The emphasis on firing-based litigation has had subtle but important effects.

The Unintended Consequences of the '91 Civil Rights Act

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The early 1990s saw a rebirth of congressional interest in employment discrimination legislation. After months of national debate, a presidential veto of a 1990 civil rights bill, and the nationally televised Clarence Thomas confirmation hearings, the Civil Rights Act of 1991 was enacted. The Act significantly expanded the rights of plaintiffs in discrimination complaints to the Equal Employment Opportunity Commission (EEOC) and in federal civil court.

Many opponents of the Act warned that the bill would lead to hiring "by quota." Critics focused on its "disparate impact" provisions, whereby the Act made it significantly easier for plaintiffs to use statistical evidence to prove unlawful discrimination even if there was no discriminatory intent on the part of the employer. For example, Roger Clegg, then a deputy assistant attorney general, later wrote that during the negotiations over what became the 1991 Act, the Bush administration was "enormously successful (and accurate) in characterizing the proposed legislation as 'a quota bill' and a 'lawyer's bonanza'." Unsatisfied by the administration's efforts to water down the Act's disparate impact provisions, the *Wall Street Journal* ran an editorial headlined "It's a Quota Bill" on the day after it was signed into law. Proponents of the legislation argued that such quota fears were overstated and that the Act was necessary in order to open opportunities for women and minorities in fields that had traditionally been unwelcoming.

The two sides of the debate clearly disagreed over how best to achieve the shared aim of racial and gender equality in labor markets. Yet, they appeared to share a set of assumptions regarding how employers would respond to the specific provisions of the Act — they believed it would cause employers to increase their hiring of minorities and women. Did that belief prove true?

Our research suggests that the quota-based hiring fears were largely unfounded. However, the Act also appears not to have improved employment opportunities in fields with traditionally low representation of women and minorities.

Our research uncovers three main patterns in employment outcomes for protected workers. First, a trend toward greater racial and gender integration in labor markets stopped around 1991. Industries that historically had low minority and female employment shares were hiring more such workers prior to the legislation, but this pattern did not continue into the post-Act period. Second, employers changed their means of dismissing protected workers. Because it is more difficult for workers to win employment discrimination lawsuits after losing their job as part of a mass layoff, it appears employers began to delay dismissal of protected workers until the next round of layoffs. While the overall rate of job loss remained constant for both protected and

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unprotected workers, the fraction of lost jobs coming as part of a mass layoff increased for protected workers, but not for unprotected, after the passage of the Act. Third, the wage premium on labor market experience (which economists refer to as returns-to-experience) increased for some groups of protected workers after the 1991 Act. If employers are concerned about the costs of dismissing potential employees, then increases in those costs will cause firms to reduce their demand for workers who are relatively likely to be dismissed. Because job turnover rates are highest for inexperienced employees, increases in firing costs can increase the returns to experience.

Our primary conclusion is this: While the 1991 Civil Rights Act did not have large beneficial or adverse effects on employment or average wages for protected workers, employers did change their behavior in subtle ways after its passage. The changes in behavior are broadly consistent with the assertion that the Act's main effect was to increase the costs of dismissing protected workers.

THE CIVIL RIGHTS ACT OF 1991

The 1991 Act, which took effect on November 21, 1991, strengthened several prior pieces of employment discrimination legislation, including the Civil Rights Act of 1866, the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act, and the Americans with Disabilities Act. The broad group of individuals gaining additional protections from the 1991 Act includes racial minorities, women, and those with disabilities.

While many of the law's provisions had the potential to affect employment relationships, we focus our discussion on two main points: changes in the ability of plaintiffs to use statistical evidence to prove discrimination, and increases in damage awards available to plaintiffs who prove discriminatory intent on the part of an employer.

Discrimination and statistics A series of 1970s Supreme Court rulings (most notably the 1971 *Griggs v. Duke Power*) had allowed plaintiffs to show unlawful discrimination using statistical evidence. Plaintiffs could proceed by demonstrating that an employer's practices led to a disparate impact on protected groups even if there was no discriminatory intent on the part of the employer. A 1989 Court decision, *Wards Cove Packing Co. v. Atonio*, made it significantly more difficult for plaintiffs to prove disparate impact. After *Wards Cove*, plaintiffs could not show disparate impact using statistical evidence alone — plaintiffs were required instead to demonstrate that a particular employment practice led to the differing effect on protected groups. The 1991 Civil Rights Act relaxed this standard somewhat by allowing the use of statistical evidence without identification of a particular employment practice, provided the plaintiff can show the employer's decision-making process cannot be separated into specific practices.

Potential damage awards were affected by three of the Act's provisions. First, the law allows employees who claim disparate treatment under Title VII to sue for punitive and compensatory damages. Prior to the 1991 Act, damage awards under Title VII had been limited to back pay. Maximum punitive and compensatory damages vary by employer size, ranging from $0 for firms with fewer than 15 employees up to $300,000 for firms with more than 500 employees. Second, the Act explicitly extends the Civil Rights Act of 1866 (which allows plaintiffs alleging racial discrimination to sue for unlimited punitive and compensatory damages) to cover termination of employment. The 1866 Act forbids discrimination on the basis of race in the "making and enforcement of contracts." While the 1975 *Johnson v. Railway Express Agency* decision and the 1976 *Runyan v. McCrary* decision clearly interpreted the 1866 Act as applying to employment contracts, those decisions did not clarify whether it also applies to the ending of employment contracts. (The language of the Act is somewhat ambiguous on this point.)

Throughout the 1980s, different federal courts applied somewhat different interpretations on this point, which meant that some plaintiffs alleging racial discrimination in firing were allowed to proceed under the Civil Rights Act of 1866 while others could sue only under Title VII. In the 1989 *Patterson v. McLean Credit Union* decision, the Supreme Court ruled that the 1866 Act did not apply to the termination of employment contracts. Thus, between 1989 and 1991, plaintiffs in such cases could sue under Title VII only. Hence, the 1991 Act effectively removed all limits on damage awards in cases of unlawful racial discrimination in termination. Third, the Act gives plaintiffs seeking punitive damages the right to a jury trial. Because juries are perceived to favor claims of individuals over those of corporations, this change may have increased expected plaintiff damage awards.

Increased litigation The Civil Rights Act of 1991 does appear to have had a significant effect on the litigiousness of employees. Our analysis of lawsuits filed in federal court shows that the number of cases alleging employment discrimination more than doubled from 1991 to 1995. Similarly, the number of race- and gender-based complaints filed with the EEOC increased by 13 percent and 46 percent, respectively, from 1991 to 1994. Monetary benefits awarded in cases resolved by the EEOC increased by 47 percent and 87 percent, respectively, over that period.

The large increase in gender-based complaints relative to race-based complaints probably reflects the fact that the 1991 Act gave women their first chance to seek punitive and compensatory damages, and that race-based suits seeking redress under the Civil Rights Act of 1866 bypass the EEOC and proceed directly to federal court.

EMPLOYERS' RESPONSES

To analyze the effects of the 1991 Act, we performed a series of statistical analyses of employment outcomes for protected and unprotected workers. Our basic approach was to compare the changes in labor market outcomes for protected and nonprotected workers around the time of the Act. From this, we made inferences regarding changes in employers' behavior.

Hiring decisions As discussed above, both sides of the 1991 Act debate appeared to share the belief that it would cause firms to increase their hiring of women and minorities. Opponents, concerned about quota effects brought about by disparate impact-based litigation, argued that the Act would require

firms to set aside a certain fraction of their workforces for members of protected groups.

To examine how the Act affected firms' hiring decisions, we analyzed data collected by the U.S. Census. As part of its Current Population Survey, the Census Bureau asks respondents monthly a number of questions about current employment status. These include hours worked, full-time/part-time status, industry, and occupation. Each March, the survey asks a specific set of more detailed questions on employment outcomes over the past year. This includes information such as weeks and hours of work, rates of pay, and number of jobs. The survey also logs a number of characteristics of the individual (such as age, education, marital status, and state of residence) that may pertain to labor-market prospects.

Employment rates To isolate the effects of the Act from other economic trends, we first compared rates of employment among protected and unprotected groups prior to the passage of the Act. We then compared rates of employment after the Act. We found that while both hours worked and employment rates increased for women (relative to men) after the passage of the 1991 Civil Rights Act, this change was largely the result of demographic effects that were in evidence long before 1991. It is well established that labor-force participation by women has been increasing in the United States for many years. When we control statistically for this trend line, we found the 1991 Act had no measurable effect on hours worked or employment rates for women.

We did find some effects for black men, but not in the direction suggested by the debate prior to the Act's passage. The evidence suggests the legislation had a mild negative effect on average black employment and hours worked. Black employment and hours trended up through 1991, but then dropped relative to whites starting in 1992. The effect is noteworthy but not large, representing about a two percent decline in black hours worked. It is possible that the decline is attributable in part to the mild recession suffered by the U.S. economy in the early 1990s, if this downturn affected blacks more than whites. However, our statistical analysis controls for education, experience, and location, which means that simple differences in the regional effects or labor-market sector effects of the recession cannot account for this result.

Racial makeup Another way in which quota-like hiring effects may appear is in changes in racial makeups of individual firms. If, for example, employers that had traditionally not had high employment of women and minorities feared lawsuits based on disparate impact of their hiring decisions, then the employers may elect to increase their hiring of such employees. Because it is difficult to locate data on racial and gender compositions of individual firms' workforces, we examined this issue by studying changes in the racial and gender compositions at the industry level.

We defined an industry's protected worker employment share as the number of protected workers (black men or white women, in our analysis) divided by the total number of workers in that industry. We then explored the evolution of those employment shares over time by dividing our full 1983-1996 Current Population Survey sample into three chronological subsamples — a "historical" sample (1983-1986), a "pre-Act" sample (1988-1991), and a "post-Act" sample (1993-1996). The key variable of interest was the change in industry-level protected worker employment shares from the pre-Act sample to the post-Act sample. Differences in employment shares from the historical sample to the pre-Act sample allowed us to examine and control for any pre-existing trends in protected-worker employment.

We have presented a full statistical analysis of protected worker employment shares in our academic articles "Layoffs and litigation" (*RAND Journal of Economics,* 2000), "Litigation costs and returns to experience" (*American Economic Review*, 2002), and "Sorting, quotas, and the Civil Rights Act of 1991: Who hires when it's hard to fire?" (*Journal of Law and Economics*, 2002). The main findings can be summarized with two simple graphs. In Figures 1 and 2, we plot the changes in protected worker employment shares over the 1983-1996 period. For each protected group, we split the set of industries into thirds based on employment share in the 1990 Census. We then examine how average protected-worker employment share varies over time within each group of industries.

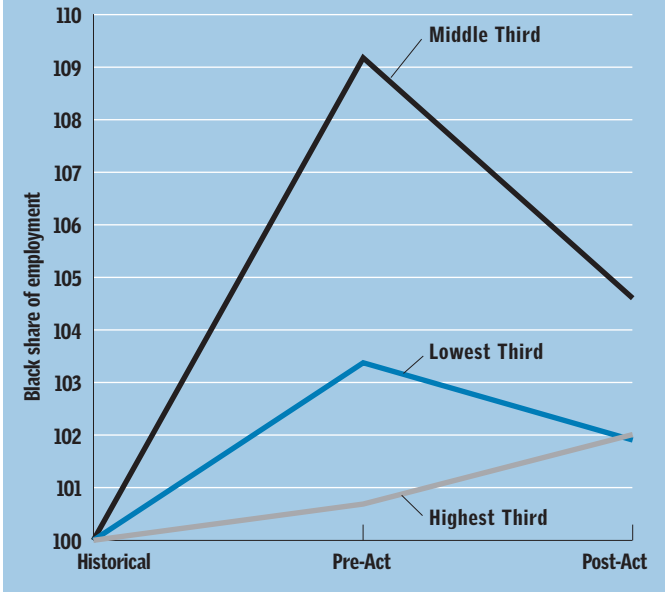
To illustrate the construction of the figures, we take, as an example, industries in the middle third of black employment share. We compute the average black employment share among this set of industries in the historical period to be 6.67 percent. Black employment share among those industries rose to 7.29 percent in the pre-Act period, but then fell to 6.98 percent in the post-Act period. On our graph, we normalize the historical share to 100 and then plot how this share changes over the pre- and post-Act periods. If quota pressures are dominant, then we expect industries with the lowest protected-worker employment shares to register the largest increases in protected worker employment.

Figure 1 focuses on blacks and depicts a clear trend break

FIGURE 1

Reversing the Trend: Race

Change in black share of employment before and after the passage of the 1991 Civil Rights Act. (Historical share = 100)



around the time of the 1991 Civil Rights Act. From the historical to pre-Act periods, black employment shares were increasing fastest in industries with medium and low black representation. From the pre- to post-Act periods, however, average black employment shares fell for the low and medium black employment share industries, and rose for the high black employment share industries. Figure 2 shows a similar pattern for women. From the historical to pre-Act periods, industries with medium and low female employment shares were expanding those shares faster than industries with high female employment shares, but this trend also reversed after the Act. Our more detailed statistical analysis confirms this basic pattern.

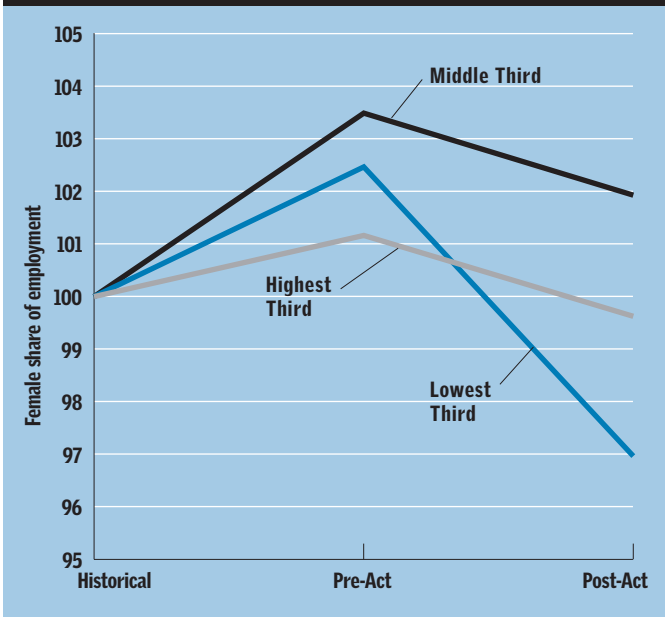
Those results suggest that fears of quota-based hiring as a result of the Act were overstated. The findings instead appear consistent with a "sorting" argument put forward by Richard Epstein, among others. Epstein observes that protected workers are likely to be sorted into industries where the mutual gains from employment are highest. Among the factors that can influence those mutual gains are the extent to which employers discriminate, the extent to which employees perceive discrimination, and the costs associated with employment discrimination litigation. Many factors are likely to make firms and industries differ significantly in their susceptibility to discrimination litigation, leading to differential costs of employment of protected workers. For example, firms with more centralized human resource management systems may be better able to assess litigation risks associated with personnel decisions. Alternatively, some firms may cater to customers or suppliers who prefer dealing with certain types of employees.

The debate over the 1991 Civil Rights Act, which focused on whether disparate-impact-based protections would lead to quotas, missed the point.

FIGURE 2

Reversing the Trend: Gender

Change in female share of employment before and after the passage of the 1991 Civil Rights Act. (Historical share = 100)



To apply this reasoning to employment discrimination litigation, we suppose firms A and B are identical in every way, except that Firm A is less susceptible to employment discrimination litigation. Given that, even prior to the 1991 Act, the potential costs of discrimination litigation were substantial, we would expect Firm A to employ a higher fraction of protected workers than Firm B before 1996. The Act's passage increases the marginal cost of employing a protected worker at both firms, but this increase should be larger at Firm B than at Firm A. As a result, the law increases Firm B's resistance to hiring protected workers more than it increases Firm A's. This sorting effect suggests firms that are more susceptible to litigation will have both smaller employment of protected workers prior to the passage of the 1991 Civil Rights Act and a larger reduction in employment of protected workers after the Act.

Firing decisions We next examined how the 1991 Act affected firms' choices over how to dismiss unproductive employees. We focused in particular on a distinction between "layoffs" (situations where a relatively large number of employees are let go) and "firings" (where relatively few employees are let go). We emphasized that distinction because legal scholars have argued that firms face greater exposure to employment discrimination litigation when dismissing a worker for cause than when dismissing a worker as part of a mass layoff. John Donohue and Peter Siegelman, for example, assert that "it is much more difficult to prove discrimination when 100 workers are laid off in a sales slump than when a single worker is fired for some alleged malfeasance" and "an individual-specific discharge underlies most suits." Further, class action suits alleging gender and racial discrimination are rare, representing less than one percent of suits and of total damages claimed. Hence, employers are unlikely to face litigation when dismissing a large number of employees.

We reason that if a given worker is more likely to sue for unlawful termination when fired for cause than when dismissed as part of a layoff, then laws offering additional employment protections tip the firing/layoff balance in the direction

of layoffs. That is, if the likelihood of a lawsuit conditional on firing a given worker is larger than the likelihood of a suit conditional on dismissing the worker as part of the next layoff, then increases in the costs associated with lawsuits will result in a larger increase in the marginal cost of firings compared to the marginal cost of layoffs. We therefore expect firms to substitute away from firings and toward layoffs in response to new employment protection legislation. This reasoning suggests a possible link between two trends that have affected the U.S. labor market over the last decade: increases in wrongful termination litigation and increases in the frequency and size of layoffs at otherwise healthy firms.

To study this hypothesis, we took data from the annual Survey of Income and Program Participation for the years from 1987 to 1993. The survey, which is also conducted by the Census Bureau, selects households at random and interviews every member of the household between three and eight times, depending on the survey year. Interviews are conducted every four months and solicit information regarding up to two jobs per person per interview.

We focused on two survey interview questions. The first asks (for each of two jobs, if the person held multiple jobs) if the respondent stopped working for the employer during the preceding four-month reference period. The second question, which is posed only to those who did leave a job, asks if the person was laid off, retired, discharged, left because the job was temporary, or voluntarily quit. We referred to those who were laid off or discharged as having suffered "involuntary separation" and those who were discharged as having been "fired."

We then compared rates of job loss among black men between the ages of 21 and 39 (all of who gained significant legal protections from the 1991 Civil Rights Act) to those of white men between 21 and 39. Again, while our statistical analysis controlled for many individual characteristics that may be related to the likelihood of firing, our main finding can be expressed with a simple graph. In Figure 3, we plot the fraction of jobs ending in a firing for black men and white men during the period around the passage of the Act. Prior to the Act, around one percent of all jobs for black men ended in a firing during a four month reference period. White men are considerably less likely to be fired, with about one-half of one percent of jobs ending in a firing in any given four-month period. After the legislation, this gap closed considerably; in the post-Act period, the firing rates for black and white men were roughly the same.

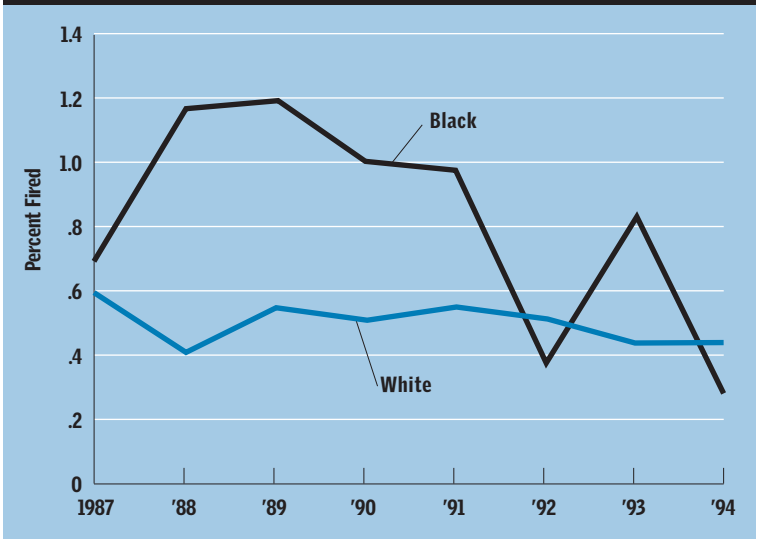
> It appears that, in response to the 1991 Act, firms simply shifted their form of dismissal for some black men from individual firings to layoffs.

Notably, we found that this pattern was not due to black men simply losing their jobs less frequently. We discovered that the overall rate of involuntary job loss for black men did not change as a result of the Act. Thus, it appears that firms simply shifted the form of some dismissals for black men from individual firings to layoffs in response to the 1991 Act. We documented that the share of black involuntary job loss coming in the form of firings dropped by around one-third after the passage of the Act, while the share of white involuntary job loss coming in the form of firings was unchanged.

FIGURE 3

Different Type of Dismissal

Percentage of black and white males fired, by year.



Wages and returns to experience As we found when examining measures of employment, the Civil Rights Act of 1991 seems not to have had a substantial effect on average wages for protected workers. From the pre-Act period to the post-Act period, wages rose four percent more for white women compared to white men. This fact is due, of course, to increasing female labor force participation over the period rather than to the Act itself. We can find no difference between trends in average wages of black men and white men around the time of the legislation.

However, the fact that average wages were not affected does not necessarily mean there was no effect on wages. Our research documents that, for some pro-

tected groups, there was an increase in the wage premium for labor market experience around the time of the Act. If wages for inexperienced workers dropped but wages for experienced workers rose, then a study of just average wages would mask that redistribution.

We argue that the increase in the economic returns to experience is consistent with the assertion that the 1991 Act increased costs to employers of dismissing protected workers. If, for example, inexperienced workers are more likely to be fired for cause (as is typically the case), then those workers may be more likely to sue conditional on being employed. Increases in litigation costs may therefore make inexperienced workers relatively more costly to employ, and employers will discount wage offers accordingly. Potentially offsetting this effect, however, is the fact that back (and some future) wages often comprise one part of damage awards. The prospect of higher damages may make experienced workers more likely to sue conditional on being fired, which may imply that increases in litigation costs will reduce firms' demand for those workers. This discussion suggests that the effect of increases in litigation costs on returns to experience depends crucially on how employees' propensity to file employment-discrimination litigation conditional on employment varies with experience.

To link the experience profile of wrongful termination claims to returns to experience, we gathered data on complaints filed with the Equal Employment Opportunity Commission. We found that wrongful termination complaints drop sharply with age for women, but rise steadily with age for blacks. Then, using wage data from the Current Population Survey, we found that returns to experience increased for women, but not for blacks, shortly after the passage of the Act. This finding is consistent with the experience/propensity-to-sue relationships found in the EEOC data, and suggests that the 1991 Act caused employers to shift their demand for protected workers away from those who were most likely to impose litigation costs. Notably, our analysis of returns to experience suggests that employment protections can have redistributive effects not merely across groups of differing protected status (that is, from whites to blacks), but also within groups of identical protected status (from inexperienced protected workers to experienced).

CONCLUSION

The debate over the 1991 Civil Rights Act, which focused in large part on whether disparate-impact-based protections would lead to hiring quotas, missed the point. Our research suggests the Act's key provisions were instead those that increased damages awards in cases where employees could prove disparate treatment — that is, intentional discrimination on the part of an employer. The increases in potential damage awards, coupled with a decades-long trend toward firing-based and away from hiring-based employment discrimination litigation, means the main impact of the Act was to increase the costs to employers of dismissing protected workers.

Employers' responses to the Act, while subtle, are consistent with this assertion. It appears that, after the Act's passage, employers changed their behavior in three ways. First, employers with higher susceptibility to employment discrimination litigation reduced their hiring of protected workers. That is borne out by the fact that a trend toward greater gender and racial equality in American industries appears to have ended around the time of the Act. Second, employers also shifted their means of dismissing protected workers toward layoffs and away from individual firings around the time of the Act. Third, employers placed a premium on those protected workers who are least likely to sue, leading to an increase in the returns to experience for some protected groups.

We think these findings should be troubling for those who supported the 1991 Act in the belief that it would help open labor market opportunities for members of protected groups. As economists and legal scholars have long argued, employment protections that make it costly for firms to fire protected workers are likely to have very different effects from protections that make it costly for firms to fail to hire protected workers. Because the firm feels firing-based costs only if it decides to hire, the costs act as an implicit tax on such hiring. Firing-based protections may therefore lead employers to hire fewer protected workers, not more. This may explain why the Civil Rights Act of 1991, unlike prior legal changes like Affirmative Action and Title VII, does not appear to have led to gains in wages or employment for protected workers. R

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