

**PANEL II:  
THE ROLE OF GOVERNMENT IN CLOSING  
THE SOCIO-ECONOMIC GAP FOR  
MINORITIES\***

**THE IMPACT OF FEDERAL CIVIL RIGHTS  
POLICY ON THE ECONOMIC STATUS  
OF BLACKS**

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I. INTRODUCTION

American civil rights policy is poised at a crossroads. The Supreme Court, reshaped by the perspectives of a new Chief Justice and three other Reagan appointees, appears convinced that the federal law against employment discrimination must be trimmed. This is evidenced by recent decisions<sup>1</sup> diminishing the impact of the major judicial expansions of civil rights law in *Griggs v. Duke Power Co.*<sup>2</sup> and *Runyon v. McCrary*.<sup>3</sup> At the same time, Congress, which is considering the Civil Rights Act of 1990,<sup>4</sup> has shown that it has little sympathy for the Court's latest outlook, and, if anything, would like to strengthen federal antidiscrimination law. The divisions within the legislative and

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1. See *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989); *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989); *Martin v. Wilks*, 109 S. Ct. 2180 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

2. 401 U.S. 424, 431 (1971) (holding that, under the adverse impact model, once plaintiff has shown that the employment practice in question operates to disqualify members of a protected group at a substantially higher rate than their counterparts in the workforce, the burden shifts to the employer to show that the practice or test "bear[s] a demonstrable relationship to the successful performance of jobs for which it was used").

3. 427 U.S. 160 (1976) (ruling that 42 U.S.C. § 1981 prohibits private, commercially operated non-sectarian schools from denying admission to prospective students because they are black).

4. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990). It is likely that some version of the Civil Rights Act of 1990 will become law in 1991.

judicial branches are symbolic of the conflict in the academic community over the effectiveness of Title VII of the Civil Rights Act of 1964<sup>5</sup> and the federal government contract compliance program.<sup>6</sup> Indeed, this academic debate assumes an importance beyond the already momentous issue of employment discrimination, because it goes to the heart of the entire debate over the wisdom of all government intervention in this area.

The collapse of centralized governments in Eastern Europe underscores the woeful consequences that are visited upon those who disregard the power of markets. Seeking to harness the momentum flowing from this powerful vindication of a central conservative tenet, the American right would like to roll back government regulation across the board. The American left, chastened over the years by the dreary results of many government initiatives, still sees the Civil Rights Act of 1964 as the shining star in the liberal firmament. If the left's star can be toppled, the case for government intervention, no matter how noble the objective, will be severely impaired. With so much at stake, it is not surprising that politics has seeped into the science of policy evaluation.

Incentive and opportunity have also conspired to allow virtually every conceivable position to be championed in the academic literature. The opportunity is afforded by the immense difficulty of determining the effect of a law that has nearly universal coverage. When objective truth is difficult to obtain, as is the case here, ideology often steps in to fill the void. The result is an astonishing cacophony of opinions. The law is said to have had no impact whatsoever,<sup>7</sup> or to have helped blacks immensely.<sup>8</sup> Indeed, these views are often expressed by the same individuals who hasten to add—as if this would cure the inconsistency—that some black progress has been undeserved, because preferences have enabled blacks to advance beyond the point where their skills would have taken them.<sup>9</sup> On the other hand, friends of Title VII have pointed to considerable black progress and attributed much or all of the success to the direct

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5. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

6. See Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), reprinted in 42 U.S.C. § 2000e note (1988).

7. See *infra* note 14 and accompanying text.

8. See Freeman, *The Changing Labor Market for Black Americans, 1948-72*, in 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 67 (A. Okun & G. Perry eds. 1973).

9. See Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 517 (1987).

and indirect effects of federal action, paying little heed to some of the alternative explanations for black economic progress.<sup>10</sup> This paper will draw upon my joint work with economist James Heckman of Yale to determine the effects of civil rights policy on the economic status of blacks.<sup>11</sup>

## II. HAS TITLE VII HELPED BLACKS?<sup>12</sup>

It is important to note at the outset of this discussion that the simple presentation of the black-white median earnings ratio, often the starting and ending point of analysis for those in policy positions, yields little conclusive evidence. Figures 1 and 2 show how this ratio has changed over time for black male workers vis-à-vis white male workers. The figures depict considerable economic progress for blacks nationally, and even greater gains for blacks in the South.<sup>13</sup> Having identified this progress, however, we are left little information about its cause. Conservative analysts have rushed to note that the progress appears to have begun before the passage of the 1964 Act. For example, Professors Smith and Welch assert:

[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 in this essay—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.<sup>14</sup>

This evidence is important, but again not conclusive. Consider first the issue of migration: Enormous numbers of blacks fled

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10. See Freeman, *Black Economic Progress After 1964: Who Has Gained and Why?*, in *STUDIES IN LABOR MARKETS* 247 (S. Rosen ed. 1981).

11. See J. Donohue & J. Heckman, *Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks* (1990) (unpublished manuscript) (available in office of *Harvard Journal of Law & Public Policy*).

12. This discussion focuses on whether Title VII has improved black employment levels and wages relative to white employment levels and wages. The law clearly has aided thousands of individual blacks (and others) who have received monetary judgments, but the most important objective of the law is to generate employment benefits for black workers through the elimination of discrimination, rather than monetary benefits through the pursuit of litigation.

13. The data presented in Figures 1 and 2 were derived from the Bureau of Labor Statistics annual *Current Population Survey*, which surveys the labor market experience of roughly 160,000 individuals across the nation.

14. Smith & Welch, *Black Economic Progress After Myrdal*, 27 *J. ECON. LIT.* 519, 555 (1989).

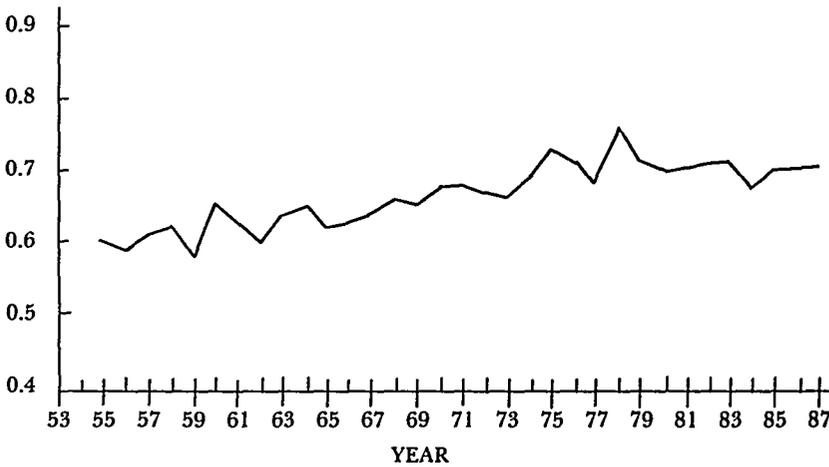


Figure 1. Ratio of Median Non-White Income to Median White Income, Year-Round Full-Time Male Workers, United States, 1955-1987.

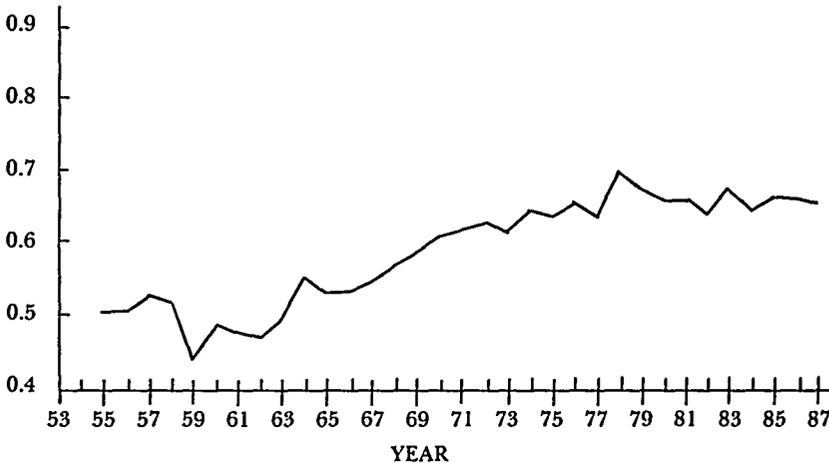


Figure 2. Ratio of Median Non-White Income to Median White Income, Year-Round Full-Time Male Workers, Southern United States, 1955-1987.

the South between 1940 and 1960, and one would expect this massive exodus of young blacks to have a powerful effect in narrowing the racial wage gap for two reasons. First, blacks were largely leaving low-paying agricultural jobs in the South and securing higher-paying industrial jobs in the North. Second, the departure of so many black workers from the South represented a backward shift in the supply of southern black labor, thus contributing to an upward wage pressure for the blacks who remained in that region. In the 1940s and again in the 1950s, roughly a quarter of young black men living in the South migrated north. This amazing exodus grew at an even

faster pace in the first half of the 1960s, but then suddenly the outflow slowed to a trickle. Indeed, over the decade of the 1970s the flow was reversed, as the South experienced net black immigration.

Thus, while black migration is an important explanation of black progress in the period prior to the passage of the Civil Rights Act of 1964, it cannot serve as an explanation for the substantial black gains in the aftermath of the civil rights legislation. Indeed, rather than undermining the case that Title VII aided blacks, as Smith and Welch would suggest, the story of black migration powerfully buttresses it. The migration patterns suggest that something very dramatic occurred in the mid-1960s to encourage southern blacks to remain in the South. Two possible explanations are that things suddenly got much worse in the North, or that things suddenly got much better in the South. There is no evidence of the former, and quite a good deal of evidence of the latter: The federal government had embarked on a comprehensive effort, directed primarily at the South, to eliminate barriers to blacks in housing, voting, schooling, and employment.<sup>15</sup>

What of the other long-term trend that is offered as an explanation of black progress in the decade following passage of the 1964 Act? Smith and Welch state that the cause of the rapid movement toward the national norm in the southern racial wage gap during the 1970s may have been that

black-white skill differences . . . converged in the South as the post-World War II cohorts entered the labor market. To illustrate this point, assume that Southern schools were effectively desegregated in 1960, six years after the Brown decision. The first class of Southern black children who had attended entirely desegregated schools would have first entered the labor market in the early to mid-1970s. Some of the improvement in black incomes during the 1970s may have been due to the skills acquired through this improved schooling. However, that is unlikely to be the whole story because there was a substantial erosion in racial wage disparities even among older workers in the 1970s . . . . *A more plausible explanation may well be that racial discrimination is waning*

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15. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.), the federal government contract compliance program, which commenced in 1965, and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)), were all important elements of the federal effort to dismantle southern racial segregation.

*in the South.*<sup>16</sup>

But if improved schooling quality is to explain black post-1964 progress, it will be necessary to look beyond desegregation to find it. In 1963, there was virtually no desegregation of southern schools. It was not until a very firm, activist Supreme Court called for immediate action in 1968 and 1969 that southern school desegregation became a reality.<sup>17</sup> Moreover, as even Smith and Welch concede, black progress after 1965 was not simply the product of better educated blacks entering the labor force. Indeed, poorly educated blacks who had entered the labor market years earlier suddenly started earning more in the post-1965 era.<sup>18</sup> This phenomenon of increased returns from completed education may have resulted from declining prejudice, as Smith and Welch suggest, but a far more likely explanation is that federal law opened up opportunities for blacks that discriminatory attitudes previously had kept closed. The law at first may not have changed attitudes, but it appears to have altered the behavior of discriminatory employers.

Of course, whenever one attempts to ascertain the impact of a law, one must confront the possibility that changes possibly attributable to the law actually reflect changes in the attitudes of the public that led to the passage of the law. While this possibility would indeed present a problem in assessing the impact of the law in the North, where support for the law was high, this is not a serious factor when examining the economic progress of blacks in the South. The South was overwhelmingly opposed to the Civil Rights Act of 1964. If ever a federal law served as an exogenous influence on a region, Title VII represented such a case.

It is useful to give one important illustration of how black employment levels rose dramatically in one industry in the South in 1965, when Title VII went into effect and the federal government contract compliance program was initiated. Figure 3 presents the share of black employment by sex in the textile industry of South Carolina during the period 1910 to 1977.<sup>19</sup>

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16. Smith & Welch, *supra* note 14, at 543 (emphasis added).

17. See *Alexander v. Holmes County*, 396 U.S. 1218 (1969); *Green v. Board of Educ.*, 391 U.S. 430 (1968).

18. See J. Donohue & J. Heckman, *supra* note 11.

19. The information presented in Figure 3 is taken from Heckman & Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138 (1989). The textile industry has long been the

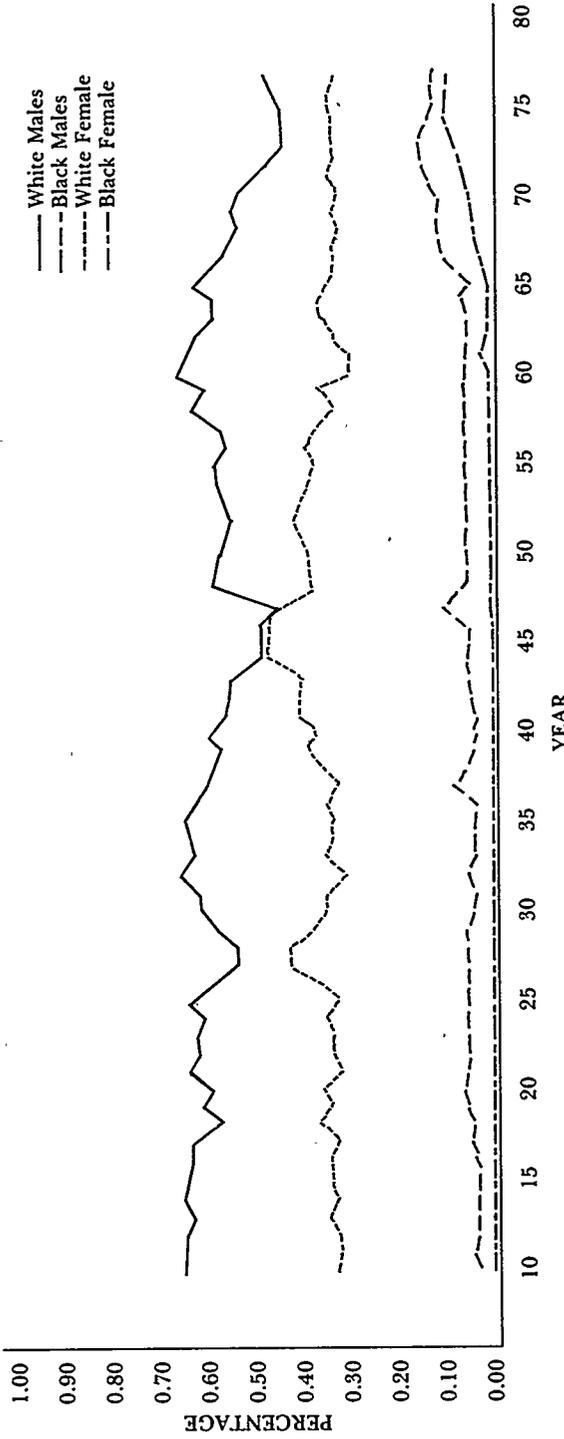


Figure 3. Employment in the South Carolina Textiles Industry, 1910-1977.

Through two world wars, the Great Depression, and the Korean War, the share of blacks remained low and stable, despite the fact that this industry was expanding in employment throughout the period. Regardless of the degree of labor market tightness or slackness, one fact emerges with remarkable clarity: Virtually no black women, and few black men, were permitted to work in the textile industry in the fifty-five years before 1965. After that date, black male and female wages (relative to those of white males) suddenly accelerated in the industry.

Black progress was dramatic in the decade following 1965, particularly in the South, but virtually nonexistent thereafter.<sup>20</sup> Economists and sociologists have argued that one reason for the stagnation in black advancement after 1975 is the decline of demand for low-skilled labor.<sup>21</sup>

It is difficult to amass any evidence indicating that black gains were greater during the Carter presidency, an administration generally considered more sympathetic toward civil rights than its successor, than during the Reagan years, when the issue of civil rights was a low priority. This should give pause to those who believe that significant additional gains for blacks can be achieved through more vigorous enforcement by the Equal Employment Opportunity Commission or substantive strengthening of legal prohibitions against discrimination.

### III. PREDICTIONS ABOUT THE IMPACT OF THE CIVIL RIGHTS ACT OF 1990

An examination of black economic progress over the last twenty-five years leads me to the following broad conclusions. First, federal antidiscrimination law is a powerful tool in attacking egregious forms of discrimination, such as that existing most conspicuously in the pre-1965 South. The process of breaking down these blatant labor market barriers to black advancement was completed by roughly 1975.<sup>22</sup> Second, once the egregious forms of exclusion have been eliminated, there is far less potential for black improvement under a law that is en-

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major manufacturing employer in South Carolina, accounting for 80 percent of all manufacturing employment in 1940 and 40 percent in 1980. *See id.* at 140.

20. *See* J. Donohue & J. Heckman, *supra* note 11.

21. *See id.*; W.J. WILSON, *THE TRULY DISADVANTAGED* (1987); Kasarda, *Urban Change and Minority Opportunities*, in *THE NEW URBAN REALITY* 33 (P. Peterson ed. 1985).

22. *See* J. Donohue & J. Heckman, *supra* note 11.

forced by complaints by alleged victims of discrimination. Third, administrative enforcement of hiring goals, such as those required of government contractors under the contract compliance program, has increased demand for black labor in the covered sector during the period since 1975,<sup>23</sup> but this benefit has not translated into aggregate black economic gains because: (1) Black workers tend to flow out of the non-covered sector, thereby reducing or eliminating the overall increase in black employment; and (2) adverse economic conditions for low-wage labor have offset any aggregate gains.

The question then becomes whether the strengthening of federal antidiscrimination law under the Civil Rights Act of 1990 will lead to any narrowing of the economic gap between blacks and whites. A number of points must be made. First, some have argued that the major purpose of the law is simply to reverse the five Supreme Court decisions of 1989<sup>24</sup> that cut back on the prior federal law of employment discrimination. To the extent that this is true, there would be no reason to hope for black improvement under the statute: The only possible goal could be to forestall black declines. The reason for this statement is that the recent Supreme Court decisions cut back on law that had been in effect for the previous fifteen years, during which time there was little or no relative economic advancement by blacks. Simply restoring the status quo ante is not likely to generate any significant gains for blacks. Second, it is clear that, in a number of respects, the Civil Rights Act of 1990 would go further than prior law. The most potent weapon in the Act would likely be the broadening of monetary remedies for victims of discrimination beyond the award of mere back-pay.<sup>25</sup> By permitting punitive and compensatory damages in certain instances, courts would effectively raise the threshold faced by employers attempting to justify a practice that has a disparate impact on minorities. Finally, the provision of the right to a jury trial could increase the monetary relief available

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23. See Leonard, *Employment and Occupational Advance Under Affirmative Action*, 66 *REV. ECON. & STATISTICS* 377 (1984); Leonard, *The Impact of Affirmative Action on Employment*, 2 *J. LAB. ECON.* 439 (1984).

24. See *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989); *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989); *Martin v. Wilks*, 109 S. Ct. 2180 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

25. See H.R. 4000, 101st Cong., 2d Sess. § 8 (1990); S. 2104, 101st Cong., 2d Sess. § 8 (1990).

to victims of discrimination.<sup>26</sup>

The conventional view is that this proposed legislation would induce greater hiring of blacks, because the penalties against discrimination would be even greater. The left is heartened by this prospect, as the perceived barriers to black progress are further dismantled. The right, dismayed at the prospect of elevating workers non-meritocratically, views the legislation as a further drag on American productivity. But if there were perfect decisionmaking by triers of fact under the Act, the higher penalties would likely lead to more individualized, meritocratic employment decisions generated at greater expense to employers.<sup>27</sup> This would result because white workers will not stand idly by if blacks who are perceived to be less qualified are hired or promoted above the white workers. In other words, if employers were to deviate from the straight and narrow path of pure productivity-based hiring, they would face discrimination suits by blacks on the one hand and whites on the other. Therefore, once again under the assumption of perfect decisionmaking by triers of fact, it is unlikely that the right's fears of undeserved black gains will be realized. Would the hopes of the left of deserved black gains be achieved? The answer is that, to the extent that blacks are still victims of discrimination, more meritocratic decisionmaking will aid them. If affirmative action has already pushed blacks beyond their productivity-based deserts, however—as some conservatives fear—then legislation similar to the Act would actually impair black economic opportunities.

Of course, we know that decisionmaking at trial would not be perfect. Indeed, there is even reason to think that, in addition to the inevitable random blunders, some systematic errors

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26. Some qualification is necessary here, because in some areas juries will tend to favor whites and defendants, as opposed to blacks and plaintiffs. A good example of how jury decisionmaking can operate in favor of whites is well-illustrated by *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702 (1989), in which a white high school football coach in Dallas received an exorbitant award from a jury after being fired by a black principal.

27. While individualized meritocratic employment decisions are beneficial, they are costly to obtain. For example, a test may be a useful way of selecting workers, but it is obviously not perfect. If we force employers to abandon the test and require on-the-job testing of applicants, we may increase individual fairness and make better meritocratic decisions, albeit at the cost of expending more resources in selecting the work force. The issues entailed in a full cost-benefit analysis are complicated, because it is possible that this type of statistical discrimination can be privately profitable but socially inefficient. See Donohue, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523, 532-33 (1987).

would be present. Biased or culturally influenced juries might push employers to favor one group or another over their pure meritocratic position.<sup>28</sup> For example, employer behavior in Newark or Harlem may well generate punitive damage awards for black plaintiffs that would yield no relief in Dallas or Cincinnati. This could lead to increased hiring of blacks in areas that favor blacks, and increased hiring of whites in areas that favor whites. In the long run, however, capital would flow in response to these short-run changes. Specifically, if employers find that in certain areas they would be forced to hire some unproductive blacks, they would tend to shun these areas, thereby impairing black progress to some degree.

The effect on the "pro-white" areas is more complicated. Once again, employers would tend to shun areas where they must hire labor inefficiently, whether it is black or white labor that must be favored. On the other hand, if white labor is preferred because of the discriminatory tastes of white employers or fellow workers, then capital may flow into the "pro-white" area. Therefore, it is possible that both the short-run and long-run effects of decisionmaker bias might aid white advance in certain areas, while in "pro-black" regions, the short-run and long-run effects would likely conflict.

In general, then, there might be some changes in the relative economic condition of blacks from the passage of legislation similar to the Civil Rights Act of 1990, although much depends on factors about which there is considerable uncertainty. For example, the degree to which discrimination is currently a labor market barrier to black advancement, and the likelihood that juries will be biased in making decisions in employment discrimination cases, are difficult to predict. Certainly, legisla-

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28. There are two possible effects in operation here. The first is the decisionmaker effect: Juries may differ from judges in their degree of bias. My assumption is that they are no less racially biased than federal judges, and possibly more biased. Because the Act would increase the use of juries—which at present is barred in Title VII cases, although permitted in Section 1981 cases—it would potentially increase the level of bias in decisionmaking. Second, even if the level of bias were unchanged, the higher damages afforded by the Act would exaggerate the effects of the existing level of bias.

These two effects are best illustrated by a numerical example. Assume that pure merit-based decisionmaking would lead to the hiring of 20 blacks out of a total of 80 workers. If decisionmakers favor blacks, then presumably more than 20 blacks would be hired by the firm, because the twenty-first black applicant would be able to prevail in an employment discrimination case. If, say, 25 blacks in this example would be hired owing to the existence of biased decisionmakers under one level of damages, then more than 25 blacks would be hired under a higher level of damages.

tion of this type would generate more lawsuits, because the deterrent effect of the enhanced penalties would almost certainly be out-weighted by the direct stimulus to file lawsuits.<sup>29</sup> The average cost to employers of settling these cases would rise, and the resources used in choosing workers would certainly rise, but it is unlikely that government interference in labor markets via this Act or similar antidiscrimination legislation will induce gains the size of those seen in the decade following the passage of the Civil Rights Act of 1964.

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29. See Donohue & Siegelman, *The Changing Nature of Employment Discrimination*, 43 *STAN. L. REV.* — (forthcoming 1991).