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EXPLAINING ADA EMPLOYMENT DISCRIMINATION CHARGES OVER THE BUSINESS CYCLE

Christopher L. Griffin, Jr.*

Abstract

Economists and legal scholars have long debated what effects, if any, the Americans with Disabilities Act (ADA) generated for people with disabilities. Empirical studies usually focus on the employer-side impact of Title I, which prohibits adverse workplace decisions with respect to hiring, termination, and conditions of employment, and that literature has produced decidedly mixed findings. Largely missing from the conversation, however, has been an employee-focused account, one that describes when and why employees seek legal relief under Title I. This Article addresses that deficiency by analyzing the submission of every ADA Title I charge to the Equal Employment Opportunity Commission (EEOC) between 1992 and 2011 as a function of the unemployment rate, political economy factors, state disability protection law, and disability type. Using state-level panel data, I first show that a percentage point increase in the unemployment rate is associated with about 30% more charge submissions. Employees with disabilities are therefore more likely to file discrimination claims during recessionary periods, which causes the ADA to resemble an informal unemployment insurance mechanism. Second, the success rate is ambiguously tied to the unemployment rate. Depending on the definition of success, the data

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suggest that charges submitted during recessionary periods tend to find less purchase at the EEOC. With respect to political economy explanations, states with Republican-controlled legislatures produce fewer Title I charges, but the statistical evidence is fairly weak. More interestingly, the opposite is true for states that enacted ADA-like statutes before 1990. Finally, no discernible differences in EEOC charge activity emerge according to the charging party’s disability type. The Article concludes with a few research implications and policy recommendations for the EEOC and employers to address the employment of people with disabilities over the business cycle.

INTRODUCTION

After a quarter century, one of the few consensus conclusions about the Americans with Disabilities Act1 (ADA) is, paradoxically, the level of disagreement about its everyday impact. Some have lauded it as a civil rights beacon for people with disabilities.2 Critical perspectives range from merely disappointed3 to much less sanguine.4 Enforcement difficulties have stymied much of the progress heralded by the ADA’s earliest champions.5 From accessible public accommodations6 to

2. See e.g., Lawrence O. Gostin, The Americans with Disabilities Act at 25: The Highest Expression of American Values, 313 JAMA 2231, 2231 (2015) (“The ADA embodies the highest values of the United States—a compassionate nation with the vision to unleash the vast potential of persons with disabilities and to inspire global social change.”).
4. E.g., Mario Loyola & Richard A. Epstein, The Disabling of America, 8 AM. INTEREST, July/Aug. 2013, at 32, 34 (“It is increasingly clear that, notwithstanding its good intentions, the ADA takes a counterproductive approach to the problems it is trying to solve. Its economic premises are flatly mistaken. It fails any rational cost-benefit analysis. And it reveals a philosophy of massive government interference in ordinary social interaction that is misguided and worrisome.”).
5. See Michael Waterstone, A New Vision of Public Enforcement, 92 MINN. L. REV. 434, 453 (2007) (“[S]trong executive leadership—something that the ADA had at its passage—is needed to shake public enforcement agencies from their path dependent behaviors. This is especially needed with the ADA.”) (footnotes omitted).
6. Samuel R. Bagenstos, The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation, 54 UCLA L. REV. 1, 30 (2006) (“The limited remedies have led to massive underenforcement of the ADA’s public accommodations title, and they have left serial litigation as one
employment opportunities, public agency action and private litigation have fallen short of the statute’s promise. Scholarly attention to the ADA’s early legacy, especially among empiricists, has focused primarily on whether the law advanced employment outcomes for people with disabilities. At the time of passage, supporters believed Title I—banning discrimination in the application, hiring, promotion, and discharge of persons with disabilities—would yield results akin to Title VII of the Civil Rights Act of 1964. Despite the range of methodologies, data sets, and findings across empirical studies, uncertainty reigns. The most one can reliably conclude is that the ADA on average probably did no harm to employment prospects.

Such analyses, helpful as they are to answering fundamental questions about the statute’s labor market effects, ignore the broader context in which workers with disabilities make use of the law’s guarantees. Prior empirical work has, at best, generated inference about how the shadow of litigation affects employer decision-making. These employer-side approaches are traditionally microeconomic in scope...
because they center on the partial equilibrium reached between workers and firm owners. For example, owners might have offered higher wages on average for people with disabilities after the ADA’s effective date. They would have done so as a rational response to the law’s sanctions for basing relative compensation on disability status. Such decisions follow more from the strength of the law’s prohibitions rather than its affirmative guarantees. Studying wage and employment outcomes therefore only indirectly covers workers’ experiences with the statute’s protections. A more direct course would emphasize how and when persons with disabilities actively rely on the ADA’s provisions—how they call upon the promises of civil rights legislation.

This Article embraces that perspective through an employee-side, macroeconomic analysis of the decision to submit employment discrimination charges and poses three empirical questions: (1) What relationship is there, if any, between business cycle fluctuations and Equal Employment Opportunity Commission (EEOC) charge submissions and success?; (2) Is there a similar relationship between charge submissions and political economy or legal factors?; and (3) Is there important variation in charge submission activity by disability type? Unlike previous work, I find that charge submissions are decidedly countercyclical—their frequency increases with the unemployment rate. The results on charge success, however, are more ambiguous owing to different interpretations of what constitutes a “win” at the administrative relief stage. I find no discernible connection between partisan control of state governments and EEOC charge activity. On the other hand, presidential politics may indirectly correlate with charges and outcomes through administrative agenda-setting and the political functions of administrative appointees. I also find that states with disability employment protection statutes tend to produce more federal discrimination charges but that charge patterns do not significantly differ by the charging party’s underlying condition.

Unlike work pursuing a causal connection between the ADA’s provisions and the propensity for employer discrimination, I concentrate on simply understanding in broad terms when employees are more likely to seek legal recourse for such discrimination. The orientation is macroeconomic because its primary explanatory variables abstract from the implicit bargaining that produces wage and employment levels. It emphasizes how broader economic conditions affect employees’ decisions to vindicate their civil rights. This employee-side perspective emphasizes individual engagement with antidiscrimination statutes as the outcome of interest rather than statistics connecting the law to labor market results. Of course, a complete evaluation of the ADA must account for changes in wage and hiring outcomes for people with
disabilities, and these questions have received significant attention in the literature. Employment discrimination laws like the ADA, though, represent a collection of rights and procedures for redressing adverse employer decisions. Determining how often and under what circumstances employees with disabilities submit claims for workplace discrimination is just as important as shifting patterns in their wages earned and hours worked.

Reorienting toward an employee-charge perspective furthers three useful empirical objectives. First, as prior studies have shown, the state of the wider economy can make market-based remedies more salient than legal ones. On this account, the decision to submit a discrimination claim should be inversely correlated with the business cycle. In economic parlance, the charge submission rate is countercyclical. In boom periods, workers who believe they were unlawfully terminated might find ample alternative employment opportunities. As a result, pursuing monetary or equitable judgment through the courts declines in importance. But in recessionary years, dampened labor demand heightens the need for the ADA’s protections. When labor markets are tighter, employment discrimination law potentially functions as an informal unemployment insurance mechanism.

Second, prior employee-side empirical studies tend to concentrate solely on complaints filed in federal court and ensuing litigation. The universe of overall discrimination claims dwarfs this subset of cases. As others have suggested, vindicating workplace civil rights remains a real challenge for antidiscrimination law: “The present system may police


13. In fact, legislators famously held up the ADA as nothing short of a revolutionary breakthrough for disability rights. RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 6 (2005) (“Democratic Senator Edward M. Kennedy (Mass.) heralded the ADA as an ‘emancipation proclamation’ for people with disabilities; Republican Senator Orrin Hatch (Utah) called the act ‘the most sweeping piece of civil rights legislation possibly in the history of our country.’”).


15. See Donohue & Siegelman, Law and Macroeconomics, supra note 14, at 710.
against egregious forms of discrimination, but for many who perceive themselves to be victims of discrimination, their rights remain unrealized.” 16 For victims of disability discrimination, that system begins with the EEOC. Before ADA claimants obtain a private right to sue, they must first exhaust administrative remedies with the Commission. 17 The set of formal charges still includes all individuals who believe they experienced unlawful discrimination. But understanding the circumstances under which employees with disabilities pursue legal options—regardless of whether the claim leads to litigation—sheds light on their engagement with the ADA and possibly other employment discrimination statutes.

Third, this analysis speaks in part to changing views of disability. The well-known, yet misplaced distinction between physical and mental/behavioral conditions affects the ways in which society perceives individuals as disabled. 18 Persons with salient, outwardly observable conditions often are presumed to be “truly disabled” relative to people with psychological disabilities. 19 The ADA’s potential implicitly relies on the notion that obstacles to social integration are independent of impairment classification. The barriers employees with disabilities face are, on this account, structural; all such workers face similar headwinds in the labor market because of employers’ biased attitudes about disabilities. Consistent with this “social model” of disability, my empirical findings interestingly suggest that the relationship between the business cycle and invoking legal remedies is independent of one’s disability type.

I develop these arguments in four Parts. Part I briefly explains the

17. See infra subpart I.A.
18. See Jane Byeff Korn, Crazy (Mental Illness Under the ADA), 36 U. Mich. J.L. Reform 585, 590, 617 (2003) (noting that since at least the times of the early Greeks and Romans, people have distinguished between mental and physical disabilities and that the distinction is “deeply entrenched in our legal system”); Susan Stefan, “You’d Have to be Crazy to Work Here”: Worker Stress, the Abusive Workplace, and Title I of the ADA, 31 Loy. L.A. L. Rev. 795, 805 (1998) (“Judicial assumptions about the nature of psychiatric disabilities and essential employment functions have resulted in the near-total failure of the ADA to protect individuals with psychiatric disabilities from employment discrimination.”).
19. See Korn, supra note 18, at 640 (“The problem for people with a mental illness in establishing that they are disabled within the meaning of the ADA is exacerbated by the vision of a ‘disability’ that is held by those who enforce the ADA, that a disability is an observable, physical limitation.”); Jeffrey Swanson et al., Justice Disparities: Does The ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?, 66 Md. L. Rev. 94, 95 (2006) (finding that “people with psychiatric disabilities fared significantly worse in employment discrimination lawsuits than their counterparts with non-psychiatric disabilities”).
EEOC charge process and reviews earlier work linking employment discrimination law to macroeconomic conditions. Part II offers preliminary, descriptive evidence for the relationship between the unemployment rate and charge submissions and success. Part III employs restricted-use data covering the universe of ADA Title I charges between 1992 and 2011 to understand the connection between macroeconomic fundamentals and employment discrimination charges. The countercyclical estimates comport with previous results on litigation filings, but not prior analysis of EEOC charges. The preferred estimates suggest that a percentage point increase in the unemployment rate increases the amount of EEOC charges by 30%. But the empirical results also suggest a negative connection between the unemployment rate and merits determinations favoring the charging party. Using three indicators of political economy and legal factors—partisan control of state government, presidential political control, and state-level employment discrimination laws—I also find some evidence of an association with EEOC charge patterns. The estimates imply most clearly that presidential administrations led by Democrats are associated with more charge submissions. So, too, are states that had passed ADA-like statutes before the federal version. I find no connection, though, between state experiences with disability employment discrimination statutes and success in EEOC charge processing. Finally, I survey how the baseline unemployment rate and merits relationships differ by disability type. Part IV discusses the empirical findings in the context of future research as well as policy priorities for both the EEOC and employers.

I. THEORY AND PRACTICE OF EMPLOYMENT DISCRIMINATION CHARGE ACTIVITY

This Part explores the procedures for ADA charge submission as well as theories and related empirical conclusions explaining why and when submissions arise. Section I.A first summarizes the EEOC charge process. Section I.B then distinguishes between the employer-side, microeconomic underpinnings of the ADA and those scanning more broadly to include structural factors. In particular, it reviews a series of studies demonstrating a link between macroeconomic conditions and Title VII litigation, but not EEOC charges. Section I.C supplements economic indicators with political and legal ones. The idea is that background features of partisan political influence and state experience with disability discrimination law can affect the climate in which employees submit charges as much as macroeconomic indicators. Section I.D hypothesizes about how one’s disability type might affect
the relationship between the unemployment rate and charge activity.

A. The EEOC Charge Handling Process

The ADA vests the EEOC and the U.S. Attorney General with the "powers, remedies, and procedures" of enforcement under its employment-related provisions. In most disability discrimination cases, however, only the EEOC plays a significant role, just as it does in Title VII of the Civil Rights Act of 1964 and related statutes. Indeed, authorization for the EEOC appeared in the text of Title VII, but the agency did not possess true enforcement powers—in particular litigation authority—until eight years later. Its role as ADA charge processor and chief conciliator is equally important. Before an ADA claim reaches the federal courts, the EEOC serves as fact finder and arbiter. Those combined tools have served the Commission well since the ADA's enactment; it "favorably resolved 91% of cases through settlement or jury verdict" in the ADA's first decade.

When a disabled employee believes an employer has based a workplace decision on his or her disability, the employee must first submit a charge to the EEOC. This procedural step, which also exists for the other landmark employment discrimination statutes, simply requires administrative review before a private right of action will be recognized. The charging party may submit a federal charge alongside a corollary state filing, normally with a Fair Employment Practices Agency (FEPA). The EEOC maintains fifty field offices for charging parties to report unlawful activity. The charge particulars contain only

23. Id. at 686.
24. 29 C.F.R. § 1601.6(a) (2014).
25. This intermediate step furthers at least three important goals the balance the interests of the charging party, the respondent employer, and the judiciary. It "enables aggrieved individuals to seek redress for harms suffered, allows employers to resolve workplace disputes earlier and through more informal means, and helps to reduce the federal court dockets." Occhialino & Vail, supra note 22, at 692.
26. 29 C.F.R. § 1601.13(a)(3)(i) (2009). These provisions were seemingly designed to avoid federalism concerns in jurisdictions where FEPA's also had subject matter jurisdiction over employment discrimination enforcement. Id. ("In order to give full weight to the policy of section 706(c) of title VII, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination . . . [i]t is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies.").
the most basic information: the employee’s contact information, the employer’s address, a “clear and concise statement of the facts,” the firm’s approximate size, and notice of an attendant state filing.28

The process that follows combines elements of pre-trial discovery and alternative dispute resolution. EEOC investigators possess subpoena power and may compel the production of evidence related to the charge.29 These facts and testimony aid the Commission as it determines whether there is reasonable cause that an unlawful employment practice occurred. Once it makes that determination, the EEOC must promptly notify the charging party and the employer. A “no cause” finding only signifies that the EEOC did not believe reasonable cause existed; it is not equivalent to a liability standard at civil trial. If reasonable cause is found, federal regulations require the EEOC to “attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief.”30 When conciliation fails, the charging party will receive a “right to sue” letter; charging parties for whom reasonable cause was not found must receive the same notice within ninety days of determination.31 These letters create a private right of action, but the EEOC may choose at its discretion to file suit on behalf of aggrieved employees. The EEOC’s criteria for selecting cases to litigate are numerous, but it tends to bring suit in cases that would otherwise resemble class actions or potentially affect the development of antidiscrimination doctrine.32

The data described below were generated from these procedural activities.33 In fact, they combine the information from the charging party’s submission with the Commission’s final disposition. An understanding of the charge processing system facilitates certain empirical judgments. For example, distinguishing charges that lead to a Commission determination from those resolved before the agency issues a judgment from those that are closed by default will be critical for defining charging party success. On the other hand, the streamlined nature of EEOC charge handling limits the amount and type of information available for analysis. Given this Article’s posture—one investigating statistical relationships short of causal mechanisms—the charge process data should reflect those relationships reliably.

29. Id. §§ 1601.15-.16(a).
30. Id. § 1601.24(a).
31. Id. §§ 1601.19(a), 1601.28(b).
32. For a comprehensive discussion of the EEOC’s litigation goals, see Occhialino & Vail, supra note 22, at 700-02.
33. See infra subpart II.A.
B. Economic Perspectives on Employment Discrimination and Charge Activity

The literature examining how antidiscrimination law affects the labor market has developed along both theoretical and empirical dimensions. Theoretical work almost exclusively models the equilibrium wages and hours that result from employer discrimination. Related empirical work estimates whether these equilibria respond to antidiscrimination mandates. Together, these approaches constitute the employer-side, microeconomic approach. A less common avenue, the employee-side approach, stresses employee incentives to seek redress under antidiscrimination law. This Section briefly reviews the two complementary viewpoints. Although many of the examples herein probe racial discrimination, the underlying notions apply equally to bias against people with disabilities.

1. Microeconomic Studies

Most empirical studies on federal employment discrimination law follow methods developed in the fields of labor economics and sociology. These studies build upon the microeconomic models of discrimination pioneered by economists in the mid-20th century. The models are microeconomic in scope because they cast outcomes—wages offered and hours worked—as functions of employer decisions rather than systemic factors. An early, central economic insight held that discrimination reflected supposedly profit-maximizing firms actually making altogether inefficient decisions. Kenneth Arrow styled the racial wage discrimination quandary as follows: “If the members of the two races, after adjusting for observable differences in human capital and the like, received different wages or were charged different prices in commodity or credit markets, an arbitrage possibility would be created which would be wiped out by competition.” In other words, discrimination should not persist because the market will eliminate the deadweight loss created by animus-driven employers.


35. See Donohue, supra note 34, at 1396-99 (explaining the Beckerian model of discrimination).

Antidiscrimination law, on this account, nudges firm owners toward efficient outcomes by outlawing biased employment choices or selection procedures. Efficiency usually follows either the Pareto or Kaldor-Hicks variation, whereby the only choices that would make some better off would inevitably reduce the welfare of others. Efficient employment decisions lead to additional hiring or reduced firing of workers with disabilities up to the point where the cost of providing accommodations to the marginal worker equals the benefit of retaining him/her. At this equilibrium point, employers no longer indulge their "taste for discrimination," if they have one. They must treat all potential hires or current employees equally without regard for protected characteristics. If so, the only permissible variation in the incidents of employment would be a function of productivity, experience, and human capital accumulation (e.g., education). Later empirical studies eventually cast doubt on the strength of that efficiency argument, showing that minority workers suffered substantial, exclusionary discrimination before the 1960s. They effectively made the case for antidiscrimination law as a vital antidote to market failure.

The dominant micro-empirical approach to assessing the ADA's impact asks whether the law measurably enhanced labor market outcomes by absorbing the under- or unemployed disabled labor force. The basic methodology uses a "difference-in-differences" or "triple-differences" setup. The former method calculates the average change in an employment-related outcome before and after the law's effective date (the first difference) and (2) subtracts that difference for workers without disabilities from the same difference for those with

37. See Michael Ashley Stein, The Law and Economics of Disability Accommodations, 53 DUKE L.J. 79, 159-67 (2003) (discussing ways in which the ADA "cure[s] the information asymmetry causing individual employers to suffer from market failures" by generating "a quasi-voluntary, wholly efficient, Pareto optimal equilibrium").


39. See BECKER, supra note 34, at 16-17.


disabilities (the second difference). A third dimension might add differences by state-level antidiscrimination law. The reason is that workers with disabilities in states with ADA-like provisions enjoyed some form of employment protection well before the federal law went into effect. In addition, one assumes that federal law should have its only (or greater) impact in states that previously did not have a statute like the ADA.43

The mixed findings from micro-level studies of the ADA have largely contributed to our present state of uncertainty about the statute’s efficacy. Some papers concluded that the law disadvantaged workers with disabilities.44 Others found that any supposed employment declines either were not due to the ADA or limited to the short term.45 Perhaps the greatest contributions from this scholarship were methodological as opposed to substantive. Attention has been drawn to the need for better survey measurements of disability.46 Procedures for empirically analyzing legislative interventions have advanced, in particular state law-based quasi-experimental techniques.47

Estimating the existence and extent of the ADA’s labor market impacts has been very worthwhile for students of employment discrimination and policymakers alike. Understanding whether a major civil rights law fulfilled its chief mandates is an elementary question worthy of examination. But there are two reasons to extend the empirical ADA and employment discrimination agenda beyond these standard inquiries. First, micro-econometric studies do not necessarily tell us the extent to which the ADA has remedied discriminatory practices. To be sure, none of these studies has produced a “disability wage gap”—a measurement of the compensation discount employees

43. See, e.g., sources cited, supra note 12.
44. Acemoglu & Angrist, supra note 12; DeLeire, Wage and Employment Effects, supra note 12.
45. See, e.g., Donohue et al., supra note 12 (finding scant evidence that the ADA negatively impacted weeks worked for people with disabilities and support for wage declines for the disabled beginning in 1986, before the ADA’s passage); Christine Jolls & J.J. Prescott, Disaggregating Employment Protection: The Case of Disability Discrimination (Nat’l Bureau of Econ. Research, Working Paper No. 10740, 2004) (finding depressive effects on employment levels in the short term); Richard V. Burkhauser, Andrew J. Houtenville & Ludmila Rovba, Accounting for the Declining Fortunes of Working-Age People with Disabilities (December 2005) (unpublished manuscript) (on file with author) (also concluding that negative employment effects predated the ADA).
47. For prominent examples as applied to the ADA context, see Acemoglu & Angrist, supra note 12; Jolls & Prescott, supra note 45.
with disabilities receive on account of discriminatory practices.\footnote{48} Producing such a measurement is notoriously difficult.\footnote{49} Rather, the studies begin with the premise that pre-ADA differentials in wages or employment levels must have been the result of inefficient firm bias. Any increase after the ADA’s effective date must then have followed from reductions in employer discrimination. The survey-based data applied in these studies, however, only support such hypotheses indirectly. Consequently, this work has not done as much to advance our understanding of discrimination incidence, which should be of great importance to employment discrimination scholars.

Second, and relatedly, an employer-side approach elides the employee’s involvement with the ADA’s protections. The micro-level studies emphasize the law’s sword-like elements by testing the hypothesis that employers respond to sanctions rationally. But they add little to an account of the ADA’s equally important employee shield against adverse employment decisions. Without aggrieved employees’ willingness to come forward and submit charges, the ADA cannot function as intended.\footnote{50} Stated otherwise, the employer-side methods underscore how compensatory damages and equitable relief for unlawful behavior dampen discrimination. The rights vindicated by those remedies are just as important. Unless one incorporates employee appeals to employment protections more explicitly, a rights-based account figures passingly in the analysis.

2. Macroeconomic Studies

Empirical analysis focusing on employee responses to discrimination are less numerous than the employer-side literature. Ample work, both theoretical and empirical, has been conducted on the probability of filing lawsuits.\footnote{51} Only a relatively small fraction focuses exclusively on


\footnotetext[50]{50. The exceptions to the requirement that aggrieved parties submit charges allow (1) others to file with the EEOC on behalf of an aggrieved party; and (2) any member of the EEOC to submit a charge to the body. See 29 C.F.R. §§ 1601.7(a) (2009), 1601.11(a) (2009).}

predicting initial administrative complaint filings. Professors Laura Beth Nielsen and Robert Nelson, for example, have studied the antidiscrimination regime both at the outset of claim processing\textsuperscript{52} and at final judgment.\textsuperscript{53} In one contribution examining the so-called “pyramid of disputes”—moving chronologically from adverse employment experiences to filing lawsuits—the authors roughly estimated that “28\% of those who complain starting with the EEOC or 0.23\% (23 in 10,000) of the potential pool of 3.4 million self-identified targets of racial discrimination in employment” file in federal court.\textsuperscript{54} Another paper on case outcomes linked the result of EEOC case processing with litigation outcomes. The estimates implied that “when the EEOC supports a plaintiff’s charge, there are no significant differences from cases with no EEOC finding,” but “[w]hen the EEOC issues a finding that does not support the plaintiff, cases are less likely to settle early.”\textsuperscript{55}

John Donohue and Peter Siegelman wrote a series of articles devoted to the empirics of Title VII employment discrimination filings.\textsuperscript{56} In one paper, they developed a simple model for the net expected utility from filing a discrimination suit in federal court after an unlawful dismissal.\textsuperscript{57} The only relevant variables were the wage rate at the time of termination ($w$), the cost of litigation ($C$), the probability of a liability finding at trial ($p$), and the duration between termination and judgment ($D$).\textsuperscript{58} (The latter two variables are themselves functions of the unemployment rate.) The first-order condition for the optimal reservation wage—the wage at which employees would be indifferent between filing suit or not after a discriminatory experience—implies that workers should be more willing to sue during recessionary periods.\textsuperscript{59} That result relies on the assumption that employers have greater latitude to discriminate unlawfully when the unemployment rate increases (because labor supply exceeds demand). The assumption is reasonable because when the unemployment rate rises, terminated employees will, on average, be

\textsuperscript{52} See Nielsen & Nelson, \textit{supra} note 16.
\textsuperscript{54} Nielsen & Nelson, \textit{supra} note 16, at 706.
\textsuperscript{55} Nielsen et al., \textit{supra} note 53, at 191.
\textsuperscript{57} Donohue & Siegelman, \textit{Law and Macroeconomics, supra} note 14, at 719-21.
\textsuperscript{58} Id. at 719-20.
\textsuperscript{59} Id. at 721-22.
expected to search longer for new positions. On the other hand, longer unemployment spells increase the expected value of litigation through a higher back pay award \((wD)\). Donohue & Siegelman called this the "worker benefits effect." 60

The authors then distinguished between the worker benefits effect on filings and its logical converse, what they termed the "employer damages effect." If workers stand to profit from longer unemployment spells for a given wage rate, then employers lose more during recessionary periods.61 Donohue & Siegelman attempted to separate measurement of the worker benefits and employer damages effects in four ways, three of which are not possible with the data used in this Article.62 The fourth—estimating the relationship between the unemployment rate and EEOC charge patterns—figures prominently in the empirical analysis below. They hypothesized that "aggrieved workers commonly complain to the EEOC but that as they return to work they let their case lapse if the EEOC response is not satisfactory," whereas "[t]hose who are still out of work when the economy goes into a downturn are more likely to pursue their claim to federal court."63 As a result, on their account, "[a]lleged acts of employment discrimination and EEOC complaints based on them [should] occur at a fairly constant rate throughout the business cycle."64

Donohue & Siegelman confirmed that hypothesis, finding no connection between the unemployment rate and EEOC charge activity as they did for litigation filings. They offered two reasons for the null result. First, Donohue & Siegelman referred to the lessons from their worker-benefits model cost: "Given that the cost of filing with the EEOC is essentially zero and the time frame for filing is very short, there is little chance for the operation of the worker benefits effect because everyone who might want to sue later files a discrimination charge with the EEOC."65 In other words, the infinitesimal cost of charge submission combined with the narrow window available for submitting a charge preclude any cost-benefit analysis based on the length of unemployment spells. Workers will simply submit charges to preserve their private rights of action, and, according to Donohue & Siegelman, that strategy should be invariant to macroeconomic factors.

The second rationale is employee shortsightedness. Based on their empirical analysis of EEOC charges, Donohue & Siegelman concluded:

60. Id. at 722.
61. Id. at 723-24.
63. Id. at 741.
64. Id.
65. Id. at 743.
If potential litigants were farsighted, they would presumably realize that a termination that occurs in a recession will be more costly than one that occurs in a boom. The lack of cyclicality in EEOC filings coupled with the strong cyclical pattern in federal court filings suggests, however, that although litigants will react to the changed incentives of the higher backpay awards when they know they have been out of work for some time as their case grinds through the EEOC, they are not good at anticipating that in a recessionary economy they will likely be unemployed longer than they would in a boom time. In other words, the absence of a strong worker benefits effect operating on the filing of EEOC charges suggests that prospective litigants are myopic in their decision making.

The myopia explanation is intuitively appealing. It seems equally plausible, however, that charging parties—behaving as rational actors—would forecast the payoff of litigation identically at the charge and litigation stages. If it is true that aggrieved employees understand that litigation delay itself increases the size of \( wD \) beyond the time between the accrual of the claim and suit, then they should also appreciate the effect on back pay at the EEOC charge stage. So long as charging parties realize that the EEOC processing stage can result in a right to sue letter regardless of the reasonable cause determination, and that there is virtually no cost to submitting a charge, backward induction should result in the same prediction then as when standing at the courthouse doors.

In some respects, the difference between the Donohue & Siegelman inquiry and the present one is merely procedural. Filing suit and initiating an EEOC investigation are, as discussed, two distinct stages in the prosecution of a discrimination allegation. And the Donohue & Siegelman analysis included only Title VII claims; employees covered by that statute arguably face different constraints than persons with disabilities with respect to reemployment.

But in other respects, the expected utility calculus for EEOC charges should reduce to the same elements that inform the litigation decision.

66. Id. at 744.
67. See supra subpart I.A.
68. See Niklas Krause et al., Modified Work and Return to Work: A Review of the Literature, 8 J. OCCUPATIONAL REHABILITATION 113, 114 (1998) (“Moreover, the longer the duration of work disability, the less likely the injured worker will ever return to work. In fact, it is the minority of workers with long-term disabilities which accounts for the majority of workers’ compensation costs.”) (footnotes omitted).
Donohue & Siegelman expressed the net expected value of a lawsuit as:

\[ E(S) = pwD - (1 - p)C \]  

(1)

First, alter Equation 1 so that \( X \) represents an EEOC charge, and let \( \pi \) be the probability of success from EEOC conciliation. Here, I define success as any firm- or EEOC-mediated settlement with compensatory benefits. If success were defined as a right to sue letter following a reasonable cause finding, then the benefit portion of the equation would be identical to the cost, i.e., the expected value of litigation, because a charging party may request a right to sue letter independent of the EEOC's determination.69 Finally, let \( \sigma \) be the settlement value, presumed to be less than \( wD \). Moreover, neither \( \pi \) nor \( \sigma \) should be a function of the unemployment rate because these parameters depend only on the negotiation process. I can then express the net expected value of submitting a charge as:

\[ E(X) = \pi(\sigma) - (1 - \pi)[E(S)] \]  

(2)

\[ E(X) = \pi(\sigma) - (1 - \pi)[pwD - (1 - p)C] \]  

(3)

If \( \pi \) and \( \sigma \) are not functions of the unemployment rate, then the first-order condition for Equation 3 is identical to that in the original Donohue & Siegelman formulation. I base these assumptions, again, on the notion that conciliation efforts will occur early enough in the process so that negotiation issues dwarf the economic effects of delay. This construction, setting up the charge cost-benefit analysis in terms of potential litigation, also rules out the charging party myopia theory. If aggrieved employees know, as they reasonably should, that a charge without reasonable cause still preserves litigation opportunities, then EEOC submissions should be just as countercyclical as litigation filings. That idea leads to the following hypothesis:

**Hypothesis 1a:** Potential hires or existing employees will be more likely to submit EEOC charges during periods of economic downturns and tighter labor markets, i.e., when higher unemployment leads to excess labor supply.

Embracing the same logic in Donohue & Siegelman's model, the "success" of an EEOC charge presumably should vary with the

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69. The only difference might be a recalibration of the litigation success probability under the assumption that a reasonable cause finding would lead to Bayesian updating of the charging party's prior.
unemployment rate. The explanation follows from the worker benefits effect. When the unemployment rate increases, the expected back pay award should as well. But the probability of success on the merits should remain constant for a given discrimination allegation. Stated another way, the higher the back pay forecast, the lower the necessary probability of success to outweigh the cost of submission. The reason the model does not quite apply to charge success, though, is that the expected benefit from a finding of reasonable cause does not always lead to compensatory awards. Only success defined as monetary settlement would resemble the final judgment payout. Furthermore, as noted before, the charge submission process is virtually costless. Combining these two points implies that the charge success rate \( \pi \) should be inelastic with respect to the unemployment rate even though the probability of litigation success \( p \) should negatively correlate with it.

**Hypothesis 1b:** Because all charge submissions can lead to litigation, regardless of the EEOC's reasonable cause determination, the unemployment rate should have no bearing on the merits of charge submissions.

**C. Political Economy and Legal Factors**

Empiricists of various disciplinary stripes have linked the success of partisan elections to popular support for policy initiatives.\(^{70}\) In turn, support for public programs can depend on partisan control of state and national governments. A chief example is support for state incarceration policy, where one political trope holds that “tough-on-crime stances offer Republicans a way to connect with voting blocs” that might not otherwise support their platform.\(^{71}\) In the race for votes, incumbents and challengers alike face incentives to offer not just pork spending but also to embrace substantive policy stances that resonate with the public.\(^{72}\)

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These two pathways suggest that, whether at the national or local level, dominant political parties exogenously affect social responses, as new institutionalists predict. This view emphasizes how politics stands outside of the polity and sways public opinion through its various institutional arms. But the attenuated connection between state government and federal antidiscrimination law should in turn dampen any link between partisan control of state capitals and EEOC charge activity.

A more likely relationship would exist solely at the federal level. A very deep literature also has pinpointed how, once elected, political figures, especially those on the national stage, exert agenda-setting control over bureaucratic entities. Some versions emphasize Congress’s role, while others stress the President’s. Of course both political branches perform important governance functions in the administrative state, one by appointing members and the other through the confirmation process. Regardless of which positive political theory better explains agency control, the takeaway is that the federal bureaucracy is much more than a collection of technocrats working on national issues. Agency members can be and are deeply inclined to pursue certain policy agendas based on the partisan control of government. The natural consequences of political control over administrative levers could be twofold. First, there might be a feedback loop where administrations less sympathetic to disability discrimination charges marginally deter future submissions. If aggrieved employees at $t_1$, holding constant the true merit of underlying charges, were less successful in reasonable cause determinations, future workers at $t_2$ might forego submitting charges. Second, holding constant the number of submissions, one might expect administrations less sympathetic to disability rights to be more exacting in their reasonable cause determinations.
determinations.\footnote{77} Although there is no explicit evidence that Republican appointees at the EEOC implemented different enforcement policies, empirical evidence suggests that disposition time and enforcement zeal have lagged under GOP administrations. For example, claimants were more than twice as likely to receive a no cause determination under President Reagan’s EEOC than in the Carter Administration’s.\footnote{78}

Citizens also interact with major policies in ways wholly independent of formal political channels. In previous research, I documented the expressive effect of the ADA through negative media portrayals of children with disabilities.\footnote{79} Such news stories arose just after the ADA’s passage and might have dissuaded some parents from bringing fetuses with disabilities to term. The influence of expressive law theory has waxed and waned over time, but its central insights remain valuable.\footnote{80} Informal norms that emerge just after a law’s passage can very often be as powerful as its textual contents. When a law’s expressive substance is strong, those meanings can become the primary, albeit indirect, conduit for engagement with its provisions. Or judicial action can transmit messages about the law’s value while courts perform their adjudicative functions.\footnote{81} Even administrative agencies like the EEOC can create quasi-expressive pathways between legislation and the wider public by implementing law in ways not necessarily contemplated by the statutory text.\footnote{82}

\footnote{77. See, e.g., B. Dan Wood, \textit{Does Politics Make a Difference at the EEOC?}, 34 \textit{AM. J. POL. SCI.} 503, 506 (1990) ("The president also appoints the EEOC general counsel, who manages litigations on behalf of the commission. In this role the general counsel plans the overall enforcement strategy of the agency. The general counsel also acts as a filtering mechanism for litigation recommendations between district offices and commissioners.").}

\footnote{78. \textit{Id.} at 522; see also \textit{id.} at 519 (noting how the EEOC’s time-to-resolution performance lagged under Clarence Thomas’s EEOC chairmanship).}

\footnote{79. See Dov Fox & Christopher L. Griffin, Jr., \textit{Disability-Selective Abortion and the Americans with Disabilities Act}, 2009 \textit{UTAH L. REV.} 845, 867-70.}


\footnote{81. \textit{See COLKER, supra} note 13, at 74 (hypothesizing that Title I plaintiffs might have been more selective when submitting charges as a result of the Supreme Court’s gradual narrowing of the definition of disability). Of course, these semi-expressive messages were rendered moot by the ADA Amendments Act of 2008, which broadened the definition of qualifying disabilities beyond that which the Court had formulated. \textit{See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12102(4) (2012)).}

\footnote{82. Theda Skocpol & Kenneth Finegold, \textit{State Capacity and Economic Intervention in the Early New Deal}, 97 \textit{POL. SCI. Q.} 255, 260-61 (1982) ("The administrative organization of government is crucial, especially when policies calling for increased government intervention are to be implemented. Governments that have, or can quickly assemble, their own knowledgeable administrative organizations are better able to carry through interventionist policies than are governments that must rely on extragovernmental experts and organizations.").}
One approximate method for testing the relationship between social
c norms and EEOC charge behavior compares jurisdictions by their
histories of pre-ADA disability protection. Specifically, did states that
enacted Title I-like statutes before 1990 produce different levels of
charge submission than states for which the ADA was a legal
innovation? The notion is not necessarily that a majority of state
residents supports employment discrimination protection for people with
disabilities. Rather, it posits that experience with disability rights
statutes creates certain social expectations that covered workers should
have legal recourse against employer bias. Those expectations in turn
legitimate resort to formal legal remedies. On that basis, I test the
following:

Hypothesis 2a: Aggrieved potential hires/discharged employees will be
no more or less likely to file EEOC charges in states governed by
Republican executives and legislatures. There should be, however, a
relationship between partisan control of the presidency and EEOC
charge activity patterns.

Hypothesis 2b: EEOC charges plausibly are more numerous and
meritorious in states that passed ADA-like laws before 1990 given a
longer history of exposure to and engagement with disability
employment protection.

D. Types of Disability

Disability advocates and scholars have long recognized that social
understanding of disabilities is not uniform across the spectrum of
conditions. Specifically, prevailing perceptions of mental/behavioral
conditions continue to sound in personal stigma or blame. By contrast,
society tends not to blame people with physical disabilities for their
circumstances. Both groups suffer nevertheless from weaker support for
combating disability discrimination, especially relative to other
outlawed forms of discrimination (e.g., on the basis of race or sex).

83. See, e.g., Patrick Corrigan et al., An Attribution Model of Public Discrimination Towards
Persons with Mental Illness, 44 J. HEALTH & SOC. BEHAV. 162, 173 (2003) (reporting that “[w]hen the
onset of mental illness is viewed as being under one’s control, persons are more likely to avoid,
withhold help, and endorse coercive treatment of someone with mental illness”); Patrick W. Corrigan et
al., Stigmatizing Attributions About Mental Illness, 28 J. COMM. PSYCH. 91, 98 (2000) (confirming
perceptions that society attributes the existence of mental health problems to individual behaviors rather
than external or environmental factors); Jack K. Martin et al., Of Fear and Loathing: The Role of
‘Disturbing Behavior,’ Labels, and Causal Attributions in Shaping Public Attitudes Toward People with
Mental Illness, 41 J. HEALTH & SOC. BEHAV. 208, 219 (2000) (finding from survey data that “a majority
of Americans also reject the idea of having [persons with mental health problems] as coworkers and
indicate an unwillingness to entertain them in their homes”).
Disabilities arise in so many combinations and forms that they appear highly individualized and specific to the outsider’s eyes. Race and sex discrimination, on the other hand, more readily align with a fundamental identity- or group-based ill. This fact may have contributed to a rationalization of discrimination against people with disabilities that increases as one moves from physical to behavioral conditions. 84

In addition, theorists have identified responses to disability as reflecting either a “medical” or a “social” model. According to the former, furthering disability rights would “reduce the complex problems of disabled people to issues of medical prevention, cure or rehabilitation.” 85 The nexus of disability and the person is clinical, emphasizing impairment over structural barriers to integration. The social model upended this line of thinking by recasting disability precisely in a structural context. Whereas “conventional wisdom attributes a disabled life to personal tragedy, or curse, or sin, or some other fairly individualized phenomenon,” the social account “redirects attention to the environment surrounding an impaired individual.” 86

Combining the medical/social divide with varying attitudes toward physical/behavioral conditions complicates matters still. Significant evidence points to differential treatment of individuals claiming physical rather than psychiatric conditions as the basis for workplace discrimination. 87 Experiences like these seemingly stem from a stereotype that, even within the medical model of disability, behavioral disorders are due more to individual “failure.” Or discrimination persists because of what Elizabeth Emens identified as the “hedonic,” or experiential, cost of mental illness. “Healthy” individuals fear “emotional contagion” from their mentally ill colleagues because mental illness in the workplace generates substantial negative externalities. 88 An affected employee then shuns his or her mentally ill colleague to avoid hedonic costs, which “would look rather like classic employer animus.” 89 Physical impairments, on the other hand, could just as likely result from misfortune as from risk-taking behavior. Therefore, they do

84. See Bradley A. Areheart, When Disability Isn’t “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma, 83 IND. L.J. 181, 190 (2008).
86. Adam M. Samaha, What Good Is the Social Model of Disability?, in THE DISABILITY STUDIES READER 214, 216 (Lennard J. Davis ed., 4th ed. 2013); see also id. ("[T]he model moves causal responsibility for disadvantage from physically and mentally impaired individuals to their architectural, social, and economic environment.").
89. Id. at 443.
not carry the same hedonic costs as behavioral impairments do under Emens' theory. Taken together, the medical/social models and the physical/behavioral divide suggest:

**Hypothesis 3:** Aggrieved potential hires/employees with physical conditions will be less likely to submit EEOC charges during recessionary periods than those with less observable and more misunderstood behavioral conditions. Physical disability discrimination charges should also be more successful on average during recessionary periods than charges based on behavioral conditions.

The rationale for this hypothesis as it relates to the unemployment rate is disability salience. If people with disabilities already experience longer unemployment spells following termination, the length of those spells should be longer for employees with less favored conditions. For example, a prospective hire with cerebral palsy might benefit from sympathy in a way that someone with chronic depression might not. This differential—both in terms of what the average employer considers a disability and the potential employee's ability to alter expectations—changes the relative utility of the ADA as a form of unemployment insurance.

II. THE LANDSCAPE OF ADA CHARGES

This Part offers preliminary assessments of the theories reviewed above. A descriptive picture of disability employment discrimination charges serves as an initial guide to the validity of those hypotheses. Only with multivariate regression analysis can one achieve a rigorous understanding of the links between macro-level phenomena and EEOC activity. Starting with a simple descriptive baseline, however, contextualizes the more thorough empirical work that follows and helps set the stage for the study's broad themes.

Here and for the remainder of the Article, I distinguish among three concepts in EEOC procedure—*filings, charges, and charge elements*—to avoid confusion in terminology. I refer to filings as complaints that initiate litigation—not the submission of a charge to the EEOC. The EEOC has not linked its charge data to the federal docket; therefore, filings are excluded from the analysis. The data only include charges submitted to the EEOC as well as the elements that constitute each charge (akin to counts in a complaint).
I use the universe of EEOC charges filed pursuant to Title I of the ADA as the basis for the empirical analysis. Before any alterations to the administrative file, the data contain almost 550,000 observations. Each original observation does not represent a single charge. Rather the data file rows denote every charge element within separate charges. For example, if a charging party alleged both inequitable working conditions and unlawful discharge, each of those two grounds would appear as separate dataset rows connected by the same unique EEOC charge identifier. The file also contains a wealth of information about the charge particulars and equally useful data about the charging parties (without compromising their individual identities). In addition to the years of charge submission and administrative closure, detailed descriptions of how the parties resolved or otherwise disposed of charges appear for every entry. It is therefore determinable both whether the EEOC resolved a particular charge and also whether it found cause. State codes for charge submissions exist for every observation, and basic demographic information—race, imputed age, and sex—appear for at least 90% of them. Finally, the file contains some indication of the employer’s NAICS industry code and employee size (in broad categories), but the spottiness of this information makes it minimally useful.

Testing any of the hypotheses in Part I required a merging of the EEOC administrative data with other publicly available sources. First, I gathered the official Bureau of Labor Statistics measure of the (not seasonally adjusted) state unemployment rate and labor force size. The unemployment rate by state and year is used straightforwardly as the main regressor of interest for Hypotheses 1a and 1b. Because of significant differences across states (and potentially within states across time), all regressions are weighted by the size of the labor force. The political economy indicators are simply dummy variables for: (1) the partisan affiliation of the Governor in every state/year; (2) the majority party across both state legislative chambers (which means that the indicator could be “split”; and (3) the party of the President in office.

90. I am indebted to Dr. Brian T. McMahon of the Rehabilitation Counseling Department at the Virginia Commonwealth University for providing a clean version, i.e., processed for analysis, of the raw EEOC data for use in this Article.

91. The simplest way is to use the multi-screen data search option for “Local Area Unemployment Statistics (LAUS).” To access the data search, see Databases, Tables & Calculators by Subject, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/ (last visited July 28, 2015).

92. Nebraska’s legislature is famously unicameral, and most analyses drop observations from the state when there is any measurement of unified or divided legislatures. See, e.g., John D. Huber et al., Legislatures and Statutory Control of Bureaucracy, 45 AM. J. POL. SCI. 330, 336 n.2 (2001).
Finally, I borrow the legislative coding in Christine Jolls’ and J.J. Prescott’s study of the ADA’s wage and employment effects. Their schematic helpfully distinguished between states that protected employees against discrimination but did not mandate reasonable accommodation requirements from those that included both (and thus were more “ADA-like.”) In the interest of capturing the full weight of the ADA in the legal factors analysis, I code only the Jolls & Prescott ADA-like states as protecting employees with disabilities before 1990.

Just fewer than 1800 observations (0.03%) in the EEOC administrative file predate the ADA’s effective date or contain missing information on the submission date, the former presumed to have resulted from clerical error. In addition, for purposes of analytical ease, I dropped all observations from charges numbering ten or more separate elements. After removing those observations, any charges submitted outside the fifty states, and those with missing charging party demographic indicators, the working dataset contains 403,032 records and 201,048 charges. Table 1 summarizes those data at the charge level.

94. This cutoff is admittedly arbitrary, but limiting the charge elements to less than ten hopefully preserves valuable information while increasing the precision of the empirical analysis. Some charges contain an incredibly large number of distinct bases, up to ninety in one case. Eliminating charges with more than nine constituent elements preserves 94% of the original data.
The summary statistics reveal that the charging population averages about forty-four years in age, is divided almost evenly by sex, and is approximately two-thirds white. Although the distinctions are not beyond debate, conditions like cancer, disfigurement, and diabetes qualify in the data as “physical.” Examples of “behavioral” conditions include manic-depressive disorder and anxiety, whereas epilepsy and multiple sclerosis are classified as “neurological.” Physical impairments unsurprisingly are the most frequent conditions cited in discrimination charges (38%), but behavioral and neurological conditions account for a combined 25%. The ADA also recognizes a cause of action for persons who have a record of a disability, are regarded as disabled, or are associated with a person with a disability (R/R/A). 95 Interestingly, R/R/A bases account for 13% of the records, meaning that

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approximately 26,000 adverse employment actions involved individuals who did not necessarily have a qualifying condition. The remaining rows summarize three of the most frequent adverse employer actions. As others have observed, the rate of discharge claims far exceeds that of bias at the hiring stage, here five times as much.

B. Descriptive Patterns

The basic relationship between the unemployment rate and ADA Title I discrimination charge frequency appears in Figure 1. The vertical bars represent the number of charges by year (not the number of elements across all charges), and the connected line tracks the national unemployment rate. From 2003 to 2011, the two series appear to be positively correlated; the number of discrimination charges moves in the same direction as the unemployment rate. For most of the 1990s, however, the charge rate held steady at approximately 14,000 per year. The unemployment rate on the other hand experienced a secular decline from almost 8% in 1992 to 4%.

96. See, e.g., Donohue & Siegelman, Changing Nature, supra note 14, at 984 ("While most cases formerly attacked discrimination in hiring, today the vast majority of all litigation suits challenge discrimination in discharge."); Michael Selmi, The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law, 57 OHIO ST. L.J. 1, 16 (1996) ("In Fiscal Year 1992 ... the largest percentage of claims related to individuals who claimed they had been unlawfully terminated, which accounted for 53.4% of all claims. Only 17.8% of the EEOC cases involved claims for discriminatory hiring.") (footnotes omitted).
Figure 1: Annual Charge Submissions and the National Unemployment Rate (1992-2011)


Figure 1 implies that a systemic account using only the unemployment rate as the explanatory factors is incomplete. Were that relationship all that mattered, I would expect a decrease in charge submission over the 1990s similar to the one observed between 2002 and 2005. Might national political tides contribute to the variation in disability rights claims? A cursory glance also hints at a political explanation. Claims reached their maximum during the first few years of the Obama Administration. Of course, those years coincided with the Great Recession. But the Clinton Administration also coincides more or less with the other peak in discrimination charges.

Looking at each of the plots separately, Figure 1 also indicates that, after the first full year of enforcement, charges plateaued for a decade at around 14,000 per year. Then in the early 2000s the charge rate dropped precipitously to 5000 or less before increasing to 15,000 by 2010. One of the more noteworthy features of Figure 1 is that the post-2008 charge level surpassed its pre-2002 level but began to fall as the effects of the Great Recession leveled off.
What of the relationship between cause determinations and macroeconomic conditions? Figure 2 shows—particularly from 1996 to 2000 and then again from 2007 to 2011—that the “success rate” also correlates inversely with the unemployment rate; it is procyclical. Here, a disposition counts as a success only if the EEOC found reasonable cause that discrimination occurred. In other words, when hiring is more robust, the EEOC filings lead to more findings of discrimination. The opposite is true during periods of labor market depression.

**Figure 2: Annual Charge Success and the National Unemployment Rate (1992-2011)**

*Sources: EEOC administrative data; U.S. BUREAU OF LABOR STATS., supra Figure 1.*

*Note: The “success rate” counts only charges for which the EEOC found reasonable cause for employer discrimination on the basis of disability.*

### III. Panel Data Analysis of Title I Charges

Having provided preliminary support for the relationship between macroeconomic factors and EEOC charges, this Part turns to regression-based evidence. Rather than a simple bivariate comparison of the unemployment rate or political economy variables with charge

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97. For more on the possible definitions of success at the EEOC stage, see *infra* subpart III.A.2.
submission and success rates, I control for a variety of other state-level features that reasonably affect those outcomes. I also include demographic measures simply to show which groups file more and receive more positive merits determinations—not to suggest a causal relationship from race, age, or sex. Section III.A focuses on the purely economic account, while Section III.B weaves in the political economy explanations. Section III.C explores relative charge activity in states with statutes that resembled what the eventual ADA eventually would contain. Section III.D concludes by testing the unemployment rate hypotheses by disability type.

The choice to use a panel data format rather than time series arises from two methodological concerns. First, a time series study with annual charge data over this limited window would suffer from too few observations. With only one (national) observation per year, the $N$ for any regression would be capped at twenty. Executing the regressions would not be impossible under the circumstances, but doing so would demand more circumspect inference. Second, because one of this study's goals is to track the relationship between macro-level influences and EEOC activity as precisely as possible, using repeat observations of the fifty states induces more profitable variation to that end. As others have observed in empirical legal studies, using a panel structure bolsters the reliability of statistical inference.98 This is particularly true when aggregating the time series elements masks significant variation within those elements, be they legal, economic, or social. Panel data are used most often when the existence of a law itself is an independent variable of interest, which is not the case in this study.99 Because this Article does not attempt to estimate casual effects—just relationship correlations—the panel structure enhances statistical precision by effectively controlling for a host of confounding effects aside from the primary macro-level factors below.

Finally, there should be no mistake about what type of statistical inference I seek below. Empiricists routinely make use of panel data to test causal relationships between exogenous variables and outcomes of

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98. See, e.g., John J. Donohue & Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 STAN. L. REV. 791, 801, 804 (2005) (noting that, for time-series data, variation in a dependent variable is driven by factors common to states with different legal regimes, which “suggests that a panel data analysis may provide more reliable estimates”). See generally Nathaniel Beck, Time—Series—Cross-Section Data: What Have We Learned in the Past Few Years?, 4 ANN. REV. POL. SCI. 271 (2001) (reviewing the benefit of panel effects models in various contexts).

99. Likewise, the Donohue & Siegelman article did not evaluate the effects of a legal shift on employment discrimination activity and adopted a time series methodology. They most likely chose time series modeling because they could not obtain state-level identifiers to run repeated cross-sectional regression. Thus, one can think of my approach as adding analytical precision by estimating the relationship between the unemployment rate and charge outcomes repeatedly over the same fixed units, i.e., the fifty states.
interests. The fixed, repeated cross-section format (correcting for serial correlation) boosts precision, which in turn generates more reliable inference. No panel structure, however, produces anything remotely approaching a causal explanation unless the analyst specifies an exogenous identification strategy that plausibly mimics the underlying causal story. I have no such causal strategy here. Instead, I present regression coefficients on the macro-level variables implicated by the hypotheses detailed above. The direction and size of the coefficients then tell us something about the correlation between the independent variables and EEOC outcomes. Controlling for demographic and other state-level factors is intended to reduce estimate bias. As a result, I only mention the existence of relationships—suggestive connections between variables—and do not claim that any independent variable causes variation in charge submissions or success rates.

A. The Unemployment Rate

Of the four hypotheses set out above, \(^1\) whether EEOC charge activity noticeably moves with the unemployment rate is the central question. In this Section, I recast the Donohue & Siegelman EEOC charge analysis using annual state-level data rather than their national time series. I find consistent with the less myopic, standard rational actor model that worker benefits operate at the charge submissions stage. In all of the regression analysis that follows, I aggregate charge elements up to single charge submissions because the dependent variables of interest are the number and success rate of charges. The EEOC will issue a reasonable cause determination so long as there is any reasonable cause described in the charge documents. \(^2\)

\(^1\) See supra Part I.B-D.

\(^2\) See 29 C.F.R. § 1601.19(a) (2014) (“Where the Commission completes its investigation of a charge and finds that there is not reasonable cause to believe that an unlawful employment practice has occurred or is occurring as to all issues addressed in the determination, the Commission shall issue a letter of determination to all parties to the charge indicating the finding.”) (emphasis added); Id. § 1601.21(a) (“After completing its investigation, where the Commission has not settled or dismissed a charge or made a no cause finding as to every allegation addressed in the determination under § 1601.19, the Commission shall issue a determination that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring . . . .”) (emphasis added).
1. Charge Filings

The fully specified empirical model for addressing the threshold unemployment rate relationship question is:

\[
\ln(\text{Charges}_{st}) = \alpha_0 + \beta_1 \text{Unemp}_{st} + \beta_2 \text{Unemp}_{-1st} + \Gamma' \mathbf{X}_{st} + \sigma_s + \tau + \epsilon_{st}\]  (4)

Equation 4 models the natural log of the number of charges by state and year as a function of the state unemployment rate; the one-year-lagged state unemployment rate; a vector \((\mathbf{X})\) containing means of age, race, and sex indicators from the charging population; state fixed effects \((\sigma)\); and a linear time trend \((\tau)\). I used demographic information from the charge files rather than the labor force population both because of data limitations over the entire time period and because the coefficients on these variables can be useful in simply observing adjusted charge and success means by race, age, and sex. The lagged unemployment rate accounts for the fact that present charge decisions might be affected only after workers appreciate macroeconomic conditions from the period before. I used the natural log transformation on the dependent variable so that coefficient estimates reflect percentage changes for unit changes in the associated independent variable. Each regression uses a weighted ordinary least squares (OLS) estimator, where the weights are the labor force population numbers in a given state and year. All specifications calculate robust standard errors clustered by state.

Table 2 shows across four specifications that EEOC charge submissions are robustly countercyclical in the current period. The difference across columns stems from the variables included from Equation 4. Columns 1 and 3 are the most parsimonious specifications, including only the unemployment measures in the former and adding state fixed effects in the latter. Columns 2 and 4 include the vector of demographic variables. The fully specified model (Column 4) suggests that a 1 percentage point increase in the current-year unemployment rate boosts EEOC charges by 30%, but that the same increase in the previous year's unemployment rate decreased submissions by 22%. The flipped signs on these coefficients, combined with their extremely low \(p\)-values, indicate that the worker benefits model operates precisely when it should. That is, as soon as economic storm clouds gather, aggrieved

102. I experimented with an alternative specification replacing the linear trend term with year fixed effects, and the results remained qualitatively similar. I retained the linear trend to mimic as closely as possible the Donohue & Siegelman approach. Admittedly, their analysis used time series methods rather than the panel structure in this Article. Possible collinearity between year fixed effects and the unemployment rate in particular counsels against using fixed effects.

103. This setup is consistent with, for example, Donohue & Siegelman, _Law and Macroeconomics_, supra note 14, at 718 tbl.2. I include only one lag, however, because their data were collected quarterly and allowed for a more plausibly intricate lag structure.
workers appear more likely to submit charges because the promise of either conciliated settlement or back pay awards becomes more attractive.

Table 2: ADA Title I Charges and the Unemployment Rate (1992-2011)

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Notes: The dependent variable in all four columns is the natural log of the number of ADA Title I charges. All regressions with race indicators also included an indicator for “other” races so that “white” is the reference group; the coefficients on “other” are unreported. All regressions also include a time trend and are weighted by the size of the labor force in every state-year combination. All standard errors are clustered by state. * = p < 0.10; ** = p < 0.05; *** = p < 0.01.

Notice, too, that the most parsimonious specification (Column 1), which includes only the unemployment rate measures and a linear time trend, explains 15% of the variation in charge submission activity. To be sure, the robust point estimates on the unemployment rate demonstrate the salience of macroeconomic health to EEOC charge
activity. But the rapidly increasing $R^2$ across columns as more covariates are added intimates that decisions to submit charges vary significantly across states and time.

2. Success Rate

In this iteration, I investigate the factors that have some bearing on the success rate of EEOC charges. Defining success at this stage, as mentioned, presents a few difficulties. Unlike completed civil litigation, which results in a liability judgment, EEOC procedures can be less resolute. Litigation of course might induce settlement before final judgment, but the ADA actively encourages conciliated agreement, and Title VII mandates the same attempt. Indeed, 16% of charges in the working dataset resulted in independent settlement through private grievance procedures or a positive EEOC-led conciliation. Do these outcomes qualify as success for the charging party given that, in both cases, the respondent employer compensated the charging party? Or must there be an affirmative finding of discrimination accompanying transfers? At the very least, success during or after EEOC processing must not include default administrative closure.

For now, I restrict the measures of success to only two outcomes, what I call “accepted determination” and “rejected determination.” Under the former heading are cases in which the EEOC determined that discrimination occurred, and the respondent accepted its judgment. The latter set encompasses cases where the EEOC determined that discrimination occurred, but the respondent did not accept the conclusion.

Charging parties, however, perhaps care as much about remedies as they do liability determinations. Like the plaintiff who achieves pre-trial settlement without the defendant admitting liability, EEOC charging parties often withdraw their filings or settle without an administrative determination. To deem the process successful, however, the charging party must have received some compensation or other benefits. The data include such settlements where (1) resolution was achieved without EEOC intervention; or (2) the EEOC participated in the negotiations. I present the analysis on success rates separately for the default categories of accepted and rejected determinations only and

104. See Americans with Disabilities Act, 42 U.S.C. § 12212 (2012) ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter."); Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) (2012) ("If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.").
then for the default plus negotiated settlement.

Relative to submission probabilities, any link between the unemployment rate and the success of those submissions is somewhat attenuated in absolute value. Table 3 adopts the default measure of success—an explicit EEOC finding of discrimination—and follows the same design as Equation 4, now with the logged mean success rate across charge submissions in state-years as the dependent variable.

Table 3: Baseline ADA Title I Charge Success and the Unemployment Rate (1992-2011)

<table>
<thead>
<tr>
<th>Variable</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unemployment Rate</td>
<td>-0.24***</td>
<td>-0.20***</td>
<td>-0.26***</td>
<td>-0.20***</td>
</tr>
<tr>
<td></td>
<td>(0.05)</td>
<td>(0.05)</td>
<td>(0.06)</td>
<td>(0.05)</td>
</tr>
<tr>
<td>Unemployment Rate</td>
<td>0.06</td>
<td>0.03</td>
<td>0.02</td>
<td>-0.03</td>
</tr>
<tr>
<td></td>
<td>(0.05)</td>
<td>(0.05)</td>
<td>(0.05)</td>
<td>(0.04)</td>
</tr>
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<td>-1.00**</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.29)</td>
<td>(0.41)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age^2</td>
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<td>-0.01**</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.00)</td>
<td>(0.00)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>0.29</td>
<td>0.47</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.47)</td>
<td>(0.53)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black</td>
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<td>-2.81***</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>(0.49)</td>
<td>(0.49)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hispanic</td>
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<td>-1.75**</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>(0.57)</td>
<td>(0.57)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State Fixed Effects?</td>
<td>N</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>N</td>
<td>770</td>
<td>770</td>
<td>770</td>
<td>770</td>
</tr>
<tr>
<td>R^2</td>
<td>0.21</td>
<td>0.28</td>
<td>0.32</td>
<td>0.42</td>
</tr>
</tbody>
</table>

Sources: EEOC administrative data; U.S. BUREAU OF LABOR STATS., supra Table 2.

Notes: The dependent variable “success” in all four columns counts only charges for which the EEOC found reasonable cause for employer discrimination on the basis of disability, and it is the natural log of the percentage of charges resulting in a reasonable cause finding. All regressions with race indicators also included an indicator for “other” races so that “white” is the reference group; the coefficients on “other” are unreported. All regressions also include a time trend and are weighted by the size of the labor force in every state-year combination. All standard errors are clustered by state. * = p < 0.10; ** = p < 0.05; *** = p < 0.01.
The point estimates range from a 20% to a 24% decrease between the most and least specified models (Columns 4 and 1, respectively). These coefficients reject the null of Hypothesis 1b and are consistent with the resilience of the worker benefits model. Recall that the model predicts a drop in the reservation wage necessary to file suit and a corresponding increase in less meritorious filings. The reason, again, is that with higher unemployment durations, the prevailing wage that would constitute the back pay judgment is permitted to be lower for a fixed cost of litigation. Even setting aside case merit, Donohue & Siegelman acknowledged that “[l]ower-wage plaintiffs are presumably less sophisticated, have poorer legal representation than those with higher wages, or both, and may therefore prevail less often for any given level of case quality.”105 One cannot determine from these data whether (1) charges below the margin of merit are submitted more often during recessionary periods; (2) employers are less likely to discriminate on the basis of disability during economic slumps; or (3) more meritorious cases are settled before final EEOC determination during these periods. A glimpse into the latter question is possible once the definition of success is expanded.

When I expand the definition of charge success to encompass negotiated settlement, the results change substantially as shown in Table 4. The estimated relationship between the unemployment rate and a favorable outcome for charging parties drops by about 70% to somewhere between 6% and 9%, although the level of statistical significance remains high ($p < 0.01$). Because the estimates remain greater than zero in absolute value, I know that this higher negotiated settlement rate does not outweigh the procyclicality of reasonable cause determinations.106 One implication must be that settlements are countercyclical or have no relationship with the unemployment rate. The former probably is closer to the truth as prior empirical work has found a positive association between the unemployment rate and settlements.107

105. Donohue & Siegelman, Law and Macroeconomics, supra note 14, at 751 n.77.
106. See Siegelman & Donohue, supra note 56, at 431.
107. See id. at 445-51.
### Table 4: Expanded ADA Title I Charge Success and the Unemployment Rate (1992-2011)

<table>
<thead>
<tr>
<th>Model</th>
<th>Variable</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Unemployment Rate</td>
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<td>-0.05***</td>
<td>-0.09***</td>
<td>-0.06***</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.01)</td>
<td>(0.01)</td>
<td>(0.01)</td>
<td>(0.01)</td>
</tr>
<tr>
<td></td>
<td>Unemployment Rate(^2)</td>
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<td>0.06***</td>
<td>0.07***</td>
<td>0.05***</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.02)</td>
<td>(0.02)</td>
<td>(0.02)</td>
<td>(0.01)</td>
</tr>
<tr>
<td></td>
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<td>-0.48***</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.10)</td>
<td>(0.11)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Age(^2)</td>
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<td>0.01***</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.00)</td>
<td>(0.00)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Female</td>
<td>-0.07</td>
<td>0.02</td>
<td></td>
<td></td>
</tr>
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<td></td>
<td></td>
<td>(0.20)</td>
<td>(0.21)</td>
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<tr>
<td></td>
<td>Black</td>
<td>-0.59***</td>
<td>-1.10**</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.20)</td>
<td>(0.44)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Hispanic</td>
<td>-0.57*</td>
<td>-0.82**</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.33)</td>
<td>(0.31)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>State Fixed Effects?</td>
<td>N</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td></td>
<td>N</td>
<td>899</td>
<td>899</td>
<td>899</td>
<td>899</td>
</tr>
<tr>
<td></td>
<td>R(^2)</td>
<td>0.06</td>
<td>0.18</td>
<td>0.22</td>
<td>0.34</td>
</tr>
</tbody>
</table>

**Sources:** EEOC administrative data; U.S. BUREAU OF LABOR STATS., supra Table 2.

**Notes:** The dependent variable “success” in all four columns counts (1) charges for which the EEOC found reasonable cause for employer discrimination on the basis of disability; and (2) charges that were settled before a final determination but that led to compensation awards for the charging party. It is the natural log of the percentage of charges resulting in either of those outcomes. All regressions with race indicators also included an indicator for “other” races so that “white” is the reference group; the coefficients on “other” are unreported. All regressions also include a time trend and are weighted by the size of the labor force in every state-year combination. All standard errors are clustered by state. * = p < 0.10; ** = p < 0.05; *** = p < 0.01.

Although it is intuitively appealing to count compensated settlement as a “win” for charging parties, the results in Table 4 caution against doing so. First, conciliation results in a monetary transfer because the threat of eventual suit looms over the employer, just as in standard civil litigation models. But for the shadow of ADA litigation, the charging party would not receive payments. For these cases, though, the analyst never knows with requisite certainty how meritorious the charge was.
This truism of course affects all normative analysis of settlement versus trial. Second, and more important, these results confirm prior findings of incomplete operation of the Priest-Klein model; observed reasonable cause determinations and conciliation outcomes have opposing connections to macroeconomic conditions and should be treated separately.108

B. Political Economy and Legal Factors

Theories of political economy and administrative agency functions suggested that support for some state-level policies can be related to partisan tides and the relative priorities that different administrations place on disability employment rights. Because I only consider federal discrimination charges in this study, I did not expect that state control of governorships or the legislature would have a measurable connection to charge patterns. Because of presidential administration agendas and priority-setting—not to mention selection control over appointees who more directly affect agency functioning—these theories predicted a national political economy account to emerge in the data.

1. State Political Economy Factors

Somewhat consistent with Hypothesis 2a, the partisan affiliation of state governors is barely related, if at all, in a statistical sense with charge submission frequency. Interestingly, however, charges are less likely to be submitted in states where Republicans control both chambers in the legislature by about 44%. Nevertheless, the sign on that coefficient flips from positive to negative with the inclusion of state fixed effects. The difference between, say, Columns 2 and 4 is that all state-year observations are compared against each other in the former specification. When state fixed effects enter the model in Column 4, the regression is constrained to “within-state” comparisons. As a result the estimates on the political economy variable reflect only outcome comparisons in one state over time, which are then averaged over all jurisdictions.

108. See id. at 431.
Table 5: ADA Title I Charges and State Political Economy Factors (1992-2011)

<table>
<thead>
<tr>
<th>Variable</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Republican Governor</td>
<td>0.12</td>
<td>0.10</td>
<td>0.00</td>
<td>0.09</td>
</tr>
<tr>
<td>Republican Legislature</td>
<td>0.07</td>
<td>0.35</td>
<td>-0.43**</td>
<td>-0.44***</td>
</tr>
<tr>
<td>Split Legislature</td>
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<td>0.22</td>
<td>(0.18)</td>
<td>(0.14)</td>
</tr>
<tr>
<td>Age</td>
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<td>(0.21)</td>
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<td>(0.00)</td>
<td></td>
</tr>
<tr>
<td>Black</td>
<td>5.53***</td>
<td>(1.00)</td>
<td>(1.44)</td>
<td></td>
</tr>
<tr>
<td>Hispanic</td>
<td>5.78***</td>
<td>(1.35)</td>
<td>(0.97)</td>
<td></td>
</tr>
<tr>
<td>State Fixed Effects?</td>
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<td>N</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>N</td>
<td>984</td>
<td>984</td>
<td>984</td>
<td>984</td>
</tr>
<tr>
<td>R²</td>
<td>0.01</td>
<td>0.39</td>
<td>0.54</td>
<td>0.68</td>
</tr>
</tbody>
</table>

Sources: EEOC administrative data; Former Governors' Bios, National Governors Association, http://www.nga.org/cms/FormerGovBios (last visited July 8, 2015); State Partisan Composition, National Conference of State Legislatures (last visited July 8, 2015).

Notes: The dependent variable in all four columns is the natural log of the number of ADA Title I charges. All regressions with race indicators also included an indicator for "other" races so that "white" is the reference group; the coefficients on "other" are unreported. Each specification also included an unreported coefficient for governors that were independent of the Republican and Democrat Parties. All regressions also include a time trend and are weighted by the size of the labor force in every state-year combination. All standard errors are clustered by state. * = p < 0.10; ** = p < 0.05; *** = p < 0.01.

Accordingly, I am reluctant to reject the null hypothesis of no relationship between state political factors and ADA Title I charge patterns. The state fixed effects specifications are preferable to those in the first two columns given the panel structure of the data, but a swing of the magnitude observed should give pause when interpreting.
results.\textsuperscript{109} Going forward, I concentrate exclusively on national-level factors, for which coefficient estimates are much less variable.

2. National Political Economy Factors

Table 6 more strongly corroborates Hypothesis 2a by demonstrating a positive relationship between the partisan identity of presidential administrations and EEOC charge filings. Columns 3 and 4 indicate that the submission rates about doubled during the Clinton presidency and Obama’s first term relative to the end of George H.W. Bush’s and George W. Bush’s two terms. Moreover, as with the unemployment rate, presidential party affiliation explains a healthy percentage of the variation in charge submission (as much as 75%).

\textsuperscript{109} See, e.g., Donohue \& Wolfers, \textit{supra} note 98, at 827-32 (calling into question the reliability of empirical estimates when coefficient signs and magnitudes changed dramatically from one specification to the next).
Table 6: ADA Title I Charges and Presidential Politics (1992-2011)

<table>
<thead>
<tr>
<th>Model</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Variable</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Democrat</td>
<td>1.09***</td>
<td>0.84***</td>
<td>1.10***</td>
<td>0.90***</td>
</tr>
<tr>
<td>President</td>
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<td>()</td>
<td>(0.04)</td>
<td>(0.06)</td>
</tr>
<tr>
<td>Age</td>
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<td>1.11***</td>
<td></td>
</tr>
<tr>
<td>Age²</td>
<td>()</td>
<td>-0.02***</td>
<td></td>
<td>-0.01***</td>
</tr>
<tr>
<td>Black</td>
<td>4.71***</td>
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<td>3.45***</td>
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</tr>
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<td>Hispanic</td>
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<td>3.60***</td>
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<td>State Fixed</td>
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<td>Y</td>
<td>Y</td>
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<tr>
<td>Effects?</td>
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<td></td>
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</tr>
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<tr>
<td>R²</td>
<td>0.14</td>
<td>0.44</td>
<td>0.66</td>
<td>0.75</td>
</tr>
</tbody>
</table>

Sources: EEOC administrative data; The Presidents, WHITEHOUSE.GOV, HTTPS://WWW.WHITEHOUSE.GOV/1600/PRESIDENTS (last visited July 2, 2015) [hereinafter The Presidents].

Notes: The dependent variable in all four columns is the natural log of the number of ADA Title I charges. All regressions with race indicators also included an indicator for “other” races so that “white” is the reference group; the coefficients on “other” are unreported. Each specification also included an unreported coefficient for governors that were independent of the Republican and Democrat Parties. All regressions also include a time trend and are weighted by the size of the labor force in every state-year combination. All standard errors are clustered by state. * = p < 0.10; ** = p < 0.05; *** = p < 0.01.

Additional research will be necessary to substantiate the administrative agenda-setting hypothesis more fully. Table 6 is only suggestive of that correlation. For example, collecting data on the professional backgrounds and partisan affiliations of commissioners appointed by each president would amplify empirical support for the impact of administrative turnover. The best I can posit based on Table 6 is that there is some independent relationship between presidential politics and charge submission rates. Given that the Clinton years were marked by declining unemployment and that unemployment rose during the end of both Bush Administrations, Hypothesis 1 would imply a negative (positive) coefficient on the Democrat (Republican) variable.
The opposite outcome evidences that partisan control over bureaucratic agendas has some bearing on the propensity of workers with disabilities to submit ADA employment discrimination charges.

Table 7 contains perhaps the most fascinating results in this Article. Given prior conclusions about EEOC charges and presidential politics,\(^{10}\) one would have forecast that marginal charges would receive more favorable treatment by Democrat-led Commissions. Controlling for state effects, the passage of time, and available charging party demographic characteristics—as Column 4 does—nonetheless results in a point estimate of -37%. The consistently negative estimates in the first row of the table do not prove that EEOCs dominated by Democrat appointees issue fewer cause determinations independent of charge merit.\(^ {111}\) They just as easily could imply that ostensibly aggrieved employees submit fewer factually meritorious charges under Democrat leadership. Another possibility is that the vast majority of charges filed under a Democrat president were during the Clinton years. His administration effectively oversaw the first eight years of ADA enforcement (1993-2000), and it could be that the labor force required more experience with qualified disabilities and evidence of discrimination before charging parties submitted allegations closer to the optimal number.

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110. *See supra* note 78 and accompanying text.

111. Recall that the measure of charge success reflects only EEOC for-cause determinations from this part of the empirical analysis forward.
Table 7: ADA Title I Charge Success and Presidential Politics (1992-2011)

<table>
<thead>
<tr>
<th>Variable</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democrat</td>
<td>-0.51*</td>
<td>-0.41*</td>
<td>-0.53***</td>
<td>-0.37***</td>
</tr>
<tr>
<td>(0.05)</td>
<td></td>
<td>(0.05)</td>
<td>(0.05)</td>
<td>(0.05)</td>
</tr>
<tr>
<td>President Age</td>
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<td>-1.08***</td>
<td></td>
<td>-0.83**</td>
</tr>
<tr>
<td>(0.27)</td>
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<td>(0.37)</td>
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</tr>
<tr>
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<td>-0.01*</td>
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<td>(0.00)</td>
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<td>(0.00)</td>
<td></td>
</tr>
<tr>
<td>Black</td>
<td>-1.45***</td>
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<td>-2.82***</td>
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<td>(0.47)</td>
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<td>(0.94)</td>
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<tr>
<td>Hispanic</td>
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<td>-1.43*</td>
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<tr>
<td>(0.55)</td>
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<td>(0.76)</td>
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<tr>
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<td>N</td>
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<tr>
<td>R²</td>
<td>0.13</td>
<td>0.22</td>
<td>0.22</td>
<td>0.31</td>
</tr>
</tbody>
</table>

Sources: EEOC administrative data; The Presidents, supra Table 6.
Notes: The dependent variable “success” in all four columns counts only charges for which the EEOC found reasonable cause for employer discrimination on the basis of disability, and it is the natural log of the percentage of charges resulting in a reasonable cause finding. All regressions with race indicators also included an indicator for “other” races so that “white” is the reference group; the coefficients on “other” are unreported. All regressions also include a time trend and are weighted by the size of the labor force in every state-year combination. All standard errors are clustered by state. * = p < 0.10; ** = p < 0.05; *** = p < 0.01.

The opportunity for additional work on this question is ripe. An empirical literature on political agency control has emerged in the last decade and enhanced our knowledge about the extent to which presidents can achieve dominance over the federal bureaucracy. 112

Previous studies have speculated at a political economy explanation for EEOC processing data but using only aggregate statistics on charge submissions. Combining the individualized data that the administrative file here contains with similarly detailed information about administrative appointments will potentially yield results more suggestive of a causal story.

3. State Disability Law Factors

Table 8 condenses both the charge number and success analyses into one presentation—the former in Columns 1 and 2, the latter in Columns 3 and 4. It provides partial support for Hypothesis 2b, which is limited to the charge submission portion. For a state to be counted as having an ADA-like statute, the law must have been passed before 1990 and included both standard employment protections and reasonable accommodation mandates. The only statistically discernible relationship is between the presence of such a statute on the books and charge submissions. To test whether this link varied with presidential administration, I interacted that indicator with the ADA-like one. As both Columns 2 and 4 indicate, the point estimates were relatively small and insignificant. (The coefficient estimates on the presidential politics variable alone remains positive and significant.)
**Table 8: ADA Title I Charge Patterns and State Disability Law (1992-2011)**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Charge Submissions</th>
<th>Charge Success</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td><strong>ADA-like</strong></td>
<td>1.61***</td>
<td>1.68***</td>
</tr>
<tr>
<td><strong>Statute</strong></td>
<td>(0.18)</td>
<td>(0.18)</td>
</tr>
<tr>
<td><strong>Democrat</strong></td>
<td>0.92***</td>
<td></td>
</tr>
<tr>
<td><strong>President</strong></td>
<td>(0.07)</td>
<td></td>
</tr>
<tr>
<td>**ADA ***</td>
<td></td>
<td>-0.05</td>
</tr>
<tr>
<td><strong>Democrat</strong></td>
<td>(0.09)</td>
<td></td>
</tr>
<tr>
<td><strong>Age</strong></td>
<td>1.26***</td>
<td>1.11***</td>
</tr>
<tr>
<td></td>
<td>(0.21)</td>
<td>(0.20)</td>
</tr>
<tr>
<td><strong>Age^2</strong></td>
<td>-0.13***</td>
<td>-0.01***</td>
</tr>
<tr>
<td></td>
<td>(0.00)</td>
<td>(0.00)</td>
</tr>
<tr>
<td><strong>Black</strong></td>
<td>5.01***</td>
<td>3.44***</td>
</tr>
<tr>
<td></td>
<td>(1.49)</td>
<td>(1.27)</td>
</tr>
<tr>
<td><strong>Hispanic</strong></td>
<td>3.73***</td>
<td>3.59***</td>
</tr>
<tr>
<td></td>
<td>(0.97)</td>
<td>(0.85)</td>
</tr>
<tr>
<td>State Fixed</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Effects?</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>N</strong></td>
<td>984</td>
<td>984</td>
</tr>
<tr>
<td><strong>R^2</strong></td>
<td>0.67</td>
<td>0.75</td>
</tr>
</tbody>
</table>

**Sources:** EEOC administrative data; Jolls & Prescott, supra note 45, at 32 tbl.2; The Presidents, supra Table 6.

**Notes:** The dependent variable in Columns 1 and 2 is the natural log of the number of ADA Title I charges. The dependent variable “success” in Columns 3 and 4 counts only charges for which the EEOC found reasonable cause for employer discrimination on the basis of disability, and it is the natural log of the percentage of charges resulting in a reasonable cause finding. All regressions with race indicators also included an indicator for “other” races so that “white” is the reference group; the coefficients on “other” are unreported. All regressions also include a time trend and are weighted by the size of the labor force in every state-year combination. All standard errors are clustered by state. *= p < 0.10; **= p < 0.05; ***= p < 0.01.

Turning to charge success, the state law dummy is not statistically significant after the inclusion of charging party demographic factors. And, once again, no measurable effect attached to the interaction term. The overall inference from Table 8 appears to be that employees in states at the frontier of disability employment rights might have been more familiar with alleging discrimination by the time the ADA arrived.
Those localized experiences might have legitimated, or at the very least inured, resort to legal process following experiences of workplace discrimination. Despite this path-dependent positive outcome for charge frequency, the sign of the charge success variable is negative, which would imply that on average charges had less clear merit in those states. A result like this could be explained by overcharging relative to underlying cause, but the lack of robust statistical significance between Columns 3 and 4 undermines that conclusion.

C. Understanding Title I Charges by Disability Type

Identifying one’s disability extends well beyond the dichotomy of having a “physical or mental impairment that substantially limits one or more major life activities.”\textsuperscript{113} The range of possible conditions spans several dimensions: the physical/mental/behavioral, the temporary/chronic, and the observable/unobservable, to name a few. As mentioned above,\textsuperscript{114} whether the ADA mimics an unemployment insurance mechanism during recessionary times might depend as much on macroeconomic conditions as on the nature of one’s disability. For a given unemployment rate, potential or existing hires with more salient conditions might be able to secure positions more easily than their counterparts with less sympathetic disorders.

To test this hypothesis, I divided the data set into three components: charges where the disability basis was physical, behavioral, or “other” in nature. Two features of the data require additional explanation. First, I adopted an existing coding in the data set that separated charges into six general disability types. There are two categories where the labeling is exclusively physical or behavioral. But a few other types straddle the line. Rather than contaminate the coding through additional aggregation, I lumped the other four categories, which have much smaller frequency counts to begin with, into the “other” grouping. Examples of each include: asthma, cancer, and cystic fibrosis (physical); manic depressive disorder, anxiety disorder, and schizophrenia (behavioral); and epilepsy, leaning disability, and multiple sclerosis (other). Second, charging parties often predicate their allegations on more than limiting condition. With no obvious method for choosing one—and not wishing to have multiple observations per individual/charge—I determined the modal condition for each charge and used that as the measure. Doing so required dropping charges where the number of conditions claimed was equal across at least two

\textsuperscript{114} See supra subpart I.D.
Tables 9 and 10 also reveal unexpected statistical associations between disability type and charge patterns. Contrary to expectations, the coefficient estimates are almost identical across Columns 1-3 in Table 9. These results mean that the link between the unemployment rate and charge submission totals remains countercyclical, at 29% on average. No observable difference, however, exists by the employee’s underlying condition covered by the ADA. Hypothesis 3 suggested that the submission rate would be different across types because of differential rates of discrimination. The idea was that discrimination would emerge more often among workers with behavioral disabilities because their conditions are more feared or misconstrued. But the data do not support this reading, at least under the assumption that employees submit charges roughly proportional to their actual experience of discrimination.
Table 9: ADA Title I Charges and the Unemployment Rate by Disability Type (1992-2011)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Physical</th>
<th>Behavioral</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unemployment Rate</td>
<td>0.29***</td>
<td>0.28***</td>
<td>0.30***</td>
</tr>
<tr>
<td></td>
<td>(0.03)</td>
<td>(0.02)</td>
<td>(0.03)</td>
</tr>
<tr>
<td>Unemployment Rate</td>
<td>-0.20***</td>
<td>-0.18***</td>
<td>-0.20***</td>
</tr>
<tr>
<td>(0.02)</td>
<td>(0.02)</td>
<td></td>
<td>(0.03)</td>
</tr>
<tr>
<td>Age</td>
<td>2.00***</td>
<td>0.74***</td>
<td>0.90***</td>
</tr>
<tr>
<td>(0.54)</td>
<td>(0.28)</td>
<td></td>
<td>(0.22)</td>
</tr>
<tr>
<td>Age^2</td>
<td>-0.02***</td>
<td>-0.01***</td>
<td>-0.01***</td>
</tr>
<tr>
<td>(0.01)</td>
<td>(0.00)</td>
<td></td>
<td>(0.00)</td>
</tr>
<tr>
<td>Black</td>
<td>4.39***</td>
<td>2.48*</td>
<td>2.67**</td>
</tr>
<tr>
<td>(1.52)</td>
<td>(1.47)</td>
<td></td>
<td>(1.40)</td>
</tr>
<tr>
<td>Hispanic</td>
<td>4.15***</td>
<td>3.80***</td>
<td>3.92***</td>
</tr>
<tr>
<td>(0.57)</td>
<td>(0.58)</td>
<td></td>
<td>(0.61)</td>
</tr>
<tr>
<td>State Fixed</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Effects?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>894</td>
<td>853</td>
<td>906</td>
</tr>
<tr>
<td>R^2</td>
<td>0.77</td>
<td>0.72</td>
<td>0.74</td>
</tr>
</tbody>
</table>

Sources: EEOC administrative data; U.S. Bureau of Labor Stat., supra Table 2.

Notes: The dependent variable in all four columns is the natural log of the number of ADA Title I charges. All regressions with race indicators also included an indicator for "other" races so that "white" is the reference group; the coefficients on "other" are unreported. All regressions also include a time trend and are weighted by the size of the labor force in every state-year combination. All standard errors are clustered by state. * = p < 0.10; ** = p < 0.05; *** = p < 0.01.

Table 10, though, offers slightly more evidence that charge success differs across the business cycle by disability type. Again, the point estimates are rather counterintuitive; the more recessionary the time period, the more likely employees with behavioral disabilities are to receive a reasonable cause determination compared to those with physical conditions. A potential explanation that still supports Hypothesis 3 is that, with higher charge rates, the merits composition of allegations is not held constant between the two groups. Employees with physical disabilities might be more inclined to submit to the EEOC
at the margin, incentivized by the worker benefits effect, which could in turn dilute the aggregate merit rate for that group. On the other hand, the number of observations is decidedly lower in Column 2 than Column 1, which could be a function of fewer state-year combinations with behavioral disability charges (see the $N$ in Table 9) or fewer state-year combinations with any successful charges for behavioral conditions.

Table 10: ADA Title I Charge Success and the Unemployment Rate by Disability Type (1992-2011)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Physical</th>
<th>Behavioral</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>$Unemployment Rate$</td>
<td>-0.23***</td>
<td>-0.16***</td>
<td>-0.22***</td>
</tr>
<tr>
<td>$Unemployment Rate_{-1}$</td>
<td>0.05</td>
<td>0.04</td>
<td>-0.03</td>
</tr>
<tr>
<td>Age</td>
<td>-2.19***</td>
<td>-1.75**</td>
<td>-1.00**</td>
</tr>
<tr>
<td>$Age^2$</td>
<td>0.02***</td>
<td>0.02**</td>
<td>0.01*</td>
</tr>
<tr>
<td>Black</td>
<td>-3.15***</td>
<td>-3.44**</td>
<td>-3.50***</td>
</tr>
<tr>
<td>Hispanic</td>
<td>-2.53***</td>
<td>-2.46***</td>
<td>-3.05***</td>
</tr>
<tr>
<td>State Fixed Effects?</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>$N$</td>
<td>615</td>
<td>421</td>
<td>692</td>
</tr>
<tr>
<td>$R^2$</td>
<td>0.42</td>
<td>0.44</td>
<td>0.43</td>
</tr>
</tbody>
</table>

Sources: EEOC administrative data; U.S. BUREAU OF LABOR STATS., supra Table 2.
Notes: The dependent variable “success” counts only charges for which the EEOC found reasonable cause for employer discrimination on the basis of disability, and is the natural log of the percentage of charges resulting in a reasonable cause finding. All regressions with race indicators also included an indicator for “other” races so that “white” is the reference group; the coefficients on “other” are unreported. All regressions also include a time trend and are weighted by the size of the labor force in every state-year combination. All standard errors are clustered by state. $* = p < 0.10$; $** = p < 0.05$; $*** = p < 0.01$. 

Griffin: Explaining ADA Employment Discrimination Charges Over the Business Cycle

Published by University of Cincinnati College of Law Scholarship and Publications, 2018
IV. RESEARCH AND POLICY IMPLICATIONS

This Article has traversed a wide swath of territory covering several aspects of ADA Title I discrimination charges. From macroeconomic forces to political economy factors to legal experiences with antidiscrimination law, the administrative data mostly hint at correlations with charge submission practices. The same is somewhat less true for success outside of the unemployment rate analysis. What does one begin to make of these various results?

In terms of social science findings, a link seems to exist between EEOC charge submissions and the unemployment rate where one was not found before.\textsuperscript{115} My research design differed in two potentially important ways: use of all the relevant information contained in charge documents and a panel structure using variation in the state unemployment rate rather than the less dynamic national counterpart. I attribute this difference simply to data availability: Donohue & Siegelman had access to quarterly national data, whereas I made use of data that only indicated the year of submission but included the state location of submission. The results of Section III.A therefore demonstrate in part the need for testing hypotheses using different data sources—or in this case, formats—and empirical strategies.\textsuperscript{116}

On the other hand, both my design and the Donohue & Siegelman version are more suggestive of statistical relationships and do not overtly claim causal links between macro-level factors and EEOC activity. Consider the charge success regressions, for example. Just as one might conjecture a relationship in which higher unemployment rates decrease the "win rate," so, too, could movements in reasonable cause determinations shape the unemployment rate. The effect certainly might be too small to matter statistically, but in fact as the number of individuals with disabilities who are not reinstated or fail to regain employment after an EEOC charge, litigation, or both increases, fewer will count as active in the labor force. The point is that the foregoing analysis easily could suffer from endogeneity or other biases in ways that preclude straightforward causal inference. The goals of this project were not identification of that sort; rather, I sought to tease out the contours of relationships between structural factors and EEOC activity.

A promising avenue of future research would involve the collection of additional data to understand better the interplay between state FEPA filings and EEOC charges. The state-level structure of the dataset used here ostensibly induced more variation in the unemployment rate over

\textsuperscript{115} Donohue & Siegelman, \textit{Law and Macroeconomics}, supra note 14, at 741-44.

\textsuperscript{116} For another recent example, see Donohue et al., \textit{supra} note 12 (applying the Panel Study of Income Dynamics to the microeconomic Title I question instead of the Current Population Study).
time, which was helpful for statistical purposes. This variation also might imply that local economic conditions could induce different levels of recourse to state disability discrimination statutes. As noted before, the ADA strikes a federalism compromise regarding the investigation of employment discrimination, allowing the states priority over the EEOC when the charging party files with its FEPA.\textsuperscript{117} To my knowledge, no empirical work has taken up questions related to dual filing with state FEPAs and the EEOC. Do aggrieved employers who file with both agencies fare any differently than those who file with only one? Does the additional time-to-file with the EEOC materially change processing and outcomes?\textsuperscript{118} These and other questions related to the optimal enforcement of disability discrimination would advance the employee-side agenda and our understanding of engagement with the ADA.

The results in this Article also illuminate a few significant policy ideas. First, additional confirmation that EEOC charge submissions are countercyclical intensifies the need to shore up the agency’s infrastructure during economic downturns. Charges trigger investigations (unless dismissed\textsuperscript{119}), and investigations are costly endeavors. Indeed, the most recent budget request from the EEOC has estimated the cost of private sector enforcement at about $295 million, with $207 million dedicated to administrative charge resolution.\textsuperscript{120} Meanwhile, the Commission Chair averred that “[o]ne of the agency’s greatest challenges has been, and continues to be, resolving discrimination charges filed by private and federal sector employees and job seekers promptly, while at the same time ensuring that the rights of the charging parties and respondents receive appropriate attention and respect.”\textsuperscript{121} Surely these projections include some accounting for economic declines. But economic shocks by definition are difficult to predict \textit{ex ante}. The EEOC will require secured funding for personnel, especially in years of macroeconomic slump, to meet all its enforcement mandates.

Second, although economic theory predicts an increase in marginally meritorious charges during recessionary periods, one could also argue that the level of charge activity is inefficient. In fiscal year 2014, the EEOC resolved 24,411 charges, and 15,074

\begin{enumerate}
\item[117.] See supra note 26.
\item[118.] Employees who previously submitted charges to a FEPA have extra time from the accrual of their action to submit to the EEOC relative to those who did not (300 versus 180 days). 29 C.F.R. § 1601.13(a), (b)(2)(ii) (2014).
\item[119.] See id. § 1601.18 (establishing the grounds for Commission dismissal of charges).
\item[121.] Id. at 6 (emphasis added); see also id. at 28-29 & chart 2 (reviewing how increased investigator staff will reduce the backlog inventory of charges).
\end{enumerate}
(62%) led to reasonable cause determinations.\textsuperscript{122} With an incredibly low rate of reasonable cause findings (4%), prophylactic education efforts can be as profitable as increased enforcement after the fact. Knowing how few persons with disabilities fully comprehend their rights under Title I,\textsuperscript{123} the extent to which non-frivolous claims remain under wraps and less meritorious ones arise might be far from surprising. Either possibility could result simply from employees failing to recognize what acts and conditions qualify for protection absent costly legal representation. Empirical findings that, especially when economic conditions worsen, ADA charges increase and reasonable cause findings decrease should spur more attentiveness to informing employees about their civil rights before the next downturn.

Employers, too, stand to benefit from additional training on their responsibilities (and corresponding rights) under Title I.\textsuperscript{124} Many firm owners still misperceive the bulk of ADA employment charges as resulting from discriminatory hiring practices, when they actually occur after the employee joins the organization.\textsuperscript{125} Of course, corrected misperceptions should not encourage lax monitoring at the hiring stage. Rather, the replacement of stylized facts with hard evidence about why and when charges tend to arise can prepare managers to be even more vigilant about their practices during economic slumps. This lesson is less about shielding employers from discriminatory allegations in the business cycle valleys than it is about identifying unlawful decision-making for them at all points in time. When all labor force participants feel economic pressure, the EEOC should encourage even more attention to the pitfalls of ADA violations.

Finally, these data potentially shed light on advancement in broad perspectives of disability. By no means does this empirical analysis directly resolve how society views people with impairments, i.e., whether the social model of disability has made gains on the medical


\textsuperscript{124} See, e.g., Carol Cirka \& Elizabeth A. Corrigall, \textit{A Case of Ability and Disability: What Managers Must Know About the ADA}, 11 \textit{Org. Mgmt. J.} 1, 3 (2014) ("Myths and misperceptions about the ADA and disabled individuals often play a role in employment decisions.").

\textsuperscript{125} Cf. Donohue \& Siegelman, \textit{Changing Nature}, supra note 14, at 984.
Rather, it may be indicative of how employees with disabilities perceive themselves. The nearly uniform charge submission coefficients in Table 9, for instance, would seemingly be inconsistent with differential discrimination against employees by disability type. In other words, the charge frequency results reflect an important corollary of the social model: disability is not defined by impairment. The social model urges an understanding that prevailing attitudes about disability and the level of willingness to include people with disabilities fully in civil society are the more critical limitations. Employees with disabilities were equally likely to allege discrimination during recessionary periods regardless of their conditions. Empirical findings of this nature lend support to the idea that disability challenges are social constructs rather than degrees of impairment.

CONCLUSION

The economic legacy of the ADA, especially Title I’s employment provisions, never coalesced around a consensus narrative twenty-five years after passage. The reasons likely have to do with the complex overlap of contributing influences: the role of disability and unemployment insurance, shifting attitudes about people with disabilities, and rapidly evolving technologies among them. Continuing to refine the empirical methods and data brought to bear on this question will remain important for the statute’s continued viability. Commentators will almost surely assess the ADA’s effectiveness by its production of favorable employment results for workers with disabilities so long as those gains do not impose excessive costs on employers. Sound empirical work at the micro-level on wages and employment levels can enhance that evaluation’s credibility.

This Article, however, has joined the chorus of empirical researchers hoping to understand better employee engagement with antidiscrimination statutes. By tracking the macro-level determinants of when aggrieved employees seek recourse under Title I, one observes just how imperative legal process can be during periods of economic downturn. The foregoing analysis, now replicating similar results for Title VII litigation, should spur additional interest in employment discrimination law as a bulwark against personal economic collapse when employers engage in unlawful decision-making. Although the data used could not disentangle completely the worker benefit from the employer damages effects, the stable results for the unemployment rate

126. See supra notes 85-89 and accompanying text.
on the number and success of charges provides strong probative evidence for the former. I also showed that political economy accounts of charge patterns carry some explanatory power, especially when comparing outcomes between Democrat and Republican presidential administrations. Some support for a legal path dependency hypothesis emerged, and I found unexpectedly scant evidence for differential effects by disability type.

An employee-side agenda for students of labor market discrimination can serve broader policy goals. In particular, many of these findings can assist federal agencies with ex post implementation endeavors. Predicting when employees are more likely to come forward with discrimination allegations, and, eventually, when employees are more likely to experience discrimination can prepare the government for a rising tide of charge submissions. Congress should then work with the President to staff and fund the EEOC at levels necessary to process and resolve those charges. And, although I found no evidence on average of differences in EEOC activity by disability type, it is difficult to believe that outmoded attitudes about various conditions have been corrected entirely. Individuals subject to additional workplace scrutiny because of mental or behavioral disabilities no doubt continue to face more disadvantageous treatment relative to those with more physical disabilities. Additional, detailed examinations of this phenomenon, possibly at a highly granular level will provide better guidance to EEOC investigators and enforcement officials.

The inferences made possible by these rich charge data represent an initial step toward a more complete picture of appeals to the ADA’s enforcement promises. Future work—linking EEOC charges with litigation outcomes or probing more pointedly the relationship between administration priorities and charge resolution—will add clarity to these broader strokes. Future developments that refine or expand ADA protections should draw on this systemic view of employee interaction with the law and its enforcing agency.