The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues

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What is the relationship between employment discrimination litigation and the relative earnings of blacks and whites in the United States? Do victories in court affect blacks' relative earnings? Are gains in earnings associated with legal victories enduring or temporary? Can litigation be an effective tactic in efforts at social reform? Data on plaintiff victories in employment discrimination cases decided by U.S. appellate courts from 1965 through 1985 show that victories are associated with significant and enduring increases in blacks' relative earnings. One implication is that at least in this area, the courts may bring about social reform.

This article addresses the relationship between employment discrimination litigation and the relative earnings of blacks and whites in the United States. Have the equal employment opportunity (EEO) decisions of the federal appellate courts brought about lasting improvements in blacks' relative earnings? And if they have, may we conclude that litigation can be an effective tactic for social reform?

When Gunnar Myrdal published *An American Dilemma* in 1944, the economic situation of American blacks was wretched. "Except for a small minority enjoying upper or middle class status," he wrote (cited in Smith & Welch 1989:519), "the masses of American Negroes, in the rural South and in the segregated slum quarters in Southern cities, are destitute. They own little property; even their household goods are mostly inadequate and dilapidated. Their incomes are not only low but irregular. They thus live from day to day and have scant security for the future."

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Even as Myrdal wrote, however, blacks' circumstances were beginning to improve. The wartime demand for labor and other factors accelerated their movement from the South to the more prosperous North and from agricultural to nonagricultural employment, increasing their job opportunities. And improvements in the quality and quantity of education available to blacks enabled them to take advantage of the new opportunities (Jaynes & Williams 1989:ch. 6; Smith & Welch 1989).

Nevertheless, blacks continued to suffer intensely from discrimination in employment and elsewhere. Together with other minorities, they agitated for state and federal antidiscrimination legislation. One crowning achievement of this movement was passage of the Civil Rights Act of 1964. Title VII of the act prohibited employment discrimination by private employers, labor unions, and employment agencies, and made it possible for individuals (and, in special circumstances, the Attorney General) to sue alleged discriminators in federal court. Further legislation, presidential executive orders, and judicial decisions sympathetic to blacks prohibited employment discrimination by state and local governments, resurrected Reconstruction-era civil rights laws, mandated affirmative action by government contractors, and gave the U.S. Equal Employment Opportunity Commission (EEOC) the right to sue alleged discriminators. By the early 1970s, all three branches of the federal government had committed themselves to ending racial discrimination in employment to a degree almost unimaginable in Myrdal's day (Blumrosen 1984; Burstein 1985; Pole 1978; Schlei & Grossman 1983).

Since the mid-1960s, blacks' circumstances have changed significantly in a number of ways, some for the better and others for the worse. Educational institutions and jobs formerly closed to them have been opened. Blacks have taken advantage of new opportunities to acquire more education and better jobs, and their earnings have risen relative to those of whites, especially for the young and well-educated.

Blacks are, however, much more likely than whites to be unemployed or in poor health; their life expectancy remains much worse than that of whites. And changes in black families divide the black community between those living in families with one adult head—most often poor—and those living in families with two adult heads, which are largely middle income (Jaynes & Williams 1989:ch. 1).

A critical issue in analyses of blacks' changing circumstances is how much change stems from economic and social forces affecting all Americans (such as increases in education and declining economic growth) and how much from public policies intended to aid blacks. The National Research Council has forcefully argued that both were critical (Jaynes & Williams 1989:4, 44–45), but others contend that the policies of the 1960s

did little good (and some, e.g., Murray 1984, suggest they did harm).

Because jobs are so critical to black progress, debates about policy often focus on federal equal employment opportunity (EEO) policies. Two questions are especially critical: Is the enforcement of EEO policies associated with improvement in blacks' labor market outcomes? And if enforcement is associated with improvement, to what extent may the improvement be attributed to specific aspects of federal policy—to affirmative action programs focusing on government contractors, the work of the EEOC, the impact of judicial decisions in EEO cases, or other mechanisms?

We focus here on one aspect of the debate: the relationship between federal appellate court decisions and the relative earnings of blacks and whites. The civil rights movement has devoted much of its resources to litigation, partly because other modes of action sometimes seemed closed to it (particularly before the late 1950s), but also because civil rights activists believed that litigation could effect social change (see, e.g., Belton 1978; Burstein 1991; Rosenberg 1991). The intense debates surrounding the Supreme Court nominations of Presidents Reagan and Bush manifested the widespread belief that judicial decisions can be extremely important for blacks and other groups. And scholarly work on the civil rights movement often argues that judicial decisions were critical to the black struggle for advancement (Belton 1978; see the review in Burstein 1991). Yet the relationship between judicial decisions and blacks' earnings has been studied relatively little, and three issues raised in past work are unresolved.

I. The Issues

A. Do Courts Have an Impact?

The first issue is whether judicial EEO decisions affect the relative earnings of blacks and whites. Perhaps surprisingly, almost no studies address exactly this question. Economists analyzing the impact of federal EEO policies usually focus on the consequences of legislative change (examining labor market outcomes before and after passage of Title VII), change in presidential administrations, or administrative enforcement.[1] Some lump together all aspects of EEO enforcement under the heading of

[1] For before-after analyses of the impact of legislation, see Smith & Welch 1989; Heckman & Payner 1989; on the impact of the Reagan administration, widely considered to be hostile to strong enforcement of EEO laws, see Bound & Freeman 1989; on administrative enforcement see Leonard 1990; see also the literature reviews in Burstein 1985:ch. 6; Heckman & Verkerke 1990; Donohue & Heckman 1991.

"affirmative action," even though affirmative action programs are only one aspect of EEO enforcement.[2]

There are a few studies of the impact of judicial decisions in EEO cases, but most either focus on blacks' employment and occupations, rather than on earnings (Leonard 1984), or abjure any attempt to distinguish between the consequences of judicial decisions and the consequences of other social, economic, and policy factors which might affect blacks at the same time (Blumrosen 1984). Among statistical analyses of judicial decisions, only Burstein's focuses on earnings. He concludes (1985:146) that blacks' (and women's) victories in EEO cases at the appellate level led to improvements in their relative earnings in the 1960s and 1970s; but no subsequent studies have been done to confirm his conclusions. It was partly the paucity of work on judicial decisions which led Donohue and Heckman to conclude (1991: 1641): "Future work will have to explore more carefully the mechanism by which the Federal antidiscrimination framework translated the command of law into significant black economic advance."

We thus have some reason to believe that judicial decisions affect blacks' relative earnings. Decisions favorable to blacks in EEO cases have arguably led to improvements in other economic outcomes, and the one study considering the relationship between judicial decisions and earnings concludes that the decisions do have an effect (see also Culp 1985). Many scholars are convinced that EEO decisions affect blacks' labor market outcomes, and Jonathan Leonard (1990) speaks for a substantial body of opinion when he writes (p. 60), "I believe that litigation under Title VII by private parties and the EEOC constituted the cutting edge of government antidiscrimination policy." Sweeping legal precedents, he argues, establish broad principles which influence employers throughout the labor market (among those who seem to agree are Farley & Allen 1987:259–61; Burr et al. 1991:844; Fossett et al. 1986:428).

Nevertheless, the conclusion that judicial decisions affect earnings is far from secure. The empirical basis for the conclusion is slight, and, in addition, some scholars remain highly dubious that judicial decisions can have much impact on earnings. Economic theory leads Posner (1987) and Epstein (1992) to doubt that EEO laws—however enforced—can improve blacks' welfare (beyond removing legal barriers to blacks' economic activities), while an institutional analysis of courts leads Rosenberg to argue (1991:338) that "U.S. courts can *almost never* be effective producers of significant social reform." Even some of those who

[2] Smith & Welch 1989:552. Other social scientists concerned with the impact of EEO laws also either misuse legal terms such as affirmative action or fail to understand the various ways in which the EEO laws are enforced; see DiPrete & Grusky 1990:110. The relevant distinctions are explained well by Leonard 1990.

find that enforcement of the EEO laws improved blacks' relative earnings conclude that such effects were only temporary (Smith & Welch 1989). Thus, while there is some basis for thinking that judicial decisions may affect blacks' relative earnings, surprisingly little evidence bears directly on this point, and some major scholars are quite skeptical about the possibility.

It is not easy to distinguish the impact of judicial decisions on earnings from the impact of other forces—indeed the difficulty of doing so is probably one reason so little work addresses the issue—but we believe that it is important to try. We think that a cautious analysis of trends in judicial decisions and other possible influences on earnings can be the basis for a meaningful claim that victories in court affect relative earnings.

B. Changes in Labor Market Outcomes: Enduring or Temporary?

If success in court does improve blacks' relative earnings, then the next important issue is whether these changes are enduring or temporary. Do judicial decisions have sustained impact, prompting changes in personnel policies which remain in place even if the Supreme Court reverses direction in EEO cases? Or do blacks benefit from judicial decisions only as long as the courts persistently support blacks alleging discrimination?

This issue is only implicit in prior work, but it is real nevertheless. Proponents of EEO legislation expected it to end discrimination permanently. Blumrosen (1984:348–52) concludes that it did, at least for blatant forms of discrimination, arguing that fundamental legal changes, more liberal attitudes, and the replacement of the older generation by a younger one have led to changes in employer practices not likely to be reversed even if the courts change direction.

Some sociologists agree, claiming that EEO enforcement has led employers to reform their internal labor markets in ways likely to reduce discrimination. They have formalized hiring, promotion, and internal grievance procedures; many have created affirmative action offices, institutionalizing the new procedures so their impact on blacks' opportunities is likely to continue even if legal pressures diminish (see Edelman 1990; 1991; Dobbin et al. 1992; cf. Baron 1992).

These sociologists are confident that EEO legislation has led to permanent changes in employer organization and procedures, but suspect that some of the changes are symbolic, put in place partly to impress judges and administrative agencies. If so, the new organizational forms could remain in place even if the legal climate changes, but without reducing discrimination.

This is what some economists might expect. Leonard, for example (1990:61), argues that the impact of Title VII on blacks is likely to decline because recent Supreme Court decisions make it

more difficult for plaintiffs to prove that they have been discriminated against (cf. Heckman & Verkerke 1990:297). Smith and Welch (1989), of course, go further, arguing that the impact of the EEO laws on blacks was short-lived indeed. All may be seen as claiming that intense EEO enforcement may have an impact, particularly against blatant forms of discrimination, but when the enforcement pressures are eased, the laws cease to have any impact.

C. Legal Mobilization as a Social Movement Tactic

Finally, an analysis of EEO litigation contributes to a wider theoretical debate about social movements and social change. Can legal mobilization be an effective social movement tactic? Rosenberg (1991:2) states: "In the last several decades movements and groups advocating . . . social reform have turned increasingly to the courts" because they believe that "American courts seemingly have become important producers of political and social change . . . protecting minorities and defending liberty." This confidence in the courts may be misplaced, Rosenberg argues. The courts may be too weak to bring about change and their role in social reform largely symbolic. Indeed, turning to the courts may impede movements' march toward their goals; litigation may "siphon . . . off crucial resources and talent, and [run] the risk of weakening political efforts" (p. 339).[3]

Work on social movements does little to resolve this issue. Most analyses focus on movement participation and organization rather than consequences (McAdam et al. 1988; Burstein, Einwohner, & Hollander 1991). Scholars often claim that specific judicial decisions have affected movement success, but litigation is rarely treated formally as a social movement tactic (Burstein 1991; see also Zemans 1983).

In several articles on EEO litigation, Burstein has shown (1989, 1990, 1991; Beckley & Burstein 1991) that plaintiffs with organizational backing are more likely to win than those without, and he claims that social movement support for plaintiffs is associated with victories and doctrinal developments favorable to minorities and women. But he has not considered whether these victories lead to improved labor market outcomes for blacks at the aggregate level. Finding that they do would strengthen the argument that social movements can bring about social change

[3] Most quantitative analyses of the impact of EEO policies have been carried out by economists. The broader theoretical issues most of them see themselves as addressing concern the economic impact of government attempts to alter labor market outcomes, including policies such as those setting minimum wages, maximum hours, and health and safety standards as well as EEO (see, e.g., Donohue 1986; Posner 1987; Epstein 1992; Lundberg 1989). We are somewhat more concerned about how components of the democratic political process (including social movement activity and legal mobilization) affect economic outcomes (cf. Burstein 1985, 1991).

through the courts; finding no relationship would buttress the claim that the courts lack the power to bring about significant change.

II. Data

These issues are difficult to resolve for many reasons, but one of the most important has been a paucity of data on EEO cases. This article presents data on trends in such cases from 1965, when Title VII went into effect, until 1985, well into the Reagan years.

The data are drawn from a content analysis of virtually all published decisions in EEO cases decided by the federal appellate courts (including the Supreme Court) during that period. The focus is on appellate courts because their decisions are the most important; their decisions become the leading cases and establish the critical precedents (Howard 1981; Priest 1980), and it is widely believed that what happens in the appellate courts will be critical for minorities and women in their battle against discriminatory employment practices (Belton 1981; Bergmann 1986; Glazer 1978; cf. Rosenberg 1991:7).

The cases include those based on Title VII, the most comprehensive EEO law, and those based on other laws prohibiting some forms of discrimination in employment, including the Equal Pay Act of 1963 (prohibiting paying men and women different wages for the same work); the Civil Rights Acts of 1866 and 1871 (prohibiting racial discrimination in a variety of contexts); the United States Constitution; and the Railway Labor Act of 1926 and the Labor Management Relations Act of 1947 (banning certain forms of racial discrimination by treating it as an unfair labor practice).

The focus is on the ultimate court resolution of EEO disputes; the unit of analysis is therefore the case, not the decision; cases heard more than once were coded as of the final decision (as of the cutoff of data collection). Cases were included if they were published in volumes 1–36 of *Fair Employment Practice Cases* (Bureau of National Affairs 1969–85); based on the Equal Pay Act of 1963 or decided after 2 July 1965 (the effective date of Title VII); decided during or before February 1985 (the cutoff date of vol. 36, the last available when data collection was completed). Only reports at least one page long were coded; shorter opinions provide too little information to be useful.

We analyzed 2,081 cases. A significant proportion were coded by two or three coders, and reliability was calculated in terms of Krippendorff's alpha (1980), a very conservative measure. Reliability for all the variables analyzed was at or above the .8 level of reliability which Krippendorff considers highly satisfactory. A more extensive discussion of content analysis, measures of relia-

bility, and the data may be found in Burstein and Monaghan (1986); on content analysis, see Johnson (1987).

III. Methodological Issues

A. What Data on EEO Cases Mean

The initial empirical question here is straightforward: What is the relationship between trends in EEO decisions and blacks' relative earnings?

Two objections are sometimes raised to analyzing trends in judicial decisions. The first is that it is difficult to interpret trends in numbers of decisions and plaintiff victories because we do not understand why some disputes but not others reach the appellate courts; for example, an increase in the number of cases might mean that discrimination is becoming more pervasive, or that the government has decided to increase legal pressure against however many discriminators remain (Heckman & Verkerke 1990). The second objection is that not all appellate decisions are published, and there are significant differences between cases leading to unpublished as opposed to published decisions (Siegelman & Donohue 1990).

Such arguments easily lead into a trap from which there is no escape. Although critics claim that they are only urging that data on judicial decisions be used cautiously, in fact they attack as fundamentally flawed virtually all measures of legal outcomes and all previous work on EEO cases (Heckman & Verkerke 1990; Siegelman & Donohue 1990; the latter find one example of "superb" research on published opinions (Schultz 1990) but do not explain how it avoids the problems they point out elsewhere). How would they then propose to assess the effects of law on employment practices? Heckman and Verkerke are left proposing the use of "anecdotal evidence," among other approaches (p. 295).

Thus, the critics' methodological strictures require abandoning available measures of judicial outcomes without suggesting more satisfactory replacements (for an attempt to deal with some of these issues, see Epp 1990). As a practical matter, this means either abandoning the attempt to assess the impact of judicial outcomes, as implied by their arguments but denied in their conclusions, or using available measures carefully with awareness of their limitations. We favor the latter. We focus on published federal appellate decisions because they hypothetically have important *consequences*. We are trying neither to generalize our findings to some larger universe of disputes nor to reach conclusions about how some disputes reach the appellate courts. However the cases we analyze became the subject of published opinions, they are intended by the judges to have significant consequences. They are certainly the cases with the greatest prece-

dential value, and there is substantial justification, both in theory and in terms of policy concerns, for attempting to determine whether they have further, "real world" consequences as well. Hypotheses about EEO decisions suggest that they might have the consequences the judges intended: that some employment practices are prohibited and others permitted. We try to determine whether, in the aggregate, the cases are related to labor market outcomes.

B. Relating Trends in Judicial Decisions to Labor Market Outcomes

Scholars typically divide potential determinants of labor market outcomes into two types: those that characterize individuals (such as education, family situation, experience, and migration) and those that characterize the broader social context, including changes in technology and the legal rules regulating labor markets (see, e.g., Jaynes & Williams 1989; Smith & Welch 1989). Most studies of earnings focus on individual-level determinants, partly because their connection to earnings seems so transparent, and partly because the theoretical and methodological problems characterizing individual-level analyses are thought of as relatively manageable (for lists of studies focusing on differences in labor market outcomes associated with race, ethnicity, and gender, see Cain 1986; Farley & Allen 1987:322–25).

Fewer studies focus on the macrolevel determinants of labor market outcomes. Least common are attempts to assess the impact of micro- and macrolevel factors simultaneously, because including different types of variables and causal processes in a single model is so difficult. Confronting these difficulties, many analysts adopt a two-step strategy, first estimating statistically the impact of individual-level attributes on labor market outcomes and then using a more historical, qualitative approach to assess the impact of the broader context on processes at the individual level. Smith and Welch (1989), for example, first describe wage equations gauging the impact of education, experience, cohort, region, and urban residence on black and white men's wages and then match a qualitative historical description of EEO policy to wage trends in an attempt to determine whether the trends in wages and policy are roughly comparable. Their conclusions about the impact of EEO policy are based on this qualitative analysis; Heckman and Verkerke's review (1990) proceeds in a similar way (cf. Heckman & Payner 1989).

We proceed in a somewhat similar fashion. The analysis below proceeds by relating trends in EEO decisions to trends in the relative earnings of blacks and whites, sometimes with controls for individual-level determinants of earnings and sometimes without, trying to show how a variety of factors may be related to earnings differences. So little is known about the impact of many

aspects of the social context—including EEO decisions—on labor market outcomes that even very simple analyses, if done carefully, can contribute to our knowledge.

C. A Note on Gender

Any analysis of how EEO litigation affects racial differences in earnings should consider both men and women, but doing so is difficult because so much work on racial differences in earnings focuses solely on men. Some major articles on EEO impact fail to use even available data. Smith and Welch's "Black Economic Progress after Myrdal" (1989), Heckman and Verkerke's "Racial Disparity and Employment Discrimination Law" (1990), and Donohue and Heckman's "Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks" (1991) focus only on men, although their titles suggest otherwise. They provide no good reason for neglecting women (see Smith & Welch 1989:520), seemingly reflecting studies of earnings in general (but see Taylor et al. 1986; Cunningham & Zalokar 1992; Fosu 1992).

This article focuses on trends in judicial decisions, and it was not possible to carry out the massive analyses necessary to bring our knowledge of women's earnings up to our knowledge of those of men. We therefore cannot be as confident in our conclusions about black women as we are about black men. This gender gap in the literature should be filled soon.

IV. Earnings

A. Men's Earnings

Black men's earnings rose significantly compared to white men's during the late 1960s and early 1970s, and even those who say EEO legislation has had little long-term impact attribute gains during this period to federal EEO efforts.[4] What happened next, however, is a matter of dispute.

Heckman and Verkerke (1990:282–83) write: "The rate of black [male] progress accelerated between 1965 and 1975, then leveled off after 1975." Smith and Welch (1989:556), however, see a more dramatic contrast between the early and late 1970s, claiming that change in black wages "resembles a wage bubble, with a sharp increase in black male incomes from 1967 to 1972, followed by the bursting of the bubble during the next five

[4] See Smith & Welch 1989:556. They attribute what they call the "wage bubble" of the late 1960s and early 1970s to "affirmative action." They use the term in an unusual way, however, referring to all enforcement of Title VII and contract compliance programs, rather than to those aspects of enforcement normally described as affirmative action; compare Smith & Welch 1989:552–53 to Schlei & Grossman 1983:ch. 24.

years." Black wage gains, they write, "did not prove to be permanent. By mid-1975–76 . . . the racial wage gap had returned to more normal levels." Relative black male wages did not merely level off; they actually declined. Smith and Welch's claim seems to be based, however, on an incorrect reading of their own data, which are presented in Tables 1 and 2. It is true, as they write, that the relative wages of college and high school graduates with 1–5 years of experience rose very rapidly and then declined. But blacks with more work experience generally continued to gain between 1971–72 and 1975–76, regardless of level of education, and the gains were even more widespread if the comparison is between 1971–72 and 1979. There was a small relative loss in mean personal income between 1975 and 1986 (0.3%, without controls for education or experience, in Table 2), but full-time black male workers gained a bit (0.6%) during the same period.

Probably the fairest reading of the literature on the relative earnings of black and white men is this: blacks' relative earnings increased rapidly by historical standards after Title VII was adopted; these gains leveled off in the middle or late 1970s; and black men's earnings may have deteriorated relative to whites' beginning in the 1980s (see also Jaynes & Williams 1989:294–301; Carlson & Swartz 1988:543).

B. Women's Earnings

Although black women's earnings have not been studied as assiduously as those of black men, their earnings relative to white women's have clearly increased more rapidly and continuously than black men's have relative to those of white men. Decades ago, black women earned far less than white women or men of either race, but by the late 1970s or early 1980s their earnings essentially equaled white women's.[5] Their relative earnings, like black men's, may have deteriorated more recently (Jaynes & Williams 1989:295).

It is impossible to be as precise about trends in black women's earnings as about those of black men, but it is important to consider the impact of judicicial decisions on both, not only as a matter of principle, but also because differences between black men and women may influence estimates of the impact of EEO laws on blacks' labor market outcomes. If much of black women's gains seem attributable to EEO legislation, analyses ignoring women will underestimate the role of EEO legislation in blacks' labor market outcomes. And indeed, one previous study (Burstein 1985:ch. 6) claims that by some measures black women

[5] Farley & Allen argue (1987:340) that in the 1980 data "black women no longer suffer from racial discrimination in wage rates," though they still suffer from sex discrimination; cf. Jaynes & Williams 1989:295; Carlson & Swartz 1988; Gwartney-Gibbs & Taylor 1986; Marini 1989.

Table 1. Weekly Wages of Black Males as a Percentage of White Male Wages, Stratified by Schooling and Experience

	Years of Experience				
Year	1–5	6–10	11–20	21–30	31–40
All Schooling Classes					
1967–68	69.5	66.1	61.9	59.7	57.7
1971–72	82.1	72.0	66.1	62.5	64.0
1975–76	81.4	74.0	70.2	67.8	68.8
1979	84.2	76.5	72.0	69.3	64.1
16 Years of Schooling					
1967–68	75.7	66.5	59.8	55.3	53.7
1971–72	101.1	84.6	65.3	62.0	69.5
1975–76	89.1	84.1	72.7	67.2	70.9
1979	91.1	87.0	77.9	69.9	64.5
12 Years of Schooling					
1967–68	81.8	76.8	71.2	68.4	68.4
1971–72	90.7	82.3	76.2	71.0	73.8
1975–76	83.1	81.8	77.2	76.7	73.6
1979	84.2	80.4	80.2	78.2	77.8

SOURCE: Yearly Current Population Survey Public Use Tapes for 1967–68, 1971–72, 1975–76. Public Use Tapes of the decennial Census were used for 1979; reprinted from Smith & Welch 1989.

Table 2. Male Incomes by Race: 1970–86 (In 1987 Dollars)

Year	White Men	Black Men	Black-White Ratio
Mean Personal Income			
1970	$22,954	$13,711	59.7
1975	22,848	13,911	61.2
1980	22,060	13,566	61.6
1982	21,270	13,005	61.1
1984	22,161	13,256	59.8
1986	23,567	14,361	60.9
Mean Personal Income, Full-Time Workers			
1970	$31,135	$19,830	63.7
1975	31,830	21,521	67.6
1980	30,297	20,838	68.8
1982	29,911	20,596	68.9
1984	30,570	21,076	68.9
1986	32,095	21,873	68.2

SOURCE: Current Population Surveys, Series P-60, various issues; reprinted from Smith & Welch 1989.

have gained more from EEO legislation than either black men or white women.

V. Judicial Decisions and Earnings

We cannot demonstrate through rigorous statistical analysis that judicial decisions affect black-white earnings differences independently of other, potentially relevant, factors—the problems of causal analysis are too immense. Rather, what we hope to do is to show, much as others have, the broad historical relationship

between EEO enforcement and relative earnings, taking other factors into account as best we can. Like Donohue and Heckman (1991:1604), we acknowledge that "the evidence supporting a successful federal intervention is more like that assembled by Sherlock Holmes than that routinely published in *Econometrica*" (cf. Heckman & Verkerke 1990; Smith & Welch 1989; Blumrosen 1984). Our argument has three steps: We argue that employers know about EEO decisions and alter their procedures accordingly; that trends in judicial outcomes are associated with trends in relative earnings; and that part of the change in relative earnings cannot be readily accounted for by factors other than the judicial decisions.

A. Employer Knowledge and Procedures

For an argument that judicial decisions affect labor market outcomes to be convincing, there must be evidence that employers learn about such decisions and alter their procedures as a result. In fact, employers get a great deal of information about EEO developments. The daily business press regularly reports on EEO issues; the *Wall Street Journal*, for example, printed over 350 articles about specific firms involved in EEO disputes between 1964 and 1986 (Hersch 1991). Personnel departments keep informed of legal developments through professional journals and labor relations and EEO newsletters (such as the *Fair Employment Practices Newsletter,* published by the Bureau of National Affairs since the 1960s, and the *Employment Practices* newsletter, published by Commerce Clearing House, Inc.; see Edelman 1990; Dobbin et al. 1992; cf. Baron et al. 1986). They often maintain contacts with law firms which receive both newsletters and compendia of judicial decisions (including the widely distributed *Fair Employment Practice Cases*, which is the source of data presented here).

Are employers likely to respond to the information by increasing opportunities for blacks? A number of economists have made theoretical arguments in recent years that EEO enforcement may increase efficiency, at least in the long run, so some employers might have economic incentives to improve opportunities for blacks (e.g., Donohue 1986; Lundberg 1989; Foster & Vohra 1992; others disagree, e.g., Posner 1987; Epstein 1992). As EEO policy information diffused through networks of personnel and other professionals in the 1960s and 1970s, many firms adopted new labor market policies conforming to the new legal standards and political climate (Edelman 1990; Dobbin et al. 1991). Some industries found substantial economic advantages to expanding opportunities for blacks (Heckman & Payner 1989). In addition, involvement in EEO legal proceedings seems to have some negative impact on the price of firms' stock, at least

in the short term, especially for class actions (Hersch 1991). Thus, a plausible argument can be made that what Blumrosen (1984) calls the "law transmission system" operates as he suggests: Information about EEO law is widely disseminated, many firms (especially larger ones) have professionals responsible for responding to such legal developments, formal personnel practices have changed, and some evidence suggests that such changes are economically rational.

B. The Relationship Between Judicial Decisions and Earnings

What are the trends in EEO decisions? The conventional wisdom is that federal courts generally favored plaintiffs until the 1980s, when Reagan-appointed judges moved in a more "conservative" direction. Some legal scholars place the turnaround earlier, however. Focusing on race discrimination EEO cases, Blumrosen (1984) sees 1977 as a turning point: in *International Brotherhood of Teamsters v. United States* (1977), the Supreme Court overturned a series of southern appellate court decisions that made it relatively easy to attack the consequences of racially segregated seniority systems. By 1982, he argues, "the Supreme Court had rejected much of the edifice of Title VII" which southern courts of appeals had created in race cases (p. 346).

Analyzing civil rights cases more broadly (rather than only race or EEO cases), Ralston (1990) would move the Supreme Court's change in direction back to 1975, when it restricted the award of attorneys' fees to victorious civil rights plaintiffs (in *Alyeska Pipeline Service Co. v. Wilderness Society* 1975 overturned by Congress in the Civil Rights Attorneys' Fees Act of 1976). This was followed by the well-known 1976 case, *General Electric Co. v. Gilbert*, in which the Court concluded that treating pregnant women worse than other workers was not sex discrimination (because the employers were distinguishing between pregnant and nonpregnant persons rather than men and women; overturned by Congress in 1978). Thus began a pattern of restrictive decisions which continues to this day.

Figures 1–4 show how appellate courts (including the Supreme Court) decided EEO cases involving allegations of race discrimination from 1965 until early 1985. Because the number of Supreme Court decisions is so small, circuit court and Supreme Court decisions are combined; for most issues, including most important ones, circuit court decisions constitute the final word in legal doctrine. Following Burstein (1991), all cases won by those claiming discriminination are counted as victories, even if they did not get everything they asked for. Data for 1965–70 are combined because the number of cases each year was so small, and data for 1985, which ran only through late winter, are combined with those for 1984.

The data for all race discrimination cases tell a story similar to Blumrosen's and Ralston's (Fig. 1). Black plaintiffs in early EEO cases usually won. Indeed, they were far more likely to win than might be expected of disadvantaged groups confronting employers (see Wheeler et al. 1987; Burstein 1991). But their victory rate began to decline in the mid-1970s—in 1974, a bit before the turnarounds identified by Blumrosen and Ralston—and continued to do so for the rest of the decade. The rate rose in the 1980s, but not to the level it had attained earlier.[6]

Among the cases, certain types seem especially likely to affect the earnings of black men: class action suits, cases involving upper-level jobs, and disparate impact cases. Class action suits are likely to be especially important because they involve multiple plaintiffs and often challenge institutionalized employment practices; victory may not only redress isolated acts of discrimination but also lead to significant changes in practices affecting many current and future employees. Suits alleging discrimination in professional, managerial, or technical jobs may be especially important because the jobs are especially important; access to upper-level jobs is critical for groups hoping to do well economically and to attain the economic resources and power necessary for sustained advance (Burstein 1989). And disparate impact cases have often been described as critical (Schlei & Grossman 1983) because they can force employers to change employment practices that disproportionately disadvantage minorities and women even if the practices were not intended to discriminate; thus, large numbers of current and potential employees may benefit from victory in such cases.

Although the trends for these cases (which are included in the data presented in Fig. 1)[7] are not perfectly parallel, they are quite similar to the trend for all race cases (see Figs. 2–4); the correlation of class action victories with total victories over time is .83; for upper-level jobs, it is .42; for disparate impact cases, .68. Plaintiffs won a fairly high proportion of cases until sometime in the 1970s, but then their victory rate declined. In class action suits, for example, plaintiffs won 80% of their cases in 1974 but only 48% in 1979; in cases involving upper-level jobs, 84% in 1975 but only 26% in 1978; and in disparate impact cases the victory rate also fell (though the pattern is less regular, perhaps due to the small number of cases per year, and 1977 is a notable

[6] The trends do not necessarily mean that the courts were reversing substantive positions. They may have been quite consistent, deciding more often against blacks or other EEO plaintiffs because the cases were changing. This issue is dealt with below.

[7] The data on class action, upper-level job, and disparate impact cases are not independent of those presented in Fig. 1; the cases are part of the total described there (46%, 21%, and 17% of the total, respectively). In addition, the data on these cases are not entirely independent of each other because some cases fit more than one type (a disparate impact, class action case involving managerial jobs would appear in all three, for example).

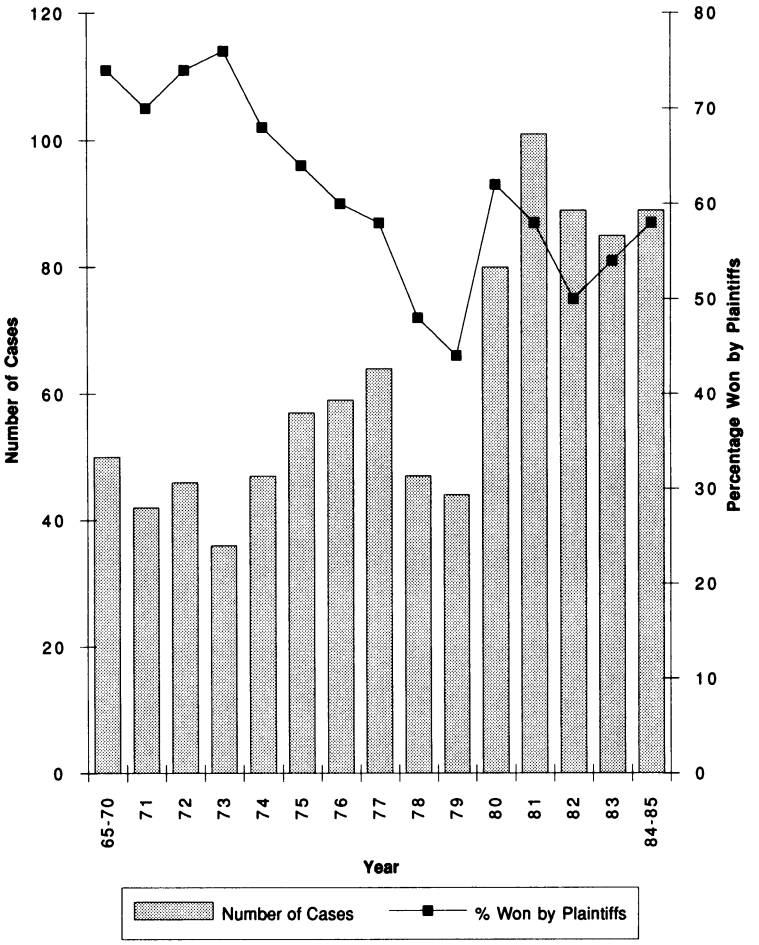

Figure 1. Appellate decisions in race discrimination cases, 1965–1985

exception to the trend). Victory rates later increased, but the mid-1970s clearly saw the courts ruling against black plaintiffs more often than before, both overall and in cases likely to be especially important.

How are these trends related to trends in blacks' earnings? For men, the two are clearly correlated through the end of the 1970s. When the proportion of victories was highest, in the late 1960s and early 1970s, black men made their greatest gains in relative earnings. And when the proportion of victories obviously began to decline, in the mid-1970s, their gains in earnings leveled off.

For black women the picture is more complex. Through the mid-1970s their earnings rose in parallel with legal victories and black men's earnings. But their earnings probably continued to rise in the late 1970s even though black plaintiffs were doing less well. How can this be explained? Decisions in cases in which

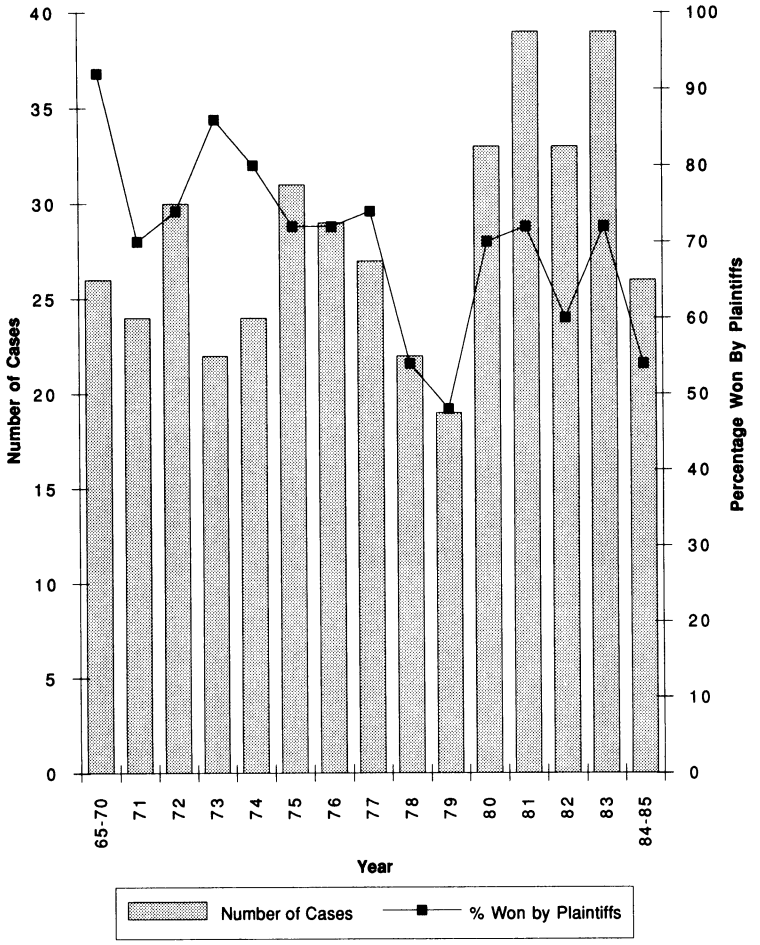

Figure 2. Appellate decisions in class action suits (race discrimination), 1965–1985

plaintiffs accused employers or unions of engaging in both race and sex discrimination may suggest an answer.

Unfortunately, the data (Fig. 5) do not distinguish between cases in which the plaintiffs were black women alleging they were the victims of race and sex discrimination, and cases in which blacks (men or women) simply combined their complaints with those of white women. Nevertheless, there is a noteworthy difference between these cases and those involving complaints of race discrimination only. Although the victory rate is lower after the mid-1970s than it was earlier, the trend is not so clearly or steadily downward; the correlation of victory rates with time is –.76 for cases involving allegations of race discrimination alone (Fig. 1) and –.45 for cases involving allegations of both race and sex discrimination (it is not obvious what to make of the extreme decline in 1978).

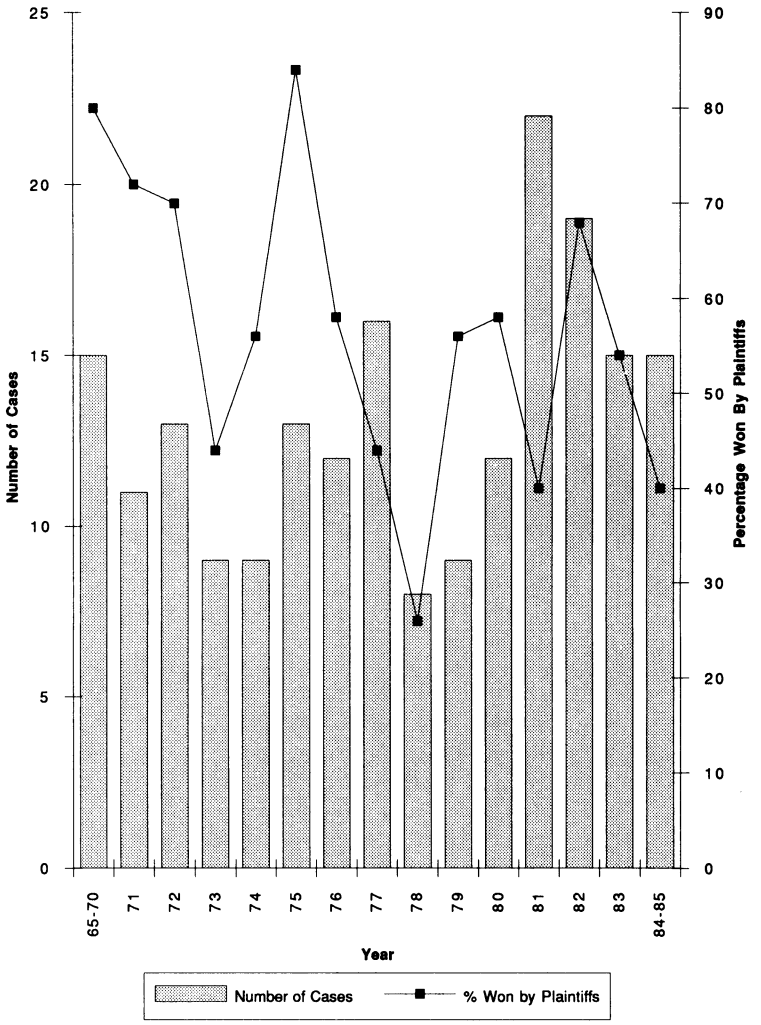

Figure 3. Appellate decisions for cases involving upper-level white-collar jobs (race discrimination), 1965–1985

Black women were *not* simply benefiting from judicial sympathy to allegations of sex discrimination. The trend in sex discrimination cases (Fig. 6) paralleled that in race discrimination cases—the correlation was .86—while the correlations of each with trends in cases involving claims of both race and sex discrimination were .47 and .54, respectively. Thus, trends in cases involving allegations of race and sex discrimination did not turn against plaintiffs in the 1970s in the same way as did trends in cases involving claims of race or sex discrimination alone (perhaps because discrimination against black women remained especially blatant). Black women may have done better than black

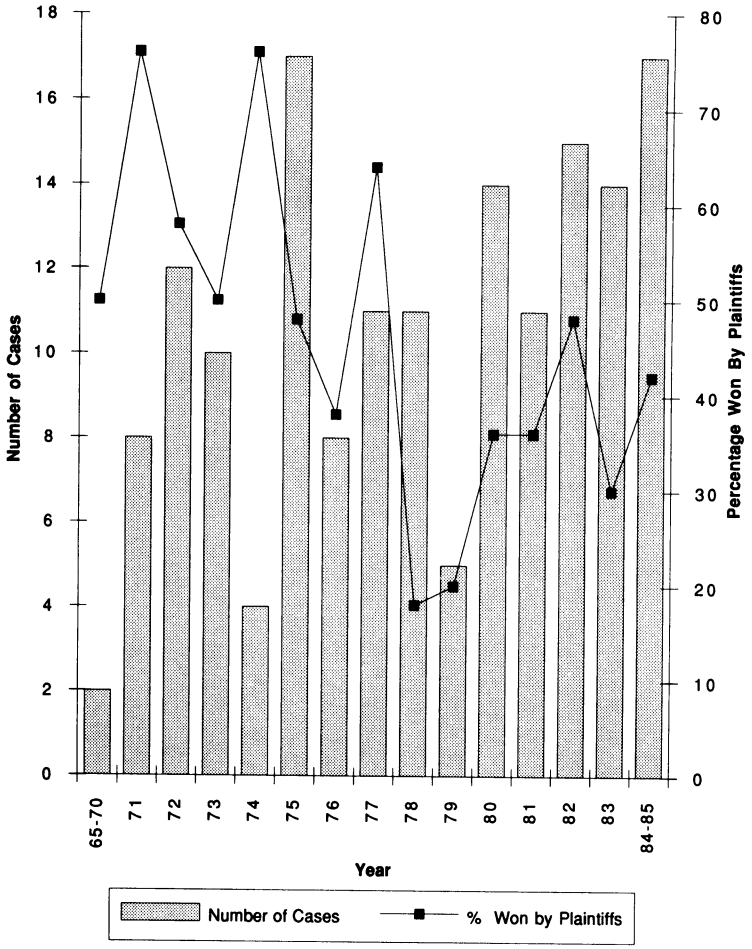

Figure 4. Appellate decisions for disparate impact cases (race discrimination), 1965–1985

men because they benefited from cases involving claims of race and sex discrimination in a way black men could not.

Those who analyze EEO enforcement conclude that the EEO laws could not have had much impact after the early or mid-1970s because black men's relative earnings stagnated even though expenditures on enforcement continued to increase and there was no weakening in enforcement by federal administrative agencies. Bound and Freeman (1989) reach the conventional conclusion when they write (p. 45) that stagnation in earnings could not be the result of reduced federal pressure, "as there was no weakening in federal pressures in late seventies." Their analysis, however, like that of others, ignores the courts. If plaintiff victories are any guide, there *was* a weakening of federal pressures in the late 1970s, one quite compatible with trends in black men's relative earnings.

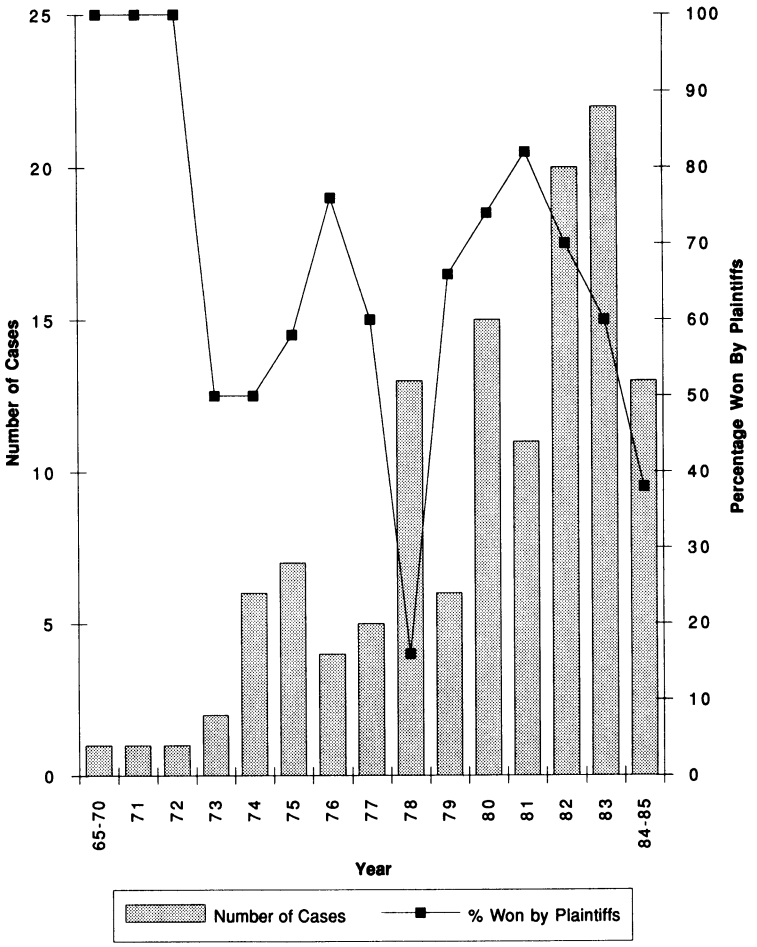

Figure 5. Appellate decisions in race/sex discrimination cases, 1965–1985

C. Is It Plausible That Judicial Decisions *Cause* Change?

Of course, we cannot yet conclude, even tentatively, that blacks' relative earnings were affected by judicial decisions. Before we can reach such a conclusion, we have to address two additional concerns. First, we have to consider whether the decline in plaintiff victories really meant a decline in federal pressure. Perhaps the courts had developed a body of EEO doctrine which they felt appropriate, and enforced it consistently. They may have started deciding cases against plaintiffs more often in response to increasingly aggressive tactics by plaintiffs demanding ever broader interpretations; in doing so, they may have refused to increase their pressure on employers but need not have decreased it. Second, we must consider whether the relationship between judicial decisions and blacks' relative earnings is spurious; earnings may be determined by labor market phenomena or

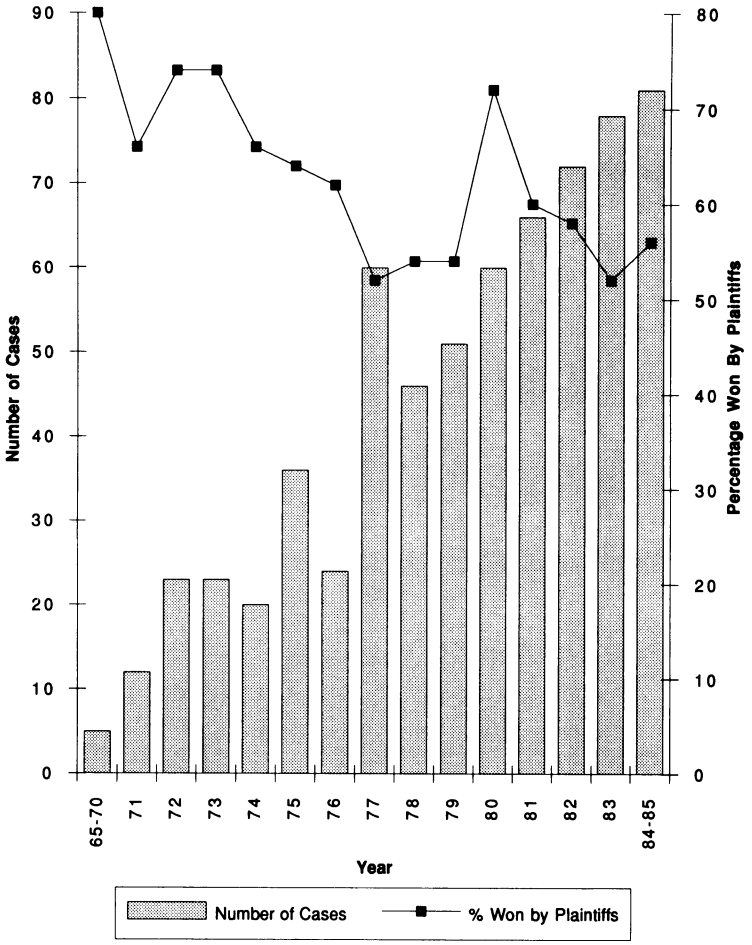

Figure 6. Appellate decisions in sex discrimination cases, 1965–1985

policy changes occurring independently of judicial decisions rather than the decisions themselves. (We will return to what happened in the 1980s below.)

On the first issue, Blumrosen (1984) and others (cf. Heckman & Payner 1989; Epstein 1992) have argued that in the decade after Title VII went into effect, the judges who decided race discrimination cases confronted blatant discrimination. Those who understood southern employment practices knew how blacks were victimized and made it relatively easy for blacks to show they had been discriminated against. Once the most blatant forms of discrimination had been eliminated, however, the cases got "harder." It was less obvious that discrimination had occurred, so the courts (the Supreme Court in particular) imposed higher standards of proof. This did not really represent a rejection of previous doctrine, Blumrosen argues; it was just a realistic adjustment to changing circumstances.

If this is what happened, then the decline in blacks' victory rates after the mid-1970s does not mean that the courts "turned against" blacks; they may not have been willing to increase the pressure on employers to change their practices, but they need not have been reducing it. If the courts were not "really" becoming less favorable to blacks, the argument that judicial decisions led to stagnation in black men's earnings becomes less plausible.

Unfortunately, neither social scientists nor legal scholars have developed rigorous ways to measure changes in legal doctrine or to take into account "hard" cases when analyzing judicial decisions. Nevertheless, two kinds of evidence suggest that the courts were really becoming less favorable to blacks in EEO cases after the mid-1970s.

First is the evidence provided by Schultz and Petterson (1992) for an important class of EEO cases: those in which employers claim that women and minorities remain in poor jobs not because they are discriminated against but because they lack interest in better jobs. Schultz and Petterson analyze the characteristics of such cases far more systematically than have previous scholars, assessing how the judges' decisions were related to the evidence presented, the legal arguments made, the characteristics of plaintiffs and defendants, and the attributes of the personnel system being challenged. They want to determine whether the likelihood of victory declined for women and minorities, and, if so, whether that was because their cases were weaker in recent years than they had been formerly. They find that the likelihood of victory did decline substantially, and that this decline cannot be explained by weakness in the cases. "[T]he more recent cases," they write (pp. 1163–64), are not "sufficiently weaker (or otherwise different) than the earlier cases to account for the dramatic decline in plaintiffs' success. . . . In the 1978–89 period, the courts became substantially more likely to accept the lack of interest defense even in cases that provided a strong evidentiary basis for rejecting this argument in the 1967–77 era."[8]

The second type of evidence about the meaning of trends in judicial outcomes is less direct but is consistent with Schultz and Petterson's. Between 1976 and 1988, Congress overruled restrictive Supreme Court readings of civil rights statutes six times, each time arguing that the Court's interpretation of the law was too narrow or that it was effectively taking away rights Congress had intended to grant, and the Civil Rights Act of 1991 essentially overturned six recent Supreme Court EEO decisions, requiring that restrictive interpretations of the EEO laws be replaced by more liberal ones (Ralston 1990; Belton 1990; Lewis 1991). Of course, congressional claims that the Court had turned against

[8] Donohue & Siegelman (1991:1019) make a similar argument about standards for class action certification in EEO cases, though without having evidence of the same quality.

civil rights plaintiffs may be nothing more than political arguments, but the fact that congressional action began around the time that legal scholars see a turnaround in the courts (Ralston 1990; Schultz & Petterson 1992) makes it likely that there was some substance to the congressional claims. Congress was certainly not responding to widespread demand that the laws be made more liberal than they had been understood to be (Burstein 1992).

Thus, both objective evidence and congressional debate suggest that the courts were really becoming less sympathetic to black EEO plaintiffs after the mid-1970s. The evidence is not definitive, but it is consistent. And it is in line with stagnation in black men's relative earnings.

Might the changes in blacks' relative earnings have been the result of changes in economic factors occurring independently of judicial decisions? To a substantial extent, changes in the supply of black workers have already been taken into account, because the data on relative earnings control for critical changes in black-white differences in human capital (Smith & Welch 1989; Heckman & Verkerke 1990).

There is some controversy about the impact of changes in the demand for black workers. Heckman and Verkerke (1990:285) argue that the decline in U.S. manufacturing may have been partly responsible for the stagnation in black men's relative earnings since the 1970s, as the need for unskilled labor had gone down. Bound and Freeman, however (1989:44–46), argue that the overall state of the economy (as measured by gross national product)—including its stagnation since the mid-1970s—has not affected black men's relative earnings. Vroman (1990:97) feels forced to conclude: "The cessation of gains in black men's relative earnings since the mid-1970s presents a continuing puzzle. Additional research to identify the relative contributions of supply-side and demand-side factors to black/white earnings differences is clearly warranted."

Even if researchers were to conclude that economic change affected black men's relative earnings, there would still be the question of mechanism. Smith and Welch prefer a purely economic model, arguing (1989:559) that poor economic conditions may have especially deleterious effects on the less skilled, and blacks, on average, are still less skilled than whites.

Donohue and Siegelman, however, propose an alternative view. They first suggest (p. 999): "When unemployment rates are low and labor markets are tight, workers probably encounter less discrimination and are certainly better positioned to seek remedies outside the litigation process for any discrimination they do encounter." When the unemployment rate goes up, they discover, so does the volume of EEO litigation. In addition, the focus of EEO cases—they consider all EEO cases, not just race

cases or those at the appellate level—has shifted dramatically. In the 1960s, complaints alleging discrimination in hiring were more frequent than those alleging discrimination in layoff or discharge, but by 1985, layoff and discharge cases outnumbered hiring cases by more than six to one (p. 1015). This is what one might expect if discrimination increases in periods of economic difficulty and blacks object to finding themselves subject to "last hired, first fired" rules after overcoming barriers to hiring. Donohue and Siegelman provide no data on the outcomes of the cases they analyze, and we do not have data that would enable us to distinguish between hiring cases and those involving layoff or discharge. Nevertheless, we have already shown that plaintiffs' victory rates declined from the mid-1970s on (just when U.S. incomes ceased to increase), and legal scholars have shown that the courts have been very reluctant to overturn "last hired, first fired" rules, even when they clearly disadvantage groups that had been the victims of discrimination (Schlei & Grossman 1983:ch. 3). If black men's relative earnings stopped increasing when the U.S. economy began to stagnate in the mid-1970s, part of the reason may be that that is when the courts were becoming less sympathetic to blacks' EEO suits (see DiPrete & Grusky's 1990 argument about how the impact of economic forces may be affected by policy interventions).

Might blacks' relative earnings have been affected by congressional action or administrative enforcement, rather than by judicial decisions? This question must be answered separately for the periods before and after the mid-1970s turnaround in judicial decisions.

Before the mid-1970s, it is impossible to distinguish between the effects of legislative, administrative, and judicial decisions on the basis of statistical trends alone. Between the passage of Title VII in 1964 and the mid-1970s, all three branches of the federal government acted more or less in concert, making it impossible to distinguish statistically the potential impact of one from the others: Congress steadily increased appropriations for EEO enforcement (and strengthened Title VII in 1972), the EEOC and other agencies expanded their efforts to improve opportunities for minorities and women, and judicial decisions favored plaintiffs in race discrimination cases (see, e.g., Burstein 1985).

Nevertheless, a strong argument can be made that the courts were essential to whatever gains blacks made during this period. Had the Supreme Court interpreted Title VII narrowly or decided that the federal government could not impose affirmative action plans on government contractors, the potential impact of congressional and executive action on behalf of black workers would have been dramatically reduced. The political climate in the country at the time and recent trends in Supreme Court decisions on civil rights might have made restrictive decisions seem

unlikely, but that does not mean that they were impossible, or inconsequential had they occurred. The Supreme Court interpreted both the Constitution and federal civil rights statutes very narrowly on racial issues in the 1870s, 1880s, and 1890s, helping to undermine the progress blacks had made during Reconstruction; and the Court's response to much New Deal legislation showed it capable of reaching very unpopular conclusions even in times of crisis (Stone et al. 1991:chs. 2, 5). The fact that almost no judicial doctrine on EEO had been developed in states with their own EEO laws (New York adopted the first one in 1945) heightened the uncertainty felt by legal observers trying to predict how the Supreme Court would interpret Title VII (Blumrosen 1971).

As it turned out, some critical Supreme Court decisions provided a far more expansive reading of the law than most of those concerned about EEO expected. To the delight of some (Blumrosen 1971) and the horror of others (Gold 1985; U.S. Department of Justice 1987), the Supreme Court came to define "discrimination" very broadly (in *Griggs v. Duke Power Co.* 1971). The Courts of Appeals and the Supreme Court also interpreted many provisions of Title VII, other civil rights laws, and executive orders very broadly as well (Blumrosen 1984), in ways that could not have been anticipated on the basis of prior decisions (Blumrosen 1971; Burstein 1990). Indeed, the courts' decisions were so expansive that they generated a tremendous amount of protest, including objections to what Glazer (1978:66) has called their "strange definitions of 'discrimination'" and attempts to allegedly require "all the major employing institutions in the country to employ minorities in rough proportion to their presence in the population." Although many of the ideas for defining discrimination and enforcing the EEO laws came from executive agencies, judicial imprimatur was almost surely necessary for them to have any impact, particularly since so many of the ideas were challenged by employers (Blumrosen 1971; Glazer 1978). Thus, while it is impossible to conclude that judicial decisions in the decade after passage of Title VII were sufficient to increase blacks' relative earnings, a strong argument can be made that favorable decisions were necessary; without them, the entire effort to end employment discrimination could have been stopped.

The argument that judicial decisions had an independent impact on blacks' relative earnings is strengthened by examining the changes in judicial outcomes that began in the mid-1970s. Trends in congressional and administrative activity continued as before—Congress consistently increasing appropriations for EEO enforcement (Burstein & Monaghan 1986) and the EEOC making more efficient use of its resources—but the courts, and the courts alone, began to treat blacks less sympathetically on

EEO issues—and when they did, black men's earnings ceased to gain on those of whites.

VI. Changes in Labor Market Outcomes: Enduring or Temporary?

If judicial decisions do affect blacks' relative earnings, how long is the effect likely to last? One possibility is that judicial decisions lead to long-term changes in labor market outcomes by creating what economists call a "stock" of legal rules governing behavior (Heckman & Verkerke 1990:294). The rules may cause employers to alter their behavior permanently and provide new opportunities for blacks (especially if they discover that it is profitable to do so; see Rosenberg 1991; Heckman & Payner 1989). Even if the courts stop making new rules favoring plaintiffs, blacks' relative earnings could continue to increase as they take advantage of the nondiscriminatory doctrines previously mandated. A decline in the proportion of cases won by plaintiffs would not lead to a decline in relative earnings. Only if the courts reverse themselves and undermine established doctrines might blacks' relative earnings decline. Blumrosen contends (1984) that the legal doctrine established by the courts as of the early 1980s was sufficient to ensure further black progress (cf. Edelman 1991; Dobbin et al. 1991).

An alternative possibility is that employers remain inclined to discriminate, and will increasingly do so if blacks and other groups begin losing a higher proportion of cases. Then blacks' relative earnings would be sensitive to trends in judicial outcomes, rising when victory is likely and falling when the courts turn against them.

The data on earnings and judicial decisions suggest that changes in labor market outcomes following judicial decisions are enduring. Blacks' relative earnings rose along with victories in court through the mid-1970s. The subsequent decline in percentage of cases won did not lead to a decline in blacks' relative earnings, however. Instead, the earnings of black men leveled off, and those of black women continued to increase.

What about the 1980s? They seem to present a problem for the hypothesis that blacks' relative earnings are affected by judicial decisions in EEO cases: victory rates rose (though not generally to the levels of the early 1970s), but relative earnings did not. How one responds to this depends on how one tries to deal with situations in which the causal processes are complex and the number of data points small (see the discussions in Donohue & Heckman 1991 and DiPrete & Grusky 1990).

For those willing to agree that the courts can affect labor market outcomes, and did so in the 1970s, three explanations for what happened through the mid-1980s appear plausible. First,

the advent of the Reagan administration led to what many observers saw as weaker EEO enforcement and to attacks on both congressional and liberal judicial interpretations of the EEO laws (see, e.g., Days 1984; Leonard 1990:58–59; U.S. Department of Justice 1987; U.S. Office of Management & Budget 1985). This weakening of administrative enforcement may have affected blacks' labor market outcomes so strongly that it more than counteracted whatever gains might have been attributed to better outcomes in the courts. Second, as Rosenberg (1991) has argued with regard to school desegregation, although the courts may be able to slow reform on their own, they may lack the power to bring it about without strong support from other institutions, including Congress and the executive branch. Thus, because of a lack of support from the Reagan adminstration, the courts may not have been able to improve labor market outcomes for blacks at all in the 1980s. And third, perhaps the nature of the cases won in the 1980s made them less consequential than those of the 1960s and 1970s.

Unfortunately, it is impossible to determine the adequacy of these explanations without better measures of administrative enforcement and case outcomes. Like the others who have dealt with the impact of the EEO laws, we find that improving our ability to estimate consequences depends on improving our ability to measure causes.

VII. Social Movements and Judicial Impact

What can this analysis tell us about the utility of legal mobilization as a social movement tactic? That depends on how one interprets recent work and deals with the fact that data needed to resolve the issue are unavailable.

Rosenberg has recently (1991:338) made the bold argument that "U.S. courts can *almost never* be effective producers of significant social reform." EEO litigation seems to have materially improved blacks' relative earnings, suggesting that with regard to an extremely important issue, the courts have had an impact. Does this mean Rosenberg is wrong?

Not necessarily, for two reasons. First, and more obviously, Rosenberg says "*almost* never," not absolutely "never." Perhaps EEO litigation is one of the rare exceptions he implicitly acknowledges. Second, Rosenberg proposes (pp. 35–36) a set of conditions in which courts may have an impact, particularly circumstances in which there is legal precedent for change; there is support for change from Congress, the executive, and the public as well as the courts; and there are incentives (including market incentives) available to induce compliance. All these conditions would seem to have been present during the period analyzed above. Title VII was implemented at a time when all branches of

the federal government were promoting equal rights and opportunities and when the public favored EEO (Blumrosen 1984; Burstein 1985). Through the mid-1970s judicial decisions supported and were supported by administrative agencies that could reward and punish employers (especially through the contract compliance program; Leonard 1990). Some economists have argued that the law was structured so that employers would be encouraged by market incentives to obey it (Donohue 1986), and, in fact, the law was arguably most effective where and when market incentives were strongest (Epstein 1992; Heckman & Payner 1989; Donohue & Heckman 1991).

By arguing that courts are too weak to bring about social reform by themselves, Rosenberg may be setting up a straw man. Probably few scholars or social movement activists ever believed that the courts could produce much social reform in the absence of other forces making for change. But there is still the question of resource allocation. Rosenberg argues that social movement organizations have devoted too much of their resources to litigation, believing incorrectly that they were likely to get more reform for their money, so to speak, through litigation than through other forms of political mobilization.

To ascertain whether Rosenberg is correct on this point, it would be necessary to calculate the costs and benefits of litigation and compare them to the costs and benefits of other forms of political mobilization. Some analyses of EEO litigation are indeed sensitive to the balance between costs and benefits (Donohue 1986; Posner 1987; Donohue & Siegelman 1991), but no one has the necessary data to make the necessary calculations for litigation alone, much less litigation in comparison to other potential means of improving blacks' labor market outcomes (cf. McCann 1993:1113–15).

At this point, it appears that the chance of winning an EEO suit at the appellate level is enhanced by collective action (including social movement organization involvement; Burstein 1991) and that victory in EEO litigation, in turn, seems to lead to improvement in blacks' relative earnings. Thus, we cannot say whether EEO litigation could be effective in a climate much more hostile to blacks (as it was in the 1920s or 1930s, for example) or whether litigation represents a more efficient use of social movement resources than other tactics might be. But we have real evidence that EEO litigation can help those it is intended to aid, and this is as much as we can say about the efficacy of any social movement tactic (Gamson 1990).

VIII. Conclusions

The data on blacks' relative earnings and judicial decisions in EEO cases are consistent with hypotheses that (1) judicial decisions affect blacks' earnings, and (2) judicial decisions have enduring impact.

Support for these hypotheses leads to several other conclusions. First, litigation may be an effective tactic in the movement for EEO. Contrary to what some scholars have suggested, the courts may not merely be placing a bit of symbolic icing on a cake created by others. We would not suggest that courts can regularly change public behavior when most people oppose their decisions or that courts have the capacity to monitor corporate behavior in detail when corporations resist their decrees (cf. Rosenberg 1991; Handler 1978). But the courts may have a substantial impact when the public is neutral or its desires vague, and when they get business to create new offices (such as EEO offices) and institutionalize new procedures (cf. Edelman 1991; Dobbin et al. 1991). We need to analyze more precisely the circumstances under which judicial decisions have significant consequences.

Second, arguments that EEO legislation is ineffective should be reconsidered. Smith and Welch (1989) argue that a decline in black men's relative earnings after the early 1970s shows that EEO laws have little impact. Their position is undermined, however, by their neglect of women, who arguably gained more than black men from EEO laws, and by neglecting the possibility that EEO laws appeared to have little impact after the mid-1970s because they were not strongly enforced. When Heckman and Verkerke suggest (1990) that EEO laws eliminate blatant forms of discrimination but not more subtle forms, it is unclear what they mean: that EEO laws *cannot* eliminate subtle forms of discrimination, or that they simply have not done so because enforcement has been weak. It is important to distinguish between these two possibilities.

Finally, those studying social movements and social change must expand the breadth of their concerns. Sociologists studying social movements usually ignore the potential impact of litigation and other forms of state-centered activities on social change, while political scientists pay little attention to movement activity. As it becomes clearer that litigation can be an effective social movement tactic, we need to design our research so that we can analyze how movements use a variety of tactics—some disruptive, others very conventional—to bring about social change. We need to analyze the circumstances under which some methods but not others are effective, the process in which social movement activists and social reformers decide on strategy and tactics, and the relationships among different tactics (McCann 1993). Then we

will better understand how blacks and other groups succeed or fail in their attempts to use the democratic political process to bring about social change.

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