EQUAL EMPLOYMENT OPPORTUNITY AND THE MOBILIZATION OF LAW

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During the 1960s and 1970s the American social movement for equal employment opportunity (EEO) succeeded in getting Congress and the courts to prohibit discrimination in employment on the basis of race, religion, national origin, and sex. We believe that the effectiveness of EEO laws depends not just upon their passage, however, but also upon their continuing successful mobilization. This is the first article to describe quantitatively the extent and outcomes of the mobilization of EEO laws at the appellate court level. It shows that mobilization is increasing; that the federal government and various interest groups are actively involved in the enforcement process; that much is at stake in many EEO cases; that alleged victims of discrimination win their court cases over half the time; and that reverse discrimination in EEO does not seem to be a serious problem.

I. INTRODUCTION

The struggle for equal employment opportunity (EEO) for blacks, Jews, other minorities, and women has been one of the more important social movements in recent American history. This struggle has been central to the civil rights and women's movements, and represents a test of the extent to which American democratic political institutions can be used to redistribute economic opportunities and income. Since becoming a subject of congressional debate in the 1940s, EEO has come to occupy an increasingly important place on the political agenda and in legal, historical, and social scientific analyses of discrimination, equality, and the role of government in American society.[1]

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[1] See, e.g., Bartholet, 1981-82; Becker, 1971; Beller, 1982; Blumrosen, 1971; Brown, 1982; Burstein, 1985a; Dorn, 1979; Feinberg, 1984; Fiss, 1971; Gamson and Modigliani, 1984; Glazer, 1978; Hill, 1977; Kluegel and Smith, 1982; Leonard, 1984; Lipset, 1979; Pole, 1978; Prager, 1982; Ragin *et al.*, 1984; Rothschild and Werden, 1982; Sowell, 1981; Stern *et al.*, 1976.

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Between the mid-1960s and the early 1970s, the movement for EEO achieved one of its major goals: the adoption as public policy, by Congress and the Supreme Court, of the principle of nondiscrimination in employment. Congress passed both EEO and equal pay legislation, and the Supreme Court reinterpreted older statutes so they could be used to attack racial discrimination in employment. The fight for EEO thus gained two potentially powerful allies: the federal courts and the executive branch of the federal government, including a new agency, the Equal Employment Opportunity Commission (EEOC), whose sole task was to bring about an end to employment discrimination.

These successes in Congress and the Supreme Court were just one step in the fight for EEO, however. American history has seen many social movements fail to reach their long-term goals despite initial successes in Congress and the courts, often because agencies established to help particular groups come to serve the interests of their opponents, the courts weaken or even reverse their previous stands, or the groups involved fail to follow up on their initial successes (see, e.g., Sabatier, 1975; Jones, 1969: chap. 2). Social scientists and legal scholars are increasingly concluding that laws are unlikely to bring about social change unless they are successfully mobilized, that is, unless their supporters are willing to invoke the laws, can obtain the resources to do so, and are able to have them interpreted favorably (Zemans, 1983; Jones, 1969: chap. 2; Sabatier, 1975; Handler, 1978; Scheingold, 1974; cf. Macaulay, 1979). Such mobilization does not guarantee that laws will be effective, but without it their impact is likely to be limited indeed.

In the fight for EEO, the mobilization of law takes place primarily through the federal courts. Although the executive branch spends hundreds of millions of dollars a year to enforce EEO legislation (U.S. OMB, 1982), the power of the relevant agencies is limited, and some of the laws used in EEO cases may be activated *only* through the courts. Especially important in this capacity are the appellate courts. Although only a small proportion of cases reach the appellate level, it is there that the leading cases are decided and the precedents that determine the path of future litigation are set (Howard, 1981: 7; Reynolds and Richman, 1981: 575; Priest, 1980: 402). Even scholars who disagree strongly on EEO policies will agree that the federal courts play a crucial role in defining what the EEO statutes mean and how they are to be enforced (Glazer, 1978: 216; Belton, 1981: 591).

Thus the outcome of the struggle for EEO is likely to de-

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pend, at least in part upon the ability of its proponents to mobilize, particularly through the courts, to gain allies, and to win their cases. Yet little is known about the extent to which this is happening. Only one social scientific study of EEO cases has been published, to our knowledge (Mills, 1981), and this was based on data of unknown reliability for only a small number of district court cases.[2] This article is therefore the first attempt to examine systematically the mobilization of EEO law through the appellate courts and to describe the outcomes of the cases.[3] The article focuses on five questions about the mobilization of EEO law:

1. To what extent is EEO law being mobilized? In the face of evidence both that employment discrimination remains widespread and that EEO laws can reduce its impact, continuing mobilization seems essential if employment discrimination is to be eliminated.[4]
2. To what extent do members of groups protected by EEO legislation receive help from interest groups and federal agencies? The protected groups are relatively disadvantaged, almost by definition, and their success in court is thus believed to depend upon help from organizations that have the resources necessary to pursue complex cases (Handler, 1978: chaps. 4-5; Belton, 1978; Mayhew, 1968: chap. 6).
3. What is at stake in EEO cases? Discrimination takes many forms, but it is systematic discrimination against large numbers of people and exclusion from upper-level jobs that have especially serious consequences for women and minority groups. It is thus important to know how often EEO lawsuits attack these two types of discrimination.
4. Who wins and who loses in EEO cases? EEO laws are not likely to be effective if plaintiffs seldom win.

[2] In fact, the social scientific analysis of appellate court decisions has begun only recently, and studies of large numbers of such decisions are few indeed for any area of law, not just EEO; see Kagan *et al.*, 1977; Friedman *et al.*, 1981; Cartwright, 1975; Baum *et al.*, 1981-82; Harris, 1985.

[3] There is of course a large legal literature on EEO, organized around the analysis of doctrine and leading cases. Such work, however, does not deal with many issues of interest to social scientists and rarely provides quantitative descriptions of large populations of cases. On the contrast between legal and social scientific studies of cases, see Cartwright, 1975; for some legal work on EEO, see Fiss, 1971; Hughes *et al.*, 1982; Howard-Martin, 1983; Belton, 1978; Warren, 1982; Maltz, 1983; Bartholet, 1982.

[4] For statistical evidence that discrimination remains a significant problem, see, e.g., Hirschman and Wong, 1984; Featherman and Hauser, 1976; for evidence that the public believes it is a significant problem, see Gallup Poll, 1978: 221, 1982: 23; for evidence of the impact of the EEO laws, see Beller, 1982; Brown, 1982; Burstein, 1985a.

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5. How often are the EEO laws mobilized by those claiming to have suffered from reverse discrimination, that is, discrimination against white (non-Hispanic) men? And are their claims upheld?

II. DATA

Since the passage of the Equal Pay Act of 1963 (29 U.S.C. § 206[d]) and the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) the United States courts of appeals and the Supreme Court have published decisions on over two thousand cases in which individuals claimed they had been discriminated against in employment on the basis of race, religion, national origin, or sex. Content analysis of these cases provides the data upon which most of the following analyses are based (some official government statistics are presented as well).[5] The cases were brought primarily under Title 7 of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, religion, national origin, or sex; the Equal Pay Act of 1963, which prohibits paying men and women different wages for the same work; the Civil Rights Acts of 1866 and 1871 (42 U.S.C. § 1981 and 42 U.S.C. § 1983, respectively), which prohibit racial discrimination in a variety of contexts; the United States Constitution; and the Railway Labor Act of 1926 (45 U.S.C. § 151-88) and the Labor Management Relations Act of 1947 (29 U.S.C. § 151 et seq.) which prohibit certain forms of racial discrimination by treating it as an unfair labor practice (for an inventory of the relevant laws, see Murphy *et al.*, 1979).

The unit of analysis in this study is the case, not the decision; some cases are heard by the courts more than once, but because the focus here is the ultimate court resolution (as of January 1, 1984, which was the cutoff date for data collection), the final decision in a case is the one that was counted. Cases were included if they were published in *Fair Employment Practice Cases* (Bureau of National Affairs, 1969-84); if they were either based on the Equal Pay Act of 1963 or decided after July 2, 1965 (the effective date of the primary EEO law, Title 7 of the Civil Rights Act of 1964); and if the report of the case was at least one page long (shorter opinions usually did not provide enough information about the case to be useful). The total number of cases analyzed was 2,083.

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[5] The data collection process was modeled to a considerable extent upon the approach developed by Kagan *et al.* in their study of state supreme court decisions (1977; Friedman *et al.*, 1981); they collected what is, so far as we know, the largest and most painstakingly constructed data set ever based on the analysis of judicial decisions.

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To maintain and evaluate the reliability of the data, many cases were coded by two or three coders; the average reliability of the coding across variables was acceptable by conventional standards. Further description of the data, data collection, and reliabilities may be found in the Appendix.

III. MOBILIZATION OF EEO LAWS

EEO legislation provides the opportunity to continue the fight against discrimination through federal administrative agencies and the courts. But it provides only an opportunity. As Zemans has written about civil law in general,

> the legal system . . . is structured so that by invoking the law, private citizens play a critical role in its enforcement. Whatever rights are conferred are thus contingent upon the factors that promote or inhibit decisions to mobilize the law. . . . Because of the contingent nature of public policies, who actually gets what from government is in significant part determined by the willingness and ability to invoke existing laws and to use the power of the state to demand compliance to benefit oneself (1983: 694, 695, 701; cf. Grossman *et al.*, 1982; McIntosh, 1983).

The contingent nature of law enforcement and its dependence upon private initiative is very evident in the EEO laws, which, as Macaulay has written about liberal reforms in general, "create individual rights without providing the means to carry them out" (1979: 161). When Title 7 of the Civil Rights Act of 1964 was adopted (hereinafter referred to as "Title 7"), the enforcement burden was placed almost entirely upon individuals; the agency created to administer the law—the EEOC—had no enforcement powers, and the power of the Justice Department to bring suit was very limited. The EEOC was given the power to bring suit on its own in 1972, but has never been involved in more than a small fraction of Title 7 suits. The Civil Rights Acts of 1866 and 1871 can be mobilized *only* by private lawsuits (these laws had essentially been nullified by the Supreme Court in the late nineteenth century, but were resurrected by the Court in 1968). Individuals play a major role in the enforcement of the other laws used in EEO cases as well (see Belton, 1978; Buckley, 1980).

How much mobilization of EEO laws should we expect? We do not know enough about the mobilization of law in any area to predict absolute *levels* of mobilization. Plausible arguments may be made, however, for expecting any one of at least three *patterns* of mobilization. First, mobilization might have begun at high levels and declined gradually in line with the in-

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cidence of discrimination, which was pervasive when Title 7 was adopted and has almost certainly declined gradually since (see, e.g., Hout, 1984; Hirschman and Wong, 1984; Dorn, 1979: Chap. 5; Lipset, 1979: xxxi--xxxii; Ratner, 1980). (A variation on this pattern would have been a slow start due to lack of knowledge about the laws, followed by a rapid increase as information was disseminated, and then a decline as discrimination declined.)

Other patterns are suggested by recent work on social movements and on the mobilization of law, which shows that the relationship between being treated badly and taking political or legal action is often tenuous (Stinchcombe, 1978: 40; Jenkins, 1983: 530; Zemans, 1983: 697). How people respond to the way they are treated often depends as much upon their perceptions of their rights and opportunities as upon the treatment itself. Thus, if those nominally protected by the EEO laws saw their use of those laws as difficult and risky, mobilization might have followed a second pattern, namely beginning at a low level and remaining there. In fact, individuals who are thinking of taking legal action must initiate a rather complex set of procedures, deal with an agency—the EEOC—known for its inefficiency, risk poisoning their relationships with an employer or union, and devote much time and effort to the case—all usually in the hope of gaining nothing more personally than the job, promotion, pay, or the like to which they were initially entitled (see Lehr, 1983; Wallace, 1973; Bennett and Covington, 1982). For many people finding another job or keeping quiet would seem a more rational decision. Experience with the EEO laws adopted in many non-Southern states before 1964 seems to have fit this pattern, for the state enforcement agencies heard relatively few cases and developed little law (Blumrosen, 1971: chap. 1; Bonfield, 1967; Sovern, 1966: chap. 3). (A variation on this pattern would have been initial mobilization at high levels followed by a rapid decline as those alleging discrimination realized the law would not be effective in providing a remedy.)

If there were little chance of a substantial monetary payoff in EEO cases, chances are there would be little mobilization and hence little change in employment practices, unless there were initially a group of ideologically committed potential plaintiffs and lawyers who had experienced some success (see Macaulay, 1979: 164-165). If there were such a group, mobilization could have followed a third pattern—beginning slowly and then increasing. That is, if the total amount of discrimination remained substantial, mobilization could increase as discrimina-

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Table 1. Mobilization of EEO Laws

Year	Complaints to EEOC[a]	Federal District Court Cases Commenced[b]	Appellate Cases Decided
1965	N.A.[c]	N.A.	1
1966	8,700	N.A.	8
1967	9,700	N.A.	6
1968	10,000	N.A.	11
1969	12,100	N.A.	18
1970	14,206	344	25
1971	22,900	757	64
1972	32,800	1,015	91
1973	48,900	1,787	88
1974	55,900	2,472	92
1975	71,000	3,931	134
1976	90,709	5,321	124
1977	57,562	5,931	185
1978	37,390	5,504	153
1979	35,279	5,477	150
1980	45,382	5,017	216
1981	47,447	6,245	254
1982	44,425	7,689	231
1983	N.A.	9,097	231
1984	N.A.	9,748	N.A.

[a] Data from U.S. EEOC, 1966–84, official "charge receipts" or "actionable charges" involving Title 7; accounting and processing procedures vary.

[b] Cases brought under Title 7 between 1970 and 1984; data not tabulated separately earlier. Data are for the 12-month period ending June 30 of year listed.

[c] N.A. = data not available.

tion declined, provided that a reasonable proportion of the victims could conclude that legal action might be fruitful.

No one knows the true incidence of employment discrimination, the costs and benefits accruing to those who pursue EEO complaints, or the thought processes of potential complainants. Data on the mobilization of EEO laws can, however, suggest which factors dominate in the aggregate. Table 1 presents data on the three best measures of mobilization available for most of the period since Title 7 was enacted: complaints to the EEOC under Title 7; the number of cases commenced under Title 7 in the federal district courts; and the number of appellate EEO cases decided under all the relevant laws (as described above).[6] Each measure indicates the level of mobilization at a different stage of the legal process.

[6] There are no adequate time series data available on the mobilization of laws other than Title 7, through either administrative agencies or the courts. At least three-fourths of the cases at the appellate level involve Title 7, however, and there is no reason to think that the restriction of two measures to

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All three measures tell similar stories; although the patterns are not completely uniform, all three forms of mobilization have increased fairly steadily and very substantially since the passage of Title 7. Complaints to the EEOC rose from 8,700 in 1966 to over 44,000 in 1982; district court cases increased by a factor of 28 from 1970 through 1984; and appellate cases rose from 69 the first six years Title 7 was in effect to 231 in 1983 alone. The most obvious exception to the overall pattern was the dramatic decline in complaints to the EEOC, which fell from over 90,000 in 1976 to just over 35,000 in 1979, before the upward trend recommenced. This decline was due to a drastic reorganization of the EEOC initiated under President Carter; among the changes instituted was a much more careful screening of complaints to weed out those of dubious merit (U.S. EEOC, 1978-79).[7]

Mobilization of EEO laws has increased relatively to other laws as well as absolutely. Title 7 cases, as a proportion of all district court civil cases, rose from an infinitesimal level in the 1960s to 3.4 percent in 1975 and 3.7 percent in 1984, despite a rapid growth of the total federal caseload during that time (Administrative Office, 1965-84). The increase in EEO cases was not simply a part of a growth in litigiousness concerning civil rights issues, either. Cases involving allegations of discrimination in public accommodations declined fairly steadily from 531 in 1976 (the first year they were tabulated separately; see ibid., 1976-84) to 296 in 1984, while cases involving alleged voting discrimination numbered 176 in 1976 and 175 in 1983.

Thus, if EEOC and court caseloads are any indication, employment discrimination remains a far more serious problem in the United States than the other issues that received so much attention at the height of the civil rights movement: the right to vote and equal access to public accommodations. Yet, it is a problem for which many people apparently believe the law has provided at least a partial solution. It seems unlikely that mobilization would increase if blacks, members of other minority groups, and women believed that the law was useless. The pat-

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Title 7 affects any conclusions. Some of the court cases are brought by the federal government rather than by private parties, but at the district level the proportion has never exceeded 5% for the years for which data are available (Administrative Office, 1976-84); appellate cases will be discussed below.

[7] This does not mean that the previous number of complaints exaggerated the true extent of discrimination, because no one knows how many victims of discrimination never officially complained; there is some reason to believe the proportion is high (see Miller and Sarat, 1980-81). All we know with certainty is that a time trend was displaced by a change in organizational procedures, after which the trend seems to have resumed its former course.

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tern of mobilization is consistent with the supposition that past mobilization has been successful enough to encourage further mobilization. We now turn to the next question: To what extent do individuals get help as they mobilize?

IV. MOBILIZATION BY FEDERAL AGENCIES AND INTEREST GROUPS

The EEO laws permit, and in some cases require, individuals to mobilize the law on their own behalf. This gives them considerable power to determine what direction EEO law enforcement will take, and leaves them less at the mercy of enforcement agencies than they would be if they could not bring suit on their own.[8] To encourage individual mobilization, congressional proponents of EEO laws, who expected most victims of discrimination to be relatively poor and unsophisticated, tried to see to it that the provisions of Title 7 would be made widely known and easy to invoke (see Blumrosen, 1971; U.S. EEOC, 1969a; U.S. Senate, 1972). They hoped that victims of discrimination would not be deterred from pursuing their rights by legal impediments or technicalities.

Both proponents and opponents of EEO legislation believed, however, that the struggle against employment discrimination would not be successful if it depended entirely upon individual initiative. EEO statutes are complex in some ways; EEO cases often require sophisticated analyses of employment processes, and individuals bringing suit lack the resources of their employers and unions. In many cases effective enforcement has been seen as depending upon federal agency involvement because only federal agencies have the resources necessary to confront major corporations and unions and to monitor complaints over time (Belton, 1978; Handler, 1978). Thus, the severe restrictions initially placed upon agency involvement in the enforcement of Title 7 were seen as a major defeat for those seeking effective EEO legislation, and the amendment of the law in 1972 to grant the EEOC broad power to bring suit was seen as an important victory (Blumrosen, 1971).

How much help might victims of discrimination expect from Congress (through the appropriations process) and the executive branch? Again, we cannot predict how much to expect, nor is there any objective way to decide whether any particular amount is "enough." One can imagine, however, the amount of

[8] Whether there should be a private right of action played a role in state and federal legislative debates on EEO laws, and is an important issue in debates on regulatory statutes in general; see Zemans, 1983; Blumrosen, 1971.

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Table 2. Federal Agency Involvement in EEO Enforcement

Year	EEOC Annual Appropriations (Millions of 1972 Dollars)[a]	In Appellate Cases on Side Claiming Discrimination[b] — As Party: Number of Cases	Percent	As Amicus: Number of Cases	Percent	In Appellate Cases, Side Not Indicated — As Amicus: Number of Cases	Percent
1965	0	0	0	0	0	0	0
1966	4.243	2	28.6	0	0	0	0
1967	6.633	1	16.7	0	0	0	0
1968	8.067	4	36.4	1	14.3	0	0
1969	10.507	7	41.2	2	28.6	0	0
1970	14.645	7	29.7	6	28.6	2	9.5
1971	16.859	18	29.0	8	13.1	7	11.5
1972	23.000	26	29.5	17	19.5	9	10.3
1973	30.274	18	21.7	7	8.4	13	15.7
1974	38.609	20	22.5	6	6.7	9	10.1
1975	44.667	21	16.7	10	7.9	16	12.7
1976	49.833	27	23.1	15	12.8	12	10.3
1977	50.475	29	15.8	13	7.1	23	12.6
1978	56.254	18	12.5	15	10.4	4	2.8
1979	65.370[c]	28	19.9	9	6.4	8	5.7
1980	69.604	31	15.1	21	10.3	9	4.4
1981	70.597	24	10.1	20	8.4	13	5.5
1982	67.869	21	9.5	14	6.3	9	4.1
1983	68.345	21	9.5	9	4.1	6	2.7
Total		323	16.3	173	8.8	140	7.1

[a] From U.S. EEOC, 1975–83, corrected by implicit price deflator for government purchases of goods and services.

[b] Reverse discrimination is excluded.

[c] Responsibility for enforcing Equal Pay Act and Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621–634) formerly under other agencies, was given to EEOC in 1979.

federal assistance provided falling into any one of several different patterns. It may have begun at a high level and then declined, in line with declines in the pervasiveness of discrimination. It may have begun relatively low and then risen because of either the rising volume of complaints or the tendency of federal expenditures and other activities to grow incrementally. Or it may have gone up and down with changes in administration, falling with the election of Republicans, who are allegedly less sympathetic to the plight of minorities than Democrats are (Carmines and Stimson, 1981), and rising with the election of Democrats.

In fact, federal expenditures on EEO enforcement rose steadily from the passage of Title 7 until the Reagan administration came into office at the beginning of 1981. Table 2 shows that appropriations for the EEOC increased from just over four million dollars in fiscal year 1966 (calculated in constant 1972 dollars) to over seventy and a half million dollars in fiscal 1981, before starting to decline slightly. Figures calculated during

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the 1970s by the Office of Management and Budget for total federal expenditures on EEO enforcement showed a similar pattern, rising steadily from 64.8 million dollars in 1971 (again, in 1972 dollars) to 211.6 million dollars in 1979 (which was 345.6 million in 1979 dollars; U.S. OMB, 1971-82).

Federal agency involvement in EEO court cases manifests a somewhat different and more complex pattern. The *number* of appellate cases in which the federal government was a party or filed an amicus brief on behalf of the side claiming discrimination rose for a time, along with the total number of cases, but has now leveled off or begun to fall. The *proportion* of cases in which federal agencies were involved has fallen slowly but fairly steadily (r of involvement as party with time equals $-.16$, r of involvement as amicus with time equals $-.08$).[9]

One consistent attribute of federal agency involvement has been its greater likelihood in cases that are arguably more important. Thus, for example, the federal government has been a plaintiff in less than 5.5 percent of Title 7 cases commenced at the district level every year since 1977 (the first year such data are available). Federal agencies have been on the side claiming discrimination in 15 percent of cases decided in the federal courts of appeals, however, and in 49.6 percent of the cases decided by the Supreme Court (courts of appeals and Supreme Court cases are combined in Table 2). Similarly, federal agencies have filed amicus briefs in 9.9 percent of the cases decided by courts of appeals and 21.2 percent of those decided by the Supreme Court, and have been involved in 7 percent of the cases involving only one or a few individuals but in 26 percent of class actions. In addition, federal agencies have been involved, as party or amicus, in many of the cases seen as "leading cases" by legal scholars, such as *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); and *Teamsters v. United States*, 431 U.S. 324 (1977).

Federal agencies are not, of course, the only potential source of help for those claiming they have suffered discrimination. The involvement of interest groups has become common in American appellate litigation, especially when issues of broad public interest are at stake, and in fact the long campaign waged by the NAACP against racial discrimination provided a model for participation by other groups (O'Connor and Epstein,

[9] Reverse discrimination cases are not included in Table 2 or subsequent tables until the section in which they are dealt with specifically; there were 91 such cases. The federal government filed amicus briefs on the side *opposing* the claim of discrimination in 12 cases, or .6% of the total.

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1981-82, 1982; Krislov, 1963). Although there are many ways groups can participate in legal cases, such as raising money to pay legal fees, doing research, and providing lawyers, the best known and most easily measured is participation as *amici curiae*, which has become quite common in noncommercial cases, especially at the Supreme Court level.

There has been a significant amount of involvement by interest groups filing amicus briefs in EEO cases, although not as much as by the federal government. Amicus briefs were filed by nonfederal organizations (including some state and local governments) in 13.5 percent of appellate EEO cases.

There are two differences between the involvement patterns of federal and nonfederal amici, and two similarities. The first difference is that nonfederal amici, unlike federal agencies, have been involved on both sides of EEO cases. Nonfederal amicus briefs were filed on behalf of the side claiming discrimination in 7.3 percent of the cases and on the side opposing the claim in 4.8 percent.[10] Most assistance goes to those believing themselves the victims of discrimination, but the defendants in EEO suits sometimes receive help as well. Second, the proportion of cases involving nonfederal third parties has not declined. Interest groups are not involved in as many EEO cases as federal agencies, but their involvement has been more constant.

The first of the two similarities between federal and nonfederal amici is that neither federal agencies nor other organizations help most of those involved in EEO suits, even at the appellate level. Second, both are most likely to help those involved in cases that are arguably more important. Just 10.6 percent of the cases heard by the court of appeals involve nonfederal amici, for example, while 83.5 percent of the cases decided by the Supreme Court do. Similarly, 9.2 percent of the cases involving one or a few individuals involve nonfederal amici, whereas 18.2 percent of class actions see such involvement. When more is at stake, groups not party to the suit are more likely to intervene.

In sum, federal appropriations to enforce the EEO laws increased steadily until recently, and probably depended more upon trends in complaints and the federal budget than upon anything else. Federal and interest group assistance to EEO litigants at the appellate level has been frequent enough to be rel-

[10] Briefs were filed in an additional 4% of the cases, but the opinions do not indicate on which side, if any; the figures total more than 13.5% because some cases involved briefs on both sides, or one on one side and another on a side not indicated.

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evant to those assessing the resources available to litigants, especially in the more important cases, but most of those involved in such cases are clearly proceeding on their own.

V. WHAT IS AT STAKE IN EEO CASES?

When Title 7 was adopted, the prototypical EEO case was probably expected to involve an individual (or perhaps a few) seeking a blue-collar job. The expectation that complaints would involve small numbers of individuals stemmed from conventional thinking and from history; conventional American beliefs about individual responsibility for labor market outcomes were reflected in the congressional debate on EEO, and state Fair Employment Practices Commissions had indeed apparently dealt mostly with complaints by individuals (Blumrosen, 1971; Sovern, 1966; Kluegel and Smith, 1981). The expectation that complaints would focus on blue-collar jobs stemmed from the fact that it was for such jobs that the greatest number of blacks were qualified, but were prevented by discrimination from acquiring (Bartholet, 1982: 949).

Whether the case outlined above indeed was, or is, prototypical has implications for the impact of EEO legislation. Since the passage of Title 7, it has become increasingly obvious that discrimination is often directed systematically at group members as a class and that the efficient way to attack discrimination is therefore class action (see Schlei and Grossman, 1983: chap. 34; cf. Warren, 1982). Resolving complaints of discrimination one by one is so costly and inefficient that it is not likely to lead to much change in the labor market. In addition, the incomes and long-term opportunities of blacks, members of other minority groups, and women depend to a considerable degree upon their access to upper-level jobs having relative autonomy and power (Kluegel, 1978; Wolf and Fligstein, 1979). Thus, whatever the prototypical case might be, cases involving relatively large numbers of people and upper-level jobs are likely to be especially important for blacks, other minorities, and women over the long term.

Legal scholars seem to think that the proportion of cases in which upper-level jobs are at stake has been increasing (Bartholet, 1982: 947–949; cf. Maltz, 1983; Howard-Martin, 1983), and that class actions are common (perhaps too common; see Warren, 1982). In fact, however, nobody has examined trends in the proportion of EEO cases in which upper-level jobs or relatively large numbers of jobs are at stake.

For cases at the appellate level, trends in three measures of

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case importance are presented in Table 3: the percentage of cases that are class actions, the percentage involving upper-level (i.e., professional, technical, and managerial) white-collar jobs, and the percentage involving supervisory positions. Two characteristics of the data stand out. First, the proportion of cases involving class action or upper-level jobs is substantial. Almost half the cases decided by the appellate courts have been class actions, almost a third have involved upper-level jobs, and a sixth have involved supervisory positions; 66.8 percent have involved at least one of the three. Second, these proportions have not changed over time; whatever kind of job the typical woman, black, or member of another minority group might find herself or himself in, much of the conflict over EEO involved upper-level jobs right from the start.[11]

Had most EEO cases involved only a few people seeking lower-level jobs, their potential for improving the economic opportunities of the protected groups would have been quite limited. Because a substantial majority of cases involve class actions, upper-level jobs, or supervisory jobs, however, EEO decisions have the potential to affect many members of the protected groups and to improve their access to all types of jobs. This potential means little unless it is realized, of course, and one critical aspect of its realization is the outcome of the cases: Who wins and who loses?

VI. WHO WINS AND WHO LOSES IN EEO CASES?

One of the most important questions about EEO cases is what proportion of plaintiffs win.[12] The EEO laws will have little impact unless members of protected groups have a good chance of success when they get to court. Yet we do not know how often they do win, and thus find ourselves in a situation in

[11] The extent to which the case mix differs at the district court level is unknown. There is a selection effect for class actions as cases move up the court hierarchy from the courts of appeals to the Supreme Court—45.4% of court of appeals EEO cases have been class actions, compared to 67.9% of Supreme Court EEO cases. There is, however, no difference between the courts of appeals and the Supreme Court in the proportion of EEO cases involving upper-level or supervisory positions.

[12] Because the concern here is with the use of the law by those who believe discrimination has occurred, the parties to the cases are described in terms appropriate to the original trial court rather than to the appellate court—as the plaintiff making a claim of discrimination and as the defendant opposing the claim—rather than as the appellant who brings the appeal and the appellee who opposes it. Categorizing the parties as appellant and appellee would cause us to lose sight of the claim of discrimination and shift attention to the claim, which is not especially relevant here, that the lower court had erred.

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Table 3. Number and Type of Jobs at Stake in EEO Cases

	Decisions Involving					
	Class Action[a]		Upper-Level Jobs[b]		Supervisory Jobs[c]	
Year	Percent	Number[d]	Percent	Number	Percent	Number
1965	100.0	1	0	1	0	1
1966	42.9	7	71.4	7	0	5
1967	20.0	5	75.0	4	33.3	3
1968	45.5	11	44.4	9	0	9
1969	52.9	17	30.8	13	16.7	12
1970	45.8	24	15.0	20	12.5	16
1971	53.2	62	30.6	49	9.5	42
1972	60.7	84	26.4	72	11.0	73
1973	63.0	81	24.6	65	12.7	55
1974	58.1	86	20.8	72	10.8	65
1975	54.0	124	30.2	106	13.8	94
1976	51.3	115	24.5	94	23.2	82
1977	48.6	183	29.5	150	12.7	142
1978	48.6	140	30.3	122	14.0	114
1979	43.8	137	38.7	106	14.9	101
1980	43.0	200	29.7	172	12.7	158
1981	33.5	239	32.7	205	19.3	171
1982	41.7	218	27.8	180	17.8	169
1983	40.6	217	31.3	179	15.3	170
Total	46.3	1,951	29.8	1,626	14.9	1,482

[a] Defined as class in a class action, all members of a bargaining unit, all potential victims in "pattern or practice" suit, or other very large numbers; not necessarily a class action in technical legal terms.

[b] Managerial, technical, and professional jobs, as defined by United States Department of Commerce Standard Occupational Classification, are clearly the focus of the suit; this category does not include class actions in which only some jobs at stake are white collar.

[c] Supervisory positions (white collar or blue collar) are very clearly the focus of the suit; this category does not include class actions in which probably only a small fraction of the jobs at stake are supervisory.

[d] Number upon which percentage is based; number varies from one variable to another due to missing data.

which estimates by respected scholars range from considerably more than half the time to considerably less.[13]

The highest estimates are implied in the work of Nathan Glazer (1978) and others (see, e.g., *Fortune*, "It's the Thought that Matters," June 1, 1981: 26–28) who believe that courts are too sympathetic to claims of discrimination. If the courts are

[13] The only quantitative study of EEO cases we have been able to find concludes that women win Title 7 cases in selected district courts 32% of the time (Mills, 1981). Studies of cases dealing with all types of discrimination conclude that blacks and women win just over half the time (in discrimination cases at the district level, according to Stidham *et al.*, 1983), and that women win more than half the time (58.8%) but blacks less (41.5%; in cases decided by the Supreme Court, according to O'Connor and Epstein, 1983). All these studies are based on small numbers of cases and say almost nothing about how the data were collected or about their reliability.

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that sympathetic, as Glazer and others argue, it must be easy to win EEO cases, and plaintiffs must win most of the time.

This suggestion conflicts, however, with three arguments that hold that plaintiffs will win EEO cases only infrequently. First, various "stratification" or "conflict" approaches to the study of politics and law predict that the relatively poor and disadvantaged will lose most of their encounters with the richer and more advantaged; black manual workers, for example, would be expected to lose most of their legal encounters with major corporations (see, e.g., Chambliss and Seidman, 1982; cf. Black, 1976: chaps. 2, 4; for some data, see Wanner, 1975). Second, although the authors of Title 7 sincerely wanted to end discrimination, they wanted to do so without interfering very much in business decision making and without penalizing people who had been the beneficiaries of discrimination (such as less qualified whites hired instead of more qualified blacks). The result of these concerns was a law full of ambiguities, internal contradictions, and limited power, solicitous of employers and unlikely to require or even permit radical changes in traditional ways of doing business (Fiss, 1971; Belton, 1978; Bell, 1977; Rothschild and Werden, 1982; Bennett and Covington, 1982). Third, American legal institutions and procedures make it very difficult to redistribute resources. In one of the best known articles in the sociology of law, Galanter showed, as the title indicates, "Why the 'Haves' Come Out Ahead" (1974). He suggested that it is difficult to use litigation to redistribute resources because in litigation the targets of the law can enlist resources, including greater information, expertise, and organization, that will help ensure their victory. The implications of Galanter's argument are especially serious for EEO, because EEO laws are so explicitly intended to redistribute opportunities and income from the "haves" to the "have-nots."

In opposition to arguments that EEO plaintiffs win considerably more or less than half their cases is a body of work that, after considering the costly and interactive nature of litigation, concludes that plaintiffs will win approximately half their cases (see Galanter, 1974; Priest, 1980; Priest and Klein, 1984). EEO suits are extremely expensive and time-consuming; even victorious plaintiffs are not compensated for their time, trouble, anxiety, or fear of retaliation by employers, and those who lose are likely to be left with large legal bills (Steel, 1983; Norton, 1981; Abel, 1981; Parmerlee *et al.*, 1982; Crowe, 1978). Thus, individuals who believe they have been discriminated against will probably weigh the likely results of legal action carefully before proceeding; those who even think seriously about bring-

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ing suit, as few in fact do (see Miller and Sarat, 1980–81), would probably be dissuaded if they thought they were likely to lose. Should certain types of EEO plaintiffs lose regularly (those seeking upper-level jobs, for example), other similar plaintiffs would avoid going to court unless they had unusually strong cases. Over time, therefore, the proportion of cases won by all types of individuals would approach an equilibrium level at which, on the average, the costs of bringing cases were matched by the benefits gained by plaintiffs.

What would this equilibrium level be? Potential plaintiffs who are quite sure they will lose are likely to give up or to settle out of court; potential defendants who are quite sure they will lose will similarly try to settle out of court, and it will usually be in the plaintiff's interest to accept such a settlement (Galanter, 1974; Priest, 1980). The cases fought out to a judicial decision, therefore, are likely to be those about which there is the greatest uncertainty as to outcome. Over time one would expect such cases to be decided in favor of plaintiffs roughly half the time and for defendants, the other half; large departures from such a division would cause cases whose characteristics are associated with losses to be brought less frequently, with the result that in the long run plaintiffs and defendants would each win their cases about half the time. Plaintiffs might win more than half the time under certain circumstances, including those in which they pursue cases as a matter of principle and have some of their costs subsidized (by interest groups or the federal government, for example), as is surely the situation in some EEO cases. The degree of departure from winning half the time is difficult to predict, however, especially since some circumstances may work in favor of defendants as well (Priest, 1980). The best prediction, from this general perspective, remains a fifty-fifty split.

Thus, plaintiffs in EEO cases are variously expected to win either a large proportion of their cases, a small proportion, or about half. How often do they actually win? To answer this question, we have to confront a serious measurement problem: Just what does it mean to "win a case"? Disputes are rarely either/or matters in which one side simply wins whatever it has demanded and the other side loses. Plaintiffs can win on some issues of law, for example, but lose on others; they can win on points of law but receive much less than they asked for in damages; or they may get a favorable decision on a point of law at the appellate level but lose on the facts when the case is remanded to the district court.

Unfortunately, the problems involved in measuring success

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Table 4. Outcomes of EEO Cases

Year	Victory for Plaintiff (Percent): Final Victory, Full Remedy	Victory for Plaintiff (Percent): Final Victory, Partial Remedy	Victory for Plaintiff (Percent): Nonfinal Victory	Victory for Defendants (Percent): Final Victory	Victory for Defendants (Percent): Nonfinal Victory	Victory for Neither Side (Percent)	*N*
1965	0	0	0	100.0	0	0	1
1966	71.4	0	14.3	14.3	0	0	7
1967	33.3	0	16.7	50.0	0	0	6
1968	18.2	9.1	54.5	18.2	0	0	11
1969	17.6	0	58.8	17.6	0	5.9	17
1970	8.3	4.2	54.2	33.3	0	0	24
1971	21.0	1.6	41.9	30.6	3.2	1.6	62
1972	26.1	9.1	36.4	22.7	1.1	4.5	88
1973	20.5	9.6	34.9	21.7	2.4	10.8	83
1974	20.2	6.7	38.2	25.8	7.9	1.1	89
1975	19.0	12.7	32.5	28.6	4.0	3.2	126
1976	14.7	8.6	39.7	27.6	7.8	1.7	116
1977	14.2	4.9	33.3	34.4	6.0	7.1	183
1978	13.3	4.9	23.1	44.8	9.1	4.9	143
1979	10.8	7.9	26.6	44.6	4.3	5.8	139
1980	18.6	14.7	30.4	32.8	2.0	1.5	204
1981	16.5	7.2	36.3	36.8	3.4	0	237
1982	15.0	6.4	35.0	35.5	6.8	1.4	220
1983	16.0	5.5	32.0	38.8	6.4	1.4	219
Total	16.8	7.6	33.7	34.0	4.9	3.0	
N	331	151	665	672	97	59	1,975

in a law suit have seldom been dealt with explicitly in the theoretical and empirical works cited above, except for the study by Priest and Klein (1984; for a partial treatment of the issue, cf. Wanner, 1975). They discuss the severity of the measurement problem and the lack of prior work in the subject before deciding that they must develop their own, essentially ad hoc measures of case outcomes for the areas of law they deal with. We must do the same.

In this study the EEO cases were categorized with respect to the original claim of discrimination on the basis of three important distinctions among outcomes. First, of course, was the distinction between victory and defeat for the side claiming discrimination. Second, was the distinction between "final" and "nonfinal" decisions. In a majority of cases (58.4 percent in these data), the court clearly indicated which side won the case, even if some details were left to the lower court to decide. These were "final" decisions. Often, however, the court decided some important issues but then remanded the case to the district court to determine the victor in light of the appellate ruling. Most of the time the appellate opinion obviously favored one side, but enough issues remained pending to preclude

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a definite prediction as to who would ultimately win; these were considered "nonfinal" decisions. The third distinction was between final decisions in which victorious plaintiffs received most of what they wanted, and those in which they won but got much less.[14] The three distinctions led to six categories of outcome: final judgment for the side alleging discrimination substantially as sought; final judgment for the side alleging discrimination substantially less than sought; nonfinal decision favoring the side alleging discrimination; final judgment for the side opposing the claim; nonfinal decision for the side opposing the claim; and nonfinal decision favoring neither side.

Determining the proportion of cases that plaintiffs win is very much a matter of how "winning" is defined, as Table 4 shows. Using a very strict definition—only final victory for plaintiff, with remedy substantially as sought—the proportion of victories is small; only 16.8 percent of cases have such an outcome. Using a more generous definition of victory, however, produces a very different conclusion: if victory is defined as any victory—final or nonfinal, with full or partial remedy—those alleging discrimination were victorious in 58.1 percent of their cases. Alternatively, if one tabulates only final decisions, those alleging discrimination win 41.8 percent of such cases, if we include both full and partial victories.

Which of these figures is "best?" There is now no way to answer this question definitively. We argue, however, for focusing on the most inclusive definition of victory, including both full and partial remedies, final and nonfinal victories. The largest category of plaintiff victories is nonfinal judgments, and it would be misleading not to count them. From the viewpoint of a purely self-interested plaintiff, only the final decision would matter; he or she would care about the ultimate resolution of the grievance but not about intermediate legal steps. From the viewpoint of those concerned about the development of EEO law, however, the situation would be different (Galanter, 1974; Priest, 1980). Interest groups, federal agencies, and employers and unions who will have to deal with EEO on a regular basis, as well as individual plaintiffs who are pursuing their cases for reasons of principle as well as economic self-interest, will all be very concerned about the impact of appellate court decisions on future cases. They are interested in the development of precedent and doctrine as well as the specific

[14] The degree of victory is thus defined in terms of plaintiff's explicit claims, as reported in the decision. There is obviously no way to ascertain the extent to which such claims might have been exaggerated in order to stake out a bargaining position.

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case. For them, and for scholars concerned about the development of the law, whether an appellate decision is "final" may be a matter of indifference. They will care instead about the precedents being established in the case and their impact on the continuing struggle over EEO. From such a viewpoint, all decisions are significant. In addition, any victory, even a modest one, is still a victory and not a defeat. In sum, it is important to be aware of the distinctions among cases, but it seems most sensible, nevertheless, to treat all plaintiff victories as exactly that.

Viewed this way, plaintiffs win somewhat more than half the time. There is no strong linear trend proportion of victories (the correlation of the likelihood of victory with time is −.08), and, if past trends continued indefinitely, the proportion of victories would eventually reach equilibrium at 62.2 percent.[15] Thus, plaintiffs seem to be doing better than most theoretical work would lead us to expect, and there is no strong evidence that today, over twenty years after the adoption of Title 7, the appellate courts are turning against EEO plaintiffs, even once the first generation of so-called easy cases involving blatant discrimination have been won (on this point see Stidham *et al.*, 1983; O'Connor and Epstein, 1983).

Plaintiffs win a majority of their cases, but that does not mean that they are equally likely to win all types of suits. Earlier research suggests two factors that may influence the likelihood of winning EEO cases. First, Galanter has argued (1974) that "have-nots" (who would be the plaintiffs in EEO cases) may overcome some of the disadvantages they face in disputes with "haves" by organizing in order to coordinate cases, develop long-term strategies, and acquire high quality legal services. They can do this by acquiring what Galanter calls "interest group sponsors," such as the NAACP, or by getting the government to act on their behalf. In addition, they can bring cases as class actions, which are more expensive to settle than individual actions (see also Hazard, 1965; Handler, 1978; Belton, 1978;

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[15] This figure is derived by analyzing the annual percentage of victories to determine whether it is tending, over time, to a stable equilibrium. This is done by calculating the coefficients of the equation $y_t = a_1 + b_1 y_{t-1} + e$, where y_t is the percentage of cases won by plaintiffs in a given year, y_{t-1} is the percentage won the year before, a_1 is the constant, and e is the error term. For the total percentage of victories, a_1 is 72.12, b_1 is − .16, unadjusted R^2 is .07, adjusted R^2 is .007, and $F = 1.12$. The trend in y_t is calculated as $a_1/(1 - b_1)$ and converges to equilibrium if b_1 is less than 1 but greater than −1. If, in order to mitigate the impact of the fact that very few cases were decided each of the first few years, we combine the cases for 1966 to 1970 and recalculate, the equilibrium level is 58.4%. For the basis and uses of this approach, see Goldberg, 1958; Land and Felson, 1976; Burstein, 1979.

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cf. Krislov, 1963; O'Connor and Epstein, 1981–82, 1982; Wanner, 1975). Thus, it is plausible to hypothesize that EEO plaintiffs aided by private or government *amici curiae* are more likely to win than other plaintiffs, and that the government itself is more likely to win than other plaintiffs.

Second, Bartholet has argued that the type of job being sought affects the likelihood of winning EEO cases (1982). She claims that those seeking upper-level positions are less likely to win than those seeking lower-level positions because of the threat the former represent to those in power, including those deciding their fate (cf. Maltz, 1983; Howard-Martin, 1983). Her contention gains plausibility because it is consistent with the more general argument of Lieberson (1980) and others about resistance to minority claims; namely that the magnitude of the resistance increases when more is at stake.

Relationships between case characteristics and the likelihood of victory by the side claiming discrimination are presented in Table 5. We would not want to interpret the relationships in causal terms because we do not know enough about the dynamics of the cases. For example, the federal government may win its cases more often than other parties either because its greater resources make a difference or because it chooses to get involved only in cases it has a high probability of winning, or both (see Priest, 1980; Priest and Klein, 1984). Nevertheless, the data make some hypotheses about EEO cases less plausible than others.

The data show that our measures of resources available to the parties have a bearing on the likelihood of victory by the plaintiffs. Having a federal agency as party to a case is associated with an 18 percent higher chance of victory, and federal agency participation as amicus makes a difference as well. Having a nonfederal amicus is also associated with an increased chance of victory, but the difference is less than when a federal agency is involved. It is worth noting that the side claiming discrimination does especially well when there is a nonfederal amicus on the *other* side. Whether this means that amici who side with alleged discriminators have a certain flair for picking lost causes is worth considering; it also weakens the argument that extra resources appear to help plaintiffs only because interest groups gravitate to cases that seem easy to win. Victory for the plaintiffs is also much more likely when there are multiple claimants than when there is only one. These findings do not demonstrate that the "have-nots" can overcome their disadvantages by acquiring more resources, but the consistency of

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Table 5. Percent of Selected Types of EEO Cases Won by Plaintiffs

	All Victories	Final Victory, Full Remedy	Final Victory, Partial Remedy	Nonfinal Victory	N
Federal Agency as Party					
Yes	73.3	25.5	6.5	41.3	322
No	55.1	15.1	7.8	32.2	1,651
Federal Agency as Amicus					
On side claiming discrimination	69.0	17.9	7.1	44.0	168
On side opposing claim	62.5	25.0	0	37.5	8
Side not indicated, or both	67.6	17.6	11.3	38.7	142
No	55.9	16.6	7.5	31.9	1,634
Nonfederal Amicus					
On side claiming discrimination	60.7	28.1	5.6	27.0	93
On side opposing claim	65.9	31.7	22.0	12.2	43
Side not indicated, or both	62.7	19.0	10.3	33.4	126
No	57.2	15.7	7.3	34.2	1,689
At Stake					
One job	48.8	10.4	5.2	33.1	921
A few jobs	63.5	24.6	6.3	32.5	126
Class action	66.7	22.6	10.5	33.6	895
Upper-level white-collar jobs	52.1	18.0	6.0	28.1	484
Other white-collar jobs	52.3	13.5	5.5	33.3	237
Other jobs	60.0	21.9	10.5	27.6	590
Most or all jobs in organization	67.6	18.3	10.8	38.6	306
Supervisory jobs	50.2	13.6	8.1	28.5	221
Nonsupervisory jobs	52.8	17.9	7.0	27.9	670
Most or all jobs in organization	68.2	23.9	11.5	32.8	582

the findings makes it more difficult to reject such an hypothesis.

The data on the types of jobs at stake, in contrast, are less clear-cut. Plaintiffs in cases involving upper-level white-collar jobs are no less likely to win than plaintiffs in cases involving lower-level white-collar jobs, while both are somewhat less likely to win than those involved in cases concerning blue-collar, service, or agricultural jobs. Whether a case concerns supervisory positions (white-collar or blue-collar) also makes little difference to the likelihood of victory. These findings do not necessarily mean that the courts apply the same standards to suits involving upper- and lower-level jobs; potential plaintiffs interested in upper-level jobs may sense the courts' hostil-

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ity and never even bring suit. However, it does mean that Bartholet and others cannot simply continue to assume that higher status plaintiffs do poorly, but must engage in a more sophisticated search for evidence that this is the case.

What does "victory" in an EEO case imply? The possibility of penalizing discriminators and compensating victims exists only in cases in which there have been final decisions favoring the side alleging discrimination—a total of 24.4 percent of the cases. The penalties that may be imposed under EEO laws are of two types: those in which discriminators must compensate the victims, typically by providing back pay or jobs, and those in which they are required to change their employment practices (or, in the case of unions, their membership or referral practices). Both types of penalties are important. If discriminators were required only to stop discriminating and did not have to compensate victims for past wrongdoing, they would have no incentive to stop discriminating until they lost a case in court, and potential plaintiffs would lack material incentives to bring cases. If discriminators were required only to compensate victims, however, discriminatory systems could be maintained so long as the number of victims who successfully complained remained small and the monetary cost of discriminating thus remained low. Pro-EEO groups tend to consider as their greatest victories those cases in which major employers are required not only to compensate victims, but also to change their employment practices (see, e.g., Wallace, 1978).

It is impractical, if not impossible, to discover exactly what penalties have been imposed in large numbers of EEO cases. It is possible, however, to ascertain how often general types of penalties have been imposed. In the 429 appellate cases in which there have been penalties, 51.7 percent involved only compensation to victims, such as money, new or better jobs, or changes in working conditions; 16.3 percent required only changes in practices; and the rest (31.9 percent) required both changes in practices and compensation to victims.[16] How we should interpret both the number and type of these penalties is difficult to say in the absence of strong theories and comparable data on other areas of law. With courts requiring changes in practices almost half the time, however, it is clear that they have come to see discrimination as often being systematic, rooted in routine business practices, and not as the product of isolated actions by prejudiced individuals.

[16] In some cases no real penalty was involved because the matter at issue was procedural; in some cases the penalty could not be ascertained.

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VII. REVERSE DISCRIMINATION AND EEO

In the mid-1980s, most Americans support the principle of equal employment opportunity (Burstein, 1985a). A much more controversial issue is the enforcement of EEO legislation. Many people believe that such enforcement has often gone beyond seeing to it that employers and unions do not discriminate; enforcement is seen as having moved on to race- and sex-conscious affirmative action programs, and then to the practice of reverse discrimination in which white (non-Hispanic) males are discriminated against so that jobs may be made available to less-qualified women and members of minority groups (on this controversy, see Burstein, 1985b; Smith and Kluegel, 1984; Fullinwider, 1980). The definition and extent of reverse discrimination have become the subject of intense debate. The Reagan administration has stated upon many occasions that the principle of nondiscrimination is paramount, that reverse discrimination has crept into some EEO enforcement procedures, and that the elimination of such reverse discrimination has a high priority (see, e.g., U.S. OMB, 1985; Lewis, 1985; Pear, 1985).

Although concern about reverse discrimination is widespread, little evidence about its extent seems to be available. We have not been able to find any large-scale national surveys that provide data on what proportion of white men believe they have personally suffered from reverse discrimination. A few small-scale studies show that some white men believe they have been discriminated against, but the proportions are always substantially smaller than the proportion of women and blacks who consider themselves wronged (see Burstein, 1985b). Apparently, no more than one study of the national labor force provides statistical evidence that women or members of minority groups are being paid more than their qualifications would seem to merit.[17]

One way to gauge the extent of reverse discrimination is to see how often the appellate courts decide cases in which a claim of reverse discrimination has been made. No EEO law explicitly permits reverse discrimination, and both congressional debates and the texts of the modern laws (Title 7 and the Equal Pay Act) make it very clear that discrimination against whites

[17] The one possibly relevant (but methodologically problematic) study seems to show that Jews are more highly rewarded for their educational credentials than members of other groups. Although Jews historically suffered from considerable employment discrimination, they are not usually the group people think of as the main beneficiary of reverse discrimination; see Chiswick, 1983. (Jencks, 1985: 759, makes a similar claim, but without presenting data).

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and men is prohibited just as strongly as discrimination against women and members of minority groups. Thus, individuals who believe they have suffered from reverse discrimination have a cause of action, and indeed, some of the most famous discrimination cases involved such claims (such as the *Bakke* and *Weber* cases, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *United Steel Workers of America v. Weber*, 443 U.S. 193 (1979); see Schlei and Grossman, 1983).

If reverse discrimination were a problem of any magnitude, one would expect there to be many such claims. White men used to being chosen for jobs in preference to women or minorities would most likely be very sensitive to changes in such outcomes and in fact might even be so surprised at losing competitions with women or minorities that they would believe that reverse discrimination had occurred even when none had (see Burstein, 1985b). It has been claimed that the courts and administrative agencies are so sympathetic to women and minorities that white men have little chance to win their cases, but the evidence for such a claim is more anecdotal than systematic, and in any case, white men would have had no way of discovering this was true without bringing many cases and losing consistently.

In fact the number of reverse discrimination cases decided by the appellate courts has been small; just ninety-one or 4.4 percent of all EEO cases, had been decided by the end of 1983, and the proportion has shown no tendency to increase, as Table 6 shows. Those claiming reverse discrimination are substantially less likely to win than other EEO plaintiffs, with the former winning some kind of victory in 34.4 percent of their cases as opposed to a success rate of 58.1 percent for the latter. Whether this is because the reverse discrimination cases lack merit or because judges are prejudiced against white men is not an issue these numbers can resolve, but there is no question that those claiming reverse discrimination lose most of the time. These data are hardly definitive, but given the lack of systematic evidence about reverse discrimination, they are not unimportant either. They do not provide a great deal of support for the hypothesis that reverse discrimination is widespread.

VIII. CONCLUSIONS

Large-scale social movements are difficult to organize, and many fail; failure may be especially likely when the movement's goal is to redistribute economic opportunities and in-

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Table 6. Reverse Discrimination Cases in the Appellate Courts

Year	Number of Cases	Percentage of All EEO Cases	Percentage of Cases Won by Claimant
1965	0	—	—
1966	1	12.5	100.0
1967	0	—	—
1968	0	—	—
1969	1	5.6	100.0
1970	1	4.0	0
1971	1	1.6	100.0
1972	3	3.3	33.3
1973	4	4.5	25.0
1974	2	2.2	0
1975	8	6.0	25.0
1976	6	4.8	66.7
1977	2	1.1	0
1978	8	5.2	42.9
1979	9	6.0	0
1980	11	5.1	36.4
1981	14	5.5	28.6
1982	10	4.3	40.0
1983	10	4.3	50.0
Total	91*	4.4	34.4

* Third-party involvement in these cases, on side claiming discrimination, was as follows: federal government as party (3 cases); federal government as amicus (5 cases); nonfederal amicus (8 cases). On side opposing claim: federal government amicus (4 cases); nonfederal amicus (8 cases). On side not indicated: federal amicus (3 cases); nonfederal amicus (4 cases).

come. Movements may not attain their ultimate goals in part because they have so many opportunities to fail and because their opponents have so many opportunities to resist—when the first attempts are made to organize, in the competition for allies, in the struggle for resources, in the search for the sympathetic attention of legislatures or courts, and in the enforcement of laws. Recent work on social movements and on the mobilization of law has begun to emphasize the importance of the final stage—the enforcement of laws—to a movement's success or failure; movements can succeed in the legislatures or courts but ultimately lose their fight because they fail to get laws strongly enforced on their behalf. Much of this recent work is a "call to arms," however—a plea for joining the study of social movements with that of the mobilization of law—more than anything else. Relatively little systematic, quantitative work analyzes the mobilization of law from a political or social movements perspective.

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The absence of the proper studies is certainly true of the field of EEO law. Despite the importance of the struggle for EEO in American political debates and labor markets, little is known about many aspects of the enforcement process. Most social scientific studies of EEO enforcement focus on agency activities and ignore the courts, even though it is the courts (along with Congress) that provide the legal boundaries within which the agencies must work. In addition, prior research has done little to analyze the role played by individuals in the mobilization of law, the involvement of interest groups, or the outcomes of the disputes. In short, earlier work tells us little about what happened to the movement for EEO after the EEO laws were adopted, specifically about trends in involvement in the enforcement process and about its results.

This article is a step in the direction of supplying this information. Five of its conclusions seem especially important. First, the mobilization of EEO laws has increased steadily and substantially since they were adopted. This pattern makes sense in a world in which employment discrimination remains pervasive *and* potential plaintiffs believe the EEO laws may be effective. Such a pattern would be less likely had discrimination virtually disappeared or the EEO laws come to be seen as ineffective.

Second, although individuals who believe they have been discriminated against cannot count on help from federal agencies or interest groups, they do receive such assistance quite often, especially in important cases.

Third, despite some initial expectations that the archetypical EEO case might involve a single blue-collar worker seeking a job, a high proportion of the actual cases involve upper-level jobs, many jobs, or both. This means that EEO decisions have at least the potential to affect many members of protected groups, and to improve their access to all types of jobs.

Fourth, plaintiffs in EEO cases have generally won more than half their cases and continue to do so. This finding calls into doubt prior work that suggests that plaintiffs in EEO cases should win only infrequently, and is consistent with other research that implies that plaintiffs should win half or more of their cases. This finding is especially important because so few large data sets dealing with plaintiff victories and defeats are available.

Finally, contrary to the claims of many concerning trends in EEO enforcement, reverse discrimination does not seem to be very widespread, to the extent that the number and outcome of appellate cases are any indication. There are rather few such

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cases, and plaintiffs in these cases are less likely to win than plaintiffs in other types of EEO cases.

In the absence of a large body of comparable research on other legal issues, we cannot say whether the amount of mobilization of EEO law is high or low, or whether other aspects of EEO cases are typical for American law in general.[18] Nor can we at this stage link these findings directly to labor market outcomes, gauging their impact on the opportunities available to women and members of minority groups (the work that comes closest to doing this is Burstein, 1985a). But we have shown, contrary to some expectations, that the mobilization of EEO law is increasing and that it is often successful. Such knowledge seems essential for understanding the movement for EEO and assessing its likely impact, and it may also help show the utility of joining the study of social movements with that of the mobilization of law.

APPENDIX: DATA RELIABILITY

Most of the data reported in this article were derived from the content analysis of court decisions. If findings based on content analysis are to be credible, there must be high reliability, which means, essentially, that the procedures employed should be able to produce the same results if applied again, even by other researchers. Unfortunately, prior work seems to supply no standard way of reporting on reliability and no set of standards as to what constitutes adequate reliability. A considerable part of the published work on the content analysis of court decisions provides very little information on how the data were collected and none at all on reliability (see, e.g., Ulmer, 1984; Segal, 1984; Mills, 1981; O'Connor and Epstein, 1983; Stidham *et al.*, 1983; Baum *et al.*, 1981–82). Some such work gives evidence that great care was taken to ensure reliability but provides no actual measures of reliability (see Cartwright, 1975; Kagan *et al.*, 1977). Work on content analysis per se suggests that no more than relatively crude standards are available for deciding whether the reliability of data is acceptable (Krippendorff, 1980: 146–147). We think it essential to report on reliability, and regret that direct comparisons seem impossible be-

[18] The level of mobilization certainly seems higher for EEO laws than for federal consumer protection laws, probably because the struggle for EEO is a "cause" involving basic economic issues in a way consumer protection is not; see Macaulay, 1979.

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Table 7. Reliability of Data Coded from the Bureau of National Affairs, 1969–84

Variables	Volumes 1–16	Volumes 17–33
Federal agency as party (6 categories)	.94	.87
Federal agency as amicus (9 categories)	.81	.81
Nonfederal amicus (8 categories)	.67	.73
Class action (4 categories)	.79	.86
Job (10 categories)	.67	.67
Supervisory position (4 categories)	.58	.60
Outcome of case (7 categories)	.79	.79
Penalty (9 categories)	.64	.58

tween these data and those presented elsewhere on comparable subjects.

Data for this article were collected in two sets, separated by several years, using identical procedures, but with one exception: different coders were used for each set. Developments in the literature during the interim led to reliabilities being calculated in slightly different ways for each data set. For volumes 1–16 of *Fair Employment Practice Cases* (Bureau of National Affairs, 1969–84), approximately one-eighth of the cases were coded by two coders (a total of three coders working in pairs), and reliabilities were calculated in terms of Scott's pi (Scott, 1955). For volumes 17–33, approximately one-twelfth of the cases were coded by all three coders, and reliabilities were calculated in terms of Krippendorff's alpha (1980). These two coefficients are very similar, and, for situations in which two coders are coding variables arranged in nominal categories, they are identical. Both coefficients range from 0 to 1.0, and may be interpreted as roughly the extent to which the coding reliability exceeds what might be expected by chance. "Chance" is here given an expansive interpretation in that the "expected" distribution across categories of the variable being coded is taken to be the distribution actually found. If most responses fall into one category of the variable, then even a small number of disagreements among coders departing from that category will lead to a drastic decline in calculated reliability. Because the distribution of responses is usually not known in advance (as it was not in this research), pi and alpha are very conservative measures of reliability.

Krippendorff suggests that, as a rule of thumb, variables should definitely be considered reliably measured when their reliability exceeds .8, and may be tentatively accepted when reliability is between .67 and .8 (ibid., p. 147). All the reliabilities reported in Table 7 were calculated based on the full range of

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categories; when categories are collapsed, as they often were for this paper, reliabilities would be higher as some of the more difficult distinctions made by coders (such as that between winning substantially what was asked for and winning substantially less) are eliminated. It is clear from the data that our conclusions about some variables should be a bit tentative. Given the consistency of the results reported above, the conservative nature of the measures of reliability, and the lack of figures in comparable work to which direct comparison could be made, we believe our data is as credible as any other court opinion content analysis data published.

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