

**When Organizations Rule:
Judicial Deference to Institutionalized Employment Structures¹**

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Abstract

This article offers a theoretical and empirical analysis of *legal endogeneity* – a subtle yet powerful process through which institutionalized organizational structures and practices influence judicial conceptions of legality and compliance. We argue that, irrespective of their effectiveness, organizational structures such as grievance procedures, anti-harassment policies, evaluation procedures, and formal hiring procedures become symbolic indicia of compliance with anti-discrimination laws, first within organizations but eventually in the judicial realm as well. As organizational structures become increasingly institutionalized, lawyers and judges become more likely to associate them with rationality and fairness. Legal endogeneity has observable manifestations: judges increasingly refer to organizational structures in their opinions, find them relevant to determinations of legal liability, and ultimately defer to those structures by inferring nondiscrimination from their presence or discrimination from their absence. We test legal endogeneity theory using a quantitative content analysis of a random sample of 1024 federal employment discrimination decisions from 1965-1999. We find that legal endogeneity has increased over time. Judicial deference to organizational structures appeared first in the district courts and later in the circuit courts. Deference is most likely where plaintiffs lack social and economic clout and where the legal theory put forward by the parties requires judges to rule on organizational attributes that are not directly observable. We suggest that legal endogeneity weakens the impact of law as judges increasingly understand organizational structures as indicators of legal governance even though those structures are often ineffective or discriminatory.

I. Introduction

Typical approaches to studying law and organizations see law as *exogenous* to organizations; that is, law is formed prior to and relatively autonomously from organizational actors, structures, and institutions. In this view, law is understood as coercive, determinative, and concrete. It is imposed upon organizations by the state in a top-down fashion. Although organizations may lobby government entities to influence lawmaking, once new legislation or regulations are enacted, organizations are seen as receivers rather than as producers of legal rules. Organizations may resist or embrace the force of law, and they may tweak the meaning of law at the margins, but they are not generally seen as ongoing participants in the construction of legal meaning. This exogenous view of law is common in the organizations literature (e.g., Meyer & Rowan 1977; DiMaggio & Powell 1983; Fligstein 1990), in the regulation literature (e.g., Hawkins 1984; Vaughan 1998; Kagan & Scholz 1984; Kagan, Gunningham & Thornton 2003) and in more traditional social theory (e.g., Weber 1978; Marx 1954). It also represents lay understandings of law.

In contrast, following earlier work by Edelman and colleagues, we suggest that law is *endogenous*, that is, it acquires meaning from the social arenas that it seeks to regulate (Edelman et al. 1999; Edelman 2002, 2005, 2007). The idea of law as endogenous builds upon work in the sociology of law, which suggests that law takes form through social interaction (Macaulay 1963; Friedman 1975; Ehrlich 2002) and that the meaning of law is often ambiguous, contingent, and contested (Tushnet 1984; Edelman 1992).² Sociologists of

² To some extent, the idea of endogenous law is implicitly present in some facets of American law, notably our common law tradition, under which judges are understood to make law on issues for which statutes do not apply (Holmes 2005; Friedman 1984). There is at least one tradition in the common law, which holds that courts are not completely bound by precedent and may base their decisions in part on societal trends or norms. Nothing in the common law, however, suggests that courts would derive their ideas about law or compliance from the regulated entities, an idea that is central to legal endogeneity. Further, no studies of common law specify the mechanisms through which courts incorporate institutionalized ideas. Our analysis, moreover, is not limited to the common law. We suggest that even in areas of law

law have long contended that statutes may create new rights and obligations, but they rarely guarantee social change, especially when rights holders lack the social and political clout to mobilize rights (Scheingold 1974; Galanter 1974; Miller & Sarat 1981; Albiston 2005), or when contextual factors remake the meaning of those rights (Edelman, Erlanger, & Lande 1993).

We focus on the endogeneity of law in the context of organizations and their regulatory environments. Previous accounts have had much to say about how organizations influence law through legislative lobbying (e.g. Burstein 1985) or through regulatory negotiation or capture (Stigler 1971; Diver 1980), but little has been written about the influence of organizations on the courts. Building upon the neo-institutional literature in organization theory, we suggest that legal endogeneity allows organizations to influence judicial doctrine through a subtle and largely unintended process. As certain organizational structures or practices become widely accepted – or institutionalized – among organizations, they also become symbolic indicia of compliance (e.g., grievance procedures) or indicia of rational governance (e.g. formal evaluation procedures) not only to actors within organizations, but also to legal actors. Lawyers become more likely to advise clients in light of the institutionalized meaning of organizational structures (Bisom-Rapp 1999, 2001a, 2001b) and to point to these structures as evidence of compliance (Edelman, Uggem, and Erlanger 1999). And, as we show in this article, judges begin to use the presence or absence of institutionalized organizational structures inferentially in evaluating whether or not an organization discriminated. Ultimately, these structures become so closely associated with rationality, fairness, and compliance that judges become less likely to scrutinize whether they in fact operate in a manner that promotes nondiscriminatory treatment. Law becomes endogenous to the extent that judicial rulings come to incorporate the presence of institutionalized structures as evidence of compliance with law, especially when judges defer

covered by statutes, judicial thinking is infused with institutionalized ideas that derive from the social realms that law seeks to regulate.

to the mere presence of these structures without considering whether the structures actually operate to reduce discrimination.

This article develops an empirical model of legal endogeneity in the context of employment discrimination law. Employment discrimination law provides an ideal setting in which to examine legal endogeneity because ambiguous statutory language and highly contested politics give organizations substantial latitude to define the meaning of civil rights compliance (Edelman 1992). Our objectives are to offer a means of operationalizing and examining patterns of legal endogeneity over time and across courts, legal theories, and types of organizational structures. Legal endogeneity is a theoretical construct, but we argue that it has three observable manifestations: *reference*, *relevance*, and *deference*, which represent progressive stages of legal endogeneity. We discuss each below.

Three Stages of Legal Endogeneity

Reference

At first, judicial opinions simply *reference* organizational structures in the factual narratives or legal analyses. While various laws may indirectly invite consideration of the organizational structures we examine, no statutes explicitly require that organizations have these structures in place as a condition of compliance. Thus, judicial reference to organizational structures to some extent reflects the extent to which these structures have become commonplace in organizational life, and, to some extent reflects the extent to which parties view them as sufficiently relevant to the law to refer to them in their briefs. Reference alone represents a low level of legal endogeneity, but it is a necessary precondition for relevance and deference. Further, reference is both a manifestation of legal endogeneity and is itself a function of legal endogeneity: as courts pay more attention to structures, those structures become an increasingly integral part of the lexicon of law; and organizations pay increasing attention to them as a result.

Relevance

Over time, judges become more likely to find those structures relevant to their legal decisions. As with reference, relevance is not statutorily required: nothing in the civil rights laws we study explicitly mandates that any of these organizational structures must be in place or states that these structures should be considered in determining whether discrimination has occurred. Yet as employers increasingly point to organizational structures in justifying their actions as non-discriminatory, judicial opinions begin to reflect their relevance to legal liability. Specifically, judges begin to consider the presence of organizational structures as potentially indicative of non-discrimination³. The legal relevance of these structures reflects their acquired meaning as symbols of compliance, good faith efforts at compliance, or rational governance. Even when courts view these structures as relevant, however, the structure is not usually determinative of liability in and of itself; rather, courts consider the structures along with other forms of evidence. Relevance indicates a considerably greater degree of legal endogeneity than does reference alone, but a lesser degree than does deference.

Deference

Eventually, the structures may become so closely associated with rationality and nondiscriminatory treatment that judges no longer scrutinize their quality or evaluate whether they actually operate to reduce discrimination. Rather, judges simply “*defer*” to the structure, assuming that the mere presence of the structure is indicative of the organization’s compliance with civil rights law irrespective of whether the structure *actually* provides a measure of protection for employees or provides a more rational, fair, and non-arbitrary system of governance. Judicial *deference* to organizational structures is the most extreme form of legal endogeneity in the judicial context: here the symbolic meaning constructed by organizations may be transferred into the judicial context in a way that

³ Judges may also consider the absence of organizational structures as indicative of discrimination. For clarity in our arguments and analysis, however, we restrict our attention in this article to judicial attention to structures that are present in organizations.

prevents judges from evaluating whether or not these structures function to achieve legal ideals.

Summary

Reference, relevance, and deference, then, should be understood as progressive stages of legal endogeneity. Reference indicates that organizational structures have entered the judicial lexicon; relevance suggests that organizational structures are theoretically relevant to the judicial calculus of whether a legal violation has occurred; and deference occurs when organizational structures have become so much associated with legality that judges fail to consider the adequacy or quality of the structures or, more generally, to give close scrutiny to organizational behavior.

Legal endogeneity has significant theoretical and policy implications for the capacity of law to produce social change. From a theoretical standpoint, legal endogeneity theory builds upon and elaborates the sociological premise that law draws its meaning largely from social life (Ehrlich 2002; Friedman 1975). But it elaborates those theories by drawing upon neo-institutional organization theory to specify the mechanisms through which organizations shape the meaning of law. Most importantly, legal endogeneity theory offers a new framework for understanding the complex and dynamic relationship between law and organizations' legal environments that focuses on the reciprocal construction of law and the social life of organizations (cf. Selznick 1969; Suchman & Edelman 1996; Edelman & Suchman 1997). Legal endogeneity theory sounds an important caveat to approaches that treat law as an exogenous shock to organizations (e.g. Fligstein 1990). While new legal rules certainly can act as an exogenous shock in some instances, our research suggests that law, itself, draws meaning from organizational life. Legal endogeneity theory also challenges arguments that law is "autopoietic" or self-referential (Teubner 1988, 1993; Luhmann 1985).⁴

⁴ In the autopoietic view, law is a self-referential system, in which external phenomena appear primarily as legal representations, constructed in terms of legal orientations and legal imperatives. Efforts to

In contrast to these works, we argue that law draws much of its meaning from the social realms that it seeks to regulate. Although we do not argue that law is entirely endogenous to social life, we suggest that the logic of organizations and economic life substantially affects the logic of law.

From a policy perspective, legal endogeneity has both positive and negative implications for the capacity of law to reduce discrimination within organizations. On the positive side, to the extent that organizational structures protect employees from discrimination and other rights violations, legal endogeneity is desirable because it reflects judicial support for the organizational structures that implement legal goals. In addition, to the extent that courts consider the quality of organizational structures, organizations may be motivated to institute more effective internal legal structures. On the negative side, however, if organizational structures merely symbolize compliance without protecting employees' civil rights in any substantive way, legal endogeneity tends to legitimate organizational practices that mask, perpetuate, or even exacerbate discriminatory treatment. Indeed, social scientific research suggests that structures designed to symbolize attention to law often fail to reduce discrimination or inequality (Baron, Mittmann, & Newman 1991; Edelman, Erlanger, & Lande 1993; Edelman and Petterson 1999; Edelman, Fuller, & Mara-Drita 2001; Kalev, Dobbin & Kelly, 2006). If judges come to infer compliance based on organizational structures that produce little meaningful choice on the ground, antidiscrimination laws may come to merely legitimate continued inequality.

The remainder of the article is organized as follows. In the next section, we provide a brief description of employment discrimination law in order to establish that law does not mandate the forms of compliance that organizations create. In the third section, we offer an institutional theory of judicial behavior, which explains how judges come to incorporate organizational constructions of law. We then discuss our sample and data and present

communicate across the boundaries of such systems are regarded as hazardous or impossible. In autopoiesis theory, then, law has an internal logic, whereas in endogeneity theory, the logic of law is given by the social realms that it seeks to regulate.

models that show legal endogeneity increasing over time, especially in cases involving less powerful plaintiffs or legal theories that require judges to evaluate employers' intent.

Finally, we discuss the theoretical and policy implications of our work.

II. Civil Rights Law and Organizational Structures

Employment statutes do not explicitly specify that organizations must create particular structures like grievance procedures, training programs or progressive discipline policies. Rather, as we show in this section, judicial attention to organizational structures tends to result from ambiguities in employment law and characteristics of legal theory that create the conditions under which institutionalized organizational structures become proxies for nondiscrimination. We provide a brief overview of federal civil rights requirements in order to show how judges may come to see institutionalized organizational structures as relevant to law even when statutes do not explicitly mandate these structures.

Federal civil rights statutes prohibit employment discrimination based on certain protected characteristics. The statutes we focus on in this study include: Title VII of the Civil Rights Act of 1964,⁵ which prohibits discrimination on the basis of race, color, sex, national origin, and religion; the Age Discrimination in Employment Act of 1967,⁶ which prohibits employment discrimination based on age (40 or older); the Equal Pay Act,⁷ which prohibits gender-based wage disparity for equal work; and two post-civil war civil rights statutes: 42 U.S.C. Section 1981, which prohibits race⁸ discrimination in the making and enforcement of contracts, including employment contracts, and 42 U.S.C. Section 1983, which

⁵ 42 U.S.C. §2000e et. seq. (as amended)

⁶ 29 U.S.C. § 621, et seq. (as amended)

⁷ 29 U.S.C § 206(d), et seq. (as amended)

⁸ Under judicial doctrine, race under Section 1981 is defined by the standards of the Reconstructionist Era. Thus, the definition of race under this statute is broader than it is under Title VII. In *St. Francis College v. Al-Khazraji*, (481 U.S. 604, 613 (1987)), the Supreme Court held that [In passing Section 1981 during the Reconstruction Era] "Congress intended to protect from discrimination identifiable classes of persons who were subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is 'racial discrimination' that Congress intended Section 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.")

provides a statutory basis for asserting violations of the Equal Protection Clause of the Fourteenth Amendment, including those involving alleged employment discrimination.⁹

These statutes prohibit discrimination in employment, but they do not define the term “discrimination.” They also do not generally specify the types of evidence courts may consider in determining whether discrimination occurred. Thus, with the exception of the passage of the 1991 Civil Rights Act which was a Congressional reaction to certain cases decided by the Supreme Court in 1988 and 1989, the legal meaning of discrimination and the nature of the legal analysis used to determine whether it had occurred were primarily left to the federal judiciary to elaborate on a case by case basis.¹⁰

Because discrimination takes different forms, courts developed various legal theories of discrimination liability. These include individual and systemic disparate treatment theory¹¹, disparate impact theory, and harassment theory. In order to understand the implications of our findings, then, it is necessary to know something about the nature of the legal doctrines that structure courts’ analyses of antidiscrimination claims.

Disparate Impact Theory

The first major employment discrimination case, *Griggs v. Duke Power Company*, was decided in 1971 by the United States Supreme Court. The *Griggs* case established what is now known as the disparate impact theory of discrimination. In disparate impact claims,

⁹ Because the legal and factual analysis involved in claims of disability discrimination under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. (as amended), the Rehabilitation Act of 1973, 29 U.S.C. § 791, et seq. (as amended), and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. are so different from those entailed in other discrimination claims, we excluded cases arising primarily under these Acts from our analysis.

¹⁰ Most of these cases, which over time shaped the meaning of “discrimination” under federal law, involved claims arising under either Title VII or the ADEA. With the exception of disparate impact theory, which is available only under Title VII and the ADEA, and failure to accommodate, which is available only under Title VII or various disability discrimination statutes not at issue here, the legal doctrines announced in Title VII and ADEA cases have been held to govern the analysis of analogous claims filed under other statutes as well.

¹¹ Not all disparate treatment cases fit neatly into a unified framework. As a result, over time various other legal doctrines developed to address issues raised in disparate treatment cases of differing types. These doctrines include constructive discharge theory, valid affirmative action defenses, and the Bona Fide Occupational Qualification (BFOQ) defense. Due to lack of space and the fact that these cases constitute a very small portion of our sample, we do not discuss them here.

the plaintiff (employee) must show that a facially neutral employment practice, such as a standardized test or a minimum height requirement, excludes members of a statutorily protected group (such as women) at a rate that is practically and significantly higher than the rate at which it disqualifies members of a corresponding group (such as men). Once this showing is made, the burden of proof shifts to the defendant (employer) to demonstrate that the challenged practice is justified as a “business necessity.”¹² If the practice can not be shown to constitute a business necessity, the plaintiff in a disparate impact case will prevail, even absent a showing of discriminatory intent.

Although the availability of disparate impact theory would seem to suggest that many organizational practices could be invalidated by a showing that they adversely affect members of a protected group, courts have limited the applicability of disparate impact theory to a very narrow range of situations.¹³ Additionally, even where the theory is available, for a plaintiff to use it successfully, he or she must prove that a *particular* facially neutral selection procedure or criterion is causing a systematic and statistically significant difference in group outcomes.¹⁴

¹² *Griggs*, 401 U.S. 424, 431 (1971); *Albemarle v. Moody*, 422 U.S. 405, 425 (1975); *Dothard v. Rawlinson*, 433 U.S. 321,329 (1977). Even if an employer can demonstrate that a neutral policy or practice is job-related and consistent with business necessity, the employee can still prevail if there is an alternative employment practice which produces less of an adverse impact and the employer has refused to adopt the alternative practice. 29 U.S.C. § 2000e-2(k) (as amended by the Civil Rights Act of 1991, which reinstated certain aspects of disparate impact law that had been undermined by the Supreme Court’s decision in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989)).

¹³ Disparate impact theory is *per se* unavailable in cases brought under 42 U.S.C. Sections 1981 and 1983 (*General Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375 (1982)(Section 1981); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979)(Section 1983)). Furthermore, during the time period studied, the circuits were split on whether disparate impact theory was available in cases brought under the Age Discrimination in Employment Act (ADEA) or the Equal Pay Act (EPA), or in Title VII cases alleging sex discrimination in compensation. These and other limitations on the applicability of disparate impact theory dramatically narrowed the proportion of discrimination cases that assert a disparate impact claim.

¹⁴ Similarly, plaintiffs in religious accommodation claims under Title VII must identify a specific procedure or criterion. In 1972, Congress amended Title VII to define the term “religion” as including “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” Title VII of the Civil Rights Act of 1964, §701(j), 42 U.S.C. §2000e(j). Religious accommodation cases appear in the Title VII case law, and in our sample, but they are relatively rare in both.

Since the essence of the plaintiff's claim under disparate impact theory is that some employment structure is *itself* discriminatory because of its unjustified adverse impact, the existence of that particular employment structure will be the court's focus in evaluating the claim. However, for the purpose of our analysis, the structure is considered relevant only if the court considered its presence as evidence of nondiscrimination or its absence as evidence of discrimination. Thus, our analysis in this article focuses on courts' treatment of structures that employers point to as evidence of compliance rather than structures that employee used challenge as discriminatory.¹⁵

Disparate Treatment Theory

The most common theory used in Title VII cases is the disparate treatment theory. Section 703(a)(1) of the Title VII provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, sex, national origin, or religion."¹⁶ Nothing in the text of Title VII or any of the other civil rights statutes explicitly discusses intent to discriminate. However, in 1973, the Supreme Court held in *McDonnell Douglas Corporation v. Green*¹⁷ that to prevail in an individual disparate treatment case, a plaintiff must prove discriminatory intent. Four years later, the Court extended the intent requirement to systemic disparate treatment cases.¹⁸

¹⁵ Some structures may fall into both categories. For example, an employer might point to the existence of any progressive discipline policy as evidence of fair treatment. However, in another action, an employee might challenge that policy (or the manner in which it is implemented) as it self discriminatory. Since we are interested in compliance structures, we would include the first example but not the second in our measure of relevance (and therefore of deference). In subsequent analyses, we will consider judicial treatment of policies that are, themselves, challenged as discriminatory.

¹⁶ 42 U.S.C. §2000e-2(a)(1)(2000).

¹⁷ 411 U.S. 792 (1973).

¹⁸ In *Teamsters v. United States*, a case in which there were *systematic* differences in outcomes for various groups that could not be attributed to a particular facially neutral selection criterion or procedure, the Court stated, "[p]roof of discriminatory motive is critical, though it can sometimes be inferred from differences in treatment." 431 U.S. 324, 335, n. 15 (1977).

In *McDonnell Douglas Corporation v. Green*,¹⁹ the Supreme Court established a three step analytical framework for proving discriminatory intent with circumstantial evidence in individual disparate treatment cases. First, the plaintiff must establish a *prima facie* case, or raise an inference, of discrimination.²⁰ Once the plaintiff has established the elements of this *prima facie* case, the onus shifts to the employer to articulate some “legitimate, nondiscriminatory reason” for its action. Once it has done so, the plaintiff must be afforded an opportunity to show that the reason given by the employer was pretextual, a “coverup” for a discriminatory decision.

Subsequent cases placed more and more emphasis on a plaintiff’s need to prove the state of mind of a discriminating employer and moved away from the relatively straightforward elements of the plaintiff’s *prima facie* case.²¹ After the enactment of Title VII, fewer employers risk making explicitly racist or sexist statements so discriminatory intent must generally be proven inferentially.²² A central element of our argument is that in

¹⁹ 411 U.S. 792 (1973).

²⁰ . In *McDonnell Douglas*, a failure to hire case, the plaintiff raised an inference of discrimination by showing: (1) that he was a member of a protected group; (2) that he was qualified for a position for which the employer was seeking applicants; (3) he was not selected for the position; and (4) the job remained open or was filled by someone outside the plaintiff’s group. In subsequent cases, the elements of this *prima facie* case were adjusted to suit different types of challenged employment actions, such as terminations or failures to promote.

²¹ For example, in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Court clarified the issue of burden of proof regarding intent, holding that the burden that shifts to the defendant after the plaintiff’s establishment of the *prima facie* case is only a burden of coming forward with evidence. The plaintiff maintains the burden of proving intent to discriminate at all times. 450 U.S. at 253, 255. The Court revisited the issue of disparate treatment proof two years later in *United States Postal Service Board of Governors v. Aikens*. 460 U.S. 711 (1983). In *Aikens*, the Court held that once an employer had offered evidence of a legitimate non-discriminatory reason for a challenged decision, the legal analysis should shift away from the elements of the *prima facie* case and move to the ultimate question of discriminatory intent. The Court’s 1983 decision in *Aikens*, then, placed the court’s focus squarely on the question of discriminatory intent.

²² Over the past thirty-three years, the Supreme Court has described the types of evidentiary facts relevant to circumstantial proof (or disproof) of discriminatory intent, including: evidence that similarly situated persons not in the plaintiff’s protected group were treated more favorably than the plaintiff or other members of the plaintiff’s group (*McDonnell Douglas Corp. v. Green*, *supra* n. 16; *Postal Service v. Aikens*, *supra* n. 20; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151-52 (2000)); statements or expressive conduct by decision makers evincing negative stereotypes or attitudes toward the plaintiff or others in his or her protected group (*Aikens*, *supra*; *Reeves*, 530 U.S. at 151); the employer’s willingness to tolerate harassment of the plaintiff or other members of the plaintiff’s protected group (*Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989) (noting proof of disparate treatment under 42 U.S.C. § 1981)); a general pattern of treatment of members of the plaintiff’s group (*Green*, 411 U.S. at 804-05); a

discriminatory intent cases – the most common type of Title VII case – organizational structures become proxies for nondiscrimination because discriminatory intent is unobservable and difficult to prove. Organizational structures, such as antidiscrimination policies, grievance procedures, leave policies, and numerous employment practices are often introduced as circumstantial evidence through which lawyers seek to create an inference of discrimination or nondiscrimination.

In sum, nothing in disparate treatment theory requires employers to adopt particular organizational structures or suggests, directly or indirectly, that the presence or absence of particular organizational structures would be relevant to the analysis of whether disparate treatment discrimination occurred. However, we suggest that by centering attention on intent to discriminate – an unobservable trait – disparate treatment theory provides an opening for organizational structures that symbolize compliance or fair treatment or rational governance to become proxies for a lack of intent to discriminate. As the symbolic value of these structures comes to be taken for granted, lawyers become more likely to invoke these procedures as evidence of nondiscrimination and judges become more likely to find these structures legally relevant and even to defer to them as indicators of compliance.

Sexual Harassment Theory

In one area of civil rights jurisprudence – sexual harassment -- the courts have, at least in recent years, explicitly encouraged organizations to create certain policies and practices by suggesting that such policies could (and later, would) help insulate organizations

specific decision maker's treatment of the plaintiff and other members of the plaintiff's protected group (*Reeves*, 530 U.S. at 151-52; *Patterson*, 491 U.S. at 188; *Green*, 411 U.S. at 804-05; whether the defendant has come forward with evidence of a legitimate, nondiscriminatory reason for its action (*Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)); whether the nondiscriminatory reasons proffered by the defendant fail to rationally explain the decision it made or are otherwise unworthy of credence (*Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)); whether the nature or operation of the employer's decision-making process left room for the operation of bias (*Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)); and whether the employer had in place and applied effective mechanisms for detecting the possible influence of bias and for preventing such biases from influencing the ultimate decision made (*Id.*) The Supreme Court has held that similar types of evidence are relevant to proof of systemic disparate treatment, although in such cases, greater emphasis is placed on statistical methods (*Teamsters v. United States*, 431 U.S. 324 (1977)).

from liability and/or damages. There are two theories of sexual harassment liability: hostile work environment and quid pro quo. The Supreme Court first recognized both theories in *Meritor Savings Bank v. Vinson* in 1986.²³ In that case, the Supreme Court found among other things that employers could be liable for discrimination based on a protected class that “created a hostile or abusive work environment,” which was “sufficiently severe or pervasive” so as to alter the plaintiff’s conditions of employment.²⁴ In contrast to “quid pro quo” harassment, in which a supervisor specifically uses authority delegated by the employer to engage in discrimination (such as conditioning a promotion on acquiescence to unwelcome sexual advances),²⁵ thus making the employer “vicariously liable” for the supervisor’s actions, the Court in *Meritor* held that an employer is not automatically liable for the harassing actions of its supervisors if it has no notice of a hostile work environment.

Although the Court did not issue a definitive rule on employer liability in *Meritor*, it implied in dicta that an employer might escape liability through the presence of a reasonable and effective grievance procedure, and referred to (but did not formally adopt) the Equal Employment Opportunity Commission’s 1980 endorsement of organizational internal grievance procedures in its guidelines. The Court, however, noted that the grievance procedure in this case was so defective that it was not adequate.²⁶ Nonetheless, by suggesting that a more effective grievance procedure might have allowed the employer to avoid liability²⁷, the Court encouraged employers in numerous subsequent cases to argue that their grievance procedures should insulate them from liability (Edelman et al. 1999).

²³ 477 U.S. 57, 66 (1986).

²⁴ *Id.* at 67.

²⁵ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1988). Under quid pro quo theory, the sexual harassment is attributable to the employer regardless of notice or anti-harassment policies and procedures.

²⁶ The Court noted that while the existence of a grievance procedure and an anti-discrimination policy were “plainly relevant,” the Bank’s policy did not refer to sexual harassment specifically and the grievance procedure required the employee to complain to her first-line supervisor, who was, in fact, her harasser. *Id.* at 72-73.

²⁷ The specific language was: “Petitioner’s contention that respondent’s failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.” 77 U.S. 57 at 73.

Twelve years later, the court strengthened considerably its endorsement of organizational anti-harassment policies and grievance procedures in *Faragher v. Boca Raton* (1998). In *Faragher*, the Court held that an employer is vicariously liable for an actionable hostile work environment created by a supervisor in the victim's chain-of-command; however, if there is no tangible employment action (e.g., demotion, discharge, or undesirable reassignment), the employer may raise an affirmative defense to liability or damages.²⁸ The defense requires the employer to show that: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. The Court specifically mentioned that an anti-harassment policy with a complaint procedure, while "not necessary in every instance as a matter of law," would address the first element of the defense.²⁹ Thus the law itself should give rise to reference and to relevance in hostile work environment cases, but not to deference.

Summary

As this brief discussion of civil rights law has shown, none of the civil rights statutes that gave rise to the cases included in our sample specifically require that employers create any particular organizational structures to comply with civil rights mandates. In some claims, most notably those alleging hostile work environment harassment, legal decisions have made the existence or non-existence of certain employment structures directly relevant to the legal analysis and have encouraged employers to rely on the presence of those structures as evidence of nondiscrimination.

However, in other contexts, most notably in cases involving individual or systemic disparate treatment, nothing in the structure of the legal analysis defined by the relevant

²⁸ However, if the harasser is a senior officer high enough in the organization to control the policies of the employer, he is considered "the employer" for purposes of Title VII. In this situation, liability automatically attaches, and "the employer" is liable even if there is a formal policy prohibiting the harassment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Ackel v. National Communications, Inc.*, 339 F.3d 376 (5th Cir. 2003).

²⁹ *Id.* at 807-08.

case law makes the presence or absence of particular structures directly relevant to the discrimination inquiry. Thus, based on the formal law alone, we would expect courts to refer to organizational structures and to find them relevant primarily in hostile work environment cases. Based on the formal law, organizational structures should be less relevant to the legal outcome in disparate treatment cases, where they would be raised only as circumstantial evidence of discriminatory intent. Most importantly, there is no rationale in the formal law for judicial deference to the mere presence of organizational structures. In the next section, however, we offer a sociological account that suggests that, irrespective of the law, one ought to see an increasing amount of reference to, relevance of, and deference to organizational structures over time. Further, we suggest other sociological factors that may affect reference, relevance, and deference.

III. Institutionalized Organizational Structures and Judicial Behavior

If the formal law does not mandate particular organizational structures, how is it that courts come to see these structures as a necessary part of compliance with civil rights law? To answer this question, we first draw upon neo-institutional theories of law and organizations to explain how organizational structures are socially constructed as “rational” and “legal” irrespective of their capacity to correct discrimination and inequality. We then develop an institutional theory of judicial decision-making, which explains how and why judges draw upon institutionalized ideas about organizational rationality in deciding whether employers have engaged in discriminatory behavior and why they may defer to these structures without scrutinizing whether they actually correct or help to avoid discrimination.

The Legalization of Organizational Fields

Institutional theory employs the construct of “organizational fields” to explain organizational structure and behavior (DiMaggio & Powell 1983; Powell & DiMaggio 1991; Scott 2001). Organizational fields refer to the larger environment around organizations, including suppliers, customers, and competitors as well as flows of influence, communication, and innovation (DiMaggio and Powell 1983). Organizational fields consist of a set of normative models and rules that influence organizational behavior. These norms and rules evolve from state entities, from the norms of professionals within and around organizations, and from patterns of organizational behavior that become so prevalent that their rationality³⁰ and propriety is taken for granted rather than based on any objective evidence such as cost-effectiveness.

As the rationality of a structure comes to be so widely accepted that its rationality and propriety is taken for granted, that structure is said to be “institutionalized”, and organizations adopt these structures either because they are so taken for granted that their adoption is almost automatic (Meyer & Rowan 1977; DiMaggio & Powell 1983; Meyer & Scott 1983; Powell & DiMaggio 1991; Scott 2002; Scott and Davis, 2007) or in order to achieve legitimacy gains (Edelman 1990; Suchman and Edelman 1996; Stryker 2000). Meyer & Rowan labeled these structures “rational myths” to emphasize that rationality is a social construction: the rationality of a particular structure is determined by the extent to which people understand that structure to be efficient or effective rather than by its cost-effectiveness or by another objective standard.

Edelman extended this line of thinking by arguing that “legal environments” are critical elements of organizational fields (Edelman 1990, 1992). Legal environments include formal law (statutes, judicial decisions, administrative law); broad legal norms such as due process; and institutionalized ideas about the meaning of law and compliance. Organizations

³⁰ Throughout this article, we used the term ‘rational’ in the Weberian sense of the word (that is, to refer to structures that are formal and law-like) rather than in the economic sense of the word (that is, to refer to structures that are cost-effective).

look to their legal environments for information about legitimate forms of compliance with law and organizational governance. As a result, organizations tend to adopt symbolic compliance structures such as grievance procedures, affirmative action and diversity offices, and sexual harassment policies, as a way of demonstrating attention to legal norms. Because these structures look legal, they tend to symbolize attention to law irrespective of whether they have any actual impact on organizational practices. Over time, these compliance structures tend to become institutionalized and organizations that do not have them begin to look suspect. Further, as legal environments construct formal rule-bound governance as rational, organizations tend to formalize all aspects of organizational governance, adopting not only compliance structures but also formal governance structures such as human resources offices, internal labor markets, progressive discipline, and evaluation procedures (Baron, Dobbin & Jennings 1986; Dobbin & Sutton 1998) and formal employment practices such as market-based pay systems (Nelson & Bridges 1999).

At first blush, it would seem that formal compliance structures and formal governance structures would reduce discrimination and enhance attention to civil rights and fair treatment generally. Studies of the effectiveness of these structures are rare, but two early studies raised serious concerns about the capacity of these structures to improve the workforce status of women and minorities (Baron, Mittman, and Newman 1991; Edelman and Petterson 1999). These studies find that structures such as EEO offices and rules have virtually no impact on the workforce representation of women and minorities and some affirmative action plans may even adversely affect women. A more thorough analysis made possible by the recent release of EEOC data to social scientists finds that practices that establish authority and accountability, such as affirmative action plans, diversity staff, and diversity committees, can be effective in increasing the proportions of white and black women and black men. However, other structures, such as mentoring and networking programs, and diversity training had no significant impact (Kalev, Dobbin, & Kelly 2006).

Several features of organizations help to explain why organizational structures may fail to reduce discrimination. First, studies of complex organizations consistently show that organizations' informal cultures and structures often deviate substantially from their formal policies (Roethlisberger & Dickson 1939; Selznick 1949, 1957; Burawoy 1979; Edwards 1979; Gordon, Edwards, & Reich 1982; Scott and Davis 2007). Whether due to culture, informal structure, or overt intent, organizational structures are often "decoupled" from organizations' core activities and therefore rendered merely symbolic (Weick 1976; Brunsson 1989; Orton & Weick 1990; Dobbin et al. 1988; Edelman 1992; Edelman & Petterson 1999; Sutton & Dobbin 1996). For example, organizations may adopt antidiscrimination policies but fail to revise their standard operating procedures to eliminate practices that violate those policies. They may create special compliance offices but give officers no authority to change practices; they may charge in-house counsel with monitoring compliance but exclude them from high level organizational decision-making (Stone 1975; Edelman 1990; Chambliss 1996; Edelman & Suchman 1999). In some cases, internal legal structures actually help organizations to *evade* legal constraints through contracts that waive legal protections, dispute resolution that undermines legal goals, and lawyers who collude with managers to put business goals above legal goals (Edelman, Erlanger, & Lande 1993; Suchman & Cahill 1996; Edelman & Suchman 1999; Nelson & Nielsen 2000).

Another reason is more subtle: when rights are articulated, adjudicated, and implemented through internal organizational structures, the law tends to become *managerialized* or infused with managerial logic (Edelman, Fuller, & Mara-Drita 2001). The managerialization of law is particularly clear in the case of organizational grievance procedures, where internal dispute handlers tend to recast discrimination complaints as typical managerial problems (e.g. poor management or interpersonal difficulties) rather than as legal violations and to remedy those problems with managerial solutions (e.g. training programs, transferring the grievant, providing counseling) rather than through formal recognition of legal rights violations (Edelman, Erlanger & Lande 1993; Edelman and Cahill

1998; Edelman and Suchman 1999). Managerialization also occurs as organizations build discretion into rules that are designed to implement laws (Edelman, Petterson, Erlanger & Chambliss 1991; Edelman & Suchman 1999) and when organizations create rules explicitly to evade law (Edelman, Abraham, & Erlanger 1993; Sutton & Dobbin 1996). In-house counsel can be important players in the managerialization of law as they act as entrepreneur and strategic advisor, helping organizations to use the law to best serve their interests, rather than as cautionary checks on potentially illegal organizational actions (Rosen 1989; Suchman & Cahill 1996; Nelson & Nielsen 2000). Finally, managerialization also occurs through managerial rhetoric or new models of management that infuse legal constructs with managerial ideas. During the 1980s and 1990s, for example, managerial rhetoric helped to transform the notion of “diversity” so that it became disassociated from the legal ideal of equitable racial and gender representation and transformed into a managerial ideal in which varying backgrounds and viewpoints of a diverse workforce could be harnessed for productive purposes (Edelman, Fuller & Mara-Drita 2001).

Neo-institutional theories of law and organizations, then, suggest that as organizational structures become more prevalent, they acquire an aura of both rationality and legality that is independent of their actual impact on the rights or workforce status of employees (Edelman 1990, 1992; Edelman, Uggen & Erlanger 1999). Only close scrutiny of how those structures operate in particular organizations can reveal the extent to which these institutionalized structures actually promote legal ideals, both broad legal principles such as due process and the more substantive policies of antidiscrimination law. Yet, as we argue below, the institutionalization of organizational structures encourages judges to assume rather than to scrutinize the effectiveness of these structures.

The Managerialization of Legal Fields

How is it that judges come to share institutionalized organizational conceptions of what constitutes compliance? To answer this question, we draw upon neo-institutional

theory, which provides a means of understanding how ideas that become institutionalized within organizational fields come to influence ideas decisions of judges. We offer an institutional theory of judicial decision making, which differs from – and complements – extant work on judicial decision making in political science.

Prior Accounts of Judicial Decision-Making

There is an enormous literature on judicial decision making, mostly by political scientists. While a complete review of this literature is beyond the scope of this article, we offer a brief overview of existing theory to show how our institutional theory differs from and extends previous work. The traditional or “legal” model of judicial decision making posits that judges decide cases based on the facts, the law, judicial norms regarding precedent (*stare decisis*), and perhaps public policy (see Segal and Spaeth 1996, 2002; Cross 1997, 2003). In this view, judges – and courts – stand as impartial and autonomous institutions unswayed by political, economic, or social interests. They are “law finders” rather than “law makers,” simply applying existing law to the facts of the case at hand. At least since the advent of legal realism, however, sociolegal scholars have been skeptical of this claim. As Oliver Wendell Holmes put it, the law is nothing more than “the prophecies of what courts will do” (Holmes 1897 at 460-61). From the realist perspective, that prediction had more to do with judges’ own preferences and policy biases than with the formal rules on the books.

More recently, socio-legal scholars, and political scientists in particular, have developed much more nuanced theories to explain judicial behavior. Scholars who adopt attitudinal models of judicial decision making contend that judges decide cases based on their ideological attitudes and values, not solely on the facts and the law (Segal and Spaeth 1993, 1996, 2002; Spaeth and Segal 1999; Baum 1992; Segal and Cover 1989). Strategic theorists also look to judges’ ideological preferences, but employ quantitative and game theoretic approaches to examine how judges strategically further those preferences within institutional constraints (Knight and Epstein 1996; Wahlbeck, Spriggs and Maltzmann 1998; Epstein & Knight 1998, 2000; Cross and Tiller 1998). Historical-institutionalists in political

science take a somewhat different and more interpretive approach that focuses on the contexts, traditions, norms, and cognitive structures that help constitute actors' preferences and judicial behavior (Gillman & Clayton 1999; Maveety 2003; McGuire 2004).³¹ What these perspectives have in common, however, is that for the most part they seek to explain judicial decision making as the product of ideological preferences and institutional structures related to legal actors or the legal system itself.³²

An Institutional Perspective on Judicial Decision Making

The institutional model of judicial decision making does not contradict or supplant the political model of judicial decision making. There is ample empirical evidence to support these accounts. Indeed, political and institutional processes often co-exist and should be taken into account in any theoretical explanation (Edelman and Stryker 2005). We do suggest, however, that accounts that focus on the characteristics of judges are incomplete and that they fail to capture attributes of the institutional environment that shaped judicial behavior. Drawing on the neo-institutional theory in sociology, we suggest that characteristics of the institutional environments in which judges work are important determinants of judicial decision-making and ultimately lead to legal endogeneity.

Recent work in neo-institutional theory suggests that fields tend to be characterized by multiple logics that may be contradictory, overlapping, and mutually influential (Friedland and Alford 1991; Stryker 2000; Heimer 1999; Scott et al. 2000; Schneiberg 2002; Lounsbury, Ventresca, and Hirsch 2003; Schneiberg and Soule 2004; Morrill 2005; Schneiberg and Clemens 2006; Edelman, 2007). The notion of overlapping fields with multiple logics provides a means of understanding how ideas that become institutionalized within organizational fields come to influence judicial decision making.

³¹ Strategic perspectives and historical-institutional perspectives together are sometimes labeled “new institutionalist” perspectives by political scientists (see Maveety 2003 at 25). New institutionalism in political science, however, is not entirely the same as the sociological new institutionalism employed in this article. For an excellent discussion of the shifting meaning of “new institutionalism” across disciplines, see Powell and DiMaggio (1991).

³² Here we also mean to include political pressures directed at legal actors and the legal system.

Just as organizations exist within organizational fields, courts exist within legal fields (Edelman et al. 2001; Edelman, 2007). Legal fields comprise courts, legislatures, administrative agencies, legal academia, and all legal actors, as well as the various parties that enter into the legal system on an occasional basis. There is substantial overlap between organizational fields and legal fields because organizations and organizational actors are regular participants in the legal process (Edelman and Suchman 1997, 1999). Every time organizations seek legal advice, enter into legal transactions such as contracts, contemplate or become involved in litigation, or even when they draw up on legal constructs and categories in devising their own policies and practices, organizational fields come into contact with legal fields.

Through this interplay, the logics of organizational and legal fields tend to influence one another (Edelman et al. 2001; Edelman 2007). Initially organizational fields may be centered around a logic of efficiency and rationality and legal fields may be centered around a logic of rules and rights (Edelman, 2007). But over time, as legal actors advise and facilitate organizational transactions and organizational actors become regular participants in legal fields, the logics of organizational and legal fields, the boundaries of these fields tend to blur and their logics tend to merge. As legal ideas enter into organizational fields, one sees a *legalization of organizations* or the influx of legal ideas into organizational life (Selznick 1969; Edelman 1990, 1992; Sutton et al. 1994; Sitkin and Bies 1994). But at the same time, one sees a managerialization of law as ideas that have become institutionalized within organizational fields tend to seep into the thinking of lawyers, judges, and juries (Edelman et al. 2001; Edelman 2005; Edelman 2007). Just as employers tend to take cues from norms and practices in their legal environments, judges tend to take cues from norms and practices that become institutionalized in organizations. Judicial decision making, then, should be understood as in part a function of the legal fields within which judges live and work. Since those legal fields overlap substantially with organizational fields, judges are

highly susceptible to ideas about the rationality of organizational structures that become institutionalized within organizational fields.

Judicial acceptance of institutionalized organizational structures occurs in part because courts presume that non-discrimination is the norm and, conversely, that discrimination aberrant condition: discrimination exists only when employers or their agents do something that is wrong, unprofessional, and irrational.³³ This presumption, which is common throughout antidiscrimination doctrine, is reflected, for example, in the U.S. Supreme Court's statement in *Furnco Construction Co. v. Waters* that it is only "when all legitimate reasons . . . have been eliminated as possible reasons for the employer's actions" that "it is more likely than not the employer . . . based his decision on an impermissible consideration such as race."³⁴ The legal presumption that discrimination is an aberration that occurs only when an employer is not acting rationally leads courts to look for signs or symptoms of employer "legitimacy" or "rationality." If only "irrational" employers discriminate, and "rational" employers adopt institutionalized structures, then the presence of structures associated with rationality supports an inference of rationality, which in turn supports an inference of non-discrimination.

Judges are likely to be unaware, moreover, of the extent to which organizations decouple formal structures from activities or infuse managerial interests and objectives into the interpretation and implement of formal policies and procedures, and they are not likely to be aware of empirical research questioning the efficacy of structures that appear to be fair and rational (Baron et al. 1991; Edelman et al. 1993; Edelman and Petterson 1999; Kalev et al. 2006). Thus judges are unlikely to recognize instances where employers' legal structures fail to protect legal rights, or in some cases even thwart those rights. Because employers'

³³ This assumption contradicts considerable social science research that suggests that much discrimination is unconscious and unintended (Krieger 1995; Stangor 2000; Banaji, Nosek, and Greenwald 2004; Gaertner and Dovidio 2000; Gaertner and Dovidio 1977; Greenwald and Banaji 1995; Krieger and Fiske 2006; Greenwald and Krieger 2006); built into the structure of society as "institutional racism" (Haney Lopez 2000); or due to structural factors such as the lack of a critical mass of underrepresented employees (Kantor 1977; more cites).

³⁴ 438 U.S. 567, 577 (1978).

legal structures look superficially like legal institutions (organizational policies and rules look like legal rules, grievance procedures look like judicial proceedings, etc) and give organizational governance an aura of rationality, the legality of these structures seems obvious and judges often fail even to question whether these organizational structures actually operate to reduce discrimination (cf. Meyer & Rowan 1977; DiMaggio & Powell 1983). Thus, these structures can create the appearance of compliance even when they fail to achieve legal goals (Edelman 1992).

Lawyers, as well as judges, contribute to the endogeneity of law. Plaintiffs' lawyers help to reinforce judges' assumptions about the fairness and rationality of employers' legal structures when they discourage employees from pursuing their cases because the organization has structures in place that make it look nondiscriminatory (Bisom-Rapp 1999) or when they fail to understand the inadequacies of many organizational structures and to fashion arguments about those inadequacies in court. Defense lawyers participate in the same process when they (increasingly) point to their clients' institutionalized structures as evidence of compliance and cite precedent that legitimates those structures (Bisom-Rapp 1999). Lawyers would, of course, be remiss if they did not take these actions. Nonetheless, it is important to understand how lawyers sound that drumbeat that equates organizational structures with nondiscrimination and, in so doing, help to managerialize the law and to create legal endogeneity. As law increasingly takes its meaning from organizational fields, and specifically from institutionalized organizational structures, law becomes increasingly endogenous.

The Endogeneity of Law

The endogeneity of law, then, occurs as ideas about law and compliance, which have become a managerialized through organizational fields, seep into and become institutionalized within legal fields. Organizational structures that come to be associated with fair treatment and rational governance within organizational fields come to be seen as evidence of compliance within legal fields. Lawyers who represent employers increasingly

reinforce the symbolism of law-like structures within organizations and judges increasingly likely to refer to those structures, to find them relevant to the legal issues, and to defer to those structures without adequate scrutiny. Rather than assessing whether or not discrimination occurred based on the close scrutiny of the facts in each case, institutionalized organizational structures become a shorthand from which judges unwittingly infer nondiscrimination. The problem with this shorthand is that it is often inaccurate: organizational structures may appear to promote fair treatment and rational governance while failing to do so in reality.

The endogeneity of law, moreover, is an iterative process. Every time that a court treats an organizational structure as evidence of legality, those structures acquire greater legal legitimacy, both within organizational communities and in the broader legal community. That legal legitimacy, in turn, encourages further organizational legitimacy and a greater likelihood that the structures will be invoked in court. The iterative nature of the institutionalization process suggests that, *over time, courts should become increasingly likely to infer nondiscrimination from organizational structures.*

The institutionalization of organizational structures in legal as well as organizational fields gives employers a form of power that has not previously been recognized in either the sociology of organizations or the sociology of law. Organization theorists recognize the power of employers over employees within organizations, organizational fields, and society generally (Marx 1954; Clegg 1990; Edwards 1979; Gordon, Edwards, and Reich 1982; Perrow 1986; Pfeffer 1981) but tend to see the legal realm as a neutral terrain for the resolution of disputes (Suchman and Edelman 1996). Sociologists of law pay less attention to the power dynamics within organizations but are more likely to see legal terrain as subject to power, emphasizing organizations' power over individual litigants both in legislatures (Burstein 1985), in the courtroom (Galanter 1974; Albiston 1999; Edelman and Suchman 1999); and in alternative dispute resolution (Edelman and Cahill 1998; Edelman and Suchman 1999). In

each of these settings, organizations tend to prevail over individuals in legal disputes not only because of greater monetary resources, but also because they can manipulate the rules, settle cases that would result in harmful precedent, use long-term strategies, access more specialized lawyers, take advantage of lower start-up costs, and use informal power to influence negotiations. The nature of power in extant accounts, however, is generally more overt – operating through the attributes of actors and, therefore, varying from case to case. The type of power suggested by legal endogeneity theory is far more subtle and affects all actors within organizational and legal fields. As law becomes managerialized by condoning and legitimating organizational structures that symbolize but often fail to achieve legal goals, the power of employers to influence the law increases “under the public radar” and irrespective of the attributes of particular actors.

Hypotheses about Legal Endogeneity

In this section, we discuss hypotheses about legal endogeneity, and more precisely, about the three components of legal endogeneity: *reference* to institutionalized organizational structures in judicial decision; judicial treatment of institutionalized organizational structures as *relevant*; and deference to institutionalized organizational structures. Our hypotheses draw on the neo-institutional theory discussed above (which pertains mostly to the institutionalization of organizational structures over time) and on law and society scholarship (which offers theoretical and empirical accounts of the factors that may explain variation in reference, relevance, and deference) as well as on characteristics of legal doctrine.

Time

As discussed in the previous section, neo-institutional theory suggests that legal endogeneity should increase over time as organizational structures become increasingly institutionalized not only within organizational fields but also within legal fields. As this happens, judges should become more likely to refer to these structures in their written

opinions, to treat these structures as relevant to the legal outcome, and to defer to the structures. This argument suggests that *reference, relevance, and deference should increase over time*. In fact, however, reference may increase over time only to the extent that the structures we are examining become institutionalized during the observation period. Since personnel structures (such as progressive discipline policies) and general employment structures (such as formal pay scales) were well institutionalized in an earlier era (Jacoby 2004; Baron, Dobbin, and Jennings 1986), we expect to see *increases in relevance primarily to compliance structures* (such as anti-discrimination policies).

Plaintiff Characteristics

Extant socio-legal literature suggests that parties with greater social status enjoy considerable advantages in the legal process (Mayhew and Reiss 1969; Galanter 1974; Balbus 1977; Bumiller 1988; Crenshaw 1989; Sarat 1990; White 1990 save file go to top; Williams 1991; Seron and Munger 1996; Albiston 1999). Research shows that minorities and the poor face substantial obstacles in mobilizing legal rights ranging from psychological and structural barriers to filing claims (Bumiller 1988; Felstiner, Abel, and Sarat 1981) to weaker legal counsel (Galanter 1974; Heinz, Nelson, Sandefur and Laumann 2005) to structural aspects of litigation that disadvantage parties that lack social clout (Galanter 1974; Albiston 1999). Formal rights to equality, therefore, always fall far short of their mark when it comes to remedying the social disenfranchisement of minorities, women, and other disadvantaged social groups (Scheingold 1974; Galanter 1974; Tushnet 1984; Crenshaw 1989; Williams 1991; Edelman 1992; Albiston 2005).

Judicial deference is a more subtle process through which those who lack social power may suffer in the legal realm. Many of the organizational structures that organizations create to demonstrate compliance with civil rights law or simply to rationalize their work processes do not in fact provide much benefit to disadvantaged groups (Baron, Mittman, and Newman 1991; Edelman and Petterson 1999; Kalev, Dobbin, and Kelly 2006). To the extent that judges defer to these structures in civil rights cases, they are condoning

structures that have little impact and in some cases even harm minorities and women.

Given the volumes of research that suggest that “the haves come out ahead,” we expect that *deference will be more likely in cases involving female and minority plaintiffs and less likely in cases involving more powerful plaintiffs (government organizations, union members, and managers or professionals).*

Legal Theories

As discussed in Section II, nothing in the text of civil rights laws nor in the legal theories of discrimination that have developed in the courts mandates or even suggests that courts should defer to organizational structures without evaluating the adequacy of those structures. One would expect from a reading of judicial precedent that organizational structures would be referenced most often and would be most relevant to in hostile work environment theory, where legal decisions have made the existence or non-existence of certain employment structures directly relevant to the legal analysis and have encouraged employers to rely on the presence of those structures as evidence of nondiscrimination. Thus, *from legal theory alone, we would predict greater reference and relevance to structures that are invoked in the context of hostile work environment theory.*

From the formal legal theory, however, one would *not* expect reference, relevance, or deference in disparate treatment theory. A sociological approach to legal theories, however, suggests that legal theory may predict legal endogeneity in a different manner. As we discussed in Section II, the central issue in disparate treatment cases is the employer’s intent to discriminate, and the analysis often focuses on whether circumstantial evidence suggests that the employer’s proffered reason for taking an action is a pretext for the illicit use of race, sex, or another protected category (Krieger 1995). Building on neo-institutional theory in sociology, however, we suggested in Section III that by centering attention on intent to discriminate – an unobservable trait – disparate treatment theory provides an opening for organizational structures that symbolize compliance or fair treatment or rational governance to become proxies for a lack of intent to discriminate. As the symbolic value of

these structures comes to be taken for granted, lawyers become more likely to invoke these procedures as evidence of nondiscrimination and judges become more likely to find these structures legally relevant and to defer to them as indicators of compliance. If we are correct, then *judicial deference will be more likely in cases invoking disparate treatment theory than cases invoking other theories of discrimination.*

Judicial Politics

As discussed in Section III, a substantial literature in political science suggests that judges' political preferences are critical to explaining judicial decision-making (Segal and Spaeth 1996, 2002; Baum 1992; Segal and Cover 1989). While socio-legal theory would, broadly speaking, suggest that more conservative judges would tend to favor employers while more liberal judges would tend to favor employees (e.g. Schultz 1990; Krieger 1995), predictions with respect to legal endogeneity go beyond mere political preferences. Existing theories of judicial behavior might suggest that because judicial attention to organizational structures tends to favor employers, especially where those structures symbolize compliance with law but fail to achieve legal ideals, one might expect greater reference, relevance, and deference, among conservative judges. In contrast, legal endogeneity theory predicts that both conservative and liberal judges would be subject to institutionalized ideas about organizational structures, which may reduce the difference among liberal and conservative judges. Thus, we include judicial politics in our models as a control variable.

Other Variables

We control for a number of other variables that might affect reference, relevance, or deference. First, whether organizations are in a goods producing or a service industry because this has been shown to affect organizational behavior in other analyses (Edelman and Petterson 1999; Sutton et al. 1994). We also control for whether the case was a summary judgment (a pre-trial motion where the moving party argues that there are no material issues of fact to be determined at trial and therefore the judge should make a

decision as a matter of law) since different decision-making rules in summary judgment cases might be expected to affect the likelihood of reference, relevance, or deference.³⁵

IV. Methods

To study legal endogeneity, we use data obtained from written judicial opinions in federal civil rights cases. Although reported decisions do not necessarily reflect the actual thought processes of the judges who write them,³⁶ these opinions comprise the existing doctrinal environment of organizations and of prospective civil rights litigants. It is the written opinions of courts (and not the unobserved thought processes of their authors) that influence how lawyers, litigants, and other judges understand law and how these actors formulate future legal arguments.

We include opinions resulting from cases brought in civil rights cases in the federal district and circuit courts from 1965-1999. We exclude Supreme Court cases both because of their relatively small numbers and because we treat these cases as independent variables in order to examine their effect on judicial reasoning in the circuit and district courts. Although most legal analyses focus on Supreme Court decisions, with some attention to appellate (circuit court) decisions, it is the lower courts that are sociologically most interesting. District court decisions constitute the vast majority of federal court decisions and they also provide the greatest opportunity for social life to influence law. It is in this locale that legal doctrine meets society most directly as lawyers and parties contest facts as well as law and make critical decisions about what types of actions are legally relevant, what legal rights to mobilize, and what types of defenses to advance. Appellate court decisions are also numerous, and, although appellate opinions focus more on legal concepts than on factual context, appellate decisions

³⁵ For example, judges do not make credibility determinations when ruling on summary judgment motions, and, therefore, undisputable facts deemed material, such as the presence or absence of an organizational structure, may carry even more weight at the summary judgment stage.

³⁶ As discussed above, a large literature on judicial behavior suggests that judges' written decisions are influenced by their (unstated) political views, attitudes, and role conceptions (see, e.g., Clayton & Gillman 1999; Segal & Spaeth 1993).

provide a critical terrain for the negotiation of social norms, policy considerations, and understandings of law. Thus our focus is on the making of law in the lower federal courts.

We focus on opinions resulting from cases brought under the following federal civil rights statutes: Title VII of the Civil Rights Act of 1964³⁷, the Age Discrimination in Employment Act of 1967³⁸, the Equal Pay Act of 1963,³⁹ and two post-civil war civil rights statutes: 42 U.S.C. Section 1981 and 42 U.S.C. Section 1983. These civil rights statutes are similar in structure in that each prohibits discrimination against a class or classes of employees. We did not include opinions resulting from cases brought under the Americans with Disabilities Act of 1990⁴⁰ (or its federal sector equivalent, the Rehabilitation Act of 1973)⁴¹ because the accommodation requirement made it difficult to discern deference in a standard manner across opinions.⁴² We also excluded opinions resulting from cases brought under the Family and Medical Leave Act of 1993⁴³ due to complicated issues involving notice. Many these solutions involve claims brought under multiple statutes; we included opinions that involved any of these statutes (but coded only the portions of each opinion that pertain to the statutes listed above).

Sampling Frame and Sample Selection

We used the WESTLAW⁴⁴ database to select all reported⁴⁵ federal employment opinions decided by the U.S. district and circuit courts between 1965 and 1999, which yielded

³⁷ 42 U.S.C. §2000 et seq.

³⁸ 29 U.S.C. §621 et seq.

³⁹ 29 U.S.C. §206

⁴⁰ 42 U.S.C. §12101 et seq.

⁴¹ 29 U.S.C. §791 et seq.

⁴² Our codebook includes items pertaining to the Family and Medical Leave Act and the Americans with Disabilities Act because we originally planned to include those cases. We have left those items in the codebook to facilitate later studies that may include these statutes.

⁴³ 29 U.S.C. §2001 et seq.

⁴⁴ WESTLAW is one of two comprehensive databases of judicial decisions. We chose WESTLAW over LEXIS primarily because it was easier to import the data into SAS and to order the cases chronologically.

⁴⁵ Not all cases are reported. When a court renders an opinion, it may order that the opinion be “published” in official case reports, it may make the opinion generally available for public distribution but specify that it be considered legally “unpublished” and therefore not cited as precedent, or it may simply file the opinion, in which case it generally does not appear either in official reporters or in on-line databases. The Westlaw federal database is based on extensive efforts to include all “published” and (legally) unpublished cases (Edelman et al. 1999). The only way to include unreported cases would be to send someone to each jurisdiction to collect them. Such an approach is not only impractical, it is unnecessary for our study since unreported cases would not generally be read and would not be cited by lawyers and judges.

34,578 district court opinions and 16,604 circuit court opinions. We intentionally used a broad search term⁴⁶ in order to include all possible federal civil rights decisions issued under the four acts listed above. Since the number of opinions in the universe rises dramatically over time and we wanted a sample that reflected the incidence of opinions over time in the district and circuit courts, respectively, we put all opinions in chronological order within court, selected a random starting number, and then selected every 50th opinion within each court. This generated a sample of 332 circuit court opinions and 692 district court opinions.

Once the initial sample was selected, we then began a process of “qualifying” the opinions into our final sample. Because our search term was over-inclusive, some opinions initially selected were not actually civil rights opinions but were included because they mentioned a civil rights statute, often in comparison to the statute principally at stake in the case. Qualification involved reading each opinion and then rejecting it if any of the following criteria applied: the decision was not principally about civil rights; the decision did not involve adjudication on the merits of the case⁴⁷; or, the case arose from an appeal of a decision by the

⁴⁶ Our WESTLAW search term was: (("title vii") ("age discrimination" /3 "employment act") ("rehabilitation act")("equal pay act")(american! /3 disabilit! /1 act)(famil! /3 "medical leave act") (fmla % (marin! lien))) & <date restriction, from 1/1/1965-12/31/1999>. This search was performed separately in Westlaw’s Court of Appeals database (CTA) and in its District Court database (DIST).

⁴⁷ Cases are considered adjudicated on the merits if the following two criteria are met. First, as a procedural matter, they must involve one of the following:

- Bench Trial (FFCL: Findings of Fact and Conclusions of Law), Appeal from Bench Trial
- Directed Verdict, Appeal from Directed Verdict
- Enforcement Action: consent decree or judgment
- Judgment as a matter of law (JNOV), Appeal from judgment as a matter of law
- Jury Verdict, Appeal from Jury Verdict
- Preliminary Injunction, Appeal from Preliminary Injunction
- Summary Judgment brought by Defendant
- Summary Judgment brought by Plaintiff
- Summary judgment, Appeal From Grant of, to Defendant
- Summary judgment, Appeal From Grant of, to Plaintiff
- Summary judgment, cross motions

Second, a decision does not represent a “merits adjudication” for study purposes if the court’s decision is based on any of the following grounds:

- Whether the defendant is a covered entity;
- Whether the plaintiff has standing to sue;
- Issues regarding the timeliness of the plaintiff’s charge or suit;
- Issues regarding compliance with other prerequisites to suit;
- Whether the defendant is protected by sovereign, qualified, or 11th Amendment immunity;
- Issue preclusion (collateral estoppel) or claim preclusion (res judicata)
- Whether certain evidence is admissible or should have been admitted; or
- Decision deals only with calculation of damages.

Merit Systems Protection Board.⁴⁸ If none of these criteria applied, the opinion was “qualified” into the final sample. If one of these criteria applied, then the coder recorded a rejection code (showing which criterion caused rejection), replaced the rejected opinion with the next opinion (chronologically) in the sampling frame, and repeated the qualification procedure until an opinion was selected into the sample.

Coding

Our coding scheme includes data at both the opinion level and the organizational structure level. At the opinion level, we collected data on the court, judges, plaintiff, defendant, statutory claims involved in the case, challenged actions, legal theories on which the claims were based, and a variety of other factors. Most importantly, we coded all organizational structures that were mentioned in the judicial decision. We coded a total of 45 categories of structures (shown in Table 1), three of which are residual categories. The 45 types of structures can be grouped into three broad categories. *Compliance structures* refer to structures that are specifically designed to comply with law or to symbolize compliance with law, such as affirmative action offices and grievance procedures. *Personnel structures* are those structures generally associated with the rational governance of human resources such as job postings, progressive discipline policies, and employee handbooks. *General business structures* refer to structures related to general business practices other than governance such as pay plans, formal task allocation procedures, and tests for job allocation.

Then, for each structure referred to, we coded a variety of structure-level characteristics, including the causes of action and legal theories to which the structure was linked, whether and how the structure was relevant to the legal outcomes, who won on the

⁴⁸ The Merit Systems Protection Board was established by the Civil Service Reform Act of 1978 to administer the Federal Government's merit-based system of employment. We exclude these cases because they may involve different considerations than other types of EEO cases.

claim to which the structure was relevant, and whether and the court discussed the adequacy or quality of the structure.⁴⁹

Given the complexity of our coding scheme, we took numerous measures to ensure coder reliability. First, we developed and refined the coding scheme (in particular the 45 organizational structures and structural characteristics) through an iterative procedure involving trial coding of opinions by five researchers over a period of about one year.⁵⁰ Once the data were coded, we also ran a series of reliability checks to ensure that there were no systematic differences among the coders.

We also coded several variables from supplemental data. Employee occupation was recorded from the decisions and then coded (along with occupational prestige) from the Bureau of Labor Statistics Standard Occupation Classification System. Employer industry was recorded and the coded from the Bureau of Labor Statistics Standard Industrial Classification System. To code judicial politics, we used data on judges from the Federal Judicial Center.

Measures

Dependent Variables

As discussed earlier, legal endogeneity is measured by its three observable manifestations: reference, relevance, and deference. Reference is operationalized as a dummy variable representing whether or not there is any explicit mention of an

⁴⁹ The five researchers included the two principal investigators (Edelman and Krieger) as well as three graduate/law students. Two of the students (Albiston and Mellema) were Ph.D. students who already had JDs and expertise in EEO law; Mellema is also an EEOC administrative judge. Both have since completed their doctorates and are coauthors on this article. The third student was a JD student who had excelled at EEO law and is now practicing law.

⁵⁰ Each week, five opinions were selected, and all the researchers independently designated the organizational structures at issue, and coded them. Discrepancies were discussed and used to refine the coding scheme. This process was repeated until we came up with a set of structure categories and other codes that could be reliably coded independently by the five researchers. One of those researchers then completed all of the case qualification and circuit court coding herself and, with one of the principal investigators, supervised and trained the district court coders. Each of the district court coders were required to have completed a course in EEO law and to have completed at least 100 hours of coding training. During the training, coders practice coded opinions that had already been coded by trained coders. They did not begin actual coding until they could accurately and consistently reproduce the coding of previously coded opinions. For the district court opinions, 5% of the cases were randomly selected and recoded by a second coder. Discrepancies were corrected, examined by the principal investigators, and used to inform the coders.

organizational structure or practice in the opinion. Relevance is measured as a dummy variable representing whether or not the court either considers the presence of an organizational structure to be evidence of nondiscrimination. Since the court cannot consider the presence of the organizational structure without referring to it, relevance cannot exist without reference. Deference is operationalized as a dummy variable that is coded "1" if relevance exists and is one of the following conditions exist: (1) the opinion reflects no consideration of the quality or adequacy of the organizational structure; (2) the opinion explicitly states that the organizational structure is inadequate but that the inadequacy does not matter; (3) the opinion states that the adequacy of the organizational structure was considered but there are clear indicators that the court gave only superficial consideration to the question of adequacy without engaging in meaningful scrutiny.⁵¹

Independent Variables:

Plaintiff Characteristics: Plaintiff characteristics are coded from the written opinions. While it was always possible to code the plaintiff's sex and whether the plaintiff was a government or public interest organization, and information on the plaintiff's occupation was generally available, information on the plaintiff's race was often available in all cases involving claims of race discrimination but was often not mentioned in other cases. The race dummy variable, therefore, should be understood as representing an explicit mention that the plaintiff was a racial or ethnic minority (in comparison to both explicit mention that the plaintiff was white and cases where there was no mention of the plaintiff's race or ethnicity). Similarly, union member is a dummy variable representing an explicit mention that the plaintiff was a union member (in comparison to both explicit information that the plaintiff was not a union

⁵¹Deference were coded as "1" under the third condition only if certain factors were present that indicated that, in spite of general language to the contrary, the court did not engage in meaningful scrutiny of the policy/structure for bias. These factors included (1) the court's disregard of evidence that suggested that the policy was applied unequally to employees of different protected classes; (2) the court's disregard of evidence that ignored bias at the lower level(s) of a multi-level structure; (3) the court's reference to the importance of "management prerogative" while dismissing evidence of potential bias in the operation of the policy/structure. Two coders had to agree that these conditions were met in order for the third condition to be met. Of the structures that the opinion stated were adequate, about 20% fell into this category. We also ran our analyses without coding these structures as having been deterred to, and there were no substantial differences in the results.

member and cases where that information was unavailable). The race and union member variables, then, capture the salience to the case of being a racial or ethnic minority or a union member. We also coded the plaintiff's occupation and prestige scores using the Bureau of Labor and Statistics occupation and prestige scores. Plaintiff occupation and prestige had no impact in any of our models and are not included in the tables presented here.

Organization Characteristics: The industry of the employer was coded from the Bureau of Labor and Statistics Standard Industrial Classification Codes. The dummy variable "goods producing industry" measures whether or not organizations are in industries associated with manufacturing as opposed to service.⁵²

Legal Theories Applied to Structure: The Disparate Treatment and Hostile Work Environment dummy variables measure whether or not the court discusses the particular structure in the context of disparate treatment or hostile work environment theories, respectively. These are linear combinations of the estimated effects due to the legal theory used in the case and the estimated effect due to the particular structure being discussed in the context of that legal theory.⁵³

Judicial Politics: To measure judicial politics, we use the judicial common score method for calculating judges' political orientations proposed by Giles, Hettinger and Peppers 2001, which takes into account the fact that senators of the President's political party are active participants in the selection of lower court judges.⁵⁴ The judicial common space scores range from -1 for most liberal to +1 for most conservative.

⁵² Using the two digit SIC codes, traditional goods producing industries (and related extractive industries) include 12 (Agriculture, Forestry, Fishing and Hunting); 21 (Mining); 22 (Utilities); 23 (Construction); 31 (Manufacturing).

⁵³ For example, in a disparate treatment case, when a specific structures (such as a grievance procedure) is discussed in the context of the employer's intent to discriminate under the disparate treatment theory, the total estimated disparate-treatment-applied-to-structure effect is the sum of the disparate treatment case-level effect plus the structure-discussed-in-the-context-of -intent structure level effect.

⁵⁴ Giles et al. (2001) propose a method of measuring judicial politics that makes use of the preference scores developed by Poole and Rosenthal (1997) and Poole (1998), which measure senators' and

Summary judgment: This is a dummy variable that measures whether or not the decision is a summary judgment.

Statistical Models of Legal Endogeneity

We use a multivariate probit model to assess the impact on these probabilities due to our set of explanatory factors, including plaintiff and organizational characteristics, legal theories applied in the case and to the structure, judicial politics, and other court case related characteristics. Let Y_{ijt}^* be an unobserved continuous measure of the degree of legal endogeneity for structure i in court case j at time t . Y_{ijt}^* is comprised of latent reference, relevance, and deference components such that $Y_{ijt}^* = [Y_{ijt}^{\text{Ref}}, Y_{ijt}^{\text{Rel}}, Y_{ijt}^{\text{Def}}]$ with ordered constraint $Y_{ijt}^{\text{Ref}} < Y_{ijt}^{\text{Rel}} < Y_{ijt}^{\text{Def}}$.

We model each of these components as a function of the observed independent variables, structure types and time, and the structure-time interaction to capture the across-structure differences in trends indicated above. Let X_{ijt} represent the set of independent variables measured on structure i and court case j at time t . Further, let σ_i be the main effect for structure i , τ_t be the main effect for time t , and γ_{it} be the interaction effect for structure i at time t . From this, the multivariate probit model is given by

presidents' political orientations based on their voting records. Poole (1998) then developed "common space scores" by placing the presidents and senators on a metric that is common across time and institutions. The use of common space scores to measure judicial preferences has been shown to be more accurate than relying on the party affiliation of the appointing president (Giles et al. 2001). It takes into account the recognized role of senators in judicial appointments. Where both senators are of the same party as the president, the judge's score is calculated as the average of the senators' common space scores, which range from -1 (most liberal) to +1 (most conservative). Where only one senator is of the same party as the president, the judge's score is assigned as the common space score of that senator. Where neither senator is out of the same party as the president, the judge's score is assigned as the president's common space score. Michael Giles generously provided us with scores for circuit court judges, which we merged with our database. For district court judges, we used data on judges from the National Judicial Center and Giles' methodology to calculate judges' political orientation scores.

$$\begin{aligned}
Y_{ijt}^{\text{Ref}} &= X_{ijt} \beta^{\text{Ref}} + \sigma_i^{\text{Ref}} + \tau_t^{\text{Ref}} + \gamma_{it}^{\text{Ref}} + \varepsilon_{ijt}^{\text{Ref}} \\
Y_{ijt}^{\text{Rel}} &= X_{ijt} \beta^{\text{Rel}} + \sigma_i^{\text{Rel}} + \tau_t^{\text{Rel}} + \gamma_{it}^{\text{Rel}} + \varepsilon_{ijt}^{\text{Rel}} \\
Y_{ijt}^{\text{Def}} &= X_{ijt} \beta^{\text{Def}} + \sigma_i^{\text{Def}} + \tau_t^{\text{Def}} + \gamma_{it}^{\text{Def}} + \varepsilon_{ijt}^{\text{Def}}
\end{aligned} \tag{1}$$

where the superscripts Ref, Rel, and Def indicate equation-specific items for reference, relevance, and deference components respectively; the β are vectors of model estimates related to the sets of independent variables in X_{ijt} , including the usual constant term; and the ε_{ijt} represent unmeasured characteristics. For the probit specification, we assume the ε_{ijt} are normally distributed with zero mean and unit variance. In addition, given the above results indicate the linear trend model well represents the data, we constrain the time effects τ_t and γ_{it} accordingly. We also constrain the structure-specific effects σ_i and γ_{it} to contrast compliance, personnel, and business practices structures.

To estimate model parameters in Eq. 1, each of the components $[Y_{ijt}^{\text{Ref}}, Y_{ijt}^{\text{Rel}}, Y_{ijt}^{\text{Def}}]$ of the latent legal endogeneity variable Y_{ijt}^* is related to observed measures of reference, relevance, and deference respectively. Recall that *reference* is observed when a legal decision refers to an institutionalized organizational structure; *relevance* is observed when a structure takes on legal significance and helps the judge to evaluate the organization's compliance; *deference* is observed when courts, having found the presence or absence of organizational structures to be relevant to the question of whether organizations were discriminated, fail to scrutinize the quality or adequacy of those structures or fail to consider the implications of inadequate organizational structures. Let $[D_{ijt}^{\text{Ref}}, D_{ijt}^{\text{Rel}}, D_{ijt}^{\text{Def}}]$ be the set of observed dummy variables indicating whether, respectively, reference, relevance, and/or deference is observed. Each of the latent components $[Y_{ijt}^{\text{Ref}}, Y_{ijt}^{\text{Rel}}, Y_{ijt}^{\text{Def}}]$ are then related to the set of observed dummy variables $[D_{ijt}^{\text{Ref}}, D_{ijt}^{\text{Rel}}, D_{ijt}^{\text{Def}}]$ such that

$$D_{ijt}^k = \begin{cases} 1 & \text{if } Y_{ijt}^k > 0 \\ 0 & \text{if } Y_{ijt}^k \leq 0 \end{cases} \quad (2)$$

where $k = [\text{Ref}, \text{Rel}, \text{Def}]$.⁵⁵ Finally, to enforce the property that $Y_{ijt}^* = [Y_{ijt}^{\text{Ref}}, Y_{ijt}^{\text{Rel}}, Y_{ijt}^{\text{Def}}]$ with ordered constraint $Y_{ijt}^{\text{Ref}} < Y_{ijt}^{\text{Rel}} < Y_{ijt}^{\text{Def}}$, we set $\rho\{\varepsilon_{ijt}^{\text{Ref}}, \varepsilon_{ijt}^{\text{Rel}}\} = \rho\{\varepsilon_{ijt}^{\text{Ref}}, \varepsilon_{ijt}^{\text{Def}}\} = \rho\{\varepsilon_{ijt}^{\text{Rel}}, \varepsilon_{ijt}^{\text{Def}}\} = 1$ where $\rho\{\cdot, \cdot\}$ represents the correlation function.⁵⁶ Given these constraints, the estimated effects in Eq. 1 above can be viewed as the influence of each independent variable on the unconditional odds of reference, relevance, and deference respectively.

While estimates of parameters in Eq. 1 give effects on the unconditional likelihoods of reference, relevance, and deference, also available are effects on the conditional likelihoods of (1) relevance given reference and (2) deference given both relevance and reference. Given model constraints, these conditional effects are simple additive functions of the model parameters and given by

$$E\{Y_{ijt}^{\text{Rel}} | Y_{ijt}^{\text{Ref}}\} = X_{ijt}(\beta^{\text{Rel}} + \beta^{\text{Ref}}) + (\sigma_i^{\text{Rel}} + \sigma_i^{\text{Ref}}) + (\tau_t^{\text{Rel}} + \tau_t^{\text{Ref}}) + (\gamma_{it}^{\text{Rel}} + \gamma_{it}^{\text{Ref}}) \quad (3a)$$

$$E\{Y_{ijt}^{\text{Def}} | Y_{ijt}^{\text{Rel}}, Y_{ijt}^{\text{Ref}}\} = X_{ijt}(\beta^{\text{Def}} + \beta^{\text{Rel}} + \beta^{\text{Ref}}) + (\sigma_i^{\text{Def}} + \sigma_i^{\text{Rel}} + \sigma_i^{\text{Ref}}) + (\tau_t^{\text{Def}} + \tau_t^{\text{Rel}} + \tau_t^{\text{Ref}}) + (\gamma_{it}^{\text{Def}} + \gamma_{it}^{\text{Rel}} + \gamma_{it}^{\text{Ref}}) \quad (3b)$$

Eq. 3a shows that the effect of any independent variable on the *conditional* likelihood of relevance *given* reference is equal to the sum of that independent variable's reference and relevance model coefficients.⁵⁷ Similarly, the effect of any independent variable on the *conditional* likelihood of deference *given* relevance *and* reference is equal to the sum of that independent variable's reference, relevance, and deference model coefficients. We make use of this property for interpretation of various results below.

⁵⁵ This is the standard probit formulation (see, e.g., Maddala 1983; Greene 1993; Long 1997)

⁵⁶ Given the data are such that relevance cannot be observed without first observing reference, and deference cannot be observed without first observing reference and relevance, these constraints on the correlations of the errors ensures the ordered constraint adheres in the statistical model. This constrained multivariate model can be viewed as a generalization of the typical ordered probit model, where here parameter estimates are allowed to differ at each threshold. At the same time it is a restricted version of the more general multivariate probit model in that the ordered constraint $Y_{ijt}^{\text{Ref}} < Y_{ijt}^{\text{Rel}} < Y_{ijt}^{\text{Def}}$ is enforced both in the statistical model and in the data.

⁵⁷ Note that the expected value notation in Eqs. 3a and 3b translate directly to likelihoods and probabilities in the probit model specification.

VI. Results

Time Trends in Legal Endogeneity

As discussed in Section III, legal endogeneity theory posits that as organizational structures become increasingly institutionalized in organizational and legal fields, we should observe an increase over time in the likelihood of reference to, relevance of, and deference to those organizational structures. Our results are in general consistent with this hypothesis.

Figures 1 and 2 show, for the district court and circuit court samples respectively, the distribution of reference, relevance, and deference over time for the three types of organizational structures: compliance, personnel, and business practices structures. For presentation purposes only, we use five-year moving averages to smooth the graphs in Figures 1 and 2.⁵⁸ For each graph, the solid, long-dashed, and short-dashed lines refer to the probabilities for reference, relevance, and deference respectively.

Table 2 gives model statistics for the saturated (i.e., observed), cubic, quadratic, linear, and no-trend models separately for the district and circuit court samples. Likelihood ratio tests (under “LR Test” in Table 2) comparing each model to its immediate parent model and the log-likelihood based BIC statistic (under “LL BIC” in Table 2) show that, for both samples, there is no evidence indicating we need consider anything beyond a linear specification to model trends in reference, relevance, and deference for these structures.

More precisely, the BIC statistic supports the linear trend models for compliance and business structures in the district court sample, as well as for personnel structures in the circuit court sample. Further evidence for these linear trend models over the more general quadratic trend model is suggested by the likelihood ratio tests, showing no significant gain for the quadratic over the linear specification at the .01 level or greater. On the other hand, the BIC statistic supports the no-trend model for personnel structures in the district court

⁵⁸ Because of this, our graphs start at 1971 for the district court data and 1973 for the circuit court data. Calculation of the five-year moving averages, however, use data over the entire time period.

and for compliance and business structures in the circuit court. Further evidence for these no-trend models over the more general linear trend model is given by the likelihood ratio tests, showing no significant gain for the linear over the no-trend specification at the .01 level or greater. Thus, to draw comparisons on trends across structures and samples in the remainder of our analyses, we make use of the linear model in trends, the more general of the two supported trend models in the data.

Table 3 gives results for the linear trend models for the district and circuit court samples, as well as between-court comparisons.⁵⁹ Turning first to the district court results (Figure 1 and Table 3), we see significant increases over time in reference (5%, $p < .05$), relevance (10%, $p < .01$), and deference (4%, $p < .05$) to compliance structures, although relative to small over-time average probabilities (0.09, 0.02, and 0.01 for reference, relevance, and deference respectively). Nevertheless, since compliance structures are the structures that are the most visible symbols of organizations' compliance with civil rights laws (e.g. antidiscrimination rules, grievance procedures), the results on these trends provide strong support for legal endogeneity theory.

For personnel structures, which symbolize rationality and fairness (e.g. formal personnel policies, progressive discipline policies), we do not see significant increases over time, but we do see higher over-time averages. In fact, personnel structures exhibit the highest overall rates of reference, relevance, and deference in the district courts (0.54, 0.11, and 0.08 for reference, relevance, and deference respectively). The data also show significant increases over time in relevance (4%, $p < .01$) and deference (5%, $p < .01$), but not reference, to general business structures in the district courts. These results are generally supportive of legal endogeneity theory, since they suggest that courts are most likely to defer to structures that symbolize rational governance.

⁵⁹ These models are based on a reduced form of the probit model specification given above; one that includes only time trend effects interacted by the three structure types (specifically, the σ_i , τ_i and γ_{it} parameters). See discussion on Eq. 1 for details.

Although the lack of increase in reference to personnel structures and general business structures appears inconsistent with the predictions of legal endogeneity theory, most of the personnel and business structures were actually institutionalized well before the period we study. This is in part due to employers' response to the threat of unionization and in part due to the general transformation of work in the twentieth century (Jacoby 2004; Baron, Dobbin, and Jennings 1986). Thus, reference to these structures had already reached a relatively high level prior to the 1970s.

Turning to the circuit court data, shown in Figure 2 and Table 3, we see that there are no significant trends for reference to any type of structure in the circuit courts. As with the district courts, the lack of increase in reference to personnel and general business structures can be explained by their previous institutionalization. For compliance structures, the estimate suggests a 3% annual increase in reference to compliance structures. The lack of a significant effect here may be due to high sampling variability in the early portion of our time frame, giving rise to a relatively high standard error for this estimate.

However, we do find a significant positive trend in relevance for personnel structures, and most importantly, significant positive trends in relevance and deference to both compliance and personnel structures. Specifically, there has been an 8% per year ($p < .05$) increase in the odds of relevance to compliance structures and a 5% per year ($p < .05$) increase in those odds for personnel structures. Even more importantly, there has been a 17% per year increase ($p < .1$) in the odds of deference to compliance structures and a 10% per year increase ($p < .1$) in those odds for personnel structures. These findings strongly support the hypothesis of increasing legal endogeneity over time.

Table 3 also reveals significant differences between the district and circuit court samples. The significant between-court differences in the intercepts for reference ($p < .01$) and deference ($p < .01$), coupled with no significant differences in trends, suggests that the overall

levels of reference and deference are significantly higher in the district courts.⁶⁰ However, when considering business structures only, there is significantly less deference in the district courts compared to the circuit courts ($p < .1$). The only significant across-court difference in trends is in relevance to business structures, where district courts exhibit significantly higher (positive) trends when compared to the circuit courts ($p < .05$).

Overall, the graphs shown in Figures 1 and 2, together with the linear trend models reported in Table 3, offer support for the hypothesis that law is becoming more endogenous over time. Although we do not see an increase in reference, relevance, and deference for *every* type of organizational structure, we do see upward trends. This is especially apparent in the case of judicial *deference* to organizational structures, which is the clearest indication of legal endogeneity. Judicial deference increases significantly over time for compliance and business structures in both the district and circuit courts and for compliance and personnel structures in the circuit courts, with the increases in judicial deference ranging from four to seventeen percent each year. The relevance of organizational structures increases significantly over time for two of the three types of structures in each court. The results for reference to organizational structures are less consistent with our predictions since the only significant result is for compliance structures in the district courts. However this finding can be explained by the fact that personnel and business structures were well institutionalized in many organizations prior to the time we study.

Figures 1 and 2 suggest, moreover, that deference appears in the district courts about a decade before it appears in the circuit courts, for each type of structure. This finding suggests that as organizational structures become more institutionalized, it is the lower courts – where employers’ arguments about the facts of the case are given the most play – where judges are most likely to accept the symbolism of structures-as-compliance without

⁶⁰ As always, interpretations of the intercepts and differences in intercepts should be accompanied with a considerable amount of caution. Importantly, what allows us to make this statement regarding the differences in these intercepts is the lack of any between-court differences in trends for reference and deference, coupled with the main effects being deviations from the overall average. Were this not the case, then we could not conclude as we do with respect to differences in the intercepts.

scrutinizing the adequacy of those structures. In contrast to the formal legal model in which the higher courts set precedent and the lower courts follow their lead, our findings suggest not only that legal meaning derives in part from organizational fields but also that lower courts may be the first to incorporate organizational institutions into judicial reasoning. To further discern the origins of legal endogeneity, we now turn to our statistical models of reference, relevance, and deference.

Determinants of Legal Endogeneity

In this section we present findings from our multivariate probit models of legal endogeneity, which test the theoretical arguments advanced in Section III. Tables 4 and 5 give results for the district and circuit courts, respectively. In each table, results for reference are given in the first set of columns, followed by those for relevance and then deference. Within each, for inferential purposes, probit model estimates are given along with their standard errors. For interpretational purposes, approximate odds ratios are given using standard formulae translating probit coefficients to the logistic scale, and then exponentiating.⁶¹

Reference

Here we examine the impact of various factors on reference to organizational structures, the earliest stage of legal endogeneity, which indicates that these structures have entered the legal lexicon. Reference is a necessary precondition to relevance and deference.

Plaintiff and Organization Characteristics: In the district courts, as shown in Table 4, plaintiff and organizational characteristics tend to have the largest influence on the odds a

⁶¹ It is well known that the probit and logistic distributions differ by a scale factor of $\pi 3^{-0.5}$, and that logistic and normal curves become, for practical purposes, indistinguishable when accounting for this scale factor. Multiplying the probit coefficient by $\pi 3^{-0.5}$ translates it to an approximate logit scale. While exponentiating this product does not strictly translate into a constant odds ratio effect on an outcome from a probit specification, it nevertheless allows for an approximation and interpretation of probit coefficients on the odds scale.

structure will be referenced. For example, an identified union member plaintiff, as opposed to all other plaintiffs, significantly increases the odds of reference, relative to no structure being referenced, by about 3 (3.09; $p < .01$).⁶² Similarly, a managerial/professional plaintiff significantly increases the odds of reference by nearly two (1.84; $p < .05$). The impact of or an organization in a goods producing industry increases the odds that a structure will be referenced by a slightly less than 2 (1.80 $p < .10$). Finally, gender and minority status combine such that, when compared to non-minority males, non-minority female plaintiffs significantly increase the odds of reference by a factor of nearly two and a half (2.46, $p < .01$), minority female plaintiffs by a factor of more than two and a quarter (2.16, $p < .01$)⁶³, and minority male plaintiffs by a factor of more than five (5.13, $p < .01$).

Similarly, in the circuit courts, Table 5 shows that, of the plaintiff and organizational characteristics, union membership has the largest impact on reference, increasing by over four times the odds that a structure is referenced (4.35, $p < .01$). Government and public interest organization plaintiffs increase the odds of reference by over two and one half times (2.77, $p < .05$), as do goods producing organizations (2.79, $p < .01$). Managerial and professional plaintiffs increase the odds of reference by about two (2.25, $p < .05$). Finally, when compared to non-minority male, minority male plaintiffs increase the odds of reference by almost three (2.80, $p < .01$), and minority female plaintiffs by over seven (7.18) in the circuit court sample. Non-minority females, on the other hand, show no significant difference from non-minority males in the odds of reference in the circuit courts.

Legal Theories: Estimates for the effects of different legal theories on reference are with respect to court cases in general: these values reveal the estimated relative frequencies

⁶² When interpreting these approximate odds ratios, from this point on in the text we do not use this full language, as it can be cumbersome. Instead, we use reduced phrasing of the sort “an identified union member plaintiff increases the odds of reference by almost two and a quarter.” We include this note here to ensure no misinterpretation of these approximate odds ratios throughout the remainder of the paper.

⁶³ This value is obtained by adding the Female, Minority, and Minority Female estimates, and translating that sum to the approximate odds ratio.

with which different legal theories are present in cases where structures are referenced.⁶⁴ Because of that, these factors do not take on the same type of explanatory status as do the other independent variables in the model. Specifically, in the district court sample, as shown in Table 4, structures are *least* likely to be discussed in the context of hostile work environment theory (0.27, $p < .01$), followed by disparate treatment theory (0.37, $p < .01$), and then all other legal theories. By contrast, in the circuit court sample, as shown in Table 5, structures are *most* likely to be discussed in the context of hostile work environment theory (2.59, $p > .05$), followed by all others. The difference is probably due to the fact that reference to institutionalized structures occurs at higher levels, earlier, in the district courts, before hostile work environment theory takes hold. By contrast, there is more reference later in the circuit courts at a time when hostile work environment theory becomes more prevalent.

Types of Structures: Consistent with the time trend models discussed above, the multivariate probit models exhibit the pattern in the district courts that personnel structures are most likely to be referenced, followed by general business structures and then by compliance structures. However, when controlling for these additional factors, we find in the multivariate models evidence for increasing odds of reference for both compliance and personnel structures over this time frame. From these results we find that the odds of reference for compliance and personnel structures is increasing at 9% and 7% per year, respectively. Given that, on average, personnel structures are far more likely to be referenced than any other type of structure (compare probabilities of reference across graphs in Fig. 1), this suggests ever higher increases in absolute prevalence of reference to personnel structures in the district courts. In the circuit courts, the odds that personnel structures will be referenced is significantly increasing over this time period by a factor of 10% per year (1.10, $p < .01$).

⁶⁴ Importantly, these refer to the estimated relative frequencies in the context of this statistical model. Partly for that reason, these estimates are unlikely to be equal to the observed marginal odds, as they would in the model with only the legal theories indicator variables included.

Other Case Characteristics: Judicial politics has no impact on the odds that a structure will be referenced in either the district or circuit courts. Summary judgment does have a statistically significant effect on the likelihood of reference in the circuit courts. In these cases, as shown in Table 5, the presence of a summary judgment depresses the odds that a structure will be referenced by about one-half (.51, $p < .05$). The differences in reference between the district and circuit courts with respect to summary judgment is probably due to the fact that summary judgment has different significance for judging in the two courts. In district courts, the judge is trying to establish a record that will minimize the likelihood of reversal at the appellate level. In the circuit courts, it is unlikely that summary judgments would be reviewed by a higher court. Thus, one is more likely to see a more detailed discussion of the facts, including organizational structures, at the district court level.

Relevance

Relevance represents an intermediate level of legal endogeneity. Our interest is the impact of plaintiff and defendant characteristics, legal theories, and types of structure on the odds that judges will treat the presence or absence of institutionalized organizational structures as relevant to the legal outcome.

Plaintiff and Organizational Characteristics. Plaintiff (employee) and defendant (employer) characteristics have very little impact on relevance. In the district courts (Table 4), the only significant effect is due to a minority plaintiff, where minority plaintiffs (both men and women) significantly increase the odds of relevance by seventy-five percent (1.75, $p < .01$) while union member plaintiffs decrease the odds of relevance by about one-half (.52, $p < .05$). In the circuit courts (Table 5), the only significant result is where structures are referenced in cases involving plaintiffs who are union members; judges are 48% less likely than in other cases to see structures as relevant (0.52, $p < .01$). This is probably due to the fact that the structures we study are generally more prevalent in unionized organizations,

but their prevalence would not necessarily make them more relevant. Both these findings are consistent with the hypothesis that legal endogeneity is more likely in cases involving plaintiffs with less social clout.

Legal Theories. Our findings for legal theories support our hypothesis that judges are likely to find organizational structures relevant to the legal outcome either where doctrine has developed in a way that makes organizational structures relevant (as in hostile work environment cases) or in cases where the judge is faced with determining the employer's intent (as in disparate treatment cases). In the district courts (Table 4), judges see structures as relevant approximately three times more frequently in the context of both disparate treatment theories (2.57, $p < .01$) and hostile work environment theories (3.36, $p < .01$) when compared to all other legal theories. In the circuit courts (Table 5), the findings are similar but much stronger. Judges are more than 18 times more likely to see structures as relevant in disparate treatment cases (18.61, $p < .01$) and about five times more likely in hostile work environment cases (5.18, $p < .01$), in comparison to all other legal theories.⁶⁵

Types of Structures. In the district courts (Table 4), controlling for other variables in the model, the odds that judges see compliance structures as relevant have been increasing over this time frame at about eight percent per year (1.08, $p < .05$). The time trends for personnel and business structures are not statistically significant. In the circuit courts (Table 5), when other variables are controlled, estimates on trends indicate there is no linear trend in the relevance of compliance structures. The odds that judges view business structures as relevant have significantly decreased over this time frame by 5% per year (0.95, $p < 0.01$) in the circuit court data. Referring to the graph for business structures in Figure 2, it appears that this estimate is capturing the downward trend in relevance immediately after about 1982. That the linear trend model fit these data in the time-trend only models

⁶⁵ While the disparate treatment effect is large, the standard error and other model diagnostics suggest the estimate is nevertheless statistically stable.

suggests that the other variables in the multivariate probit model are likely accounting for the slight upward trend prior to 1982 and again after around 1993.

By contrast, the odds that judges in the circuit court will treat personnel structures as relevant has increased at a statistically significant 6% per year ($p < .01$). Recall that the odds that judges refer to personnel structures have also increased over this time frame by 10% per year (see above). Thus, referring to the additive property of the expected values given in Eq. 3 above, the *conditional* odds that judges see personnel structures as relevant *given* that it has been referenced has increased by 16% per year in the circuit court data.⁶⁶ Given that personnel structures are by far the most prevalent type of structure observed in the circuit court data, a 16% annual increase is all the more a compelling and substantial result.

Other Case Characteristics. Judicial politics does not have a statistically significant effect on the odds that judges will treat institutionalized organizational structures as relevant in either the district or circuit courts. Summary judgment, however, significantly increases the odds of relevance in the district courts by 30% (1.30, $p < .05$). This result, especially in light of the results for deference, suggests that organizational structures become even more important as proxies for compliance and rationality in cases where less attention is paid to the facts of the case in the district courts.

Deference

Judicial deference, where judges treat the structure as itself an indication of compliance or noncompliance irrespective of the quality of the structure, is the strongest form of legal endogeneity. We are again interested in the attributes of plaintiffs, defendants, and cases that produce variation in the likelihood of judicial deference.

Plaintiff and Organizational Characteristics. In the district courts (Table 4), minority male plaintiffs see significantly increased odds of deference of 92% (1.92, $p < .01$)

⁶⁶ This approximate odds ratio is obtained by calculating $\phi = e^{\pi_3^{-1/2}(\hat{\beta}^{\text{Ref}} + \hat{\beta}^{\text{Rel}})} = e^{\pi_3^{-1/2}(0.05+0.03)}$.

when compared to all other plaintiffs. In the circuit courts (Table 5), on the other hand, it is minority females who experience significantly increased odds of deference of 4% when compared to all other plaintiffs.⁶⁷

At both the district and circuit court levels, the odds that judges will defer to institutionalized organizational structures are far lower where the plaintiff is a government or public interest organization. A government or public interest organization plaintiff significantly decreases the odds of deference by 64% ($p < .01$) in the district court data. At the circuit court level, the effect is even greater: the odds of deference is 86% lower for government or public interest organization plaintiffs at the circuit court level ($p < .01$).

Legal Theories. As predicted, when compared to non-disparate-treatment theories, there is no difference in the odds of deference for hostile work environment theories at either the district or circuit court levels. Although structures invoked in the context of hostile work environment are more likely to be seen as relevant, judges do not appear to defer to these structures (that is to fail to consider their adequacy or to base their decision in part on these structures despite their inadequacy) at a rate different from other non-disparate treatment theories. This finding is mostly likely due to the fact that the Supreme Court in *Meritor v. Vinson* (1986) explicitly called attention to the need for structures to be effective.

In contrast to what legal theory would predict (but consistent with our sociological argument), judicial deference is more likely where the structure is invoked in the context of disparate treatment cases than in any other context. Specifically, as shown in Table 4, deference to structures in the district courts is 15% ($1.93/1.67=1.15$) more likely when disparate treatment theory is invoked relative to hostile work environment theory, and almost twice as likely (1.93 , $p < .01$) when disparate treatment theory is invoked compared to all other theories. This relationship is even more dramatic in the circuit courts (Table 5), where judicial deference to a structure is nearly six ($11.48/2.01=5.71$) times more likely when disparate treatment theory is invoked compared to hostile work environment theory, and

⁶⁷ This approximate odds ratio is obtained by calculating $e^{\pi^3 \cdot \frac{1}{2}(-0.07-0.27+0.57)} = 1.04$.

over eleven times more likely (11.48, $p < .01$) when disparate treatment theory is invoked when compared to all other legal theories. This finding provides very strong support for our contention that courts infer employers' rationality and good faith efforts to comply with law from the presence of institutionalized organizational structures.

Types of Structures. After controlling for other variables, in the district courts (Table 4), the odds of deference to compliance structures still increase significantly at about 6% per year in the district courts ($p < .01$). However, in the circuit courts (Table 5), the increase in deference is no longer statistically significant once other variables are entered into the model. The significant increase in deference to compliance structures shown in the more basic model (Table 2) is most likely absorbed by the strong effect for disparate treatment cases in the circuit courts. In other words, the increase in deference to compliance structures is occurring mostly where judges are inferring nondiscriminatory intent from the presence of compliance structures.

The full models also show that, controlling for other factors, in the district courts (Table 4), deference is increasing at 3% per year ($p < .05$) to business structures, and in the circuit courts, deference is increasing at 10% per year ($p < .01$) to personnel structures and 5% ($p < .01$) to business structures. Recall the statistically significant trend in reference to and relevance of personnel structures in the circuit courts over this time frame. More precisely, we found a statistically significant 10% per year increase in reference to, and a statistically significant 6% per year increase in relevance of, personnel structures in the circuit courts. Thus, considering the additive property given in Eq. 3b, the *conditional* odds that a personnel structure is deferred to *given* that it has been referenced *and* judged relevant has increased by 27% per year in the circuit court data.⁶⁸

Other Case Characteristics: Judicial politics does not have a statistically significant effect on deference at the district court level but does have an impact at the circuit court level

⁶⁸ This approximate odds ratio is obtained by calculating $\phi = e^{\pi 3^{-1/2}(\hat{\beta}^{\text{Ref}} + \hat{\beta}^{\text{Rel}} + \hat{\beta}^{\text{Def}})} = e^{\pi 3^{-1/2}(0.05+0.03+0.05)}$.

where, controlling for other factors, liberal judges are more likely to defer to organizational structures than do conservative judges (.38, $p < .01$) Given our judicial politics scale is coded from -1, indicating the most liberal, to +1, indicating the most conservative, this reveals that the most conservative judges are 86% less likely to defer to organizational structures than are the most liberal judges.⁶⁹ This is an interesting finding, given that deference generally favors employers, although somewhat difficult to interpret given that most circuit court decisions are by three judge panels (so that the judicial politics variable is an average of their scores). It is possible that liberal judges are more impressed by the trappings of legal rational governance.

The summary judgment effect on deference is also interesting. At the district court level (Table 4), judges are 30% more likely to defer to organizational structures (1.30, $p < .05$) whereas at the circuit court level (Table 5), judges are 54% less likely (0.46, $p < .01$) to defer to organizational structures. The legal standard in summary judgment cases, which requires judges to draw inferences in favor of the non-moving party, should result in less deference because the employer is nearly always the party moving for summary judgment in employment cases. Thus, as is the case in the circuit courts, judges should be careful not to draw inferences about the employers' compliance from the presence of institutionalized employment structures. However, to the extent that organizational structures have become widely accepted as symbols of compliance or rationality, judges may not recognize that they are making an inference. This would be especially likely in district courts for several reasons. First, there is only one judge instead of three, providing less chance for errors to be recognized. Second, district court judges have higher caseloads and counsel in district court cases may be less experienced or expert, leading to fewer opportunities for erroneous inferences to be questioned. Finally, there may be a selection effect, in cases that are appealed to the circuit courts, more attention is given to organizational structures so that judicial deference (without scrutiny) is less likely.

⁶⁹ This approximate odds ratio is obtained by calculating $e^{\pi^3 \sqrt{2}(-0.53)}$.

VII. Conclusion

Reference, relevance, and deference are observable manifestations of legal endogeneity, or the process through which law incorporates ideas of legality and rationality that have become institutionalized within organizational fields. Our data on the incidence of reference, relevance, and deference over time support our argument that judicial constructions of law have become increasingly likely (albeit in fits and starts) to incorporate and eventually to defer to institutionalized organizational structures over the past forty years. The gradual institutionalization of organizational structures appears first in the district courts, which is likely due to the fact that these courts handle the bulk of the cases and judges in those courts engage most directly with the nature of organizational structures. In the circuit courts, the more sudden rise of legal endogeneity in the mid-1980s is probably in part a response to the institutionalization process in the district courts. As reference to compliance structures increases and relevance and deference to all structures increase in the district courts, there may be a critical point in the mid-1980s when circuit courts begin to witness and to condone the increasing legitimacy of organizational forms of compliance. It may also be that the *Meritor v. Vinson* case in 1986, in which the Supreme Court recognized hostile work environment sexual harassment and the relevance of organizational structures in determining liability helped to foster judicial attention to those structures (Edelman et al. 1999). In the circuit courts, moreover, politics seem to be at work as liberal judges defer to organizational structures more than do conservative judges.

There are also important differences across the legal characteristics of cases. Most critically, judicial evaluation of aspects of organizational behavior that are not easily observable appears to facilitate the infusion of organizational logic into legal logic. In those cases, judges tend to infer employers' rationality or reasonableness from the presence of organizational structures that are already institutionalized (and constructed as rational) within organizational fields. As the meaning of law, and of compliance with civil rights law,

takes shape through the lens of managerial rationality, the law becomes endogenous – or shaped through the social arenas that it seeks to regulate.

An important question that we could not address in this article due to space considerations is how legal endogeneity affects the outcomes of judicial decisions. In a companion article, we will explain the relationship between judicial deference, judicial understandings of the adequacy of organizational structures, and case outcomes. In short, we will argue in that article that in the district courts, judicial deference to organizational structures significantly increases the odds of employers winning, even controlling for judicial rulings about the adequacy of legal structures. In the circuit courts, the impact of judicial deference to organizational structures on case outcome is less clear. It may be that in the circuit courts, judicial deference does not directly affect case outcome when rulings about adequacy are controlled, or it may be that circuit court judges are more likely to justify their rulings in favor of employers by arguing that organizational structures are adequate.

The endogeneity of law has important implications for the sociology of law, the sociology of organizations, and for theories of law and organizations. The sociology of law has long held that law is fundamentally a social phenomenon (Durkheim 1949; Weber 1978; Ehrlich 2002; Hurst 1956; Macaulay 1963; Friedman 1975). Scholarship on the regulation of organizations has established that corporate interests influence law through lobbying and regulation, including regulatory capture (Burstein 1985; Blumrosen 1993; Hawkins 1984). Our research elaborates both of these themes in the literature by offering a novel theory of how institutionalized organizational practices and structures work their way into judicial conceptions of organizational rationality and compliance. Initially, organizational structures work their way into the consciousness of lawyers and judges, leading to increasing references to these structures in judicial opinions. As law becomes more endogenous, judges become increasingly likely to view organizational structures as relevant to legal issues. Eventually, institutionalized organizational structures become so closely associated with rationality and fairness that judges do not think to evaluate whether those structures in fact operate in a

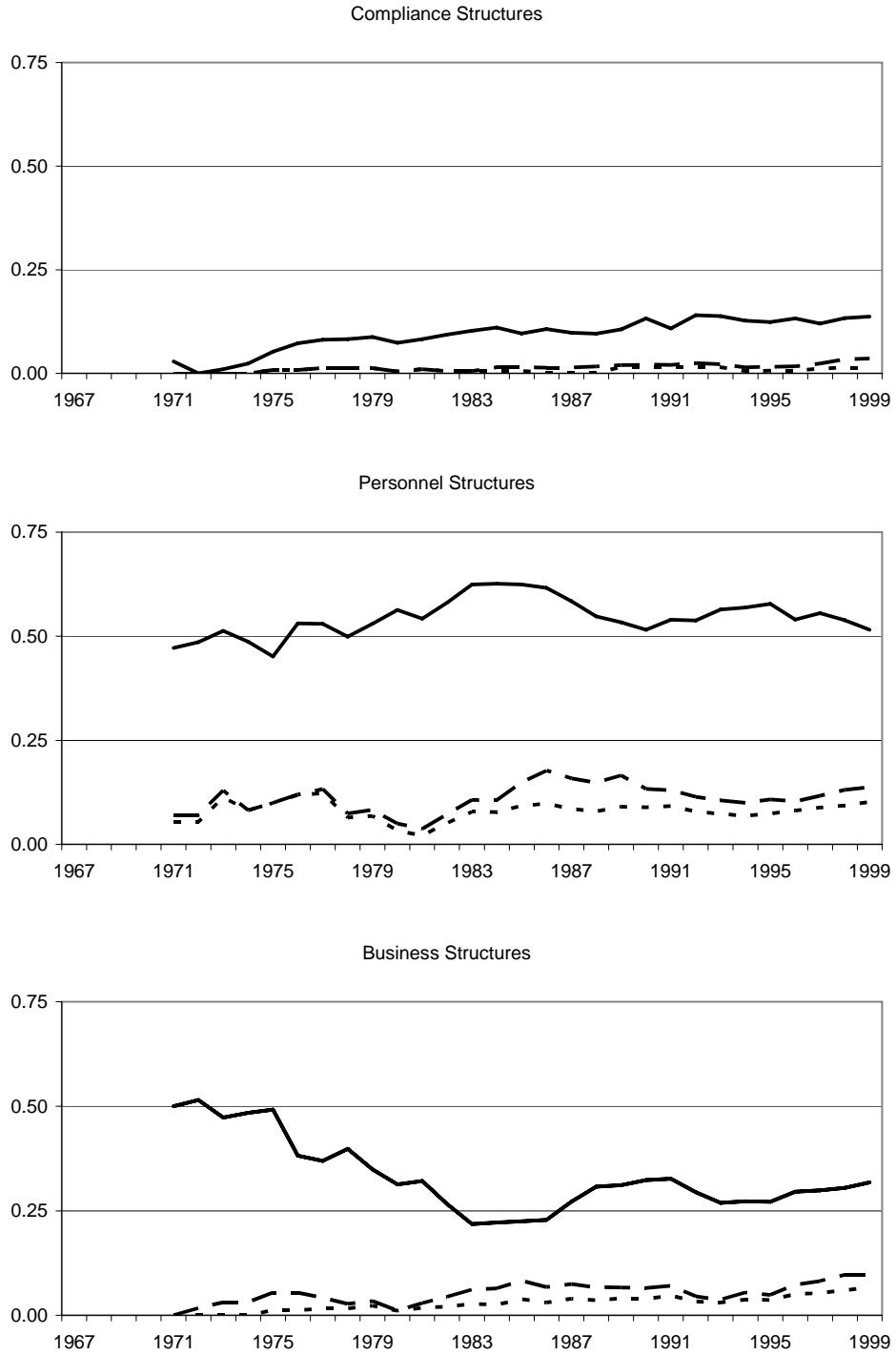
manner that promotes nondiscriminatory treatment. When this happens, judges are in essence deferring to institutionalized organizational practices as they interpret the meaning of law.

The endogeneity of law also has important implications for social policy. The endogeneity of law is an important barrier to the capacity of law to produce social change because it leads judges to infer nondiscrimination from organizational structures that may in fact operate to perpetuate discrimination. Especially where judges defer to organizational structures, they may be condoning and legitimating organizational rules that prohibit discrimination or sexual harassment are often not enforced (Edelman & Suchman 1999; Marshall 2005); leave policies that exist formally but which employees fear using because of informal sanctions or retaliation (Albiston 1999); grievance procedures that are not publicized or are ineffective or that employees will not use due to a fear of retaliation (Bumiller 1988; Edelman et al. 1993; Edelman & Cahill 1998; Marshall 2005; Albiston 2005); affirmative action plans that do little to improve the status of women and minorities (Baron et al. 1991; Edelman & Petterson 1999); diversity training programs are often ineffective (Kalev et al. 2006); and many other potentially ineffective organizational structures. Legal endogeneity (in particular, judicial deference) acts as an obstacle to social reform through law by legitimating organizational structures that often perpetuate discrimination.

Although legal endogeneity sounds a depressing note, it is not necessarily the death knell for equality in the workplace. For one thing, some organizational structures do in fact help to reduce discrimination and workforce inequality (Edelman & Petterson 1999; Kalev et al. 2006) and legal endogeneity encourages organizations to create those structures. To the extent that plaintiffs' lawyers call into question the institutionalized association between organizational structures and nondiscrimination and judges scrutinize those procedures, judges can more effectively identify those organizational structures that promote organizational justice and those that do not.

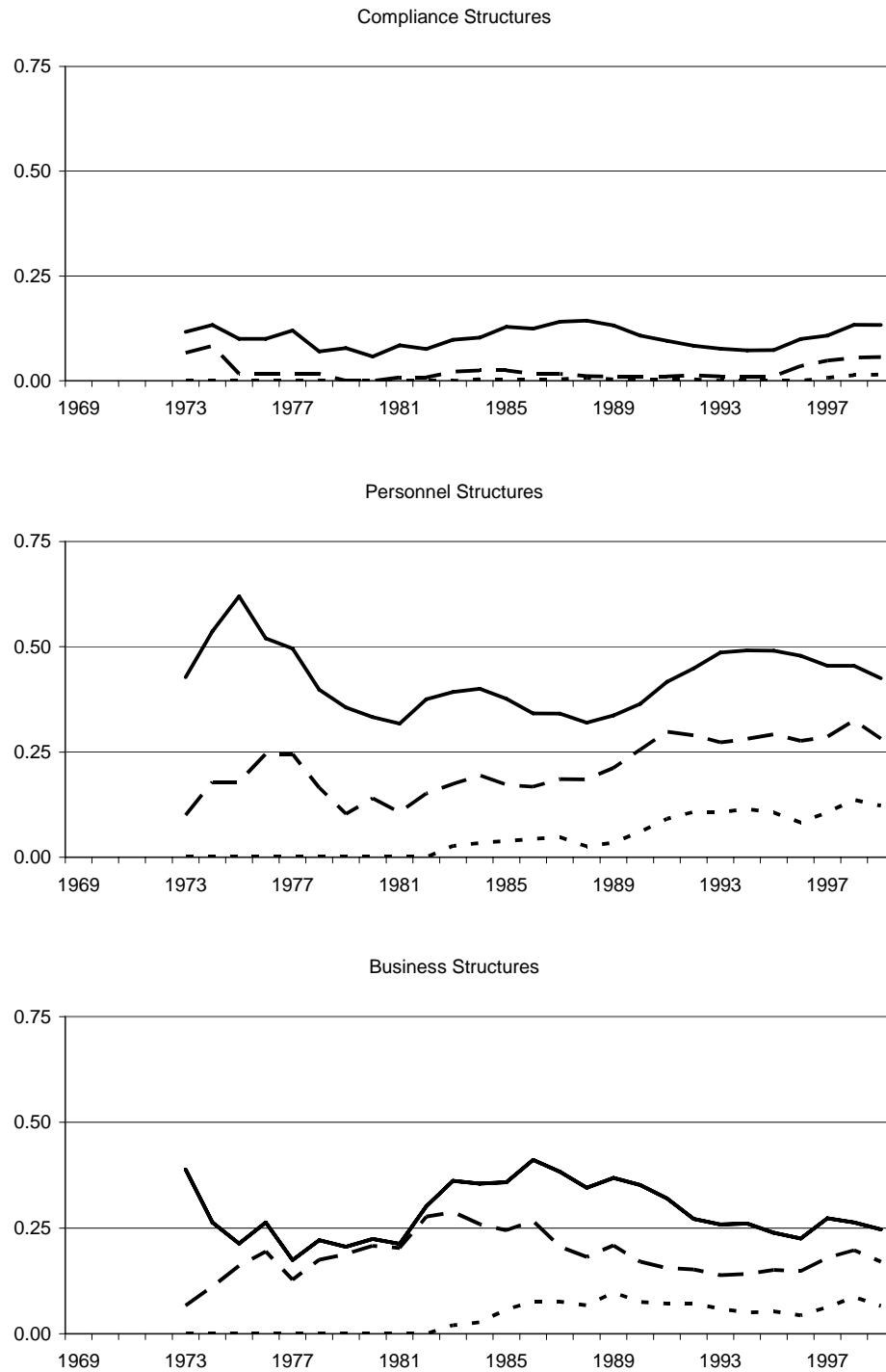
Figures and Tables

Figure 1: Five-year moving averages for probabilities of reference, relevance, and deference in the district court data (N=2031) by structure type.



Note. Reference is represented by the solid line, relevance by the long-dashed line, and deference by the short-dashed line in each graph.

Figure 2. Five-year moving averages for probabilities of reference, relevance, and deference in the circuit court data (N=706) by structure type.



Note. Reference is represented by the solid line, relevance by the long-dashed line, and deference by the short-dashed line in each graph.

Table 1: Types of Organizational Structures

Compliance structures

Formal grievance procedure (written multilevel procedure)
Formal open door policy (written statement that boss' door always open)
Informal open-door policy (not written but exists in practice)
No written policy but court says employer generally follows a process that indicates fairness
OTHER ways to complain
Diversity office or officer
EEO/AA office or officer
Employer's willingness to discuss accommodations
Employers' offer of accommodations
HR office with explicit EEO function
Legally required poster
Simple policy prohibiting illegal activity
OTHER explicit efforts at preventing discrimination (e.g. AAP)

Personnel Structures

HR office with NO explicit EEO function
Attendance policy
Employee handbook
Evaluation procedure (including rebuttal and complaints; including quantitative rating systems)
Job Posting/ Notice of Interest in new job
Leave policy (including rules for giving notice)
Multi-person decision-making process, formal
Multi-person decision-making process, informal
Policy regarding notice time for leave
Progressive discipline policy (verbal warning, written warning, fired)
Record-keeping procedure
Recruitment program
Seniority/tenure policy
Training program (*May be external to organization*)
Written job description
Other standardized personnel practices/policies (*must be on-going/ non ad-hoc practice*)

General Business Structures

Appearance Requirements
Define job and Allocate Tasks (including restructuring)
Inside candidates, preference for
Language skills, including good English or no accent), preference for
Physical requirements (age, weight, height)
Recent education, preference for
Restructuring (reduction in force, down-sizing) involving job loss)
Set pay based on competition, availability, labor market
Set pay based on employer's special needs
Set pay based on skill
Set time, place and attendance (including restructuring)
Subjective evaluation criteria (e.g. leadership skills), use of
Tests, use of
Word of mouth recruitment, use of
Workplace Behavioral Rules
Other employer prerogatives (*must be on-going/ not ad-hoc practice; includes objective, on-going performance standards (e.g. quota)*)

Table 2
 Model Statistics and Likelihood Ratio (LR) Tests for Trends in
 Reference, Relevance, and Deference for District and Circuit Court Samples by Structure

District Court (N=2031)						
Model	Log-Likelihood	Params	LR Test	DF	P	LL BIC
Compliance Structures						
Saturated (Observed)	-2743	99	-----	-----	-----	6240
Cubic Trend	-2857	12	228	87	0.0000	5805
Quadratic Trend	-2859	9	4	3	0.2615	5787
Linear Trend	-2861	6	4	3	0.2615	5768
No Trend	-2889	3	56	3	0.0000	5801
Personnel Structures						
Saturated (Observed)	-7001	99	-----	-----	-----	14756
Cubic Trend	-7158	12	314	87	0.0000	14407
Quadratic Trend	-7159	9	2	3	0.5724	14387
Linear Trend	-7166	6	14	3	0.0029	14378
No Trend	-7168	3	4	3	0.2615	14359
Business Structures						
Saturated (Observed)	-5410	99	-----	-----	-----	11574
Cubic Trend	-5604	12	388	87	0.0000	11299
Quadratic Trend	-5609	9	10	3	0.0186	11287
Linear Trend	-5614	6	10	3	0.0186	11274
No Trend	-5650	3	72	3	0.0000	11323
Circuit Court (N=706)						
Model	Log-Likelihood	Params	LR Test	DF	P	LL BIC
Compliance Structures						
Saturated (Observed)	-336	93	-----	-----	-----	1283
Cubic Trend	-365	12	58	81	0.9771	809
Quadratic Trend	-366	9	1	3	0.7626	791
Linear Trend	-367	6	3	3	0.3618	774
No Trend	-372	3	9	3	0.0367	763
Personnel Structures						
Saturated (Observed)	-998	93	-----	-----	-----	2607
Cubic Trend	-1045	12	93	81	0.1622	2169
Quadratic Trend	-1048	9	6	3	0.1116	2155
Linear Trend	-1052	6	8	3	0.0460	2143
No Trend	-1066	3	28	3	0.0000	2152
Business Structures						
Saturated (Observed)	-856	93	-----	-----	-----	2323
Cubic Trend	-911	12	109	81	0.0208	1901
Quadratic Trend	-914	9	6	3	0.1032	1887
Linear Trend	-917	6	6	3	0.1218	1873
No Trend	-920	3	7	3	0.0700	1861

Table 3
 Linear Trend Models and Between-Courts Differences
 District and Circuit Court Samples

	Reference			Relevance			Deference		
	<i>Estimate</i>	<i>Std Error</i>	<i>Approx OR</i>	<i>Estimate</i>	<i>Std Error</i>	<i>Approx OR</i>	<i>Estimate</i>	<i>Std Error</i>	<i>Approx OR</i>
District Court Sample (N=2031)									
<i>Main Effects - Deviations from Average</i>									
<i>Compliance Structure</i>	-0.80	0.08	0.23 ***	-0.40	0.09	0.48 ***	-0.32	0.08	0.56 ***
<i>Personnel Structure</i>	0.54	0.04	2.67 ***	0.24	0.06	1.55 ***	0.28	0.05	1.65 ***
<i>Business Structure</i>	0.26	0.05	1.61 ***	0.16	0.06	1.33 ***	0.04	0.06	1.08
<i>Linear Trends - Annual Scale</i>									
<i>Compliance Structure</i>	0.03	0.01	1.05 **	0.05	0.01	1.10 ***	0.02	0.01	1.04 **
<i>Personnel Structure</i>	0.00	0.00	1.00	0.01	0.01	1.02 **	0.01	0.01	1.01
<i>Business Structure</i>	0.00	0.01	1.01	0.02	0.01	1.04 ***	0.03	0.01	1.05 ***
<i>Intercept</i>	1.11	0.06	7.45 ***	-1.02	0.05	0.16 ***	-1.28	0.05	0.10 ***
Circuit Court Sample (N=706)									
<i>Main Effects - Deviations from Average</i>									
<i>Compliance Structure</i>	-0.80	0.14	0.23 ***	-0.87	0.15	0.21 ***	-0.87	0.47	0.21 *
<i>Personnel Structure</i>	0.48	0.08	2.40 ***	0.30	0.09	1.72 ***	0.36	0.25	1.91
<i>Business Structure</i>	0.32	0.09	1.78 ***	0.57	0.09	2.82 ***	0.52	0.25	2.55 **
<i>Linear Trends - Annual Scale</i>									
<i>Compliance Structure</i>	0.02	0.02	1.03	0.04	0.02	1.08 **	0.08	0.05	1.17 *
<i>Personnel Structure</i>	0.00	0.01	1.01	0.03	0.01	1.05 **	0.05	0.03	1.10 *
<i>Business Structure</i>	-0.01	0.01	0.99	0.00	0.01	1.00	0.03	0.03	1.06
<i>Intercept</i>	0.73	0.09	3.79 ***	-0.49	0.15	0.41 ***	-1.77	0.06	0.04 ***
Between-Court Differences									
<i>Main Effects - Deviations from Average</i>									
<i>Compliance Structure</i>	0.00	0.17	0.99	0.47	0.17	2.35 ***	0.55	0.48	2.72
<i>Personnel Structure</i>	0.06	0.10	1.11	-0.06	0.11	0.90	-0.08	0.26	0.87
<i>Business Structure</i>	-0.05	0.10	0.91	-0.41	0.11	0.47 ***	-0.47	0.26	0.42 *
<i>Linear Trends - Annual Scale</i>									
<i>Compliance Structure</i>	0.01	0.02	1.02	0.01	0.02	1.01	-0.06	0.05	0.90
<i>Personnel Structure</i>	0.00	0.01	0.99	-0.02	0.01	0.97	-0.05	0.03	0.92
<i>Business Structure</i>	0.01	0.01	1.02	0.03	0.01	1.05 **	0.00	0.03	0.99
<i>Intercept</i>	0.37	0.11	1.97 ***	-0.53	0.16	0.38 ***	0.49	0.08	2.44 ***

* p < .10, ** p < .05, *** p < .01

Table 4
 Multivariate Probit Models for District Court Sample (N=2031)

	Reference			Relevance			Deference		
	<i>Estimate</i>	<i>Std Error</i>	<i>Approx OR</i>	<i>Estimate</i>	<i>Std Error</i>	<i>Approx OR</i>	<i>Estimate</i>	<i>Std Error</i>	<i>Approx OR</i>
Plaintiff Characteristics									
<i>Gov or Pub Interest Org</i>	0.20	0.24	1.45	0.03	0.12	1.05	-0.56	0.26	0.36 **
<i>Female</i>	0.50	0.15	2.46 ***	-0.05	0.09	0.91	-0.03	0.10	0.95
<i>Minority</i>	0.90	0.20	5.13 ***	0.31	0.08	1.75 ***	0.36	0.09	1.92 ***
<i>Minority Female</i>	-0.97	0.33	0.17 ***	-0.36	0.15	0.52 **	-0.35	0.17	0.53 **
<i>Union-Member</i>	0.62	0.18	3.09 ***	0.06	0.07	1.11	-0.03	0.08	0.96
<i>Manager/Professional Occ</i>	0.34	0.14	1.84 **	0.09	0.06	1.18	0.07	0.06	1.13
Organization Characteristics									
<i>Goods Producing Industry</i>	0.32	0.18	1.80 *	-0.11	0.07	0.82 *	-0.21	0.07	0.69 ***
Legal Theories Applied to Structure									
<i>Disparate Treatment</i>	-0.55	0.13	0.37 ***	0.52	0.09	2.57 ***	0.36	0.08	1.93 ***
<i>Hostile Work Environment</i>	-0.73	0.17	0.27 ***	0.67	0.17	3.36 ***	0.28	0.20	1.67
Other Case Characteristics									
<i>Judicial Politics - Conservative Scale</i>									
<i>Summary Judgment</i>	-0.18	0.17	0.72	0.08	0.09	1.17	-0.02	0.09	0.97
<i>Summary Judgment</i>	0.12	0.13	1.23	0.14	0.06	1.30 **	0.14	0.06	1.30 **
Types of Structures									
<i>Main Effects - Deviations from Average</i>									
<i>Compliance Structure</i>	-1.01	0.15	0.16 ***	-0.28	0.08	0.61 ***	-0.20	0.08	0.70 **
<i>Personnel Structure</i>	0.82	0.10	4.40 ***	0.12	0.05	1.24 **	0.14	0.05	1.30 ***
<i>Business Structure</i>	0.19	0.10	1.42 *	0.16	0.06	1.36 ***	0.05	0.06	1.29
<i>Linear Trends - Annual Scale</i>									
<i>Compliance Structure</i>	0.05	0.02	1.09 **	0.04	0.01	1.08 ***	0.03	0.01	1.06 ***
<i>Personnel Structure</i>	0.04	0.01	1.07 ***	0.00	0.01	1.00	0.00	0.01	0.99
<i>Business Structure</i>	-0.01	0.01	0.98	0.01	0.01	1.02	0.02	0.01	1.03 **
Intercept	-0.08	0.17	0.86	-1.43	0.10	0.07 ***	-1.53	0.11	0.06 ***

* p < .10, ** p < .05, *** p < .01

Note. The “Legal Theories Applied to Structure” effect for reference is with respect to the case in general. See text for details.

Table 5
Multivariate Probit Models for Circuit Court Sample (N=706)

	Reference			Relevance			Deference		
	<i>Estimate</i>	<i>Std Error</i>	<i>Approx OR</i>	<i>Estimate</i>	<i>Std Error</i>	<i>Approx OR</i>	<i>Estimate</i>	<i>Std Error</i>	<i>Approx OR</i>
<i>Employer Won Case in Lower Court</i>	-0.37	0.23	0.51	-0.10	0.14	0.83	0.35	0.12	1.89 ***
Plaintiff Characteristics									
<i>Gov or Pub Interest Org</i>	0.56	0.23	2.77 **	-0.18	0.19	0.72	-1.10	0.24	0.14 ***
<i>Female</i>	-0.26	0.19	0.62	-0.08	0.15	0.87	-0.07	0.18	0.87
<i>Minority</i>	0.57	0.21	2.80 ***	-0.02	0.17	0.97	-0.27	0.13	0.61 **
<i>Minority Female</i>	0.78	0.38	4.12 **	-0.03	0.21	0.94	0.57	0.22	2.79 ***
<i>Union-Member</i>	0.81	0.27	4.35 ***	-0.36	0.14	0.52 ***	-0.80	0.16	0.23 ***
<i>Manager/Professional Occ</i>	0.45	0.18	2.25 **	0.17	0.13	1.36	0.00	0.10	1.00
Organization Characteristics									
<i>Goods Producing Industry</i>	0.57	0.18	2.79 ***	-0.05	0.11	0.91	0.02	0.13	1.04
Legal Theories Applied to Structure									
<i>Disparate Treatment</i>	-0.36	0.20	0.52 *	1.61	0.19	18.61 ***	1.35	0.30	11.48 ***
<i>Hostile Work Environment</i>	0.52	0.34	2.59	0.91	0.32	5.18 ***	0.38	0.36	2.01
Other Case Characteristics									
<i>Judicial Politics - Conservative Scale</i>	-0.31	0.32	0.57	-0.18	0.28	0.72	-0.53	0.22	0.38 **
<i>Summary Judgment</i>	-0.37	0.19	0.51 *	-0.10	0.12	0.83	-0.43	0.13	0.46 ***
Types of Structures									
<i>Main Effects - Deviations from Average</i>									
<i>Compliance Structure</i>	-0.35	0.23	0.53	-0.46	0.16	0.43 ***	-0.24	0.17	0.64
<i>Personnel Structure</i>	0.22	0.21	1.50	-0.03	0.10	0.95	0.01	0.12	1.03
<i>Business Structure</i>	0.12	0.21	1.25	0.49	0.11	1.25 ***	0.23	0.13	2.08 *
<i>Linear Trends - Annual Scale</i>									
<i>Compliance Structure</i>	0.04	0.03	1.07	0.04	0.02	1.07	0.05	0.03	1.09
<i>Personnel Structure</i>	0.05	0.02	1.10 ***	0.03	0.01	1.06 ***	0.05	0.01	1.10 ***
<i>Business Structure</i>	0.01	0.03	1.02	-0.03	0.01	0.95 ***	0.03	0.01	1.05 ***
Intercept	0.17	0.29	1.35	-1.04	0.24	0.15 ***	-2.34	0.30	0.01 ***

* p < .10, ** p < .05, *** p < .01

Note. The “Legal Theories Applied to Structure” effect for reference is with respect to the case in general. See text for details.

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