RUSH TO JUSTICE: THE DISAPPEARING CIVIL TRIAL

A Dissertation

by

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Submitted to the Office of Graduate and Professional Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

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December 2016

Major Subject: Political Science

ABSTRACT

I address an issue largely ignored by political science: the role of litigation procedure in influencing policy outcomes. The specific aim of my dissertation is to explain the phenomenon of diminishing civil trials and the concomitant policy effects caused by this diminution.

I begin with the following research puzzle: United States federal civil case filings have increased steadily over time to reach the highest levels ever seen. Federal civil case filings have increased over 400% between 1964-2014. Yet, despite the increased number of case filings, the percentage of cases reaching trial is 1/12th what it was in 1964. Presently, only 1% of all cases filed reach trial. The puzzle is why have the number of trials diminished even though case filings have increased? And, does the diminution of trials have a substantive impact on national policies?

My dissertation theorizes that the decrease in trials has resulted from a modification in litigation incentives created by changes to the Federal Rules of Civil Procedure, namely, the summary judgment process. In 1986, the U.S. Supreme Court issued a trilogy of decisions which dramatically altered the usage of summary judgment, and in so doing, the economic incentives for litigants to go to trial.

To address the aforementioned questions, I utilize a multi-level research design. First, in a macro-level study of aggregate data, I utilize advanced time series methods and find structural breaks in the data consistent with these changes to the summary judgment process. Additionally, continuing the macro-level analysis, I examine the consequences of this procedural change by analyzing the effects of the change to summary judgment on federal employment discrimination cases.

I find diminishing employment discrimination trials cause increased disparity in income ratios between men and women, as well as African-Americans and whites. The findings suggest that changes to legal procedure by the federal judiciary have hurt legislative endeavors to promote income equality, despite Congress' efforts to incentivize civil rights litigation. Finally, I perform a micro-level analysis evaluating case-level data. Through creation of a unique dataset, I evaluate the causes of motions for summary judgment and the determinants of judicial grants of such motions. The data suggest that several factors, including litigant resources and the type of case brought (such as civil rights cases), impact a court's decision to dismiss claims using this procedural device. My results suggest policymakers must rethink their efforts at legislating equality through private statutory enforcement.

DEDICATION

To my parents, who have supported me through thick and thin, and always encouraged me to achieve…and who've managed to put up with me without going crazy (or at least haven't shown it outwardly).

ACKNOWLEDGEMENTS

The work put into this dissertation and time spent traversing through graduate school could not have been accomplished without the support of many, support that began long before I entered graduate school or even began practicing law. For all who have seen, for some reason, to provide support for me, in professional as well as personal life, I extend my deepest sense of gratitude. Identifying everyone who has over time become a constituent part of my life is impossible; just know that I have you in my thoughts as I proceed through this phase of my endeavors.

I would like to thank Texas A&M, and the College of Liberal Arts, for providing research support for this project in the form of a Vision 2020 Dissertation Enhancement Grant. The money utilized for this data gathering has provided insight into a series of issues that are long-understudied, and will hopefully provide fertile ground upon which future research on the effect of legal procedure on case outcomes can grow. I would like also to express my thanks to my undergraduate research assistants who helped in the data gathering, Joseph Hartman and Milo Bobbitt.

I would like to express my gratitude to my dissertation committee members: Dr. James R. Rogers (Chair), Dr. Joseph Daniel Ura, Dr. Paul M. Kellstedt, and Dr. Arnold Vedlitz. The committee has served me well, pushing me to refine and crystallize my thoughts for this particular project. I am thankful for all they have done as not only dissertation "enforcers," but also as mentors as I enter this profession. I would like to particularly thank Dr. Rogers for his time, not only as a member of my dissertation committee, but also as my adviser. Jim Rogers has been, without

question, the greatest adviser for whom any graduate student could ask. His support has been of inestimable value, both in a professional and personal sense. I am happy to be able to call him a mentor, a friend, and now, a colleague.

The process of advancing through graduate school can seem daunting. An aspect that has always given me the necessary push to keep going are my students generally, and my moot court students in particular. I have loved teaching and working with the Texas A&M Moot Court Team. For five years now I have had the privilege to help students learn the art of appellate advocacy. They have trusted me to show them how to be successful at this technique; there is no greater privilege, and responsibility, than to have had these students place their trust in me to help them become successful and realize goals that they might not have even known possible. From the road trips throughout the country, the long drives to tournaments, and the many nights working and re-working arguments and outlines in the Allen Building, I can say without question this part of my graduate school existence has been nothing short of fun. The students have never received class credit for their work, have had to pay out of pocket at times to participate in the program, and yet, despite this all-volunteer army, they keep coming back and committing themselves to improving. They are, in a word, inspiring. I cannot thank all of you enough for allowing me to be a part of your lives.

I further want to acknowledge the following individuals for their help with moot court: Brad Goodine and Nathan Favero (terrific assistant coaches to me over the last four years); Kinzie Craig (who allowed me to begin working with the moot court team as an assistant coach and trusted me to take over the program upon her matriculation from graduate school); my TUMCA and AMCA friends, in particular Dr. Kimi King at the University of North Texas who, not knowing who I was,

invited me in to become a part of the wonderful community that is undergraduate moot court.

I also want to thank all of my graduate student friends, people I have come to know that are sympaticos in the experience that is known as "graduate school." In particular, I would like to acknowledge the sincerest support these individuals have offered to me over time: Brad Goodine, Nathan Favero, David Switzer, Angel Molina, Kinzie Craig, Mallory Compton, Alison Higgins, Clay Webb, Mitch Radtke, and Carlie Fogleman. Thank you to you all.

It is also necessary to thank Michael K. Sutherlin, Attorney-at-Law. I worked for Mike for years, first as a law clerk in law school, and later as an associate attorney litigating constitutional and civil rights cases. Mike was a wonderful mentor on the practice of law. He permitted me at an early stage of my career to "get my hands dirty" in the practice of law and truly learn the ins and outs of constitutional litigation. Many of the insights in this project began as pregnant thoughts as a young lawyer learning the craft of litigation under Mike's auspices. I thank him for giving me these opportunities as a young lawyer.

I wish to particularly acknowledge my family. They have been there with me every step of the way; the good and bad. While all my family has played a part in me reaching this stage, I want to particularly thank my parents, Cindy Sibert and Rick Conway; my siblings, Andrew Conway and Carly Conway; my grandparents, Richard Conway, Eva Conway, Ken Pope, and Martha Pope; my cousins (you have multiplied into a number so large you cannot fit into this acknowledgement section); my aunts and uncles.

I have to especially acknowledge my great-Aunt, Mary Margaret (Peggy) Conway. A retired professor of political science, Peggy has *always* encouraged my in-

tellectual growth and education. She consistently supported my educational endeavors (at every level), has listened to me as an undergraduate discussing newly discovered (to me) ideas of political science, has attended my early graduate student presentations at professional conferences, has been happy to look at drafts of my research, and taught me the most important and central part of using one's intellect: *to critically think*. It is a mantra I have taken and push to instill in my students, as she once did with her students, and frankly there is a part of me reaching this stage that simply could not have happened without the kind of unique support that she was able to provide. I will always be thankful for that generosity…and I apologize for waking you up as a kid playing hide-and-seek with the other cousins while visiting on vacation.

Finally, I want to thank my wife, Dominique Lewis. I have an unyielding love for her, and in her I have found a friend, partner, and collaborator. On many occasions, I have talked with her about the science of politics generally, and methodology in particular. Her perspicacious insights are always relevant and spot-on. Her methodological ideas appear facile and always demonstrate how much I have to learn. She is inspiring, and I thank her for her support.

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1. INTRODUCTION

If we go to the federal district courthouses what might we see? Oil paintings of jurists past. Marbel pillars rising high before us. Courtrooms, draped with ornate murals and etchings. The occasional stained-glass depiction of a notable historical event. The courtrooms that exist, and that I have practiced in, truly command a respect that borders on the solemn.

What you will not see in those courtrooms: trials.

Despite the fact that American society reflects a litigiousness, and despite record numbers of case filings in the federal system, absent from the federal trial courts are actual trials. Data from the Administrative Office for the United States Courts indicate that federal civil case filings have increased over 400% between 1964-2014. Yet, despite the increased number of case filings, the percentage of cases reaching trial is now 1/12th what it was in 1964. Presently, only 1% of all federal civil cases filed reach trial. The general question is, *why*? The larger thematic question consists of: *Is there a rush to justice?*

Let me explain what I mean by a rush to justice. The rush to justice is not necessarily centered on time dependence or temporality. Instead, it is the concept that litigation has been forced from a paradigm in which parties accumulated evidence and expended resources toward a buildup for trial by jury and moved to a paradigm in which parties are singularly focused on presenting a case to a judge. Rather than letting a case develop until ripe for consumption by a jury, the case has been reoriented for evaluation by a judge who evaluates whether such claims may even be presented at a trial. This is the *rush* in the rush to justice. It is the sys-

tematic movement away from the jury to the judge; a manipulation away from the role that a trial plays in our society to a paper evaluation of merits by the unelected federal trial court judge.

In the chapters that follow, I discuss potential causes for this move away from trials and conclude that alterations to the Federal Rules of Civil Procedure by the United States Supreme Court has incentivized away the desire for litigants to reach trial, and has worked to make it easier for federal district judges to prevent cases from ever reaching the trial stage. This development in modern American litigation has significant consquences for public policy, particularly in the area of civil rights. In performing this assessment, I will detail with specificity how the procedural device known as summary judgment has been manipulated to cause the diminution of federal civil trials.

For now, I will briefly detail the following structure of the study. In Chapter 2, I address the theoretical foundations for why trials have a role in our democratic system of government. In this discussion I will detail the various roles that trials perform in general, and jury trials in particular. I also provide a brief history of the American experience with the trial system to explain how trials have come to hold the place they occupy in the present American legal system.

Chapter 3 includes a brief statistical detail of the federal civil system, including statistics on federal civil trials. The chapter's discussion then pivots to previous scholars' accounts of the diminution in trials and the major theories in the literature for the causes of this phenomenon.

Chapter 4 contains a discussion of the role of civil procedure. In this section of the study I present the historical background on the development of the Federal Rules of Civil Procedure, and a particular discussion on the summary judgment

procedural device. I continue the analysis with formulation of a unified theory of how alterations to legal procedure can account for a remaking of litigants' incentivization structures for litigation and why alterations to summary judgment standards have induced litigants to avoid trial or be dealt a signficant blow.

Chapter 5 builds upon the theoretical foundations of the previous chapter and presents a multi-level research design. I first evaluate, using advanced time series modeling techniques, macro-level aggregate data on civil trials and conclude that the Supreme Court's alterations to the summary judgment standard can be considered a cause of the diminution in federal civil trials. I then present a micro-level analysis of the causes for determinations to file motions for summary judgment and the determinants of whether a summary judgment motion will be granted. The micro-level analysis utilizes a unique dataset constructed from individual docket and document reviews from the federal case docketing system known as PACER. This dataset includes heretofore un-measured variables to test competing theories of summary judgment motion practice. Finally, Chapter 5 contains an analysis of the implications for lack of trials in an issue-specific domain, that of employment discrimination. The results here suggest that the diminution in trials has consequence not only for this particular type of case, but also the attendant public policy concerns of income inequality.

In Chapter 6, I discuss the ramifications for the present study. In particular, I expound on the impact and consequences of the diminution in federal civil trials. Here, I focus attention to the subterranean nature of legal procedure, and how its modification has importance for the larger question of private statutory enforcement regimes and use of priviate litigants for mobilization of public policies.

I turn now to the theoretical foundations for usage of trials.

2. POLITICAL AND LEGAL THEORY OF CIVIL TRIALS

2.1 Introduction

What is the harm to our civil justice system if cases no longer go to trial? It is the perception of some that trials are inefficient, that jurors are comprised of laypersons who are ignorant and incapable of sophisticated reasoning, and the judicial system's energies are better spent steering cases (in the civil system) toward non-adjudicatory resolution (such as summary judgment and settlement). If not having trials means a renouncing of these malificent properties, then using summary judgment (and dismissing cases early) is a noble component of legal procedure. This position, however, ignores the critical role that trials in general, and jury trials in particular, play in our democratic system.

Chapters 3-5 will discuss the diminution of trials in the federal civil system as well as the policy consequences for this reduction in trials. In this chapter, however, I focus on the theoretical foundations for why trials—in particular jury trials—have a role in our democratic system of government. I will also provide a brief history of the American experience with the trial system to explain how trials have come to hold the place they occupy in the present American legal system.

2.2 Why Trials Are Important

Explaining why trials are important requires multifaceted evaluation of the roles that jury trials play in our legal system. I borrow here from the useful taxonomy of trial "roles" proposed by Ellen Sward (2001). Sward maintains that jury trials serve: (1) a political role, (2) a dispute-settling role, and (3) a law-making

role.[1] Each of these roles provides a theoretical pillar upon which jury trials stand, and which together, provide utility for the jury trial as mechanism implicit within a concept of good democratic governance.

2.2.1 The Political Role of Jury Trials

Democratic theory suggests that the key component of democracy is participation by the citizenry in the governance of a society. In *Democracy and Its Critics*, Robert Dahl (1989), states that "democracy" requires opportunity for the citizenry to understand civic issues and the capacity for the citizenry to control the decision-making agenda. Democracy also requires other attributes, such as the ability to vote in elections. But, the aforementioned requirements of participation, exposure to civic matters, and control over the decision-making agenda align neatly with the role of the jury in a trial.

Historically, "juries" have long been considered a component of the citizenry's participation in the democratic process. We can look back to the days of ancient Greece when juries would decide questions of policy or pronouncements of judgment. Indeed, the Greek polity rendered Socrates' fate by jury (Held 1987). And the Greek democratic experience included the use of the "Assembly." As Held (1987, 21) notes, "The Assembly met over 40 times a year and had a quorum of 6,000 citizens." Much like a jury, unanimity in decision was often sought for a solid pronouncement of judgment on matters. More modern political philosophers have further suggested participation in the form of "jury-like" service. Rousseau (1762) lauded the effects of participatory democracy. I do not suggest here that modern civil trial juries function in the same manner as the Athenian democracy of the

[1] Sward actually identifies a fourth role, the socializing role of jury trials. I believe this "role" is effectively subsumed by the political role, and therefore have reconstituted Sward's suggested classification scheme for the purposes of my discussion here.

past. What I do suggest, though, is that participation and involvement of citizens in the administration of their government has long been considered a benchmark of democratic theory, and the modern incarnation of that involvement can take the form of the civil jury (as opposed to an unelected Article III judge).

In the American experience, there has been a resurgence of sorts in the calls for participation of citizens in democratic governance. In America's earliest days, the civil jury was considered a political enterprise with beneficial attributes for democracy as a whole. Tocqueville was particularly keen to this discernment. In *Democracy in America*, Tocqueville devotes nearly an entire chapter to the impact juries have in maintaining the American democratic experience. As he notes, the jury is not only judicial in nature, but also "a political institution" (Tocqueville, 1863, 358). Tocqueville was particularly focused on the impact of the civil jury. As he states: "When…the jury acts also on civil causes, its application is constantly visible; it affects all the interests of the community; everyone co-operates in its work: it thus penetrates into all the usages of life, it fashions the human mind to its peculiar forms, and is gradually associated with the idea of justice itself." For Tocqueville, the civil jury in particular operated to expand citizens' interests beyond just their own and to their community at large. He notes (364):

> The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions…It teaches men to practise equity; every man learns to judge his neighbor as he would himself be judged…It invests each citizens with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in its government.

For Tocqueville, the civil jury operated to effect individual citizens in such a way as to induce feelings for, and dedication to, their community. The notion

that the civil jury can operate to produce effective citizenship and civicness is not without its critics. Contrary to Rousseau, one need look no further than Thomas Hobbes and his *Leviathan*, or even to John Locke (in his *Second Treatise of Government*), for philosophical positions that are notoriously skeptical of democratic participation by the uneducated or unsophisticated masses, and thus run contrary to Tocqueville's exhaltations. Whatever may be these criticisms, however, the reality is that we *do* have civil juries in the United States. But does this jury system fall short of Tocqueville's observations? It turns out, there is much work suggesting that juries do, in fact, appreciably contribute to the democratic system as a mechanism for citizen participation.

More-recent scholarship suggests that past criticisms of the jury system are unfounded. As Sward (2001, 57) notes, "The general thrust of the criticism is that earlier studies of political behavior did not do justice to the quality of citizens participation—that citizens do a much better job, and have more respect for democratic institutions, than appeared from those early studies." Page and Shapiro (1993) note that the mass public appears to have a rather capable sense of determining what is not only in their individual interest, but also in the national collective interest. Additionally, the more citizens are involved in juries, the more they can become educated about the problems and difficulties that not only occur in the legal system, but more generally within their community (Pateman 1970). In short, scholars have noted the potential for civic engagement that stems from the use of juries (Diamond 1993; Amar 1995; Dzur 2012; Fukurai & Krooth 2010; Vidmar & Hans 2007).

The notion that juries can serve as a mechanism to inducing increased civic-mindedness is not only a pale theory of civic republicans[2] or communitarians[3], but also empirically demonstrated. Sward (2001, 61) notes the mechanisms that lie at the heart of this process:

> Jurors have a common goal of reaching the right decision in the case before them, and they must deliberate face-to-face until that unanimous (consensus) decision is reached. None of our other widespread governmental institutions has these characteristics. Only the jury among our governmental institutions requries diverse people to come together and deliberate to a unanimous decision.

Empirical investigations into these processes provide support for this conclusion. Consolini's (1992) dissertation work demonstrated serving on juries increased jurors' political self-confidence and knowledge about the judicial branch. Additionally, post-trial surveys show service on juries alters jurors' views about the courts and legal process: most jurors are satisfied with their experience and hold more positive views about courts (Diamond 1993; Gastil et al. 2010). Gastil's works have demonstrated a link between jury service and voting rates (Gastil et al. 2002; Gastil et al. 2008; Gastil et al. 2010). In particular, jurors who served on juries that reached an agreement in a verdict showed increased voting rates after their jury service.

Jury service provides, as Hans et al. (2014, 699) note, a "civic spark." Indeed, Hans et al. (2014) in their own review of Gastil's data of 522 different civil juries and 3,378 individual jurors find that individuals who serve even on civil juries (as opposed to criminal trials) show an increase in the likelihood that they will

[2] A modern example would be Benjamin Barber (*Strong Democracy* (2003)) or Cass Sunstein (*Beyond the Republican Revival* (1988)).

[3] A modern example would be Amitai Etzioni (*The Spirit of the Community* (1993); *The New Communitarian Thinking* (editor) (1995))

cast a ballot in future elections. The effect is most pronounced when unanimity is required for a verdict. As Hans et al. (2014, 713) stated: The findings are consistent with what jurors might see on television in that, "The jurors move from strangers to comrades through their shared experience *even before the jury room deliberation begins*." This result is consistent with Sward's (2001, 63) socializing role of the jury. She contends that:

> Jury duty requires diverse people to work together for a common end. It requires that we respect each other's perspectives. It requires that we try to understand lives that are quite different from our own. And it does all this not in the rarefied atmospheres of speculation or entertainment, but in real cases involving real people. Even apart from political participation and deliberation, then, jury duty can help us to understand and get along with each other.

Simply put, the empirical evidence does suggest that participation in juries not only provides an important element for citizen-governance, but also that the experience of serving on a jury is of such a profound impact as to consist of spillover effects for other positive features for democracy, including voting. Tocqueville's observations appear to hold nearly 200 years later.

2.2.2 The Dispute-Settling Role of Jury Trials

The second role of the jury is the dispute-settling role it plays. Within this role, the jury serves to provide public benefits in the form of policy choices, resolve factual disputes, and establish liability with policy consequences. I will discuss each of these components of the jury's value, beginning with the public benefits that the jury provides.

It is easy to forget the forest for the trees when academically evaluating a particular subject. We can easily lose "first principles" by focusing on rather minute and

specific contentions between factions engaged in the scholarly dialogue. Accordingly, I want to draw the reader out a bit and consider a rather large, but sometimes non-obvious, public benefit of the jury system: civil dispute resolution.

When I say "civil" dispute resolution, I refer not to the fact that juries can serve to resolve disputes in *civil* (as opposed to criminal) cases. Instead, I refer to the fact that as a dispute resolution mechanism, juries are a part of the legal process that seeks to provide redress for injuries without resort to violence or breach of peace. It may seem too base or banal a point to make, but the reality is that many nations across the globe ostensibly have a civil justice system, and yet see civil and political violence at alarming rates. As Sward (2001, 29) notes, the civil jury system "benefits those citizens who find themselves involved in a dispute that they cannot resolve without authoritative help. But it also benefits those citizens who never make use of the adjudicatory services of the state, because without an authoritative resolution of such disputes, the disputants may well engage in self-help, resulting in a breach of the peace." In other words, there are public benefits to be derived from the maintenance and appreciation for a civil justice system that encourages the use of civil juries. And, as noted in the previous section, there is a "civic-ness" that appears to follow individuals beyond their jury service into their future affairs, including their participation in the democratic system as voters. If serving on juries instills a maintenance of civil order, not only for the parties involved in the litigation, but also for those who leave the jury box and have political disagreements, then it is fair to say on a normative level that trials (and their concomitant use of juries) are a public good.

A related concern with trials and juries is in the area of resource-disparity. Sward (2001) contends that juries can serve as an "equalizer." When two large

corporations, for instance, do battle in the courtroom, it is often the case that there is a parity in resources. The same can often be said for disputes in the civil system between two individuals. But, there are two examples where the jury can provide an equilizing effect: (1) when individuals are against the government in civil cases and (2) when individuals are against deeper-pocketed corporations in a civil case. In these scenarios, one party is disproportionately disadvantaged by the lack of resources to contend its position. It is not difficult to consider the large resources available to the government should it wish to push a particular argument in court; the same can be said for a large corporation. Yet the private litigant, the individual, does not have the resources to "lawyer up," and thereby lacks at the outset an equal footing, particularly at the pre-trial stage of litigation. But at the point of a jury trial, many of these elements disappear, *at least as far as the jury knows*. For instance, a corporate defendant may very well be represented by a large law firm with thousands of attorneys, have devoted innumerable (billable) hours to discovery, and have out-investigated the facts of the case several times over than an individual represented by a solo-practitioner. However, in the presence of the jury, this resource disparity is not on display in an overt sense. The jury typically hears from the lead attorney in opening and closing arguments, a single lawyer will typically conduct examination and cross-examination of evidence during the trial, and closing argument is typically conducted by a single attorney (indeed, it is often not to one's advantage to have several attorneys stepping in to conduct such closings in piecemeal fashion, if the trial judge would even allow it). In short, the essence of the case is distilled into the factual determinations necessary for the jury to render its verdict and the resource discrepancies (which are never lost on the attorneys and even the parties to a case) do not pierce the jury box. This contention is not to suggest that these factors do not matter at all at the trial stage; they can.

If a judge asks for a trial brief, the large firm can assign a newly-minted lawyer (or three) to stay up all night with a crisp written argument prepared by 8:00 a.m. the next morning, while the solo-practitioner must decide whether to expend time drafting the brief and not prepping for the next day's witnesses (to say nothing of the other, personal demands on their time). But *to the jury*, these matters are held somewhat in check and the jury can have an equilizing effect. This fact leads Sward (2001, 31) to conclude that the "jury can mediate th[e]se inequalities" (*see also* Carbonneau, 1989, 208-09). The same can be said for the advantage "repeat players" have in the litigation process. The government, and often large corporate entities, are repeat players in litigation, which gives them an advantage at understanding their probabilities of success and the mechanics necessary for advantageous resolution of their claims or defenses.[4] Carbonneau (1989, 208-09) suggests the repeat player advantage can be mollified by the jury trial system.

Another benefit that appears to exist for usage of the civil jury concerns the deliberative capacity of juries to decide cases imbued with "tragic choices." This argument, espoused by Calabresi and Bobbitt (1978), results from the larger idea that juries can produce "greater common sense to decisionmaking, since the judgment of twelve persons is very probably superior to the judgment of an individual" (Priest 1993). This argument that juries reach superior decisions is the very argument proposed by Harry Kalven and Hans Zeisel in perhaps the most well-known book ever written on juries, *The American Jury*. As Priest (1993, 107) notes, according to this view, "a civil jury is most appropriate for issues requiring the application of complex societal values by a group of citizens who, in dispersing, deflect possible antagonism."

[4]In the context of litigation strategy and "repeat players," *see* Galanter's (1974) seminal article "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change."

The case of "tragic choices" follows this line of reasoning: A "tragic choice" is "a selection, sometimes compelled in a complex society, from among a set of alternatives, all of which are difficult or impossible according to some widely accepted moral vision" (Priest, 1993, 107). A typical example used is that of assignment of kidney dialysis machines: to assign the machine to one patient means another will do without (leading to death). Because the jury is "decentralized" and "representative," while at the same time "discontinuous" and "aresponsible," the jury can render decisions in these "tragic choice" situations in an effective manner. The jury is decentralized and representative because it is populated with laypeople randomly drawn from the population. It is discontinuous because it serves to make a decision and then ends. It is aresponsible in that it is tied to no constituency directly, as a political actor might be. Calabresi and Bobbitt (1978, 17-19, 186-89, 57-64) suggest these factors together render the jury as a particularly good, and important, agent in society's decision of complex and difficult matters. As they note:

> The jury's representativeness and lack of responsibility. . . [are] the source of the characteristic and powerful way in which the jury operates: Juries apply societal standards without ever telling us what these standards are, or even that they exist. This is especially important in those situations in which the statement of standards would be terribly destructive.

It should be noted that the situations envisioned with "tragic choices" are not the everyday occurrence, at least in the modern era of litigation. A slip-and-fall at the grocery store case might not rise to the level of a "tragic choice." Thus, it is certainly the case that juries are not always called upon to decide crucial matters of resource allocation between parties or contending interests every day. But, there are ocasions where this could be the case. Disputes over patent expirations for drugs and whether they should receive "generic" production, liability for failure to

correct safety issues with production automobiles, and even the constitutionality of funding mechanisms for schools could present difficult choices to a community for which overtly political actors are ill-prepared or even incapable of rendering an efficient decision. While Calebresi and Bobbitt's conclusion regarding the jury in these respects is perhaps controversial, it is another argument about the efficacy of the jury, in particular its ability to make important decisions on complex societal policies.[5]

The final concern for the jury in their dispute-settling role is a rather clear extension of our discussion heretofore, namely, *are juries any good at making these decisions*? It is one thing to theoretically contend that juries provide improved decision, or that they are uniquely able to convey a pull towards civic engagement. It is quite another to suggest that the decisions they render are in any way "accurate" or "good." And it is here where there is a strong argument against juries proffered by some. For instance, why should we expect laypeople with no formal training in the law to comprehend cases that can sometimes involve rather complex considerations? And, why should we trust them to resource allocation when the anecdotal evidence suggests they award ridiculously high damages in some cases that do not comport with actual notions of injuries suffered?[6] Simply put, would it not make sense for a judge, who has the formal training of the law, to decide these matters and do away with the conceptualization of a jury?

It turns out, the situation is not as dire as many think. According to Sward (2001, 35), the empirical evidence that "juries cannot handle complex cases is mixed." And, it seems that, for the most part, juries actually do a good job apportioning re-

[5] A related issue to the "tragic choice" is the regulatory function of the jury. I discuss this function *infra* in this chapter.

[6] *See*, e.g., Huber 1990.

sponsibility and damages in civil cases (Merritt & Barry 1999; Lempert 1981; Lempert 1993; Cecil, Hans & Wiggins 1991). As Lempert (1993, 182) notes, "the jury often appears to do surprisingly well in the face of complexity, particularly insofar as complexity is defined by length of trial and the introduction of massive arrays of evidence."

But what of the alternative, that is judges deciding cases rather than juries. It turns out, judges and juries agree at rather high levels. A study of federal judges found that 96.8% of federal judges agreed with jury verdicts all the time or nearly all the time (Curriden 2000). In the *American Jury*, the researchers evaluated more than four thousand civil trials and found that judge and jury agreed on the question of liability in 78% of civil cases (Kalven & Zeisel 1966).[7] A study of four hundred state and federal trial judges who tried negligence cases in the state of Georgia showed that 97% of the judges reported that they agreed with the jury at least 79% of the time (Sentell 1991*a*; 1991*b*).[8] A 1998 study of Arizona civil cases found an 84% judge-jury agreement rate (Hannaford et al. 1998). A study conducted by Louis Harris Associates found that 69% of state judges and 80% of federal judges do not believe that "the feelings jurors have about the parties often cause them to make inappropriate decisions" (Harris Study 1989). Indeed, the Harris Study results indicate that more than 75% of both federal and state judges agree that for routine civil cases, the right to trial by jury is an "essential safeguard" that should be retained. The polling evidence leads Bogus to conclude, "judges appear to be saying that juries are at least as capable as they at deciding cases" (Bogus, 2001, 96).

[7] A parallel study conducted by Kalven and Zeisel found in criminal trials the rate was exactly the same: 78%.

[8] This "79% of the time" figure is reflected in the findings because the survey questionnaire informed the judges of the findings from *The American Jury*.

Of course, that judges and juries agree is certainly evidence that they can at least perform as well as judges *view themselves* as determiners of "truth." This is a step in the right direction if the jury is to be considered as supplying an effective role as a dispute-settler of value, as Sward (2001) proposes. But what can we say of the objective capacity for jurors to properly ascertain facts? Again, the evidence strongly suggests juries are also competent in this domain.

In *Inside the Jury* (1983), Hastie et al. conducted a number of experimental juries utilizing as close to possible the mechanics of a real trial. Members of the experiment were recruited from jury pools in three Massachussetts counties. Jurors were shuttled through a mock *voir dire* process[9], watched a video of a trial conducted by the researchers (though based entirely on a real case and fact pattern), and were videotaped in the mock trial process, including in the deliberation process. Post-deliberation surveys were conducted to ascertain, *inter alia*, the participants' feelings about the process and ability to recall factual matters. In total, the process approximated the juror experience as closely as possible to maximize external validity. The results were fascinating and largely served to reinforce the fact that jurors tend to be good decision-makers. With particular regards to the juries' factfinding responsibilities (something that is taken away in the summary judgment process), the authors conclude (1983, 230):

> In their task of factfinding, juries perform efficiently and accurately. The reconstruction of the testimony and the construction of plausible narrative schemes to order, complete, and condense the trial evidence occur with thoroughness and precision. These accomplishments in jury deliberation are especially impressive when compared to the performance of even the most competent individual jurors. The view of the evidence produced by deliberation processes is invariably more complete and more accurate than the typical individual juror's rendition of the same material. This conclusion is supported by postdeliberation

[9]This is the stage where potential jurors are excluded for potential biases and conflicts.

> measurement of jurors' memory for trial evidence. Not only do erroneous statements about evidence occur roughly half as frequently as errors on the law, but evidence errors are also more likely to be corrected during deliberation... Because jury performance of the factfinding task is so remarkably competent, few innovations are needed to improve performance.

The results from *Inside the Jury* address several of the concerns for the usage of juries. Not only were juries able to properly ascertain facts, and indeed recall them after the trial had concluded, they were also able to work collectively to better ascertain the "truth," something that theory had suggested might be the case. In sum, the evidence is quite strong that juries actually serve an important dispute-settling role through the processing of even complex amounts of information.

One final point is worth making on the jury's facility for rendering decisions that collectively agree with those of judges. Is it possible that the judge-jury agreement that we see is out of line with other realms of social decision-making? For instance, that judge's and juries agree with one another at rates between, say, 78% and 96% of the time, is that still low for other human endeavors? There is actually some evidence that suggests, no, in fact, these rates are actually quite high even for other attempts at reconciling distinct decision-agreement rates.

In her early work, Shari Diamond (1983) looked at agreement rates for other decision-makers engaged in complex human judgments. She found that that for National Science Foundation (NSF) and National Academy of Science (NAS) grant proposals, these organizations had a 75% agreement on grant funding. For practicing physicians (between 21-23 of them), the agreement was (scarily) worse: with three patient-actors who presented symptoms, medical professionals agreed 67%, 77%, and 70% of the time (for each respective patient). For psychiatrists, of 153 patients interviewed twice, one by each of two psychiatrists (with a total of four

experienced psychiatrists put to test), the pair-wise agreement existed in 70% of the cases presented. In short, the evidence suggests that juries' capacity to address and resolve a dispute (consistent with what the judge might find) performs as well as, if not better than, other difficult judgment decisions rendered by humans in other complex matters. Accordingly, the dispute-settling role of the jury finds much support in the available scholarly literature.

2.2.3 The Law-Making Role of the Jury

We typically think of the jury as deciding questions of fact, while the court (or judge) decides questions of law. And, for the most part, this separation of duties is how trials are handled. It is taken in modern American litigation as a maxim: the jury's duty does not encompass the law.[10]

This dichotomy between judge and jury, however, is not quite accurate. Lurking behind the pronouncement of the dichotomy is the concept of jury nullification. Jury nullification occurs when a jury abrogates or refuses to follow the court's instruction of the law. In short, jury nullification is the jury's act to take the law into their own hands. Given that it is often difficult to know *why* a jury has decided what it decided, it can be a threat that operates in the balance of a trial. To say the least, "Jury nullification is a highly controversial phenomenon" (Sward, 2001, 41). The arguments in favor of the phenomenon center on the notion that nullification permits juries to individualize justice and to "temper justice with mercy" (Sward,

[10]This has come to be largely through practice, and even in the face of explicit constitutional assignment of the law-finding task to the jury. As an example, the Indiana state constitution states that in criminal trials, the jury shall have the right to determine "*the law* and the facts" (emphasis added). The Indiana Supreme Court, however, has taken a different view, such that, "Notwithstanding Article 1, Section 19 of the Indiana Constitution, a jury has no more right to ignore the law than it has to ignore the facts in a case" (*Bivens v. State*, 642 N.E.2d 928, 946 (Ind. 1994)). Though a single example, the result is consistent with the modern treatment of the law-facts dichotomy and the parties who will decide each.

2001, 41). Or, as Judge Learned Hand once stated, it "introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions" (*U.S. ex rel. McCann v. Adams*).[11] Despite the fact that strict efforts have been put in place to curb the usage of jury nullification, there are those that argue vociferously for its permitted use (*see*, e.g, Abramson 1994). And while jury nullification—once existing for both civil and criminal cases in the early years of the American existence—has fallen out of usage, it still occurs, even if infrequently. A relatively recent example is the acquittal of Dr. Jack Kevorkian of the common law crime of assisted suicide by a Michigan jury in 1996.

Noting that the jury *can* effectuate legal policy changes through jury nullification is not to suggest it is always a good or fruitful activity. Very clearly it can run amok, and the experience of Southern juries acquitting whites who committed racist crimes against African-Americans can (and should) be in the forefront of one's mind when considering the issue. Clearly, jury nullification in those situations would be inappropriate. My discussion of this issue is not necessarily to take a position as to whether the jury, as decider of law (through nullification) is always a "good" or always a "bad." Rather, it is to point out that the jury can serve several roles, including one as the law-maker, and in that process can serve larger societal interests in the right situations. A situation in which jury nullification has served to facilitate what many think to be a positive policy advancement is in an arena far less enthralling than the issue of civil rights and Jim Crow policies, namely, car accidents.

At first blush, discussion of vehicular accidents and damages would seem to a rather bland topic. And, of course, it can be. But these types of claims are ac-

[11] 126 F.2d 774, 776 (2d Cir.), *rev'd on other grounds*, 317 U.S. 269 (1942).

tually quite important. The United States is laden with vehicles. Those vehicles require insurance. And, as a result, collectively the costs of operating those vehicles is pooled and distributed amongst society writ large through premiums paid to insurance companies. In short, big money is at stake in maintaining this system. And, even bigger money is at stake when the rules of liability are modified.

The story of jury nullification here begins with comparative negligence law. In general, this theory of tort recovery permits the fact-finder (a jury) to weigh the relative fault of each actor involved in the case. In other words, the jury can consider who is "more at fault," the person who sideswiped someone's vehicle, or, the person who made (for instance) an inappropriate left-turn that placed their vehicle in the position of getting sideswiped.[12] In "reaction to a perceived pro-plaintiff bias on the part of jurors, common law courts in the nineteenth century had developed the doctrine of contributory negligence" (Sward, 2001, 43; *see also* James 1953). Prosser & Keeton's authoritative treatise on torts defines contributory negligence in the following manner:

> Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection...[A]lthough the defendant has violated his duty, has been negligent, and would otherwise be liable, the plaintiff is denied recovery because his own conduct disentitles him to maintain the action. In the eyes of the law both parties are at fault; and the defense is one of the plaintiff's disability, rather than the defendant's innocence.[13]

In other words, contributory negligence essentially says that if the person injured is found to have contributed to their injury through their own negligence, then no recovery is possible for their injuries, even if the defendant was negligent,

[12]For a discussion of comparative negligence and its historical development, *see* Yeazell (1990) ("The New Jury and Ancient Jury Conflict.")

[13]11 *Prosser & Keeton on Torts* § 65, p. 451-52 (5th Ed. 1984)

and even if the defendant was more negligent than the plaintiff. In my automobile example above, if the person sideswiped was even 1% at fault (and, therefore, the other person who hit them 99% at fault), they could not recover for their injuries. Simply put, this legal doctrine is strong medicine against individuals recovering for injuries suffered.

Over time, judges attempted to enforce tort cases that involved contributory negligence by taking away from the jury claims that the judge determined could be settled "as a matter of law" (i.e., contributory negligence existed). However, those cases that made it to trial often found juries unwilling to abide this rather draconian fixture of the bygone days of tort law. Thus, juries would appear to apportion fault, in a comparative sense, and factor damages accordingly. In other words, juries in these civil cases engaged in jury nullification. Quite clearly these juries *should* (as a matter of law) find no recovery for these plaintiffs. But they did. And they did, presumably, because of some community norm of "fairness." Yeazell (1990, 113) explains that, "[f]or many years juries simply declined to find contributory negligence when the strictest interpretation of the law might have suggested its presence. " Sward (2001, 44) notes, "This rebellion by juries eventually contributed to formal changes in the law in most states, so that some form of comparative negligence is now the rule among states rather than the exception."[14]

The effect of the liability shift in this example had a huge impact for insurance purposes. In the past, individuals harmed typically could not recover, their insurance premiums would go up (since they had damage to their vehicle that had to

[14]In the comparative negligence scheme, liability is apportioned out, and damages effectively prorated on that basis. In some states, a modified-comparative fault scheme is used whereby a plaintiff must show they are at least less than 50% at fault; once that threshold is met, then damages are apportioned. Regardless, whatever form it takes, comparative fault standards are *far more* favorable to a plaintiff's recovery than the former contributory negligence standard.

be fixed if above their deductible), and the defendant's insurance company would not have to pay. It is not hard to see why, for instance, insurance companies would favor the contributory negligence standard over the comparative fault standard. And it is also easy to see why such insurance companies would lobby and promote the usage of this standard in courts over the comparative fault standard. Yet, it is here where the jury served a law-making function. Through jury nullification, juries across the country insisted that their community values did not embrace the contributory negligence standards of big business and the insurance companies. In short, we see in this example the very real capacity for juries to act as law-makers through their nullification efforts.

The final law-making function of the jury I will discuss is the regulatory role of the jury. If we assume (safely) that juries will typically *not* engage in jury nullification, then can a jury have law-making authority on another dimension of its power? In other words, if juries simply serve as factfinders, can they still effectively "make policy" in such a manner as to steer policy in the aggregate? The answer would appear to be, yes, they can through what Marc Galanter refers to as their "regulatory" capacity.

Assuming the dichotomy exists in which judges decide questions of law, and juries decide questions of fact, is there room for juries to function as establishing precedent of some sort? In the strictest sense of the word, the answer is clearly "no." Trials between specific litigants are confined to those parties and generally the disputes that are resolved at trial bind only these individuals.[15] But, there

[15]There is an exception to this situation called *collateral estoppel*. Collateral estoppel occurs when one party to litigation argues that the matter has already been adjudicated and thus the issue cannot be again judicially determined. Typically, arguments of collateral estoppel occur when one party seeks to use an already-decided issue against the other party (i.e., these two parties were already litigants in a matter, an issue was decided, and henceforth that decision should apply between these two parties). However, collateral estoppel can be used against a third party if that third party is in

is a wrinkle. Many times juries, in deciding their questions of fact, are actually resolving questions of law. These situations are often times referred to as mixed questions of law-and-fact. A simple example will illustrate the point.

Suppose an individual (Plaintiff) is walking along a sidewalk in front of someone's home. In front of the home is a piece of property placed partially on the walkway (let's say, a broken dishwasher). The Plaintiff does not notice the dishwasher (perhaps it is dark), and bumps into it, causing an injury. The Plaintiff then sues the homeowner (Defendant) for negligence (a simple tort).[16] If the case were to proceed to trial by jury, one of the jury's determinations will be whether the homeowner (and the passerby) acted "reasonably" in their conduct. Here, the jury will need to decide the facts (what actually happened), but in rendering a verdict will also determine whether the conduct was reasonable or not, thereby deciding the question of law (whether negligence occurred, on any party's part). Here, the jury has decided a mixed question of law-and-fact, and ostensibly they set a form of precedent. This is the essence of the common law system. "Common law precedent consists of neither fact nor law alone, but both in disparate combinations" (Sward, 2001, 47; *see also* Fuller 1979). What are we to make, then, in such a situation? Has the jury established "precedent?"

In a sense, the jury has established precedent. Not only has it determined what is "reasonable," and thus what is actionable in the present case, but it also has

privity with one of the parties in the initial litigation. Privity, a concept from contract law, exists if there is a close or mutual relationship between one of the original parties. A party that inherits or takes over property (and successive debts, for instance) might be bound by collateral estoppel to the previous finding. Such a situation is truly an exception; most of the time, litigants in trial are the only ones who are bound by a particular decision, and no larger precedent is typically set, in the formal sense of the word.

[16]Let us avoid complicating the fact pattern with the public sidewalk. Perhaps the government is liable for failing to clear the walkway, or, perhaps the nearby streetlight was inoperable due to the public works department's failure to properly fix a broken light. We will confine our example here to just the two private parties for simplification purposes.

sent a signal to others as to what type of behavior will be tolerated under the law, and what behavior will be actionable. It is this particular behavior of the jury that Galanter (1993) considers to be the regulatory function of the jury. For Galanter, the jury performs two essential tasks:

> To decide whether civil juries are a good thing, one has to ask what juries are supposed to do. I would answer that basically they do two things. Distributively, they decide cases. Collectively, they generate a body of knowledge that fuels the American system of "litigotiation."

Galanter (1993, 61) considers "litigotiation" to be a system of "contesting claims in the vicinity of courts, where recourse to the full process of adjudication is an infrequent occurrence but at every stage an important option." In other words, juries (1993, 61), in the aggregate "provide signals or markers by which legal actors form estimates of what other juries will do and on that basis make decisions and formulate policies about claims, offers, settlements, and trials, and even about pre-claim investments in safety, disclosure, and so forth." Accordingly, trials provide a "lay-of-the-land," a reference point for litigants to determine their fate (*see also* Jacobsohn 1977). From this decision node other decisions are made through backwards induction. The amount a party thinks a jury is likely to award, for instance, affects (reverse chronologically), the amount of time that party thinks is appropriate for discovery, the amount and type of resources necessary to defend the claim, what settlement value might be worthwhile (either in offer, or in acceptance), and etc. The point is, the jury trial serves as points of data to be incorporated into a decision-maker's conceptualization of how to behave. And it is in this sense that the jury functions in a quasi law-making role.

This consideration of the jury as a law-maker is not to suggest it is *the only* reference point a party will make. Who one's judge is, what is the likely effect

of an appeal, etc., are considerations. But the jury, and its capacity to act as an expositor of the "law" in a particular case will serve as an expositor for other cases. As Daniels and Martin (1995, 62) note, "verdicts are important not just because of the results for the parties involved in the suit, but also because of the messages they send to others." Indeed, as one insurance executive noted, "decided cases are only the tip of the iceberg; they directly affect thousands of other cases that get settled before going to trial, not to mention acting as a stimulant for even more lawsuits" (McCormick 1986).[17] H. Laurence Ross, in his seminal study of insurance claims adjustment, found that the basis of settlements seems:

> [O]n both sides to be an estimate of the likely recovery of the claimant before a jury. Although the attorneys go about it more rationally, both sides come to this estimate by comparing a given case in its many dimensions against other, similar, cases that have gone to trial.[18]

In other words, the jury trial serves a regulatory function, deciding the social costs/benefits to be attributed to individuals' (or other entities') behavior which carry through the legal system, thereby altering society's behavior. This regulatory function, then, serves as a quasi-precedent, establishing standards of conduct through which individuals will chart future behavior.

2.3 The History of American Civil Trials

Having understood why trials are important in a democratic theory sense, as well as the several roles that a jury can perform, it is necessary to examine how

[17] Of course, it is only a stimulant if there is an increase in liability standards (for instance, the change to a comparative fault standard from contributory negligence). The opposite could occur; juries rule against plaintiffs and make it harder to prove certain types of claims. The insurance executive here, James McCormick, was advocating for tort reform, to put the "stimulant" comment in perspective.

[18] Ross is clear that "jury value" and "settlement value" are not the same thing. As he notes, "The jury value is initially discounted by the savings in cost to the claimant by not proceeding to trial" (Ross, 1980, 115).

this particular choice of adjudicatory vehicle has found its way into the modern American litigation state. The following historical sketch is necessarily brief. There are volumes of work on the historical roots of trials in general, and jury trials in particular. The historical question alone would occupy an entire field of study, and would be well-beyond the scope of my present inquiry. Accordingly, I present just the basic thumbnail of the historical evolution of trials, particularly as it relates to the American experience. This information will provide a minimum working knowledge of how we got to the point we are with civil trials and lead into the next chapter's discussion of the present state of trials, in both a statistical and theoretical sense.

It is generally agreed that the modern conception of a "jury" began following the Norman Conquest in 1066. "The two centuries after the Conquest saw, among other things, the establishment of the king's common law courts, the growth of the jury, the origins of equity, the definition of the rights of English people in the Magna Carta, and the beginnings of Parliament" (Sward, 2001, 68). Prior to the institution of juries, disputes were adjudicated in a legal sense through three mechanisms: (1) trial by battle, (2) trial by compurgation, and (3) trial by ordeal.

Trial by battle is, as it sounds, the use of violence to resolve a dispute. Trial by battle typically required the parties "to engage in a duel of some sort, often a fight to the death" (Sward, 2001, 71). Killing another person, or fearing one's own demise, often struck individuals as an unpromising scenario. The good news for disputants, however, was they could hire "champions" to fight for them. These individuals were not exactly known for their charm and were, in a word, quite "unsavory" (Sward, 2001, 71; *see also* Thayer 1898). Trial by battle was ultimately not outlawed until 1819 (Thayer, 1898, 45).

Trial by compurgation consisted of a group of compurgators, or "oath-helpers," who were acquainted with the individual who held the burden of proof. These compurgators would swear to their faith that the statements by the litigant were truthful. An oath would be recited by these individuals, and if they made an error, it was taken that the individual litigant was untruthful and should lose (Sward, 2001, 72). This method of "trial" survived until 1833 (Thayer, 1898, 34).

The final method utilized in England post-Norman Conquest was trial by ordeal. This method, as the name might suggest, also involved unusual tactics. As Hans and Vidmar (1986, 24-25) explain:

> The ordeal took a number of forms. The ordeal of the hot iron required the accused person to carry a red-hot pound of iron in his or her hand for a certain distance, usually nine feet. An alternative test was the ordeal of hot water. The accused was required to dip one hand in a pitcher of boiling water and pluck out a stone hanging by a string. In both ordeals, the injured hand was bound up in bandages. If after three days the hand had not become infected, the person was judged to be innocent. In another variant called "going to the water," accused persons were bound with a rope and thrown into a body of water; if they sunk to a prescribed depth they were pulled out and declared innocent, but if they floated they were judged guilty.

These ordeals, and other interesting exercises in "truth discernments" (for instance, forcing a person to eat a piece of food to see if they choke) were utilized until only 1215 when the Church, in the Lateran Council, forbade clergy from participating in these events (Sward, 2001, 71).

Variants of what came to be the civil jury, however, began to percolate even while these other forms of "trial" were in existence. For instance, the famous *Domesday Book*, which acted as a census and property record of sorts for post-Norman Conquest England, was compiled by requiring nobles to appear before an "assize court" and state under oath the names of manors in their area, the own-

ers of those manors, and related property considerations for valuation (Hans & Widmar, 1986, 25). Within about a century, these same assizes (with some modifications) were used to settle litigants' disputes and adjudge taxations (Plucknett, 1956, 111-12). In short, the movement toward the modern civil trial did not occur overnight. In fact, the movement to juries can be seen as a consolidation of power by the Norman kings over England. The creation of new "writs" (requests for court orders) were given to the adjudicatory province of the King's courts, and over time these courts became the dominant form of dispute resolution in England (Green 1907).

Historians point to evidence that jury trials, which resembled the modern form, began to appear around the end of the fifteenth century (Sward, 2001, 75; Plucknett, 1956, 129-30). The size of the jury (fixed at twelve) was settled somewhere around the middle of the fourteenth century (Sward, 2001, 77).[19] And by the early eighteenth century, empaneled jurors were prohibited from using their personal knowledge of the facts of a case and were required to confine themselves to the evidence introduced (Mitnick, 1988, 207).

It is under this background that the English colonists to America brought the civil jury. From the start, civil juries played a significant role in the colonists' lives and were used as vehicles to announce colonists' dissatisfaction with English revenue collection efforts through jury nullification of enforcement actions (Wolfram 1973; Nelson 1975). After the failure of the Articles of Confederation, however,

[19]The reasons for the twelve-person jury are not fully known. Sward (2001, 76-77) collects the various theories: (1) twelve witnesses were utilized as a quantum of proof in some cases, so this carried over to the jury; (2) it was inherited from Scandinavian countries through Scandinavian colonies; (3) mystical reasons (twelve tribes of Israel, twelve patriarchs, twelve officers of Solomon, twelve Apostles). Sward suggests the actual reason is unknown. For the United States Supreme Court's discussion of the matter, *see Williams v. Florida*, 399 U.S. 78 (1970) (holding the Sixth Amendment to the U.S. Constitution does not require empaneling twelve jurors in a criminal case).

and the ensuing Constitutional Convention, the question of the civil jury actually became a point of contention between the Federalists and Anti-Federalists.

The Federalist position, espoused by Hamilton in *Federalist No. 83* was that any suggestion that the use of a civil jury would not be protected by the new Constitution was not the case. The reality, however, was that only right to a jury trial in *criminal* cases was contained in the Constitution draft.[20] Hamilton downplayed this omission by noting in *Federalist No. 83* that:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

For the Federalists, failure to include a civil jury trial right did not necessarily mean the right did not exist; it was simply unnecessary to include. Anti-Federalists would have nothing of this argument. Thomas Jefferson explained that he "consider[ed] trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution" (Jefferson 1789). As Landsman (1993, 38) notes, the Anti-Federalists, "who were challenging the appropriateness of the Constitution as a whole, treated the absence of a civil jury guarantee as sufficient grounds to oppose the adoption of the document." The Anti-Federalists looked to William Blackstone's statement (Landsman, 1993, 38-39):

> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have

[20]Codified in Article III § 2.

> frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that *the few* should be always attentive to the interests and good of *the many*.[21]

Ultimately, the Constitution passed and was ratified without an explicit provision for the civil jury. However, as a part of the compromise in which Anti-Federalists voted for ratification in return for a Bill of Rights, the civil jury found new life. The Seventh Amendment, ratified in 1791, contained the following provision:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

With this provision, the right to a jury trial in civil cases found constitutional protection. Over time, the United States Supreme Court has interpreted the Seventh Amendment using an "historical test." Under this standard, the question is whether there was a right to a jury trial as that right existed in common law England (i.e., 1791). As a relatively recent Supreme Court case stated:

> [W]e ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the Founding or is at least analogous to one that was. If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.[22]

The test itself draws a distinction between claims sounding in "law" and those in "equity," which is consistent with the practice of the English courts at common law. Claims sounding in "law" typically involve declarations of rights with

[21] Quoting William Blackstone, 3 *Commentaries on the Laws of England* 379.
[22] *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (internal citations omitted).

redressable injuries; those in "equity" typically request a particular remedial form of relief (a request for transfer of property, the court to order a litigant to perform some task, etc.). Though a full discussion of this matter is beyond the scope of the present inquiry, a complication with this matter is that the Federal Rules of Civil Procedure abolished the distinction between law and equity when they were instituted in 1938. The Court proclaims, however, that this merger of law and equity does not terribly complicate its decisions in Seventh Amendment cases (*See*, e.g., *Chauffeurs, Teamsters, and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) ("Since the merger of the systems of law and equity…this Court has carefully preserved the right to trial by jury where legal rights are at stake."). It appears that as a practical matter, there is rare disagreement on the usage of this particular test and is "rarely questioned in the court" (Sward, 2001, 95 n.178; *see also* Wolfram 1973). That said, scholars of the Constitution have increased their opposition to the Court's read on the Seventh Amendment, contending that it ill-suits the modern era of litigation (Krauss 1999; Redish 1975; Schwartz 1996; Moses 2000). Notwithstanding these concerns, the Court seems unlikely to change course any time soon on the "historical test" discussed above.

2.4 Conclusion

In this chapter I have discussed the foundational features of the civil trial, both in theoretical and historical terms. As detailed, a jury trial performs several functions, including political, dispute-settling, and law-making roles. It is within these roles we see the civil jury's ties to democratic theory and the connection between jury trials and the regulatory effect it can have on society. Additionally, a brief historical sketch of jury trials provides enough background to understand how we have arrived at the present point of modern day civil trials. In the next chapter I

detail the current state of civil trials in the federal courts system with attention to the statistical features and trends from the 20th Century to the present millenium. I will also discuss the current explanations for why civil trials are no longer utilized, their limitations in explaining the diminution of civil trials, and foreshadow a discussion of my theoretical contention that better explains the large decline in federal civil trials.

3. PREVIOUS EXPLANATIONS FOR DIMINISHING TRIALS

3.1 Introduction

The appearance of the civil justice system is one often painted in terms of litigiousness. *See, e.g.*, Schachner 1995. The typical picture painted in the movies and television is that of courtrooms stuffed with litigants, armed with attorneys, and filled with drama. In reality, however, Perry Mason and Ben Matlock would spend almost none of their time in their respective courtrooms. The empirics suggests that yes, in fact, cases are filed at relatively high rates. Indeed, United States federal civil case filings have steadily increased to reach the highest levels ever seen. Data from the Administrative Office for the United States Courts indicate that federal civil case filings have increased over 400% between 1964-2014. Yet, despite the increased number of case filings, the percentage of cases reaching trial is now 1/12th what it was in 1964. Presently, only 1% of all federal civil cases filed reach trial. These contradictory trends suggest a puzzle: why have the number of trials diminished despite record case filings? And, does that diminution of trials have a substantive impact on national policies?

The present chapter details the current state of the literature explaining why we no longer have civil trials. We will see different arguments made for why civil cases no longer go to trial. Ultimately, I conclude that the present explanations proffered by the scholarly community fail to provide a unified theory and neglect, in particular, the role that pre-trial procedure can have on reducing the number of trials. In the next chapter I will detail my theory for a better way to evaluate the research puzzle posited above. Before addressing past explanations for the

diminution in trials, it is necessary to conduct a brief statistical snapshot of the present state of federal civil trials in the United States.

3.2 Statistical Snapshot of Federal Civil Cases

I have repeatedly referenced the fact that few cases make it to the trial stage in the federal civil system. But how few is *few*? To answer that question, we need partially to speak in relativities. Clearly, there is a relationship between the number of cases filed in the federal civil system and the trial output. Figure 3.1 indicates the number of federal civil cases filed between 1964 and 2014.[1] Very clearly, we can see that the total number of cases filed over time has increased dramatically in the fifty years of data. In contemporary times, the total number of federal civil cases filed sits at approximately 300,000. This number, in historical terms, is quite large. Of particular note, we can clearly see the period from the mid-1970s to the early 1980s where the federal courts experienced, what some have called, the "litigation explosion." The rapid rise in cases filed contributed to the popular sentiment that the United States was a country of lawsuits, and, for this epoch, the data bear that sentiment out. But, there is also another component to that story, and it is this: the federal courts have *not* see a dramatic increase in the total number of federal civil cases filed in the last twenty years. Public sentiment nothwithstanding, the federal courts have oscillated between just over 250,000 civil cases filed per year to no more than approximately 290,000 civil cases during the last two decades or so. Accordingly, while it is fair to speak of the "litigation explosion," it is not fair to say the increase in cases filed carry through past the 1990s and into present times at anywhere near the level many suspect.

[1] All data are from the Administrative Office for the United States Courts.

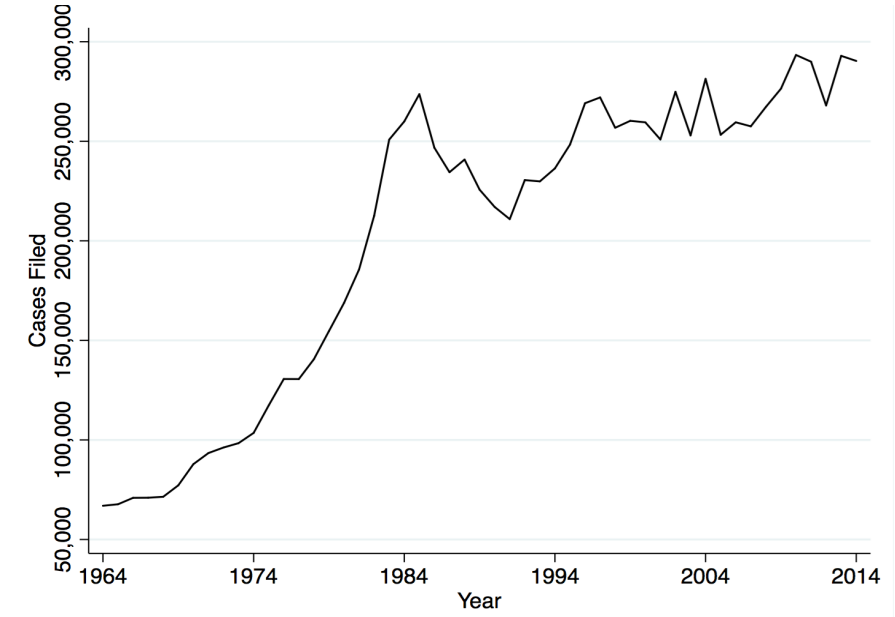

Figure 3.1: Total Federal Civil Cases Filed: 1964-2014

Returning to the initial question: how many cases go to trial in the federal system? The answer is, in raw numbers, not that many. Figure 3.2 details the total number of federal civil cases that reached the trial stage. As we can see from the graph, the total number of trials has seen a sharp decrease in raw numbers over time. In 1984, the federal courts system saw the greatest number of civil trials in the dataset; just over 12,000 total trials. This number coincides with the apex of the "litigation explosion" for cases filed. It makes sense, then, that as the federal courts system received the greatest number of cases filed, it also had the greatest output in the form of trials. Heretofore, the data reveal nothing of surprise. This observation changes as we move forward in time.

Within a mere few years of the "litigation explosion" peak, there began a *drastic* reduction in the total number of cases reaching the trial stage, *despite* a continued increase in the total number of cases filed. In fact, by the mid-1990s, the total num-

ber of cases that reached trial were at the same levels as those in the mid-1960s. In short, there has been an increase in federal civil case filings of over 400% between 1964-2014, but the total number of cases that reach trial is 1/12th what it was in 1964. There is a complete inflection point in the data.

One note that should be made on the data for the total federal cases that reached trial concerns the rather large spike in the data near 2007. In this year, the total number of trials spiked to nearly 10,000; almost three times the level in the year before (and indeed, the year after). This large increase, however, is more of a quirk in the coding scheme utilized by the Administrative Office for the U.S. Courts. In 2007 in the Middle District of Louisiana, the district court resolved thousands of claims simultaneously that involved litigation related to an oil refinery explosion. In short, there were not 10,000 individual trials, there was a large trial that resolved many claims. The Administrative Office for the U.S. Courts considered this event "trials," rather than a "trial," and therefore the raw data suggest a massive increase in total trials for the country. This result is an illusion; it is an artifact of the federal court administrator's coding scheme.

That the total number of trials has decreased suggests "something" occurred to cause such a sweeping change. However, it is also necessary to evaluate the percentage of cases that made it to trial of all cases terminated in a given year. Perhaps it is the case that the raw numbers do not accurately reflect the proportion of cases that do end in a trial. Figure 3.3 details the percentage of cases that were terminated at the trial stage.

The results are clear: not only have we seen a diminution in the total number of cases that make it to trial in the federal civil system, we also see a decrease in the percent of cases that go to trial overall. Indeed, the present numbers indicate

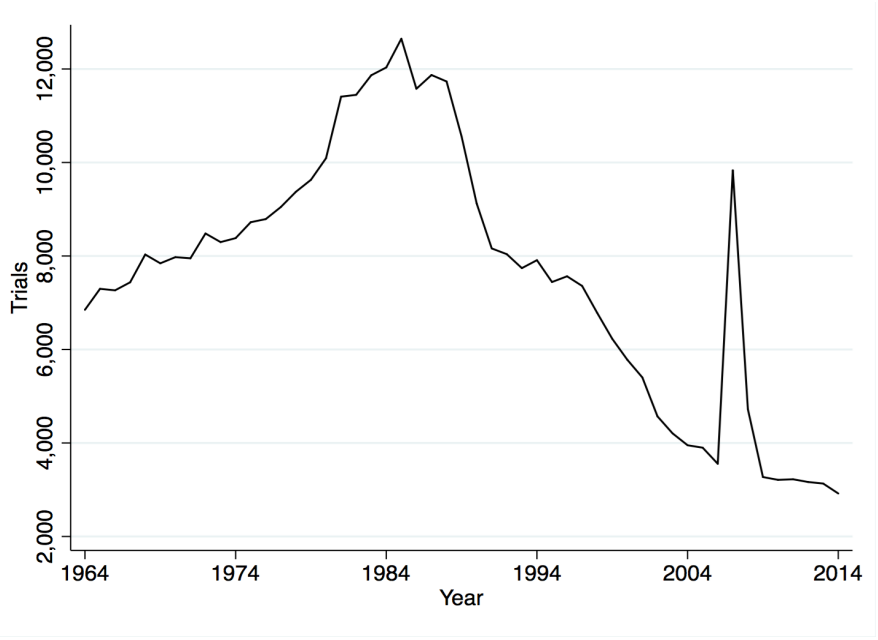

Figure 3.2: Total Federal Civil Cases Reaching Trial

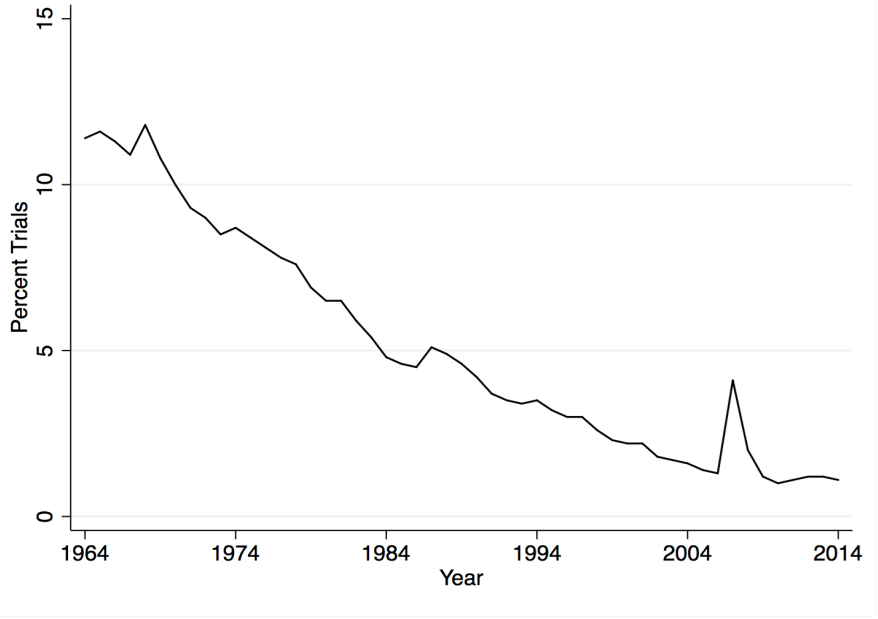

Figure 3.3: Percent of Federal Civil Cases Reaching Trial

that only about 1% of all civil cases are terminated through a trial. This number is exceedingly small, and follows a continued trend over the duration of the time series.[2] In the last few years, the number appears to have bottomed out at the near-1% level; perhaps we have reached a floor. Regardless, the data very clear indicate that federal civil cases simply do not reach the trial stage. The question is, why?

3.3 Explanations for the Diminution in Trials

The question of what has happened to cause this massive decrease in trials is one that scholars have tried to address. Marc Galanter, who has long studied this question and is perhaps the nation's foremost authority on the subject, provides several "clusters" of answers scholars have provided in an attempt at addressing this question. Galanter (2005) identifies these clusters as:

1. Changes to demand for trials.
2. Changes in available resources.
3. Changes in the character of the litigation process.
4. Changes in judicial ideology and practice.
5. Changes in the strategies and tactics of litigants.
6. Changes in the usage of alternative dispute resolution (ADR).

Professor Galanter ultimately stakes a claim that "the long-term decline [in trials] reflects resource constraints in that the supply of courts is not designed to provide trials in all cases" (2005, 1263). For him, "the long-term decline of trials [is] the result of a conjunction of a restricted supply of judicial resources with the generation of signals and threats that manage to stretch the small supply of adjudication to meet increased demand" (2005, 1264). In this view, the issue of resource

[2]The spike in Figure 3.3 for 2007 is, again, the effects of oil refinery cases from the Middle District of Louisiana.

demands constrain the courts and forces litigants to truly think of alternative forms of dispute resolution (for instance, settlement, or, ADR).

Diamond and Bina (2004) approach the issue slightly differently, but in the same vein. These scholars suggest a "supply-side" explanation as the reason cases do not make it to trial. In particular, the authors suggest that scarcity of judicial resources contributes to the low trial rate. Because individual litigants must consider the costs of extended delay in prosecution of their claims, alternative resolutions could appear more favorable. Notably, the authors evaluate whether the federal criminal dockets play a role in the lack of trials due to the fact that Article III judges who preside in federal civil cases also have a federal criminal docket. To them, focus must be given to the judicial workloads of judges, which, if taken as a weighted measure[3], have increased over time (2004, 647).

While Diamond and Bina's "supply-side" explanation has intuitive merit, there are problems with its conclusion when one looks more deeply at the data. First, as their own data suggest, the median time from filing a case to ultimate disposition from 1982-2002 did increase, but not much: one month (Diamond & Bina, 2004, 653). A one month increase in this measure surely cannot account for the dramatic decrease in trials. Additionally, as even the authors point out, were we to look at the median time from filing to trial in civil cases, while there is an increase (of about seven months), that measure fails to account for the distortion to this measure caused by a massive influx of new cases.[4] In other words, a judge could have a docket mostly comprised of young cases; conversely, they could have a large

[3] Alternative formulations of caseload measurement have been proposed, however, to account for the litigation realities that some contend are better measures of workload. *See*, e.g., Habel & Scott (2014)

[4] *See also* Clermont & Eisenberg (2002, 130) presenting data that the time to termination of federal civil cases resolved at trial has not generally increased from the period 1970-2000.

number of older cases. As the authors note, "the percentage of pending cases that are over three years old depends on the mix of cases in the queue" (2004, 653). The result leads the authors to ultimately suggest that these measures "do not offer an accurate picture of supply" (2004, 652).

Galanter further contends that Diamond and Bina's explanation cannot serve to explain the decline in trials. As Galanter (2005, 1264) notes:

> Not all cases present equal demands on court resources; court administrators weight case types to produce estimation of "weighted filings" that reflect judicial workloads more accurately than do the raw numbers of filings. Observers who emphasize the role of resource constraints in the decline of civil trials present data indicating that weighted filings in the federal district courts in 2001 were about 30% greater than in 1985. But in 2002 there were major additions to the resources available in 1985: about 18% more federal judges were sitting, accompanied by an augmented roster of magistrates, and expenditures on the judiciary (in constant dollars) were more than three times as high. But in 2002, the courts conducted only 4569 civil trials, a bit more than a third of the 12,529 conducted in 1985.

As Galanter (2005, 1264) explains, factors such as resource constraints, increased cost and complexity, improved signaling, and more lawyers "do not account for the sudden and dramatic decrease in trials in the last twenty years [1985-2005]."[5] Simply put, the argument proposed by supply-siders cannot explain the recent dramatic decline in the number of cases that go to trial.

If "supply-side" explanations cannot account for the decrease in trials, what can? The reality is that many cases actually settle and never reach the trial stage. As Eisenberg & Lanvers (2009, 112) note, "settlement is the modal civil case outcome." Issacharoff and Witt (2004, 1618) contend that, "[A]s patterns of liability

[5] *See also* Galanter (2004, 519): "Even given an increase in mandatory noncivil matters and postulating increased complexity of cases, it seems doubtful that lack of court resources is a major constraint on the number of trials."

and damages stabilize, trials seem to become increasingly exceptional as claims are handled through routinized negotiations between established representatives" (*see also* Langbein, 2012, 564-66 discussing generally settlement dynamics on the lack of civil trials). In Ross' seminal study of automobile insurance claims, he reports a settlement rate of 95.8% (Ross 1980). Eisenberg & Lanvers peg the number much lower. In their study of two federal district courts from 2001-2002, the aggregate settlement rate between these two districts sat at about 67%. This is a large number, but nowhere near the 95% settlement rate proposed by Ross. In reality, the fact that two-thirds of cases settle is a substantial number, however, and if those cases are settling rather than proceeding to trial, then that could be a large explanation of the diminution in federal civil trials. But there's a catch (or, two). First, Eisenberg & Lanvers suggest that, when compared to previous attempts to identify the settlement rate, "[t]he pool of results spanning more than 20 years of cases provides no evidence of a materially increasing settlement rate over time" (2009, 146). Accordingly, if, as Galanter suggests, we must look for explanations for the rapid decrease in trials from the late-1980s to present, settlement does not appear to be a likely culprit as *the* answer. Secondly, to say that the settlement rate is high (or, assuming it to be the case, has increased) does not address the fundamental question of *why* cases are settling. Merely identify the litigation route through which cases pass does not tell us anything about why that particular course has been charted. One would think, borrowing from the law and economics literature, that the expected utility derived from settlement simply outweighs the expected utility from proceeding to trial. Fair enough. But why is the utility for settlement structured in the manner that it is? And, relatedly, why has it come to outweigh proceeding to trial? As a result, settlement *per se* cannot explain the decline in trials.

One potential explanation for why cases no longer go to trial is proposed by Hadfield (2004). She challenges the traditional law and economics perspective that settlement has generated much of the decline in trial activity. She suggests that pre-trial adjudication has had an effect on the total number of trials. These pre-trial adjudications could be reflected in motions to dismiss (Rule 12(b)), motions for judgment on the pleadings (Rule 12(c)), or motions for summary judgment (Rule 56). The insight of Hadfield's work stems from her dataset. Hadfield obtained a sample of cases from the Public Access to Court Electronic Records (PACER) database. PACER serves as a "national" docket for federal cases.[6] Hadfield then performed a statistal audit of cases from previous years to compare them to a sample of PACER cases she herself gathered. She reaches several conclusions, including (1) past coding schemes employed by the Administrative Office for the U.S. Courts were significantly inaccurate, and (2) making a correction to the data she employed revealed that settlement rates did not appear to change really at all (consistent with Eisenberg & Lanvers (2009)). Interestingly, however, Hadfield contends that while settlement rates did not increase (though remained relatively high by 2000 at 40.5%), there was a distinct increase in nontrial adjudications. In other words, what could be driving the diminution in trials is not so much settlement (or even, for that matter, "supply-side" concerns), but rather the usage of pre-trial procedural devices to end claims before the trial stage.

Yeazell (2004) disagrees slightly with Hadfield's position, though he focuses on procedure in a similar manner. Yeazell maintains that procedural mechanisms have had an effect on the diminishing number of trials. However, Yeazell believes

[6]PACER is not, in actuality, a national docket and each district mainatains its own server and electronic case management system. For the purposes of this discussion here, however, we can assume it operates in this manner.

that the procedural changes have also ushered in a cost-increasing effect to litigation through changes to discovery practice. Because of the increased expense litigants must face with the discovery and disclosure process, taking a case all the way to trial becomes cost prohibitive. Yeazell is right to point to the mix between procedure and cost, but does not provide original quantitative evidence to support his claims. Furthermore, he identifies, but does not answer, a significant question for federal litigation, namely, many cases in the federal system are based upon employment or civil rights actions. These cases have fee-shifting provisions which operate to transfer the cost of representation from the plaintiff to the defendant. Thus, a victorious civil rights plaintiff would have their attorneys fees paid by the civil rights violator. Galanter (2004) notes that many cases that go to trial are, in fact, civil rights cases. As a result, Yeazell mentions, but does not answer, an important quandry in the realm of litigation studies.

So what are we to make of the explanations for the decrease in trials? The focus on procedural mechanisms, such as pre-trial adjudicatory motions, and alterations to discovery, would seem to be a fruitful area of evaluation. I will note at this point that I believe an answer sits at these crossroads. I detail in Chapter 4 my substantive theory on how we can reconcile these particular strands to establish an explanation for the diminution in trials. For now, I address the final avenue of research, and one from which my theory springs, which is the use of summary judgment to dismiss claims.

In Chapter 4, I detail with specificity how summary judgment can be employed by judges not only to dismiss claims prior to the trial stage, but also how this procedural device can operate to shift litigation incentive mechanisms to induce settlement and discourage litigants from even attempting to resolve their disputes at

trial. At this point, however, it is worth evaluating why the present state of research on this particular procedural device is lacking and why a better theory is required if we are to answer the question, where have all the trials gone?

There are two general strands of thought in the literature when it comes to summary judgment impacting the number of cases that go to trial. The first strand of thought is that in 1986, when the United States Supreme Court issued its "Trilogy" of summary judgment decisions[7] the Court effectively made it easier for district court judges to kick claims out of the federal courts without ever having reached the trial stage.[8] This branch of the scholarly debate tends to focus on the doctrinal and legal shift alleged to have occurred *vis-a-vis* summary judgment use. The second strand of scholarship suggests that the Supreme Court's Trilogy did not effectuate such changes. This form of analysis tends to utilize empirical investigations to buttress its claims. At the outset I will state that both strands of research, while contributing to the larger scholarly discussion about why it is rare to see federal civil trials, are flawed and require an improved theory (which I discuss in the next chapter).

For those who contend that summary judgment worked to reduce the number of trials, perhaps principle amongst the contenders is the work of Professor Arthur Miller (2003). Miller argues that the summary judgment Trilogy re-worked prior standards for granting a motion for summary judgment (which is often a defendant's motion). In short, Miller suggests that prior to the Trilogy, the Supreme Court had developed a doctrine of being cautious before authorizing a claim to be dismissed, particularly in "complex cases invovling issues of motive and in-

[7]These are (1) *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*; (2) *Anderson v. Liberty Lobby, Inc.*; and (3) *Celotex Corp. v. Catrett.*

[8]For a detailed discussion of summary judgment, *see* Chapter 4.

tent" (Miller, 2003, 1033). Following the Trilogy, however, Miller suggests that the doctrine was so altered that where the motion for summary judgment was previously a relatively disfavored device, it became openly embraced. The reasons for this change could be the fact that the Court was encouraging lower federal courts to take control of their dockets and utilize this procedural device to induce disposition of cases (either through threat of usage (in which, perhaps a settlement might take shape)), or through actual usage (meaning dismissal of the case in the pre-trial stage). Miller believes that the Trilogy as a whole (and the *Celotex* decision in particular) strongly advocated the use of summary judgment "as a tool to promote judicial efficiency" and "fundamental[ly] reconfigur[ed]" the "balance of power between plaintiffs…and defendants" (2003, 1040). Miller cites to the work of Berkowitz (1992), who (in an unpublished manuscript) found that summary judgment grant rates increased in two federal districts (Miller, 2003, 1049 n.360; *see also* Berkowitz 1992) and Gordillo (1994), who found increased grant rates for summary judgment motions. Miller effectively concludes that a litigant's right to trial and their day in court is in jeopardy as a result of the Trilogy, the Trilogy's "improper extension and the lack of any reasoned law-fact analysis by lower federal courts…appear to pose the danger," and that the "litigation crisis" rhetoric in the public "may be encourageing district courts and courts of appeals to rely on the trilogy to justify resorting to pretrial disposition too readily because they believe that there is a need to alleviate overcrowded dockets or because they disfavor certain substantive claims" (Miller, 2003, 1133).

Miller's work is impressive in terms of scope (the law review article clocks a healthy 152 pages with 749 footnotes). For what the article contains in scope it lacks in actually *testing* the hypothesis that the Trilogy did, in fact, cause the decline in

federal civil trials. Miller offers no original data analysis, and his reliance on the two small empirical studies confines even those findings to a few district courts in the United States in only a few years. The rigorous requirements of the scientific method are simply not present to determine whether, in fact, Miller demonstrates his main contentions.

The second strand of thought on summary judgment is that it simply did not have the effect envisioned by those like Miller. Under this rationale, while it is conceivable that the Trilogy did make it easier for defendants to file, and the court to grant, motions for summary judgment, the available data simply do not bear out this claim.

Linda Mullenix (2012) contends that the available record demonstrates that the Trilogy simply did not have the effect as many in the legal academy contend. In fact, Mullenix (rather blithely) contends that "the summary judgment trilogy had its greatest impact on the way in which first year civil procedure professors teach summary judgment" (562). In her study, Mullenix reviewed all published and unpublished Circuit Court of Appeals decisions in 2010 (N=222) to determine if courts of appeals even cited *Celotex*[9]; if they did, did the court discuss the legal standard elaborated in that case; and did the court consciously apply the standard to reach its conclusion in its decision (2012, 567). Mullenix concludes that much of the time, federal courts of appeals do not even cite the *Celotex* case, do not appear to "acknowledge, understand, or apply" the standard correctly, and appear to lean on "a kind-of gestalt 'tennish match' mode of analysis" (2012, 583-84). She further contends that one of the other cases from the Trilogy (*Anderson v. Liberty Lobby*) appears to have had negligible effects and, in "examining the entire corpus

[9]She did not evaluate the other two constituent cases to the Trilogy in this manner.

of federal district court and appellate decisions over a twenty-four year span, only *three* reported district court decisions cite and rely on the *Anderson* holding" (2012, 579). Mullenix's findings would appear to significantly curb the notion that summary judgment has no role in the diminution in trials, but upon even a cursory inspection her contentions suffer from fatal flaws.

The article's contention about summary judgment stops almost before it begins by suggesting that an evaluation of courts of appeals decisions will provide support for how the Trilogy has operated in the lower federal district courts. This is problematic. We have no idea *why* those cases were appealed; it is entirely possible that many cases were not appealed, and we should be evaluating the conduct of the lower courts in taking the signal from the Supreme Court in terms of the summary judgment process. True, lower federal district courts can look to their respective circuit courts of appeals for instruction on the law, but if we want to evaluate why cases do not go to trial, focusing on the intermediate courts of appeals charts our focus in an improper direction. Second, singling out a solitary year twenty-six years *after* the Trilogy does not provide leverage on whether the Trilogy had an impact on trials. Not only is this point of observation vastly removed from the time in which we would expect lower courts (of any stripe) to begin using the "new" Trilogy standard, her research design fails to account for other events that could have occured in the over two decades since the Trilogy. Were other alterations made to substantive law that might matter? Is there a consideration of resources for the litigants? If we are seeking an answer as to the *trends*, then confining our analysis to an incorrect unit of observation and ignoring all temporal spaces around that point ignores the fundamental question at hand, namely, whether the Trilogy contributed to the decline in trial numbers.

Finally, there is something immediately suspect about her claim that in a twenty-four year period she could discover only three federal district courts that "cite and rely" on the *Anderson* holding. To test whether this proposition might be true, I searched for cases (in `Westlaw`) that cited to *Anderson*...in a single district (Northern District of Texas)...in the last month (8/13/16—9/13/16). My results: I found *four* decisions at the district court level that cite *Anderson*.[10] In fact, a previous analysis of citations by myself found that, by the Fall of 2015, *Anderson* had been cited 197,096 times[11] (this time, performed in `LexisNexis`). Indeed, *Anderson* appears possibly to be the most-cited Supreme Court case ever, with the exception of its Trilogy companion *Celotex* (cited 208,546 times). Perhaps Mullinex's word "rely" means that the district court not merely cited, but then discussed in detail, the *Anderson* case. Perhaps. But to ascertain if other cases "relied" on *Anderson* this way would require a thorough review of *all* federal decisions without reliance on merely a citation, which seems unlikely to have occurred given her research design.[12] In short, Mullenix falls below the requisite threshold for demonstrating that the Trilogy worked to reduce federal civil trials.

Gelbach (2014) evaluates whether summary judgment filing rates might provide clues into whether the Trilogy has re-worked the incentive mechanisms for certain litigants to file such motions. In short, Gelbach suggests that, for instance, if a defendant is truly benefited by the Trilogy's re-working of the summary judg-

[10] *Martin v. Transport Workers Union of America, Local 556*, 2016 WL 4505749, *3 (N.D. Tex.) (Aug. 29, 2016); *Industrial Models, Inc. v. SNF, Inc.*, 2016 WL 4533321, *1 (N.D. Tex) (Aug. 29, 2016); *Cooper v. Harvey*, 2016 WL 4427481, *2 (N.D. Tex.) (Aug. 21, 2016); *Vianet Group PLC v. Tap Acquisition, Inc.*, 2016 WL 4368302, *4 (N.D. Tex.) (Aug. 16, 2016).

[11] This number includes all federal court citations, irrespective of the level in the federal judicial hierarchy.

[12] As Mullenix explains: "Appellate decisions were selected as the basis for study because the `LexisNexis` and `Westlaw` databases indicated in excess of 10,000 reported and unreported district court summary judgment decisions in 2010 alone, a database too large for the reading and parsing every district court summary judgment disposition" (Mullenix, 2012, 567).

ment standard, then we should see litigant behavior associated with this fact. As an example, Gelbach notes that if defendant selection effects exists (meaning cases that defendants would not challenge under a demanding summary judgment burden of production, but would do so under an easier burden), then a finding that the "summary judgment disposition rate had not fallen post-trilogy could be explained only by a shift favoring defendants in summary judgment adjudication" (Gelbach 1670-71). Gelbach draws his data from `Westlaw`'s database of district court civil docket reports (the DCT database). As he notes, the "DCT database contains essentially the same docket information as PACER."[13] He gathers data from 2005-2011 which includes a total usable dataset of 29,673 civil rights cases and 30,070 tort cases (Gelbach, 2014, 1678). Gelbach performs logit estimations to predict whether a motion for summary judgment is likely to be filed, and includes as independent variables the gender and race of the judge, as well as dummy variables for the appointing president for the judge. Gelbach finds limited influence of the judge's characteristics for tort cases, but does find that a judge's demographic traits can influence whether a motion for summary judgment is filed in civil rights cases. He also determines that the president who appointed the judge can influence the probability of filing a motion for summary judgment.

Gelbach's efforts are laudable for his attempt to construct a large dataset. The problem with his analysis, however, lies within his modeling strategy. First, Gelbach talks of "selection effects" and their impact on summary judgment "disposition rates." Yet, his models evaluate the probability of a motion for summary judgment being *filed*, not decided. If what he contends is a focus on the decision

[13]Gelbach does not detail, however, what these substantive differences are between the DCT and PACER.

to grant or deny should be evaluated, his dependent variable is simply the wrong variable to use.

Assuming, however, that his intent is to evaluate filing rates, as noted previously (and as will be discussed in the next chapter), whether a motion for summary judgment is filed or not is only part of the answer to our question about whether the Trilogy impacted federal civil trials. If plaintiffs expect they will be bounced from court much easier after the Trilogy, they may choose never to do battle, either at the summary judgment stage, or, by filing the case at all. In the latter situation, one needs to evaluate larger trend patterns rather than single case observations to ascertain if aggregate data demonstrate behavior coordinate with these doctrinal changes rendered in the Trilogy.

Gelbach's empirical estimations are problematic as well. He first finds that essentially *all* of the demographic variables increase the probability of a motion for summary judgment being filed. White judge, Hispanic judge, a judge appointed by Reagan, a judge appointed by Clinton, a judge appointed by Johnson and both Bushes all have statistically significant positive effects on a motion for summary judgment being filed. And, given he creates dummy variables for the presidential appointment, the reference category is Carter. Is an increase in the marginal effects for a summary judgment motion being filed between Carter and Clinton interpretable in a real sense? What about Johnson to Carter (who similarly displays the same positive marginal effects)? Another option would have been to utilize ideology scores for the judges, which Gelbach states he did in alternative estimations, but "it had virtually no association with summary judgment motion filing[s]" (2014, 1684). The fact that the ideology variable suddenly becomes neutered through usage of a continuous variable, rather than the dummied

presidential appointment categories, should give pause, particularly on the issue of interpretability. Perhaps a coding scheme which separated (through a dummy variable) the effects of Republican-appointed judges versus Democrat-appointed judges would capture the anticipated effects Gelbach seeks, in addition to the added benefit of clarified interpretability.

Finally, it is almost certainly the case that there is omitted variable bias in these estimations[14] The assumption of the model is that a judge's demographic characteristics, their age (whose marginal effects are not provided), and their presidential nominator are all that determine if a motion for summary judgment is filed: all other potential factors (such as discovery time, relative resource advantages between parties, how long the court spent reviewing the motion, etc.) are not included and are thrust into the error (ε) term. This is problematic, particularly for a logistic regression, as omitted variables in such estimations can bias the coefficients (downward) even if the omitted variables are unrelated to the independent variables included in the model (*see*, e.g., Mood 2009). Accordingly, failure to include these variables (or otherwise attempt to account for them in some manner) would seem to severely damage the reliability of Gelbach's estimations and conclusions.

The final set of anti-Trilogy studies stem from the work of the Federal Judicial Center (FJC). The FJC is the "education and research agency for the federal court."[15] These studies have been spearheaded by Joe S. Cecil, a senior research associate in the research division of the FJC. By far, these studies are the most-frequently used in the argument against the effects of the summary judgment Trilogy. While these studies are superior to any others offered on the question of

[14]There are also no model performance diagnostics provided either.
[15]*See* http://www.fjc.gov (last visited September 14, 2016).

whether the Trilogy can be a cause of the diminution in trials, they too are flawed and should not be taken as gospel on this important question.[16]

There are four FJC studies in particular worth discussing, each occuring over a period of multiple decades. I discuss these studies below.

3.3.1 FJC Study #1

In 1987, the FJC issued a study evaluating the effects of summary judgment in three district courts (Cecil & Douglas 1987). In this study, the authors examined docket sheets randomly selected from three federal districts[17] In total, the authors obtained a sample of N=564. The authors found that in all the usable observations, a summary judgment motion was filed in 25% of the cases (Cecil & Douglas, 1987, 6). Summary judgment motions were granted in about one-third of the cases (*Id.*). The authors reference a prior study from 1975 that suggests summary judgment filing rates were about the same in these two years (i.e., 1975 and 1986), and that the likelihood of a case being terminated by virtue of summary judgment had actually decreased in each district evaluated (19% for Eastern District of Pennsylvania; 37% in Central District of California; 22% in the District of Maryland). The authors conclude that while "summary judgment motions are currently filed at about the same rate as they were in the past, it appears less likely that such motions will dispose of a case" (Cecil & Douglas, 1987, 13).

The FJC's study has benefits of research design beyond the studies previously discussed. First, the use of docket sheets is important. Rather than relying on

[16]For a contrary view, *see* Mullinex (2012, 566) ("The FJC has preempted and occupied the entire field of empirical study of summary judgment in the post-*Celotex* era. So complete and thorough are these studies that it is humbling to even attempt to venture in this field.")

[17]These districts were: (1) Eastern District of Pennsylvania; (2) Central District of California; and (3) District of Maryland.

commercial datasets (like Gelbach), or focusing on the court of appeals' behavior (Mullenix), FJC Study #1 looks to the actual docket entries by the federal district courts. These docket sheets maintain the court's official record and review of them will determine whether a motion for summary judgment has, in fact, been filed and whether that motion has, in fact, been granted. Measurement in this research design is, then, superior to other studies.

That said—and this will be a frequent comment for the FJC studies (*see infra*)—the focus on only three district courts is problematic. Limiting the pull of cases to only these districts affects the generalizability of findings to other geographical areas, and the nation at large. Additionally, the authors' measurement of whether a summary judgment motion is granted or not is problematic. In particular, the authors measure whether a summary judgment motion was granted as whether a motion for summary judgment "terminated" the case. What this coding decision means is that if a motion for summary judgment had been filed, and if that motion were granted (in full, or in part), but *did not terminate the case*, it was not considered a successful summary judgment motion. This measurement decision is a problem. It is entirely possible for a litigant (read: defendant) to file a motion for summary judgment on, say, three of four claims presented by a plaintiff. If that motion is granted in full, then the fourth claim remains alive. *However*, that claim may be the least harmful claim to the defendant (say, for instance a claim where damages are capped). If the defendant were successful in having summary judgment granted on a claim where damages were not capped, then the defendant has, as a practical matter "won" by restructuring the settlement-bargaining equa-

tion (i.e., reduced the potential cost of liability). Accordingly, failure to consider this grant of summary judgment simply underestimates grant rates.[18]

3.3.2 FJC Study #2

A second study performed in 2001 also evaluated summary judgment trends (Cecil et al. 2001). In this study, the authors drew a random sample of cases across six district courts[19] over six different years[20]. This time, the authors included coding for not only whether the case saw a summary judgment motion (and whether that motion terminated the case), but importantly, whether the motion itself was granted (either in whole or in part). This new measurement of "grant" rates would appear to correct the deficiencies of FJC Study #1 in that regard.

The authors find that in the total sample, the summary judgment motion rate increased over time, the rate at which those motions were granted increased over time, and the termination of cases by motion for summary judgment increased over time (Cecil et al., 2001, 5). In slightly more than 20% of the cases was there a motion for summary judgment filed by 2000. The grant rate stood at 12% by 2000 (2001, 3). The authors indicate that while summary judgment motion practice appeared to increase over time (and indeed increased in 1988, the closest time point in their data after the Trilogy), their "analysis so far has not been able to isolate any effect from the Supreme Court trilogy" (2001, 6). The authors contend that

[18]The authors seem to acknowledge this fact, but do not operationalize this measure differently in order to provide comparability with the previous 1975 study, which used case termination as "success" for a summary judgment grant. *See* Cecil & Douglas, 1987, 10 n.18 ("A more sensitive measure of change in summary judgment practice would examine grants of motions for summary judgment. However, we were limited by the nature of the earlier data to comparisons of cases terminated by grants of motions for summary judgment.")

[19]These were (1) Eastern District of Pennsylvania; (2) Central District of California; (3) District of Maryland; (4) Eastern District of Louisiana; (5) Souther District of New York; and (6) Northern District of Illinois.

[20]These years were: 1975, 1985, 1988, 1990, 1995, and 2000.

the "apparent increase in summary judgment filings immediately following the trilogy may be due to increased dispositions of asbestos cases rather than a broad change regarding summary judgment" (2001, 2).

Ultimately, FJC Study #2 improves upon the 1987 study. In particular, the measurement of grants is better and the random draw of cases is extended to six districts (as opposed to merely three). However, there are some limitations. Again, in the study the FJC attempted to ascertain whether there were trends over time. The problem is the study only selects six distinct time points during a 25 year history, so no time series analysis is actually performed to discern if "trends" actually exist. Additionally, the authors' conclusion that the Trilogy did not rework the summary judgment process is a bit tenuous. Apparently, the authors feel that while there is an increase in summary judgment motions following the Trilogy, that increase is, ostensibly *not enough*. The authors indicate that the increase post-Trilogy might be related to the asbestos litigation at that time, but they do not appear to control for this fact in any manner.[21] And, the reality is, there were increases in the summary judgment rates *after* the Trilogy. Notwithstanding the limitations of focusing on only the rates at which summary judgment motions are filed (or the concomitant rates at which they are granted[22]), the fact remains that after the Supreme Court invited federal district courts to use summary judgment (and by implica-

[21]One of the districts in their study, the Eastern District for Pennsylvania, has become home to all asbestos-related personal injury claims through Multi-District Litigation (*See* MDL #875). This order, issued by the federal Judicial Panel on Multi-District Litigation, transferred all such cases to this district, but did not occur until 1991, however. That said, the authors appear to have excluded such asbestos claims from their analysis (*see* Cecil et al., 2001, 1 n.2 ("For purposes of this analysis we excluded...multi-district litigation cases")). It would appear that the authors reference to distorting effects by asbestos cases is a reference to *pre*-MDL asbestos claims, but given the above, it is somewhat unclear.

[22]I address this research design limitation in a theoretical-sense in Chapter 4; I address the issue empirically in Chapter 5.

tion, lawyers in those courts), summary judgment motion practice saw an uptick in activity, even by the FJC's standard.

3.3.3 FJC Study #3

The main study often cited by researchers as demonstrating that the summary judgment Trilogy did not have an effect on the number of federal civil trials is the third study by the FJC (Cecil et al. 2007)[23]. The structure of the study is similar to the 2001 study. Here, the same six district courts were reviewed with essentially the same dataset for the same years.[24] Docket sheets were reviewed (or, had already been reviewed), and for the last two years in the data PACER was utilized to gather the docket sheets through electronic collection.

Given the data is largely the same, the results proffered by the authors at least with respect to summary judgment filing rates and summary judgment grant rates is the same:

> [A]fter we controlled for differences across courts and the changing mix of cases, we found few changes in summary judgment activity after the Supreme Court trilogy. The appearance of higher rates of summary judgment in general may be due to increased filings of civil rights cases, which have always had a higher-than-average rate of summary judgment motions and dispositions. Although increases in summary judgment may be part of the reason for the decrease in trial rates, the decline in trials reflects far broader changes in litigation practice than simply a response to the Supreme Court's affirmation of summary judgment practice.
>
> (Cecil et al., 2007, 906)

[23]There is a related study also issued in 2007 that confines itself to the year 2006; I will discuss that study last.

[24]In actuality, it appears the year in FJC Study #2 1985 has been converted to 1986 and the year 1990 in FJC Study #2 has been converted to 1989. It is unclear why this change was made, although it is reasonable to postulate that the change in title of the years is simply a modification from considering when the data were gathered versus when the data were presented in the studies. Whatever the reason, the numbers for the raw data match suggesting this is only a nomenclature issue, and not a substantive concern.

Given the data are the same, the filing and grant rates are the same for FJC Study #3 as FJC Study #2. But, the authors do more with the data this time around and produce logistic regressions for the contributing causes for whether a motion for summary judgment is filed and whether a motion for summary judgment is granted (again, in whole or in part). It is here where there is cause for concern with this study.

The logit estimations utilized by the authors (for both the filing rates and the grant rates) include as independent variables dummied categories for each district (with the Southern District of New York as the omitted category) and the year (1986 is the omitted category). These are all the independent variables utilized. As with Gelbach (2014), if we are to properly test a social scientific theory, failure to include other variables will bias the estimates. In short, the models are straw men: if, in particular, the time (dummy) variables show no statistical significance, then it is taken that with regard to the reference category (1986, the year of the Trilogy), no effect can be discerned. But of course, failing to include omitted variables in the logit estimation will cause biased coefficients that are overly deflated (Mood 2009), thereby suggesting no effect post-Trilogy. So, precisely because these are the only independent variables included in the model is the very reason the authors can claim to draw the conclusion that there is no post-Trilogy effect. It is a cyclical statistical problem wrought from model misspecification at the start.[25]

The authors also make a questionable call in determining whether a motion for summary judgment is granted or not. The process by which such a motion is granted is rather simple to understand, but I will elucidate it here for further clarity. When a party (read: defendant) wishes to have a claim (or claims) kicked out of

[25] As with Gelbach (2014), we have no model diagnostics and no notion as to whether these variables even serve as good predictors (through, for instance, a Link Test).

federal court during the pre-trial stage, they will file a motion for summary judgment, the other side will respond, the district court will review the paper record, and a decision is then rendered by the district court judge as to whether the motion will be granted (either in whole, or in part).[26] Keep in mind the processed ordering of the motion: a summary judgment motion cannot be granted unless it is filed. In other words, *a federal district court judge cannot grant a motion for summary judgment unless such a motion is made by a party*.[27] The decision to grant the motion for summary judgment is conditional on the motion for summary judgment being filed. Cecil et al. (2007) do not model the grant rates in this fashion, however.

While a bit lengthy, the authors (almost) complete statement for this modeling strategy is worth evaluating:

> This analysis of grant likelihood is not conditional on the presence of a motion for summary judgment…We conducted the analyses in this way for at least two reasons. First, policy discussions about changing litigation trends in general, and summary judgment activity specifically, tend not to be couched in conditionals; rather, changes (such as increasing or decreasing termination rates) are spoken of as individual effects in what is understood to be a complex system. Second, we knew that reducing the sample size for each analysis through conditionals would limit the power of the analyses and increase the chances that meaningful results would be masked—although we did not anticipate substantial differences. In fact, when we did run a logistic regression estimating the likelihood of a summary judgment grant conditional on there being a motion for summary judgment, the results were *generally the same*. As expected some districts' previously significant coefficients became marginally significant or nonsignificant…However, the sample years that possessed significant coefficients in the nonconditional analysis also did so in the conditional analysis…For a discussion of the benefits of a nonconditional analysis over a conditional analysis, see

[26] Recall Cecil et al. measure this "grant" as a grant in whole or in part. I have no qualms with this measurement of a "grant," and indeed it is the same measure I employ in the micro-analysis portion of my research design discussed in Chapter 5.

[27] A district court judge could dismiss a case on their own, for intance, if a party fails to actively engage the litigation and lets it go dormant. This situation, however, is not what is discussed in this section.

> A.N. Pettitt & S. Low Choy, Bivariate Binary Data with Missing Values: Analysis of a Field Experiment to Investigate Chemical Attractants of Wild Dogs, 4 J. Agric. Biological & Envtl. Stat. 57 (1999).
>
> (Cecil et al., 2007, 893-94 n.75 (emphasis added))

There are several problems with this econometric rationale. As to their first contention, if the authors are truly concerned with "individual effects," then retaining the conditional impact of deciding only what has been filed *is the individual effect*. To put it another way, to treat, for instance, whether a motion is granted or not as the only effect of what has happened in that particular case, but to also create a sense of semi-aggregation to all other cases, is to diminish the individual effects and obtain some estimate for the sample based on what other observations have done.[28]

Additionally, the authors' reliance on the work of Pettitt & Choy (1999) (evaluating the efficacy of certain chemical attractants for Australian dingos) to vouch for their modeling strategy misapprehends that work. In short, Pettitt & Choy *do not* recommend that one models "missing" data by simply employing a non-conditional maximum likelihood estimation. Instead, what those authors propose is "a model conditioning on dingo presence/absence and hypothesizing a distribution for dingo presence/absence [through the use of] an EM[29] algorithm" (Pettitt

[28]It is difficult to tell how the authors have even coded this scheme. It is perhaps the case that they employed the following scheme: if a case did not have a motion for summary judgment filed, it was coded as a zero. Additionally, by definition, that observation would receive a zero for "grant" (because, obviously, no motion was filed and thus could not be granted). But, a case could also have a zero for the "grant" column if a motion was filed, but the court simply did not grant the motion. As a result, the zeros in effect have multiple meanings. Thus, rather than coding the zeros where no motion had even been filed as "missing," the value of zero has been conflated with its true meaning: the motion was not granted. Without the data, it is difficult to determine if this coding scheme is what the authors are referencing with their statement, but it seems plausible that this approach is what they have employed when one backs out their "conditionals" discussion to its logical conclusion.

[29]Expectation Maximization.

& Choy, 1999, 57). In other words, what the authors propose is a way to model the probability distribution for whether a dingo even went to a site or not, and then incorporate that distribution into the ultimate estimation for the effects of various chemical attractants. Cecil et al.'s (2007) work ignores the hypothetical distribution of non-filed motions that are not-granted, and condenses the data into an unconditional estimation. This is an incorrect estimation strategy.

A simple manner for dealing with this problem is to consider the non-grants in non-filing cases as just that: missing data. The exclusion of these observations will necessarily diminish Cecil et al.'s N (as they correctly note), but with thousands of observations it would be surprising to see this N drop to levels where the asymptotic properties of the estimator can be called into question. Another method for dealing with this problem is to do a variant of what Pettitt & Choy recommend which is to model a probability distribution for the choice to "opt-in" to the system (whether a motion is filed), and then model what happens once in that system (grant/deny of a pending motion for summary judgment). This strategy could be accomplished through use of a two-stage procedure. In the Ordinary Least Squares (OLS) realm, one would use a Heckman estimation[30]; in a binary choice to file, and binary choice to grant situation, an extension of the two-stage rationale could be applied (*see* Greene, 2012, 880-83 (discussing sample selection issues and two-stage estimations for non-linear models)). Ultimately, while the data gathering efforts are substantial, and Cecil et al. employ a research design more carefully crafted than others, it still falls short of answering the ultimate question, which is whether the Trilogy impacted summary judgment motions practice.

[30] Also known as a "heckit" model.

3.3.4 *FJC Study #4*

The final FJC study analyzed data from 78 federal district courts (essentially those that had fully implemented the CM/ECF reporting system) in fiscal year 2006 (Cecil & Cort 2007b).[31] The general research design is the same as others except the sample is closer to the true population of case filings: essentially all cases that were in the PACER system were reviewed by docket entries to determine if a motion for summary judgment was filed and granted. The study identifies basic descriptive statistics, such as the filing rates for summary judgment, and the rates at which such motions are granted by case type. The study concludes that "approximately 17 motions for summary judgment are filed for every 100 cases terminated" and that "[a]pproximately 60 percent of the summary judgment motions are granted in whole or in part, with a somewhat higher rate of motions granted in civil rights cases" (Cecil, 2007b, 2).

The problems of the past FJC studies have been remedied in part in this study. For instance, no longer are only a few districts covered in the data gathering; this is good. However, the analysis is confined to a single fiscal year, which can say nothing about time trends for the summary judgment process and whether the Trilogy impacted that process or not. To be fair, the researchers do not make such a claim. It is worth pointing this fact out, however, given the posture of previous studies by the FJC. There is also a question as to the coding scheme utilized. Ostensibly these codings were done by machine extrapolation. It is unclear, however, what searching criteria the researchers employed; e.g., `boolean` searches on

[31] CM/ECF is an abbreviation for "Case Management/Electronic Case Filing" system. The CM/ECF system is the case filing system utilized by attorneys who electronically file case documents (such as pleadings and motions) with the court. Essentially, and in short order, what is uploaded through the CM/ECF system is then routed through the PACER system for public consumption of publicly available court records.

variants of phrases or terms, review for specific reference to the Federal Rules of Civil Procedure that might deal with motions for summary judgment, etc. Nontheless, the study is laudable for its data gathering and the results are interesting to say the least. Recall that the study found a summary judgment filing rate of 17%; this is similar to past FJC studies (in actuality, a slight decline). But the grant rates are *much* higher. The FJC suggested in its third study that grant rates were in the ballpark of 12%; here, *they are 48% higher*. This is a dramatic rise, and suggests something is at work, either in a substantial change in how the courts utilized summary judgment, or, (what I feel to be the case) something is amiss with the past data effort. An increase that size would have been felt like a shockwave in the litigation realm. It seems unreasonable to think litigants, lawyers, and judges would have simply "missed" this rather large development. The study itself does not indicate why this increase occurred, so it is difficult to postulate beyond these bare considerations. But, if this is the grant rate, then it would call into question the previous numbers suggested in other studies.

Another fact is somewhat buried in the report that is quite disturbing. I have mentioned (based on the work of others, as well as my own efforts in Chapter 5), that civil rights cases tend to subject to the summary judgment process more than other types of cases. What is particularly striking about the report is that it provides additional insight into this effect. Recall that FJC Study #4 states that summary judgment grant rates are, in the FJC's words, "somewhat higher" for civil rights cases. This statement is putting it mildly. In fact, the grant rates for the two highest-*N* categories of such claims (civil rights cases involving jobs (which include employment discrimination claims, as well as other job-related claims), and what the Administrative Office for the U.S. Courts terms "other civil rights"

claims (which include constitutional litigation)) have grant rates of 73% and 68%, respectively. These rates are quite high. The filing rates for summary judgment in these claims is higher than even suggested by past researchers, at 30% and 28%, respectively (Cecil, 2007b, 6).[32] In other words, the rates are high, and, much higher than other types of cases (*see* Cecil & Cort, 2007b, 6-8).[33] Indeed, according to FJC Study #4, when one extracts from the dataset employment discrimination claims, and only evaluates those types of claims, the grant rate remains steady at 73% across all districts. Again, these numbers are staggering. Note that in FJC Study #3, the grant rates for defendants' summary judgment motions in civil rights cases was just over 50% (Cecil, 2007, 887), but in FJC Study #4 the grant rates for civil rights cases is now 70% for all civil rights claims (not breaking this category into sub-categories; Cecil, 2007b, 6). Again, this is a substantial increase. If civil rights cases see a summary judgment motion in nearly a third of all such claims, and if almost three-fourths of those motions are successful, this means a great many civil rights claims are being dismissed from federal court. Given that such claims now comprise a large proportion of federal cases, this means the bulk of federal causes of action are being steered through the summary judgment process.[34]

FJC Study #4 does much to tell us about the nature of summary judgment motions at the district court level. It does not, however, give us much insight into whether the Trilogy impacted the usage of summary judgment motions in the federal district courts. Additionally, the study does not engage in any econometric modeling, so we do not know what causes might influence whether a motion for

[32] *See* Eisenberg & Lanvers (2008, 16-17) (reporting summary judgment filing rates in employment discrimination cases for the Northern District of Georgia reached just over 24%.)

[33] I find grant rates for civil rights cases (which includes, but is not limited to, employment discrimination cases) at over 63%; *see* my discussion in Chapter 5.

[34] *See* Galanter, 2004, 468 ("[I]n 1962 there were only 317 civil rights dispositions; in 2002, there were 40,881.")

summary judgment is filed (or not), or whether a motion for summary judgment is granted (or not). In short, we are left without an answer to the initial research question presented and require further investigation of the matter.

3.4 Conclusion

The picture we obtain from the basic data and literature points us in a general direction for answering the question: *Where have all the trials gone*. Very clearly, the data show that cases simply do not go to trial anymore. In this respect, we can be confident that there is, in fact, a shortage of trials in the federal district courts. We are less-confident, however, in the reasons for this fact. Some scholars suggest it is a lack of available judicial resources; others contend that federal litigation practice and procedure has increased costs, thereby diminishing incentives to litigate to trial; other suggest the Supreme Court's summary judgment Trilogy has caused the decline, while others suggest it has not. And, further complicating the matter, only a small amount of empirical work has been done on the question, and what has been done is limited. None of the explanations heretofore present a unified theory, drawing on one or more of these ideas, to suggest the reason for the decline in federal civil trials with the requisite testable hypotheses or quantative analysis of such conjectures. In the next chapter I introduce my theory for the decline in federal civil trials, and follow that chapter with a multi-level research design aimed at overcoming the shortcomings of previous work.

4. THE PROCEDURAL THEORY OF DIMINISHING TRIALS

As we see in Chapter 3, the decrease in the number of trials in the last 50 years is staggering, in not only the proportion of all civil cases filed, but also in total numbers. As detailed in that chapter, several reasons have been proffered for this trend. These explanations run the gamut from increased case settlement by parties, increased resource constraint on federal judges, increased case management by judges due to changes in the Federal Rules of Civil Procedure, and increased usage of pretrial disposition mechanisms, such as summary judgment. What these theories lack, however, is a sense of cohesiveness. To say, for instance, that "settlement has increased" does not explain the reasons *why* settlement has increased. Additionally, to suggest that summary judgment is the reason for the decrease in trials does not fully explain why that procedure has caused the diminution of trials. Indeed, if Cecil et al. (2007) are correct, summary judgment filing rates have not increased dramatically, and thus case dispositions by summary judgment cannot, to them (and others), be the reason for the lack of civil trials.

The explanations offered above, however, fail to consider the full context of civil procedure as a whole. The present federal civil procedure regime acts as a unitary system to increase pretrial costs to litigants, and the modern summary judgment legal standards act in concert creating downward pressure on trials. These concerns are not distinct forces, they are part of a larger procedural system that incentivizes the non-trial result. Accordingly, to understand how we have arrived to the point where approximately one percent of cases end at the trial stage, we need to consider the development of these procedural rules and the incentive mechanisms they create to avoid trial. To do that, we need to examine the historical posture of

these rules in the litigation realm. I begin with a discussion of the move to the modern Federal Rules of Civil Procedure.

The litigation procedures in place prior to the enactment of the Federal Rules of Civil Procedure generally borrowed from the common law. By the fifteenth century, England had created a civil legal system with two distinct types of courts. The first court was the jury system sounding in law which essentially confined itself to awarding damages (Langbein 2012). The second court, the Court of Chancery, evaluated claims in equity and employed non-jury procedures (Langbein 2012; Langbein *et al.* 2009). In addressing claims in equity, the Court of Chancery could award specific relief, in other words, order individuals to perform certain acts. Chancery cases were decided by judges (chancellors) who would base their decision on the court file, rather than on live testimony. As Sward (2001, 88) notes, "an equitable suit was more open-ended than a common law suit, and a petitioner in equity had more freedom to explain the injustice she thought was being done." The Chancery Courts also utilized procedures that were very different from the common law courts. As Langbein (2012, 540) notes, drawing from Roman-canon tradition, these procedures "enabled a litigant (1) to obtain sworn responses from an opposing litigant; (2) to require nonparty witnesses to answer interrogatories on oath; and (3) to compel the production of relevant documents" (internal footnotes omitted). The two-track system created situations in which individuals who sought damages in the common law courts had to initiate actions in the Chancery court to obtain evidence (including documents) necessary for usage in the original action. The fact that individuals needed to pursue their claims in two different courts with distinct procedural systems was complex (Story, 1838, 61-62) and,

therefore, increased litigation expense. The American system inherited this procedural duality.

The American legal system's adoption of English concepts of "law" and "equity" meant that the dual framework similarly operated in the United States. As Langbein (2012, 514) notes, "Dissatisfaction with the complexity and expense of running two distinct civil justice systems led, in the nineteenth century, to efforts to merge law and equity." That effort to streamline procedure in the United States began with the Field Code in 1848, a code of civil procedure that simplified litigation in the State of New York (Subrin 1988). Legal procedure had become full of "high cost and delay" (Haramati, 2010, 188). Ultimately, the move away from the distinct realms of law and equity became complete upon adoption of the Federal Rules of Civil Procedure in 1938. A full discussion of the origins of the Federal Rules of Civil Procedure is beyond the scope of my inquiry, though numerous scholars have addressed this issue (*see e.g.*, Marcus 2010; Subrin 1987; Burbank 1982). A few points about the Federal Rules of Civil Procedure are worth noting, however.

First, the Federal Rules of Civil Procedure specifically eliminated distinctions between cases based in law and equity. Indeed, Rule 2 of the Federal Rules of Civil Procedure specifically states, "There is one form of action—the civil action." With this statement, the Rules very clearly intended to eliminate the previous distinction between law and equity. The Notes of the Advisory Committee on Rules stated, "Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules" (Fed. R. Civ. P. 2 & Committee Notes).

Second, the Rules also aimed to expeditiously resolve lawsuits and reduce the costs of litigation. Rule 1 of the Federal Rules of Civil Procedure provides that the rules should be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding" (Fed. R. Civ. P. 1). Though concerned with moving cases quickly through the federal courts, the Rules also acknowledged an individual's Seventh Amendment right to a jury trial in civil cases. Rule 38(a) states that "the right of trial by jury as declared by the Seventh Amendment to the Constitution...is preserved to the parties inviolate" (Fed. R. Civ. P. 38). However, instead of assuming a jury trial would occur, the Rules specifically required an individual to "demand" a jury trial, and that failure to timely do so resulted in waiver of that right. In essence, then, while the jury trial as a product of the common law court existed, the Rules made a clear move toward defaulting against such a result. As Langbein (2012, 542) notes, "What the Federal Rules have largely done, however, is to create conditions in which litigants have found it not in their interests to exercise that right." In other words, as they have developed over time, the Federal Rules of Civil Procedure have incentivized litigants away from exercising their constitutional right to a jury trial. The use of procedure to create such conditions is not without controversy (*see, e.g.*, Miller 2003 (arguing the use of summary judgment has led to violations of individuals' Seventh Amendment rights to a jury trial); Thomas 2007 (contending that summary judgment is unconstitutional as it is inconsistent with the common law and therefore violates the Seventh Amendment right to a jury trial)).

Third, the Federal Rules of Civil Procedure provided for "discovery," the ability to probe into the opposing party's claims for strengths and weaknesses. At the common law, the civil jury performed the task of factfinding. Recall that com-

mon law courts did not have the authority to compel production of documents or related discovery efforts; those endeavors would need to be performed in the Courts of Chancery, and even then they were limited. Litigants in common law courts needed to plead specific facts to support their case. The Federal Rules of Civil Procedure, however, adopted a "notice pleading" standard (*see* Rule 8), which only required "a short and plain statement of the claim" in order to initiate a lawsuit.[1] To counter the effect of "surprise" at trial, the Rules systematically shifted the information-obtaining process of litigation to the pretrial stage. The Rules accomplished this aim through a set of pretrial discovery provisions aimed at increasing the parties' levels of information prior to the trial. This development held the potential to shift information gathering to earlier in a civil action's lifespan.

The Federal Rules of Procedure provide several mechanisms for obtaining information regarding the strengths and weaknesses of parties' claims. The Rules permit discovery to include documents, interrogatories, admissions, and depositions. Federal Rule of Civil Procedure 26(b)(1) permits one party to demand from the other side documents "relevant to any party's claim or defense." Rule 33(b)(3) allows one party to submit written questions (interrogatories) to the other side asking for answers to those questions as they relate to the parties' claims and contentions. Rule 36 provides that parties may submit requests for admissions to the oppsition. Requests for admissions require the opposing party to admit, deny, in-

[1]In recent times, however, the U.S. Supreme Court issued two decisions that heightened the pleading standard through an interpretation of Rule 8. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (raising the pleading standard to require a complaint contain specificity of facts to demonstrate a claim for relief is "plausible," and not merely conceivable); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (extending the *Twombly* standard to all federal court cases). The decisions have been criticized by many as erecting a barrier to access to the federal courts (*see, e.g.,* Clermont & Yeazell (2010); Miller (2010)). The decisions also appear to have caused an increase in courts granting motions to dismiss claims before the discovery stage of litigation can begin (*see, e.g.,* Hatamyar (2010); Gelbach (2012)). Furthermore, the decisions appear to have disproportionately impacted minorities in their access to courts (*see* Quintanilla (2011)).

dicate they cannot answer, or object to the admissions. Failure to respond within thirty days results in a default that the requests for admission are, in fact, admitted as truth for the purposes of the litigation. Furthermore, the scope of discovery can be daunting. In the time of common law procedure, the "truth" would come through the trial, a trial in which evidentiary considers could be considered by the judge. In the modern American system of discovery, however, parties need not confine their queries to the other side to evidence that would be admissible at a trial. In fact, Federal Rule of Civil Procedure 26(b)(1) permits parties to seek information that need not be admissible at trial "if reasonably calculated to lead to the discovery of admissible evidence."

The information exchange that is supposed to occur under the rules provides an opportunity for both sides to ascertain the strengths and weaknesses of their own contentions, as well as their opponents. As a result, the rules of discovery generally provide for both sides to critically evaluate the value of their case. The ability to ascertain the value of a lawsuit was principally motivated by a desire to see cases settle. As Edson Sunderland, an original drafter of the Federal Rules and a "founding father" of civil procedure, explicitly noted approximately five years before enactment of the Rules, "[O]ne of the greatest uses of judicial procedure is to bring parties to a point where they will seriously discuss settlement" (Sunderland 1933). With both sides to a civil case armed with the same general knowledge, surprise at trial is diminished, and theoretically, settlement is more likely. This has led one commentator to indicate that "[p]retrial civil procedure has become nontrial civil procedure" (Langbein 2012).

There are other ramifications for the discovery regime of the Federal Rules of Civil Procedure. As indicated above, a great deal of information-gathering can

occur earlier in a civil case than before the Rules went into effect. What is clear is that the costs associated with litigation have moved closer to the point of initiation of the litigation and have increased. Rather than spending resources developing a case for presentation at trial, those energies and resources are now spent on the discovery phase of litigation. This fact is particularly important given that in the United States, the so-called "American Rule" governs litigation whereby parties generally pay for their own costs (rather than a loser-pays-winner scenario found in England). The requirement that parties finance their own litigation can lead to strong considerations regarding prosecution of one's claims and the need for settlement (Langbein 2012). The ability to inflict costs on the other side, however, can also lead to discovery abuse and efforts by litigants to spend the other side into submission. Beckerman (2000) investigates modern discovery practices and finds that while discovery can work relatively well in easy cases, more complex litigation and high-stakes lawsuits reveal troubling patterns of discovery abuse. As the author notes, "Not only do these failings impede discovery in practice, increasing litigation delay and expense; they also imperil the integrity of adjudication of complex and high-stakes lawsuits and undermine public confidence in the civil justice system" (2000, 585). As Beckerman emphasizes, because complex cases represent approximately one-third of federal courts caseloads, there is a real concern with cost-imposing behavior (2000, 506; *see also* Easterbrook 1989 (discussing the problems of discovery abuse)). Gordon Tullock goes one (or more) step(s) further on the matter of litigation costs: "It is my opinion that the bulk of the procedural rules used in Anglo-Saxon courts are useless or positively perverse...The purpose of any legal rule should be to minimize the costs inflicted on society by incorrect decisions, together with the cost of the decisions themselves" (Tullock, 1980, 5-6).

By the 1980s, federal litigation had done what was, frankly, incentivized by the early Federal Rules of Civil Procedure: become costly and burdensome.

According to the Administrative Office for the U.S. Courts, between 1964 and 1985 the number of civil cases filed in federal district courts increased from just under 67,000 to just over 273,000. The influx of civil cases, combined with the pressures associated with discovery, created calls for more intervention by judges into the early stages of litigation. In 1983, Federal Rule of Civil Procedure 16 was substantially changed. This Rule addressed the role that the judge would play in the pretrial portion of a case. As one scholar notes, "While the goal of the original Rule 16 was to help the parties formulate issues for trial, the 1983 version allowed more and earlier intervention by the trial judge in the day-to-day management of the case" (Sward, 2001, 121; *see also* Shapiro 1989). This change resulted in what some have referred to as "Managerial Judging" (Elliot 1986; Resnik 1982). Indeed, the Notes of the Advisory Committee indicated in the 1983 Amendment that changes to the rule were performed to meet "the challenges of modern litigation" and that modifications were aimed to ensure cases were "disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices" (Fed. R. Civ. P. 16 and Committee Notes).[2] In other words, the previous version of the Rules were not working and whatever benefit may have been derived from the information-gathering process had become inefficient and in need of supervision. Moreover, "[a]s the complexity of legal regulation ha[d] grown, predicting the outcome of adjudication in such cases ha[d] become more difficult" (Langbein, 2012, 558). Inadequate predictions meant settlement prob-

[2]Congress also passed the Civil Justice Reform Act (CJRA) in 1990 that included, *inter alia*, requirements for each federal district court to prepare expense and delay reduction plans, in addition to streamlining case management. The CJRA expired in 1997; the long-term effects of it are difficult to discern. *See* Miller, 2003, 998-999.

lems, which required in many eyes the necessity for the district court judge to be more involved in the pretrial litigation stage. What was ultimately happening, however, was a movement toward injecting the judge into the pretrial (and thus, factfinding) stage earlier and creating the circumstances under which judges could begin pushing for settlement, aggressively if need be.

Scholars concerned about the involvement of the judge in the pretrial portion of litigation have not been silent. Owen M. Fiss, in an apty-titled piece "Against Settlement," argued that coercion would be problematic, particularly for those who have unequal access to resources to conduct litigation (Fiss 1984). Charles E. Clark, Reporter on the original original Rules of Procedure (and the other "founding father" of civil procedure, with Edson Sunderland) argued against judicial intervention being considered by the younger generation of lawyers, and stated to the Judicial Conference's Committee on Pretrial Procedure, "[T]he proper function of pre-trial is not to club the parties—or one of them—into submission. Rather the function is to see that the parties and the court are fully acquainted with the case, leaving no room for the tactic of surprise attack or defense, and to uncover and record the points of agreement between the parties—all to the end of shortening and simplifying the *eventual* trial" (Clark 1961) (emphasis added). Others have pointed to the concerns that judges can exert hostility toward parties at this early-stage, causing consequences that move through the litigation (Resnik, 1982, 425). Albert Alschuler argued that a judge who becomes familiar with the facts of a case during the pretrial stage will not want to see a case move past that stage, settlement or no settlement: "[the] judge may regard an elaborate adversarial proceeding as unncecessary...and may attempt to 'cut through the foliage' in order to save the

taxpayers, the litigants and—of course—himself the bother of a costly and largely duplicative proceeding" (Alschuler, 1986, 1835).

Out of hand discovery and litigation expense was clearly a problem, prompting the Rules to reflect a concern for a "managerial judge." This paradigm permitted the judge to exert pressures on litigants, attempts that pruned the branches of a litigation tree. What came next, however, surprised many and converted the scissored pruning efforts into a full-fledged axe. That change came when the United States Supreme Court fundamentally altered the legal standards for motions for summary judgment and encouraged judges to wholesale eliminate cases with a revitalized procedural rule.

Before detailing the watershed cases by the Supreme Court, it is necessary to briefly discuss the summary judgment procedure. Summary judgment stems from Rule 56 of the Federal Rules of Civil Procedure. That Rule provides that a court shall grant a judgment as a matter of law in cases where "there is no genuine dispute as to any material fact" (Fed. R. Civ. P. 56). Thus, summary judgment permits a judge to enter judgment against a party if a jury could not reasonably find in favor of the non-moving party. It is strong medicine, and one that the courts initially were wary of utilizing. Summary judgment motions are one of a few different procedures a court can utilize for ending a party's case during the pretrial stage

of litigation.[3] Summary judgment motions, however, are the most controversial of these procedural devices.

The summary judgment motion is not an ancient construct. Rather, its origin began in the 19th Century. In the 1855 Keating's Act, the English Parliament created a summary motion that would enable a common law court to issue a judgment based on the summary record (and thus, before trial). Essentially, these summary devices "provided a creditor's remedy for collecting liquidated debts arising from bills of exchange or promissory notes" (Langbein, 2012, 566). Parliament passed the law in response to merchants in England who were upset with the delay experienced in recovering debts through the common law courts (Bauman 1956). This summary motion "entitled a party complaining of a debt to judgment in his favor unless the defending party filed an affidavit disputing the factual basis of the claim" (Wood, 2011, 234). Eventually, the use of this summary motion expanded in England and caught the eyes of two individuals who would go on to shape the American Federal Rules of Civil Procedure: Edson Sunderland and Charles Clark.

Charles Clark, the Reporter for the Advisory Committee tasked with promulgating a draft of the Federal Rules of Civil Procedure, had considered summary

[3]The other two methods for dismissal of a case are motions to dismiss (pursuant to Rule 12(b)(6)) and motions for judgment on the pleadings (pursuant to Rule 12(c)). A motion to dismiss has its roots in the common law and asks whether the Complaint filed by the initiating party to the lawsuit has stated a cognizable claim for relief. Under the notice pleading standards, these were typically disfavored motions, though with the recent cases of *Twombly* and *Iqbal* the United States Supreme Court has made it easier to grant such motions (*see* Footnote 1, *supra*). Motions for judgments on the pleadings are far less common than the summary judgment motion or motion to dismiss. Motions for judgment on the pleadings permit a party to file for judgment based on the initiating Complaint and Answer (by the Defendant(s)). If either a motion to dismiss, or a motion for judgment on the pleadings, contains material outside the strict pleadings consisting of the Complaint and Answer, then the motion is automatically converted to a motion for summary judgment pursuant to Rule 12(d). I confine my discussion in this section to motions for summary judgment as they are the typical pretrial dispositive motion filed and because of the rule requiring the other two less-utilized motions to convert to a summary judgment motion in the event evidentiary materials are presented to the court.

judgment in his scholarly work. Clark found the procedure useful, proclaiming "the whole judicial process is, by this procedure, made to function more quickly and with less complexity than in the ordinary long drawn out suit" (Clark & Samenow, 1929, 423). While Clark wanted to incorporate the summary judgment procedure into the new Federal Rules, it was Sunderland who actually drafted the original rule (Burbank, 2004, 595; *see* Millar 1952 (discussing the historical account behind the creation of the summary judgment procedure)).[4] Sunderland, also a professor at the University of Michigan Law School, had drafted the State of Michigan's procedural rule for expanded summary judgment (Burbank, 2004, 597-598) and had come to believe the summary judgment motion, in congruence with a more open discovery process, would diminish the waste of judicial resources and unnecessary delay associated with civil litigation. For Sunderland, summary judgment was a simple procedural mechanism that, in the English experience, constituted "nothing but a process for the prompt collection of debts" (Sunderland, 1925, 111). For Clark, the new procedure would only address sham defenses (Haramati, 2010, 199). In other words, the procedure would amount to an expeditious result for unworthy cases filed in federal court. However, the lead authors were clear that the rule should apply to both plaintiffs and defendants equally (*See* Haramati, 2010, 210-211), a difference from the English common law predecessor. Another difference (one ultimately adopted by the Committee) applied the new summary judgment motion to *all* cases (not just claims for liquidated debts, as in the common law).

[4] *See also* Hoffer, 1993, 435 (Contending that Clark gave Sunderland the summary judgment assignment to appease Sunderland given Clark had maneuvered to be appointed Reporter for the new Federal Rules project. According to Hoffer, "Sunderland asked to prepare the rules for summary judgment, and Clark sweetened the pot with that concession—and $125 per week or $500 per month—to Sunderland. Thereafter, Sunderland supported Clark consistently.").

There was, however, some concern expressed for the new procedural device. The Advisory Committee, chaired by William D. Mitchell (former U.S. Attorney General under the Herbert Hoover administration), expressed concern about the potential for violation of individuals' rights to a jury trial pursuant to the Seventh Amendment (Haramati, 2010, 197). Another member worried that the rule would devolve into a trial by affidavit, as opposed to a trial by jury (Burbank, 2004, 602). As Haramati notes, "what is surprising about the Advisory Committee's reaction is their strong focus on the jury trial in summary judgment...[t]hey were interested in preserving entrenched rights from the encroachments of new summary judgment innovations" (Haramati, 2010, 198). In other words, even before Rule 56 and summary judgment became a topic of conversation after the Supreme Court liberalized its usage, the drafters of the original Federal Rules of Civil Procedure were concerned about the prospects that this new device could favor "efficiency" over constitutional rights. Their concerns were prescient.

Ultimately, Clark and Sunderland were able to assuage the concerns of the rest of the Advisory Committee enough to forge passage of the new Rules of Federal Procedure, including the newly minted summary judgment rule. Though ostensibly the summary judgment rule aimed to eliminate judicial waste, concerns were raised relatively early that the new rule would, with a lack of genuine standards, serve to exacerbate the problems already experienced in the federal district courts. Bauman expressed that "[f]ailure to articulate intelligible standards in jurisdictions where a completely unlimited summary judgment procedure is permissible results in wasted judicial effort and added delay to litigants in settling disputes" (Bauman, 1956, 354). As Judge Diane Wood of the Seventh Circuit Court of Appeals explained, "The lack of intelligible standards in Rule 56 not only created the

potential for delay in resolving motions under the rule; it also created the potential for misapplication of the rule...judges inevitably had more discretion to dismiss a lawsuit and...the dreaded and unconstitutional 'trial by affidavit' was a real danger" (Wood, 2011, 236). In other words, given discovery rules, movement toward the managerial judge, and the explicit injection of the judge into the pretrial factfinding portion of litigation with summary judgment, the elements were present for Clark's simple procedural device to morph into something else. That moment would have to wait, however, for a time.

As Wood (2011, 237-238) notes, "For the first forty years after the adoption of the Federal Rules, the potential problems posed by judicial discretion did not materialize." In general, courts were reluctant to impose a standard that would make the usage of summary judgment easy and replace the function of the jury with a battle of affidavits and other discovery material. An early, and famous, example of this perspective occurred in the 1946 Second Circuit Court of Appeals case of *Arnstein v. Porter*. In *Arnstein*, Judge Jerome Frank authored an opinion maintaining that the usage of summary judgment should not be made easy. Frank's opinion held that the "slightest doubt as to the facts" should preclude granting summary judgment (*Arnstein*, 154 F.2d at 469-470 (citations omitted)). For Judge Frank, the very real concern expressed by the skeptics on the Advisory Committee rung true: summary judgment should not, in the hopes of expediency, trample on the rights of individuals to have their proverbial day in court. Though clearly ruling in favor of a restrained view of summary judgment, the Second Circuit was divided in the case. Vigorously fighting the majority's position was none other than Charles Clark (by then a federal appellate judge). Clark repeated his arguments, made years earlier at the Advisory Committee's meetings, that summary judgment was

a necessary component of eliminating litigation waste and a necessary mechanism now that the Federal Rules of Civil Procedure utilized a notice pleading standard (*Arnstein* at 479). As Clark pointedly contended, "The second premise—dislike of the summary-judgment rule—I find difficult to appraise or understand...summary judgment [is] an integral and useful part of the procedural system envisaged by the rules...the demand is not for limitation, but for at least a small extension, of the rule" (*Arnstein* at 479).

Notwithstanding Clark's contentions, the Second Circuit Court of Appeals decided otherwise. For the majority in *Arnstein* the risk of inappropriately dismissing a party's claim outweighed the perceived expeditious benefits for the summary judgment motion. The *Arnstein* perspective that summary judgment was a disfavored motion was the general perspective of the federal bench. That view seemed to receive reinforcement in 1962 from the United States Supreme Court in *Poller v. CBS, Inc.* In *Poller*, the Court confronted a claim for conspiracy to engage in antitrust behavior in violation of the Sherman Act. The plaintiff alleged that CBS attempted to monopolize trade by canceling CBS' affiliation with a UHF television station. In order to prove the violation, intent to engage in the conspiracy had to be shown. The lower courts granted summary judgment to CBS, but the United States Supreme Court reversed. The Court, per Justice Tom C. Clark, wrote "summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles...trial by affidavit is no substitute for trial by jury which so long has been the hallmark of even handed justice" (*Poller* at 473 (internal quote marks and footnote omitted)). The Court in *Poller* agreed in essence with the sentiment espoused in *Arnstein*—summary judgment would not be a mechanism

for holding a paper trial. As Miller (2003, 1023) notes, *Poller* "had a dampening effect on summary judgment in the federal courts."

Eight years later in 1970, the Supreme Court again addressed the role that summary judgment would play, this time in a federal civil rights case. I will spell out the facts of the case briefly, as I believe the case indicates the type of factual inferences that were important to the Court prior to their years-later revolution in summary judgment. In *Adickes v. S.H. Kress & Co.*, a white school teacher from New York, who was working for the summer in Hattiesburg, Mississippi at a "Freedom School," went to lunch with some of her African-American students. The restaurant refused to serve lunch to the teacher and upon her leaving the restaurant she was arrested by a local police officer on a charge of "vagrancy." The teacher brought suit for a violation of her constitutional rights, alleging that the restaurant had acted in concert with the local police. The conspiracy claim here was important, as her suit was against the restaurant and thus "state action" had to be proven in order for there to be a colorable claim that her federal constitutional rights were violated. The defendant filed a motion for summary judgment, and both parties (the teacher, and the restaurant) submitted affidavits concerning the circumstances of the case. Noticeably absent, however, was an affidavit from the waitress in the case who had been the actual person to refuse the teacher service. Accordingly, the evidence that was submitted indicated a police officer entered the restaurant before the school teacher was asked to leave, and that the same officer then arrested the teacher after she exited the restaurant.

The Supreme Court in *Adickes* ultimately found in favor of the teacher, and in so doing addressed the requisite burden of proof that a moving party would need to meet in order to successfully obtain a motion for summary judgment. The restau-

rant contended that the teacher did not submit any proof during the summary judgment phase that there was, in fact, a conspiracy between the restaurant and the police. The Court indicated, however, that it was not the restaurant's duty to dispute and negate the teacher's allegations, but the restaurant did have to demonstrate there were no factual questions that should be sorted out by a jury. The Court found the restaurant had failed to show there were no factual issues, since an inference could be drawn either way, particularly because no party had submitted any evidence from the waitress, the person who actually denied the teacher restaurant service. In other words, the burden was on the moving party for summary judgment to explain why there were no factual issues for a jury to resolve. Again, then, we see that despite the existence of Federal Rule of Civil Procedure 56 permitting the use of summary judgment, this mechanism was not a particularly favored device. This position would not change until sixteen years later in a dramatic turn by the Court known as the Summary Judgment Trilogy.

By 1986 the federal courts were receiving record numbers of civil case filings. This litigation explosion, coupled with the increased call for more managerial judging, led the Supreme Court to dramatically alter the summary judgment landscape. In the three cases ((1) *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*; (2) *Anderson v. Liberty Lobby, Inc.*; and (3) *Celotex Corp. v. Catrett*), the Supreme Court reduced the burden on parties who move for summary judgment and in essence shifted the burdens onto the non-mover to demonstrate the legitimacy of their claims to a jury trial.

In *Matsushita*, the Court was confronted with another claim of antitrust behavior. The plaintiffs (American television manufacturers) alleged that the defendants (Japanese television manufacturers) had engaged in predatory pricing. The defen-

dants had moved for summary judgment. The Supreme Court held that summary judgment was appropriate in the case. The Court believed that "if the factual context renders [the American television manufacturers'] claim implausible—if the claim is one that simply makes no economic sense—the [American television manufacturers] must come forward with more persuasive evidence to support their claim than would otherwise be necessary" (*Matsushita*, 475 U.S. at 587). As one commentator has noted, "Despite the testimony of five expert witnesses, the plaintiffs failed to persuade the Court that their theory was rational enough to survive pretrial disposition" (Miller, 2003, 1030). What makes *Matsushita* stand out, then, are a few different factors. First, the Court very clearly had moved from disfavoring summary judgment to accepting it, even in complex cases such as antitrust allegations, something it was not prepared to do in *Poller*. Additionally, the Court openly embraced economic theory as explaining rationality under the law. This point is particularly instructive as we will see below. Finally, the Court determined in *Matsushita* that a nonmovant (the party who does not move for summary judgment) "could not survive a summary judgment motion simply by advancing facts that, standing alone, support the inferences needed for a finding in its favor. Instead, the inferences to be drawn must be reasonable in light of the *entire* record, not simply that portion of it favorable to the nonmoving party" (Miller, 2003, 1032).

In *Anderson v. Liberty Lobby*, the Court addressed a libel action against a publisher. The plaintiff organization (a self-described "citizens lobby"[5] alleged that the magazine had depicted it as "neo-Nazi, anti-Semitic, racist, and Fascist" (*Anderson*, 477 U.S. at 245). The Supreme Court held that the lower court of appeals

[5]Or, "the most influential right-wing extremist propaganda organization in the United States," according to the Anti-Defamation League (*see* http://archive.adl.org/holocaust/carto.html#.VXZcA0YsPzs).

had applied an incorrect standard for summary judgment, and thus vacated that court's decision and remanded for consideration of the Supreme Court's articulation of the appropriate standard. The *Anderson* Court held that the party opposing summary judgment must put forth a sufficient evidentiary basis to defeat the motion. Importantly, the *Anderson* decision had a few components that would serve to affect future lower courts' interpretations of Rule 56. First, the Court was clear that a nonmovant must "present affirmative evidence in order to defeat a properly supported motion for summary judgment...even where the evidence is likely to be within the possession of the defendant" (*Anderson*, 477 U.S. at 257). Additionally, when ruling on a motion for summary judgment, the judge "must view the evidence presented through the prism of the substantive evidentiary burden," such that the judge must ask "whether a jury could reasonably find *either* that the plaintiff proved his case...or that he did not" (*Anderson*, 477 U.S. 254 (emphasis in original)). The *Anderson* decision unquestionably sanctioned the judge to serve as a jury in a paper trial. Contrary to the majority's contention that its decision "by no means authorizes trial on affidavits," the requirement that a judge consider what a "reasonable jury" would do necessarily requires the judge to begin to act and think *like a jury*, something that is done at trial. With nothing but a paper record before the judge, the Court's decision certainly risked (if not invited) lower court judges to engage in a weighing of evidence and inferential contentions. Indeed, Justice Brennan in his dissent explicitly castigated the majority for this very concern: "[T]he Court's opinion is also full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would" (*Anderson*, 477 U.S. at 266). Justice Brennan further explained, in what would appear to be a rather prescient passage, his concerns with how summary judgment would come to function in the lower federal courts:

> If in fact, this is what the Court would, under today's decision, require of district courts, then I am fearful that this new rule—for this surely would be a brand new procedure—will transform what is meant to provide an expedited "summary" procedure into a full-blown paper trial on the merits. It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the "quantum" of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with all of the evidence he can muster in support of his client's case. Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

Justice Brennan's concerns, however, were in the minority, and the Court moved forward with this round of adjustments to the summary judgment standard. The final alteration would come in *Celotex Corp. v. Catrett*.

The Court decided the *Celotex* decision the same day as *Anderson*. In *Celotex*, the plaintiff had sued a company over the death of her husband who had allegedly been exposed to asbestos. The defendants, manufacturers of the asbestos products, filed summary judgment on plaintiff's claims. One of the issues in contention was whether the plaintiff's husband had been exposed to the toxic materials. The plaintiff provided documents that indicated her husband had been exposed, but could not identify witnesses to testify that they saw her husband exposed to the asbestos. The D.C. Circuit Court of Appeals determined that the asbestos manufacturers motion for summary judgment was defective because it did not provide substantive evidence that supported its arguments. The Supreme Court reversed, holding that a party who moves for summary judgment does not have to provide evidence supporting its contention that the nonmovant has failed to raise a genuine issue of material fact at trial. As the Court, per Justice Rehnquist, noted, "[W]e find no express or implied requirement in Rule 56 that the moving party support

its motion with affidavits or other similar materials *negating* the opponent's claim" (*Celotex*, 477 U.S. at 323). Note that this is a change from the *Adickes* decision where the moving party had the burden of production to bring forth evidence suggesting there was no basis for moving the case to trial. In *Celotex*, however, the Court changed positions and strictly imposed that burden on the non-moving party. The Court in *Celotex* stated that the "burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case" (*Celotex*, 477 U.S. at 325).

Celotex also stood for the proposition that summary judgment would no longer be viewed as a "disfavored" procedural device. Indeed, the Court went to lengths to explicitly state that it would support a more aggressive usage of the litigation mechanism: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the *just, speedy and inexpensive determination* of every action." (*Celotex*, 477 U.S. at 328 (internal quote marks omitted) (emphasis added)). The Court appeared to support defendants as well, giving a wink and nod to the fact that most parties who utilize the procedure are defendants, when it stated that Rule 56 should not only be viewed through the lens of individuals pressing claims, "but also for the rights of persons opposing such claims and defenses" (*Celotex*, 477 U.S. at 327). *Celotex*, it is clear, stands for the proposition that federal courts should not be dissuaded from intervening early in cases and clearing their dockets with summary judgment.

Combined, the Trilogy embraced the usage of summary judgment in ways the Court never had done before. And, it is safe to say the Court felt strongly about this change, as it took no less than *three* occasions in a single term to address a matter

of procedural litigation rules; hardly a salient issue. Professor Arthur R. Miller, an author of the leading treatise on federal procedure, summed up the meaning of the cases well in his seminal article discussing the failings of summary judgment (2003, 1041):

> On a practical level, the three decisions collectively forge a new, stronger role for the motion. *Matsushita* requires that the moving party's evidence be sufficient to render the plaintiff's claim implausible. *Anderson* allows the trial court to enter judgment if the evidence produced by the plaintiff is not sufficient, under the applicable standard of proof, to convince the judge that a reasonable jury could return a verdict in his favor. And *Celotex* has made it easier to shift the burden of adducing support for the nonmovant's legal position on a Rule 56 motion and effectively obliges the plaintiff to come forward, on the defendant's motion, with her case before trial. Stated differently, *Celotex* has made it easier to make the motion, and *Anderson* and *Matsushita* have increased the chances that it will be granted.

It is clear that the Trilogy opened the door to more usage of summary judgment. But importantly, by relaxing Rule 56 the Court strongly incentivized certain types of behavior by litigants. And it is here where the narrative begins to take shape: the alteration to the standards used in summary judgment have combined with the open (and costly) discovery procedures, as well as the managerial role of the modern federal judge, to create the conditions to begin dismissing cases quickly, but not necessarily inexpensively. As Judge Diane Wood has noted, post-Trilogy the "stakes soared for litigants, who learned quickly that they had to redouble their investment in discovery so that they could present enough material to avert an untimely demise of their cases" (Wood, 2011, 240). Judge Wood notes that "as it became ever more urgent to amass, and then use, more supporting materials either to oppose or support summary judgment, both costs and delays kept growing" (Wood, 2011, 241). And, as we would expect, the lawyers litigating in federal

courts have picked up on the Supreme Court's cues. As D. Brock Hornby (a former professor of law and now federal district court judge) noted in a recent article, the American Bar Association's Section on Litigation conducted a survey of its members and found that "50% of plaintiffs' lawyers, 47% of defense lawyers, and 44% of mixed practice lawyers believe discovery is used *more to develop evidence for summary judgment* than it is to understand the other party's claims and defenses for trial" (Hornby, 2010, 274 (internal quote marks omitted) (emphasis in original); *see also* ABA Section of Litigation Member Survey on Civil Practice (2009) for the full report).[6] This connection to discovery is critical to understanding where to look for the causal mechanisms behind the diminution of trials. Langbein (2012, 567-568) is right to point out that "[t]here is an intimate connection between the discovery revolution and summary judgment." This link was *possible* in the past. As Edson Sunderland (the drafter of Rule 56) once noted, "An effective general system of discovery would greatly increase the effectiveness of the summary judgment" (Sunderland, 1933, 74). In the modern litigation era, it is a *necessity* by virtue of the Supreme Court's Trilogy (*see* Yeazell, 2004, 952 ("Discovery and expert testimony changed [the] calculation: they not only enabled substantial, continuing pretrial investment but in many cases *required* it")).

The connection between discovery, summary judgment, and the judge's role in case management is critical to understanding where to look when evaluating the question of why the number of trials is consistently decreasing in the United States. Studies in the literature have heretofore engaged in a debate about whether sum-

[6]The trend away from trials, while slightly muted in state courts, is also clear, particularly as states embrace the usage of summary judgment. As one Texas attorney confessed in an article on the matter, "We write motions for summary judgment today for our corporate clients that we would have laughed at only a few years ago" (Curriden 2013). Found at http://www.dallasnews.com/business/headlines/20130622- number-of-civil-jury-trials-declines-to-new-lows-in-texas.ece.

mary judgment filing and grant rates have increased (*see, e.g.*, Cecil *et al.* 2007 (finding summary judgment filing rates increased moderately pre-Trilogy, and grant rates increased to 47% post-Trilogy); Cecil *et al.* 2007b (finding filing rates were steady at around 17%; grant rates at around 60%, a slight movement upward); Eisenberg & Lanvers 2008 (finding filing rates increased, but at a statistically insignificant amount; finding grant rates for civil rights cases increased dramatically); Berkowitz 1992 (finding grant rates increased in two district courts post-Trilogy); Burbank 2004 (arguing summary judgment filing rates have increased, but still do not represent a large portion of non-trial litigation results); Hadfield 2004 (finding non-trial adjudications (which include summary judgment) have increased over time), Eisenberg 2015 (finding civil rights claims face a tougher path to trial than other types of claims). Chapter Three discussed these, and other, pieces of the literature in detail. Suffice it to say, most scholarship has focused on trying to demonstrate that the Supreme Court's Trilogy impacted filing and/or grant rates as a means for demonstrating reasons for the decrease in trials.

The scholarship on summary judgment has been laudable. Endeavoring to find answers to the above questions is difficult, particularly for litigation data. The data, unlike some subfields of political science, can be problematic. Litigation data is even more so. The discordant and discombobulated system of maintaining litigation records has led to very incremental, and tenuous, propositions for empirical conclusions (*see* Farhang & Spencer, 2014, 251 ("[T]he work of the American court system, and the maintenance of its records, are massively decentralized. Accordingly, the vast majority of scholarship on adjudicatory activity in America has been based on the study of activity within particular states, cities, judicial districts, and even legal services providers."). These limitations are, in some circumstances,

quite severe (*see, e.g.*, Hadfield 2004 (discussing the problems with the Administrative Office for U.S. Courts coding system)). Nonetheless, we must properly test our hypotheses that best conform to theory. And it is here where I suggest we can do more. Namely, the question of whether summary judgment filing rates have increased post-Trilogy is not the precise question we should be asking. Rather, the question should be: *has the Trilogy worked to reduce civil trials*.

I want to be clear that determining whether summary judgment filing and/or grant rates have increased *is* a part of answering the central theoretical question above. If filing rates have increased (which they appear they have) and if grant rates have increased (which they appear they have), then those findings are evidence that lower federal courts have been receptive to the Supreme Court's invitation to treat summary judgment motions not as a "disfavored" procedural device, but rather as a useful tool to evacuate claims from the federal system. However, the debate thus far has been have the filing/grant rates increased, decreased, etc. This debate, while important, does not strike at the central theoretical concern. The reason this argument fails is because whether the filing/grant rates have increased misses the ultimate effect the summary judgment Trilogy has had on litigation, in conjunction with other facets to federal procedure. In other words, if the summary judgment Trilogy has had a negative effect on federal civil trials, that effect would logically extend to all phases of the litigation. For instance, if a plaintiff knows they will now have a harder time making it past summary judgment, they might be more apt to settle. Given the costs associated with a summary judgment motion (particularly in light of the discussion above regarding discovery), then that plaintiff may very well settle early without enduring the increased costs of litigation. If such a settlement occurs, the defendant will not even have made a summary judg-

ment motion. According to the past studies, because the defendant did not file a motion for summary judgment, it would not factor into the summary judgment rate, and thus, would not appear that the Trilogy had an effect. But, it is clear that under such a set of circumstances, the plaintiff would very clearly have factored that determination into their calculation of risk and cost, and thus, the Trilogy, while not directly observed in a motion for summary judgment, would, in fact, have had an impact on that case not going to trial. In other words, just because one cannot "see" the Trilogy at work with a summary judgment motion does not mean it has not had an "effect" on that case.

Law and economics literature supports this reasoning and suggests we need to expand our view of measuring the Trilogy's "effect." The law and economics academy has long considered the role cost and information have on rational parties in the litigation process (*see, e.g.*, Landes 1971; Gould 1973; Posner 1973; Shavell 1982; Priest & Klein 1984; Cooter & Rubinfeld 1989; Polinsky & Shavell 1998). Reviewing the principles of this literature demonstrates that in order to evaluate the effects of the Trilogy, we cannot theoretically confine our analysis to the summary judgment filing/grant rates. As I will discuss in the next chapter, we can aggregate our data and look for distinctive regimes of behavior that, if consistent with my hypothesis that the Trilogy has had an effect on civil trial rates, will reflect change on or nearly after the date of these Supreme Court decisions. A review of the basic economic analysis regarding litigation now, however, will demonstrate we need to expand our considerations beyond past litigation studies.

The formal models for whether a litigant chooses to settle their case or go to trial have been formulated in various ways. I utilize the most basic of these to demonstrate the effect of summary judgment on litigation. At its core, the litigation

model presumes that if the expected value of a plaintiff's case in proceeding to trial is positive, minus their costs, the individual will litigate.[7] Moving a step further, borrowing Posner's notation (1973), a trial will occur over settlement when:

$$\underbrace{P_p J - C_p + S_p}_{A} > \underbrace{(1 - P_d)J + C_d - S_d}_{B}$$

Here, P_p is plaintiff's subjective probability of prevailing, P_d is the defendant's subjective probability of prevailing[8], C_p the plaintiff's litigation costs, C_d the defendant's litigation costs, and J the stakes of the case. Thus, in the above equation, the plaintiff's minimum settlement offer exceeds the defendant's maximum offer, so no settlement occurs (and thus the case results in litigation/trial).

We can now consider the impact of the summary judgment Trilogy on the litigation equation above. It is clear if summary judgment became an easier tool to utilize after the Supreme Court's decision in *Celotex*, *Matsushita*, and *Anderson* (which it did), then the value of P_p will diminish (and, concordantly, the defendant's probability of prevailing P_d will increase). Additionally, a plaintiff's maximum settlement offer includes their litigation costs, C_p. As I detailed earlier in the chapter, the move toward greater discovery under the Federal Rules of Civil Procedure, coupled with the summary judgment process, has greatly increased the

[7]Farhang frames the calculation in the following manner: $EV = EB(p) - EC$, where EV is the plaintiff's expected monetary value, EB is the expected monetary benefit if the plaintiff prevails, p is the probability the plaintiff will win if they go to trial, and EC are the expected costs of litigating the claim (Farhang, 2008, 822).

[8]Priest & Klein (1984, 11) construct the same model, though express the probability of the plaintiff winning to simply P_d, and not $(1 - P_d)$. This change is simply notational, as Priest & Klein and Posner (1973) both define this value as the defendant's estimate of their probability of winning. I adopt Posner's notation, but point out this notational difference for clarity's sake.

costs associated with a plaintiff's claim. As a result, pretrial litigation costs have increased, thereby increasing the value of C_p. Even assuming the defendant's costs have remained steady (a heroic assumption), the formula dictates that the inequality cannot hold, causing a further reduction in the likelihood of a trial. With these prospects in mind, the only way the left side of the inequality can be greater than the right (*i.e.*, $A > B$) is if the settlement costs, S_p, were to outpace the plaintiff's litigation costs, C_p. As a practical matter, this will not generally occur, as the costs of discovery associated with litigation will greatly outweigh the costs associated with settlement (which could include, for instance, a paid mediation session, or the costs of attending a settlement conference for a day, etc.). What we see, then, is that with the post-Trilogy summary judgment regime, there should be a diminution in cases that go to trial.

There is more, however. Issacharoff and Loewenstein (1990), in an excellent article, utilize game theoretic methods to demonstrate that the summary judgment Trilogy has drastic consequences for the litigation model. In particular, the authors find that the Trilogy alters litigation incentives in such a manner as to potentially render certain types of settlement more difficult. Additionally, because of the enhanced opportunity for summary judgment, there is a fundamental change to the balance of power between plaintiffs and defendants which disproportionately impacts plaintiffs. The authors construct a simple game involving a one million dollar claim in which the plaintiff has an 80% chance of winning and the parties agree on that success rate. Additionally, the plaintiff has litigation expenses of $75,000 and defendant's litigation costs are $50,000. Finally, the authors assume that settlement prior to trial or the filing of a summary judgment motion is cost-free.[9]

[9]This assumption is probably not a fair assumption in reality, though it is not so far removed as to render the model useless. Clearly, the costs of a defendant filing summary judgment are not

Issacharoff and Loewenstein demonstrate that with summary judgment, the litigation process separates into two distinct epochs of negotiation. In the no summary judgment universe, settlement follows the standard litigation model given above. But, with summary judgment, the zone of agreement in which the parties can reach settlement can actually shrink, which would run counter to the logic of expanding summary judgment in the Trilogy (*i.e.*, increasing settlement).[10] The authors note that without a more refined model, it is not clear what the aggregate effects will be on settlement versus trial, though they speculate that summary judgment would "decrease the aggregate likelihood of going to trial" and "increase expected legal expenses" (Issacharoff & Lowenstein, 1990, 102).

Additionally, as the authors note, "perhaps the most striking and unambiguous impact of the trilogy is a transfer of wealth from plaintiffs to defendants" (Issacharoff & Loewenstein, 1990, 103; *see also* Bronsteen, 2007, 547 ("Because summary judgment entices judges to end cases before trial and makes it harder for

zero, but neither are they extravagantly great, particularly given the *Celotex* Court's requirement that the moving party for summary judgment merely "show" that no dispute of material facts exist to preclude granting the motion.

[10]Issacharoff and Loewenstein note that if a plaintiff defeats a motion for summary judgment, they are less inclined to settle. In essence, after making it through to the second stage of negotiation, the plaintiff has a "pedal to the metal" mentality, seeking to recoup greater litigation costs (post-summary judgment). Some scholars might find fault with this fact, given in traditional economic considerations, a rational actor should ignore sunk costs when evaluating whether to continue expending resources for, in this case, litigation gain. *See, e.g.*, Dickson and Shepsle (2001, 301) ("It is a central tenet of rational choice theory that individuals honor neither sunk costs nor sunk benefits in deciding on future courses of action."). Here, however, the authors posit that the costs are potentially recoverable at trial. Moreover, this phenomenon makes sense when considering the standard litigation inequality discussed above. As Posner (1973, 419) notes, taking the first derivative of the left-side of the inequality with respect to J (the stakes of the case) yields $(P_p + P_d - 1)$. Accordingly, if the parties' collective subjective expectations of a plaintiff victory exceed one (which is not a totally unreasonable belief after a plaintiff successfully makes it past the summary judgment stage), $(P_p + P_d - 1)$ will always be greater than zero and thus an increase in the stakes of the case will always increase the likilihood of trial (i.e., non-settlement). Of course, outside of the game theoretic universe, individuals may not be so rational, and even if there are sunk costs involved, they will push forward, seeking to capture losses that will not be recouped (*See, e.g.*, Murnighan 1992). Regardless, because these costs are recoverable in Issacharoff and Loewenstein's model, the issue is not present here.

any plaintiff to extract an early settlement, it helps *all* defendants"). The authors note that the greatest impact on the size of the wealth transfer is "the probability that the defendant will prevail on summary judgment" (Issacharoff & Lowenstein, 1990, 104). In their example of the hypothetical case, Issacharoff and Loewenstein find that the settlement zone would run between $710,000 to $760,000 if the defendant's probability of prevailing at summary judgment were a mere 5%. If the defendant's probability of prevailing were 20%, the settlement range would extend from $590,000 to $640,000 (1990, 104). The authors' model may, in fact, significantly underestimate the stated effect, as Cecil and Cort (2007b) found in their study of seventy-eight federal district courts in 2006 that grant rates were approximately 60% on the whole, and a staggering 73% in employment discrimination cases. In other words, the summary judgment process serves to deflate a plaintiff's claim and devalue it significantly.

Taken as a whole, what we can learn from the law and economics literature is that summary judgment serves to affect litigants' rational decisions not just at the point of the summary judgment motion, but also early in the civil case. And it is here where past scholarly endeavors have missed the mark. In order to evaluate whether the Trilogy has served to diminish the number of trials we have to incorporate an assessment of cases that terminate not only because of summary judgment, but also are affected in such a way as to remove the case before the trial begins. As Hadfield (2004) and Eisenberg and Lanvers (2009) demonstrate, *most* cases are either settled or disposed of by pretrial adjudication (such as summary judgment, or motions to dismiss). Past research has focused too extensively on the filing/grant rate issue, and not on the larger, and in some sense easier, question of whether there have been episodic changes to the trial rate. The question is, can

we observe the seemingly unobservable? The answer is, yes. Instead of casting off the aggregate data, contemporary time series analysis can sort through the data thicket to ascertain if, in fact, we have seen trial rates diminish in conjunction with the Summary Judgment Trilogy. Additionally, past research efforts have made no substantive inquiry into the political determinants of summary judgment, which is needed to evaluate the larger social implications of summary judgment. Having established the theoretical motivation for this study, I detail in the next chapter my research design and findings, with the aim of answering the question: *Is there a rush to justice?*

5. EMPIRICAL RESULTS FOR CAUSES AND CONSQUENCES OF DIMINISHING TRIALS

5.1 Introduction

The question of whether the Supreme Court's Summary Judgment Trilogy caused substantive changes to the federal courts system requires a multi-faceted research design. As discussed in Chapter 3, the collapse of trials in this country is profound. However, as noted, previous research has only scraped the empirical surface in answering this question. In order to empirically ascertain (1) whether we see the Summary Judgment Trilogy reduced the number of trials, (2) the causes of summary judgment usage in the federal courts system, and (3) the policy impact of the reduction in trials, a multifaceted research design is necessary. To answer each question, I employ three distinct research designs. First, I utilize macro-level data with advanced time series techniques to evaluate the theoretical predictions in Chapter 4 that the Trilogy worked to reduce the number of civil trials in the United States. Second, I employ a micro-level data analysis to discover the determinants of why a summary judgment motion is filed and why such a motion is granted. Finally, I utilize policy-specific data to determine the policy impact of the diminution of civil trials in the area of employment discrimination cases. Each research design utilizes different data and statistical modeling techniques to provide leverage in answering these distinct, but related, queries.

5.2 Macro-Level Analysis

In Chapter 4, I posed the question of whether "we can we observe the seemingly unobservable?" The question is in reference to determining if the Trilogy actually

worked to disincentivize the use of trials in civil litigation. My theory (expounded in Chapter 4) and others' formalized work (e.g., Issacharoff & Lowentstein 1990) suggests the Trilogy certainly *should* have re-worked the incentive mechanisms of litigation. One way to know whether these changes caused litigants and lawyers to modify their utility calculations would simply be to ask them with survey research. This research design, however, is fraught with difficulties. Aside from no systematic data existing in this vein, there is also the added difficulty of actually getting lawyers to answer questions about their strategic calculations given their strict need to adhere to attorney-client privilege. In other words, knowing what is "in the heads" of litigants and lawyers is a near-impenetrable boundary to actually understanding how the Trilogy works to affect the strategic calculations of individuals in the throes of civil litigation.

It would seem this boundary represents a dead end for our inquiry, but it does not. Indeed, I contend we arrive at an answer to the motivating question and see the "unseen" through the usage of time series analysis on aggregated data. This research design has the benefit of ascertaining national trends which can reveal if individuals, in the aggregate, have altered their behavior consistent with our theoretical predictions over time. This methodological technique cannot be understated. If our question is whether X (here, the Trilogy) caused a change in Y (civil trials), then by definition we are asking if distinct *types* of behavior can be observed before and after the Supreme Court's intervention. Accordingly, in answering this large question of litigant and lawyer behavior, application of time series analysis is in fact *the* appropriate methodology. The innovation here is that past public law research has entirely eschewed time series analysis on this question. The only empirical studies on this question heretofore have been severely limited and flawed

in answering the question of trends, and, have in no way employed any time series analysis. Accordingly, I utilize multiple time series techniques to answer the question of whether the Trilogy worked to impact litigant behavior and find that no matter which technique is employed, the answer is the same: the Trilogy reworked incentives as predicted to diminish the usage of trials in the United States.

Recall that I posed the question of whether X (the Trilogy) caused a change in Y (civil trials). In time series analysis, this question is really asking if the intervention of the Supreme Court's modification to Rule 56 of the Federal Rules of Civil Procedure manifested the reduction in federal civil trials. Fortunately, there are multiple statistical techniques in time series analysis to determine if an intervening event impacted our phenomenon of interest (trials). All of these techniques (which I discuss below) have the advantage of identifying if there are distinct "regimes" or "epochs" of behavior. My theory predicts that we should see such changes in behavior after the Court's Trilogy. Notice too, however, that this research design carries an added benefit: with such modeling strategies we are stating *a priori* our expectation for behavior-switches (at some point in time, t). If the results *do not* find these switches coordinate in time with our intervening event (here, the Trilogy), then we cannot say there is evidence to support our hypothesis. On the other hand, if we state in advance when we expect to see the switch in behavior, and our models precisely identify those points in time as indeed the point at which a switch occurs, then we have strong evidence for our theory.[1]

[1] A potential pitfall of this approach is if two or more events occur at the same time as potential interventions. In that case, parsing the effect of one intervention from another can be difficult. Theory, of course, can drive an argument for why one intervention is preferred to another as the causal explanation for observed behavior changes. Here, we have the theory of the Trilogy's reworking of litigation incentives in Chapter 4. Additionally, and more importantly from a statistical modeling perspective, there are no coordinate events at the same time, t, as the Trilogy that would have had the re-working of litigation practices as the Trilogy. Furthermore, because these are aggregate

In order to assess whether there are structrual breaks consistent with the Trilogy, I employ a multifaceted approach which includes a variety of quantitative endeavors, including Bai-Perron regression, Bayesian Changepoint analysis, and Markov-switching models. Additionally, I employ differing model specifications to guard against spurious results. The data are all national aggregate time series.

5.2.1 Bai-Perron Models

The first method I utilize is that of Bai-Perron regression (Bai and Perron 2003; Bai and Perron 1998). The Bai-Perron method detects m structural breaks (and, thus, $m+1$ regimes) by minimizing the residual sum of squares in a regression context. Accordingly, the model is specfied such that:

$$y_t = x_t'\beta + z_t'\delta_j + u_t, t = T_{j-1}+1, \ldots T_j$$

for $j = 1,...,m+1$. In the model, y_t is the observed dependent variable at time t; x_t and z_t are vectors of covariates and β and δ_j are the corresponding vectors of coefficients; u_t is the disturbance at time t. Importantly, the effects of x_t are not time-varying, while the effects of z_t do depend on the structral breaks. The indices for the breakpoints are $T_1, \ldots, T_m$ and define when the changepoints occur. The timing of the structural breaks are assumed unknown and are estimated.

The regression principle of least squares is used for estimation. For each partition of the sample into $T_1, \ldots, T_m$ (meaning a split of the sample into the $m+1$ regimes), minimize:

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data, doctrinal shifts in the federal courts in one area of the law or another would not be expected to create similar nationally-apparent regime switches for the entire civil system.

$$S_t(T_1,...,T_m) = \sum_{i=1}^{m+1} \sum_{t=T_{i-1}+1}^{T_i} [y_t - x_t'\beta - z_t'\delta_i]^2$$

The estimator will then select the optimal split of the sample into the estimated breakpoints that minimizes the sum of squared residuals.

For the Bai-Perron regressions my dependent variable is the number of trials per year. Independent variables include the number of cases filed per year according to the Administrative Office of the U.S. Courts, as well as the judicial ideology of the U.S. Circuit Courts of appeals (measured as the mean ideology of the federal circuits per Giles-Hettinger-Peppers (GHP) scores (Giles et al. 2001)). I estimated the models utilizing the `R` package `strucchange` for the years 1964-2009.

In Figure 5.1, we see the graphical results of the Bai-Perron regression. The black line is the actual dependent variable. The green line is the Bai-Perron regression line. The Red line is the OLS estimation for comparison purposes. The vertical dotted lines represent time points where the Bai-Perron model finds a structural break. Clearly the Bai-Perron model does an excellent job of tracking the dependent variable, much better than the OLS estimations. Additionally, the Bai-Perron model finds three breakpoints. Most importantly for my hypothesis that the Trilogy had an impact on trials, however, is the first breakpoint situated in the year 1989[2], a period of time near the implementation period by lower federal district courts of the new summary judgment standards, and also clearly after the Trilogy. Contrary to prevous scholars' work suggesting summary judgment trends began to rise before the Trilogy and thus discounting the change in procedural law, these

[2]The other breakpoints are associated with 1999 and 2005. There is no theoretical reason to suspect these breaks are associated with the Trilogy *per se*.

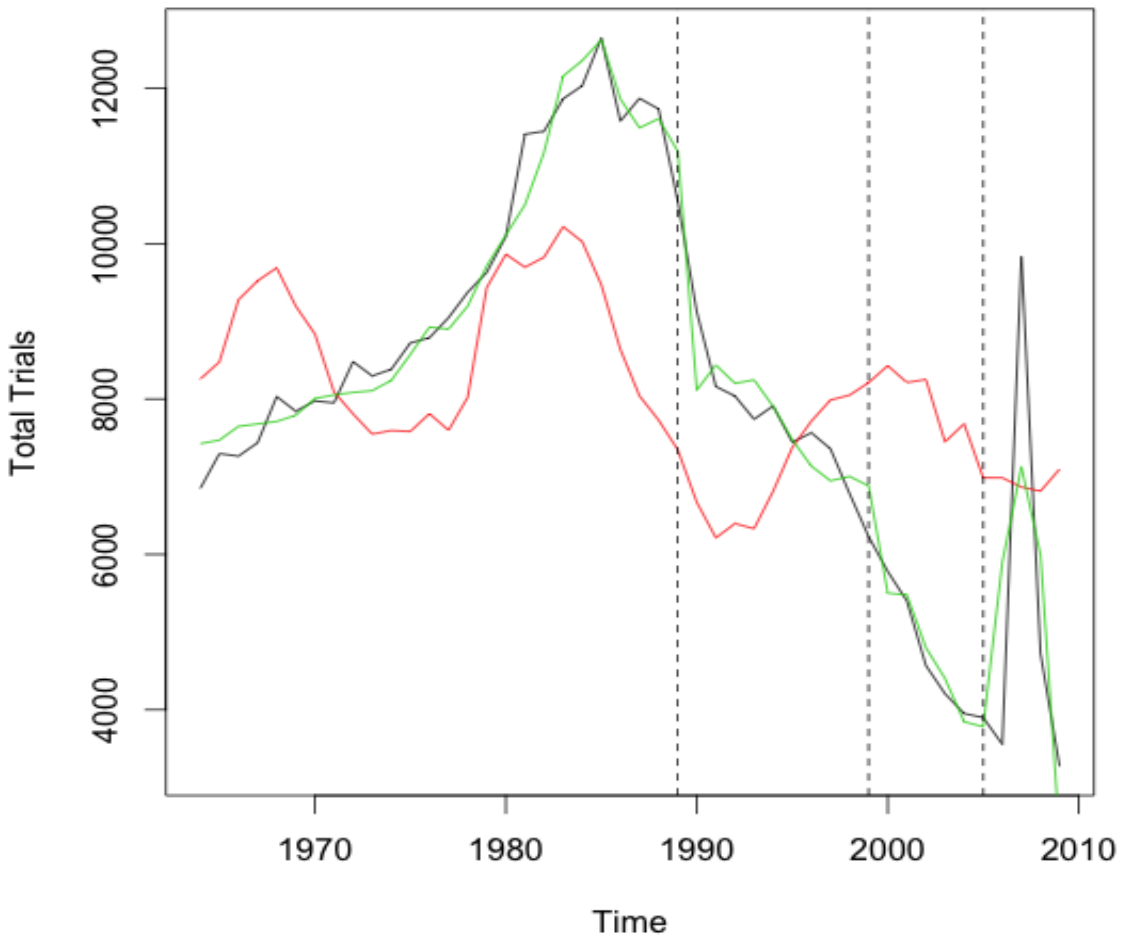

Figure 5.1: Bai-Perron Breakpoints

results suggest the change happened *after* the Trilogy, and indeed, as a result of the Trilogy.

Table 5.1: Bai-Perron Results

Variable	**Segment 1**	**Segment 2**	**Segment 3**	**Segment 4**
Constant	5366	10650	8572	64030
	(687.9)	(5291)	(7080)	(13820)
Cases Filed	.03	-.02	-.008	-.30
	(.003)	(.02)	(.03)	(.06)
Ideology	-2927	14980	-31730	184100
	(4059)	(18760)	(15170)	(101500)

Note: Standard errors in parentheses; N=46.; Adjusted R^2=0.99

The Bai-Perron models also provide point estimates. In Table 5.1, I provide the Bai-Perron regression results. Each variable is listed according to which segment they fall into (up to $m+1$, or here, 4). Of note is the *Cases Filed* variable. As the table demonstrates, the effect of the number of cases filed switches from positively impacting the number of trials to negatively impacting trials. This result provides some explanation for the conundrum: why don't increased case filings mean more trials? The answer: increased cases negatively affect the number of trials, at the limit. In other words, increased case filings will certainly increase the number of trials, but up to a point. Eventually, the judicial pipes become too clogged, and as a result, the stream of cases backflows out of the pipe. An escape valve is necessary to reduce the pressure in the judicial pipes, and that mechanism is summary judgment.

When dealing with time series, there is always the threat of spurious regressions when variables contain a unit root (Granger & Newbold 1974). In order to combat against this effect, especially given Bai-Perron regressions utilize least

squares principles, I differenced the variables in order to ensure the series were stationary. In Figure 5.2 we see the breakpoint results from the differenced models. Again, consistent with the breakpoints identified in Figure 5.1, we see a breakpoint associated within the time period we would expect implementation of the Supreme Court's Trilogy on summary judgment. In Figure 5.2, we see a breakpoint in 1988.

The results from the Bai-Perron regressions certainly suggest that the Trilogy did indeed have an effect on the number of trials. In both regressions, whether accounting for stationarity concerns or not, the models indicate that something happened just after the Supreme Court decided its summary judgment Trilogy. These results suggest past efforts to account for the effect of summary judgment on trials are misguided, and that the theory that shifts in litigation costs did provide a substantive reworking of civil cases is correct.

In order to further test my hypothesis that the Trilogy substantively altered litigation realities, I also performed two further tests for structural breaks utilizing different methods. These efforts are robustness checks against the odd chance that the Bai-Perron models happened to "get it right."

5.2.2 Bayesian Changepoint Models

The second type of structural break models I ran are Bayesian changepoint models. Bayesian statistics provide for updating of information, something that Frequentist statistics cannot do. Moreover, concerns associated with the sample of data can be mitigated by the large sampling that can be performed with Bayesian statistics, including the usage of Monte Carlo Markov Chain algorithms. Rather than looking to pure point estimates from fixed probability densities, Bayesian es-

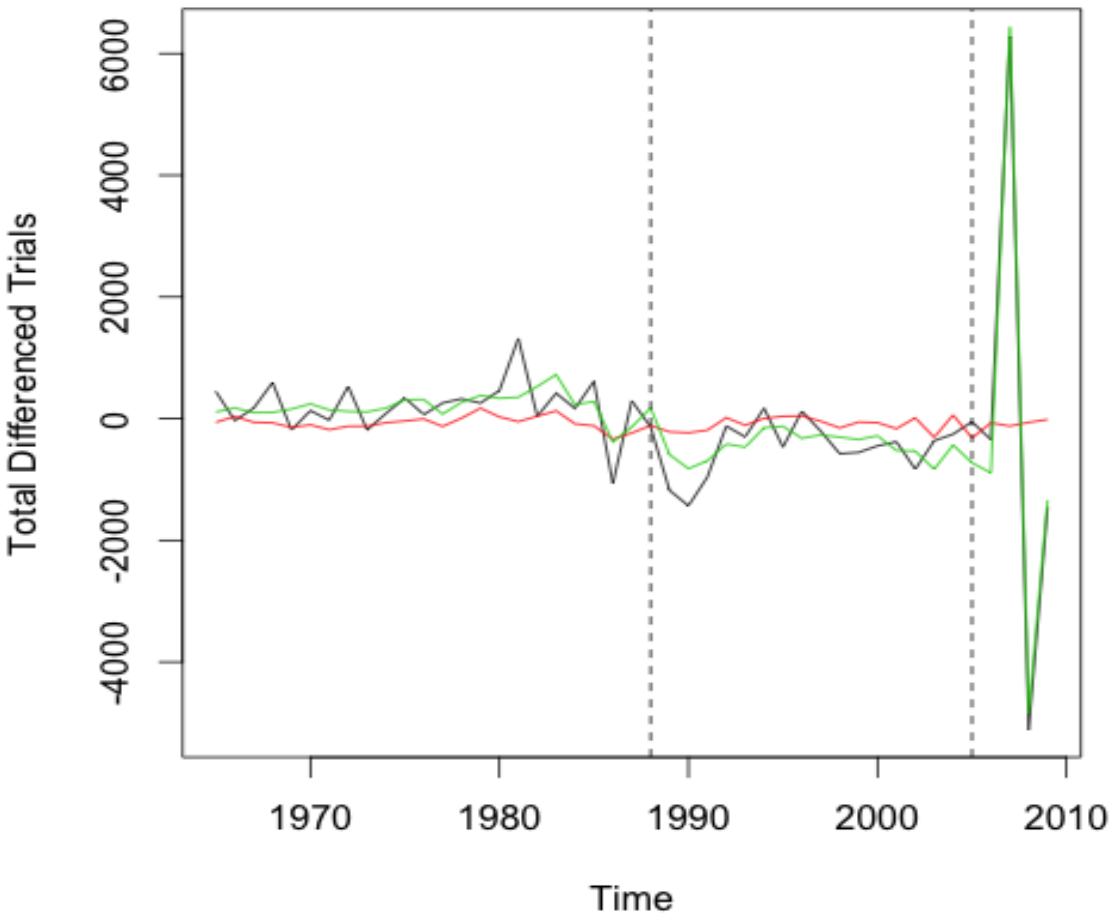

Figure 5.2: Bai-Perron Breakpoints - Differenced Model

timations can utilize probabilistic information to find the most likely sets of regime classications for the changepoints.

Chib (1998) proposes a changepoint model that improves previous Bayesian efforts by reparameterizing such models as a particular type of Markov mixture model.[3]

In these models, there are constraints imposed on the transition probabilities across the potential regimes in the Markov process. Accordingly, Chib's innovation is to suggest there are latent states of existence (s_t) that govern the data generating process. If s_t is the latent state of existence for each distinct regime, we can write the collection of latent states as:

$$S_t = \begin{pmatrix} s_1 \\ s_2 \\ \vdots \\ s_{t-1} \\ s_t \end{pmatrix} = \begin{pmatrix} 1 & 0 & 0 \\ \vdots & \vdots & \vdots \\ 0 & 0 & 1 \\ 0 & 0 & 1 \end{pmatrix}$$

Relatedly, the transition matrix (P) associated with these states can be written as:

$$P = \begin{pmatrix} p_{11} & p_{12} & 0 & \cdots & 0 \\ 0 & p_{22} & p_{23} & \cdots & 0 \\ \vdots & \vdots & \vdots & \vdots & \vdots \\ \cdots & \vdots & 0 & p_{mm} & p_{m,m+1} \\ 0 & 0 & \cdots & 0 & 1 \end{pmatrix}$$

[3]For fuller discussions of these models and sampling techniques, including for limited dependent variables, *see*, e.g., Chib 1996; Park 2010; Frühwirth-Schnatter 2001, 2006; Brandt 2011, 2012.

Here $p_{ij} = Pr(s_t = j|s_{t-1} = k)$. Accordingly, $S_t P$ gives the evolution of the changepoint probabilities for y_t.

The goal is to estimate the posterior density, including regression parameters (Θ) such that:

$$\underbrace{\pi(\Theta, P|Y_t)}_{Posterior} \propto \underbrace{f(Y_t|\Theta, P)}_{Likelihood} \; x \; \underbrace{\pi(\Theta, p)}_{Prior}$$

Utilizing these models, it is possible to determine whether there are structural breaks consistent with the implementation of the changes to summary judgment law. Again, I utilize data for the years 1964-2009. Two models were run. Model 1 has as the dependent variable the number of trials by year, with independent variables again consisting of total cases filed and the circuit courts' ideology. Model 2 adds to the list of independent variables a dummy variable for pre- and post-Trilogy. Again, different specifications were utilized to test the consistency of the estimations in finding changepoints. As a part of the sampling process, I utilized 10,000 burn-ins and 10,000 separate regressions to compute the posterior probability density. Estimations were performed in `R` utilizing the Gibbs sampler in the `MCMCPack` package.[4]

Figures 5.3 and 5.4 show the changepoint results for Model 1 and Model 2, respectively. The figures indicate the probability of a time point existing in a particular regime. For instance, at the very first time point ($t = 0$), we see that in both models the probabilities of being in the first latent state (s_t) is 100%. The red line at the bottom of the graph is at $p = 0$, and the black line at the top of the graph is at $p = 1.0$. What we are looking for is movement in the lines where they begin to converge. At the point of convergence, the lines will cross, and we will enter a

[4]Increasing the number of regressions beyond this level did not make a difference. I ran one model with 1,000,000 regressions and obtained the same results.

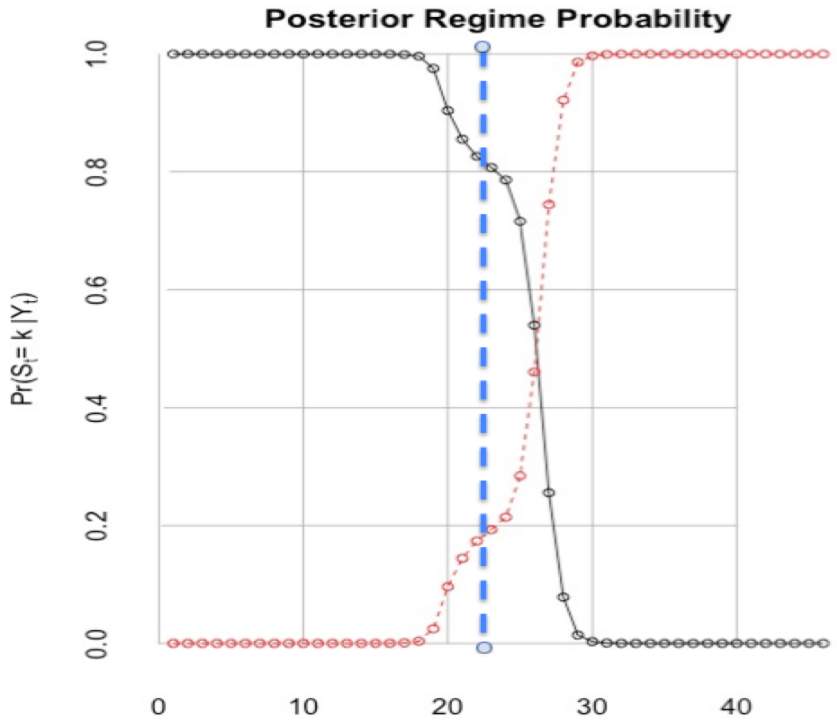

Figure 5.3: Changepoints: Model #1

new latent state of existence. The dashed line provides a reference point for when the Supreme Court issued its Trilogy of summary judgment decisions. If my procedural hypothesis is correct, we should see an inflection point between the lines (and thus, a cross-over into a new latent state) *after* the Supreme Court's Trilogy, but within a period of implementation by lower courts of the new legal standard. In both models, we see precisely that. The point of convergence, and thus changepoint, occurs around 1990. This result is consistent with the Bai-Perron models. Notice as well that in Model 1, and without the trilogy dummy variable to "assist" the model in finding the changepoint, we see a sharp movement and acceleration begin right as the Court decides the Trilogy. When we include a dummy variable for the pre- and post-Trilogy world, that acceleration is even sharper.

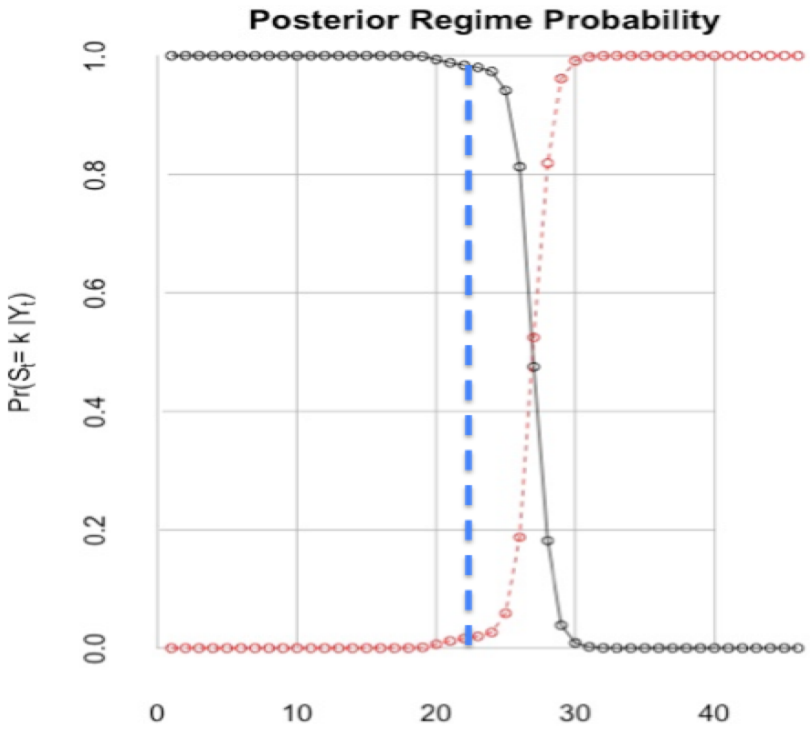

Figure 5.4: Changepoints: Model #2

In substantive terms, however, what can we say about the differences between these two latent states of existence? The changepoint models will compute the mean levels of the dependent variable (here, trials) for each latent state. I have termed these two states a *High Trials State*, the state of existence prior to implementation of the Trilogy, and a *Low Trials State*, the latent state after Trilogy implementation. What is clear is that the average number of trials before the summary judgment paradigm shift was much higher. In fact, the changepoint models indicate that after implementation of the new summary judgment standards, the number of trials decreased approximately 34%. Moreover, included within these estimations is the 2007 year with the outlier spike in the number of trials, which only serves to artificially dampen the decrease in total numbers. In all, the Bayesian

changepoint estimations indicate results consistent with the Bai-Perron regression, namely, that the implementation of the Trilogy served to significantly diminish the total number of trials in federal courts.

Table 5.2: Regime-specific Mean Levels

Regime	**Mean**
High Trials State	9484
Low Trials State	6277

5.2.3 Markov-switching Models

As a final attempt at evaluating whether there was a structural break post-Trilogy, I utilize Markov-switching models. Markov-switching models are similar to the changepoint models except that the transition matrix (P) is structured in the following manner:

$$P = \begin{pmatrix} p_{11} & p_{12} & p_{1h-1} & p_{1h} \\ p_{21} & p_{22} & \cdots & p_{2h} \\ \vdots & \vdots & \ddots & \vdots \\ p_{h1} & p_{h2} & \cdots & p_{hh} \end{pmatrix}$$

As we can see, the transition matrix is not confined to serial movement, as in the changepoint models. In other words, the probability of existing in one latent state does not require a movement forward; reversion is possible. Stated differently, latent states can move from Latent State 1 to Latent State 2, back to Latent State 1, forward to Latent State 3, and so on. If there is concern that there could be reversion of the latent states, Markov-switching models are preferable to the changepoint

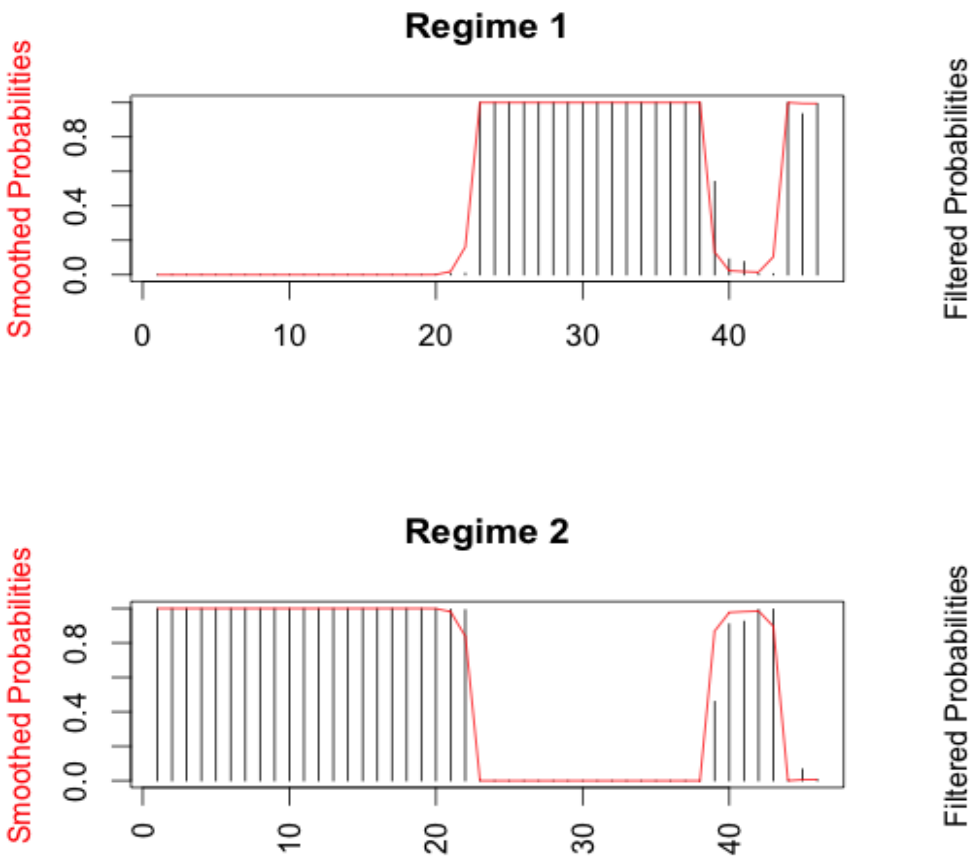

Figure 5.5: Markov-switching Model

models, which can only move forward through latent states of existence. For the Markov-switching models, I again use the same data. I include a dummy variable for pre- and post-Trilogy in these estimations.[5] Estimations were performed in `R` using the `MSwM` package.[6]

[5]Estimations performed without the dummy variable yielded similar results.

[6]These estimations employ a Frequentist approach, rather than Bayesian, utilizing an Expectation Maximization (EM) algorithm.

Figure 5.5 details the Markov-switching model results. The graphs show the probability of existing in either Regime 1 (the *Low Trials State*) and Regime 2 (the *High Trials State*). We see in these estimations two switches. The first occurs when, consistent with the procedural hypothesis, the *Low Trials State* moves into existence in 1987; again, right after the issuance of the summary judgment Trilogy. That state of existence persists until a switch occurs leading into the 2007 year of outlier data. Clearly, that year with its massive increase in trials is causing the reversion to the previous *High Trials State*. But, note the power of the Markov-switching estimations in that, despite the massive increase in trials, we see a quick diminution and movement toward the *Low Trials State*. Regardless of the impact of the outlier year, there is no question that consistent with the previous estimations, we find a structural break during the period of lower courts' implementation of the new summary judgment standards. In fact, in this model, the structural break occurs at 1987.

Like the Bai-Perron regressions, we can obtain point estimates on the variables. These results are contained in the table below. Again, we see that in the *Low Trials State*, the number of cases filed actually has a statistically significant negative effect on the number of trials.

In total, the structural break results are very consistent across estimations, model specification, and methodology. All the models indicate a structural break consistent with the hypothesis that the Summary Judgment Trilogy worked to reduce the number of trials. The results further support the theoretical proposition that motivated this empirical endeavor, namely, that cost adjustments to the litigation calculus wrought from the Trilogy *should* manifest a decreasing number of trials. Finally, the results suggest that the little empirical work that has heretofore been

Table 5.3: Markov-switching Results

Variable	Regime 1	Regime 2
Constant	32516	5493
	(7542)	(298)
Cases Filed	-.07	.03
	(.02)	(.001)
Ideology	-33658	-1751
	(14732)	(2003)
Post-Trilogy	-4166	-8291
	(4724)	(292)

Note: Standard errors in parentheses; N=46.

done is not correct when its authors contend that summary judgment did not have an impact on the number of federal civil cases that go to trial. Simply put, the evidence suggests national trends consistent with the Trilogy's impact, an impact that manifested in a large reduction of civil trials.

5.3 Micro-Level Analysis

Having identified that the Summary Judgment Trilogy has worked to reduce the number of trials in the United States is an important empirical step in my analysis of effects of trial procedure on litigation incentive mechanisms. While the aggregate time series analyses go far in supporting the theoretical expectations from Chapter 4, there are limitations. Importantly, while we can see national trends at work in the previous section, we do not yet know the precise factors that cause litigants either to file summary judgment motions or the determinants of district courts to grant such motions. Understanding that the hypothesized utility functions have been altered, thereby evidencing that those alterations have caused national movement away from trials, certainly demonstrates the strong impact of the Trilogy. But we need to understand with greater clarity just what the impact is

of those trend changes. In other words, further investigation is required to understand the ramifications for a district court's ability to set policy through the usage of summary judgment. Are certain types of cases treated differently under this procedural device? Are certain social policy aims affected by this procedural mechanism? In order to answer those questions we need to delve more deeply into smaller units of analysis.

To determine which factors affect the usage of summary judgment, and the policy implications for such usage, I have constructed a research design which focuses on individual cases, or a micro-level analysis. In general, this type of research design within public law scholarship is incredibly difficult to perform. Some datasets already exist that utilize the individual case as the unit of analysis and from which we can derive very general considerations of the factors that influence a case's history. For instance, the *Federal Court Cases Integrated Database Series* (maintained by the Inter-university Consortium for Political and Social Research (ICPSR)) holds information on all cases filed in the federal district courts for all years going back to 1970. The database is a rich resevoir of information on case trends. But there are notable problems with the database. While providing information on *all* cases, there are important pieces of information (and thus, variables) not included. The database does not contain political variables, such as the ideology of the district court judge presiding over the case. Judicial politics scholars have long demonstrated the effect that ideology has on the decision-making processes of federal judges (*see*, e.g., Pritchett 1948; Segal & Cover 1989; Giles, Hettinger & Peppers 2001; Martin & Quinn 2002; Segal & Spaeth 2002; Epstein et al. 2007). Not including this variable in the dataset therefore leaves a clear gap in analyses that utilize this dataset. Moreover, the "public" version of the dataset accessible af-

ter obtaining "restricted access" to it does not include the judge's name to whom the case was assigned, thereby rendering after-the-fact imputation of ideological scores impossible. Moreover, the coding employed by the dataset is problematic facilitating significant "cleaning" issues to the data were it even to be utilized due to changes in codes over time by the Administrative Office for the U.S. Courts (*See*, e.g., Eisenberg 2015).

Another problem with the database (and other available databases), is that they fail to include even systematic procedural variables, such as the amount of time that discovery was conducted in the observed case. This is true with the ICPSR database, as well as other databases which use the data from the Administrative Office for the U.S. Courts. If, as Chapter 4 proposes, there should be a relationship between the Federal Rules of Civil Procedure for discovery and the litigation incentive mechanisms tied to the summary judgment rules, failing to account for this fact in any model will subject such estimations to clear omitted variable bias. Indeed, Cecil et al.'s 2007 study, which is one of the very few attempts to econometrically model the summary judgment phenomenon (referenced in Chapter 4), includes as independent variables (in the logistic regression) only the district where the case was heard. This approach leads to another problem: random sampling.

The empirical studies heretofore on summary judgment rates have problematically *only* evaluated data from certain districts. For instance, Cecil et al. (2007) evaluate summary judgment practices in six district courts in six different years[7] (through a review of the docket sheets). Eisenberg & Lanvers (2008) also limit themselves to certain districts. The reasons for these strategies are quite obvious:

[7]Another problem with this particular study are the over-time conclusions rendered by the authors; six years of data with gaps in the data cannot provide a foundation upon which to make such time serial/trend statements.

given there is no "national" case filing system[8], compiling a randomly drawn subset of cases is incredibly difficult and extremely time-consuming. But cordoning off observations from the rest of the nation sacrifices a great deal of generalizability. If we are interested in the national effects of the Trilogy, we ought to look to the nation as the data population.

Faced with the prospects of either utilizing an incomplete dataset, or, to reperform a non-random study that pulls cases from only some districts, I have opted for a different course. I have constructed a database of randomly drawn cases filed between the years of 2000-2013 from the national population of federal civil cases and coded them with legal, procedural, political, and where possible, demographic data. The result is a dataset that is unlike any other presently available.

Before discussing the merits of the new dataset, I should point out what this dataset will not provide. First, the data (and related estimations) in no way contend anything about the summary judgment trends before *and* after the Trilogy. The years covered are limited to an entire time period *after* the Trilogy. This result is not problematic because, as I contend in the macro-analysis section of this chapter, we can derive what we need to know from the aggregated data and time series analysis concerning the national trends in summary judgment practice (and, importantly, test the theory from Chapter 4). That said, it is important to note that the new dataset will not test structural breaks associated with the Trilogy: it is distinctly limited to ascertain what the *post*-Trilogy litigation environment looks like to litigants.

[8]Each electronic case filing system is maintained by each federal district court in the federal system, which is then transmitted for aggregation to the Administrative Office for the U.S. Courts. Accordingly, one cannot easily pull a list of cases in numerical order, randomly draw a number, and code the case. I discuss a workaround to this problem in a moment.

Second, the dataset is appropriately limited in scope given the amount of time it takes to "hand-code" each case. While Cecil et al. (2007) reviewed docket sheets, my efforts went a step further in this regard. In addition to a review of the actual docket sheets for each case, I also reviewed individual pleadings associated with the case that permitted the accumulation of additional variables that could not have been obtained (or, that would have been significantly limited) were I only to look at the docket sheets. Much information about a case can be gleaned by actually reviewing the litigant pleadings, the court's rulings, and court orders from a case. Of course, this process meant that for many observations the amount of time to code a single case was quite high. As a result, the sample size N is smaller than a machine-coded review of docket sheet text. However, as I will demonstrate below, what is lost on sample size is made up for in variable depth.

In order to draw the random sample of cases, I utilized the Public Access to Court Electronic Records (PACER) system. PACER is the electronic system that permits viewing of case documents filed by lawyers and litigants in federal cases.[9] PACER began in 1988, though with limited availability to the public. As technology advanced, by the early 2000s, most district courts had adopted the PACER filing system for use by litigants, and eventually moved to required usage.[10]

PACER provides access to court records in a convenient manner. Without PACER past research of docket sheets and case filings would have required researchers to

[9]Lawyers will utilize the CM/ECF (short for Case Management/Electronic Case Files) system, which then transfers the documents (in PDF) to the PACER party/case index server located in San Antonio, Texas.

[10]By way of example, in 2003 in the Southern District of Indiana, documents could be filed either by CM/ECF or in hard copy format. If filed in hard copy format, the documents would be scanned and transferred into the electronic case management system, and then kicked to the PACER system for public records. It is now required that unless due to some excepted inability, case filings be made through the CM/ECF system (*see* L.R. 5-2 (S.D. Ind.)). As a note, this requirement has been adopted by districts throughout the federal courts system.

first obtain a random sample of cases, then travel to where those documents were located (often in storage facilities maintained by the federal government) and then coding could only occur after retrieval of the actual hard copy case file from the warehouse. A national random sample was financially and logistically impossible and would have required researchers to travel the country from warehouse to warehouse for perhaps as little as a single case (not to mention whether the case file could be found, and if so, whether it contained useful information to fill a coding sheet). For years, this is why studies of this sort were simply impossible.[11] PACER provides an avenue for moving beyond these research design constraints.

While PACER provides a unique avenue for obtaining court records that were in the past virtually impossible to review, it has limitations. First is cost. Each "page view" in PACER costs 10 cents, with a maximum per document cost of $3.00. A "page view" could consist of simply a printing of the case docket sheet, a single page from a motion filed by an attorney, etc. As a result, there is a financial limitation involved.[12] Additionally, PACER does not list each case filed in the federal courts system in sequential order. For instance, the typical civil case has a case number of this sort: 1:13-cv-XXXX, where "1" is the division within the actual district (most districts have multiple divisions or courthouses), "13" is year (here, 2013), "cv" (which stands for civil case), and XXXX (which is some numer-

[11]To give some perspective on this difficulty, *see* Farhang & Spencer, 2014, 251, where he notes "Our decision to limit the study to two districts, with records housed in a single storage facility, was a simple function of resource limitations: the litigation files had to be reviewed onsite at the NARA facility where they are maintained in storage. We acknowledge that we cannot make inferences about the nation as a whole. Nevertheless, we highlight that virtually all studies of litigation are similarly limited because the work of the American court system, and the maintenance of its records, are massively decentralized. Accordingly, the vast majority of scholarship on adjudicatory activity in America has been based upon the study of activity within particular states, cities, judicial districts, and even legal services providers.")

[12]The cost issue was held at bay through usage of a generous Vision 2020 Dissertation Enhancement Grant from the College of Liberal Arts, Texas A&M University.

ical value as the case number). The problem is, when one searches PACER for cases, were they to type in the above case identifier, they might have multiple such cases returned. The reason: that identifier can be used in multiple districts. As a result, you might have, for instance, a case returned from the Eastern District of Texas, Southern District of Indiana, and Western Division of Pennsylvania simultaneously. And here is where a workaround is needed.

To navigate this research design difficulty I utilized PACER's ability to find cases by filing date. I generated a list of all dates between January 1, 2000 and December 31, 2013. From this list I assigned each date a randomly generated number in STATA. From there, I took my now randomly sorted list and looked up all federal civil cases filed on a given date. Once I had that information, I then used STATA to randomly draw a number from the total number of cases filed on a date. For instance, if there were 936 cases filed on December 5, 2008, I randomly drew a number between 1 and 936. From there, I moved to that case number for the date in question, performed a docket review, and reviewed related pleadings and court orders as necessary to complete coding. This workaround provides a manner for directly using PACER, with randomness in sampling built into the date and case pull, to provide a national random sample of cases that could not have been performed in the past.

Some cases drawn, for instance, were unusable. If those cases were unusable, I re-ran that day's random draw and pulled another case. Cases were unusable for a variety of reasons. First, it was possible that the case had not yet concluded (through any means, e.g., trial, settlement, summary judgment, etc.). If a case had not concluded, it was not used. Additionally, some types of cases were automatically excluded. For instance, student loan cases were automatically discarded were

they drawn (these cases have notoriously high rates of default judgments and governmental victories). Additionally, social security disability appeals[13] were not included as summary judgment is required for such cases (thus biasing any summary judgment findings). Moreover, some prisoner cases were automatically excluded. Often, prisoners who file civil complaints are required to go through what is known as a "pre-screening" process where a "screening attorney" at a district court will determine whether the complaint is at all viable and can proceed to being actually docketed with the court. Such cases that were pre-screened out of the civil dockets were not utilized.[14] Additionally, *habeas corpus* cases were not used as they are docketed as "civil cases," but are actually reviews of criminal convictions (and thus subject to different procedural considerations than typical civil cases). Finally, I did not use cases which dealt with attorney bar admission or discipline. These cases (usually styled as "*In re [person's name]*" can be docketed on the civil side, but are clearly not contested cases between parties and rather are simply court pronouncements granting an attorney to practice before the court (or, in the more unfortunate situations, disciplining the attorney for malfeasance).

In total the research design produced 384 usable cases. With each docket and document review, I was able to obtain a plethora of variables previously uncoded with a research design such as this one. The variables utilized in the subsequent analyses will be detailed below. Two different types of analyses were performed: an analysis of the determinants of summary judgment motions being filed (SJ Filed), and the determinants of a summary judgment motion being granted (SJ Granted). Each of these dependent variables were dichotomous (0 or 1). In the

[13]These cases are first reviewed by a federal Administrative Law Judge (ALJ), and then can be appealed to a local district court.

[14]Prisoner cases that did make it past the screening process, however, were used.

first set of analyses, if a summary judgment motion were filed (by either party), it was coded as a 1, 0 otherwise. For summary judgment grants, the variable was coded as a 1 if a motion for summary judgment were granted (either in whole, or in part), and a 0 otherwise. Before discussing the independent variables utilized, I will detail the summary statistics, which themselves provide an interesting view of summary judgment practices post-Trilogy.

5.3.1 Summary Judgment Filings and Grant Rates

The traditional empirical evaluation of summary judgment effects on litigation strategies centers on the raw filing rate. Table 5.4 contains the filing rates for summary judgment motions in my dataset.

Table 5.4: SJ Filing Rates

SJ Filed?	**Percent**
SJ Not Filed	69.27
SJ Filed	30.73
N=384	

The percent of cases in which a motion for summary judgment was filed occurred in approximately 31% of all cases, nearly a third. This number is much higher than others, such as Cecil et al. (2007), report. In their study, those authors report a filing rate of approximately 19%. My results suggest a filing rate approximately 63% higher than initially thought. This is substantial increase, and what Chapter 4's theory would suggest. Simply put, the Trilogy has incentivized litigants to file motions for summary judgment to devalue cases and attempt to kick claims from the federal courts system.

It is perhaps possible that the filing rates have so dramatically increased because plaintiffs (those initiating a lawsuit) are using these motions at an increased rate, and have thus caught up to their defendant counterparts. But this result is not the case.

In civil cases where a summary judgment motion was filed, defendants filed such a motion in approximately 84% of the cases. In cases where a motion was filed, plaintiffs only filed in less than 30% of the cases.[15] The endgame is clear: as Issacharoff & Lowenstein (1990) predicted, motions for summary judgment are most certainly a defendant's motion and weapon of choice in the litigation environment.

The evidence thus far suggests that motions for summary judgment are utilized at a much higher rate than previously thought. But what about their grant rates? If the grant rates are low, then the increased usage of the motion can be mollified and potential policy consequences of the procedural device muted. The statistics for grant rates are found in Table 5.5.

Table 5.5: SJ Grant Rates

SJ Granted	**Percent**
SJ Not Granted	42.20
SJ Granted	57.80
N=109	

The results are staggering in a sense, and certainly call into question previously-held beliefs about summary judgment motions. Motions for summary judgment

[15]Note that these numbers can exceed 100% because it is possible that in a given case both the plaintiff and the defendant filed motions for summary judgment (known as cross-motions for summary judgment).

are granted at approximately a 58% rate. For perspective, Cecil et al. (2007) report that in 2000, the summary judgment grant rate was the highest in their study at 49%. Thus, not only have summary judgment motions become more prevalent post-Trilogy, but they have also become more deadly to plaintiffs' claims. Again, with the relaxed standards for granting the motion encouraged by the Supreme Court in the Trilogy, this result is expected (though even these rates reveal a level beyond past empirical work).

One of the areas of law where past scholarship has suggested summary judgment rates is particularly deadly are civil rights cases. I utilized a dummy variable for whether the case was a civil rights case (either coded as such on the docket sheet or after review of the case type determined it to be of this nature). As Cecil et al. (2007) (and others) note, the federal courts dockets have become increasingly comprised of civil rights claims. In my dataset, civil rights cases account for approximately 43% of all cases. These studies also suggest that summary judgment grant rates are higher in civil rights cases; my data indicate this assertion to be correct. Table 5.6 shows the grant rates for summary judgment in civil rights cases where a motion for summary judgment was filed.

Table 5.6: SJ Grant Rates: Civil Rights Cases

SJ Granted	**Percent**
SJ Not Granted	36.54
SJ Granted	63.46
N=52	

In civil rights cases, the motion for summary judgment is granted in almost two-thirds of all cases where a motion is filed. As with the overall filing rates, this

number is quite large. In many of these civil rights cases (by type of civil rights case), Congress has specifically created litigation incentive mechanisms for civil rights claims to be litigated (*see* Farhang 2010). If, however, contrary to these expectations that claims be litigated, they are instead dismissed from court through the usage of subterranean procedure, then it is distinctly possible social policy aims by the federal legislative branch are hindered by the un-elected members of the federal judiciary.[16]

The raw data thus far certainly suggest a plaintiff's passage over the litigation landscape is fraught with difficulty. In addition to the summary judgment minefield posed above, the data hold that trials (either jury or bench) only occurred in just over 3% of the total 384 cases. This number is relatively consistent with the 1-2% rate identified by the Administrative Office for the United States Courts.[17] In short, my dataset suggests litigants do not go to trial, summary judgment motions are frequently used, and those motions are granted at levels unseen in previous research.

While the raw data certainly reveal interesting features to the present state of federal court litigation, the real value of the dataset lies in the additional variables previously unused in a dataset of this nature. It is important not only to understand how much summary judgment is utilized, but also the what factors affect the filing and granting of these motions. In order to obtain purchase on these inquiries I perform multivariable modeling of the determinants of whether a summary judgment motion is filed and whether a summary judgment motion is granted.

[16] I discuss the potential policy consequences of this phenomenon in the next section on employment discrimination trials.

[17] My data indicate settlements occurred in 64.58% of cases; this number is slightly higher than Hadfield's (2004) number of 54.1% from a random sample of cases in the year 2000.

5.3.2 *Determinants of SJ Filings*

The factors that influence whether a motion for summary judgment is filed are both simultaneously obvious and non-obvious. The independent variables utilized for the summary judgment filing models are discussed below.

Judicial Ideology.

Theory certainly suggests, for instance, that civil rights cases would see greater filing rates than non-civil rights cases, for instance. Additionally, given previous ideology studies on court decision-making, it is conceivable that "conservative" judges would disfavor some types of claims (civil rights/liberties) than others, consequently appearing to invite defendants to file motions for summary judgment in these cases. Accordingly, I coded an ideology score for each judge for which such a score was available. The ideology scores are based on Christina Boyd's district court ideology dataset (Boyd 2015).[18]

Discovery.

Unlike the traditional attitudinal explanation of ideology, there are perhaps less-obvious bases for whether a motion for summary judgment might be filed. For instance, whether relaxing the summary judgment standard or not, the Trilogy's interpretation of Rule 56 of the Federal Rules of Civil Procedure is exactly that: a legal interpretation of what it means for a claim to be in dispute. Recall that Rule 56 specifically states that summary judgment should not be granted if there are genuine issues of material facts in dispute. While the Trilogy certainly placed a particular gloss on this rule, the fundamental precept behind even a "reinterpreted" Rule 56 is clear: factual disputes *should* preclude summary judgment be-

[18]Boyd's scores are themselves derived from GHP Scores (Giles et al. 2001) and Judicial Common Space scores (Epstein et al. 2007).

ing granted. One way to obtain purchase on this matter is through a measurement of discovery.

As previously noted, the changes over time to the Federal Rules of Civil Procedure have engaged the free flow of discovery of litigants' claims and defenses from one party to another. This discovery device, however, has become imbued with elements of "papering a party to death." In other words, if delay assists one side, or if increasing the cost of litigation to one party creates leverage for another, then we might expect to see increased discovery times. Moreover, as Chapter 4's theoretical discussion notes, it is clear that whatever resources were once devoted to marshalling evidence for trial have been shifted earlier in a case's lifetime and compressed into the stages of discovery for the (what some might call) "inevitable" showdown at summary judgment (whether in posturing for settlement purposes, or, in actual filing of the motions). As a result, I expect that as discovery increases in a case, it is more likely that a summary judgment motion will be filed. This hypothesis is, again, consistent with the discussion in the previous chapter that the Trilogy's reworking of the summary judgment standard has served to motivate litigant resources to the front-side of a case. As a part of this dataset, therefore, I have operationalized discovery as the total time discovery was open in a case by days. A brief note on this coding scheme is worth mentioning.

How much time is spent in a given case on discovery can vary from case to case, not only because of different rulings by different judges, but also because it is difficult to conceptualize a start date for when the "discovery clock" begins to run. Litigants are *supposed* to provide what are known as Initial Disclosures (which include basic information about witnesses and evidence that might have bearing on claims in a particular case) automatically (*see* Fed. R. Civ. P. 26(a)(1)). These initial

disclosures are to occur within fourteen (14) days of the Rule 26(f) conference. But what is supposed to occur, does not always actually occur. Often times, litigants or lawyers will agree to proceed in a different manner, or, the strict interpretation of Rule 26(a)(1) drops by the wayside due to other reasons. However, Rule 16(b) does require a scheduling order to be issued by the judge (after consultation by the parties) about the general trajectory of the case.[19] This scheduling order will detail how much discovery is needed, deadlines for discovery, deadlines for dispositive motions (such as summary judgment motions), when expert witness report need to be submitted, etc. It is here where we can obtain a "starting" time for our discovery clock. The cases in the micro-level analysis dataset were checked for these scheduling orders to ascertain when discovery was initiated (the clock began on the date of the issuance of this scheduling order). Sometimes a quick perusal of the case's docket sheet would reveal this information as an entry by the judge; sometimes a full read was required of the actual scheduling order. To determine when the clock ended, I coded how much time had elapsed by the end of the discovery period entered in the scheduling order, or, case termination (should some dispositive event occur prior to the end of discovery; a settlement, for example), or, an end-date provided by court order.[20] Again, the time spent coding this value for each case could be lengthy, but given theory suggests discovery and summary judgment motions are intricately related to one another, it was obtained along the operationalization discussed above.

[19] As a practical matter, local rules often times require parties to decide on whether they wish to proceed on a "fast track" (if the case can be addressed quickly with little discovery and/or delay), or another type of longer "track."

[20] For instance, it is not uncommon for parties, as an example, to jointly agree to an extra thirty (30, 60, etc.) days of discovery, which is then typically granted as matter of course by the district judge.

Judge Demographic Variables.

Judicial decision-making on motions in civil rights cases by federal district court judges has been shown to be influenced by a judge's gender and race (*see*, e.g., Christina Boyd's recent work (2016)). Accordingly, I have included the judge's race and gender as dichotomous variables (for race: 1 for non-white, 0 for white; for gender: 1 for female, 0 for male). Data for the judge demographic variables came from a variety of web sources, including the newly released *Court Listener* database of judicial officers in the United States.[21]

Litigant Specific Variables.

In order to parse the effects of particular litigants, I include two dummy variables for whether the plaintiff in the case was an individual and whether a governmental actor was a defendant. As noted in Chapter 4's discussion of the impact of summary judgment on litigant resources, it is expected that individuals (who typically bear a steep cost compared to other deeper-pocketed entities) will face an increased usage of summary judgments filed against them. Accordingly, I use a dummy variable for whether an individual plaintiff (or, plaintiffs if there is more than one plaintiff[22]) is involved in the case (1 for individual plaintiff; 0 otherwise).

Additionally, I include a dummy variable for whether the government is a defendant in the case. Again, because resource-allocation is a concern with the summary judgment universe post-Trilogy, I attempt to parse the effects of when the government (which typically has substantial litigation resources relative to other

[21] Accessible at `https://www.courtlistener.com/api/bulk-info/#judge-data` (Last visited August 30, 2016).

[22] This does not include class actions where there are named plaintiffs litigating for the benefit of many individual plaintiffs.

parties) is involved. As with the individual plaintiff variable, I code a 1 for governmental defendant, and a 0 for a non-governmental defendant.[23]

Attorney Firm Size

The final set of variables utilized are the size of the law firms that represent the parties in a given case. As with the previous variables, there is a concern that a model of whether a summary judgment motion is filed or not would not be appropriate without some conceptualization of litigant "firepower," to use a colloquial phrase. In short, the more lawyers working for a litigant, the more resources those lawyers can devote to a particular case. Additionally, if summary judgment practice has become a scenario in which litigants attempt to expend considerable resources in the discovery stage, the more attorneys who can assist in that process, the more likely discovery will be protracted and expensive. As noted earlier, increased discovery should cause increased summary judgment motion filings. Relatedly, the larger the law firms serving the combatants to a case, the more likely it will be that a summary judgment motion is presented to the district court. This variable is treated as continuous ranging from 0 (meaning the litigant had no

[23]There are occasions in the dataset when I have coded an individually named defendant as a governmental defendant due to the fact that the individual named is supported and defended by the government or government-hired lawyers. The classic example of this event occuring is in civil rights litigation against police officers (for instance, a claim for excessive force). In these cases, the officer is typically represented by either a government attorney (for instance, a city's corporation counsel), a private attorney (contracted by the insurance company who issued the insurance policy to the state or local governmental entity to cover such claims), or a private attorney retained by the police officer's union (who acts in concert with the city attorney for liability purposes). Additionally, given the usage of insurance by many state and local entities for such claims and/or the requirements that officers be indemnified for damages incurred for liability (either by state statute, local ordinance, or collectively bargained agreement between the police union and local government), I have coded such scenarios as a "government defendant." I acknowledge that some might take issue with this coding approach as the officer is "technically" (in my example) the named defendant. However, given the theoretical concerns with relative distribution of litigation resources, and the fact in the example the officer would not pay the damages (indeed, the city would, or, the insurance company with a potential related hike in premiums later to the governmental entity transferred through taxation to the taxpayers), I have operationalized this variable to reflect such scenarios as involving governmental defendants.

lawyer (i.e., was *pro se*)) to the total number of lawyers associated with the firm involved in the case.[24] Data for firmsize was obtained from websites associated with the respective firms, or, in some cases other online sources (advertisements, etc.). The determination of who was "lead counsel" was ascertained by either the docket sheet (if lead attorney was clearly specified) or through a review of the case pleadings to determine who drafted, composed, and filed the documents on behalf of a litigant. It is worth noting that efforts were made to obtain firm sizes as close temporally to the date of the case to reflect the resources of the law firm at the time of case activity. It was often not possible, however, to obtain such numbers. In those cases, the data were gathered from sources that were available at the time of the actual data gathering. Ideally, the data would have been culled contemporaneously with the litigation itself. In many cases, however, it was not possible to do so given the elapsed time between case conclusion and data gathering. The operationalization of data contained here is the best attempt to include a variable heretofore not included in previous datasets.[25]

Summary Statistics

Table 5.7 reports the summary statistics for the continuous independent variables and Table 5.8 reports the summary statistics for the dichotomous independent variables.

[24]If there was more than one firm representing a party, the larger of the total number of lawyers from a given firm was utilized. This situation can occur with multiple defendants, or, as is often the case, a local attorney is considered the counsel of record while an attorney who is licensed in another jurisidiction is granted *pro hac vice* status to practice on a limited basis for a particular case in a given court. In the latter situation, the outside attorney with the larger law firm is clearly handling the litigation, while the local counsel is there to satisfy the requirements of, perhaps, local rules of temporary bar admission for co-counsel.

[25]The firm size variables were also transformed by taking the square root of each variable. The transformations were appropriate to address extreme skew associated with the large outliers for firm sizes. Thus, given the spread of the data and extreme outliers for these variables (*see* discussion of summary statistics, *infra*), the data were transformed.

Table 5.7: Summary Statistics: Continuous Variables

Variable	Obs.	Mean	Std. Dev.	Min.	Max
Ideology	334	.10	.37	-.59	.64
Pl. Firm Size	365	61.70	263.96	0	3800
$\sqrt{Pl.FirmSize}$	365	3.90	6.83	0	61.64
Def. Firm Size	285	217.02	453.19	0	3800
$\sqrt{Def.FirmSize}$	285	9.80	11.022	0	61.64
Discovery Length	378	164.72	208.13	0	1901

Table 5.8: Summary Statistics: Dichotomous Variables

Variable	% "0"	% "1"
Civil Rights Cas	57.03	42.97
	(219)	(165)
Judge Race	82.42	17.58
	(300)	(64)
Judge Gender	75.80	24.20
	(285)	(91)
Ind. Pl.	26.04	73.96
	(100)	(284)
Govt. Def.	72.66	27.34
	(279)	(105)

Note: N in parentheses.

In whole, the summary statistics tell an interesting story. Judicial ideology is relatively dispersed with a mean close to the equivalent of a perfectly moderate judge. The disparity in attorney "firepower" is quite pronounced: The mean plaintiff firm size is three times less than the mean defendant firm size.[26] The mean value for discovery time is approximately 5.5 months, though the maximum value in the dataset is over 1,900 days; the equivalent of over *five years* worth of discovery.

[26]The median values for these variables indicates an even more pronounced disparity in litigation resources with a 13:1 ratio in firmsizes for defendants versus plaintiffs.

The dichotomous variables are less surprising and tell a relatively familiar tale from federal court litigation: civil rights are the a great deal of the cases (though not the majority), federal district court judges tend to be white and male, and federal civil cases will usually involve an individual plaintiff litigant while the government is involved often, but not typically.

Estimations

To model the determinants of whether a summary judgment motion is filed I utilized a probit estimation on the dichotomous dependent variable (motion filed, or not) with the aforementioned independent variables. Results from these estimations are reported in Table 5.9.

As Table 5.9 indicates, some, but not all, of our variables serve as statstically significant predictors of whether a motion for summary judgment is filed in a given case. Of note, and as expected, the longer discovery time period, the more likely one can expect a motion for summary judgment. Additionally, if a governmental defendant is involved in a case, that case sees a statistically significant increase in the probability that a summary judgment motion will be filed (and, because it is a defendants' motion, that the government will be the litigant making the motion). Finally, if the case involves civil rights claims, there is a statistically significant and *negative* effect on the probability that a motion for summary judgment will be filed. This result was unexpected. Given that summary judgment motions appear more prevalent in civil rights cases than non-civil rights cases, one might expect this coefficient to be positive. However, it must be kept in mind that the effects of the civil rights case modulates through the interaction between judicial ideology and the existence of civil rights claims. Theoretically, and consistent with the judicial ideology literature, we would expect that conservatives treat civil rights claims with

Table 5.9: Summary Judgment Filed

Variable	**Coefficient**
Ideology	.14
	(.30)
Civil Rights	-.57**
	(.25)
Ideology *x* Civil Rights	.55
	(.57)
Judge Race	-.20
	(.26)
Judge Gender	.24
	(.22)
Ind. Pl.	.31
	(.24)
Govt. Def.	.83*
	(.41)
$\sqrt{Pl.FirmSize}$	-.02
	(.01)
$\sqrt{Def.FirmSize}$	-.01
	(.01)
Disc. Length	.003***
	(.000)
Constant	-1.06***
	(.24)
$p > \chi^2$	.00
Pseudo R^2	.14
Log Likelihood	-121.38

Note: Robust Standard errors in parentheses; N=234.
***=$p < .01$; **=$p < .05$; *=$p < .10$.

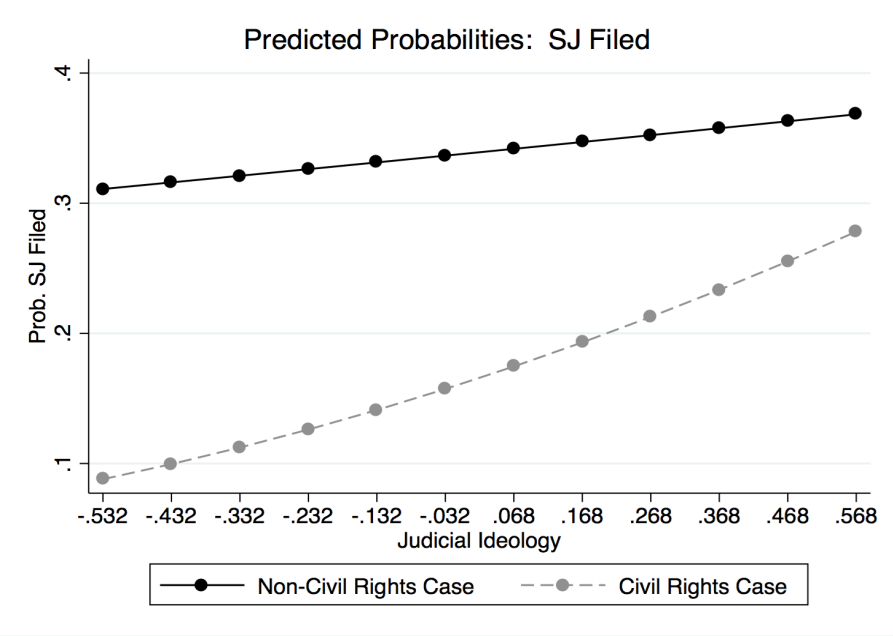

Figure 5.6: Probability SJ Filed

greater hostility and might welcome such motions. The evidence suggests, however, that this line of reasoning might be more nuanced than originally thought.

Figure 5.6 plots the point estimates of the predicted probabilities for observing a motion for summary judgment based on whether the case is a civil rights case or a non-civil rights case along the ideological scale for district court judges (from the most liberal to most conservative in the dataset). All remaining independent variables were held at their means or modes.

We see in Figure 5.6 that, under the constraints above, a motion for summary judgment would appear to be filed with greater probability in non-civil rights cases than in civil rights cases. This result, however, must be tempered by the fact that the independent variables have been defined in such a manner that might not accurately reflect a "true" civil rights case versus a "true" non-civil rights case. Non-

theless, the discrepancy when all independent variables are held to their means and modes is a finding that suggests a different result from previous studies.

More interesting, however, is the dramatic difference between whether a summary judgment motion is filed when litigants appear before a liberal versus conservative district court judge. When a liberal judge is assigned to a case, a summary judgment motion is less likely to occur. However, what is particularly interesting is the rather large discrepancy between when such a motion is filed in civil rights versus non-civil rights cases. Figure 5.6 suggests that in a civil rights case with a liberal district court judge, litigants will not file motions for summary judgment. However, as the judge becomes more conservative, the likelihood that a summary judgment motion will be filed is approximately the same between civil rights cases and non-civil rights cases.

The above result is fascinating because it reveals insight into how the lawyers in cases consider the utility of such motions. Given that we know most motions for summary judgment are filed by defendants, it suggests that defendants' counsel are strategically altering their behavior not based on the law, but on the ideological dispositions of the sitting judge. In other words, lawyers factor into their consideration for litigation maneuvers political factors. The results suggest a defendant's lawyer will recognize in civil rights cases that they are appearing before a liberal judge and consider the cost of the motion greater than the benefit they expect to derive from filing the procedural device. Contrarily, when the defendant's counsel observes a conservative judge sitting on the case, they believe it worth taking a shot at kicking the case out at the summary judgment stage and will file such a motion at a 20% increase in probability.

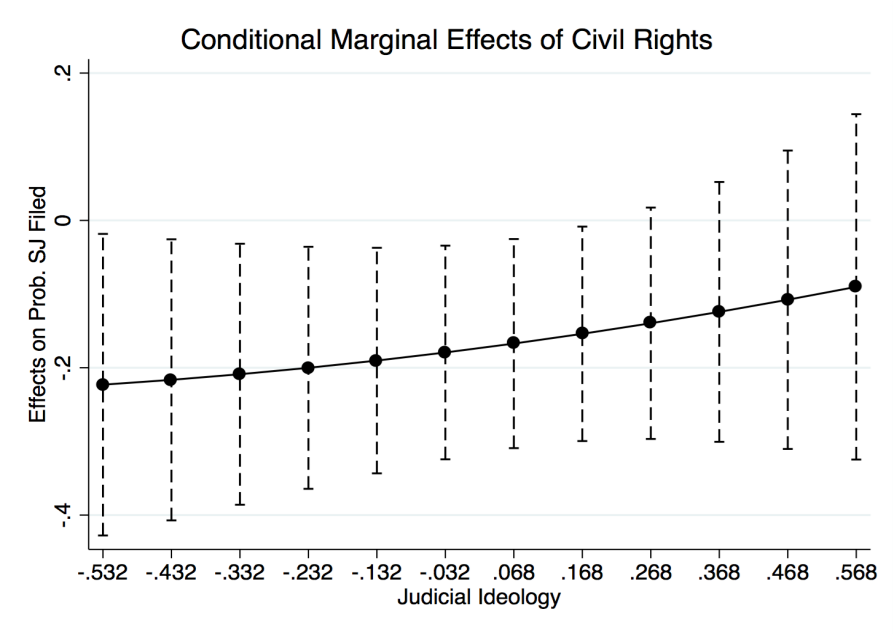

Figure 5.7: Conditional Marginal Effects: SJ Filed & Civil Rights Cases

Recall that our model included an interaction term between the existence of a civil rights case and judicial ideology. Given that we want to see the effects of the civil rights variable and the concomitant increase in the probability of observing a motion for summary judgment, we need to calculate the marginal effects of this dichotomous variable. Indeed, the predicted probabilities in 5.6 are useful, but they are averaged effects across the observations. In order to ascertain the true effect of a single variable for a binary outcome, marginal effects must be computed.

Figure 5.7 displays the conditional marginal effects of the civil rights variable. The results suggest that for all liberal judge values and into the moderate conservative judge values the effect of being in a civil rights case produces a statistically significant from zero decrease in the probability of a summary judgment motion being filed. Notice, though, that as the district court judge becomes more conservative, there is an increase in the probability of a summary judgment motion being

filed in civil rights cases. In other words, while the predicted probability graph suggested it is less likely to see a summary judgment motion in a civil rights case (with remaining independent variables held at their means and modes), the reality is that litigants (i.e., defendants) are more likly to file these summary judgment motions when they appear before conservative judges. Again, this result suggests strategic activity on the part of litigants and lawyers.

Overall, the model performs moderately well. Though it holds a modest pseudo R^2 value of .14, it does correctly predict over 73% of the dependent variable outcomes correctly. The percent reduction in error (PRE) is similarly a modest 9%.

Diagnostics suggest the model is moderately strong, but could be improved upon. For instance, multicollinearity does not appear to be a problem. Because the regression is probit and not OLS, I utilized the `collin` `STATA` ado command to calculate the Condition Index Number (CIN) for the independent variables. Here, the CIN is is 6.34; less than a value of 10 which might suggest potential collinearity concerns. Additionally, I performed a Link Test on the model to determine if there were specification issues. `STATA` utilizes the link test specification proposed by Pregibon (1979). In this test, if the model is properly specified, additional predictors should not be statistically significant except by chance. The link test proposed by Pregibon obtains the linear predicted value (`hat`) and linear predicted value squared (`hatsq`). The `hat` variable should be statistically significant (indicating our predictors provide solid explanatory power), while the `hatsq` variable should not be statistically significant. If the latter is statistically significant, it suggests there could be a missing variable or variables that contribute to the model's problems. Performing this test indicates the p-values found in Table 5.10 for these variables.

Table 5.10: Link Test *p*-Values (SJ Filed)

Variable	*p*-value
`hat`	.00
`hatsq`	.00

The link test suggests that the model could be missing a variable or variables that are important to my theory. It is possible the model simply fails to include a variable, such as the calculated probability of success by each litigant, which would offer additional insight into the litigant's determination to file a motion for summary judgment. Theoretically, this piece of information (and related operationalization in the form of a variable) would be an important component to the litigation equation discussed in Chapter 4 (*see* Posner 1973; Priest & Klein 1984). Such a variable, however, does not exist as it would require survey information from lawyers and litigations, the perils of which have previously been discussed.

It might be the case that the discovery variable does not properly work in the model and therefore while statistically significant, fails to provide much leverage in the analysis and therefore is possibly a misspecification. Recall that this variable has heretofore not been utilized in previous scholarship, and it is possible the operationalization employed in my data collection efforts is inappropriate, not only as a matter of theory, but also statistically speaking. These conclusions, however, appear not to be the case. Figure 5.8 displays the Receiver Operator Characteristic (ROC) Plot.[27] In my estimation, the ROC plot quantifies the accuracy of the probit model in its discrimination between two states, here, the filing of a summary judgment motion or not. The "sensitivity" referenced in the graph is the fraction

[27]The ROC plot can be generated in `STATA` with the `roc` command. *See* `STATA` 14 manual for a discussion of this test (found at http://www.stata.com/manuals14/rroc.pdf).

of "positive" cases that are correctly classified by the diagnostic test, while the specificity represents the fraction of negative cases accurately identified. We can compare ROC plots between nested models to ascertain if variable(s) add to the model and contribute to its explanatory power in a statistically significant manner. In Figure 5.8, the gray triangles represent the predictive power of the summary judgment filing model without the inclusion of the discovery variable. The black line represents the predictive capacity of the model with the discovery variable. The dashed line represents "chance" prediction. In other words, if the ROC curve runs along (or below) the dashed line, the estimated model(s) are no better than "chance" at predicting the binary outcomes for the dependent variable. Here, both lines are above the dashed line and thus do better than "chance." Additionally, the model which includes the discovery variable encompasses a total area of .78 of the full area possible (which would be 1.00). The model which excludes discovery only covers .64 of the area. We can compare these sensitivity and specificity calculations to determine if they are statistically different from one another. If so, then it suggests inclusion of the discovery variable is an important contributor to our model. And, in fact, there is a statistically significant difference between the two models. The p-value for the comparison statistic is $p = .00$, thereby rejecting the null hypothesis that the area under the two curves is the same (and thus, that the models are no different from one another). In short, utilizing the discovery variable is not only consistent with theoretical expectations, but also is a strong contributor to the predictive power of the summary judgment filing model.

Overall, the micro-analysis model for summary judgment provides new insight into the contributors of whether a summary judgment motion is filed. First, the model suggests that there are in fact differences between civil rights and non-civil

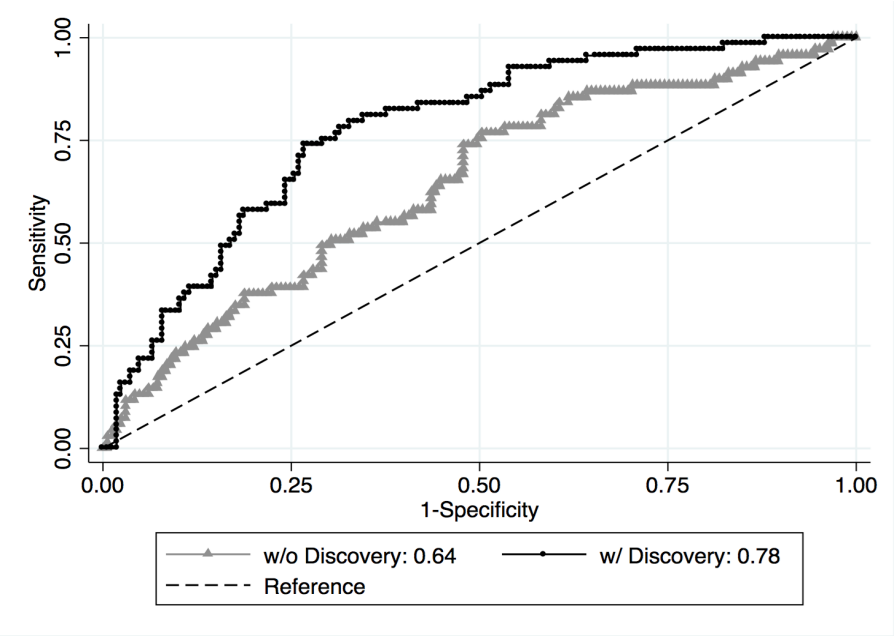

Figure 5.8: ROC Plot: SJ Filed

rights cases when it comes to the decision to file summary judgment. Additionally, that decision to file a motion for summary judgment is related to political (and not legal) calculations which suggest lawyers and litigants engage in sophisticated strategic considerations about the judge before whom they appear. Finally, the model suggests the new dataset importantly contributes to our understanding of the summary judgment process through validation of newly created, and previously non-operationalized, variables.

5.3.3 Determinants of SJ Grants

In the previous section I discussed the factors that determine when a motion for summary judgment can be expected. The logical next inquiry is to determine the reasons for why a summary judgment motion might be granted.

The decision to grant a motion for summary judgment should follow many of the same theoretical expectations for the filing determination. For instance, as detailed above, gender or race might play a role in the decision, whether the case is one involving civil rights claims or not, and the ideololgical moorings of a reviewing judge could impact the decision to grant summary judgment. There is one variable in particular, however, that will add necessary texture to our analysis that needs to be addressed before discussing the results for the summary judgment grant model.

Factual Disputation.

Recall that pursuant to Federal Rule of Civil Procedure 56, a summary judgment motion should be granted if there are no genuine disputes of material facts. In other words, if the case does not require a jury to resolve factual discrepancies before a jury, the judge may render a decision as a matter of law as to whether the claims in the case are valid or not. One way to test whether "the law" matters in the decision to grant a motion for summary judgment (in addition to other political explanations) would be to include a measure of disputation. In other words, if a case involves a series of facts that are material to the underlying claims of the case, and those facts are truly in dispute, then the "legal model" would predict that the motion will be denied. The difficulty, however, lies in knowing whether a case is truly in dispute. Could we rely on the statements of the parties to help us determine if such disputation actually exists? I contend, no, we cannot.

The problem of disputation is readily apparent when one considers the basic nature of a lawsuit. One party sues another and seeks damages for a perceived injury. The non-suing party literally "defends" (they are named *defendants*) against the claims of liability. By definition, then, the parties feel there is a disputation of

facts, and the parties' attorneys will vigorously contend the disputation. Accordingly, simply surveying the parties' contentions will not reveal much in the way of measuring disputation. As a result, reliance on the pleadings is also suspect. What *seems* a disputed material fact to one party, may be nothing of the kind to the judge. An (extreme) example is illustrative here.

In *Jones et al. v. UPS, et al.*, the district court confronted motions for summary judgment filed by the defendants. In order to demonstrate that there were disputed material facts in the case, counsel for plaintiff filed a rather large brief in opposition to the motions for summary judgment. I will let the district court's narrative on this matter take over from here:

> Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment...totals 480 pages. Plaintiff's brief bombards the Court with information that is largely irrelevant and inadmissible. Upon a review of the document, it is almost incomprehensible that it could at once be so utterly oppressive by means of its shear size, while at the same time remain so completely pedestrian and underwhelming in its execution...Plaintiffs set forth a 948 paragraph Statement of Controverted Fact ("Fact Statement") which spans 168 pages...Following the gargantuan Fact Statement, Plaintiffs set forth their Responses to the defendants various statements of uncontroverted facts ("Responses"), which totals 179 pages...As with the Plaintiffs' Fact Statement, their Responses are not only largely unsupported by the record, but also are set forth in [a] manner completely inconsistent with the Local Rules of this Court. Finally, Plaintiffs conclude their titanic document with 132 pages of argument in opposition to summary judgment...As glaringly inept as many of the representations in the Fact Statement are, Plaintiffs' Responses are even more incredible. Most of Plaintiffs' attempts at controversion are either unsupported by record or blatantly non-responsive to the facts presented by the Defendants. These poor attempts to controvert the Defendants' factual statements are not only clumsy and unprofessional, but are most certainly noncompliant with the Local Rules...As such, this Court can only conclude that they were

> created for the sole purpose of causing unnecessary delay and a needless increase in the cost of litigation.[28]

Clearly, reliance on the pleadings in the above case would provide little in terms of a measure of "disputation." Though an extreme example, the point remains: reliance on what is disputed by the parties themselves will not provide an appropriate measure of disputation.

Measuring disputation based on the judge's conduct provides a better avenue for operationalization of this variable. One might suggest looking to the court's order on the motion for summary judgment to find what is disputed, and what is not. The problem with this approach, however, is that all we have are the orders themselves in which clear decisions on the factual discrepancies (or lack thereof) are rendered. Such a measurement provides no accounting for how *difficult* the disputation determination is and whether the court wrestled with any factual disputes. In short, the orders will almost always read as an assertive declaration of what is, or is not, disputed and offer no sense of how much the facts were truly in dispute.

I propose a way forward through this measurement thicket which provides a sense of how disputed the facts were when presented at the summary judgment stage. I operationalize disputation as a measure of the amount of time (in days) the district court spent reviewing the summary judgment motion. A little background here on the mechanics of the summary judgment pleading process is useful.

When a party files a motion for summary judgment, the opposing (non-moving) party will then file a response to that motion (commonly called a Brief in Oppo-

[28] *Jones v. UPS*, 03-cv-0288 (W.D. Mo. 2005) [Docket #506]. The district court judge ultimately sanctioned the lawyer in this case to the tune of $10,000 per defendant. This sanction was upheld on appeal. *See Jones v. UPS*, 460 F.3d 1004 (8th Cir. 2007).

sition to Summary Judgment). Thereafter, the moving party will have the opportunity to have the last word and file a response to that response (commonly called a Reply Brief). Sometimes, for instance if new evidence is included in the Reply Brief, the non-moving party will be permitted to file a Surreply Brief. This briefing process takes time, and, relatedly, it takes time for the Court to process the material and render a decision. If a case is truly one where the facts are not in dispute, it is to be expected that the court will render a quick decision (granting the summary judgment motion). If, on the other hand, the material facts are heavily in dispute, and the judge (or, their law clerk) has to spend time cross-referencing factual assertions to determine if a true dispute exists, then those endeavors will increase the amount of time during which the motion is under court review. As a result, operationalizing disputation as a function of the time a motion for summary judgment spends under review sidesteps the problems of measurement noted above and provides a more accurate sense of the disputed nature of the case.

This measurement is not perfect. Unquestionably, delay by the court in rendering a decision on pending motions for summary judgment can be influenced by other factors. Was the judge's law clerk out ill for an extended period of time, thereby causing work to pile up in the judge's chambers. Were there other, more pressing, matters that diverted the judge's attention from the pending motion for summary judgment. These considerations, and others, are admittedly a part of the overall concept of delay that is infused within the federal courts system. However, operationalizing court review as proxy for disputation does have theoretical and practical advantages. The theoretical I have discussed above. The practical is that with some effort, this information can be gleaned from the district court's docket sheets and orders. Accordingly, I have constructed a variable that calculates the

time, in days, that a motion for summary judgment was under court review. This clock begins when the final summary judgment brief has been submitted, through to the time that the district court renders its decision. As with the discovery variable, the court review variable has not been previously utilized in the study of summary judgment motions.

Estimations.

Table 5.11 contains the estimations for the summary judgment grant model. Again, I have employed a probit estimation for the dichotomous variable for grant ("1") or deny ("0").

The results provide support for several of the hypotheses. Ideology is statistically significant ($p < .05$) and suggests a liberal judge is more likely to grant a summary judgment motion than a conservative judge. Additionally, the civil rights dummy variable is statistically significant at the $p < .10$ level and suggests that a motion for summary judgment is more likely to be granted in a civil rights case. As with the summary judgment filings model, these variables are interacted (marginal effects are discussed *infra*).

Interestingly, one of the judge demographic variables finds statistical significance. Non-white judges are less likely to grant a summary judgment motion. This result is consistent with Boyd's (2016) research suggesting that minority judges tend to behave more favorably toward toward plaintiffs in race discrimination cases. Given the large number of civil rights cases within the federal court system, this effect is an important find, suggesting additional research into the causal pathway is needed. Like Boyd, however, the judge's gender appears not to have a statistically significant effect at the motion stage.

Table 5.11: Summary Judgment Granted

Variable	**Coefficient**
SJ Filed by Pl.	.36
	(.41)
Judicial Ideology	-1.18**
	(.52)
Civil Rights	1.22*
	(.69)
Ideology *x* Civil Rights	.20
	(1.19)
Judge Race	-1.41 **
	(.55)
Judge Gender	.32
	(.43)
Ind. Pl.	-.69
	(.52)
Govt. Def.	-.61
	(.76)
$\sqrt{Pl.FirmSize}$	-.10**
	(.05)
$\sqrt{Def.FirmSize}$	-.05**
	(.02)
SJ Time Ct. Review	.01***
	(.00)
Disc. Length	.005***
	(.002)
SJ Time Ct. Review *x* Disc. Length	-.00003***
	(.00001)
Constant	.03
	(.61)
$p > \chi^2$	.02
Pseudo R^2	.25
Log Likelihood	-31.55

Note: Robust Standard errors in parentheses; N=61.
***=$p < .01$; **=$p < .05$; *=$p < .10$.

The type of litigant appears not to have a strong effect on whether a motion for summary judgment is granted or not. The individual plaintiff and governmental defendant dummy variables are not statistically significant, suggesting that whether a motion for summary judgment is granted or not is driven not by the type of litigants as much as other factors, such as the newly created variables from my dataset addressing the case complexity and attorney "firepower."

Turning to the attorneys, we can see that as both the plaintiff's attorney firm size and the defendant's attorney firm size increases, there is a decrease in the probability that a motion for summary judgment will be granted. The results for the plaintiff's firm size has intuitive appeal. Given that most summary judgment motions are filed by defendants, the bigger the firm supporting the plaintiff, and one would think the greater the attorney's resources, the less likely the summary judgment motion will be granted. Simply put, for a plaintiff, lawyering up in a big way makes good sense if the litigant wishes to keep the case alive past the summary judgment stage. The size of the defendant's law firm also matters, but in an unanticipated manner. Here, as the size of the defendant's firm increases, the probability that the summary judgment motion is granted actually decreases. It is unclear why this might be the case.

The discovery and summary judgment review time by the court, however, are statistically significant. Interestingly, the time that the summary judgment motion is under review actually causes an increase in the probability that a motion for summary judgment will be granted. This result was not expected. One would think that if the case truly held disputed material facts, the probability that a motion for summary judgment would be granted would decrease. But, under the operationalization of disputation employed here, the opposite is true. This result

suggests a couple interesting ramifications. First, the model suggests that increasing delay in the case through submission of lengthy and burdensome briefs is actually a winning strategy for defendants. Additionally, it also suggests that courts are not being faithful to requirements for when summary judgment motions should be granted (as required by Federal Rule of Civil Procedure 56), but *are* being faithful to the Supreme Court's Trilogy in utilizing the summary judgment process as a docket-cleansing mechanism, even if the facts would appear to be in dispute. It is true that this finding can be tempered by the reality that perhaps the operationalization of the disputation variable is not the best. One way to obtain a better sense of whether the courts are truly embracing the Trilogy over the text of Rule 56 would be to independently read the pleadings in a case to determine if, upon expert review, the facts could be considered "in dispute." However, reliance on the pleadings can be problematic (as noted above), and accordingly the operationalization employed here makes a contribution to the study of court usage of procedural mechanisms. The effects of this variable, however, must also be considered in light of the interaction term between time of court review and the discovery variable (discussed *infra*).

Turning to the discovery variable, it is statistically significant and in the expected direction. The more time spent in the discovery process gathering evidence, the more likely the motion for summary judgment will be granted. The result suggests a few interesting insights. First, it supports previous theories that the discovery process has been incentivized to be lengthy and drawn out. "Papering" an opposing party and extending the discovery process in both time and cost is a strategically advantageous course of conduct by litigants, and in particular, defendants. Additionally, prodding a party for weaknesses in their case through

discovery can provide the litigant who files for summary judgment strong ammunition at this stage of a case. And, if courts are apt to use summary judgment with a relaxed standard consistent with the Trilogy, it means plaintiffs find themselves facing a true uphill battle.

The interaction term between discovery length and the time a motion for summary judgment is under review is also statistically significant, but is negatively signed. This result is actually expected and returns us to the discussion of disputation. If the case involves lengthy discovery, and the court is required to pour through summary judgment pleadings in a heightened manner, then the interaction term suggests a diminished probability of summary judgment being granted. It is here where the concept of disputation takes shape. Independently, these variables operate in a manner to increase the probability of a summary judgment motion being granted. Interacted, however, the variables suggest that long cases with a great deal of discovery that requires a judge to analyze what would appear to be heavily debated facts causes the court to pass the case through the summary judgment stage and set up a showdown for trial where a jury determines the facts. Accordingly, while the variables independently suggest courts do skew toward the more relaxed version of summary judgment considerations put forth by the Supreme Court in its Trilogy, it also suggests that in cases where there are truly disputed facts with a great deal of discovery and the necessity for extended court review, then the case will pass the Rule 56 hurdle (as it should). The interpretation of these variables, then provides a nuanced account for judicial decision-making at the district court level and provides new insight into the summary judgment process heretofore unexplored.

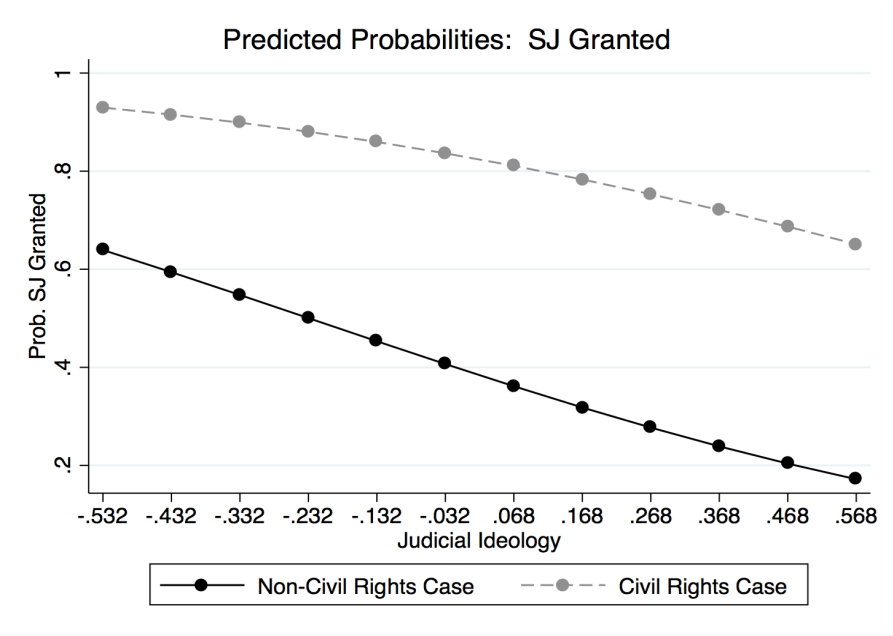

Figure 5.9: Predicted Probabilities: SJ Granted

As with the summary judgment filings model, I provide the point estimates of the predicted probabilities associated with whether a summary judgment motion is granted or not between civil rights cases. Recall that much ink has been spilled determining if there is a distinct difference in treatment between civil rights cases and non-civil rights cases at the summary judgment stage. The predicted probabilities sugggest this is, in fact, the case.

Figure 5.9 displays the predicted probabilities for a grant of summary judgment for both civil rights and non-civil rights cases across judicial ideology, which is set to the minimum and maximum values in the dataset. Additionally, all other independent variables were held at their means or modes.

The predicted probabilities make it clear: civil rights cases face a far greater risk of being dismissed on summary judgment than non-civil rights cases. For in-

stance, for a moderate judge nearly at the middle of the ideology spectrum (.068), the probability that summary judgment will be granted in a non-civil rights case is about 36%. Merely converting that case to a civil rights case increases the probability that summary judgment will be granted to an astounding 81%; an increase of 45% in the likelihood that summary judgment will be granted. Simply put, there is a strong difference between summary judgment grant rates for civil rights versus non-civil rights cases. I will discuss in the next section a potential policy impact of increased summary judgment usage in the context of employment discrimination. However, it bears stating here that if civil rights cases are susceptible to summary judgment at such high rates, significant policy consequences can exist. Previous scholarship suggests there is something simply different between civil rights cases and non-civil rights cases when it comes to the summary judgment procedural device. The results in Figure 5.9 agree with this conclusion, and indeed suggest the situation is potentially more dire for civil rights plaintiffs than initially thought.

Figure 5.10 displays the conditional marginal effects of the civil rights variable on the probability that summary judgment will be granted plotted along the same judicial ideology measure in the last graph. Again, the independent variables not in the graph are held to their mean or modes.

The results suggest an interesting (and expected phenomenon): as the case appears before an increasingly conservative judge, the effect of that variable in a civil rights case produces an increasing effect on whether summary judgment will be granted. The confidence intervals for very liberal judicial ideology are not statistically significant from zero (as the intervals cross the zero-line), suggesting it is possible extremely liberal judges could cause either an increase or decrease on the granting of summary judgment (though the point estimates clearly suggest

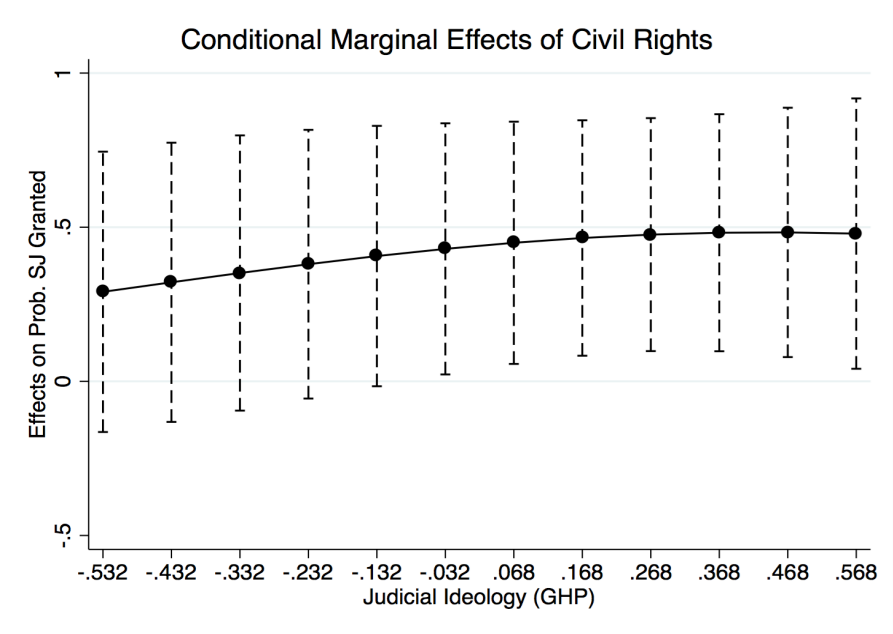

Figure 5.10: Conditional Marginal Effects: SJ Granted & Civil Rights Cases

a diminished effect on granting summary judgment before a very liberal judge). However, moving from a moderately liberal judge to the most conservative judicial ideology in the dataset displays marginal effects that *are* statistically different from zero, and cause an increase in the grant of summary judgment. While the confidence intervals are somewhat large (a function of the low N associated with the summary judgment grant model), the point estimates suggest the move toward increasingly conservative judges in civil rights cases and related effect on summary judgment being granted is quite large. Indeed, at the nearly perfectly-moderate judge level (.068), the marginal effect estimate is nearly a 45% increase in summary judgment being granted for a civil rights case. Again, this result comports with the predicted probability figure above and suggests again that civil rights cases face a tough barrier to proceeding past the summary judgment stage and to trial.

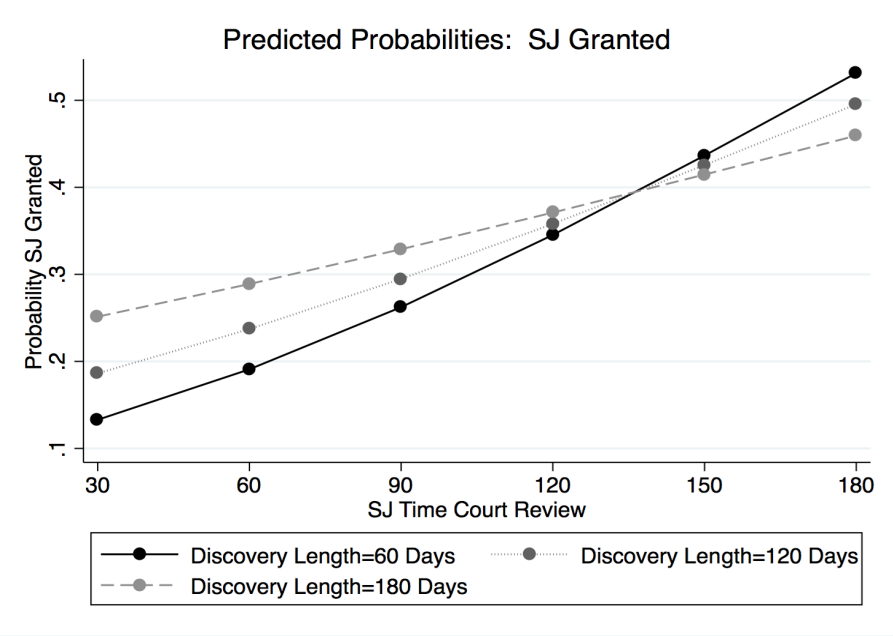

Figure 5.11: Predicted Probabilities: SJ Granted (Effect of Discovery and Court Review Time)

In addition to the effects of civil rights cases, it also worth investigating the effects of the newly operationalized discovery and time for court review variables. Figure 5.11 contains the predicted probabilities. Here, the probability of a summary judgment motion being granted is plotted along varying levels of discovery time (two, four, and six months), with court review time spanning a single month through six months. All other independent variables were held at their mean and modes.

As we can see from the figure, increased discovery time and increased time for court review leads to an overall increase in the probability that summary judgment will be granted. The figure also sheds light on the interaction between these two variables on the overall probability that a motion for summary judgment will be granted. Notice the inflection point at about 140 days of court review. At this

point in court review, the trends switch with a case under court review for only two months passing the case under court review for six months in terms of the probability that summary judgment will be granted. In other words, cases that have a great deal of discovery, and a great deal of court review, are now being granted at a lower rate than cases with a small amount of discovery time (though the effect is still positive at all levels). What this result suggests is the interaction term kicking in, colloquially speaking. At this point of lengthy discovery and lengthy court review, disputation would appear to exist, thereby mollifying the probability that summary judgment will be granted, relative to the other levels of discovery displayed in the figure. Overall, the figure displays the nuance mentioned above for the newly-created variables, and also suggests that while disputation can be a factor, it simply does not outpace the coefficients for the discovery and court review variables individually, thereby leading to the increase in probability that summary judgment will be granted as both variables increase (albeit, at differing pace given the difference in slope between each respective probability plot).

Finally, it worth investigating what a plaintiff can do to give themselves a better chance in a civil rights case at moving past the summary judgment stage. One variable that is new with the dataset is firm size. We know that if a plaintiff's firm size increases, there is a related decrease in the probability that summary judgment will be granted. In order to obtain purchase on this effect, I plot the predicted probability point estimates for this variable over a range of firm sizes. Recall that the variable has been transformed to the square root of the raw data. Accordingly, the values plotted for plaintiff's firm size range from 0 (meaning, the plaintiff did not have an attorney) to 11 (meaning the plaintiff was represented by a firm with 121 attorneys). Because we are evaluating a "typical" civil rights case, I have set

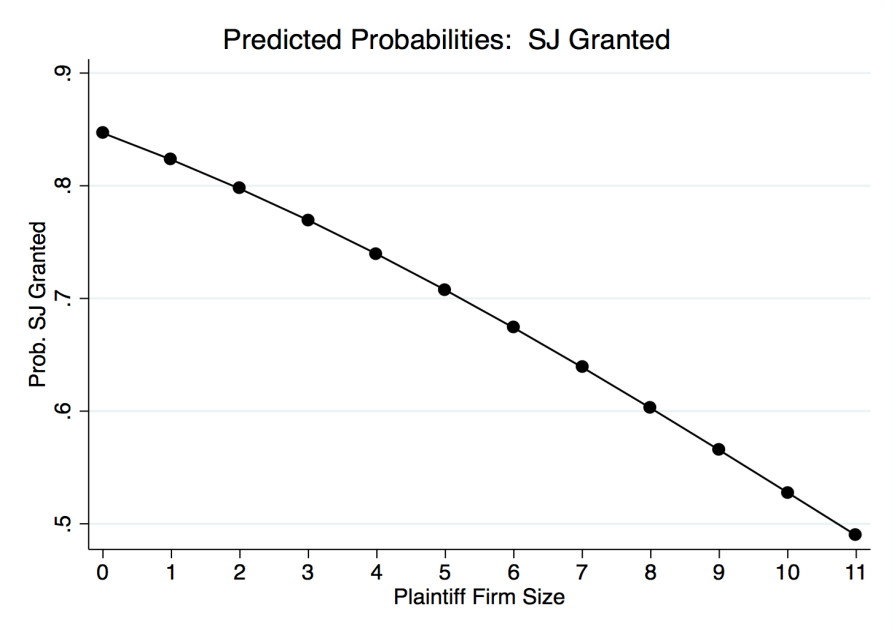

Figure 5.12: Predicted Probabilities: SJ Granted (Effect of Plaintiff Firm Size)

the variable for governmental defendant to zero (meaning, the plaintiff has sued a private defendant) and the individual plaintiff variable to 1 (meaning the plaintiff was a person, not a corporation or governmental entity). Finally, all other variables were set to their mean or mode. Of note, given that we want to evluate parity, the defendant's firm size has been set to the mean of 13.40, meaning a firm size of just over a 179 attorneys with the firm. Figure 5.12 contains the results.

The results suggesting a few interesting insights. First, the old adage "he who represents himself has a fool for a client" is true, at least when it comes to summary judgment. Individuals who proceed in a federal civil rights case *pro se* have about an 85% probability that summary judgment will be granted in their case. Not good odds, to say the least. What is also interesting, however, is that a plaintiff who obtains attorney "firepower" can mollify the effects of a summary judgment motion being granted. The trend is clear: the more attorneys in the firm the plaintiff hires,

the better their chances at getting past the summary judgment stage. But there is an interesting wrinkle here: a plaintiff must hire a law firm with approximately 121 attorneys before they can even have a better than 50-50 shot at getting past summary judgment. In other words, retaining a big firm does help, but the summary judgment process is so difficult for plaintiffs that hiring even a large law firm by any reasonable standard will still only give that plaintiff a probability of getting past a motion for summary judgment at slightly better than even odds. Again, this suggests a rather steep climb for individuals in civil rights cases.

Finally, as with the summary judgment filings model, it worth evaluating some of the model's diagnostics. First, the model has a better Pseudo R^2 (.25) value than the summary judgment filings model. Additionally, the model correctly predicts approximately 69% of the dependent variable outcomes, and provides a robust 36.7 percent reduction in error (PRE). Overall, the model has relatively succesful predictive power.

Diagnostics suggest the model is strong. For instance, multicollinearity does not appear to be a problem. As with the filings model, given the regression is probit I again utilized the `collin` STATA ado command to calculate the Condition Index Number (CIN) for the independent variables. Here, the CIN is is 9.71; less than a value of 10 which might suggest potential weak collinearity concerns. Additionally, I performed a Link Test on the model to determine if there were specification issues. As noted *supra*, STATA utilizes the link test specification proposed by Pregibon (1979). Again, if the model is properly specified, additional predictors should not be statistically significant except by chance. As stated above, the test obtains the linear predicted value (`hat`) and linear predicted value squared (`hatsq`). The `hat` variable should be statistically significant (indicating our predictors provide

solid explanatory power), while the `hatsq` variable should not be statistically significant. The latter squared term should not be statistically significant; if its, it suggests there could be a missing variable or variables that contribute to the model's problems. Performing this test on the summary judgment granted model returns the *p*-values found in Table 5.12 for these variables.

Table 5.12: Link Test *p*-Values (SJ Granted)

Variable	***p*-value**
`hat`	.00
`hatsq`	.41

The link test suggests that the model not only has good predictors, but also is not missing other variables that would improve model performance. Accordingly, the model appears to be stronger in both predictive performance and model specification than the summary judgment filings model.

Taking a step back, we can put together the macro and micro analyses. The macro analyses suggest the Trilogy did rework litigation incentives to cause the diminution in trials. The micro analyses reveal there are important constituent factors that influence whether a party will file a motion for summary judgment, and whether that motion will be granted. Both of these levels of analysis provide new insight into the capacity of alterations to legal procedure to impact the likelihood that a case goes to trial. This project began with the expectation that these alterations will have a forceful decrease in getting a case to trial, and indeed the results support this contention. Thus far, the question has centered on whether summary judgment has significantly restrained cases from reaching the trial stage. I now

turn to investigate the potential policy ramifications for claims not going to trial in an analysis of employment discrimination cases.

5.4 Policy Impact of Diminishing Trials

As noted above, knowing that the summary judgment Trilogy has caused a diminution in trials is an important first step in understanding how procedural changes to the Federal Rules of Civil Procedure can cause substantive changes to the legal system. However, we can do more. The next step is to understand not only that procedure can cause substantive changes, but also, what specific public policy outputs are modified? If, for instance, procedural modifications to the Rules of Civil Procedure have policy consequences that run counter to the policy aims of the elected branches, it calls into question not only the actual policy changes, but also the related concern of counter-majoritarianism. In other words, if the political branches of our government seek to obtain certain societal results through legislation that is thwarted by these judicially-motivated procedural alterations, we must question the efficaciouness of those political endeavors.

In order to assess these concerns I turn to the issue of income inequality. Income inequality is an area that has generated much scholarly interest recently. *See, e.g.,* Kelly 2009; Enns *et al.* 2014; Volscho & Kelly 2012; Kelly & Witko 2012; Kelly & Enns 2010; Bartels 2008. While the literature in general has focused on causes of income inequality, it has not substantively addressed whether efforts to *combat* income inequality through changes to legal rules have been successful. An area of the law where legal rules are specifically designed to counter income inequality is in employment discrimination law. Employment discrimination claims are designed to protect individuals from disparate treatment in employment condi-

tions. Such conditions of employment typically relate to matters of pay or income. For instance, Title VII of the 1964 Civil Rights Act prohibits individuals from being paid differently on the basis of their race for equal work (as does, for instance, 42 U.S.C. §1981). Gender discrimination is similarly proscribed by Title VII (as well as the Equal Pay Act). Accordingly, with employment discrimination law we have a collection of legal rules explicitly designed to reduce employment (and concomitantly, income) inequality. If employment discrimination claims, however, are kicked out of court due to summary judgment, or, if they are devalued because of the changes to summary judgment, then it is distinctly possible the related inability to get to trial will cause anti-discrimination efforts to be muted. Thus, the question is whether the alterations to the summary judgment process, and diminishing employment discrimination trials, has a negative effect on income equality.

In order to assess this question, I model income equality as a function of employment discrimination trials (with appropriate control variables). If employment discrimination trials are a statistically significant predictor of income equality after controlling for structural, political, and economic variables, it suggests that reducing the number of trials through procedural changes can have deletrious effects on public policy goals.

In Figures 5.13 and 5.14, I plot income equality between men and women, as well as between blacks and whites. The data come from the U.S. Census and are the median household income ratios between comparator groups. As we can see, there is general upward movement over this time, though the disparity between men and women, as well as blacks and whites, still exist. During the time in question (1981-2013), women gained about 18 cents on the dollar, while blacks only gained

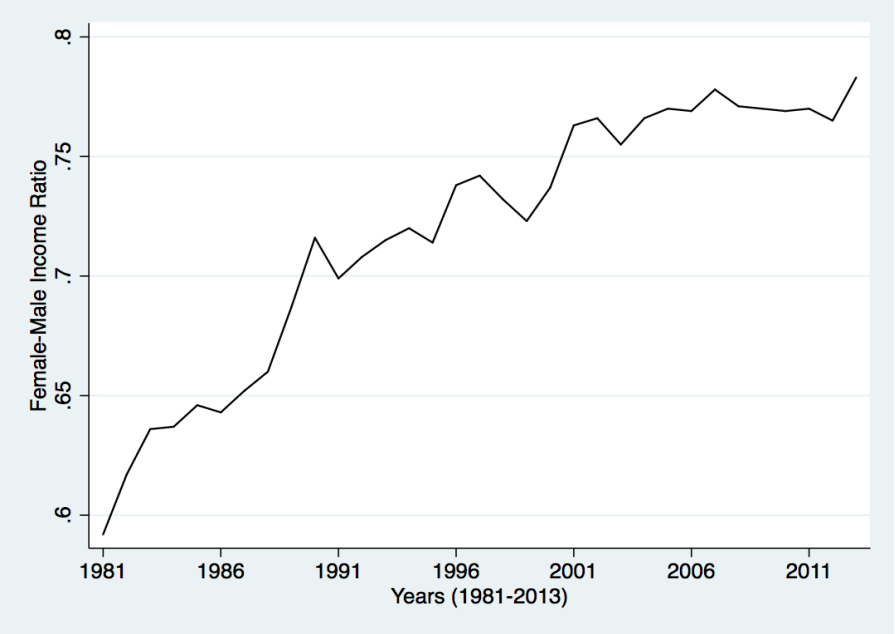

Figure 5.13: Female-Male Income Ratio

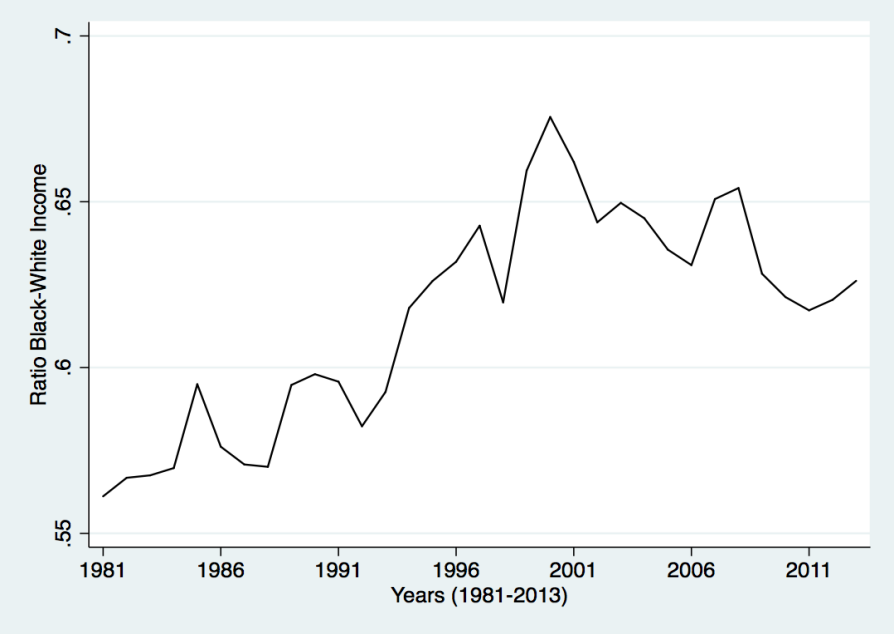

Figure 5.14: Black-White Income Ratio

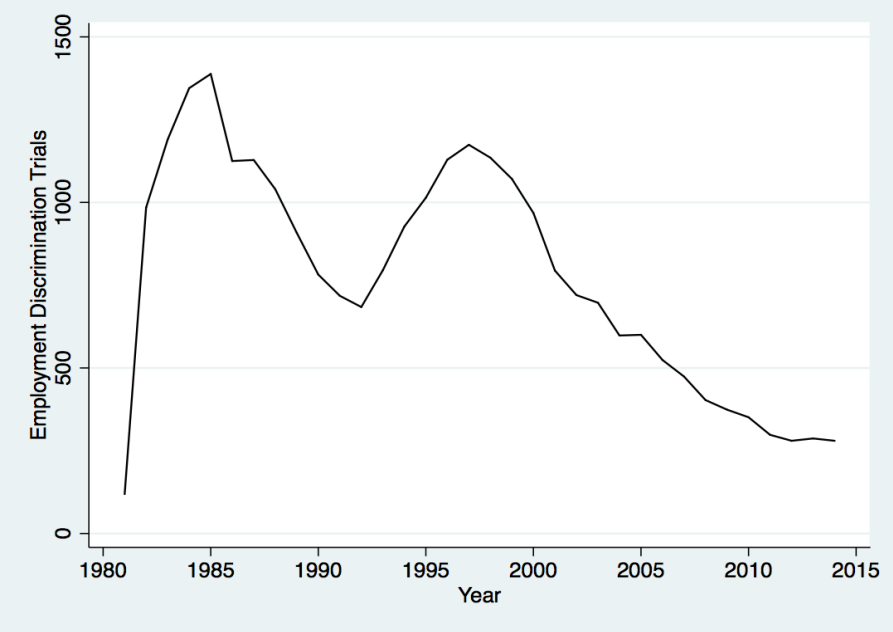

Figure 5.15: Employment Discrimination Trials

approximately 7 cents on the dollar. In both cases, the comparator groups (men and whites, respectively) continue to outpace in income.

Figure 5.15 details the number of federal employment discrimination trials in the United States. Data comes from the Administrative Office for the United States Courts. We can see that after such trials began in the U.S., there was a sharp decline, and then a leveling off in the total number of trials over time. In terms of raw numbers, we have about as many employment discrimination trials in contemporary times as we did in the early 1980s.

In order to assess the effects of employment discrimination on income ratios, I perform Ordinary Least Squares (OLS) estimations where the dependent variable is the above income ratios. I control for a variety of structural, political, social, and economic factors, in addition to the main independent variable of interest (employ-

ment discrimination trials). In terms of structural variables, I control for relevant epochs for employment discrimination law. I control for the pre-Trilogy time period with a dummy variable (1 for pre-Trilogy, 0 otherwise) as well as the time period between the Trilogy and enactment of the 1991 Civil Rights Amendment (1 if in this period, 0 otherwise). The 1991 Civil Rights Amendment altered some of the incentive mechanisms for individuals to litigate discriminiation cases by, for instance, permitting damages for emotional distress (something that was not permitted prior to 1991). In order to control for these changes, I utilize the above dummy variable.

In terms of social factors, socio-economic status theory has long held that education is a large determinant of income earning potential. Accordingly, I control for the ratio of individuals aged 25 years old or older with 4 years of college between the comparator groups. This data comes from the U.S. Census Bureau. I also control for the public "Mood," a measure of how liberal or conservative the nation is at any given moment based on Stimson's (1998) work.

For economic factors, I control for the unemployment rate and the strength of the economy, here measured as GDP (*see*, e.g., Kelly & Witko 2012). The unemployment rate data come from the Current Population Survey; GDP data come from the Department of Commerce, Bureau of Economic Accounts. Finally, for political factors, I control for the party of the president (1 if Democrat, 0 if not), and whether the Democrats controlled both houses of Congress (1 if so, 0 if not).

Before moving to the estimations, a word about the time series nature of these variables is appropriate. First, it is clear that many of these variables trend in a particular direction and exhibit signs of having a unit root. As Granger & Newbold (1974) first discussed, regressions based on time serial data with unit roots can re-

sult in spurious regressions. In order to combat the unit root effects, data must be transformed and made stationary before running estimations, often through differencing the data or detrending the data (Enders 2010). Figure 5.13 displaying the Female-Male Income Ratio is a good example of such data. From the figure, it is clear that there is a trend in the time series. Performing an OLS estimation with such a trend could result in incorrect estimates and the high potential for a spurious regression. On the other hand, typical unit root tests, such as the Augmented Dickey-Fuller test, with a low N (as we have here), can also be biased and have low power (*see* De Boef & Granato 2000). Dickey-Fuller tests in such situations can be biased toward a finding of unit roots. Given the data and low-N, I have decided to operationalize the model cautiously. Accordingly, I performed Augmented Dickey-Fuller tests on all variables in both income inequality models. With the exception of employment discrimination trials and the ratio of Black-White college education, all other variables indicated stationarity concerns. I therefore detrended the following variables: Female-Male income ratio and Black-White income ratio. I differenced the following variables: Female-Male college education, unemployment, and Mood. Finally, I logged the GDP variable. After each of these transformations, the time series were all stationary and we can have confidence that our results are not the product of spurious regressions.[29]

Turning to the Female-Male income model, the results are contained in Table 5.13.

The results are clear; employment discrimination trials have a statistically significant positive effect on income equality between men and women even after

[29]I also ran the models with a Beta regression utilizing a Beta distribution, given the untransformed dependent variables are percentage ratios. The results for these estimations were substantively the same for our main independent variable of interest (employment discrimination trials).

Table 5.13: Female-Male Income Model

Variable	**Coefficient**
Empl. Disc. Trials	.00003**
	(.00001)
Pre-Trilogy	-.05**
	(.01)
Trilogy-CRA	-.03*
	(.01)
Δ Ratio M-F College	-.04
	(.19)
Δ Unemp.	.002
	(.003)
Δ Mood	-.001
	(.002)
GDP_{Log}	-.001
	(.02)
President	-.02*
	(.01)
Dem. Congress	.003
	(.01)
Constant	.01
	(.20)
R^2	.55
$N = 33$	

Note: Standard errors in parentheses. *=$p < .01$; **=$p < .05$

factoring in a host of structural, political, social, and economic variables.[30] Additionally, the structural variables indicate that income equality declined due to the post-Trilogy time period before enactment of the 1991 Civil Rights Amendment. The only additional variable to obtain statistical significance is the Presidential variable, which indicates that Democratic presidents have a negative effect on income equality; this was an unexpected result. In order to obtain purchase on the impact of the employment discrimination trials variable, I plot in Figure 5.16 the predicted values associated with these trials, with affiliated 95% confidence intervals. The Figure moves from approximately the lowest number of trials contained in the dataset (approximately 100) to the greatest number of trials in the dataset (approximately 1400).

The graphical results in Figure 5.16 are clear: as the number of employment discrimination trials increase, income equality increases.[31] Essentially, moving from the lowest level of employment discrimination trials in the dataset to the highest number results in approximately a 4 cent increase on the dollar for women compared to men. This change is not insubstantial. Note that during the entirety of the Female-Male income ratio series (*see* Figure 5.13), the total amount of change between 1981 and 2013 for women was approximately 18 cents. Moving from the smallest to greatest number of employment discrimination trials can account for nearly a quarter of this change.

In order to assess the effect of employment discrimination trials on the income ratio between blacks and whites, I similarly perform an OLS estimation. The only

[30] A Breusch-Pagan test of the residuals indicated there was no problem with heteroskedasticity in the model. Additionally, a Durbin-Watson test found no problem with serial correlation in the residuals.

[31] Recall that the dependent variable is the detrended income ratio between females and males. This detrended variable, however, does not alter the original scale, so unit changes still reflect the "cents on the dollar" analysis as in the non-detrended variable.

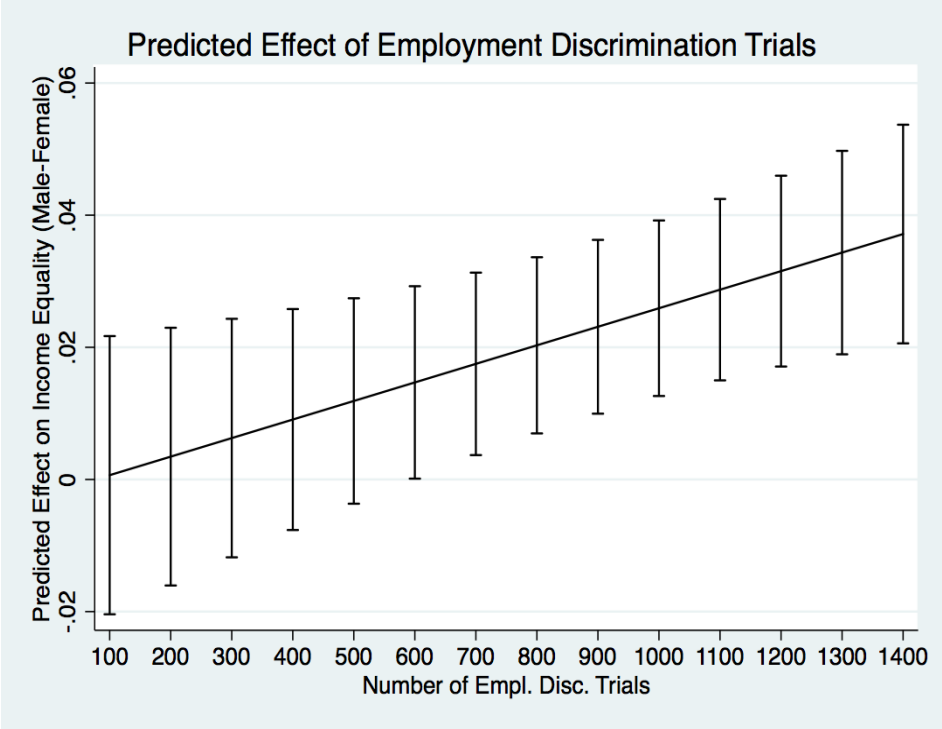

Figure 5.16: Effect of Empl. Disc. Trials on Income Equality (Female-Male)

change in the model is the dependent variable, which is switched to reflect income ratios between blacks and whites, and the education variable, which is modified to reflect the ratio in college education between blacks and whites. The results of this estimation are contained in Figure 5.14.

The graphical results in Figure 5.17 are again clear: as the number of employment discrimination trials increase, income equality increases between blacks and whites.[32] Moving from the lowest level of employment discrimination trials in the dataset to the highest number results in approximately a 5.5 cent increase on the dollar for blacks compared to whites. This change is meaningful. Note that dur-

[32]A Breusch-Pagan test of the residuals indicated there was no problem with heteroskedasticity in the model. Additionally, a Durbin-Watson test found no problem with serial correlation in the residuals.

Table 5.14: Black-White Income Model

Variable	**Coefficient**
Empl. Disc. Trials	.00005**
	(.00001)
Pre-Trilogy	-.01
	(.02)
Trilogy-CRA	-.01
	(.01)
Δ Ratio B-W College	-.29
	(.19)
Δ Unemp.	.005
	(.003)
Δ Mood	-.001
	(.002)
GDP_{Log}	.12*
	(.06)
President	-.01
	(.01)
Dem. Congress	-.01
	(.01)
Constant	-1.00*
	(.47)
R^2	.53
$N = 33$	

Note: Standard errors in parentheses. *=$p < .01$; **=$p < .05$

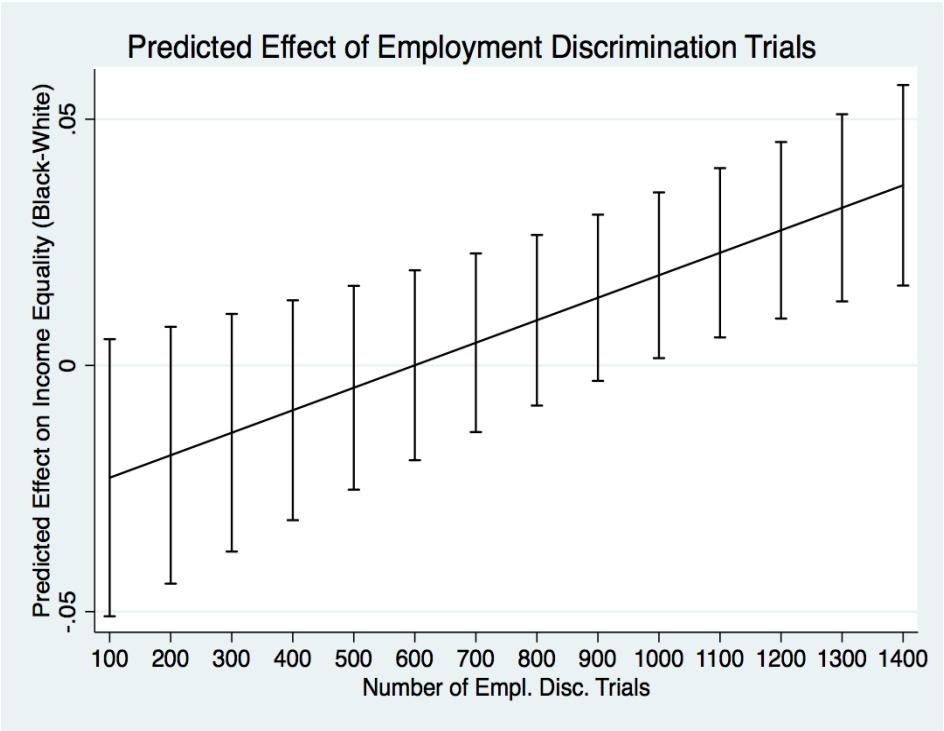

Figure 5.17: Effect of Empl. Disc. Trials on Income Equality (Black-White)

ing the entirety of the Black-White income ratio series (*see* Figure 5.14), the total amount of change between 1981 and 2013 for women was approximately 7 cents. Moving from the smallest to greatest number of employment discrimination trials can account for approximately three-quarters of this change. In other words, if employment discrimination trials decline, the income ratio between blacks and whites is substantively reduced.

5.5 Discussion & Conclusion

The results from the macro-level estimations support the procedural hypothesis that the summary judgment Trilogy had a negative impact on the total number of cases that go to trial. When the U.S. Supreme Court issued its Trilogy, the de-

cisions had the effect of re-working the parties' litigation calculus. Simply put, post-Trilogy, federal civil cases became devalued and plaintiffs (and their attorneys) were fully aware of the consequences for pushing claims. The downward effects of summary judgment simply do not render it worthwhile to go to trial, or risk going to trial.

Additionally, the micro-level results indicate that political variables impact the decision of whether a litigant files a motion for summary judgment. We saw quite clearly that lawyers behave strategically in deciding to file a motion for summary judgment by considering the ideology of the judge before whom they appear, as well as how the discovery process (a central feature of Chapter 4's theoretical discussion) can cause increased likelihood that a motion for summary judgment is filed. Moreover, the results for whether a summary judgment motion is granted are profound. Very clearly, civil rights cases face a steep hill in the climb for a trial. Additionally, newly operationalized variables that are unique to this study also indicate they have an impact on whether a motion for summary judgment is granted, including the size of the law firms representing the parties, the length of time a case is subject to the discovery process, and the duration of time under which a motion for summary judgment is under review by the court.

Finally, the alterations to the summary judgment process had profound effects on income inequality, not only in effect, but also in the theory behind encouraging individuals to litigate. It has long been thought that an efficient manner to revitalize individuals' claims and to allow for the "rights revolution" is to incentivize litigation. Scholars in political science have discussed the impact that litigation incentives have played in motivating individuals and their attorneys to bring claims which seek, in the aggregate, to accomplish public policy objectives. For

instance, Farhang (2010; *see also* 2008; Silverstein 2009; Kagan 2003) discusses the manner in which policy makers seek to incentivize litigation in order to accomplish their policy goals, namely, the filing of lawsuits to achieve these policy aims. What is missing from this analysis, however, is whether policy makers are correct in their assessment when they ignore underlying procedural devices that can work against their goals (*but see* Staszak 2015). I have challenged these scholars' ideas by suggesting that, whatever the aims of policy makers, failure to incorporate procedural aspects of litigation ignores the reality of policy implementation-through-litigation, and can result in policy consequences unintended by the policy makers. In other words, *procedure becomes substance*. Simply put, whatever the incentive mechanisms created by legislation, alterations to the underlying incentive structure contained *within* the actual litigation cannot be ignored. In the realm of civil rights litigation, changes to the law which encourage individuals to litigate will certainly bring about more lawsuits, but that is not where our inquiry should end. Just because more lawsuits are filed does not say whether those lawsuits are successful in implementing the policy aims of political actors. If cases are summarily dismissed from the litigation pipeline, the increase in case filings will have a muted effect. This phenomenon is precisely what we see in the realm of summary judgment and income equality. Future endeavors to achieve policy goals through litigation incentivization should pay heed not only to the ultimate end sought to be achieved, but also the subterranean machinations through which those cases must ultimately move in order to assess their viability.

6. CONCLUSIONS AND RAMIFICATIONS OF FINDINGS

6.1 Introduction

This project has attempted to provide an answer to the fundamental question for why we no longer have civil trials. The evidence is clear that cases no longer go to trial, and theory suggests the reason for this is the re-working of a procedural device whose effects spill throughout the litigation process, namely, summary judgment. Through a multi-level research design, I have demonstrated that not only do shifts in trial trends occur coordinate in time with the alterations to the summary judgment process by the United States Supreme Court's Trilogy, but also that this re-working has consequences. With a micro-level analysis consisting of a unique dataset with measured variables previously unused, the results suggest that litigants' resources, the time spent on charting a course through the litigation process, and the type of case impact whether a motion for summary judgment will be filed, and relatedly, whether a motion for summary judgment will be granted. Finally, the impact of the diminution in trials is examined with respect to an area that generates a great deal of public attention, namely, employment discrimination. Here, the results suggest that decreases in the number of trials for this subject area have effects which spill into the larger society. Specifically, a decline in employment discrimination trials is related to an increase in income inequality between segments of the American population. At this point, it is worth taking a step back and considering the larger implications of this project.

6.2 Ramifications

For years, the observable fact of a decline in trials was unquestioned. We *knew* that civil cases no longer went to trial, but we did not know *why* cases no longer went to trial. The unified theory I present, focusing on alterations to the Federal Rules of Civil Procedure, presents solid theoretical ground upon which we can moor our conclusions on this matter. The evidence very clearly suggests that subterranean features to the American legal system have shifted the paths of many cases. The fact that procedural devices (such as summary judgment) work on such a subterreanean level is to suggest the difficulty past researchers have had in addressing this question. And yet, it is precisely within this difficult-to-discern realm where the action is, to put it colloquially.

A decade ago, Margo Schlanger suggested that if we really want to understand American trial trends, we need to do more than rely on review of cases and doctrinal discussion (Schlanger 2006). She suggested that "reported opinions are simply beside the point…[r]ather, research will primarily need to use statistical information about case outcomes [and] docket and pleadings research" (2006, 38).[1] This project has taken heed of this call and has utilized quantitative modeling of theoretically-driven principles focused on procedure to arrive at the conclusions presented. The previous chapters can thus now provide an answer to the *why*-question.

Understanding that summary judgment has, in fact, caused a massive alteration to litigation strategies, and that this re-working has impacted discrete policy

[1] *See* Coleman 2012 (suggesting we need to dig more deeply into the causes and consequences of summary judgment to go beyond our present knowledge on the subject matter); *see also* Clermont & Eisenberg (2002) (discussing the need for theoretically-driven quantitative efforts to discern the impact of settlement).

areas, such as employment discrimination and income equality is important. But, backing out from these results, what can we say about larger theoretical concerns for the administration of justice in the United States? I offer here a few tentative (as they must be) conclusions on this matter.

Gordon Silverstein has proposed that the modern litigation state is a system of "juridification" (Silverstein 2009). Juridification means "efforts to legalize, formalize, and proceduralize; efforts to strip out the ambiguity of politics and the U.S. Constitution and replace it with unambiguous rules and automated default procedures" (*Id.*, 2). The rise of the litigation state, that system in which the "rights revolution" has occurred, is one now where litigants have an "extensive reliance on the courts to address questions of politics and policy" (Staszak, 2011, 78). As Robert Kagan (2001) notes, we have entered a period of "adversarial legalism," where litigants employ private suits to create or enforce public policy. People (whether actual, or corporate), in addition to governmental actors, are now a moving force behind charting a course for the establishment of rights and responsibilities (*see also* Epp 2009).

The area of individual rights, not only in the constitutional sense, but also in the statutory, is where there are severe implications for my findings. In *The Litigation State*, Farhang (2010) points to the movement over time of assigning enforcement of individuals' civil rights to the individuals themselves. Ours is a legal system of "private enforcement regimes," one where Congress has, through "*legislative choice*" determined that priviate litigation should be the moving force behind statutory implementation. Farhang (2010) details the reasons for this development and concludes the battle between Congress and the Executive over bureaucratic enforcement of statutory rights has encouraged Congress to mobilize

individuals to enforce the law. The incentivization of attorneys fees awards, for instance, is a mechanism through which Congress has attempted to encourage individuals to press their individual claims to establish concrete national policy in the area of employment discrimination. And, as Farhang notes—and I agree—the resort to the courts for this policy output is entirely democratic. As he explains, "[t]he institutional organ of government that produced the litigation-dominated civil rights enforcement framework that prevails in the United States was not only legislative, but was, over and over, a robustly democratic example of the legislative process…[i]t was…most certainly democracy at work" (Farhang, 2010, 234).

Public law scholarship suggests, then, that the mobilization of private lawsuits is democratic, the purposes behind it were to protect policy choice implementation "from erosion from future congresses or resistant bureaucrats" (Staszak, 2011, 82), and can serve important ends particularly in the realm of civil rights. But here is where there is a significant problem for the results of my study. If, as my analysis shows, procedural devices such as summary judgment have been modified to counteract particular policy results, then the litigation state has no teeth.

Legal procedure is the ultimate backstage pass. If you file a federal civil lawsuit involving a car crash; legal procedure steers the case. If you file a lawsuit for excessive force against a police officer; legal procedure steers the case. If you file an employment discrimination claim, a claim for violation of the Employee Retirement Income Security Act (ERISA), a claim under the National Labor Relations Act (NLRA), a contract claim, a tort claim, a property claim, etc., if you are in federal court, you will use the Federal Rules of Civil Procedure. And if you use those rules, you are subject to procedural devices like summary judgment. In other words, no

matter the incentivization scheme employed to encourage private litigants to effectuate national policy, federal legal procedure is involved every step of the way.

In theory, if legal procedure is applied the same way for all types of claims, then no problem exists in terms of disproportionality. If, for instance, contract cases are kicked from court under the summary judgment process on balance as employment discrimination claims, then the procedure is just the procedure; no more, no less. We can debate whether the procedure should be more plaintiff-friendly, for instance, or pro-defendant, but the outcome is distributionally uniform. But that world is not the world in which we live. As we have seen, civil rights cases face a much tougher road at the summary judgment stage, either in terms of motions being filed, or in terms of the motion being granted. Differential treatments with procedure cause differential policy outputs. And it is here where there is real concern for the present state of summary judgment practice.

The Supreme Court's Trilogy was not only a significant re-ordering of boring legal procedure, it was a re-making of the rights revolution and the American "Litigation State." Pummelled by Democratic congresses that institutionalized enforcement regimes within the mass public, the Court very clearly took the opportunity to scale back these policy designs. In a recent study, Burbank & Farhang (2015, 1561) found that interpretations of "procedural law…afford[s] courts greater latitude to frustrate or subvert congressional preferences through interpreting that law." In other words, courts—including the Supreme Court—have turned to considerations of *procedure* to alter or amend policy *substance*.

The endeavors by political actors to pull at the roots of private enforcement regimes has been given the name "retrenchment" by public law scholars. Rather than "entrenching" the enforcement scheme to the private litigant, it is now be-

ing retrenched and removed. As Staszak (2015, 30) notes in her excellent book *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment*, "rules of adjudication can make it more difficult for a potential plaintiff to initiate a claim in court, build a case, or succesfully navigate the legal process through to a trial." As I have demonstrated in this project, this result is precisely the case with respect to summary judgment practice.

Staszak (2015, 210) expounds on the above point by noting:

> [C]ourts and judges can have no role to play in the enforcement of rights and the implementation of policy unless the relevant plaintiffs can make it through the courthouse door to begin with. Thus, the rights revolution was not just about the passage of landmark legislation like the Civil Rights Act, but was also necessarily fueled by a dramatic expansion of procedural mechanisms, causes of action, and a deep support structure to enable disadvantaged groups to get their day in court.

But what procedure can add, it can also take away. Thus, "[t]argeting procedural mechanisms can be an attractive way to disguise reform efforts laced with political motivations" (Staszak, 2015, 220). The summary judgment Trilogy can be viewed in this manner. The alterations instituted to Rule 56 of the Federal Rules of Civil Procedure in a series of cases that are hardly on the list of most-momentous Supreme Court decisions went miles toward facilitating the retrenchment of public policy, and in particular, federal civil rights policy. And, the effects of that re-working of summary judgment standards not only impacted the actual policy results (for instance, income inequality), it also served to render endangered the sacred institution of the trial.

Future work is surely necessary to assess whether other procedural mechanisms have impacted public policy preferences by the elected branches of the government. This study is not an all-encompassing investigation of procedural devices

writ large. But the results here do suggest a fruitful avenue for future research. And, the findings suggest that in the future, if policymakers wish to entrench their policy preferences through private enforcement, they cannot discount the procedural devices those litigants will face when they initiate the lawsuit. For now, we can confine our conclusion to what we know and state that modifications to the summary judgment process have potentially dire consequences for civil rights in the United States, and that courts are very clearly engaged in a *rush* to justice.

REFERENCES

ABA Section of Litigation Member Survey on Civil Practice: Full Report. 2009.

Abramson, Jeffrey. 1994. *We the Jury: The Jury System and the Ideal of Democracy*. New York, NY: BasicBooks.

Adickes v. S.H. Kress & Co., 398 U.S. 144. 1970.

Alschuler, Albert W. 1986. "Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases." *Harvard Law Review* 99 (8): 1808–1859.

Amar, Vikram D. 1995. "Jury Service as Political Participation Akin to Voting." *Cornell Law Review* 80: 203–259.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242. 1986.

Arnstein v. Porter, 154 F.2d 464 (2d Cir.). 1946.

Ashcroft v. Iqbal, 556 U.S. 662. 2009.

Bai, Jushan, and Pierre Perron. 1998. "Estimating and Testing Linear Models with Multiple Structural Changes." *Econometrica* 66 (1): 47–78.

Bai, Jushan, and Pierre Perron. 2003. "Computation and Analysis of Multiple Structural Change Models." *Journal of Applied Econometrics* 18 (1): 1–22.

Barber, Benjamin. 2003. *Strong Democracy: Participatory Politics for a New Age*. Berkeley, CA: University of California Press.

Bartels, Larry M. 2008. *Unequal Democracy: The Political Economy of a New Gilded Age*. Princeton, NJ: Princeton University Press.

Bauman, John A. 1956. "The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating's Act." *Indiana Law Journal* 31 (3): 329–356.

Beckerman, John S. 2000. "Confronting Civil Discovery's Fatal Flaws." *Minnesota Law Review* 84 (3): 505–588.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544. 2007.

Berkowitz, Sean. 1992. "Summary Judgment After the Supreme Court Trilogy: Lower Courts' Responses to *Celotex*, *Anderson*, and *Matsushita* (Unpublished Manuscript)." *New York University Law Review* .

Bogus, Carl T. 2001. *Why Lawsuits Are Good for America: Disciplined Democracy, Big Business, and the Common Law*. New York, NY: New York University Press.

Boyd, Christina L. 2015. "Federal District Court Judge Ideology Data." Available at http://cLboyd.net/ideology.html.

Boyd, Christina L. 2016. "Representation on the Courts? The Effects of Trial Judges' Sex and Race." *Political Research Quarterly* .

Brandt, Patrick, John R. Freeman, and Philip A. Schrodt. 2011. "Real Time, Time Series Forecasting of Inter- and Intra-State Political Conflict." *Conflict Management and Peace Science* 28 (1): 41–64.

Brandt, Patrick T., John R. Freeman, Tse-min Lin, and Philip A. Schrodt. 2012. A Bayesian Time Series Approach to the Comparison of Conflict Dynamics. Paper presented for the 2012 Annual Meeting of the American Political Science Association.

Bronsteen, John. 2007. "Against Summary Judgment." *George Washington Law Review* 75 (3): 522–551.

Burbank, Stephen B. 1982. "The Rules Enabling Act of 1934." *Univerity of Pennsylvania Law Review* 130 (5): 1015–1197.

Burbank, Stephen B. 2004. "Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?" *Journal of Empirical Legal Studies* 1 (3): 591–626.

Burbank, Stephen B., and Sean Farhang. 2015. "Federal Court Rulemaking and Litigation Reform: An Institutional Approach." *Nevada Law Journal* 15 (3): 1559–1596.

Calabresi, Guido, and Philip Bobbitt. 1978. *Tragic Choices*. New York, NY: W.W. Norton.

Carbboneau, Thomas. 1989. *Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds*. Urbana, IL: University of Illinois Press.

Cecil, Joe S., and C.R. Douglas. 1987. "Summary Judgment Practice in Three District Courts." *Report by Federal Judicial Center* .

Cecil, Joe S., Dean P. Miletich, and George Cort. 2001. "Trends in Summary Judgment Practice: A Preliminary Analysis." *Report by Federal Judicial Center* .

Cecil, Joe S., and George Cort. 2007b. "Estimates of Summary Judgment Activity in Fiscal Year 2006." *Memo to Hon. Michael Baylson (Federal Judicial Center)* .

Cecil, Joe S., Rebecca N. Eyre, Dean Miletich, and David Rindskopf. 2007. "A Quarter-Century of Summary Judgment Practice in Six Federal District Courts." *Journal of Empirical Legal Studies* 4 (4): 861–907.

Cecil, Joe S., Valerie P. Hans, and Elizabeth C. Wiggins. 1991. "Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials." *American University Law Review* 40: 727–774.

Celotex Corp. v. Catrett, 477 U.S. 317. 1886.

Chib, Siddhartha. 1996. "Calculating Posterior Distributions and Modal Estimates in Markov Mixture Models." *Journal of Econometrics* 75: 79–98.

Clark, Charles E. 1961. "Summary and Conclusion to an Understanding Use of Pre-Trial". In *Proceedings of the Seminar on Procedures for Effective Judicial Administration*. 29 F.R.D. 191.

Clark, Charles E., and Charles U. Samenow. 1929. "The Summary Judgment." *Yale Law Journal* 38 (4): 423–471.

Clermont, Kevin M., and Stephen C. Yeazell. 2010. "Inventing Tests, Destabilizing Systems." *Iowa Law Review* 95 (3): 821–861.

Clermont, Kevin M., and Theodore Eisenberg. 2002. "Litigation Realities." *Cornell Law Review* 88: 119–154.

Coleman, Brooke D. 2012. "Summary Judgment: What We Think We Know Versus What We Ought To Know." *Loyola University Chicago Law Journal* 43 (3): 705–725.

Consolini, Paula Maria. 1992. Learning by Doing Justice: Jury Service and Political Attitudes PhD thesis University of California-Berkeley.

Cooter, Robert D., and Daniel L. Rubinfeld. 1989. "Economic Analysis of Legal Disputes and Their Resolution." *Journal of Economic Literature* 27 (3): 1067–1097.

Curriden, Mark. 2000. "Putting the Squeeze on Juries." *American Bar Association Journal* 86 (8): 52.

Curriden, Mark. 2013. "Number of Civil Jury Trials Declines to New Lows in Texas." *Dallas Morning News* June 22.

Dahl, Robert A. 1989. *Democracy and Its Critics*. New Have, CT: Yale University Press.

Daniels, Stephen, and Joanne Martin. 1995. *Civil Juries and Politics of Reform*. Evanston, IL: Northwestern University Press.

DeBoef, Suzanna, and Jim Granato. 2000. "Testing for Cointegrating Relationships with Near-Integrated Data." *Political Analysis* 8 (1): 99–117.

Diamond, Shari Seidman. 1983. "Order in the Court: Consistency in Criminal-Court Decision". In *The Master Lecture Series: Psychology and the Law*, ed. C. James Scheirer, and Barbara L. Hammonds. Vol. 2 American Psychological Association Washington, D.C.: p. 119.

Diamond, Shari Seidman. 1993. "What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors". In *Verdict: Assessing the Civil Jury System*, ed. R.E. Litan. Washington, D.C.: Brookings Institution.

Diamond, Shari Seidman, and Jessica Bina. 2004. "Puzzles About Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals." *Journal of Empirical Legal Studies* 1 (3): 637–658.

Dickson, Eric S., and Kenneth A. Shepsle. 2001. "Working and Shirking: Equilibrium in Public-Goods Games with Overlapping Generations of Players." *Journal of Law, Economics, and Organization* 17 (2): 285–318.

Dzur, Albert W. 2012. *Punishment, Participatory Democracy and the Jury*. New York, NY: Oxford University Press.

Easterbrook, Frank H. 1989. "Discovery as Abuse." *Boston University Law Review* 69 (3): 635–648.

Eisenberg, Theodore. 2015. "Four Decades of Federal Civil Rights Litigation." *Journal of Empirical Legal Studies* 12 (1): 4–28.

Eisenberg, Theodore, and Charlotte Lanvers. 2008. Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts. In *Cornell Law School Legal Studies Research Paper Series*.

Eisenberg, Theodore, and Charlotte Lanvers. 2009. "What is the Settlement Rate and Why Should We Care." *Journal of Empirical Legal Studies* 6 (1): 111–146.

Elliott, E. Donald. 1986. "Managerial Judging and the Evolution of Procedure." *University of Chicago Law REview* 53 (2): 306–336.

Enders, Walter. 2010. *Applied Econometric Time Series*. 3rd edition ed. Wiley.

Enns, Peter K., Nathan J. Kelly, Jana Morgan, Thomas Volscho, and Christopher Witko. 2014. "Conditional Status Quo Bias and Top Income Shares: How U.S. Political Institutions Have Benefited the Rich." *Journal of Politics* 76 (2): 289–303.

Epp, Charles R. 2009. *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State*. Chicago, IL: University of Chicago Press.

Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland. 2007. "The Judicial Common Space." *Journal of Law, Economics, and Organization* 23 (2): 303–325.

Etzioni, Amitai. 1993. *The Spirit of Community*. New York, NY: Crown Publishers.

Etzioni, Amitai, ed. 1995. *The New Communitarian Thinking: Persons, Virtues, Institutions, and Communities*. Charlottesville, VA: University Press of Virginia.

Farhang, Sean. 2008. "Public Regulation and Private Lawsuits in the American Separation of Powers System." *American Journal of Political Science* 52 (4): 821–839.

Farhang, Sean. 2010. *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* Princeton, NJ: Princeton University Press.

Farhang, Sean, and Douglas M. Spencer. 2014. "Legislating Incentives for Attorney Representation in Civil Rights Litigation." *Journal of Law and Courts* 2 (2): 241–271.

Federal Rule of Civil Procedure 1. 2015.

Federal Rule of Civil Procedure 2. 2015.

Federal Rule of Civil Procedure 26. 2015.

Federal Rule of Civil Procedure 33. 2015.

Federal Rule of Civil Procedure 36. 2015.

Federal Rule of Civil Procedure 38. 2015.

Federal Rule of Civil Procedure 56. 2015.

Federal Rule of Civil Procedure 8. 2015.

Fiss, Owen M. 1984. "Against Settlement." *Yale Law Journal* 93 (6): 1073–1090.

Frühwirth-Schnatter, Sylvia. 2001. "Markov Chain Monte Carlo Estimation of Classical and Dynamic Switching Models." *Journal of the American Statistical Association* 96 (153): 194–209.

Frühwirth-Schnatter, Sylvia. 2006. *Finite Mixture and Markov Switching Models*. Springer Series in Statistics. New York: Springer.

Fukurai, Hiroshi, and Richard Krooth. 2010. "What Brings People to the Courtroom? Comparative Analysis of People's Willingness to Serve as Jurors in Japan and the U.S." *International Journal of Law, Crime, and Justice* 38 (4): 198–215.

Fuller, Lon L. 1979. "The Forms and Limits of Adjudication." *Harvard Law Review* 92 (2): 353–409.

Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9 (1): 95–160.

Galanter, Marc. 1993. "The Regulatory Function of the Civil Jury". In *Verdict: Assessing the Civil Jury System*, ed. R.E. Litan. Washington, D.C.: Brookings Institution.

Galanter, Marc. 2004. "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts." *Journal of Empirical Legal Studies* 1 (3): 459–570.

Galanter, Marc. 2005. "The Hundred-Years Decline of Trials and the Thirty Years War." *Stanford Law Review* 57 (5): 1255–1274.

Gastil, John, E. Pierre Deess, and Phil Weiser. 2002. "Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation." *Journal of Politics* 64 (2): 585–595.

Gastil, John, E. Pierre Deess, Phil Weiser, and Cindy Simmons. 2010. *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation*. New York, NY: Oxford University Press.

Gastil, John, E. Pierre Deess, Phil Weiser, and Jordan Meade. 2008. "Jury Service and Electoral Participation: A Test of the Participation Hypothesis." *Journal of Politics* 70 (2): 351–367.

Gelbach, Jonah B. 2012. "Locking the Doors to Discovery? Assessing the Effects of *Twombly* and *Iqbal* on Access to Discovery." *Yale Law Journal* 121 (8): 2270–2348.

Giles, Michael W., Virginia A. Hettinger, and Todd Peppers. 2001. "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas." *Political Research Quarterly* 54 (3): 623–641.

Gordillo, Gregory A. 1994. "Summary Judgment and Problems in Applying the Celotex Trilogy Standard." *Cleveland State Law Review* 42 (2): 263–299.

Gould, John P. 1973. "The Economics of Legal Conflicts." *Journal of Legal Studies* 2 (2): 279–300.

Granger, C.W.J., and P. Newbold. 1974. "Spurious Regressions in Econometrics." *Journal of Econometrics* 2: 111–120.

Green, Alice Stopford. 1907. "The Centralization of Norman Justice Under Henry II". In *Select Essays in Anglo-American Legal History*. Association of American Law Schools pp. 111–138.

Greene, William H. 2012. *Econometric Analysis*. 7th ed. Prentice Hall.

Habel, Philip, and Kevin Scott. 2014. "New Measures of Judges' Caseload for the Federal District Courts, 1964-2012." *Journal of Law and Courts* 2 (1): 153–170.

Hadfield, Gillian K. 2004. "Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statitical Artifacts in the Changing Disposition of Federal Civil Cases." *Journal of Empirical Legal Studies* 1 (3): 705–734.

Hannaford, Paula L., B. Michael Dunn, and G. Thomas Munsternman. 1998. "How Judges View Civil Juries." *DePaul Law Review* 48 (2): 247–263.

Hans, Valerie P., John Gastil, and Traci Feller. 2014. "Deliberative Democracy and the American Civil Jury." *Journal of Empirical Legal Studies* 11 (4): 696–717.

Hans, Valerie P., and Neil Vidmar. 1986. *Judging the Jury*. New York, NY: Plenum Press.

Haramati, Ilana. 2010. "Procedural History: The Development of Summary Judgment as Rule 56." *New York University Journal of Law & Liberty* 5 (1): 173–187.

Hastie, Reid, Steven D. Penrod, and Nancy Pennington. 1983. *Inside the Jury*. Cambridge, MA: Harvard University Press.

Hatamyar, Patricia W. 2010. "The Tao of Pleading: Do *Twombly* and *Iqbal* Matter Empirically?" *American University Law Review* 59 (3): 553–633.

Held, David. 1987. *Models of Democracy*. Stanford, CA: Stanford University Press.

Hoffer, Peter Charles. 1993. "Text, Translation, Context, Conversation, Preliminary Notes for Decoding the Deliberations of the Advisory Committee That Wrote the Federal Rules of Civil Procedure." *The American Journal of Legal History* 37 (4): 409–439.

Hornby, D. Brock. 2010. "Summary Judgment Without Illusions." *Green Bag 2D* 13 (3): 273–288.

Huber, Peter. 1990. "Junk Science and the Jury." *University of Chicago Legal Forum* 1990 (1): 273–302.

Issacharoff, Samuel, and George Loewenstein. 1990. "Second Thoughts About Summary Judgment." *Yale Law Journal* 100 (1): 73–126.

Issacharoff, Samuel, and John Fabian Witt. 2004. "The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law." *Vanderbilt Law Review* 57 (5): 1571–1636.

Jacobsohn, Gary J. 1977. "Citizen Participation in Policy-Making: The Role of the Jury." *Journal of Politics* 39 (1): 73–96.

James, Fleming. 1953. "Contributory Negligence." *Yale Law Journal* 62 (5): 691–735.

Jefferson, Thomas. 1905. "Letter to Thomas Paine". In *The Writings of Thomas Jefferson*, ed. Albert Ellery Bergh. Vol. 7 p. 408.

Kagan, Robert A. 2003. *Adversarial Legalism: The American Way of Life*. Cambridge, MA: Harvard University Press.

Kalven, Harry, and Hans Zeisel. 1966. *The American Jury*. Boston, MA: Little, Brown.

Keeton, W. Page, Dan B. Dobbs, Robert E. Keeton, and David G. Owen. 1984. *Prosser and Keeton on Torts*. 5th ed. St. Paul, MN: West.

Kelly, Nathan J. 2009. *The Politics of Income Inequality in the United States*. New York: Cambridge University Press.

Kelly, Nathan J., and Christopher Witko. 2012. "Federalism and American Inequality." *Journal of Politics* 74 (2): 414–426.

Kelly, Nathan J., and Peter K. Enns. 2010. "Inequality and the Dynamics of Public Opinion: The Self-Reinforcing Link Between Economic Inequality and Mass Preferences." *American Journal of Political Science* 54 (4): 855–870.

Krauss, Stanton D. 1999. "The Original Understanding of the Seventh Amendment Right to Jury Trial." *University of Richmond Law Review* 33 (2): 407–484.

Landes, William M. 1971. "An Economic Analysis of the Courts." *Journal of Law and Economics* 14 (1): 61–107.

Landsman, Stephan. 1993. "The History and Objectives of the Civil Jury System". In *Verdict: Assessing the Civil Jury System*, ed. R.E. Litan. Washington, D.C.: Brookings Institution.

Langbein, John H. 2012. "The Disappearance of Civil Trial in the United States." *Yale Law Journal* 122: 522–572.

Langbein, John H., Renee Lettow Lerner, and Bruce P. Smith. 2009. *History of the Common Law: The Development of Anglo-American Legal Institutions*. New York: Aspen.

Lempert, Richard. 1981. "Civil Juries and Complex Cases: Let's Not Rush to Judgment." *Michigan Law Review* 80 (1): 68–132.

Lempert, Richard. 1993. "Civil Juries and Complex Cases: Taking Stock After Twelve Years". In *Verdict: Assessing the Civil Jury System*, ed. R.E. Litan. Washington, D.C.: Brookings Institution.

Marcus, David. 2010. "The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform." *Georgia Law Review* 44 (2): 433–510.

Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis* 10 (2): 134–153.

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574. 1986.

McCormick, William. 1986. "The American Tort System: A Time to Rebalance the Scales of Justice." *Vital Speeches of the Day* 52: 267.

Merritt, Deborah Jones, and Kathryn Barry. 1999. "Is the Tort System in Crisis? New Empirical Evidence." *Ohio State Law Journal* 60 (2): 315–393.

Millar, Robert W. 1952. *Civil Procedure of the Trial Court in Historical Perspective*. New York: The Law Center of New York University for the National Conference of Judicial Councils.

Miller, Arthur R. 2003. "The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?" *New York University Law Review* 78 (3): 982–1134.

Miller, Arthur R. 2010. "From *Conley* to *Twombly* to *Iqbal*: A Double Play on the Federal Rules of Civil Procedure." *Duke Law Journal* 60 (1): 1–130.

Mitnick, John Marshall. 1988. "From Neighbor-Witness to Judges of Proofs: The Transformation of the English Civil Juror." *American Journal of Legal History* 32 (3): 201–235.

Mood, Carina. 2009. "Logistic Regression: Why We Cannot Do What We Think We Can Do, and What We Can Do About It." *European Sociological Review* 26 (1): 67–82.

Moses, Margaret L. 2000. "What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence." *George Washington Law Review* 68 (2): 183–257.

Mullenix, Linda S. 2012. "The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little." *Lyola University Chicago Law Journal* 43 (3): 561–591.

Murnighan, J. Keith. 1992. *Bargaining Games: A New Approach to Strategic Thinking in Negotiations*. New York: William Morrow and Company.

Nelson, William E. 1975. *Americanization of the Common Law*. Cambridge, MA: Harvard University Press.

Page, Benjamin I., and Robert Y. Shapiro. 1992. *The Rational Public: Fifty Years of Trends in American Policy Preferences*. Chicago, IL: University of Chicago Press.

Park, Jong Hee. 2010. "Structural Change in U.S. Presidents' Use of Force." *American Journal of Political Science* 54 (3): 766–782.

Pateman, Carole. 1970. *Participation and Democratic Theory*. Cambridge, UK: Cambridge University Press.

Pettitt, A.N., and S. Low Choy. 1999. "Bivariate Binary Data with Missing Values: Analysis of a Field Experiment to Investigate Chemical Attractants of Wild Dogs." *Journal of Agribultural, BIological, and Environmental Statistics* 4 (1): 57–76.

Plucknett, T.F.T. 1956. *A Concise History of the Common Law*. London: Butterworths and Co.

Polinsky, A. Mitchell, and Steven Shavell. 1998. "Punitive Damages: An Economic Analysis of Punitive Damages." *Harvard Law Review* 111 (4): 869–962.

Poller v. CBS, Inc., 368 U.S. 464. 1962.

Posner, Richard A. 1973. "An Economic Approach to Legal Procedure and Judicial Administration." *Journal of Legal Studies* 2 (2): 399–458.

Pregibon, Daryl. 1979. Data Analytic Methods for Generalized Linear Models PhD thesis University of Toronto.

Priest, George L. 1993. "Justifying the Civil Jury". In *Verdict: Assessing the Civil Jury System*, ed. R.E. Litan. Washington, D.C.: Brookings Institution.

Priest, George L., and Benjamin Klein. 1984. "The Selection of Disputes for Litigation." *Journal of Legal Studies* 13 (1): 1–56.

Pritchett, C. Herman. 1948. "The Roosevelt Court: Votes and Values." *American Political Science Review* 41 (1): 35–67.

Quintanilla, Victor D. 2011. "Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination." *Michigan Journal of Race and Law* 17 (1): 1–61.

Redish, Martin. 1975. "Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making." *Northwestern University Law Review* 70 (3): 486–531.

Resnik, Judith. 1982. "Managerial Judges." *Harvard Law Review* 96 (2): 374–448.

Ross, H. Laurence. 1980. *Settled Out of Court: The Social Process of Insurance Claims Adjustment*. New York, NY: Aldine De Gruyter.

Rousseau, Jean-Jacques. 2008. *The Social Contract*. Cosimo.

Schachner, Michael. 1995. "U.S. Public Frowns on Litigious Society." *Business Insurance* April 17.

Schlanger, Margo. 2006. "What We Know, and What We Should Know About American Trial Trends." *Journal of Dispute Resolution* 2006 (1): 35–50.

Schwartz, Rachael E. 1996. "'Everything Depends on How you Draw the Lines': An Alternative Interpretation of the Seventh Amendment." *Seton Hall Constitutional Law Journal* 6 (2): 599–630.

Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of the U.S. Supreme Court Justices." *American Political Science Review* 83 (2): 557–565.

Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York, NY: Cambridge University Press.

Sentell, R. Perry. 1991*a*. "The Georgia Jury and Negligence: The View from the Bench." *Georgia Law Review* 26 (1): 85–178.

Sentell, R. Perry. 1991*b*. "The Georgia Jury and Negligence: The View from the (Federal) Bench." *Georgia Law Review* 27 (1): 59–120.

Shapiro, David L. 1989. "Federal Rule 16: A Look at the Theory and Practice of Rulemaking." *Univerity of Pennsylvania Law Review* 137 (6): 1969–1998.

Shavell, Steven. 1982. "Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs." *Journal of Legal Studies* 11 (1): 55–82.

Silverstein, Gordon. 2009. *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*. New York: Cambridge University Press.

Staszak, Sarah. 2011. "Private Power and Public Policy: Rights Enforcement in the Modern Litigation State." *Tulsa Law Review* 47 (1): 77–85.

Staszak, Sarah. 2015. *No Day in Court*. New York, NY: Oxford University Press.

Stimson, James A. 1998. *Public Opinion in America: Moods, Cycles, and Swings*. Boulder, CO: Westview Press.

Story, Joseph. 1838. *Commentaries on Equity Pleadings; and the Incidents Thereof; According to the Practice of the Courts of Equity of England and America*. Boston: Charles C. Little and James Brown.

Subrin, Stephen N. 1987. "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Hisorical Perspective." *Univerity of Pennsylvania Law Review* 135 (4): 909–1002.

Subrin, Stephen N. 1988. "David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision." *Law and History Review* 6 (2): 311–373.

Sunderland, Edson R. 1925. "An Appraisal of English Procedure." *Michigan Law Review* 24 (2): 109–129.

Sunderland, Edson R. 1933. "Improving the Administration of Civil Justice." *Annals of the American Academy of Political and Social Science* 167: 60–83.

Sunstein, Cass. 1988. "Beyond the Republican Revival." *Yale Law Journal* 97 (8): 1539–1590.

Survey, Harris. 1989. "Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend At Least Half Their Time on General Civil Cases." *Boston University Law Review* 69: 731–763.

Sward, Ellen E. 2001. *The Decline of the Civil Jury*. Durham, North Carolina: Carolina Academic Press.

Thayer, James Bradley. 1898. *A Preliminary Treatise on Evidence at the Common Law*. Boston, MA: Little, Brown.

Thomas, Suja. 2007. "Why Summary Judgment is Unconstitutional." *Virginia Law Review* 93 (1): 139–180.

Tocqueville, Alexis De. 1863. *Democracy in America*. 3rd edition ed. Cambridge: Severs and Francis.

Tullock, Gordon. 1980. *Trials on Trial: The Pure Theory of Legal Procedure*. New York: Columbia University Press.

Vidmar, Neil, and Valerie P. Hans. 2007. *American Juries: The Verdict*. Amherst, NY: Prometheus Books.

Volscho, Thomas W., and Nathan J. Kelly. 2012. "The Rise of the Super-Rich: Power Resources, Taxes, Financial Markets, and the Dynamics of the Top 1 Percent, 1949 to 2008." *American Sociological Review* 77 (5): 679–699.

Wolfram, Charles W. 1973. "The Constitutional History of the Seventh Amendment." *Minnesota Law Review* 57 (4): 639–747.

Wood, Honorable Diane P. 2011. "Summary Judgment and the law of Unintended Consequences." *Oklahoma City Univeristy Law Review* 36 (1): 231–252.

Yeazell, Stephen C. 1990. "The New Jury and Ancient Jury Conflict." *University of Chicago Legal Forum* 1990 (1): 87–117.

Yeazell, Stephen C. 2004. "Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial." *Journal of Empirical Legal Studies* 1 (3): 943–971.