Racial Disparity and Employment Discrimination Law: An Economic Perspective

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The basic facts of black economic progress are well known.1 Since 1940, black wages and occupational status have improved, approaching the higher levels that Whites enjoy.2 Beginning in 1965, the rate of improvement in black relative wages and occupational status accelerated. However, since 1975, relative black economic status has not advanced and may have deteriorated slightly. The South is the region of the United States where Blacks have made the most dramatic gains in relative wages and occupational status.

Since 1964 both the legislative and executive branches of the federal government have made substantial efforts to eliminate racial disparity in employment and wages. Congress enacted Title VII of the Civil Rights Act of 19643 in response to a growing national consensus that racial discrimination perpetuated the economic, political, and social subordination of black Americans.4 Title VII expressed a broad Congressional objective to prohibit employers from making employment decisions on the basis of race.5 In 1965,

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2. References to "relative" characteristics, such as earnings or years of education, are to the black/white ratio of these characteristics unless otherwise noted.
4. Supporters of Title VII offered a variety of political, economic, and moral arguments for outlawing employment discrimination. However, one aphoristic excerpt from the House Report on the bill captures the essential character of these arguments: "The right to vote ... does not have much meaning on an empty stomach." Additional Comments of McCullough et al., H.R. REP. No. 914, 88th Cong., 2d Sess., reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2487, 2513.
5. Section 703(a) provides:
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President Johnson issued Executive Order 11,246 prohibiting racial discrimination by federal contractors and imposing affirmative action obligations upon them. Where Title VII focuses on unlawful employment practices, Executive Order enforcement efforts have emphasized direct monitoring of minority representation in the workforces of government contractors.

This article attempts to evaluate the role of these federal antidiscrimination policies in eliminating the economic disparity between black and white Americans. Economists are divided in explaining the observed improvements in black relative wages and occupational status. One group of economists emphasizes the role of long-run trends in migration and education, and minimizes the importance of federal policy. A competing group claims that federal pressure has reduced labor market discrimination, producing a concomitant increase in demand for black workers. Evidence exists to support both groups’ positions.

Migration and education were important factors in the long run improvement of black economic status, but they do not explain the post-1965 increase in the rate of improvement. Rather, the coincidence of increased federal antidiscrimination pressure in the mid-

It shall be an unlawful employment practice for an employer
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discrimi-
nate against any individual with respect to his compensation, terms, conditions, or
privileges of employment, because of such individual's race, color, religion, sex, or
national origin.
prohibitions for employment agencies and labor organizations). Other titles of the Act
prohibited racial discrimination in voting, public facilities and education, and in the pro-

The Supreme Court has translated the general statutory prohibition of Title VII into
two basic theories of liability—disparate impact and disparate treatment. A disparate
treatment case alleges that an employment decision involved intentional racial discrimi-
nation. The order and allocation of burdens of proof in disparate treatment cases is
explained in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-60 (1981).
For the original statement of the disparate treatment theory, see McDonnell Douglas
Corp. v. Green, 411 U.S. 792 (1973). In contrast, if an employer's selection criterion
disqualifies a disproportionate number of black candidates and does not "serve[e], in a
significant way, the legitimate employment goals of the employer," it is unlawful under
the disparate impact theory, regardless of whether the employer's motivation was ra-
cially discriminatory. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2125-26
(1989). For the original statement of the disparate impact theory, see Griggs v. Duke
Power Co., 401 U.S. 242 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425
(1975).

1965). President Johnson's antidiscrimination order was by no means the first executive
action condemning employment discrimination. In fact, the federal contract antidiscrimi-
nation program began in 1941. For further discussion of the early Executive Or-
ders, see infra notes 65-69 and accompanying text.
1960s with the acceleration in the rate of black progress beginning in 1965 makes it plausible that federal pressure caused the improvement in black status. In addition, black wage and occupational gains were concentrated in the South, where employment discrimination was most severe, and where federal enforcement activity was most vigorous during the period 1965 to 1975. This suggests that the federal government's efforts to reduce southern employment discrimination influenced the improvement in black relative economic status.\(^7\)

The southern concentration of black gains also provides some insight into the mechanism by which the law achieved its effects. Prior to federal intervention, many southern labor markets, like much of southern society and politics, were segregated. White employers excluded black workers from important sectors and occupations. State and local governmental officials often disregarded or interfered with the civil rights of Blacks, but only one state, South Carolina, had laws mandating employment segregation, and those regulations applied only to the textile industry.\(^8\) In most southern states, however, informal social codes effectively regulated individual conduct and severely constrained employers’ conduct.\(^9\) The

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7. Although black relative wages have improved, reported wage statistics overstate the magnitude of the improvement. The most compelling statistical evidence of black economic progress is based only on the labor market experience of employed Blacks. Black unemployment rates have been historically, and remain, roughly twice the rates for Whites, and the labor force participation rate for black men has fallen significantly since the mid-1960s. Since a greater proportion of low wage black workers than of low wage white workers has dropped out of the labor force, declining participation rates have raised the average wage of employed black workers relative to Whites. Such wage growth is spurious. Thus, not only has relative black labor supply diminished—a disturbing development in its own right—but also the relatively greater proportion of black labor market dropouts has manufactured some fraction of black relative wage growth as a statistical artifact. Butler & Heckman, The Government’s Impact on the Labor Market Status of Black Americans: A Critical Review, in EQUAL RIGHTS AND INDUSTRIAL RELATIONS 235 (1977); see also Heckman, The Impact of Government on the Economic Status of Black Americans, in THE QUESTION OF DISCRIMINATION: RACIAL INEQUALITY IN THE U.S. LABOR MARKET 50 (1989) (estimating that labor market dropouts account for 15 to 25 percent of black relative wage growth); Brown, Black-White Earnings Ratios Since the Civil Rights Act of 1964: The Importance of Labor Market Dropouts, 99 Q.J. ECON. 31, 38 (1984) (suggesting a figure of 60 percent).


9. The role of government in enforcing these codes of behavior was extremely limited. The southern code was enforced primarily through social and economic pressure, with the threat of private violence should less severe sanctions fail. The consequence of these restrictions was that employment in the South was highly segregated. See Dewey, Negro Employment in Southern Industry, 60 J. POL. ECON. 279 (1952).
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massive federal intervention of the mid-1960s eliminated the overt effects of covert private violence, of governmental indifference to black civil rights, and of a white, southern system of shared values that severely oppressed Blacks. Viewed in these terms, the law protected the basic civil rights of Blacks by the only means available—regulation of voting, public accommodations, schooling, and employment; the law overturned both private consensus and state legal constraints on the labor market.

The available evidence broadly supports the hypothesis that federal law improved black relative wages and occupational status. However, one must be cautious in interpreting the relationship between specific legislation and black economic progress. Existing studies use relatively crude measures of the law. More precise measurement of the effects of legal pressure depends on understanding and modeling the process by which law achieves its impact. The subtle evolution of legal interpretation and enforcement determines what business practices the law prohibits or mandates. These legal obligations should be expected to vary across industries, occupations, regions, and time. Regrettably, neither the legal nor the economic literature contains a careful specification of the evolving requirements of federal employment discrimination law.

Although the available economic evidence cannot distinguish the effects of specific federal policies or legal doctrines, it does support some conclusions. Federal employment discrimination policy—measured as the combined effect of Title VII and the Executive Order—contributed to the post-1964 improvement in black relative wages and occupational status. The influence of federal pressure was most pronounced between 1965 and 1975, and in the South where black wages and integration into manufacturing jobs improved most rapidly. However, it is unlikely that the successes of

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10. Social science research on the effects of antidiscrimination law has largely ignored the role of this system of shared values in reinforcing southern segregation. It is extremely difficult to make precise the notion of community norms, but the segregationist norm pervaded southern life and undoubtedly exerted a powerful constraint on southern labor markets.

11. For one effort to analyze the process by which employment discrimination law changes business practices, see Blumrosen, The Law Transmission System and the Southern Jurisprudence of Employment Discrimination, 6 IND. REL. L.J. 313 (1984); see also Culp, Federal Courts and the Enforcement of Title VII, 76 AM. ECON. REV. PAPERS & PROC. 355 (1986); Culp, A New Employment Policy for the 1980s: Learning from the Victories and Defeats of Twenty Years of Title VII, 37 RUTGERS L. REV. 895 (1985). Although it is beyond the scope of this article to offer a detailed characterization of the evolution of the law, one of us has begun research on this problem. See Verkerke, The Evolution of Employment Discrimination Law: A Legal and Economic History (1990) (unpublished manuscript on file with the authors).
the first decade of enforcement will be repeated in the 1990s. The earlier period was a historically unique opportunity to eliminate the blatantly discriminatory practices that pervaded southern labor markets. There is also evidence that many firms benefited from the new laws and so willingly complied with them. In this environment, the law was easy to enforce and the potential gains from enforcement were substantial. While employment discrimination law remains an important aspect of society's commitment to individual justice and equal treatment in the labor market, legal pressure is unlikely to significantly reduce racial disparity in the 1990s.

The plan of this article is as follows. Section I discusses the available evidence on changes in the relative economic status of Blacks. Section II asks whether federal antidiscrimination policy explains the decline in racial disparity. Section III argues that existing economic studies employ imprecise and limited measures of the law. The conclusion summarizes the policy implications of existing work on the role of law in reducing racial disparity.

I. The Contours of Black Economic Progress

To assess the contention that federal employment discrimination law has reduced economic disparity between Blacks and Whites, one must first determine whether the relative status of black Americans has in fact improved since significant federal efforts began in the mid-1960s. The pattern of black progress across time, geographic regions, occupations, and industries reveals important clues about the effects of federal antidiscrimination pressure.

The basic measure of racial differences in economic opportunities in the labor market is the wage that a person with a given set of productive characteristics (schooling and experience, for example) can expect to earn. This wage measures how much the labor market values a unit of that person's time. It avoids the confounding influences of decisions concerning labor force participation and hours worked. Economic comparisons based on income or earnings are less useful than wage-based comparisons because they implicitly value time spent away from market work at zero rather than recognizing that an hour of home work or leisure is normally worth as

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12. It is understandable that economic studies of federal antidiscrimination policy have focused on the post-1965 period since both Title VII and Executive Order 11,246 became effective in 1965. However, both the wartime Committee on Fair Employment Practices and President Kennedy's Committee on Equal Employment Opportunity may have produced measurable improvements in black employment. See infra notes 65-69 and accompanying text.
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much or more than the wage that could be earned in that hour.\textsuperscript{13} In addition, comparisons based on earnings combine the effects of employment discrimination policies with the effects of various other employment policies. The market wage, particularly after adjusting for differences in productive characteristics, measures possible labor market discrimination more precisely.\textsuperscript{14}

Whether measured by income, wages, or adjusted wages, the economic gap between Blacks and Whites has narrowed. In 1964, the median income of nonwhite males was 57\% of the median white male income. By 1985, the income ratio had risen to 66\%.\textsuperscript{15} The wage gap between black and white workers has also declined. In 1939, the average wage of black male workers was only 43\% of the average white wage; by 1979, this wage ratio had improved to 73\%.\textsuperscript{16} Adjusted wage figures show somewhat less improvement because gains in measurable productive characteristics produced much of black economic progress. Black relative weekly earnings,\textsuperscript{17} adjusted for the influence of region of residence, urban status, age, and education, rose from 75\% in 1963 to 93\% in 1984.\textsuperscript{18}

Other measures of black relative economic status also show significant improvement. The proportion of black men working as professionals or managers relative to the proportion of white male professionals or managers has doubled from 32\% in 1964 to 64\% in

\textsuperscript{13} If individuals are not free to choose their hours of work, an hour of home work or leisure may be worth less than the prevailing wage rate.

\textsuperscript{14} The wage is not without problems as a policy measure. If discrimination induces low wage black workers to drop out of the labor force, then relative wage statistics will underestimate the level of labor market disparity between Blacks and Whites. Moreover, since pure wage discrimination by race is quite rare, relative wage statistics are an indirect measure of hiring and promotional discrimination. Indices of occupational status offer more direct measures of exclusion from desirable positions. The available occupational statistics, unfortunately, distinguish only a few extremely broad occupational categories, making it impossible to determine if Blacks are being relegated to inferior jobs within these broad categories.


\textsuperscript{17} Weekly earnings statistics are not strictly comparable to wage figures, but their movements are closely related.

1986.\textsuperscript{19} A simple index of the similarity of black and white occupational distributions, which equals 100 when the distributions are completely dissimilar and zero when the distributions are identical, improved from 37.1 in 1964 to 21.4 in 1988.\textsuperscript{20} The convergence of black and white income distributions offers further evidence of black economic progress. One measure of the degree of similarity between the two income distributions is the proportion of black men whose income exceeds the median white income; this figure tripled from 8\% in 1939 to 29\% by 1979.\textsuperscript{21}

In contrast to the optimistic picture of wage and occupational advance for employed Blacks, the black unemployment rate has remained approximately twice the level for Whites, and the black relative labor force participation rate has fallen since the mid-1960s.\textsuperscript{22} These data suggest that antidiscrimination pressure has not solved the economic problems of low income Blacks. Now the greatest difference between the labor market experiences of Blacks and Whites is whether Blacks will be employed at all.\textsuperscript{23}

A closer examination of the data by time, region, occupation, and industry reveals important details within the general pattern of wage improvement.

\textit{A. Time}

First, there is little doubt that significant black economic progress occurred over a relatively short period of time. The rate of black progress accelerated between 1965 and 1975, then leveled off after

\textsuperscript{19} Id. at 34.

\textsuperscript{20} U.S. DEPT OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 78 (1989); HANDBOOK OF LABOR STATISTICS 44, 47 (1983). The index equals the sum of the absolute differences between the percentage of black workers and the percentage of white workers in each occupational classification divided by two.

\textsuperscript{21} J. SMITH & F. WELCH, CLOSING THE GAP, supra note 16, at 10.

\textsuperscript{22} Butler & Heckman, supra note 7, at 238.

\textsuperscript{23} There is as yet no generally accepted explanation for the decline in labor force participation. One view is that the expansion of government transfer programs beginning in the mid-1960s, particularly the increasing benefits under the social security disability program, made labor force participation less attractive for marginal workers. Another possibility is that the relative profitability of nonmarket activities such as selling drugs increased. Such an explanation may be plausible as applied to young black men, but it seems unlikely to explain the marked decline in participation of 45 to 65 year old black men. Unfortunately, existing studies have been unable to either confirm or refute these hypotheses or to offer a more convincing explanation for declining labor force participation. The available evidence does suggest, however, that a fraction of the measured improvement in black economic status is due to the statistical effects of declining participation rates. For a review of the evidence on these issues, see Heckman, supra note 7.
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1975. Studying aggregate statistics on the relative income and occupa-
tional position of Blacks, Richard Freeman found that the post-
1964 rate of improvement significantly exceeded the pre-1964 rate.24 Subsequent studies by Freeman and others using more re-
cent data have confirmed the existence of this post-1964 acceleration.25

A detailed study of the South Carolina textile industry demonstrates stable patterns of racial exclusion over the period 1910 to 1964. During this period the mills employed only a few Blacks, who performed janitorial or menial outdoor work. After 1964, however, Blacks made dramatic break throughs in employment and wages.26 Even studies that emphasize the role of gradual historical forces in generating black progress support the view that the rate of change accelerated in the 1960s and 1970s.27 But since 1975 black relative wages have stagnated. The adjusted weekly earnings ratio, which had reached approximate parity in 1975, deteriorated slightly through 1984.28

B. Region

Second, regional data reveal that black progress was most pro-
nounced in the South. In the South the adjusted relative wage rose from 60% in 1964 to 88% in 1984. The increase in the North during the same period, from 88% to 97%, was considerably less dra-
matic.29 Moreover, the fact that more than half of the black population lives in that region magnifies the South’s importance.30


26. Heckman & Payner, supra note 8; see also Butler, Heckman & Payner, supra note 8.

27. Smith & Welch, Black Progress, supra note 16, at 528.

28. Bound & Freeman, supra note 18, at 38. For further confirmation of the post-1975 slowdown in black progress, see Juhn, Murphy & Pierce, Accounting for the Slow-

29. Bound & Freeman, supra note 18, at 38.

30. In 1970 and 1980, 55 percent of Blacks lived in the South. U.S. Dep’t of Com-
merce, State and Metropolitan Area Data Book 1986 at 504.
Other studies document the concentration of black progress in the South. For example, the strongest post-1964 relative wage gains were in the South.\textsuperscript{31} There is also evidence of rapid desegregation of Southern firms.\textsuperscript{32} Richard Butler, James Heckman, and Brook Payner report that two-thirds of the black economic advance between 1959 and 1969 occurred below the Mason-Dixon line.\textsuperscript{33} Southern wages for both Blacks and Whites have historically been less than those for other regions, and the wage penalty for southern residence was greater for Blacks.\textsuperscript{34} Between 1969 and 1979 Blacks and Whites converged in this measure of southern inequality.\textsuperscript{35}

C. Occupation and Industry

Examing black economic progress by occupation and industry reveals other interesting facts. First, Blacks employed in higher level managerial and professional jobs experienced the greatest advances in relative wages.\textsuperscript{36} Second, the largest movements of black workers into new and higher paying occupations came in unskilled and low-skill blue collar job classifications such as manufacturing operatives.\textsuperscript{37}

The large relative wage movements at the upper end of the occupational distribution are signs of progress. The vast majority of black workers, however, work at lower level jobs, a pattern that was even more pronounced in 1964 than it is today. Developments in blue collar and lower skill labor markets thus have a disproportionately strong influence on black economic status. The rapid entry of large numbers of black workers into higher paying occupations such as manufacturing operatives accounts for a far larger portion of

\begin{itemize}
\item \textsuperscript{31} Freeman, \textit{Black Progress}, supra note 25, at 277; Butler & Heckman, supra note 7; Freeman, \textit{Changes in the Labor Market}, supra note 24, at 105.
\item \textsuperscript{33} Butler, Heckman & Payner, supra note 8, at 262; see also Heckman & Payner, supra note 8; Butler & Heckman, supra note 7.
\item \textsuperscript{34} The wage penalty for southern residence refers to the amount by which the wages for residents of the South are lower than the wages of otherwise comparable non-southerners.
\item \textsuperscript{35} J. Smith & F. Welch, \textit{Closing the Gap}, supra note 16, at 48.
\item \textsuperscript{36} Many studies have found greater wage gains for black workers with higher skill and education. See, e.g., Freeman, \textit{Changes in the Labor Market}, supra note 24; Freeman, \textit{Black Progress}, supra note 25; Smith & Welch, \textit{Affirmative Action and Labor Markets}, 2 J. Lab. Econ. 269 (1984). This feature of the change has come to be known as the "pro-skill bias" of affirmative action pressure.
\item \textsuperscript{37} See Heckman & Payner, supra note 8; Butler, Heckman & Payner, supra note 8; Freeman, \textit{Changes in the Labor Market}, supra note 25; Vroman, supra note 25.
\end{itemize}
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black progress than do the wage gains for higher level occupations. In contrast to the relative deterioration of the position of unskilled black workers, highly educated Blacks now appear to earn salaries comparable to Whites with equal education and experience. These relative wage gains are likely to be permanent since the demand for highly skilled workers continues to grow.

The importance of the manufacturing sector to black workers has influenced the degree to which the gains of the post-1964 period were maintained into the 1980s. A significant decline in the unskilled labor market appears to have caused the post-1975 stagnation in relative black status. The South Carolina textile industry illustrates how the manufacturing industry's decline diminished Blacks' relative status. During the 1960s and early 1970s large numbers of black workers were hired in the southern textile industry, an industry from which they had been largely excluded. However, in the early 1980s, due to increasing competition from foreign textile mills, many southern mills closed and Blacks lost their past employment gains. A similar pattern has been repeated in other manufacturing industries throughout the country.

To summarize the important findings on the contours of black economic progress: The gap between the wages of Blacks and Whites has narrowed substantially. However, the improvements in black relative wages were quite different across time, regions, and occupations. In particular, black relative wage gains were most pronounced in the South during the period 1965 to 1975, and black employment grew most rapidly in low-skill, blue-collar occupations. Black relative wages have stagnated since 1975, most likely due to the collapse of the U.S. manufacturing industry and the attendant loss of many relatively high-paying, low-skill jobs. At the upper end

38. Heckman & Payner, supra note 8.
39. R. Freeman, Black Elite: The New Market for Highly Qualified Black Americans (1977); Freeman, Black Progress, supra note 25.
40. See sources cited supra note 7. There has been an increase in the relative premium for skilled labor. The wages of unskilled workers have fallen as jobs for these workers largely disappear, leaving a large pool of unskilled workers to compete for relatively few jobs. As a result, Blacks, who are disproportionately concentrated in low-skill jobs, have fared poorly since 1975. See Kasarda, supra note 28; Juhn, Murphy & Pierce, supra note 28.
41. See Heckman & Payner, supra note 8.
of the occupational and skill distribution, highly educated Blacks appear at present to earn wages similar to those earned by Whites of similar measured skills.

II. Identifying the Role of Employment Discrimination Law

Although the statistics on black progress are reasonably uncontroversial, economists are divided about how to interpret these facts. In particular, they disagree over the degree to which federal civil rights policies contributed to improving black economic status. One view, which we will call the “continuous change” hypothesis, holds that long-term trends in black migration and relative educational attainment explain improvements in black status. A competing view, which we will call the “discontinuous change” hypothesis, emphasizes the temporal coincidence of federal civil rights law and the post-1964 acceleration in black progress. Any effort to evaluate the competing theories of black progress should focus on the comparative ability of the theories to explain the pattern of black economic advance, in particular the central role of black improvement in the South and the acceleration of black economic progress during the period 1965 to 1975.

A. The Continuous Change Hypothesis

Continuity theorists emphasize the role of long-term trends in migration and educational attainment in their explanation of black progress. Adherents to this view thus minimize the importance of antidiscrimination efforts. James Smith and Finis Welch, the foremost proponents of the continuous change hypothesis, believe federal law and other antidiscrimination programs have had a marginal impact:

[T]he racial wage gap narrowed as rapidly in the 20 years prior to 1960 (and before affirmative action) as during the 20 years afterward. This suggests that the slowly evolving historical forces we have emphasized . . . education and migration—were the primary determinants of the long-term black economic improvement. At best, affirmative action has marginally altered black wage gains around this long-term trend.43

Despite an emphasis on “historical forces” that evolved slowly over the entire period under study, Smith and Welch’s own work undermines the continuity hypothesis. Their results show that the sources of black improvement differed dramatically across decades. Black

43. Smith & Welch, Black Progress, supra note 16, at 555.
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migration out of the South, for example, played an important role in early decades but declined in importance after 1965.\footnote{Donohue & Heckman, supra note 1.}

An even more severe problem for continuity theorists is how to explain the rapid acceleration of black progress after 1964. Proponents of the continuity hypothesis argue that the relative improvements in black schooling explain black progress after 1960.\footnote{Smith & Welch, \textit{Black Progress}, supra note 16.} However, the convergence in years of schooling completed does not explain this progress. Rather it is improvement in the return to black schooling relative to white schooling;\footnote{\textit{Id.} The return to schooling measures the increase in wages produced by an additional year of schooling.} more than 80\% of the estimated contribution of education to black progress comes from this source.\footnote{Donohue & Heckman, supra note 1.} Proponents of the continuity hypothesis argue that as the quality of black schools improved relative to the quality of white schools, the market payment for black schooling increased relative to that for white schooling.

There is some historical evidence to support this claim.\footnote{This evidence is reviewed in greater detail in Donohue & Heckman, supra note 1.} Aggregate data on relative term length and schooling expenditures in segregated southern schools markedly improved during the mid-1940s. Black children educated in these schools appeared in the labor market in the mid-1960s. It is possible, therefore, that improvements in the quality of schooling account for much of the black economic advance in the South in the 1960s.

There are, however, several important reasons to treat this interpretation with some skepticism. First, there is no direct evidence linking increased black school quality to improvements in the return to schooling. In fact, even the aggregate evidence on relative schooling quality is somewhat ambiguous. Although term length at black schools converged toward levels found in white schools during the period in question, the rapid growth in the other important measure of school quality, school expenditures, may not signal an improvement in school quality. Much of the growth in school expenditures for black schools came from a relative increase in the salaries of teachers in black schools, which resulted from an NAACP
salary equalization drive. At least in the early years after equalization, the same teachers were simply paid more. 49 Finally, all age groups, even those who had completed their schooling before the 1940s, experienced post-1960 increases in their estimated returns to schooling. If schooling quality improvements were an important determinant of increased returns, only those workers who could have benefited from enhanced school quality should have received higher returns. The relative improvement in the return to schooling for Blacks of all age groups is more consistent with a decline in market discrimination than with an improvement in school quality. 50

B. The Discontinuous Change Hypothesis

Because the discontinuous increase in black relative wages, the passage of Title VII of the Civil Rights Act of 1964, and the adoption of affirmative action requirements for federal contractors all occurred at the same time, many scholars believe government policy played an important role in improving black economic status. 51 Despite the fact that the evidence for the continuity hypothesis suffers from several internal contradictions we should be cautious about embracing the discontinuity hypothesis. First, the correlation between the federal intervention and the acceleration of black progress might be purely spurious. One could argue that changing attitudes about employment discrimination sparked both the adoption of new federal policies and the rapid improvement in black status. An additional problem for those who claim that federal policy was important is that enforcement agency budgets were small and their powers were weak during the period of greatest black relative wage gains.

The warning that "correlation is not causation" applies with particular force to the attempt to infer from aggregate time series data that employment discrimination laws caused a change in the labor market. It is possible that the attitudinal changes that made the legislative or executive action possible were the true cause of the observed change in the labor market. On this view, federal policies merely expressed underlying changes in attitudes, which themselves

49. Id. It is possible that higher salaries inspired black teachers to improve their teaching. However, to the extent that schooling quality improvements depend on attracting more highly qualified teachers, the effects of salary equalization would be felt only after potential teachers had time to adjust their expectations and plans.

50. This point is conceded in Smith & Welch, Black Progress, supra note 16; see also Donohue & Heckman, supra note 1.

51. See, e.g., Freeman, Black Progress, supra note 25; Freeman, Changes in the Labor Market, supra note 24.
produced a decline in discrimination. Ironically, the shift in national attitude that made possible the enactment of Title VII was in part produced by the persistence and virulence of southern racial discrimination.52 Southern attitudes undoubtedly changed to some extent during this period, but the disaggregated statistics on southern labor markets reveal a stable and persistent pattern of exclusion. Consequently, Title VII primarily sought to eliminate a characteristically southern pattern of occupational segregation.53 Southern political leaders resisted vigorously, and yet it was in the South that the law had its greatest effect.

Critics of the discontinuity hypothesis emphasize administrative agencies’ poorly coordinated enforcement efforts during the first years of concerted federal antidiscrimination activity from 1965 to 1975—the decade that witnessed dramatic black relative wage gains.54 For example, they point to the remedies available to agencies against federal contractors who discriminated. These remedies include debarment,55 but very few federal contractors have been debarred under the Executive Order. The EEOC did not have authority to sue employers until 1972, and its funding for investigations remained at a low level well into the 1970s.

To focus only on the funding and effectiveness of the enforcement agencies is to neglect the crucial role private litigation plays in enforcing employment discrimination law. Title VII initially limited the EEOC to conference, conciliation, and persuasion, but in 1965 private parties obtained the right to challenge discriminatory practices in federal court.56 The threat of private litigation provided immediate incentives for employers to comply with Title VII. Even before it gained the right to sue, the EEOC exerted influence by pressing for expansive interpretations of the law through its issuance of administrative guidelines. The Supreme Court, for example, referred to the EEOC’s Guidelines on Employment Testing

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53. Id. at 212 (complaints of Senator Strom Thurmond that Civil Rights Act was targeted exclusively at South).


Procedures in its landmark decision in \textit{Griggs v. Duke Power Co.}^{57} The EEOC's impact during this early period thus appears to have been greater than its meager budget would indicate.

By adopting a broader view of the scope of the federal attack on discrimination, one also can see how various aspects of the federal antidiscrimination programs were mutually reinforcing. During the same period in which Title VII was enacted, Congress and the federal courts challenged other facets of the southern pattern of racial subordination. Voting rights, school desegregation, and public accommodations were important noneconomic areas in which federal pressure increased.\textsuperscript{58} The simultaneous federal attack on discrimination in employment, voting, schooling, and public accommodations was far more likely to succeed than a law limited to just one of these areas.

For many southern employers, the prohibition of employment discrimination dramatically expanded the pool of available workers. Private entrepreneurs' earlier attempts to integrate southern textile plants in isolated mill villages failed.\textsuperscript{59} Butler, Heckman, and Payner document that employing Blacks slowed the growth of labor costs and kept the South Carolina textile industry competitive in the face of foreign competition.\textsuperscript{60} Since social and economic sanctions played an important role in preventing firms from employing Blacks, employers complied willingly with a law that provided an excuse to do what was in their economic interest. Studies of budget allocations and the like ignore the fact that the economic incentive for nondiscrimination created a powerful leverage effect for the law. This fact helps to explain why black employment prospects improved, despite weak enforcement of the law.

It would be a grave mistake to attribute all of the post-1964 black progress in relative wages and blue collar employment to civil rights laws. Social activism in the South, improvements in schooling quality, and southern industrial growth played significant roles. However, the record from the South demonstrates that the labor market

\textsuperscript{57.} 401 U.S. 424, 433-34 (1971).


\textsuperscript{59.} G. Wright, Segregation and Racial Wage Differentials in the South Before World War II (Stanford University, 1988) (unpublished manuscript); Butler, Heckman & Payner, \textit{supra} note 8.

\textsuperscript{60.} Butler, Heckman & Payner, \textit{supra} note 8; Heckman, \textit{supra} note 7.
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for Blacks improved in a way that can most convincingly be explained by assigning a major role to federal civil rights policy.

III. Measuring the Impact of the Law

Quantifying the law in order to measure its impact is a troublesome problem. One common approach analyzes the timing of black economic progress in relation to the advent of federal antidiscrimination pressure. When improvement in black relative status coincides with the enactment of federal laws prohibiting discrimination and mandating affirmative action for federal contractors, the claim that the law caused the improvement is more credible. Alternative approaches to the measurement problem study specific measures of enforcement activity, rely on anecdotal and survey evidence concerning changes in employment practices, or compare minority employment growth for federal contractors with that of noncontractors.

A. Timing

Understanding the timing of changes in black relative economic status is an important first step toward establishing a causal relationship between federal policy and black progress. The strongest evidence of federal policy effects is the acceleration of the rate of black economic progress after 1964. However, this trend variable is an inherently limited measure of the law. A post-1964 trend variable measures the influence of both Title VII and the Executive Order program along with any other concurrent events that affected the labor market. For the purposes of policy analysis, a trend can reveal, under the best of circumstances, whether the net effect of all federal policies intended to improve black status worked toward the desired result. However, a trend cannot distinguish the effects of simultaneous legal interventions, or the influence of doctrinal innovations such as the disparate impact theory under Title VII or the use of goals and timetables under the Executive Order program.

There also are ambiguities concerning the appropriate starting date for measuring federal antidiscrimination pressure. Economic studies of antidiscrimination policy effects have uniformly adopted 1965 as the date at which the impact of federal policy should become discernible. Two important legal events that occurred in 1965

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61. A trend variable takes the value 1 in the first year, 2 in the second year, and so on. It measures the average change from year to year after controlling for the other variables in the regression. This variable is a statistical synonym for time.
support this choice: the provisions of Title VII, which went into ef-
fect on July 2, 1965, and Executive Order 11,246 which became ef-
fective on October 24, 1965. Each will be discussed below.

The practical effects of Title VII depended on administrative and
judicial interpretation of the statute. Important doctrines such as
the disparate impact theory and the rules for awarding back pay
were not established until many years after 1965. Far from estab-
lishing a well-defined and fully developed system of law, the effec-
tive date of Title VII marked the beginning of an uneven, and often
unpredictable, pattern of doctrinal development. By failing to dis-
entangle the disparate elements of this doctrinal pattern, existing
studies incorrectly conflate early developments with later ones.

Nor is it clear that 1965 marked the advent of federal antidis-
crimination pressure on federal government contractors. Executive
Order 11,246 was only part of a complex historical pattern of anti-
discrimination pressure on federal contractors. Beginning in
1941, President Franklin D. Roosevelt's wartime Executive Order
8802 established a Committee on Fair Employment Practice to en-
sure nondiscrimination in the defense industries. Although this Or-
der and its immediate successor, Executive Order 9346, appear to
have temporarily reduced employment discrimination against
Blacks, the Committee was dissolved in 1946. Subsequent orders
issued by Presidents Truman and Eisenhower produced little more
than studies of the problem.

The first Order to have serious enforcement provisions was Presi-
dent Kennedy's Executive Order 10,925, issued in 1961. This Or-
der established the President's Committee on Equal Employment
Opportunity, which initiated the voluntary Plans for Progress pro-
gram and processed many more complaints far more expeditiously
than did its predecessors. Executive Order 11,246, issued in 1965,
largely incorporated the provisions of the Kennedy Order, but

later); Albemarl Paper Co. v. Moody, 422 U.S. 405 (1975) (back pay doctrine; ten years
later).
63. 3 C.F.R. 957 (1938-1943 compilation) (issued on June 25, 1941).
64. 3 C.F.R. 1280 (1938-1943 compilation) (issued on May 27, 1943).
65. See, e.g., M. Sovern, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOY-
67. M. Sovern, supra note 67, at 106. The Committee's jurisdiction was, like that of
its successor the OFCC, limited to employers with federal government contracts.
transferred administrative responsibility from the President's Committee to the Secretary of Labor. The Secretary of Labor established the Office of Federal Contract Compliance (OFCC) to carry out his responsibility to administer the Order and to adopt the necessary rules and regulations. Each contracting agency retained responsibility for obtaining compliance with the Order. The transfer, coupled with increasing budgets for the OFCC, appears to have increased enforcement activity such as compliance reviews and the issuance of formal regulations. However, the OFCC continued to emphasize the same methods of conference and conciliation that had characterized the work of the President's Committee. Beginning in 1968, the Office of Federal Contract Compliance (OFCC) required contractors to prepare written affirmative action plans designed to eliminate any "underutilization" of black workers. Thus, it would be most accurate to say that antidiscrimination pressure on federal contractors increased in the early 1960s and then increased again in the late 1960s as the OFCC became more active.

B. Specific Measures of Enforcement

Because trend variables are of limited usefulness for analyzing legal interventions, it is important to recognize that variables with other labels are often little more than the functional equivalent of trend variables. For example, some studies of black economic progress have used cumulative EEOC expenditures as an indicator of federal enforcement activity. Since EEOC expenditures increased fairly smoothly during the post-1964 period, the expenditure variable is equivalent to a post-1964 trend variable. Other measures of specific enforcement activity can be distinguished from a trend variable. Among these alternative measures are variables such as the number of discrimination claims filed, the percentage of plaintiff victories, the percentage of favorable appellate rulings, and, finally, the presence of an EEOC regional office.

69. The initial OFCC regulations were issued on May 1, 1968. Subsequent elaborations of the affirmative action requirement were Order No. 4, issued February 5, 1970, and Revised Order No. 4, issued in 1971. See 41 C.F.R. §§ 60-1 to 60-4, 60-20, 60-50.
70. See, e.g., Freeman, Black Progress, supra note 25.
71. See Beller, The Economics of Enforcement of an Antidiscrimination Law: Title VII of the Civil Rights Act of 1964, 21 J.L. & Econ. 359 (1978) (number of charges filed with EEOC in each state, presence of EEOC regional office); Burstein, Equal Employment Opportunity Legislation and the Income of Women and Nonwhites, 44 Am. Soc. Rev. 367 (1979) (percentage of plaintiff victories); Culp, A New Employment Policy, supra note 11 (percentage of favorable rulings, percentage of procedural as against substantive rulings); Freeman,
An intuitively appealing approach to the problem of measuring specific enforcement activity is to count the number of claims filed under the relevant law. One difficulty with this approach is that claim counting measures legal flows without accounting for the effect of the stock of legal rules. To the extent that prior cases have established clear legal standards, the existing stock of legal rules governs behavior without the need for further litigation. An equally important problem is that claim counting ignores the composition of the flow of legal cases. As the law evolves, the nature of litigated cases varies for a variety of reasons unrelated to the amount of legal pressure applied. Finally, it is quite conceivable that the regions, industries or occupations with more claims are simply those more resistant to complying with the law. Cases filed could indicate the extent of the problem—rather than the amount of legal pressure applied. As long as we consider voluntary compliance part of the law’s effects, fewer cases do not necessarily mean the law has exerted little influence. If voluntary compliance is widespread then counting claims is perverse. The number of claims filed is then more a measure of resistance to compliance than an accurate index of the influence of the law.

Similar problems arise in using the percentage of plaintiff victories, the percentage of favorable appellate rulings, or the mix of procedural and substantive rulings to measure the degree of legal pressure. The percentage of plaintiff victories at trial depends on both the prevailing legal standard and the distribution of disputes that come to trial. Plaintiffs and defendants must weigh the competing costs and benefits of litigating a case to final judgment or settling their dispute. The factors that determine which disputes are settled and which are litigated (such as, the stakes to the parties and the amount of uncertainty) bear little, if any, relation to amount of legal pressure felt by employers. The decision to appeal involves similar considerations. As a result, the distribution of appellate

Black Progress, supra note 25 (percentage of favorable rulings); Leonard, The Effectiveness of Equal Employment Law and Affirmative Action Regulation, in 8 Research in Labor Economics 319 (S. Rosen ed. 1986) (number of Title VII class action law suits).

72. For a simple model of law as a capital stock, see Landes & Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 J.L. & Econ. 249 (1976).

73. For a discussion of the changing composition of Title VII claims filed, see J. Donohue & P. Siegelman, The Changing Nature of Employment Discrimination Litigation (April 1989) (unpublished manuscript on file with the authors).

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cases is even less likely to represent the overall distribution of disputes. Since an appellate court’s ability to render favorable rulings is largely determined by the distribution of cases that are appealed, the proportion of favorable rulings is unlikely to bear any systematic relationship to the level of legal pressure. Similarly, the distribution of appellate cases largely determines the proportion of substantive and procedural rulings.

C. Anecdotal and Survey Evidence

A more direct approach to measuring the effects of the law on employment practices is to rely on surveys of businesses and anecdotal evidence concerning changes in personnel practices. In 1976, the Bureau of National Affairs (BNA) surveyed personnel executives about their companies’ responses to federal employment discrimination law. Of the companies responding, 86 percent had formal equal employment opportunity policies,\(^{75}\) while 60 percent reported that they had changed their selection procedures in response to federal law.\(^{76}\) In addition, more than half of the firms surveyed had special minority recruiting programs to help achieve their equal employment opportunity goals.\(^{77}\) A series of studies sponsored by the Conference Board documented the dramatic changes in personnel practices since the enactment of Title VII, as well as the importance of federal policy in altering employer’s personnel policies.\(^{78}\)

Economists are generally suspicious of anecdotal and survey evidence. They prefer to observe directly the choices that individuals and firms make in the market. While this stance does guard against the selective citation of supportive anecdotes, a broader conception of admissible evidence may be appropriate in this difficult inquiry. At the very least, anecdotal and survey evidence could generate hypotheses to be tested by more conventional means.


\(^{76}\) Id., at 4.

\(^{77}\) Id., at 2. Richard Freeman has characterized the BNA survey results as documenting “the far-reaching impact of the federal equal employment pressures on corporate labor market behavior.” Freeman, Black Progress, supra note 25, at 281. See also Blumrosen, supra note 11; Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 107 (1972) (further anecdotal evidence of changes in personnel practices induced by federal pressure).

D. Minority Employment Growth in Government Contractors

Part of the economic literature on employment discrimination focuses on the effects of a specific program—the Executive Order contract compliance program. By comparing the rate of growth of relative minority employment and occupational status in firms with government contracts to the rate of minority employment growth in firms that without them, these studies purport to measure the effects of the Executive Order’s affirmative action obligations.\textsuperscript{79} The increase in the rate of growth for contractors is compared to the rate of growth for noncontractors, who are covered by Title VII. These studies attempt to capture the incremental effect on contractors’ employment decisions of imposing affirmative action obligations in addition to Title VII’s nondiscrimination requirement.

Although economic studies consistently find higher minority employment growth in contractor firms, the interpretation of these results remains somewhat ambiguous.\textsuperscript{80} One possible interpretation of differential rates of minority employment growth is that the affirmative action obligation caused a shift of black workers into the covered sector. If minority workers are highly responsive to improved employment opportunities, the observed higher rate of growth could represent little more than black workers moving into the protected sector,\textsuperscript{81} with little or no overall effect on black wages or employment.

In an attempt to measure the wage effect directly, James Smith and Finis Welch compared black relative wages in industries that sold a high proportion of total output to the federal government to relative wages in industries that sold a low proportion of output to the government.\textsuperscript{82} Smith and Welch found little relative wage difference between the two sectors. From this result, the authors concluded that the Executive Order program had minimal effects.\textsuperscript{83} Such an interpretation is unwarranted, however, because of an ambiguous feature of the wage comparison. The large movement of


\textsuperscript{80} For further elaboration of these ambiguities, see Donohue & Heckman, supra note 1.

\textsuperscript{81} Id.

\textsuperscript{82} A more appropriate comparison would be between industries with a large proportion of employment in contractor firms and those industries with low proportions.

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workers into the covered sector would be expected to reduce the supply of black workers in the noncontracting sector. This supply restriction could cause noncontractor employers to bid up the relative wages of black workers. A comparison of contracting sector wages to noncontracting sector wages may significantly understate the true wage effect of the Executive Order program. In short, comparing wage rates across sectors may reveal even less about the effects of the Executive Order than does comparing rates of black employment growth.

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At this point, it should be clear that existing measures of federal antidiscrimination policy suffer from serious interpretive problems. Chief among these problems is the fact that existing measures are ill-suited to distinguish the effects of specific polices. Although strong evidence indicates that federal employment discrimination policies improved Blacks’ relative wages and occupational status, this conclusion provides little guidance as to the costs and benefits of introducing new programs and doctrines or changing existing ones. Only evidence concerning the effects of specific policies can guide policy formulation. For instance which was responsible for the rapid black progress of 1965 to 1975—the Executive Order or Title VII? What role did the disparate impact doctrine play in accelerating the transformation of business practices? Were the nondiscrimination provisions of the law sufficient to produce the observed improvements or did numerical goals and timetables involve significant preferential treatment for black workers? Existing studies cannot answer these questions.

IV. Conclusions

This article considers current economic research on the role of federal law in reducing economic disparity between Blacks and Whites. The available evidence demonstrates that federal employment discrimination law played a significant role in accelerating the rate of improvement in black relative wages and occupational status during the period 1965 to 1975, particularly in the South. This is not, however, cause for optimism about the future role of employment discrimination law in eliminating racial economic disparity.

Although the law succeeded in the South between 1965 and 1975, it appears to have had little aggregate effect since then. Eliminating the South’s overtly discriminatory practices explained a great deal of
the improvement in black economic status. The prohibition of blatant discrimination was reasonably easy to enforce and led to significant advances for black workers. In fact, many employers, particularly southern manufacturing firms, probably welcomed the larger supply of workers. It is unwise, though, to extrapolate from the achievements of the first decade of federal intervention to the potential for improvement in the 1990s. The earlier period presented a historically unique opportunity to eliminate blatantly discriminatory practices without serious danger of impinging on the overall efficiency of the labor market. The remaining targets for employment discrimination law are considerably less clear and appear to offer smaller potential gains.

Employment discrimination law remains an important aspect of our commitment to individual justice in the labor market. The law continues to protect individual Blacks from both the economic loss and the personal indignity of being rejected from employment on racial grounds. However, the available economic evidence strongly suggests that the law is unlikely to have a major influence on aggregate racial disparity in the 1990s. Basic economic forces such as the decline of manufacturing industries and the increasing return for skilled labor relative to unskilled labor will play a much more prominent role in shaping black relative economic status.