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The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment

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The federal policy of affirmative action effectively passed away with the inauguration of the Reagan administration in 1981. The Supreme Court decisions in the summer of 1989 nailed down the coffin lid.[1] But affirmative action has carried more symbolic than real weight, and symbols have ways of persisting even when the body of law and regulation lies six feet under. The tenth anniversary of its passing is an appropriate time to consider what it achieved during its conflicted existence, and whether its possible resurrection is to be feared or welcomed.

Affirmative action is one of the most controversial government interventions in the labor market since the abolition of slavery. In recent years, two major criticisms of affirmative action have found prominent voice. The first is that affirmative action does not work; therefore, we should dispose of it. The second is that affirmative action does work; therefore, we should dispose of it. My chief concern in this paper will be with the first of these criticisms. Was affirmative action successful in increasing employment opportunities for blacks? In this paper, affirmative action will refer to the provisions of Lyndon Johnson's Executive Order 11246 in 1965, as amended by Richard Nixon's Executive Order 11375 [3 C.F.R. 169 (1974)]. This focus is distinct from affirmative action required as a remedy by judicial decision, which is not the primary focus here.

[1]Chief among these was the case of Wards Cove Packing Company, Inc. v. Atonio, 109 S.Ct. 2115 (1989) in which the Supreme Court held that to prove discrimination, plaintiffs would have to go beyond demonstrating numerical imbalance, and show that the responsible personnel policy is not a business necessity.

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The federal affirmative action policy may be modelled as a tax on white male employment in contractor firms, and so can be analyzed in the standard two-sector models applied to unionization or taxation (Leonard, 1984a). A controversial question is whether this tax improves or reduces efficiency. Some proponents of affirmative action advocate it for equity reasons, arguing for retribution for past wrongs such as slavery, or for an investment in future social peace and cohesion. Increased equity may also improve efficiency by counterbalancing discrimination. In Becker's model of discrimination for example, an affirmative action tax forces employers towards the efficient use of labor (Leonard, 1984c). The two questions to be asked of affirmative action are first, whether it has increased black employment, and second (and more difficult) whether this has induced or reduced discrimination.

Executive Order 10925, issued by President John Kennedy on March 6, 1961, was the first to require federal contractors[2] to take affirmative action, and the first to establish specific sanctions, including termination of contract and debarment. Although various presidential Fair Employment Practice Committees had been preaching nondiscrimination since the 1940s, they were voluntary and without teeth. Norgren and Hill summed up their impact in 1964 (p. 169, p. 171): "One can only conclude that the twenty years of intermittent activity by presidential committees has had little effect on traditional patterns of Negro employment.... It is evident that the non-discrimination clause in government contracts was virtually unenforced by the contracting agencies during the years preceding 1961." Coming on the heels of Title VII of the Civil Rights Act of 1964, Johnson's Executive Order 11246 was the first to be enforced stringently enough to provoke serious conflict and debate.

Under Executive Order 11246, federal contractors agree "not to discriminate against any employee or applicant for employment because of race, color, religion, sex, nor national origin, and to take affirmative action to ensure that applicants are employed and employees are treated during employment without regard to their race, color, religion, sex or national origin" [3 C.F.R. 169 202(1) (1974)]. This language imposes two obligations: first, not to discriminate; second, whether or not there is any evidence of discrimination, to take affirmative action not to discriminate. Thus, federal contractors are required to develop affirmative action plans (AAPs), including goals and timetables, for good-faith efforts to correct deficiencies in minority and female employment. It is a measure of this nation's progress that the first obligation is now largely beyond debate. The redundant-sounding second obligation, however, has provoked continual controversy, and its meaning and effect are not well understood. Reviewing the development of affirmative action into "quotas," Lawrence Silberman, Undersecretary of Labor from 1970 to 1973, wrote: "We wished to

[2]Employees in the manufacturing sector are more likely to work for federal contractors, particularly in transportation equipment, electrical machinery, chemicals and paper (Smith and Welch, 1984, table 4).

create a generalized, firm, but gentle pressure to balance the residue of discrimination. . . . Our use of numerical standards in pursuit of equal opportunity has led ineluctably to the very quotas, guaranteeing equal results, that we initially wished to avoid. . . . Thus was introduced a group rights concept antithetical to traditional American notions of individual merit and responsibility."

Silberman raises two key issues. The first is that an affirmative action program without measurable results invites sham efforts. According to the U.S. Comptroller General [48 Comp. Gen. 326 (1968)], such vague requirements may also fail to conform with the requirement of federal procurement law that prospective bidders be informed of the minimum standard for a contract. On the other hand, numerical standards in the quest for equal opportunity open the door to an emphasis on equal results. The second issue raised is whether discrimination and its remedy should be addressed in terms of groups or individuals.

In the heated political arguments over whether and what affirmative action should be, mythic visions have come to overwhelm any clear conception of what affirmative action actually is. To discern what the affirmative action obligation means, I believe it is more useful to examine the actions rather than the words of employers and regulators.

The Development of Affirmative Action in the Early 1970s

The literature on the early years of affirmative action can be divided into studies of process that find it mortally flawed and studies of impact that find it modestly successful. Studies of affirmative action in its first few years by the U.S. Commission on Civil Rights (1975), the U.S. General Accounting Office (1975), and the House and Senate Committees on Labor and Public Welfare all concluded that affirmative action has been ineffective and blame weak enforcement and a reluctance to apply sanctions. For example, in its 1975 appraisal of the contract compliance program, the GAO found (p. 30): "The almost nonexistence of enforcement actions taken could imply to contractors that the compliance agencies do not intend to enforce the program." In fact, the Department of Labor has been sued with some success more than once for failure to enforce affirmative action; for example, see the case of Legal Aid Society of Alameda County v. Brennan, 608 R.2d 1319 (9th Cir. 1979), cert. denied 100 S. Ct. 3010 (1980). The ultimate sanction of debarment has been used less than 30 times; debarment of the first nonconstruction contractor did not occur until 1974. The GAO and USCCR found that other forms of regulatory pressure, like pre-award reviews, delay of contract award, and withholding of progress payments, had not been forcefully and consistently pursued.

In the light of these studies finding that regulatory pressure in the affirmative action program had been close to nonexistent, it is surprising that

the few econometric studies of the impact of affirmative action in its first years have generally found significant evidence that it has been effective for black males (Burman, 1973; Ashenfelter and Heckman, 1976; Goldstein and Smith, 1976; Heckman and Wolpin, 1976). These few studies of the initial years of affirmative action (1966–73) are not directly comparable because of different specifications, samples, and periods. They do find, nevertheless, that despite weak enforcement in its early years, and despite the ineffectiveness of compliance reviews, affirmative action has been effective in increasing black male employment share in the contractor sector; Brown (1982) provides a review. The effects are not large, generally on the order of less than a 1 percent increase in the black male share of employment per year. However, they do imply that even with seemingly weak enforcement, affirmative action under the contract compliance program did increase the proportion of black males in federal contractor firms in the early 1970s.

The Maturation of Affirmative Action in the Late 1970s

Enforcement of affirmative action did become more aggressive after 1973, whether measured by the increased incidence of debarment or by back-pay awards. In addition, the contract compliance agencies were reorganized into the Office of Federal Contract Compliance Programs in 1978.

Since affirmative action under the Executive Order applies only to federal contractors, one method of judging its effect is to compare the growth of minority and female employment at federal contractor establishments with figures at similar establishments that have no affirmative action obligation. I performed such a comparison using data on employment demographics reported to the government by 68,690 establishments in 1974 and 1980. This sample includes more than 16 million employees. The results summarized here are reported at length in Leonard (1983, 1984a).

Table 1 compares the mean employment share of demographic groups in 1974 and 1980 across contractor and non-contractor establishments. Between 1974 and 1980 black male and female employment shares increased significantly faster in contractor establishments than in non-contractor establishments. In Leonard (1984a), I have estimated the impact of affirmative action after controlling for establishment size, growth region, industry, occupational and corporate structure. Affirmative action has similar effects even with these additional controls. Even controlling for these other factors, the employment of members of protected groups grew significantly faster in contractor than in non-contractor establishments.

Expressed as an annual growth rate, black male employment grows 0.62 percent faster in the contractor sector. For white males, the annual growth rate is 0.2 percent slower among contractors, so contractor status appears to shift the demand for black males relative to white males by 0.82 percent per year.

Table 1
Changes in Employment by Federal Contractor Status, 1974 and 1980

Demographic Group across Status	*Contractor Status*	*1974 Mean*	*1980 Mean*	*T-statistics for Change*
Black Males	N	.053	.059	6.5
	Y	.058	.067	
Other Minority Males	N	.034	.046	1.2
	Y	.035	.048	
White Males	N	.448	.413	16.4
	Y	.583	.533	
Black Females	N	.047	.059	5.7
	Y	.030	.045	
Other Minority Females	N	.024	.036	1.1
	Y	.016	.028	
White Females	N	.394	.400	7.8
	Y	.276	.288	

Note: The last column reports T-statistics for whether the change in demographic share between 1974 and 1980 differs by contractor status. N = noncontractor in 1974 (27,432 establishments); Y = contractor in 1974 (41,258 establishments).
Source: Leonard (1984a).

These effects are significant at the 99 percent confidence level or better, and are robust across a number of specifications. These effects are similar in magnitude to those previously estimated by Ashenfelter and Heckman (1976) and by Heckman and Wolpin (1976).

Compliance reviews have played a significant role over and above that of contractor status. Compliance reviews are the main enforcement mechanism: an audit of employer's demographics and personnel procedures, with negotiations over suggested changes. For black males, the impact of undergoing a compliance review is roughly twice that of being a contractor. Conversely, compliance reviews have retarded the employment growth of whites. Direct pressure does make a difference. Simultaneity is unlikely to bias these estimates because, as we shall see, the probability of being reviewed hardly depends upon demographics.

The total impact of affirmative action on the growth rate of employment for black men among federal contractors is then the weighted average of the annual 0.62 percent shift among nonreviewed contractors and the 1.91 percent shift among reviewed contractors, or 0.84 percent per year. The corresponding demand shift for black females is 2.13 percent.

Regression estimates also indicate that minorities and females experienced significantly greater increases in representation in establishments that were

growing and so had many job openings, irrespective of affirmative action. The elasticity of white male employment growth with respect to total employment growth is .976, significantly less than one. This indicates that members of protected groups dominate the net incoming flows in both contractor and non-contractor establishments. The supply of blacks has not greatly increased, so this suggests the importance in expanding employment opportunities of broader forces, such as Title VII, which apply to all sample establishments. The respective elasticities for black males and black females (1.22 and 1.19) are significantly greater than one. The efficacy of affirmative action also depends heavily on employment growth. Affirmative action has been far more successful at establishments that are growing and have more job openings to accommodate federal pressure.

Although affirmative action has lacked public consensus and vigorous enforcement, and has frequently been criticized as an exercise in paper pushing, it has actually been of material importance in prompting companies to increase their employment of blacks.

Occupational Advance

One of the major affirmative action battlefields lies in the white-collar and craft occupations. In these skilled positions, employers are most sensitive to productivity differences and have complained the most about the burden of goals for minority and female employment. It is also in this region of relatively inelastic supply that the potential wage gains to members of protected groups are the greatest.

The four econometric studies mentioned earlier, which found employment gains for blacks despite little enforcement of affirmative action in its early years, also found that while affirmative action increases total black male employment among federal contractors, it does not increase their employment share in the skilled occupations (Burman, 1973; Ashenfelter and Heckman, 1976; Goldstein and Smith, 1976; Heckman and Wolpin, 1976). These studies suggest that contractors had been able to fulfill their obligations by hiring into relatively unskilled positions. Before 1974, affirmative action appears to have been more effective in increasing employment than in promoting occupational advancement.

Some might argue that such a result is only to be expected given a short supply of skilled minorities or females. However, even in the case of a small fixed supply, affirmative action should induce a reshuffling of skilled blacks and women from non-contractor to contractor firms, without any increase in overall supply being necessary. The long-run presumption behind affirmative action, however, is that trainable members of protected groups will be considered for promotion to skilled employment. Indeed, by the late 1970s affirmative action

was no longer as ineffective as it may have been in its early years at increasing minority employment in skilled occupations (Leonard, 1984b). This difference may reflect the increasing supply of highly educated blacks, as well as the more aggressive enforcement program that developed in the middle to late 1970s.

Analyzing occupational advance within nine broad occupations between 1974 and 1980, Leonard (1984b) finds black males' share of employment increased faster in contractor than in non-contractor establishments in every occupation except laborers and white-collar trainees, and except for operatives and professionals these differences are significant. This impact is found in both the proportionate change in black males' share of total employment, and in the proportionate change in the ratio of black male to white male share.

The total impact of the contract compliance program, the weighted sum of contractor and review effects, shows some evidence of a twist in demand toward more highly skilled black males. The contract compliance program has not reduced the demand for black males in low-skilled occupations, except for laborers. It has raised the demand for black males more in the highly skilled white-collar and craft jobs than in the blue-collar operative, laborer, and service occupations. While this may help explain why highly skilled black males have been better off than their less skilled brethren, it does not help explain why black males should be having greater difficulty over the years in finding and holding jobs. Neither employment-population ratios nor unemployment rates of blacks relative to whites have shown a marked improvement over the past two decades (Freeman, 1981; Jaynes, this volume).

Black females in contractor establishments have increased their employment share in all occupations except technical, craft, and white-collar trainee. The positive impact of the contract program is even more marked when the position of black females is compared with that of white females.

It is possible that part of this occupational upgrading may be overstated because of biased reporting to the government, in particular the upward reclassification of minority or female intensive occupations, as argued in the useful paper by Smith and Welch (1984). To the extent that contractors may have selectively reclassified black- and female-intensive occupations at a faster rate than did non-contractors, most studies will overstate the actual occupational advance due to affirmative action. However, this effect is unlikely to overwhelm the general direction of the results; pure reclassification would cause black losses in the lower occupations, which is generally not observed.

Moreover, this finding of occupational advance for non-white males is reinforced by evidence from Current Population Survey wage equations that affirmative action has narrowed the difference in earnings between the races by raising the occupational level of non-white males. These wage equations are reported at greater length in Leonard (1986). These estimates of the wage effects of affirmative action offer evidence suggesting that the underlying supply of labor is not perfectly elastic. Minority male wages are higher relative to those of white males in cities and industries with a high proportion of

employment in federal contractor establishments subject to affirmative action, although the effect is not always significant.

Affirmative action does not appear to have contributed to the economic bifurcation of the black community. Given increased pressure to justify the non-promotion or discharge of blacks, fears have been raised that employers will screen blacks more intensely and be less willing to risk employing less skilled blacks. In practice, affirmative action appears to increase the demand for poorly educated minority males as well as for the highly educated.

The lesson to be drawn from this evidence is that affirmative action programs work best when they are vigorously enforced, when they work with other policies that augment the skills of members of protected groups, and when they work with growing employers.

Goals or Quotas?

The goals and timetables for the employment of minorities and females drawn from the affirmative action plans of federal contractors stand accused of two mutually inconsistent charges. The first is that "goal" is really just an expedient and polite word for inflexible quotas for minority and female employment. The second is that these goals are worth less than the paper they are written on, and that affirmative action has never been enforced stringently enough to produce significant results. What are affirmative action promises actually worth (Leonard, 1985b)?

Neither the penalties for inflating promises to hasten the departure of federal inspectors nor the prospects of being apprehended seems great. The ultimate sanction available to the government in the case of affirmative action is to bar a firm from holding federal contracts, but fewer than 30 firms have ever been debarred. If the OFCCP finds an establishment's affirmative action plan unacceptable, it may issue a show-cause notice as a preliminary step to debarment, but even this step has been taken in only 1 to 4 percent of all compliance reviews (USCCR, 1975, p. 297). Of these, one-third to one-half involve basic and blatant paperwork deficiencies such as the failure to prepare or update an Affirmative Action Plan (US GAO, 1975, p. 26).

The other major sanction used by the OFCCP is to award back pay as part of a conciliation agreement. In 1973 and 1974, $54 million was awarded in 91 settlements, averaging $63 per beneficiary (US GAO, 1975, p. 46). In 1980, $9.2 million was awarded to 4336 employees in 743 conciliation agreements (USCCR, 1982, p. 47). These beneficiaries represented less than two-thirds of 1 percent of all protected-group employees at the reviewed establishments. After 1980, back-pay awards were phased out because the administration found them undesirable and arguably in excess of regulatory authority. The low penalties if caught are compounded by the low probability of apprehension. All of this suggests that contractors might well face (and perceive) only a weak threat of enforcement.

Indeed, the employment goals that firms agree to under affirmative action are not adhered to as strictly as quotas, although they are not vacuous. For a sample of establishments that experienced more than one compliance review during the 1970s, Leonard (1985b) compares the goals set in the mode year 1975 with the employment actually achieved one year later. Establishments overestimated the growth of total employment; they projected 1 percent employment growth one year ahead, but employment subsequently fell by 3 percent. But even though overall minority employment did not increase, minority employment shares did increase. This is because the contraction in employment that did occur was almost entirely white and male. While white males averaged 63 percent of initial employment, they accounted for 78 percent of the employment decline. Since females and minorities typically have lower seniority, they are usually found to suffer disproportionately more during a downturn. Thus, finding that white males accounted for most of the employment decline is striking evidence of the impact of affirmative action.

Goals and timetables generally predict growth in minority and female employment share far in excess of their own past history, and far in excess of what they will actually fulfill. In fact, they also overpromise white male employment, which reveals something of their strategy in formulating promises. They do not promise direct substitution of minority and female workers for white males; instead, they promise more for all.

But while the projections of future employment of members of protected groups are inflated, establishments that promise to employ more do actually employ more. It turns out that the affirmative action goal is the single best predictor of subsequent employment demographics, far better than the establishment's own past history, even controlling for the direct impact of detailed regulatory pressure.

Leonard (1985b) came to this conclusion after examining administrative records of companies that had undergone more than one compliance review in the early 1970s. These records include data on past and projected employment demographics, indications of deficiencies found in affirmative action plans, and an indicator for compliance reviews that take place before a contract is awarded (in which case one might expect the government's leverage to be greater). These records also indicate successively higher levels of government pressure brought to bear: hours expended by review officers, progress reports required, conciliation process initiated, and finally, show-cause notice issued. These may be taken roughly as inputs into a regulatory production function. By assuming that corporate attitude (or resistance) is described by past growth rates of employment for protected groups, and by their reaction to initial notification of deficiencies, we can then ask what the marginal impact is of factors of regulatory production such as conciliation agreements and show-cause notices.

Of course, these identifying assumptions are open to question. Caution should be exercised in interpreting the following results, since they may be biased toward finding ineffective enforcement if enforcement has been targeted against the most recalcitrant cases.

In general, the results on the impact of various enforcement tools are mixed and often insignificant. On average, employers had not significantly altered their demographics a year later in response to pre-award reviews, interim progress reports, conciliation agreements, or show-cause notices. On the whole, there is no compelling evidence that these detailed components of the enforcement process have a significant impact on the employment of members of protected groups.

The major finding in Leonard (1985b) is that goals set in these costly negotiations do have a measurable and significant correlation with improvements in the employment of minorities and females at reviewed establishments. At the same time, these goals are not being fulfilled with the rigidity one would expect of quotas. This indicates that while establishments promise more than they deliver, the ones that promise more do deliver more. We have a policy that appears to be effective in its whole and ineffective in its parts.

Can we then infer that extracting greater promises will result in greater achievement? The critical evidence is that there is an overall response to pressure. Within labor markets of the same industry and region, reviewed contractors do better than the nonreviewed. Within a given metropolitan area, the establishments that set higher goals achieve greater growth rates of employment for protected groups. My reading of this evidence is that while much of the nitpicking over paperwork is ineffective, the system of affirmative action goals played a significant role during the 1970s in improving employment opportunities for members of protected groups.

The Targeting of Compliance Reviews

Affirmative action can be broadly conceived of either as a tool to fight discrimination or as a tool to redistribute jobs and earnings. That is to say, it can either pursue equality of opportunity or equality of result. Given the historical record, progress toward one goal will often entail progress toward the other. Some see discrimination to be a broad enough target that it can be hit even with imperfect aim. The approach taken here is to infer the ends of affirmative action policy from an analysis of the historical record of actual enforcement.

Assertions concerning the ends of affirmative action are surprisingly common, especially when one realizes that only twice in the past has the actual pattern of enforcement been analyzed. The pathbreaking study of Heckman and Wolpin (1976) examined the incidence of compliance reviews at a sample of 1185 Chicago area establishments during 1972. These compliance reviews are the first, the most common, and usually the last step in the enforcement process. Heckman and Wolpin find that the probability of review was not affected by establishment size, minority employment, or change in minority employment. They discovered "no evidence of a systematic government policy

for reviewing contractor firms." This first analysis of targeting studied a relatively small sample in one city during the early 1970s, before the contract compliance program reached full stride. Additional research is needed to discover if these early findings continue to hold true. Just as importantly, how are such results to be interpreted?

If one thought of the OFCCP's primary concern as fighting the most blatant forms of employment discrimination directly in the workplace, one might then expect reviews to be concentrated at establishments with a relatively small proportion of females and black males, controlling for size, industry and region. Indeed, the OFCCP has had formal systems for targeting review such as the Revised McKersie System or the later EISEN system. These systems generally select for review those establishments with a low proportion of minorities or females relative to other establishments in the same area and industry.

But interviews with OFCCP officials in Washington and in the field suggest that these formal targeting systems were never really used. Instead, compliance officers claim they simply reviewed the firms with the most employees, and the growing firms. Given an even distribution of discriminators, and large fixed costs of review, this may not be unreasonable. Leonard (1985a) provides some additional evidence by examining which types of establishments were actually reviewed between 1974 and 1980. Table 2 illustrates the results, showing that firms with low proportions of black men were not any more likely to be reviewed than those with much higher proportions.[3]

How can the lack of a consistent targeting pattern by race or sex be explained? A likely explanation is that affirmative action is primarily concerned not with attacking the grossest forms of current employment discrimination, but rather with redistributing jobs and earnings to minorities and women.

The model of affirmative action as an earnings redistribution program has two testable implications. The first is that no particular pressure should be applied to firms with relatively few minorities or females, since discrimination is not at issue. The second implication is that greater pressure should be brought to bear to shift demand curves where the supply of labor is relatively inelastic. In particular, this implies a higher incidence of compliance reviews at establishments with non-clerical white-collar intensive workforces.

As already noted, Table 2 does not show that enforcement is concentrated on establishments with few blacks. As to the second implication, I find significant evidence that reviews are significantly more likely to take place, other factors held constant, in non-clerical white-collar intensive establishments. Reviews are also more likely to occur at both large and growing establishments, where any costs to white males are likely to be more diffused.

[3]These results should be interpreted with caution, since they mainly include reviews done by the Department of Defense. As such, the patterns shown here may not be indicative of current policies or practices of the OFCCP, nor of past practices of other compliance agencies. In addition, part of the patterns observed here may reflect the requirement that compliance reviews be performed before contracts are awarded.

Table 2
Proportion of Defense Contractor Establishments Reviewed from 1975 to 1979, by 1974 Black Male Employment Share N = 7,968 Establishments

Black Male Employment Share, 1974	*N*	*Proportion Reviewed*
zero	1,773	.106
.01–.02	1,672	.226
.02–.04	1,260	.263
.04–.06	761	.254
.06–.08	490	.255
.08–.10	380	.279
.10–.20	911	.301
.20–.50	633	.273
.50–.70	72	.083
.70–1.00	16	.188

Source: Leonard (1985a).

Charades for the 1980s

Black economic advance faltered along a number of dimensions during the 1980s, as other essays in this symposium document. I do not know how much of this was due to weakened affirmative action, but I do know that affirmative action under the contract compliance program virtually ceased to exist in all but name after 1980 (Leonard, 1987a). From a public relations perspective, the gutting of the program had a certain artfulness. With no greater staffing or budget, the OFCCP doubled the number of compliance reviews. A wondrously invigorated bureaucracy doubling its efficiency? It is easy to go twice as fast when you are just going through the motions, with more desk reviews and fewer in-depth audits. After 1980, fewer administrative complaints were filed, back-pay awards were phased out, and the already rare penalty of debarment became an endangered species. Over the same period, staffing and real budget were reduced. This type of surface enforcement resulted not just in a stagnation, but in a reversal of black advances under affirmative action. Between 1980 and 1984, both male and female black employment grew more slowly among contractors than non-contractors (Leonard, 1987a). Affirmative action, such as it was, no longer aided blacks. Consider the different response by contractor status, of black male employment growth to total establishment employment growth of 10 percent. Before 1980, this could be expected to result in black male employment growth of 12 percent among non-contractors and 17 percent among contractors. After 1980, the comparable rates are 11 percent among non-contractors and 10 percent among contractors. The reversal for black females is even more marked.

It was as though contractors were returning to a growth path they had been forced off by previous affirmative action efforts. This is discouraging news. Affirmative action seeks to give those discriminated against a chance to demonstrate their skills, and thus to break the preconceptions upon which prejudicial barriers are based. Under this model, affirmative action should serve as long-term inoculation against discrimination, and previous victims of discrimination should continue to progress even after active treatment has ceased.

The evidence supports far less optimistic views of what is at stake. The decline of black employment advances under the affirmative inaction program of the 1980s suggests either that affirmative action during the 1970s resulted in discrimination against whites, or that ongoing treatment is required to counteract the after-effects of generations of discrimination, or that there is a persistence and resiliency to the taste for discrimination against blacks.

The Impact of Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964, which made employment discrimination illegal, stands at the center of the federal antidiscrimination effort. While the focus of this analysis has been on affirmative action under the Executive Order, it should be understood that the Executive Order has functioned within the backdrop of Title VII's Congressional mandate and substantial legal sanctions. This section will sketch some of the literature about the impact of Title VII. For a more complete discussion, see Brown (1982), Freeman (1981), Butler and Heckman (1977), and Smith (1978). Title VII allows individuals to bring suit with only pro forma bureaucratic oversight. More importantly, Title VII litigation has resulted in multi-million dollar remedies. The threat of costly Title VII litigation, largely private, has been of great importance to employers.

The major contribution of the Equal Employment Opportunity Commission, which oversees Title VII enforcement, has probably been in helping to establish far-reaching principles of Title VII law in the courts which can then be used by private litigants, rather than in directly providing relief from systematic discrimination through its own enforcement activity.

A 1976 General Accounting Office review of direct EEOC enforcement activity concluded that it was generally ineffective. Most individual charges were closed administratively before a formal investigation. Charges took about two years to be resolved, and only 11 percent resulted in successful negotiated settlements. There was little EEOC followup to ensure compliance with conciliation agreements, and entering into a conciliation agreement caused no significant change in a firm's employment of blacks or females. Between 1973 and 1975, among 12,800 charges for which the EEOC found evidence of discrimination and was able to negotiate settlements, fewer than 1 percent had been brought to litigation resulting in favorable court decisions (U.S. GAO, 1976).

Between fiscal years 1972 and 1976 the EEOC brought 462 cases to court (U.S. GAO, 1981). The much publicized charges brought by the EEOC against AT&T, GM, Ford, Sears, GE, and the International Brotherhood of Electrical Workers in the early 1970s were largely anomalous. The EEOC also tends to avoid large companies, finding them too hard to digest, and there is little evidence to suggest that the EEOC has focused its attention on large firms that discriminate systematically. The Commission has normally been a reactive body slowly working its way through a mountain of individual complaints, many of which it discards as lacking substance (Hill, 1983).

Although the EEOC did not accomplish much through its administrative procedures, I believe that litigation under Title VII by private parties and by the EEOC constituted the cutting edge of government antidiscrimination policy. Before 1972, the Justice Department was empowered to bring suit through the courts for enforcement of Title VII's provisions. But since 1972, the power of litigation has been entrusted to the EEOC, which, in turn, can pass it on to individual plaintiffs. By such recourse to the courts, the EEOC can sometimes accomplish in years what takes the OFCCP weeks. What it gives up in speed, though, it sometimes wins back in power through the setting of sweeping legal precedents. For example, the celebrated case of Griggs v. Duke Power Co. (401 U.S. 424 [1971]) did not simply aid Griggs or affect only Duke Power. By establishing the principle of disparate impact (numerical imbalance) as prima facie evidence of discrimination, it placed a heavier burden on all employers to avoid the appearance of discrimination.

Between 1964 and 1981 more than 5000 cases of litigation under Title VII, many of which were private suits, were decided in the federal district courts. More than 1700 of these were class action suits. These are the tip of an iceberg that includes cases settled out of court or decided in state courts.

The enforcement of Title VII through the courts has contributed to significant improvement of the employment and occupational status of blacks. In Leonard (1984c), I regressed the change in the percentage of workers in an occupation who are members of a protected group on the number of Title VII class action suits per corporation, percentage of employment in an industry by state cell that is in federal contractor establishments under the affirmative action obligation, and a lagged dependent variable. Title VII leads to moderate and significant improvement in the employment of blacks, with an even more pronounced impact for black females.[4] This litigation has had its strongest impact in the white-collar occupations, particularly in professional and management positions, suggesting that Title VII litigation has created pressure for occupational advancement as well as employment. The analysis here treats

[4]Similar regressions sometimes show negative but generally insignificant changes for white females. The apparent ineffectiveness of antidiscrimination policy in promoting female employment remains an interesting question for research. It may be that the demand shifts for females are simply swamped by the ongoing massive increase in the labor supply of women. In addition, many of the early Title VII cases focused on racial rather than gender discrimination.

litigation under Title VII as exogenous. Since this method only counts the direct effects of litigation on firms in the same industry and state, it does not count the spillover effects onto firms in other industries and states from establishing credible threats and wide-ranging legal precedents. In fact, the greater the spillover, the less the differential impact of Title VII. If one believes that Title VII suits that reach a decision in the federal district courts are more prevalent in firms with growing black employment, then the estimate presented here will be biased upward. More plausibly, in my judgment, if discrimination leads to both stagnant levels of black employment and to litigation, then my estimate of the impact of Title VII will be biased downward and the positive results shown here are that much more notable.

One criticism of Title VII is that it has led to numerical balancing rather than to a reduction in discrimination, as firms sought safety behind the right numbers. A facile employer response to Title VII is to ensure that all employment flow rates (hires, promotions, discharges, and so on) are the same across demographic groups, irrespective of discrimination. In time, black representation in the firm mirrors that in the relevant labor pool. However, cases such as Connecticut v. Teal, 457 U.S. 440 (1982), indicate that employers could not be assured immunity from challenge under Title VII by having the "right" numbers of minority or female employees on the bottom line. Moreover, evidence of a decline in the variance of demographic employment shares is more complex and mixed than the numerical balancing theory predicts (Leonard, 1987b). For example, the variance of black female employment shares has increased.

In sum, these results suggest that Title VII litigation has played a significant role over and above that of affirmative action. Title VII has affected a larger group of employers and implemented more severe sanctions. But in the future, the impact will probably be weaker. The Supreme Court decisions of 1989 raise the burden and limit the prospects for plaintiffs contemplating adverse impact claims under Title VII. Wards Cove Packing Company, Inc. v. Atonio, 109 S.Ct. 2115 (1989), does this by requiring that plaintiffs demonstrate that a particular policy having an adverse impact is not a business necessity. Overturning this decision is a key element of the Civil Rights Act of 1990, currently before Congress and the administration.

Conclusions

Despite poor targeting, affirmative action has helped promote the employment of minorities and women, and Title VII has likely played an even greater role. But has this pressure led to reduced discrimination, or has it gone beyond and induced reverse discrimination against white males? The evidence is least conclusive on this question. Direct tests of the impact of affirmative action on productivity find no significant evidence of a productivity decline, which implies a lack of substantial reverse discrimination (Leonard, 1984c). However,

since the productivity estimates are not measured with great precision, strong policy conclusions based on this particular result should be resisted. The available evidence is not yet strong enough to be compelling on either side of this issue.

Affirmative action has had a short and turbulent history in this country. Of all the social programs that grew during the 1960s, it has enjoyed perhaps the least measure of consensus. While the targeting of enforcement could be improved, and while the impact of affirmative action on other groups is still open to question, the evidence reviewed here is that affirmative action has been successful in the past in promoting the integration of blacks into the American workplace. This evidence of the effectiveness of past affirmative action programs should be of some use as we enter the second generation of policy by a troubled euphemism: nonpreferential affirmative action.

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References

Ashenfelter, Orley, and James Heckman, "Measuring the Effect of an Antidiscrimination Program." In Ashenfelter, Orley, and James Blum, eds., *Evaluating the Labor Market Effects of Social Programs*. Princeton: Princeton University, Industrial Relations Section, 1976.

Beller, Andrea H., "The Economics of Enforcement of an Antidiscrimination Law: Title VII of the Civil Rights Act of 1964," *Journal of Law and Economics*, 1978, *21*, 359–380.

Brown, Charles, "The Federal Attack on Labor Market Discrimination: The Mouse that Roared?" In Ehrenberg, R., ed., *Research in Labor Economics*, Vol. 5. New York: JAI Press, 1982, pp. 33–68.

Brown, Charles, "Black/White Earnings Ratios Since the Civil Rights Act of 1964: The Importance of Labor Market Dropouts," *Quarterly Journal of Economics*, February 1984, *99*, 31–44.

Burman, George, "The Economics of Discrimination: The Impact of Public Policy," Ph.D. dissertation, University of Chicago, 1973.

Burstein, P., "Equal Employment Opportunity Legislation and the Income of Women and Nonwhites," *American Sociological Review*, 1978, *44*, 367–391.

Butler, Richard, and James J. Heckman, "The Government's Impact on the Labor Market Status of Black Americans: A Critical Review." In Hausman, Leonard J., et al., *Equal Rights and Industrial Relations*. Madison: Industrial Relations Research Association, 1977, pp. 235–281.

Ferrand, Louis G., Jr., "Compilation of Lists of Back Pay Agreements Obtained by Compliance Agencies under Executive Order 11246." Affidavit of the Counsel for Civil Rights, U.S. Department of Labor, in the matter of Warner and Swasey Company and Defense Logistics Agency, September 13, 1978.

Fiss, Owen M., "A Theory of Fair Employment Laws," *University of Chicago Law Review*, 1977, *39*, 235–313.

Freeman, Richard B., "Changes in the Labor Market for Black Americans, 1948–1972," *Brookings Papers on Economic Activity*, 1973, *1*, 67–120.

Freeman, Richard B., "Time-Series Evidence on Black Economic Progress: Shifts in Demand or in Supply," unpublished paper, Harvard University, Department of Economics, May 1978.

Freeman, Richard B., "Black Economic Progress After 1964: Who Has Gained and Why?" In Rosen, Sherwin, ed., *Studies in Labor Markets*. Chicago: University of Chicago Press/NBER, 1981, pp. 247–294.

Glazer, Nathan, *Affirmative Discrimination*:

Ethnic Inequality and Public Policy. New York: Basic Books, 1975.

Goldstein, Barry, "The Importance of the Contract Compliance Program: Historical Perspective," unpublished paper, NAACP Legal Defense Fund, May 1981.

Goldstein, Morris, and Robert S. Smith, "The Estimated Impact of the Anti-discrimination Program Aimed at Federal Contractors," *Industrial and Labor Relations Review*, July 1976, *29*, 524–43.

Heckman, James J., and Kenneth I. Wolpin, "Does the Contract Compliance Program Work? An Analysis of Chicago Data," *Industrial and Labor Relations Review*, July 1976, *29*, 544–64.

Hill, Herbert, "The Equal Employment Opportunity Commission: Twenty Years Later," *The Journal of Intergroup Relations*, Winter 1983, *11*, 45–72.

Jones, James E., Jr., "The Bugaboo of Employment Quotas," *Wisconsin Law Review*, 1970, *2*, 341–403.

Jones, James E., Jr., "Twenty-One Years of Affirmative Action: The Maturation of the Enforcement Process Under the Executive order 11,246 as Amended," *Chicago Kent Law Review*, 1982, *59*, 67–122.

Leonard, Jonathan S., "The Impact of Affirmative Action," Department of Labor Report, July 1983.

Leonard, Jonathan S., "The Impact of Affirmative Action on Employment," *Journal of Labor Economics*, October 1984a, *2*, 439–463.

Leonard, Jonathan S., "Employment and Occupational Advance under Affirmative Action," *Review of Economics and Statistics*, August 1984b, *66*, 377–385.

Leonard, Jonathan S., "Anti-Discrimination or Reverse Discrimination: The Impact of Changing Demographics, Title VII and Affirmative Action on Productivity," *Journal of Human Resources*, Spring 1984c, *19*, 145–174.

Leonard, Jonathan S., "Affirmative Action as Earnings Redistribution: The Targeting of Compliance Reviews," *Journal of Labor Economics*, July 1985a, *3*, 363–384.

Leonard, Jonathan S., "What Promises Are Worth: The Impact of Affirmative Action Goals," *Journal of Human Resources*, Winter 1985b, *20*, 3–20.

Leonard, Jonathan S., "Splitting Blacks? Affirmative Action and Earnings Inequality Within and Between Races," *Proceedings of the Industrial Relations Research Association, 39 Annual Meeting*, Winter 1986, 51–57.

Leonard, Jonathan S., "Affirmative Action in the 1980s: With a Whimper, Not a Bang," unpublished paper, U.C. Berkeley, 1987a.

Leonard, Jonathan S., "Anti-Discrimination or Numerical Balancing: The Impact of Title VII, 1978–1984," unpublished paper, U.C. Berkeley, 1987b.

Norgen, Paul, and Samuel Hill, *Toward Fair Employment*. New York: Columbia University Press, 1964.

Report of the 1967 Plans for Progress Fifth National Conference.

Ruchames, L., *Race, Jobs and Politics—The Story of FEPC*. New York: Columbia University Press, 1953.

Silberman, Lawrence H., "The Road to Racial Quotas," *Wall Street Journal*, August 11, 1977, p. 14.

Smith, Arthur B., Jr., *Employment Discrimination Law*. Indianapolis: Bobbs-Merrill, 1978.

Smith, James, "The Improving Economic Status of Black Americans." *American Economic Review*, May 1979, *68*, 171–178.

Smith, James, and Finis Welch, "Affirmative Action and Labor Markets," *Journal of Labor Economics*, April 1984, *2*, 269–301.

U.S. Commission on Civil Rights, *1961 Report: Employment*, Book 3. Washington: Government Printing Office, 1962.

U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, Vol. 5, *To Eliminate Employment Discrimination*. Washington: U.S. Government Printing Office, July 1975.

U.S. Civil Rights Commission, *The Federal Civil Rights Enforcement Effort—1977, To Eliminate Employment Discrimination: A Sequel*. Washington: U.S. Government Printing Office, December 1977.

U.S. Civil Rights Commission, *The Federal Civil Rights Budget 1983*. Washington: U.S. Government Printing Office, 1982.

U.S. General Accounting Office, "The Equal Employment Opportunity Program for Federal Nonconstruction Contractors Can be Improved," April 29, 1975, p. 30.

U.S. General Accounting Office, "EEOC Has Made Limited Progress in Eliminating Employment Discrimination," 1976.

U.S. General Accounting Office, "Further Improvement Needed in EEOC Enforcement Activities," April 19, 1981.

Vroman, Wayne, "Changes in the Labor Market Position of Black Men Since 1964," *Proceedings of the Twenty-Seventh Annual Winter Meeting*, Industrial Relations Research Association, 1975, pp. 294–301.

Welch, Finis, "Affirmative Action and Its Enforcement," *American Economic Review*, May 1981, *71*, 127–133.