congressional policy preferences, due to the distinct institutional and electoral imperatives of the presidency, Congress has reason to enact incentives for private actors to do so. To the extent that this structural cause for enactment of private enforcement regimes is in fact at play, it will be intensified under conditions of ideological conflict between Congress and the president. This is the flip side of the delegation literature just discussed. Under conditions in which that literature has found legislators delegating less implementation power to the bureaucracy – ideological conflict between the legislative and executive branches – legislators do not abandon implementation. Rather, under those conditions legislators marshal other resources to achieve their policy goals, including private litigants, who are substantially beyond the reach of presidential influence.[22] This suggests that the more ideologically

[20] David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (New York: Cambridge University Press, 1999).

[21] John D. Huber and Charles R. Shipan, *Deliberate Discretion?: The Institutional Foundations of Bureaucratic Autonomy* (New York: Cambridge University Press, 2002).

[22] Epstein and O'Halloran find that during divided government, while Congress is less likely to delegate to executive agencies, it is more likely to make "non-executive" delegations of authority, which are measured

distant Congress is from the president, the more likely it will be to enact private enforcement regimes. It bears emphasis that I do not claim that Congress will *only* enact private enforcement regimes under conditions of ideological conflict, but rather that it will be more likely to do so. The institutionally rooted difference between the preferences of legislators and presidents in the separation of powers system can make private enforcement regimes appealing to Congress even when the president is an ideological ally, but their appeal will multiply when he is an enemy.

Though the delegation literature does not consider it, if Congress is concerned about the possibility of subversion by the president when delegating to agencies, then it is reasonable to expect that it will also be concerned about subversion by the judiciary when providing for implementation through private litigation. Empirical research establishes beyond any question that judges' ideological preferences influence their decisions implementing statutes across the whole range of federal policy domains.[23] At first blush, intuition suggests that Congress would be less likely to enact private enforcement regimes due to fear of judicial subversion the further away ideologically courts move from Congress. If courts will elaborate the substantive meaning of statutes in a manner

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by an amalgamation of delegations of authority to state agencies, local authorities, and the courts (1999, 156-57). However, no separate analysis of delegation to the courts is provided, nor do they discuss in detail what they count as delegation to courts, and thus while their findings are suggestive, it is not possible to conclude from them whether or not Congress delegated more power to courts during periods of divided government.

[23] See, e.g., Sean Farhang and Greg Wawro, "Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making," *Journal of Law, Economics, and Organization* 20 (2004) 299-330 (employment discrimination); James J Brudney, Sara Schiavoni, and Deborah J. Merritt, "Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern," *Ohio State Law Journal* 60 (1999) 1675–1771 (labor policy); Richard Revesz, "Environmental Regulation, Ideology, and the D.C. Circuit," *Virginia Law Review* 83 (1997) 1717–72 (environmental policy); Daniel M. Schneider, "Empirical Research on Judicial Reasoning Statutory Interpretation in Federal Tax Cases," *New Mexico Law Review* 31 (2001) 325-52 (tax policy).

objectionable to Congress the more distant they are ideologically, this naturally should militate against congressional enactment of private enforcement regimes. Further, as the distance between Congress and the judiciary increases it is reasonable to expect judicial ideology to move a plaintiff's probability of prevailing (p) in a direction objectionable to Congress, making the judiciary a less hospitable enforcement venue from Congress' point of view. These considerations suggest that as the judiciary becomes more ideologically distant from Congress, Congress should become less likely to enact private enforcement regimes.

However, contrary to initial intuition, there are also theoretical reasons to expect countervailing forces to incline Congress toward *increasing* incentives for private litigation as courts move ideologically *further* away from Congress. As discussed above, with private enforcement regimes Congress is partly endeavoring to control expected value in the equation EV = EB(p) – EC, and with it the level of enforcement activity. If, as just suggested, with increasing distance between courts and Congress, courts will move plaintiffs' probability of prevailing (p) in a direction objectionable to Congress, Congress can counteract this by *increasing* EB or EC. Thus, it is evident that in some circumstances Congress may rationally respond to an increasingly ideologically distant court by enacting ever more robust private enforcement regimes.

Because there are countervailing forces that cause increases in the judiciary's distance from Congress to create incentives to enact private enforcement regimes, and not to enact them, it is difficult to arrive at general predictions about the relationship. However, it is reasonable, theoretically, to expect that the relationship will at times be

contingent upon the location of the president in ideological space. All other things being equal, Congress will be more likely to respond to a distant judiciary by increasing EV through choices of statutory design when the president is also distant, and less likely to do so when the president is an ally whose supervision of the administrative apparatus will make bureaucratic delegation comparatively more attractive.

Whatever the effect of the judiciary's ideological position, there is reason to expect that it will be weighed significantly less by Congress than that of the executive. Bureaucratic implementation typically gives agencies both powers of *rule articulation* (the elaboration of the meaning of a statute through rulemaking) and *rule enforcement* (the monitoring, investigation, and prosecution of violators). In contrast, private enforcement regimes divide the two powers between courts (rule articulation) and private plaintiffs and their attorneys (rule enforcement), who will execute rule enforcement functions guided by, and insulated from subversion by, economic incentives. Whereas in the bureaucratic case the president and his officers could subvert congressional preferences with respect to *both* rule enforcement and rule articulation, in the case of private enforcement regimes the rule enforcement functions are largely self-executing and insulated. This logic suggests that while Congress may be influenced by the judiciary's ideological distance from it, the magnitude of this effect will be weaker than the president's ideological distance.

INTERBRANCH CONFLICT AND THE CIVIL RIGHTS ACT OF 1991

Title VII, as enacted in 1964, contained a private right for aggrieved individuals to file lawsuits to enforce the law, allowed prevailing plaintiffs to recover backpay and

attorney's fees, and provided that federal trial judges would serve as factfinders.[24] Plaintiffs would be required to first file an administrative complaint with the Equal Employment Opportunity Commission (EEOC), which, if it found "probable cause" to credit the claim, would attempt to supervise a voluntary settlement, but whatever the EEOC's assessment of the case the plaintiff would be free to pursue litigation de novo in district court after exhausting the administrative process. These private enforcement provisions remained intact for twenty-seven years, until amended in the CRA of 1991, when substantial new compensatory and punitive monetary damages were made available to successful plaintiffs, and the plaintiffs were given the right to trial by jury. As detailed below, it was Congress' express intent in the CRA of 1991 to increase private enforcement, and it heartily succeeded. The CRA of 1991 brought about an increase of 58% in Title VII charges filed with the EEOC, which is a formal legal precondition to proceeding with suit.[25] Why did Congress do this?

The answer is fundamentally grounded in ideological conflict throughout the 1980s between a predominantly Democratic Congress and the Reagan administration over civil rights policy in general, and over control of the EEOC in particular, as we all as ideological conflict between Congress and a federal judiciary that grew increasingly, through the appointment of new judges, to reflect the administration's position on civil rights. Whereas the executive and judicial branches were clearly to the left of Congress on civil rights policy when the CRA of 1964 was passed, they migrated somewhat

[24] 78 Stat. 253-66.

[25] Farhang, "Congressional Mobilization of Private Litigants."

rightward in roughly the decade of the 1970s, and then swung sharply to Congress' right on civil rights policy during the Reagan/Bush years.[26] This polarizing interbranch realignment in the 1980s on civil rights policy produced extensive outright conflict between Congress and both the executive and judicial branches, conflict that grew more intense in the latter half of the decade.

As the decade drew to a close, in the summer of 1989 a new conservative majority on the Supreme Court issued a series five decisions leveling a frontal assault on Title VII's private enforcement regime, and one clearly intended to curtail private enforcement levels. A swift and vigorous countermobilization by civil rights groups and their allies in Congress not only overrode most of the Supreme Court decisions in the CRA of 1991, but, more significantly, seized the opportunity to add new monetary damages and jury trial provisions that substantially increased levels of private enforcement. Pointing to the EEOC's and the Reagan administration's asserted refusal to adequately enforce Title VII, and the failure of congressional oversight to remedy the situation, civil rights advocates argued instead for the necessity of mobilizing private litigants and their attorneys, using economic incentives, to do what the executive branch would not. And they succeeded.

Before turning to the historical evidence linking this interbranch conflict to the enactment and substance of the CRA of 1991, a few words are in order about the meaning of rhetoric in the course of ideological clashes over civil rights policy. When engaged in public struggles over civil rights policy, legislators and interest group representatives have been known to use inflated and sometimes vitriolic rhetoric, at times

[26] Eskridge, "Reneging on History?"

to express deeply held beliefs, and at times to strategically appeal to voters, donors, or other audiences. In presenting key themes, language, and arguments enunciated by players in the legislative struggle that led to passage of the CRA of 1991 -- such as liberal civil rights advocates' charges that Reagan was an enemy of civil rights who used government to subvert them -- it is important to be clear about what the evidence is intended to show, and what it is not intended to show. It is presented as evidence that serious and sharp interbranch conflicts over civil rights policy were an important force driving the passage and content of the CRA of 1991. It is not meant as evidence of the actual merits of one side or the other's policy positions, a debate that has already received abundant scholarly attention, and which is beyond the scope of the present discussion.

Interbranch Conflict Over Title VII Enforcement in the 1980s

Civil Rights Enforcement in the 1980s

Reagan ran on a platform of deregulation in general, and deregulation of civil rights in particular. He took aim, especially, at category-conscious, affirmatively oriented civil rights policy, condemning "bureaucratic regulations which rely on quotas, ratios, and numerical requirements," opposing "reverse discrimination," and advocating for a color-blind and gender-blind approach to civil rights.[27] The Republican party platform on which Reagan ran in 1980 declared that "equal opportunity should not be jeopardized by bureaucratic regulations and decisions which … exclude some individuals

[27] Herman Belz, *Equality Transformed: A Quarter-Century of Affirmative Action* (New Brunswick: Transaction Publishers, 1991), 181; Alfred W. Blumrosen, *Modern Law: The Law Transmission System and*
Equal Employment Opportunity (Madison: University of Wisconsin Press, 1993), 268.

in favor of others."[28] Once in office, Reagan curtailed civil rights enforcement. In a large-scale study published in 1989 retrospectively surveying federal civil rights enforcement during the Reagan years across the fields of employment, housing, education, and voting, focusing on *objective enforcement statistics*, the Citizens' Commission on Civil Rights reported "a dramatic decline in civil rights enforcement by the federal government."[29] During Reagan's two terms in office the Justice Department and federal agencies, according to the report, prosecuted fewer enforcement lawsuits, obtained lesser redress for plaintiffs in conciliation and settlement, were slower in processing complaints, and initiated fewer and less aggressive investigations into patterns of discrimination.[30] As one civil rights advocate and Reagan administration critic put it, the administration "began using executive powers to dismantle the governmental machinery" for protecting civil rights.[31]

While there was little doubt when Reagan took office that it would be rough sailing ahead for civil rights groups' relationship with the executive branch, the already strained relations were immediately exacerbated when Reagan appointed William Bradford Reynolds to head the DOJ's Civil Rights Division (CRD). An outspoken critic of race-conscious civil rights policy, Reynolds made clear in repeated public declarations

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[28] *Congressional Quarterly Almanac* (Washington, D.C.: Congressional Quarterly News Features, 1980), 58B, 62B.

[29] Citizens Commission on Civil Rights, *One Nation, Indivisible: The Civil Rights Challenge for the 1990s* ed. Reginald C. Govan and William L. Taylor (Washington, D.C.: Citizens' Commission on Civil Rights, 1989), 6.

[30] Citizens Commission on Civil Rights, *One Nation, Indivisible*, 6-19.

[31] Betty Friedan, *The Second Stage* (Cambridge: Harvard University Press, 1981), 237-38.

that the CRD would be unwavering in its repudiation of any policies smacking of preferential treatment for racial minorities or women, in the employment context and otherwise. He attacked the Title VII enforcement approach focusing on systemic discrimination and seeking class-wide relief -- preferred by civil rights groups -- as creating "a caste system in which an individual is unfairly disadvantaged for each person who is preferred," which he regarded as being "as offensive to standards of human decency today as it was some 84 years ago when countenanced under *Plessy v. Ferguson*."[32] Ira Glasser, then executive director of the American Civil Liberties Union, matched Reynolds' acerbic tone when attacking his posture toward Title VII, reflecting the severity of the rift that opened up between the Reagan Justice Department and civil rights groups.

> Mr. Reynolds is the moral equivalent of those Southern segregationists of a generation ago standing in the schoolhouse door to defend segregation. Today, he stands at the workplace gate, defending discrimination in employment. His efforts disgrace the American dream of equal opportunity.[33]

It was not only interest groups on the far left that doubted Reynolds commitment to vigorous civil rights enforcement. Within a year of his appointment, more than half the attorneys at the CRD signed a petition objecting to the policies of their new leader.[34]

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[32] *Affirmative Action: Joint Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, and the Subcommittee of Employment Opportunities of the House Education and Labor Committee*, 99th Cong., 1st sess., 1985, pps. 273-74.

[33] Robert R. Detlefson, *Civil Rights Under Reagan* (San Francisco: Institute for Contemporary Studies Press, 1991), 10.

[34] Detlefson, *Civil Rights Under Reagan*, 10.

Under Reynolds' leadership, the CRD sharply reversed course and shifted to a more conservative position, consistent with the new administration's preferences, on a variety of civil rights issues then percolating through the federal courts. The Division participated as an intervenor or an amicus in cases seeking judicial reconsideration of several Supreme Court decisions interpreting Title VII that had allowed race-conscious affirmative action plans as an appropriate remedy in Title VII class actions, without requiring every member of the minority class to prove that he or she was subjected to individualized discrimination in order to benefit under the remedial plan. Civil rights advocates insisted that such class-wide affirmative action plans were necessary to address systemic bias rooted in a history of discrimination.[35] The CRD also switched sides, and moved rightward and in opposition to civil rights groups, on high profile civil rights issues relating to busing, higher education, and redistricting.[36] In their litigation positions and strategy on civil rights reform, the CRD operated in disregard of regulations and guidelines which had been adopted through notice and comment rulemaking during previous administrations.[37]

The EEOC's substantive legal posture underwent a similar transformation, again reflecting the policy promises that the new president had run on. The agency began to oppose affirmative action arrangements, particularly the use of goals and timetables in

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[35] Blumrosen, *Modern Law*, 268; Detlefsen, *Civil Rights Under Reagan*, 60-82; David Rose, "Twenty Five Years Later: Where Do We Stand On Equal Employment Opportunity Law Enforcement?," *Vanderbilt Law Review* 42 (1989): 1121-1182, 1153-55.

[36] Detlefsen, *Civil Rights Under Reagan*, 112-131, 156-64.

[37] Blumrosen, *Modern Law*, 268; Rose, "Twenty Five Years Later," 1156-57.

settlement agreements.[38] More generally, Clarence Thomas, appointed EEOC chair in 1982, took a non-interventionist approach to his position. He eschewed the development of policy through rulemaking and interpretive guidelines, promulgating many fewer than his predecessors.[39] He took the stance that the EEOC would focus its attention only on individual intentional discrimination claims, to the exclusion of systemic discrimination claims seeking class-wide relief based upon statistical disparities across groups, and he eliminated the agency's special unit for handling such systemic litigation.[40] Between 1983 and the end of Reagan's second term the EEOC effectively ceased bringing "disparate impact" claims.[41] Such claims – in which facially neutral employment policies, such as aptitude tests, are challenged as disproportionately disadvantaging minority groups – can have far greater policy consequences than individual intentional discrimination claims.

The EEOC also experienced large reductions in available resources. Using the Office of Management and Budget, the Reagan administration cut budget requests for the agency. The agency's budget, adjusted for inflation and case load, dropped by 35% between 1979 and 1984, after having increased steadily from the EEOC's inception until

[38] Rose, "Twenty Five Years Later," 1158-59; Belz, *Civil Rights Under Reagan*, 188-89; Blumrosen, *Modern Law*, 358 n.28.

[39] Belz, *Civil Rights Under Reagan*, 189.

[40] Belz, *Civil Rights Under Reagan*, 189.

[41] Rose, "Twenty Five Years Later," 1158-59.

Reagan took office.[42] These declining budgets under Reagan led to significant reductions in EEOC staff. As compared with 3,752 authorized EEOC staff positions in 1979, by 1987 the number had shrunk to 2,941, by 22%.[43]

Under Thomas' leadership, according to numerous objectively measurable criteria, the EEOC's administrative complaint process also became much more favorable to employers and unfavorable to people complaining of discrimination. During the Reagan administration, the average length of time the EEOC took to conduct investigations about doubled, increasing progressively from roughly 5 months in 1980 to roughly 10 months in 1989. The proportion of cases in which the EEOC found *against* the claimant doubled between 1980 and 1987, rising from approximately 30 to 60 percent. Concomitantly, the proportion of cases in which the EEOC achieved a settlement resulting in some benefit to the claimant sank steadily, from about 32 percent in 1980 until it bottomed out at between 12 and 15 percent in the years 1985 to 1989. The number of complaints for whom the agency obtained monetary relief fell by 81 percent between 1980 and 1985, from 15,328 to 2,964.[44] Simply put, people complaining

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[42] Paul Burstein and Kathleen Monaghan, "Equal Employment Opportunity and the Mobilization of Law," *Law and Society Review* 20 (1986): 355-84, 363-65; William Wines, "Title VII Interpretation and Enforcement in the
Reagan Years (1980-89): The Winding Road to the Civil Rights Act of 1991," *Marquette Law Review* 77 (1994): 645-718, 692; Dan B. Wood, "Does Politics Make a Difference at the EEOC?" *American Journal of Political Science* 34 (1990): 503-30.

[43] Anne Noel Occhialino and Daniel Vail, "Why the EEOC (Still) Matters." *Hofstra Labor and Employment Law Journal* 22 (2005): 671-709, 683.

[44] Blumrosen, *Modern Law*, 271, table 17.1; Citizens Commission on Civil Rights, *One Nation, Indivisible*, 16; see also Wood, "Does Politics Make a Difference at the EEOC?"

of discrimination did worse by virtually every objective measure under the Reagan/Thomas EEOC than they had during previous administrations.

Enforcement efforts at the Office of Federal Contract Compliance Programs (OFCCP) were also reduced. OFCCP, housed in the Department of Labor, is responsible for ensuring that employers who contract with the federal government comply with employment discrimination laws. Like the EEOC, under Reagan the OFCCP saw sharp reductions in its budget and staffing.[45] Following the administration's direction, it also significantly relaxed the process for determining whether a government contractor underutilized minority and women workers relative to relevant labor pools, and lessened and loosened its use of goals, timetables, and affirmative action plans to facilitate progress for those who did.[46] The effects on bottom line enforcement statistics were remarkable. In 1980, in carrying out its compliance review function, OFCCP obtained back pay for 4,336 individuals, and in 1986 it obtained back pay for 499 individuals.[47] The aggregate sum of back bay it recovered also plummeted.[48] A staff report of the

[45] Frank Dobbin and John R. Sutton, "The Strength of the Weak State: The Employment Rights Revolution and the Rise of Human Resource Management Divisions," *American Journal of Sociology* 104 (1998): 441-76, 461; Erin Kelly and Frank Dobbin, "How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961-1996," *American Behavioral Scientist* 41 (1998): 960-84, 967.

[46] Belz, *Civil Rights Under Reagan*, 193; Rose, "Twenty Five Years Later," 1126; Skrentny, *The Ironies of Affirmative Action*.

[47] Blumrosen, *Modern Law*, 274.

[48] Edsall and Edsall, *Chain Reaction*, 187-88.

House Education and Labor Committee disclosed that OFCCP cases reported to the Solicitor of Labor for enforcement dropped from 269 cases in 1980 to 22 cases in 1986.[49]

Reagan also affected civil rights policy through his marked influence on the ideology of the federal judiciary, consistent with his campaign promises to appoint conservative judges who would reverse judicial trends toward social activism. Reagan appointed Sandra Day O'Conner to the Supreme Court in 1981, Anthony Scalia in 1986, when he also elevated William Rehnquist to Chief Justice, and Anthony Kennedy in 1987, creating a powerful conservative majority on civil rights issues. The magnitude of Reagan's influence, in terms of the total share of the federal bench that he had appointed by the time he left office, was matched by only two other presidents in American history. Of the 736 sitting federal judges at the end of Reagan's second term, he had appointed 346, or nearly half. The profile of his first term appointments was 98% Republican, 93% white, and 92% male. The administration was unusually rigorous, relative to past practice, in its ideological vetting of prospective judicial appointments, and by the end of the Reagan presidency the law of employment discrimination clearly reflected the preferences of the conservative jurists that Reagan had appointed. A study of federal district judge voting patterns found that between 1981 and 1985, while Carter appointees had voted in favor of race discrimination plaintiffs at a rate of 59 percent, Reagan's appointees did so at a rate of 13 percent.[50]

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[49] Citizens Commission on Civil Rights, *One Nation, Indivisible*, 18.

[50] David G. Savage, Turning Right: *The Making of the Rehnquist Supreme Court* (New York: Wiley, 1992); Sheldon Goldman, "Reagan's Judicial Appointments at Mid-term: Shaping the Bench in His Own Image," *Judicature* 66 (1983): 335-47; Wines, "Title VII Interpretation and Enforcement in the Reagan Years (1980-89)," 646-50, 715; Eskridge, "Reneging on History?," 623-38.

Reagan's influence on civil rights implementation was considerable, and this much is well recognized. It is critical to stress, however, what he was unable to control, which has been ignored in discussions of civil rights enforcement in the Reagan years. He was unable to control private litigation. There had been 5492 private federal job discrimination suits filed in 1980 – Carter's last year in office – a number that had been roughly stable since 1975, averaging 5410 private civil suits per year during those six years. In Reagan's first three years in office, as the demobilization of the federal civil rights enforcement machinery was under way, private litigation nearly doubled, rising to 7046 in 1981, to 8311 in 1982, to 10,002 in 1983. It then declined somewhat and plateaued, averaging 8685 private job discrimination suits per year for the balance of Regan's presidency, a 59 percent increase over the average figure of 5479 during the Carter years. Between 1975 and 1988, private litigation represented approximately ninety-six percent of total enforcement actions, with EEOC prosecutions, averaging 317 per year, accounting for only four percent.[51]

Thus, employers during the Reagan years were actually far *more* likely to be sued under federal job discriminate laws than ever before. It is plausible, from a theoretical point of view, that this sharp increase in private enforcement litigation during the Reagan years actually resulted from the executive demobilization. As detailed above, in the Reagan years, by numerous objective measures, the national government secured far less relief for employment discrimination claimants than it had under previous

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[51] Federal Court Cases: Integrated Data Base, 1970-2000, maintained by the Inter-University Consortium for Political and Social Research.

administrations. Given that Title VII allows claimants dissatisfied with the results of the administrative process to proceed with private litigation, an administrative process that delivers fewer benefits to claimants is likely to produce more civil rights lawsuits. The decline, for example, in the number of claimants for whom the EEOC obtained monetary relief, from 15,328 in 1980 to 2964 in 1985, would almost certainly be associated with a corresponding increase in the number of claimants leaving the agency dissatisfied, and thus more likely to seek redress though private litigation. Whatever the cause of the surge of private job discrimination litigation during the Reagan years, it powerfully illustrates the capacity of private enforcement regimes to insulate at least a portion of the enforcement function from executive control.

The Congressional Response

During the 1980s, a predominantly Democratic Congress was acutely aware of the Reagan administration's demobilization of the civil rights enforcement machinery, and the decade was marked by implacable conflict over civil rights policy between Congress and the executive branch. The conflicts ranged from confirmation battles over presidential appointments in which civil rights issues were central (the most notable of which was over the failed nomination of Robert Bork to the Supreme Court), to the first vetos of civil rights legislation since Reconstruction, to legislative-executive struggles over control of agencies with responsibility for implementing civil rights laws.[52] The EEOC was a key focal point of this conflict. In the nine years between 1983 and

[52] Eskridge, "Reneging on History?," 633-41; Louis Fisher and Neal Devins, *Political Dynamics of Constitutional Law* 4th ed. (Saint Paul: West Group, 2006), 270-77; Reginald C. Govan, "Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991," *Rutgers Law Review* 46 (1993): 1-242, 7-16; Citizens Commission on Civil Rights, *One Nation, Indivisible*.

enactment of the CRA of 1991, Democratic chaired congressional committees conducted no less than 15 oversight hearings examining various aspects of EEOC enforcement efforts, including (1) the substantive legal positions the agency advocated, (2) the limited nature of its enforcement litigation, and (3) its complaint processing practices.[53] The tenor of the hearings was sharply critical and often combative. Committee Democrats excoriated the agency for what they regarded as a pro-employer bias in changes in the agency's position on a variety of legal issues of broad significance, including the

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[53] See (1) *Oversight Hearings on the Federal Enforcement of Equal Employment Opportunity Laws Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 98th Cong., 1st sess., 1983; (2) *Hearings on Equal Employment Opportunity Commission's Handling of Pay Equity Cases Before the Subcommittee on Manpower and Housing of the House Committee on Government Operations*, 98th Cong., 2nd sess., 1984; (3) *Oversight Hearing on the EEOC's Enforcement Policies Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 98th Cong., 2nd sess., 1984; (4) *Hearing on Equal Employment Opportunity Commission Update: Policies on Pay Equity and Title VII Enforcement Before the Subcommittee on Employment and Housing of the House Committee on Government Operations*, 99th Cong., 1st sess., 1985; (5) *Oversight Hearing on the Equal Employment Opportunity Commission's Enforcement Policies Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 99th Cong., 1st sess., 1985; (6) *Hearing on the Equal Employment Opportunity Commission Collection of Federal Affirmative Action Goals and Timetables and Enforcement of Federal Sector EEO Complaints Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 99th Cong., 1st sess., 1985; (7) *Oversight Hearing on EEOC's Proposed Modification of Enforcement Regulations, Including Uniform Guidelines on Employee Selection Procedures Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 99th Cong., 1st sess., 1985; (8) *Hearings on Equal Employment Opportunity Commission Policies Regarding Goals and Timetables in Litigation Remedies Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 99th Cong., 2nd sess., 1986; (9) *Hearing on Processing of EEO Complaints in the Federal Sector: Problems and Solutions Before the Subcommittee on Employment and Housing of the House Committee on Government Operations*, 100th Cong., 1st sess., 1987; (10) *Hearing on Age Discrimination: Quality of Enforcement Before the House Select Committee on Aging*, 100th Cong., 2nd sess., 1988; (11) *Hearing on EEOC Delays in Processing Age Discrimination Charges Before the Subcommittee on Employment and Housing of the House Committee on Government Operations*, 100th Cong., 2nd sess., 1988; (12) *Hearing on the EEOC's Performance in Enforcing the Age Discrimination in Employment Act Before the Senate Special Committee on Aging*, 100th Cong., 2nd sess., 1988; (13) *Hearing on EEOC's Reprisal Against District Director for Testimony Before Congress on Age Discrimination Charges Before the Subcommittee on Employment and Housing of the House Committee on Government Operations*, 101st Cong., 1st sess., 1989; (14) *Joint Oversight Hearing on Equal Employment Opportunity Commission's Proposed Reform of Federal Regulations Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor and the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service*, 101st Cong., 2nd sess., 1990; (15) *Oversight Hearing on the Equal Employment Opportunity Commission's Implementation of the American's with Disabilities Act Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 102st Cong., 1st sess., 1991.

agency's repudiation of consent decrees conferring class-wide relief, affirmative action plans utilizing goals and timetables, and "disparate impact" theory, in which facially neutral employment policies, such as aptitude tests, are challenged on the basis of statistical evidence establishing that they disproportionately exclude protected groups.[54] The Congressional Black Caucus attacked chairman Thomas for advocating grudgingly narrow interpretations of civil rights precedents, refusing to seek the full range of remedies provided by statute, and eschewing class actions and systemic pattern or practice cases.[55]

Congressional Democrats also criticized the agency for excessive delay in its complaint processing, most dramatically illustrated by revelations in 1988 that the statute of limitations had expired on as many as 13,000 claims while they languished before the agency, claims which Congress revived by special statute.[56] Following an investigation of selected EEOC district offices, the House Committee on Education and Labor reported that, as compared to 1980 (Carter's last year in office), by 1985 there had been a

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[54] See note 53, Hearing No. 1, pps. 1-3 (opening statement of Rep. Augustus Hawkins (D, CA); Hearing No. 5, pps. 1-2 (opening statement of Rep. Matthew Martinez (D, CA)); Hearing No. 6, p. 3 (opening statement of Rep. Pat Williams (D, MT)); Hearing No. 7, pps. 1-3 (opening statement of Rep. Matthew Martinez (D, CA)); Hearing No. 8, pps. 1-3 (opening statement of Rep. Matthew Martinez (D, CA)); Hearing No. 10, pps. 1-2 (opening statement of Rep. Edward Roybal (D, CA)); see also *A Report on the Investigation of Civil Rights Enforcement by the Equal Employment Opportunity Commission Based on a Study of Selected District Offices*, Committee on Education and Labor, 99th Cong., 2nd sess., 1986.

[55] Congressional Black Caucus Foundation, "In Opposition to Clarence Thomas: Where We Must Stand and Why," *Court of Appeal: The Black Community Speaks Out on the Racial and Sexual Politics of Clarence Thomas vs. Anita Hill*, ed. Robert Chrisman and Robert L. Allen (New York: Ballantine Books, 1992), 234.

[56] Congressional Black Caucus Foundation, "In Opposition to Clarence Thomas," 234; see note 53, Hearing No. 9, pps. 1-3 (opening statement of Rep. Tom Lantos (D, CA)); Hearing No. 11, pps. 1-3 (opening statement of Rep. Tom Lantos (D, CA)); Hearing No. 12, pps. 1-4 (opening statement of Senator John Melcher (D, MT)); Hearing No. 14, pps. 1-3 (opening statement of Rep. Matthew Martinez (D, CA)).

precipitous decline in the number of complainants for whom the agency obtained monetary benefits in the conciliation process, and a doubling in the percentage of charges in which the agency found "no cause" to believe that discrimination had occurred, while in some instances "no cause" findings were rendered without meaningful investigation.[57]

Finally, Democrats made abundantly clear that they regarded these asserted deficiencies in EEOC performance as resulting from the ideological preferences of a presidential administration that opposed robust civil rights enforcement. In 1983 oversight hearings Democrat Augustus Hawkins, chair of the House Subcommittee on Employment Opportunities, decried "the extent to which the administration has gone to undermine the Nation's civil rights enforcement efforts."[58] In 1986 hearings Democrat Matthew Martinez, who took over as subcommittee chair in 1985, characterized the EEOC as "an agency which obstructs enforcement of the law [and] … has abdicated responsibilities which it has been charged with," and stated that "the EEOC Commissioners seek to undermine the mission of the agency."[59] In 1987 Democrat Tom Lantos, chair of the House Subcommittee on Employment and Housing, complained during oversight hearings in reference to the EEOC: "there is not much point in passing good laws if, in the implementation of the legislation, the purpose and the goal and the objective of sound legislation is undermined, eroded, or sabotaged … making a mockery

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[57] *A Report on the Investigation of Civil Rights Enforcement by the Equal Employment Opportunity Commission Based on a Study of Selected District Offices*, Committee on Education and Labor, 99th Cong., 2nd sess., 1986, pps. V-VIII.

[58] See note 53, Hearing No. 1, p. 1.

[59] See note 53, Hearing No. 8, p. 2. In 1990 hearings Rep. Martinez characterized the EEOC as a "toothless kitten" responsible for "bankrupt" equal employment opportunity policy. See note 30, Hearing No. 14, p. 1.

of the solemn promise of the Civil Rights Act."[60] A report of the Congressional Black Caucus disclosed that "Thomas was so reluctant to bring class and systemic cases that Congress had to earmark EEOC funds specifically for that type of enforcement and threaten to cut the budget of the chair and members of the EEOC …" in an effort to compel him to undertake such litigation.[61] During the 1980s Democrats in control of oversight committees were locked in an acrimonious struggle with the Reagan administration over control of the EEOC.

The Supreme Court Curtails Title VII's Private Enforcement Regime

Alongside Congress' clash throughout the 1980s with the president over civil rights policy, it was also sparring on the same subject with the Supreme Court, which grew increasingly to reflect presidential preferences with the appointments of Justices O'Conner, Scalia, and Kennedy. This conflict heated up particularly in the latter half of the decade and into the early 1990s. In the five years from 1986 to 1990, Congress passed five pieces of civil rights legislation that were explicitly directed at overriding Supreme Court decisions interpreting civil rights statutes, and the tone of the legislative proceedings leading to the overrides was highly antagonistic toward the court.[62] It was this legislative-judicial discord that ultimately served as the catalyst for the CRA of 1991.

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

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[60] See note 53, Hearing No. 9, p. 2.

[61] Congressional Black Caucus Foundation, "In Opposition to Clarence Thomas," 234.

[62] Eskridge, "Reneging on History?," 633-41.

June of 1989, by a series of five Supreme Court decisions interpreting Title VII handed down by a sharply divided Supreme Court. 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, and it signaled a clear move by the court to redirect Title VII implementation. All but one of the decisions were stridently divided, with an ascendant conservative wing carrying the day. 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'Conner to form a new majority on numerous important civil rights issues.

The decisions did not overtly strike at the substantive right to a discrimination free workplace for protected groups, but rather constricted Title VII's private enforcement regime. The most controversial of the cases was *Wards Cove Packing Co. v. Atonio*,[63] which substantially revised the framework for adjudicating "disparate impact" cases, an infrequent but important type of claim in which a plaintiff challenges a facially non-discriminatory policy, such as aptitude tests or minimal education requirements, as having discriminatory effects on a protected group. *Wards Cove* tightened a plaintiff's burden of proof, limited the nature of evidence she could rely upon, and expanded the range of defenses available to employers. In the other cases the court held that even when discrimination was a "substantial factor" in an adverse employment action, the employer would be absolved of liability if it established that it would have

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[63] 490 U.S. 642 (1989).

made the same decision in the absence of the discriminatory motive;[64] it expanded standing for whites and males to challenge the legality of affirmative action consent decrees entered into by municipalities that benefited racial minorities and women;[65] it restricted application of Title VII's statute of limitations in cases challenging seniority systems so as to cause such claims to expire faster;[66] and it limited the potential entities from which successful Title VII plaintiffs could recover attorney's fees under the statute's fee shifting provision.[67] In addition to these five Title VII cases, also in the summer of 1989, a five justice majority handed down a decision holding that the Civil Rights Act of 1866's prohibition of race discrimination in private employment contracts was limited to the formation and enforcement of contracts, and did not extend to post-formation conduct, such as discriminatory harassment.[68]

While the legislative process aimed at overriding these decisions was underway, in March 1991 the Supreme Court handed down two additional decisions that influenced the content of the CRA of 1991's amendments to Title VII. The decisions were again divided, with president Bush's appointment of Justice Souter in 1990 adding an additional vote (if only initially) to the new conservative majority. One decision held that American citizens employed by an American company in a foreign country did not meet

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[64] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[65] *Martin v. Wilks*, 490 U.S. 755 (1989).

[66] *Lorance v. AT&T Technologies* , 490 U.S. 900 (1989).

[67] *Independent Fed'n of Flight Attendants v. Zipes* , 491 U.S. 754 (1989).

[68] *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

the statutory definition of plaintiff under Title VII,[69] and the other held that expert witness' fees could not be recovered by prevailing plaintiffs as part of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976,[70] a decision that did not address Title VII but which clearly indicated how the court would resolve the same issue under Title VII, which had identical fee shifting language.[71]

There could be no mistaking the fact that the new conservative Supreme Court majority 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 *every single one* of the seven cases the court adjusted these elements of Title VII's private enforcement regime in the same direction – to the detriment of women and minority plaintiffs. National civil rights organizations, including the Leadership Conference on Civil Rights, the NAACP, and the ACLU, reacted with swift and decisive condemnation.[72] In commenting on the ostensibly technical and procedural decisions, a member of the NAACP's executive board lamented that president Reagan had succeeded in reshaping the Supreme Court's civil rights philosophy, while the organization's executive director, Benjamin Hooks, characterized the Court as "more dangerous to this nation than any Bull Connor with a fire hose."[73]

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[69] *Boureslan v. Arabian American Oil Company*, 499 U.S. 244 (1991).

[70] 42 U.S.C. § 1988.

[71] *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991).

[72] Joan Biskupic, "Groups Look to Capitol Hill for Help on Civil Rights," *Congressional Quarterly Weekly Report*, 17 June 1989, 1479.

[73] Julie Johnson, "High Court Called Threat to Blacks," *New York Times*, 10 July 1989, sec. A, p. 14, col. 1.

Conservatives no less than liberals recognized the deeply ideological significance of the decisions. Bruce Fein, a conservative constitutional lawyer who had worked in the Reagan Justice Department, characterized the decisions as reflecting "that we have a Reagan court on civil rights and social welfare. It means we won't have the rampant social engineering emanating from federal judges."[74]

Civil rights leaders were abundantly clear in their assessment of the decisions' effects, an assessment resonant the law and economics model of the choice to litigate. Because the decisions decreased the probability of plaintiffs' success and reduced potential economic recoveries, civil rights lawyers would litigate fewer cases, curtailing private enforcement of Title VII.[75] Reporting on a core theme that emerged in a two day strategy session following the decisions held by the LDF, attended by about 80 of the nations leading civil rights advocates, a staff reporter of the *Wall Street Journal* wrote:

> As a result of the decisions, civil-rights lawyers are turning away clients because many job-discrimination claims are viewed as too costly to litigate and almost impossible to win, the lawyers said. Some of the lawyers predicted that these decisions – combined with the increased difficulty of getting courts to require defendants to pay attorney's fees and the tendency of some judges to dismiss novel claims as frivolous – will lead to a thinning of the ranks of civil-rights lawyers.[76]

Civil rights activists sought a legislative solution.

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[74] Biskupic, "Groups Look to Capitol Hill for Help on Civil Rights."

[75] Arthur S. Hayes, "Job-Bias Litigation Wilts Under High Court Rulings," *Wall Street Journal*, 22 September 1989; Johnson, "High Court Called Threat to Blacks"; Charles Rothfeld, "Rulings on Job Bias: Chilling Effect on Lawsuits," *New York Times*, 27 October 1989, sec. B, p. 7, col. 3.

[76] Hayes, "Job-Bias Litigation Wilts Under High Court Rulings."

Congress Overrides, and More

Civil rights organizations and activists were the catalysts for override legislation.[77] Long-time civil rights liberals Augusts Hawkins, Chair of the House Education and Labor Committee, and Edward Kennedy, Chair of the Senate Labor and Human Resources Committee, led the way among lawmakers. Reginald Govan, the staff counsel on the House Education and Labor Committee tasked with developing the override legislation on the House side, wrote a detailed first-hand contemporaneous account of events between the initial mobilization to override the 1989 decisions and passage of the CRA of 1991.[78] He reports that the Leadership Conference on Civil Rights constituted a drafting committee, which worked in close collaboration with congressional committee staff to draft the override bill that would be introduced in February 1990.[79] The Leadership Conference drafting committee members included representatives of the NAACP, the LDF, the Lawyers Committee for Civil Rights Under Law, the Mexican-American Legal Defense Fund, the National Urban League, the American Civil Liberties Union, the Women's Legal Defense Fund, the National Women's Law Center, and People for the American Way.[80]

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[77] Joan Biskpuic, "Congress May Seek to Reverse Narrow Civil Rights Ruling," *Congressional Quarterly Weekly Report*, 10 June 1989, 1404; Biskupic, "Groups Look to Capitol Hill for Help on Civil Rights."

[78] Govan, "Honorable Compromises and the Moral High Ground."

[79] Bureau of National Affairs, "Omnibus Civil Rights Bill May Include Civil Rights Reform," *Daily Labor Report*, 18 December 1989, A1, A9-A10; Govan, "Honorable Compromises and the Moral High Ground," 31-50.

[80] Govan, "Honorable Compromises and the Moral High Ground," 31.

In addition to formulating language to overturn the Supreme Court decisions issued in the summer of 1989, the drafting committee persuaded Hawkins and Kennedy to press beyond a narrow override and incorporate into the bill additional amendments adding the availability of uncapped compensatory and punitive damages, providing for trial by jury, overturning several decisions handed down in the mid 1980s restricting attorney fee awards, and extending Title VII's statute of limitations from 180 days to two years.[81] The damages and jury trial provisions were, by far, the most important provisions in the proposed amendments, and Hawkin's was initially reluctant to incorporate them for fear that they would provoke intense business opposition and risk killing the entire bill.[82]

The proposed new damages provisions would radically alter potential economic recoveries for Title VII plaintiffs, for whom back pay was the only form of monetary relief available. Under the proposed bill, compensatory damages would be available for *all* pecuniary losses resulting from discrimination (as opposed to back pay only), as well as for pain and suffering. Punitive damages could also be awarded, without limit, to punish the employer and deter future violations by it and other would-be violators. This change in available damages would transform claims that had previously lacked any monetary value under Title VII because they did not involve back pay, such as claims based upon religious or sexual harassment, into claims with potentially massive monetary value. Further, claims that had previously involved only modest monetary stakes for the

[81] Govan, "Honorable Compromises and the Moral High Ground," 32-50.

[82] Govan, "Honorable Compromises and the Moral High Ground," 37-44.

plaintiff, so typical of Title VII's backpay limitation, would be worth much more. Under the existing Title VII, for example, a plaintiff discriminatorily denied a promotion could recover only the pay differential between her actual position and the one she was wrongfully denied, which might be quite modest. Under the proposed bill she could also be awarded compensatory damages for emotional harm suffered, as well as punitive damages in a sum calculated to punish and deter.

Also crucial was the drafting committee's proposed right to trial by jury. 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). Whereas in 1963-64 civil rights advocates regarded bench trials as imperative because they feared bias at the hands of southern juries,[83] in 1989 they were more fearful of bias at the hands of federal judges and strongly preferred jury trials.[84] Reginald Govan, committee counsel who worked directly with the drafting committee, explained that civil rights groups pressed for the jury trial amendment "because it stripped a federal judiciary increasingly comprised of Reagan/Bush appointees of its exclusive role as fact-finder in employment discrimination cases under Title VII."[85]

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[83] Andrea Catania, "State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts," *American University Law Review* 32 (1983) 777-838, 807 n. 141; Greenberg, *Race Relations and American Law*, 15-16; Note, "Practice and Potential of the Advisory Jury," *Harvard Law Review* 100 (1987): 1363-1381, 1374-75.

[84] Mary Kathryn Lynch, "The Equal Employment Opportunity Commission: Comments on the Agency and its Role in Employment Discrimination Law," *Georgia Journal of International and Comparative Law* 20 (1990): 89-104, 103.

[85] Govan, "Honorable Compromises and the Moral High Ground," 36. There was a live dispute about the whether allowance for additional monetary damages triggered the requirement of a jury trial under the

These proposed damages and jury trial provisions would have the effect of giving to gender, religion, and national origin plaintiffs under Title VII benefits already enjoyed by race discrimination plaintiffs under the CRA of 1866. The latter law's prohibition of interference with a person's right to "make and enforce contracts" that "is enjoyed by white citizens" was interpreted in the early 1970s to apply to private employment, and it includes the right to compensatory and punitive damages as well as trial by jury. 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."[86] In pressing for adoption of the damages and jury trial provisions under Title VII, advocates stressed the equitable argument that it would bring other protected groups to parity with rights already enjoyed by racial minorities.[87]

When introduced in February 1990, the override bill composed by the Leadership Conference drafting committee, in close coordination with Hawkins' and Kennedy's committee staff, encountered stiff opposition from the Bush Administration, conservative Republicans in Congress, and the business community. Major national business interests, such as those represented by the National Association of Manufacturers and the United States Chamber of Commerce, moved strongly to block the 1990 bill, particularly its

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Seventh Amendment. Numerous proposals were floated creating new damages without trial by jury. Govan, "Honorable Compromises and the Moral High Ground," 95, 102, 121, 173-74, 216.

[86] Jean F. Rydstrom, "Applicability of 42 U.S.C.A. § 1981 to National Origin Employment Discrimination Cases," *American Law Reports Federal* 43 (2007): 103, § 2[a].

[87] Govan, "Honorable Compromises and the Moral High Ground," 44, 57, 171-73, 181.

provisions concerning disparate impact claims and new monetary damages.[88] The steep growth of private job discrimination suits in the 1980s, and the attendant costs imposed on business, it appears, had made job discrimination suits a serious business concern.

The debate was notable for its contentiousness,[89] and was particularly belligerent in connection with two substantive grounds offered for opposition to the bill. First, an (now familiar) anti-litigation and anti-lawyer theme was broadly advanced against the bill by Republicans and their business constituents. The proposed bolstering of Title VII's private enforcement regime, they argued, would be an "engine of litigation," "provoke a torrent of costly litigation," and would "prompt frivolous lawsuits and bankrupting damage awards."[90] The bill, according to Republicans and business associations, would yield a "bonanza … for plaintiffs and their lawyers," "would do more to promote legal fees than civil rights," and could best be characterized as "the plaintiffs' lawyers' full employment law of 1990."[91] A second point of heated contention, reflecting the partisan

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[88] Joan Biskpuic, "Congress May Seek to Reverse Narrow Civil Rights Ruling"; Joan Biskpuic, "Bush Caught in Contradiction Over Job-Bias Remedies," *Congressional Quarterly Weekly Report*, 21 April 1990, 1196; Joan Biskpuic, "New Struggle Over Civil Rights Brings Shift in Strategy," *Congressional Quarterly Weekly Report*, 9 February 1991, 366; Joan Biskpuic, "Democrats Offer Compromise on Contentious Bias Bill," *Congressional Quarterly Weekly Report*, 18 May 1991, 1286.

[89] Janet Hook, "Dole Outburst Shows Frustration Over More Than Civil Rights Bill, *Congressional Quarterly Weekly Report*, 21 July 1990, 2314; Joan Biskpuic and Christine Lawrence, "Civil Rights Bill Advancing Despite GOP Objections," *Congressional Quarterly Weekly Report*, 5 May 1990, 1352; Joan Biskpuic, "Partisan Rancor Marks Vote on Civil Rights Measure," *Congressional Quarterly Weekly Report*, 21 July 1990, 2312; Joan Biskpuic, "House Joins in the Standoff Over Civil Rights Measure," *Congressional Quarterly Weekly Report*, 4 August 1990, 2517.

[90] Biskpuic, "Bush Caught in Contradiction Over Job-Bias Remedies"; Biskpuic, "Civil Rights Act Poised to Clear, but Bush Veto Looks Certain"; Biskpuic, "New Struggle Over Civil Rights Brings Shift in Strategy"; Biskpuic, "Democrats Offer Compromise on Contentious Bias Bill."

[91] Dinah Wisenberg, "House Panel Adds Its Stamp to Civil Rights Measure," *Congressional Quarterly Weekly Report*, 28 July 1990, 2418; Joan Biskpuic, "Expected Bush Veto Looming Over Civil Rights Measure," *Congressional Quarterly Weekly Report*, 20 October 1990, 2312; Biskpuic, "Bush Caught in

antagonisms over civil rights that had grown in the 1980s, concerned assertions by many Republicans, echoing their galvanized business constituents, that the projected explosive growth in lawsuits that would be caused by enactment of the bill would have the practical effect of causing hiring "quotas."[92] Employers seeking to avoid liability would give racial preferences to minorities and women to the detriment of more qualified white males. This argument -- that an excessively strong private enforcement regime would effectively induce affirmative action -- proved a politically potent weapon against the bill, at least in the sort run.[93]

These attacks, coupled with a veto threat by the president, succeed in causing liberal Democrats and the drafting committee to make some concessions sought by southern Democrats and moderate Republicans, such as capping punitive damages, in their quest for a veto proof majority.[94] In October of 1990, both the House and Senate voted to pass a bill – in both chambers just shy of the two-thirds necessary to override a veto -- that overturned nearly all of the offending decisions and provided for uncapped compensatory damages, punitive damages capped at $150,000, trial by jury, and a statute

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Contradiction Over Job-Bias Remedies"; Biskpuic, "House Joins in the Standoff Over Civil Rights Measure."

[92] Biskpuic, "Bush Caught in Contradiction Over Job-Bias Remedies"; Biskpuic, "New Struggle Over Civil Rights Brings Shift in Strategy"; Joan Biskpuic, "Deal on Civil Rights Stymied by 'Quota' Issue," *Congressional Quarterly Weekly Report*, 14 July 1990, 2225; Joan Biskpuic, "Civil Rights Act Poised to Clear, but Bush Veto Looks Certain," *Congressional Quarterly Weekly Report*, 29 September 1990, 3128.

[93] Ronald D. Elving, "Successful Passage of Civil Rights Bill Could be Political Plus for Both Parties," *Congressional Quarterly Weekly Report*, 2 September 1991, 268; Joan Biskupic, "Another Round on 'Quotas'," *Congressional Quarterly Weekly Report*, 29 June 1991, 1760.

[94] Biskpuic, "House Joins in the Standoff Over Civil Rights Measure"; Biskpuic, "Civil Rights Act Poised to Clear, but Bush Veto Looks Certain"; Govan, "Honorable Compromises and the Moral High Ground," 71, 103-17.

of limitations enlarged to two years.[95] President Bush's opposition remained firm, but he was also sufficiently concerned about the electoral repercussions of a veto that he wished to avoid appearing adamantly opposed to any civil rights legislation.[96] He proposed a vastly weaker bill that no one seriously thought Democrats would accept, and when they summarily reject it he vetoed what would have been the Civil Rights Act of 1990.[97] It appeared that an override vote in the House would not succeed so none was taken, and the Senate failed to override by a single vote.[98] The 101st Congress ended without civil rights legislation.

In the first session of the next Congress the issue was back on the agenda, and it was evident that civil rights liberals would have to make meaningful concessions relative to the bill that was passed in 1990 to have any chance of attracting sufficiently broad support to override an anticipated veto. And so they did. Working with moderate Republicans led by Senator John Danforth, they conceded some ground to opponents of the 1990 bill on what had been hard fought battles over the formulation of the burden of proof, available defenses, and allowable inferences from statistical evidence in disparate

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[95] House Report No. 856, 101st Cong., 2nd sess., 10/12/1990; Joan Biskupic, "Conferees Attempt to Rescue Imperiled Civil Rights Bill," *Congressional Quarterly Weekly Report*, 13 October 1990, 3428.

[96] Elving, "Successful Passage of Civil Rights Bill Could be Political Plus for Both Parties"; Joan Biskupic, "Failure to Enact Civil Rights Bill Laid to Political Miscalculation,"*Congressional Quarterly Weekly Report*, 27 October 1990, 3610; Biskpuic, "Bush Caught in Contradiction Over Job-Bias Remedies"; Govan, "Honorable Compromises and the Moral High Ground," 68, 71.

[97] Biskupic, "Failure to Enact Civil Rights Bill Laid to Political Miscalculation"; Govan, "Honorable Compromises and the Moral High Ground," 149-51.

[98] Biskupic, "Failure to Enact Civil Rights Bill Laid to Political Miscalculation"; Govan, "Honorable Compromises and the Moral High Ground," 153-54.

impact cases; they agreed to cap not just punitive damages, but also most forms of compensatory damages as well; and they ceased to insist upon increasing Title VII's statute of limitations.[99]

While these moderating concessions were enlarging support for the bill, the political calculus shifted in favor of voting for it. In early October 1991, shortly after the first round of Senate hearings on the nomination of Clarence Thomas to the Supreme Court had concluded, the story on Anita Hill's allegations of sexual harassment broke. The nation was then riveted by televised hearings on the subject from October 11th to October 13th, and the seriousness and pervasiveness of sexual harassment on the job, for which Title VII provided no compensatory remedy but the proposed amendments would, became the focus of a national dialogue. This development dovetailed perfectly with the recent strategy of some of the bills proponents, who sought to neutralize the race politics of the quota issue by casting the bill primarily as a women's rights bill, emphasizing that it provided monetary damages to victims of gender discrimination already enjoyed by race discrimination plaintiffs under the CRA of 1866.[100] The White House and Republican Senators were beset by charges that their reflexive disbelief of Hill's allegations revealed insensitivity to women's rights in general, and sexual harassment in particular, arousing anxiety among conservative Republicans about voting against

[99] Biskpuic, "Democrats Offer Compromise on Contentious Bias Bill"; Biskupic, "New Struggle Over Civil Rights Brings Shift in Strategy"; Biskupic, "Another Round on 'Quotas'"; Joan Biskupic, "Danforth's Persistence Paid Off In Thomas, Civil Rights Battles," *Congressional Quarterly Weekly Report*, 2 November 1991, 3202; Govan, "Honorable Compromises and the Moral High Ground," 211-35.

[100] Biskupic, "New Struggle Over Civil Rights Brings Shift in Strategy"; Joan Biskupic, "Supporters of Anti-Job-Bias Bill Need a Winning Strategy," *Congressional Quarterly Weekly Report*, 16 March 1991, 683; Govan, "Honorable Compromises and the Moral High Ground," 171.

another civil rights bill that increased remedies for gender discrimination at work.[101] Public opinion polls conducted in January 1991 on the failed 1990 bill had showed remarkable public support for compensatory and punitive damages in gender discrimination claims, with 68% in favor and 25% against, and this was before the Hill-Thomas hearings.[102]

Republicans were also concerned about recent national media attention drawn by former Klansman turned self-styled "white nationalist" David Duke, who had made a strong second place showing in the November Republican primaries for the Louisiana governorship. While the national Republican party and the president himself unambiguously repudiated Duke,[103] they were clearly worried that the Duke spectacle would feed what moderate Republican James Jeffords of Vermont characterized as the "perception problem" that the party was insensitive on race issues and at times exploited them.[104] Democrats invoked Duke's name repeatedly in the debates over the bill, charging that Republicans' frequent repetition of the word "quota" represented a Duke-like strategy of using race-baiting code words.[105] Polling in early 1991 had disclosed that

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[101] Pamela Fessler, Joan Biskupic, and Phil Kuntz, "Rights Bill Rises From the Ashes of Senate's Thomas Fight," *Congressional Quarterly Weekly Report*, 26 October 1991, 3124; Joan Biskupic, "Senate Passes Sweeping Measure To Overturn Court Ruling," *Congressional Quarterly Weekly Report*, 2 November 1991, 3200; Bureau of National Affairs, "Thomas Hearings Illustrate Problems in Harassment Cases," *Daily Labor Report*, 28 October 1991, C1; Govan, "Honorable Compromises and the Moral High Ground," 224-25.

[102] Govan, "Honorable Compromises and the Moral High Ground," 178-79.

[103] Ann Devroy, "Bush Saw Gains in Deal, Officials Say," *The Washington Post*, 26 October 1991, A1; Govan, "Honorable Compromises and the Moral High Ground," 145.

[104] Fessler et al., "Rights Bill Rises From the Ashes of Senate's Thomas Fight."

[105] Govan, "Honorable Compromises and the Moral High Ground," 144-45.

a majority of respondents thought that president Bush was "just playing politics" by inaccurately denominating the proposed legislation a "quota bill."[106] With the 1992 elections looming, the Duke controversy fostered apprehension among many Republicans about appearing inflexibly opposed to even compromise civil rights legislation, and, together with the charges of sexism against Republicans following the Hill-Thomas hearings, it eroded the number of Republicans prepared to stand with president and against the compromise bill.[107] Senators John Warner of Virginia and Ted Stevens of Alaska, who had voted to sustain the president's veto in 1990,[108] publicly announced that they had met with the president and notified him that they could not be counted upon to cast that vote again. "I felt that it was imperative that we did not have the divisiveness of not having a civil rights bill in the 1992 presidential and congressional campaigns," Warner said. "We made it clear we felt it was necessary to get a bill."[109]

The compromises reached on some of the more contentious issues, particularly those regarding disparate impact claims and damages caps, coupled with this political context more conducive to passage, produced easily veto-proof majorities in both chambers. The CRA of 1991, as finally passed, overrode of a large majority, though not

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[106] Govan, "Honorable Compromises and the Moral High Ground," 178-79.

[107] Bureau of National Affairs, "White House Announces Civil Rights Dispute Compromise Ending Two-Year Long Dispute," *Daily Labor Report*, 28 October 1991, A-11; Biskupic, "Danforth's Persistence Paid Off In Thomas, Civil Rights Battles"; Biskupic, "Senate Passes Sweeping Measure To Overturn Court Ruling"; Fessler et al., "Rights Bill Rises From the Ashes Of Senate's Thomas Fight"; Govan, "Honorable Compromises and the Moral High Ground," 229.

[108] *Congressional Record*, 101st Cong., 2nd sess., 10/24/1990, p. 16589.

[109] Fessler et al., "Rights Bill Rises From the Ashes Of Senate's Thomas Fight."

all, of the offending Supreme Court decisions of 1989 and 1991.[110] The amendments to Title VII statutorily specified new evidentiary and proof standards that eased a plaintiff's burden in disparate impact cases, enacted rules shifting certain costs of prosecution to defendants in cases won by plaintiffs, clarified statute of limitations rules so as to make them more permissive in seniority cases, and restricted the scope of standing for individuals to challenge consent decrees creating affirmative action programs. These provisions of the CRA of 1991 sought, manifestly, to restore nearly all aspects of Title VII's private enforcement regime to their condition prior to the summer of 1989. The CRA of 1991 also created new punitive and compensatory damages provisions, where the sum of (1) punitive damages, (2) compensatory damages for pain, suffering, and other nonpecuniary losses, and (3) future pecuniary losses, would be capped at between $50,000 and $300,000 in a gradated scheme increasing with the size of the employer.[111] Compensatory damages for pecuniary losses -- excluding future losses -- would not be capped. Plaintiffs seeking compensatory or punitive damages would be entitled to trial by jury.[112]

When president Bush's final efforts to rally conservative Republicans to sustain a veto failed, the president sought to negotiate some eleventh hour influence over the bill,

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[110] 105 Stat. 1071, 102 P.L. 166. *Price Waterhouse, Martin, Lorance, Boureslan, Casey, Wards Cove*, and *Patterson* were all overruled.

[111] The caps are $50,000 for employers with 15 to 100,000 employees, $100,000 for employers with 101 to 200 employees, $200 for employers with 201 to 300 employees, and $300,000 for employers with more than 500 employees. 42 U.S.C. § 1981a(b)(3).

[112] 42 U.S.C. § 1981a(c).

but with his veto threat undermined he had lost any leverage to affect material changes.[113] The Senate voted for the Civil Rights Act of 1991 93 to 5,[114] and the House voted for it 381 to 38,[115] rendering a stunning bipartisan consensus for the Act's unambiguous increase in incentives for private litigation, enacted for the express purpose of increasing the number of private Title VII suits. Recognizing clear defeat and not wanting to further alienate minority and women voters without any potential benefits for business, president Bush switched to a credit claiming posture, asserted that the bill before him was not a "quota bill" like the one passed in 1990, and signed it into law on November 21, 1991.[116]

Legislative Historical Evidence of Lawmakers' Motives

Mobilizing Private Enforcers

Why did Congress, following an agenda set by liberal members with strong ties to civil rights groups, pass a law straightforwardly intended to increase Title VII litigation? Both the House and Senate Reports on the bills that led to the CRA of 1991 emphasized that private enforcement litigation was intended, in the compromise of 1964, to be a central part of the enforcement scheme for federal employment discrimination laws. "In enacting Title VII," the House Report stated, "Congress intended to vindicate the substantial public interest in a discrimination-free workplace by encouraging private citizens to enforce the statute's guarantees," and it identified as a key goal of the statute

[113] Govan, "Honorable Compromises and the Moral High Ground," 229-38.

[114] *Congressional Record*, 102nd Cong., 1st sess., p. 15503, 10/30/1991.

[115] *Congressional Record*, 102nd Cong., 1st sess., p. 9557, 11/07/1991.

[116] Govan, "Honorable Compromises and the Moral High Ground," 235.

to "encourage … victims [of discrimination] to act as 'private attorneys general' by enforcing the statute for the benefit of all Americans."[117]

The House and Senate Reports further concurred that Title VII's remedial scheme, both in its express content and as recently interpreted by the new conservative majority on the Supreme Court, was deficient in meeting this goal. There existed instead a condition of under-enforcement of meritorious claims due to inadequate monetary incentives for plaintiffs to assert claims, and for attorneys to prosecute them. With respect to the modest monetary damages available under Title VII, the Senate Report stated that limiting economic damages to backpay "often means that victims of intentional discrimination may not recover for the very real effects of the discrimination; and thus victims of intentional discrimination are discouraged from seeking to vindicate their civil rights."[118] The House Report characterized the strict 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."[119] Allowance for compensatory and punitive damages would mobilize more private plaintiffs with meritorious claims to enforce their rights.

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[117] House Report No. 644, 101st Cong., 2nd sess., 7/30/1990 (submitted by the House Committee on Education and Labor on H.R.4000) (hereinafter House Report No. 644), pps. 42, 46; *see also* pps. 44-45; Senate Report No. 315, 101st Cong., 2nd sess., 6/8/1990 (submitted by the Senate Committee on Labor and Human Resources on S. 2104) (hereinafter Senate Report No. 315), p. 33.

[118] Senate Report No. 315, p. 30; see also House Report No. 644, p. 39 (In reference to the absence of compensatory damages for pain and suffering 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.").

[119] House Report No. 644, p. 43 (emphasis added) (quoting *Denny v. Westfield State College*, 880 F.2d 1464, 1771-72 (1st Cir. 1989)).

Further, the bill's advocates emphasized that even where monetary damages provide sufficient incentives for plaintiffs to initiate enforcement, retaining counsel to prosecute claims is another matter entirely, even in clearly meritorious cases. In December 1989, the Federal Courts Study Committee (FCSC), empanelled by Congress and charged with examining problems facing the federal courts, released a report stating that the monetary stakes in many Title VII cases are so small that, even with the potential to recover attorney's fees, claimants sometimes find it difficult to litigate because they are unable to retain counsel. The FCSC identified three reasons for this: delay, uncertainty of case outcome, and difficulty encountered in recovering fees by winning plaintiffs.[120]

While attorneys would be awarded fees if they prevailed, litigation nearly always involves long delay and uncertainty of outcome, and thus the prospect of fees is discounted accordingly. An attorney with purely economic motivates who has the opportunity to be paid at market rate – in a timely fashion and not contingent upon winning -- would not accept Title VII cases.[121] Further, in developing a framework for assessing whether a prevailing plaintiff's fee petition was "reasonable," many courts had adopted a practice of weighing whether the fee requested (based upon hours worked on

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[120] Judicial Conference of the United States, Federal Courts Study Committee, *Tentative Recommendations for Public Comment* (1989), 50; Judicial Conference of the United States, Federal Courts Study Committee, *Working Papers And Subcommittee Reports* (1990), working paper titled "Employment Discrimination Cases," 28-29. Senator Edward Kenney cited this study in his floor statement in favor of amending Title VII to increase economic rewards for enforcement. *Congressional Record*, 102nd Cong., 1st sess., 10/29/1991, p. 15341.

[121] Federal Courts Study Committee, *Working Papers And Subcommittee Reports*, "Employment Discrimination Cases," 28-29.

the case) was "proportionate" to the economic recovery achieved for the plaintiffs.[122] If not, courts utilizing this approach would allow only a proportionate award even if this meant compensating attorneys at well below market rates, sometimes drastically so.[123] In a 1989 article titled "Eliminating the Plaintiff's Attorney in Equal Employment Litigation," an EEOC regional attorney, with no financial stake in fee awards, characterized a series of federal court decisions in the mid to late 1980s curtailing fee awards in Title VII cases as "a disaster for plaintiffs … [and] a judicially constructed mine field through which many attorneys have decided not to travel."[124]

These conditions made it difficult for plaintiffs with meritorious but low value cases to retain counsel. The Senate Report observed that there were a "dearth of competent counsel willing to represent victims of discrimination despite many meritorious suits,"[125] and that "private counsel representing plaintiffs in equal employment cases have become an endangered species, in many places already extinct."[126] The House Report similarly found that, as a result of inadequate monetary

[122] Federal Courts Study Committee, *Working Papers And Subcommittee Reports*, "Employment Discrimination Cases," 29.

[123] See, e.g., *Sangster v. United Air Lines, Inc.*, 633 F.2d 864 (9th Cir. 1980); *Sas v. Trintex*, 709 F. Supp. 455 (S.D.N.Y. 1989); *E.E.O.C. v. Nutri/System, Inc.*, 685 F. Supp. 568 (E.D. Va. 1988).

[124] Ray Terry, "Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearian Tragedy," *The Labor Lawyer* 5 (1989): 63-81, 72.

[125] Senate Report No. 315, p. 33 (quoting *Robinson* v. *Alabama State Department of Education*, 727 F. Supp. 1422, 1430-32 (M.D. Ala. 1989)) (internal quotations omitted).

[126] Senate Report No. 315, p. 33 (quoting Terry, "Eliminating the Plaintiff's Attorney in Equal Employment Litigation," 5 *The Labor Lawyer* 63 (1989)) (internal quotations omitted).

incentives to attract counsel to prosecute claims, "[t]he evidence suggests that plaintiffs are already encountering substantial difficulty in obtaining legal representation."[127]

Lack of counsel for potential plaintiffs with meritorious but low value claims, therefore, was a market problem in need of a market solution. Attorneys will only represent plaintiffs, the Senate Report observed, citing the comments of a distinguished federal judge, if "the civil rights market . . . adequately compensate[s] them."[128] "[A]ttorneys, like other professionals and workers generally," the House Report echoed, "cannot afford to work for free. They have got to be paid."[129] The extent of monetary incentives for attorneys to enforce statutes can be regarded, it continued, "as a fuel that makes the machinery of adjudication work. If the fuel runs out, the machinery does not function and civil rights do not have the effect of protecting people whose interests are at stake."[130] Adding compensatory and punitive damages would allow contingency arrangements to counteract the discounting of fees that results from delay and uncertainty of case outcome, and would reduce the problem of small awards (backpay only) serving as a justification for judges, applying the proportionality principle, to award fees far below market rates. The proposed new damages, then, were intended by civil rights advocates both to mobilize plaintiffs and to increase their chances of retaining counsel.

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[127] House Report No. 644, p. 47.

[128] Senate Report No. 315, p. 33 (quoting *Robinson* v. *Alabama State Department of Education*, 727 F. Supp. 1422, 1430-32 (M.D. Ala. 1989)(emphasis added)). Senator Edward Kennedy also quotes this language from the opinion of District Judge Myron H. Thompson of the Middle District of Alabama during the floor debates in the Senate. *Congressional Record*, 102nd Cong., 1st sess., 10/29/1991, p. 15345.

[129] House Report No. 644, p. 42 (quoting Professor Charles Silver's testimony during the committee hearings on the bill).

[130] Id.

With respect to the latter issue, the new damages were manifestly intended to transform the "civil rights market" so as to shore up the civil right bar.

Separation of Powers Conflicts

But what motivated Congress in 1989, after living with Title VII's original private enforcement provisions for a quarter century, to push beyond a simple override of the offending decisions and tilt the enforcement framework sharply toward greater privatization with the new damages and jury trial provisions. The legislative record is replete with evidence that separation of powers conflicts between Congress and the executive over implementation of Title VII drove Congress in the CRA of 1991 to attempt to elevate enforcement by private litigants. The CRA of 1991 was the apex of a decade-long struggle between Congress and the president over civil rights policy in general, and the EEOC in particular. Liberal Democratic legislators and civil rights groups argued, unambiguously, that increased private enforcement of Title VII was necessary because: (1) they regarded the Reagan and Bush I administrations to be hostile to civil rights in general; (2) they were sorely dissatisfied with EEOC performance in particular; (3) they regarded deficiencies in EEOC performance to be rooted in executive ideology; and (4) they believed that congressional oversight of agency enforcement efforts had failed. They sought, accordingly, to mobilize private litigants to do what the EEOC would not. Republican legislators' and business interest groups' opposition to the liberals' proposals were also entwined with separation of powers struggles. They complained that the practical effect of the law would be to shift the regulatory implementation scheme from one centered upon bureaucracy to one dominated by private

litigation, thereby diminishing executive power, and some actually urged instead that enforcement should be improved by strengthening administrative power of the EEOC, a suggestion roundly repudiated by liberals.

In the course of their arguments in favor of an enhanced private enforcement regime for Title VII, Democratic legislators frequently shifted into broad-gauged attacks on the Reagan-Bush I record on civil rights, clearly indicating that the proposed legislation was intended as a response to executive ideology, as well as, manifestly, the decisions of recent Republican judicial appointments who were, many Democrats believed, carrying out the Reagan agenda on civil rights in the judiciary. In the House, typical were statements by Major Owens of New York that the bill introduced by Hawkins could "prevent the poisonous civil rights polices of the Reagan administration from being permanently embedded in the laws,"[131] by John Conyers of Michigan that "the President is leading the charge to reverse civil rights progress,"[132] and by Donald Edwards of California that "we have generally a very hostile administration to civil rights legislation."[133] The same theme reverberated in the Senate, where Howard Metzenbaum of Ohio thundered:

> Over the last 9 years we have seen a marked increase in the tolerance for racism and sexism. The Reagan administration launched a campaign against civil rights. Ronald Reagan did more to set back the clock on civil rights than any other president in this century…. It is no wonder, then, that the US Supreme Court,

[131] *Congressional Record*, 102nd Cong., 1st sess., 6/4/1991, p. 3888.

[132] *Congressional Record*, 102nd Cong., 1st sess., 6/4/1991, pps. 3851-52.

[133] House Hearings, vol. 1, 2/20/1990, p. 383.

> with the three Reagan appointees tipping the balance, slammed the door in the face of the victims of discrimination.[134]

Such broadside attacks on the Reagan civil rights record -- focused on both bureaucracy and courts -- were also recurrent among witness during committee hearings, generally offered as prologue to pleas that Congress act swiftly against executive and judicial retrenchment on civil rights by bolstering Title VII's private enforcement regime.[135]

Civil rights advocates argued that private litigants had to be mobilized to perform the enforcement task that the EEOC was failing to accomplish. Some characterized the agency as simply ineffectual. Regarding "enforcement by the EEOC and other agencies," Chairman Hawkins pronounced "that they offer no help whatsoever,"[136] and he characterized the EEOC's administrative process as "useless."[137] House Democrat Jose Serrano of New York stated that the agency had failed to even investigate claims filed with it,[138] alluding to a General Accounting Office Report requested by Hawkins and released at the end of 1988 which found, across six EEOC district offices studied, that

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[134] Senate Hearings on S 2104, The Civil Rights Act of 1990, Hearings before the Committee on Labor and Human Resources, 101st Cong., 2nd sess., 3/1/1990, p. 238; *see also* Representative Donald Payne (D, NJ), stating that "starting in the 1980s" discrimination was "tolerated … from the White House down." House Hearings, vol. 3, 5/21/1990, p. 330.

[135] See, e.g., House Hearings, vol. 1, 2/20/1990, p. 219 (testimony of John Buchanan, Chairman, People for the American Way); House Hearings, vol. 2, 3/20/1990, pps. 281-82, 286, 310 (testimony of Richard Arrington, Jr., Mayor, City of Birmingham, Alabama); House Hearings, vol. 2, 3/20/1990, p. 298 (testimony of William Hundut, III, Mayor, City of Indianapolis, Indiana); House Hearings, vol. 2, 3/20/1990, pps. 347, 377 (testimony of Robert Joffee, an attorney who defended the consent decree in *Martin*).

[136] House Hearings, vol. 2, 3/13/1990, p. 50.

[137] *Congressional Record*, 101st Cong., 2nd sess., 8/3/1990, p. 6749.

[138] *Congressional Record*, 102nd Cong., 1st sess., 6/4/1991, p. 3852.

"41 to 82 percent of charges closed by the district offices were not fully investigated."[139] Ellen Vargyas of the National Women's Law Center said of the EEOC's administrative process: "It simply hasn't worked."[140] Claimants and attorneys who had been through the agency process similarly testified that it did not meaningfully investigate their claims or otherwise provide any help to them.[141]

Others regarded the agency as not just ineffectual and unresponsive, but also affirmatively harmful, both symbolically and practically. Benjamin Hooks, Executive Director of the NAACP, complained that the agency process "make[s] a mockery of one's ability to bring claims of discrimination before administrative agencies,"[142] while a private civil rights practitioner characterized it as "a hurdle that one has to overcome," and as "a thorn in the process," producing delay which simply had to be endured before proceeding to court, where it would then be possible to address discriminatory employment practices in a serious fashion.[143] Representatives of the Hispanic community accused the agency of bias against them.[144] Indeed, this view that the

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[139] General Accounting Office, Human Resources Department, "Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges," GAO/HRD-89-11, 10/11/1988.

[140] House Hearings, vol. 3, 4/25/1990, p. 62.

[141] House Hearings, vol. 2, 3/13/1990, p. 63 (testimony of Carol Zabkowicz, of Racine, Wisconsin); House Hearings, vol. 3, 5/21/1990, pps. 326-29 (testimony of Patricia Carroll, of Houston, Texas); House Hearings, vol. 3, 5/21/1990, p. 398 (testimony of Gerald Birnberg, Partner, Williams, Birnberg, and Anderson, Houston, Texas).

[142] House Hearings, vol. 1, 2/20/1990, p. 45.

[143] House Hearings, vol. 3, 5/21/1990, p. 398 (testimony of Gerald Birnberg, Partner, Williams, Birnberg, and Anderson, Houston, Texas).

[144] House Hearings, vol. 1, 2/27/1990 p. 638 (statement of Antonia Hernandez, President and General Counsel of the Mexican-American Legal Defense and Education Fund); *Congressional Record*, 102nd Cong., 1st sess., 11/7/1991, p. 9550 (Rep. Jose Serrano, D, NY).

agency's administrative procedures provided no benefits to claimants while imposing costs upon them led Vargyas to advocate for eliminating the requirement that claimants first exhaust the administrative process before filing an action in court.[145]

And the EEOC's weakness, the bill's advocates charged, was not only failing to deliver remedies to victims of discrimination, but concomitantly was failing to create meaningful compliance incentives for employers. "I don't think being notified of a Title VII charge pending," said Nancy Kreiter of Women Employed Institute in the House hearings, "makes many employers shake in their boots these days. Certainly going through the EEOC process doesn't."[146] In urging her colleagues in the House to increase available monetary damages for Title VII plaintiffs, Washington Democrat Jolene Unsoeld insisted that "[a] slap on the hand from the EEOC just isn't good enough," and that increased money damages would provide the kind of "meaningful deterrent" the EEOC was not delivering.[147] This justification for the bill was repeated time and again in floor statements.[148]

Moreover, *and this point is crucial to the present analysis*, Democratic legislators made clear that they did not regard the EEOC's asserted deficiencies as an enforcer to be

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[145] House Hearings, vol. 3, 4/25/1990, p. 62.

[146] House Hearings on HR 4000, The Civil Rights Act of 1990, Joint Hearings before the Committee on Education and Labor and the Subcommittee on Civil Rights and Constitutional Rights of the Committee on the Judiciary, 101st Cong., 2nd sess., vol. 2, 3/13/1990, p. 51.

[147] *Congressional Record*, 101st Cong., 2nd sess., 8/2/1990, p. 6798.

[148] See, e.g., *Congressional Record*, 102nd Cong., 1st sess., 6/4/1991, p. 3893 (Rep. Nancy Pelosi, D, CA); *Congressional Record*, 102nd Cong., 1st sess., 6/4/1991, p. 3896 (Rep. Barbara-Rose Collins, D, MI); *Congressional Record*, 102nd Cong., 1st sess., 6/4/1991, p. 3850 (Rep. Barbara Kennelly, D, CT); *Congressional Record*, 102nd Cong., 1st sess., 6/4/1991, p. 3888 (Rep. Major Owens, D, NY).

mere bureaucratic ineptitude, nor the result of simple resource constraints, but rather they understood them to result from their ideological opponents' control of the executive branch. Advocates of the bill identified as a key source of the EEOC's weakness the fact that during the Reagan-Bush I years, in their view, the executive branch had refused to use the agency to implement civil rights laws vigorously. Such denunciations, of course, were not new. They closely paralleled charges by Democrats leveled regularly during the near-continuous EEOC oversight hearings throughout the 1980s – charges that EEOC leadership was obstructing and sabotaging enforcement.

During committee hearings, in explaining the need for the bill's punitive damages provision to mobilize private enforcers, Representative Donald Payne of New Jersey remarked:

> [T]his agency which is the appointed body of administration—have you followed the last eight, nine or ten years and observed the people who have been nominated for civil rights enforcement? I think that the less you want to do to enforce civil rights the better your opportunities are to get nominated.[149]

"We had an EEOC during the Reagan years that did not function properly," complained Ohio Representative Mary Rose Oakar in her floor statement in support of the proposed enhanced private enforcement regime. "Ironically," she continued, "during the last decade we had a Civil Rights Commission that had a director and a majority who worked against civil rights."[150] Chairman Hawkins offered the same observation, arguing that the employment discrimination laws had to be amended to better mobilize private enforcers because the "EEOC and the other law enforcement agencies of the Administration are not

[149] House Hearings, vol. 2, 3/13/1990, p. 68.

[150] *Congressional Record*, 101st Cong., 2nd sess., 8/2/1990, p. 6791.

effective. They are led by individuals who do not even believe in their own law,"[151] and who do not "believe in civil rights."[152]

According to Hawkins, speaking as chair of the committee with oversight authority over the EEOC, oversight efforts had failed, and he regarded further attempts at oversight as futile. In his view, the agency was under the control of his ideological opponents and the committee had been unable to monitor and control it effectively. Said Hawkins in the House hearings:

> The Subcommittee on Employment Opportunities of the Committee on Education and Labor has gone through this charade for almost a decade. We have given up even investigating the EEOC because it is useless to investigate the agency because they obviously are not going to protect against the type of [discrimination] cases that we have heard this morning.[153]
> . . .
> I was surprised this morning that one of the corporate lawyers argued in favor of EEOC, defending EEOC. A rather strange case it seemed to me. It seemed that when they got control of EEOC, then the EEOC was okay because they had control of it.… In the last 10 years we have become so disgusted with what EEOC was doing that we discontinued monitoring it ….[154]

Hawkins' skepticism about congressional control of the EEOC was shared by interest groups testifying in favor of the Act, who believed that an enhanced private enforcement regime was a preferable way to resolve perceived enforcement deficiencies. For example, Ellen Vargyas of the National Women's Law Center urged, in her committee testimony, adoption of increased monetary damages in order to mobilize private enforcers

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[151] *Congressional Record*, 101st Cong., 2nd sess., 8/3/1990, p. 6749.

[152] House Hearings, vol. 2, 3/13/1990, p. 172.

[153] House Hearings, vol. 2, 3/13/1990, p. 51.

[154] House Hearings, vol. 2, 3/13/1990, p. 172.

in light of the EEOC's weakness, and the great difficulty congressional Democrats would have in controlling it.

> [T]he experience with [EEOC] conciliation shows an approximately 13% success rate. This is not, in my view, something to be proud of. … Now, we certainly believe that … this committee has been in the forefront of efforts to make the EEOC seem more responsive, to give it more resources to help it along. But the solutions of an improved EEOC and a damages remedy are by no means mutually exclusive. Unfortunately, the experience in trying to have a more successful EEOC has taught us that if, in fact, it can be achieved, it will not be achieved easily.[155]

Civil rights advocates believed that, with the agency was in the hands of their ideological adversaries, oversight by Congress was of limited value. Accordingly, they sought to mobilize private litigants and attorneys to carry out their policy goals.

Hawkins' observation that at least some advocates for business interests had become converts to bureaucratic regulation through the EEOC finds support in the record. They argued that the proposed changes to Title VII's private enforcement regime would radically alter the existing implementation scheme, tilting it toward one based upon private litigation and away from bureaucracy, regrettably undermining the power of the EEOC. Republicans, management lawyers, business interest groups, and conservative academics argued that bureaucratic regulation would be a more effective policy tool than economic incentives for self-help by private actors through litigation, and thus, to the extent that there was an under-enforcement problem, it should be addressed by giving the EEOC more money and power, thereby expanding its bureaucratic capacity.

[155] House Hearings on HR 4000, vol. 3, 4/25/1990, pps. 61-62.

Opponents of the goal of incentivizing more private litigation argued that the remedial scheme of Title VII, as originally enacted, represented a deliberate choice of an administratively-centered implementation approach, founded on voluntary conciliation, rather than one based primarily upon litigation. The modest economic damages available to plaintiffs encouraged them to sincerely participate in the search for a voluntary administrative resolution. To substantially increase the economic value of claims with compensatory and punitive damages provisions, to be awarded by juries, would markedly diminish plaintiffs' and their attorneys' willingness to submit voluntarily to resolutions supervised and crafted by the Commission. Instead, plaintiffs and their attorneys would "hold out for a bigger payday in federal court," as one management lawyer put it.[156] According to Illinois Republican Harris Fawell, the net result, deplorably, would be "gutting the EEOC."[157] A representative of the National Association of Manufacturers likewise testified in reference to the new damages provisions:

> Were this section enacted, any hope of conciliation and settlement through the EEOC would vanish…. [A]ttorneys would hold out to individuals the promise of six or seven figure judgments, with the accompanying six or seven figure legal fee. The purpose and function of the EEOC would be effectively terminated.[158]

[156] House Hearings, vol. 2, 3/13/1990, p. 41, 74 (testimony of Ralph Baxter, Jr., Partner, Orrick, Herrington, Sutcliffe, San Francisco, California).

[157] House Hearings, vol. 2, 3/20/1990, pps. 447-48.

[158] House Hearings, vol. 1, 2/27/1990, pps. 681-85, 688, 716 (testimony of Lawrence Lorber, on behalf of the National Association of Manufacturers, Washington, D.C.).

This lament about the untoward weakening of administrative power to regulate business was repeated by other conservative Republicans legislators,[159] representatives of the Bush administration,[160] business interest groups,[161] and management lawyers.[162]

Those most opposed to increasing incentives for private litigation offered an alternative solution. While there were legitimate concerns about inadequate enforcement by the EEOC, some Republicans and their constituents argued, rather than diminishing executive power and effectively transferring more implementation authority to private litigants, lawyers, and courts, the better solution would be to give the agency more power and money. House Republican Steve Bartlett of Texas suggested that the EEOC could be made a more effective enforcer if it were given power to administer an alternative dispute resolution mechanism with teeth, such as binding arbitration.[163] House Republican Moorhead of California advocated for an approach that, instead of increasing incentives for private litigation, "strengthens the existing settlement process under the Equal Employment Opportunity Commission."[164]

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[159] *Congressional Record*, 102nd Cong., 1st sess., 6/4/1991, p. 3847 (Rep. James Sensenbrenner, R, WI); Senate Hearings, 2/27/1990, p. 103 (Senator Orrin Hatch, R, UT).

[160] House Hearings, vol. 1, 2/20/1990, p. 360-363 (testimony of Deputy Attorney General Donald Ayer).

[161] House Hearings, vol. 2, pps. 221-22 (testimony of David Maddux, the National Retail Federation); House Hearings, vol. 3, 4/25/ 1990, pps. 16-17 (testimony of Edward Potter, the National Foundation for the Study of Equal Employment Policies).

[162] House Hearings, vol. 2, 3/13/1990, pps. 86, 100 (testimony of Victor Schachter, Partner, Schacter, Kristoff, et al., San Francisco, California); Senate Hearings, 3/1/1990, p. 294 (testimony of James Paras, Senior Partner, Morrison & Foerster, San Francisco, California); p. 346 (testimony of Cathie Shattuck, Partner, Epstein, Becker & Green, Washington, D.C., and former Commissioner of the EEOC).

[163] House Hearings, vol. 1, 2/27/1990, p. 639.

[164] *Congressional Record*, 102nd Cong., 1st sess., 6/4/1991, p. 3843.

Witnesses testifying on behalf of employer interests, acknowledging the agency's weakness as an enforcer, also repeatedly took the same position in hearings. "[S]trengthen the EEOC's existing administrative capabilities," and "provid[e] sufficient enforcement capability to the EEOC to assure prompt investigation of claims," counseled one management lawyer.[165] "[B]eef up the administration of the statute, [and] see to it that claimants and victims of discrimination have an agency they can turn to for relief, they have confidence in, and an agency that has what it takes to enforce this statute as it was intended," implored another.[166] If necessary, restructure the agency as so to strengthen it, advised an economist testifying against the new damages provisions.[167] Just don't generate more lawsuits, they all agreed.

The prospect of increasing the EEOC's administrative powers was considered while the bill was being drafted by civil rights groups and committee staff, and civil rights groups rejected it. When the Civil Rights Act of 1964 was being debated, liberals had advocated for a strong agency with cease-and-desist powers modeled on the National Labor Relations Board, with no private right of action, but in the course of negotiations to secure sufficient Republican support to overcome southern Democratic opposition, the EEOC's proposed cease-and-desist powers were eliminated and lawsuits were substituted

[165] House Hearings, vol. 2, 3/13/1990, p. 101, 105 (testimony of Victor Schachter, Partner, Schacter, Kristoff, et al., San Francisco, California).

[166] House Hearings, vol. 2, 3/13/1990, p. 33 (testimony of Ralph Baxter, Jr., Partner, Orrick, Herrington, Sutcliffe, San Francisco, California).

[167] House Hearings, vol. 1, 2/20/1990, p. 424 (testimony of Walter Oi, Professor, Department of Economics, University of Rochester, Rochester, New York).

as the primary enforcement vehicle.[168] Now that substantial Title VII amendments were underway, the possibility of giving the EEOC cease-and-desist powers came back onto the agenda.[169] However, when the Leadership Conference drafting committee was asked to consider this approach to addressing enforcement deficiencies, it "categorically rejected this proposal."[170] Civil rights advocates, who openly charged that agency leadership was actively subverting the agency's mission, were more dissatisfied than ever in an agency that had been headed for eights years by Clearance Thomas, who they regarded as an ideological enemy.[171] Enhancing the agency's formal powers to authoritatively rule on cases was not the solution they were looking for.

In the end, it was a minority of Republican and their constituents that advocated for addressing enforcement problems by shoring up the EEOC's administrative power and providing it more resources. It is significant and ironic, nevertheless, that in 1989-91

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[168] Daniel Rodriguez and Barry Weingast, "The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation," *University of Pennsylvania Law Review* 151(2003): 1417-1542; Tony Chen, *The Fifth Freedom: Jobs, Politics, and Civil Rights in the United States, 1941-72* (Princeton: Princeton University Press, forthcoming), Chapter 5.

[169] Clifford L. Alexander, "The EEOC Solution," *Washington Post*, 25 July 1989, A11; Bureau of National Affairs, "Omnibus Civil Rights Bill May Include Civil Rights Reform," *Daily Labor Report*, 18 December 1989, A1, A9-A10; Leroy D. Clark, "Insuring Equal Opportunity in Employment Through Law," *Rethinking Employment Policy*, ed. D. Lee Bauden and Felicity Skidmore (Washington, D.C.: Urban Institute Press, 1989), 173-203, 185-88; Govan, "Honorable Compromises and the Moral High Ground," 34-37, 47; Judicial Conference of the United States, Federal Courts Study Committee, *Tentative Recommendations for Public Comment* (1989), 49-51; Judicial Conference of the United States, Federal Courts Study Committee, *Report of the Federal Courts Study Committee* (1990), 60-62.

[170] Govan, "Honorable Compromises and the Moral High Ground," 34-35.

[171] Congressional Black Caucus Foundation, "In Opposition to Clarence Thomas," 234; Mary C. Dunlap, "Are We Integrated Yet? Pursuing the Complex Question of Values, Demographics and Personalities," *University of San Francisco Law Review* 29 (1995): 693-704, 695; Paul J. Spiegelman, "Remedies for Victim Group Isolation in the Workplace: Court Orders, Problem Solving and Affirmative Action in the Post-*Stotts* Era," *Howard Law Journal* 29 (1986): 191-258, 199 & n.35; correspondence between the author and Richard Seymour, 7/24/07.

the *only* voices speaking in favor of strengthening the EEOC were conservative Republicans and witnesses representing employer interests. Surely Hawkins was at least partly correct that "when they got control of EEOC" they regarded it as less of a potential menace, particularly given its resource starvation. Moreover, during the same period that administrative enforcement had abated during the Reagan/Thomas years, job discrimination lawsuits by private parties had grown considerably, plateauing in the mid 1980s at a level about 59 percent higher than during the Carter years. The prospect of triggering a new upward spiral in this litigation threat seemed worse, at least to some Republicans and employer interests, than strengthening the agency. They lost the fight, however. And the sharp rise in private enforcement that the bill's supporters promised and its opponents feared did, in fact, come to pass. The number of Title VII charges filed with the EEOC, which is a legal precondition to proceeding with litigation, experienced a long run increase of 58 percent following enactment of the CRA of 1991.[172]

CONCLUSION

In contrast with theories emphasizing litigation and "litigiousness" in the United States as a function of American political culture, the evidence presented here highlights the important role of legislative choices shaped by American state structures. Statutory litigation rates are to an important extent the product of the legislative choice to utilize private enforcement regimes as instruments of state intervention and capacity, and an important factor contributing to this choice is a separation of powers framework in which Congress and the president compete for control of the bureaucracy. One significant and

[172] Farhang, "Congressional Mobilization of Private Litigants."

broad implication of this is that ideological polarization between Congress and the executive not only diminishes executive power, which has been well established in the delegation literature, but also correspondingly enhances the power of courts, private litigants, and lawyers in the implementation of statutory policy.

The elucidation of this link between ideological polarization between Congress and the president and legislative enactment of private enforcement regimes also points toward a potential connection between the long-run historical patterns of polarization between the legislative and executive branches beginning in the late 1960s,[173] and the explosive growth of federal statutory litigation at the same time. While it is not clear whether there was a "litigation explosion" in general during this period,[174] it is abundantly clear that there was an explosion of privately filed federal statutory claims. The rate rose from 5 per 100,000 population in 1970, to 13 in 1980, to 21 in 1990, to 27 in 2000, more than quintupling over those three decades.[175] Moreover, this massive increase in federal statutory litigation did not mirror a more general comparable increase that included other forms of civil litigation.[176] Legislative-executive polarization has not heretofore been identified as a potential cause of this growth. Of course, the single case of the CRA of 1991 cannot support a general conclusion about the effects of polarization

[173] Gary Jacobson, "Partisan Polarization in Presidential Support: The Electoral Connection." *Congress and the Presidency* 30 (2003) 1-36.

[174] Marc Galanter, "The Day After the Litigation Explosion," *Maryland Law Review* 46 (1986) 3-39.

[175] Annual Report of the Administrative Office of the United States Courts, Table C-2, 1970-2000.

[176] Galanter, "The Day After the Litigation Explosion."

over the past four decades on congressional mobilization of private litigants. However, it points to a potentially fruitful line of further research on the topic.