8-5-2008

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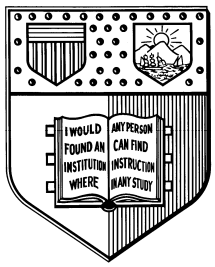

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Cornell Law School research paper No. 08-022

Draft of 5/28/08

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Theodore Eisenberg & Charlotte Lanvers*

Abstract

Prior research on summary judgment hypothesizes a substantial increase in summary judgment rates after a trilogy of Supreme Court cases in 1986 and a disproportionate adverse effect of summary judgment on civil rights cases. This article analyzes summary judgment rates in the Eastern District of Pennsylvania (EDPA) and the Northern District of Georgia (NDGA), for two time periods, 1980-81 and 2001-02. It also analyzes summary judgment rates for the Central District of California (CDCA) for 1980-81 and for other civil rights cases in the CDCA in 1975-76. The combined sample consists of over 5,000 cases. The three-district sample for 1980-81 had an overall summary judgment rate of 4.5%. The summary judgment rate increased from 6.5% to7.0% in the two-district EDPA and NDGA sample from 1980-81 to 2001-02, a statistically insignificant difference. The pattern was inconsistent across case categories. For contract, tort, and a residual category of other noncivil rights cases, there was no evidence of a significant increase in summary judgment rates over time. Interdistrict differences were not dramatic in these three areas except that NDGA had a higher rate of summary judgment in tort and contract cases than did EDPA. The most striking effect was the approximate doubling—to almost 25%—of the NDGA summary judgment rate in employment discrimination cases and a substantial increase in the NDGA summary judgment rate in other civil rights cases. Subject to the limitation that both time periods studied are removed in time from the Supreme Court's 1986 summary judgment trilogy, the only strong evidence in this study of a post-trilogy increase is in NDGA employment discrimination cases. Civil rights cases had consistently higher summary judgment rates than noncivil rights cases and summary judgment rates were modest in noncivil rights cases.

Prepared for The First International Conference
on Empirical Studies of Judicial Systems
Institutum Iurisprudentiae, Academia Sinica
Tapei, Taiwan

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I. Introduction

Summary judgment is one of the most important methods of pretrial disposition in U.S. federal courts. Rule 56 of the Federal Rules of Civil Procedure authorizes summary judgment in whole or in part when the record in a case establishes that a party is entitled to judgment as a matter of law. Entitlement to judgment as a matter of law requires that there be no material facts at issue that must be resolved at trial. Courts render summary judgment without trial and based on the conclusion that, "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact . . .."[1] Although summary judgment was often regarded as an ineffective procedural device until the Supreme Court expanded its availability in the summary judgment trilogy of 1986,[2] it has since been labeled the "device of greatest interest in modern times . . .."[3]

As a prominent feature of the civil procedure landscape, summary judgment has been blamed or credited with important developments. Marc Galanter has documented the striking decline in trial rates since the 1960s[4] and summary judgment has been said to contribute to that decline. Well-informed sources, including Judge Richard Posner and others, have identified summary judgment as a source of the decline of trials,[5] and as part of a shift from trial-centered to motion-centered adjudication.[6] In addition to allegedly shifting procedural outcomes away from trial, summary judgment has been blamed for substantive results. Commentators suggest that summary judgment has contributed to unsatisfactory treatment of employment discrimination claims[7] and to a decline in the Seventh Amendment right to trial by jury.[8] In general, business interests seek to expand the scope of summary judgment while civil rights groups regard its possible expansion as an obstacle to just

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[1] FRCP Rule 56(c).

[2] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). For a thorough list of articles suggesting summary judgment's historical ineffectiveness, see Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, A Quarter-Century of Summary Judgment Practice in Six Federal District Courts, 4 J. Empirical Legal Stud. 861, 865 n.10 (2007).

[3] Kevin M. Clermont, Litigation Realities Redux (forthcoming).

[4] Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459 (2004).

[5] E.g., Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997) (the "expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial") (Posner, J.); Milton I. Shadur, Trials or Tribulations (Rule 56 Style)? 29 Litigation (No. 2) at 5 (2003) (referring to "the growth of the summary judgment industry as a replacement for the civil trial").

[6] Paul W. Mollica, Federal Summary Judgment at High Tide, 84 Marquette L. Rev. 141, 143 (2000).

[7] Ann C. McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 B.C. L. Rev. 203, 228 n.111 (1993).

[8] Mollica, supra note 6.

adjudication, especially in the area of employment discrimination.

Summary judgment reform is on the agenda of the Advisory Committee on Civil Rules and has been at least since the Supreme Court's 1986 trilogy. The Committee received a report on a proposal to revise Rule 56 in 1992 but the Judicial Conference rejected the proposal.[9] The Committee hosted a conference on Civil Rule 56 in late 2007 and revision of the Rule is under consideration. To its credit, the Committee has sought systematic empirical information about Rule 56's operation and the Federal Judicial Center (FJC) has responded with excellent studies, summarized below.

For purposes of this paper, at least four empirical questions relating to summary judgment are worth separating. First, the aggregate, national summary judgment rate is of obvious interest. That is, what portion of filed cases terminated as the result of summary judgment? This question is of interest much in the same way that national trends in housing prices are of interest. The national rate gives an overall measure, though the aggregate measure might not apply to any particular locale or type of case. Second, has the summary judgment rate changed over time? This question is important to reform proposals that assume that summary judgment rates have increased or decreased over time. Third, moving beyond aggregate rates and time trends, to what extent do summary judgment rates vary by case category? Rates and time trends may differ across case categories. Fourth, to what extent do summary judgment rates vary by locale? Prior work provides some insight into each of these questions though none of them have been answered definitively.

This article provides a rare comprehensive assessment of summary judgment rates for specific case categories at different times in the same districts. The most comprehensive study of summary judgment, conducted by the FJC, establishes that summary judgment rates differ significantly across case categories.[10] But existing studies provide imprecise measures of summary judgment rates by case category. That imprecision limits our ability to accurately describe summary judgment rates at specific points in time. The imprecision also limits the ability to assess changes in summary judgment rates over time. Our primary goal is descriptive: to provide reasonable estimates of summary judgment rates by case category, by district, and over time. We thus hope to improve the information available to policymakers assessing how summary judgment has functioned.

Using data from three large federal districts, the Central District of California (CDCA), the Eastern District of Pennsylvania (EDPA), and the Northern District of Georgia (NDGA), we first estimate the summary judgment rate to have been four to five percent in 1980-81. For the EDPA and NDGA, summary judgment rates are available both before and after the Supreme Court trilogy. By focusing on detailed case categories in these districts before and after the trilogy, this study provides evidence about whether the trilogy is associated with increased summary judgment rates. Summary judgment rates in employment

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[9] Rule 56 Agenda Materials from Oct. 2005 Meeting at 1 (Aug. 2005 draft).

[10] Memorandum from Joe Cecil & George Court to Judge Michael Baylson "Re: Initial Report on Summary Judgment Practice Across Districts with Variations in Local Rules" (Nov. 2, 2007).

discrimination cases in the NDGA were significantly higher in 2001-02 than in 1980-81. The NDGA summary judgment rate in employment discrimination cases almost doubled and reached approximately 25% of terminations in 2001-02. A substantial increase, but not statistically significant, also occurred in the NDGA summary judgment rate in other civil rights cases. Similar increases were not observed in the Eastern District of Pennsylvania (EDPA) for either employment discrimination or other civil rights cases. We found no evidence of significant increases in summary judgment rates in tort or contract cases in either district. Results for the CDCA are similar to the other districts to the extent comparable data were available. Civil rights cases tended to have higher rates of summary judgment than other cases. Sensitivity to case categories and districts is thus needed in studies of summary judgment.

Part II of this article describes prior empirical research on summary judgment rates. Part III describes this article's data and methods. Part IV presents the empirical results, which are discussed in Part V. Part VI concludes.

II. Prior Empirical Research on Summary Judgment

Several empirical studies of summary judgment exist. A review of post-trilogy doctrinal developments found "a widespread and dramatic recasting of summary judgment doctrine by the lower courts."[11] This evaluation of published opinions was consistent with other contemporary summary judgment studies.[12] A study of appellate court opinions for 1973 and 1997-98 found a shift towards summary judgment and against trial in "civil cases migrating up the appellate channel."[13] These studies suggest a significant shift summary judgment rates, as quantified by available opinions discussing summary judgment doctrine. But such studies cannot purport to establish a shift in summary judgment practice in the mass of cases. The studies are limited to available opinions and courts might be expected to write opinions if they are granting a motion that terminates a case or discussing recent doctrine. Patterns in published opinions can differ from patterns in the mass of cases.[14] With the

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[11] Samuel Issacharoff & George Lowenstein, Second Thoughts About Summary Judgment, 100 Yale L.J. 73, 88, 92 (1990) (reviewing 140 contested summary judgment motions).

[12] Note, Summary Judgment in Federal Court: New Maxims for a Familiar Rule, 34 N.Y.L. Sch. L. Rev. 201, 281 & n.125 (1989) (reporting no decision entered after trial on the merits in antitrust cases).

[13] Mollica, supra note 6, at 143. See also Paul W. Mollica, Employment Discrimination Cases in the Seventh Circuit, 1 Emp. Rights & Emp. Pol'y J. 63, 67–68 (1997) (study of Seventh Circuit employment cases). Additional studies are cited in Stephen B. Burbank, Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Towards Bethlehem or Gomorrah? 1 J. Empirical Legal Stud. 591, 605 (2004).

[14] E.g., Theodore Eisenberg & Sheri Lynn Johnson, The Effects of Intent: Do We Know How Legal Standards Work?, 76 Cornell L. Rev. 1151, 1172-75 (1991); Theodore Eisenberg & Stewart J. Schwab, What Shapes Perceptions of the Federal Court System?, 56 U. Chi. L. Rev. 501 (1989); Theodore Eisenberg & Martin T. Wells, Punitive Awards After *BMW*, A New Capping System, and the Reported Opinion Bias, 1998 Wisc. L. Rev. 387; Peter Siegelman & John J. Donohue III, Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases, 24 Law & Soc'y Rev. 1133 (1990).

publicity accompanying the Supreme Court's summary judgment trilogy, changes in doctrinal discussion and in patterns of reported cases might reasonably have been expected. Detecting an actual change in summary judgment's prominence in the mass of cases can only be conclusively established by examining the mass of cases. This has been done in a few FJC studies, discussed below, which provide little evidence of systematic change in summary judgment rates since the trilogy.

A. Assessing the Overall Summary Judgment Rate

With respect to the overall summary judgment rate, the most comprehensive summary judgment study is described in a FJC 2007 Memorandum ("FJC Memorandum") covering 118,796 federal cases terminated in fiscal year 2006, 43% of that year's federal terminations.[15] The FJC estimated that 4,386, about four percent, of these cases were terminated by summary judgment.[16] The estimate was based on "identifying those cases that court records indicate were resolved through a dispositive motion before trial and included at least one summary judgment motion that was granted in whole."[17] One limitation of the FJC 2007 Memorandum is that it cannot identify with certainty all cases terminated via summary judgment.[18] And since it is a cross-sectional study of one year, it does not provide information about time trends, though it gives the best available estimate of summary judgment activity in recent years.

A 2007 FJC study published in the *Journal of Empirical Legal Studies* ("FJC-JELS") reported on summary judgment activity in six federal district courts for six time periods spanning 25 years (1975-2000).[19] The FJC-JELS study is not as comprehensive as the FJC Memorandum with respect to any individual year. But, unlike the FJC Memorandum, the FJC-JELS study covers multiple time periods. It thus provides the best available estimate to date of summary judgment activity over time. The study is extraordinary in that it estimates both the rates at which cases contained summary judgments and the rate at which summary judgment terminated cases. The study found that the rate at which cases contained motions for summary judgment increased from about 12% in 1975 to about 17% in 1986 and remained at about 19% since 1986. The study also found that summary judgment terminated 3.7% of cases in 1975 and 7.8% of cases in 2000.[20]

Although the FJC-JELS study continues to provide the best estimate of summary judgment rates over time, the latter figure of 7.8% for 2000, based on a smaller sample than the FJC Memorandum, may be too high. If the national estimates of a 7.8% summary

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[15] Memorandum, supra note 10.

[16] Id. at 15 (tbl. 12).

[17] Id. (underscore in original).

[18] Memorandum, supra note 10, at 15.

[19] Cecil et al., supra note 2.

[20] Cecil et al., supra note 2, at 881-83.

judgment rate in 2000 and a four percent summary judgment rate in 2006 are both correct, then the rate of summary judgment plummeted by 50% in a period of six years. It may be that the six-district sample was not fully representative of all federal districts or case categories, and therefore that a national point estimate based on the 2000 sample was biased upward. Interestingly, Stephen Burbank's report of a detailed estimate of the summary judgment rate for the EDPA in fiscal year 2000 is 4.1%,[21] much closer to the FJC-Memorandum's 2006 estimate of an overall four percent rate than to the FJC-JELS estimate of an overall summary judgment rate of 7.8% in 2000.[22]

The FJC-JELS study has another important limitation. The point estimates within districts and years for particular case categories are likely too imprecise to isolate within-district changes in summary judgment rates over time. For example, in 1986 in the EDPA, the FJC-JELS study included 221 civil case terminations, including prisoner cases.[23] The study excluded prisoner cases from the analysis so the analyzed sample was 221 cases minus the prisoner cases randomly sampled. Since prisoner cases comprised 740 of 7,812 EDPA terminations in the 1986 sample period,[24] one expects the 1986 EDPA results to be based on about 200 nonprisoner cases. It is within these 200 cases that the 1986 data includes its civil rights and other case category subsamples of cases. There were 586 civil rights case terminations out of 6,484 total terminations included in the 1986 sample.[25] So about (586/6,484) times 200 sample cases would be expected to be civil rights cases in the 1986 sample. This yields 18 expected civil rights cases for the 1986 sample.

Limiting consideration to the employment discrimination subset of the larger civil rights case category further reduces the sample. Employment discrimination cases comprised about 31% of the terminated civil rights cases from which the 1986 sample was drawn. This yields an expected sample size of six employment discrimination cases. Assuming the actual sample conforms to the expected sample, the summary judgment rate for employment discrimination cases in this sample has a 95% confidence interval ranging from zero percent summary judgments to 64% summary judgments. This is far too broad a range to permit reliable inferences about the employment discrimination case summary

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[21] Burbank, supra note 13, at 616.

[22] Information relating to the national federal summary judgment rate is available from a random sample of 400 federal cases terminated in 2000 and 2001. Gillian K. Hadfield, Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases, 1 J. Empirical Legal Stud. 705 (2004). Hadfield reports a "Nontrial adjudication" rate of 2.4% for one disposition code and of 2.7% (± 2.3%) for a second code. The nontrial adjudication terminations include, but are not limited to, summary judgments, id. at 724-25 (tbls. 2, 3). But the disposition codes do not include all codes that might be used to record a summary judgment termination. Id. at 723 (describing other disposition codes).

[23] Cecil et al., supra note 2, at 877 (tbl. 1).

[24] We use the same samples period as the FJC-JELS study. See Cecil et al., supra note 2, at 875-76 for a description.

[25] Cecil et al., supra note 2, at 877 (tbl. 1). Social security cases and benefit repayment cases were excluded from the samples. Id. at 876 n.46. We similarly exclude these classes of cases.

judgment rate in 1986, and therefore to support inferences about changes in the employment discrimination case summary judgment rate over time.

Table 1 reports the above 1986 calculation as well as similar calculations for all the other time periods in the FJC-JELS EDPA sample. Columns (3) and (4) summarize our estimate of the number of civil rights cases and employment discrimination cases included in the FJC-JELS EDPA samples. As column (4) shows, the estimated number of employment discrimination cases in the EDPA (and likely in other districts) data are too few to permit reliable estimates of the summary judgment rate in employment discrimination cases. Based on an assumed summary judgment rate of 10%, column (5) provides an estimated confidence interval for the summary judgment rates for employment discrimination cases. The corresponding estimated 95% confidence intervals are wide and essentially meaningless except for the 1995 and 2000 samples. Even for these two most recent samples, the confidence intervals are so wide that reliable estimates of time trends in EDPA employment discrimination cases likely cannot be made from these data. Knowing, for example, that the estimated summary judgment rate for 1995 is in the range of two percent to 28% when that range likely encompasses nearly all plausible summary judgment rates is not a very useful estimate. More comprehensive information is needed.

Table 1. Estimates of EDPA Civil Rights Cases in FJC-JELS Sample

	(1)	(2)	(3)	(4)	(5)
FJC sample year	Reported sample size[a]	Nonprisoner sample size[b]	Number of civil rights cases[b]	Number of employment discrimination cases[b]	Estimated 95% CI of summary judgment rate[c]
1975	490	446	34	2	0.00—0.84
1986	221	200	18	6	0.00—0.64
1988	336	296	25	8	0.00—0.53
1989	340	303	24	8	0.00—0.53
1995	629	497	89	28	0.02—0.28
2000	628	533	135	65	0.03—0.19

Notes. [a] Reported sample size is from Cecil et al., JELS (2007). [b]Nonprisoner sample size, number of civil rights cases, and number of employment discrimination cases are estimates based on Federal Court Integrated Database data for the relevant time periods. [c]Confidence interval estimates are for employment discrimination cases and are based on an assumed number of summary judgments closest to a 10% rate (0 summary judgments for 1975, 1 for 1986, 1988, and 1989, 3 for 1995, and 7 for 2000).

B. Summary Judgment Over Time

Study of summary judgment over time suggests that the summary judgment rate has increased since the 1960s. But the FJC-JELS study found the timing of the increase to be surprising. The increase in summary judgment activity predated the Supreme Court trilogy.[26] The sample size limitations of the FJC-JELS study, explored in Table 1, suggest that additional information about historic summary judgment rates would be helpful.

[26] Cecil et al., supra note 2.

This is especially so because the difference between the FJC Memorandum and the FJC-JELS summary judgment overall estimates has important implications for the time trend of summary judgments. If the four percent summary judgment rate is correct for 2006, and is less than four percent for the important case categories of contract and tort,[27] then there is little room for summary judgment rates to have consistently increased over time. Since summary judgment rates cannot be negative, a rate of less than four percent cannot be the result of steady substantial increases over a lengthy time period. If one accepts the FJC-JELS estimate of summary judgment terminating 3.7% of cases in 1975, then the 2006 overall summary judgment rate of four percent is not noticeably different from the rate observed 31 years earlier.

Important additional information about possible changes over time comes from Stephen Burbank's study of the EDPA. Burbank reported on summary judgment rates in the EDPA for the fiscal years 2000 through 2003.[28] Table 2 summarizes his results. The consistent rates of four percent or so that he finds during the 2000 to 2003 period also supports there being little room for summary judgment rates to have increased dramatically after the trilogy. If four percent constitutes a noticeably increased rate, the prior rate would have to be approximately zero.

Table 2. Summary Judgment Rate, Eastern District Pennsylvania, 2000-2003

Fiscal year	Number of summary judgments	Number of Terminations	Summary Judgment Rate
2000	293	7148	4.1%
2001	343	8430	4.1%
2002	448	13277	3.4%
2003	565	11946	4.7%

Source. Burbank, JELS (2004).

C. Case Category Variation

Existing research suggests substantial variation in summary judgment rates across case categories. The FJC-JELS study reported that increased summary judgment activity is associated with civil rights cases. For each of six time periods from 1975 to 2000, the study found that summary judgment motions were filed at a higher rate in civil rights cases than in tort, contract, or a residual category of other cases.[29] Defendants' motions were also granted at a higher rate in civil rights cases.[30] The 2007 FJC Memorandum also showed substantial variation across case categories for 2006 cases. Across three variants of local

[27] Memorandum, supra note 10, at 15 (tbl. 12) (showing summary judgment rates of 3% in contract cases and 2% in tort cases).

[28] Burbank, supra note 13, at 616.

[29] Cecil et al., supra note 2, at 884 (fig. 3).

[30] Id. at 887 (fig. 6). Plaintiffs' summary judgment motions were less successful in civil rights cases than in other categories of cases. Id. at 889 (fig.8).

rules dealing with summary judgment,[31] employment discrimination cases had by far the highest rates of summary judgment (14%, 10%, and 9% across the three kinds of local rules), followed by other civil rights cases (six percent for all three local rule variations). Contract cases and tort cases had about three percent and two percent summary judgment rates, respectively, and other cases had about a two percent rate.[32] A preliminary 2001 FJC study also found higher rates of summary judgment in civil rights cases.[33] An earlier study using some of the data analyzed in this article found high summary judgment rates in federal employment discrimination cases.[34]

D. Interdistrict Variation

Available data suggest that interdistrict variation in summary judgment rates is the norm. As noted above, the 2007 FJC Memorandum reported substantial differences in summary judgment rates across varying local rules.[35] The FJC-JELS study further illustrates interdistrict variation. A principal finding of that study is the pre-trilogy increase in summary judgment activity. But that finding is not uniform across districts. Some

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[31] The FJC Memorandum groups local rules into three categories: The first group consisted of twenty federal districts that, in general,

> require the moving party to include a statement of undisputed facts with its motion for summary judgment, and require the non-moving party to respond to the movants statement, fact by fact. . . .
>
> The second group consisted of thirty-six federal district courts with local rules that require the moving party to include a statement of undisputed facts, but do not require the respondent to address each fact. . . .
>
> The third group consisted of thirty-six federal district courts that do not require the moving party to submit a statement of undisputed facts with its motion . . .."

FJC Memorandum, supra note 10, at 1-2.

[32] The FJC study reports exclusions as follows:

> We excluded cases designated as class actions (though we have learned from other research that the attorney designation of a class action is an imprecise indicator of such cases), cases consolidated in multidistrict litigation proceedings, cases reopened or remanded from the courts of appeals, and cases appealed from magistrate judges rulings. We also excluded asbestos personal injury product liability cases, bankruptcy appeals and withdrawals (because summary judgment motions are not filed, social security cases (because summary judgment motions are the procedural device used to review the decision of the administrative law judge), and prisoner cases (because such cases are likely to be exempt from the proposed rule due to the pro se nature of the plaintiff).

FJC Memorandum, supra note 2, at 3.

[33] Joe S. Cecil, Dean P. Miletech & George Cort, Federal Judicial Center, Trends in Summary Judgment Practice: A Preliminary Analysis 5 (2001).

[34] Charlotte L. Lanvers, Different Federal District Court, Different Disposition: An Empirical Comparison of ADA, Title VII, Race and Sex, and ADEA Employment Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia, 16 Cornell J. L. & Pub. Pol'y 381, 395 (2007).

[35] Memorandum, supra note 10, at 15 (tbl. 12).

increase occurred in all six studied districts but the magnitude of the increase during that period varied considerably, from more than doubling in the Southern District of New York to trivial increases in the Northern District of Illinois and in the District of Maryland. In three of the six studied districts the largest increase in the rate of filing summary judgment motions occurred from 1975 to 1986, before the trilogy.[36] During the critical periods before and after the trilogy and closest to it, 1986 and 1988, the rate of summary judgment motions increased in three districts, remained stable in two districts, and declined in one district.[37]

Whatever the value of a single, aggregate national summary judgment figure,[38] the existing empirical literature establishes the importance of sensitivity to time, case category, and locale.

III. Data and Methods

The data analyzed here come from one new data gathering initiative and two prior studies. The new initiative consists of data gathered on cases in the EDPA and NDGA in 2001-02. The larger of the two prior studies focused on civil right cases in 1980-81 in the EDPA, NDGA, and CDCA.[39] That study included a control group of noncivil rights cases in each district. The second prior study focused on section 1983 cases in 1975 and 1976 in the CDCA.[40] Data in that study did not include information about the other major civil rights category, employment discrimination cases, and did not include a control group of noncivil rights cases. The two datasets with EDPA and NDGA cases allow precise estimates of summary judgment rates in employment discrimination and other civil rights cases at two points in time, one before and one after the summary judgment trilogy. The datasets' samples of noncivil rights cases also allow less precise estimates of summary judgment rates in noncivil rights cases for those districts over time. The 1980-81 CDCA data provide, for 1980-81 in a third district, reliable estimates of summary judgment rates for employment discrimination and other civil rights cases and a reasonable estimate of summary judgment rates in noncivil rights cases. The 1975-76 CDCA data provide a good estimate of the summary judgment rate in an important case category, section 1983 cases, and, when compared to other civil rights cases in the CDCA in 1980-81, information about summary

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[36] Cecil et al., supra note 2, at 883.

[37] Id.

[38] The figures here are limited to federal courts. In state court tort cases, the best available evidence is that summary judgment rates vary from 4.5% in product liability cases to 1.0% in automobile cases. The summary judgment rate across all tort cases was 1.7%. These figures are based on 1992 data from 45 of the 75 largest counties. Bureau of Justice Statistics Bulletin: Civil Justice Survey of State Courts, 1992: Tort Cases in Large Counties 3 (1995) (tbl. 2).

[39] Stewart J. Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L. Rev. 719 (1988); Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 Cornell L. Rev. 641 (1987).

[40] Theodore Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 Cornell L. Rev. 482 (1982).

judgment over time for these cases in one large district. The period from 1975-76 to 1980-81 is of interest because, as noted above, the FJC has reported that a notable increase in summary judgment rates occurred before the 1986 summary judgmenty trilogy.

A. The 2001-02 Data

The 2001-02 data analyzed here have three distinct components for each of two time periods in two large federal district courts: the NDGA and the EDPA. The components are job discrimination cases (Administrative Office of U.S. Courts (AO) case category code 442[41]), other civil rights cases (AO code 440), and a comparison group of noncivil rights cases. The two time periods are all cases terminated from July 1, 2001 through December 31, 2001 and all cases filed from January 1, 2002 through July 31, 2002.

Information was gathered using PACER[42] for the two largest federal civil rights case categories: all job discrimination cases (AO code 442), and other civil rights cases (AO code 440) *terminated* from July 1, 2001 through December 31, 2001. As a comparison group, information was also gathered on 317 noncivil rights cases in the NDGA as follows: the 317 cases were a random sample of 1149 terminations in the NDGA. Every third case (beginning randomly at the first terminated case) of the 1149 terminations was included except the following AO case categories were excluded from the comparison group and skipped if they were randomly selected: social security appeals, U.S. foreclosures on student loans property, incorporation of foreign judgments (AO codes 863-865, 625, 690, 152, 890[43]). All civil rights and prisoner cases were excluded from the comparison group (AO codes 441, 442, 443, 510-555). In the EDPA, the comparison group for this time period consisted of 380 cases out of 2332 terminations with the same exclusions from the comparison group. In the EDPA, every sixth case was included in the comparison group sample with the same exclusions as in the NDGA.

The second time period for the EDPA and NDGA covered all cases *filed* from January 1, 2002 through July 31, 2002. All job discrimination and other civil rights cases were again included. For the NDGA, the random comparison group, again using every third case, consisted of 331 out of 1084 noncivil rights filings during the seven month 2002 time period. The same AO case code categories that were excluded from the six month 2001 time period were also excluded from the comparison group of cases used for the 2002 time period. For the EDPA, the random comparison group, using every sixth case, consisted of 393 cases out of 2471 terminations with the same case category exclusions as in the other comparison

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[41] For a description of Administrative Office case category codes, Federal Judicial Center. Federal Court Cases: Integrated Data Base, 1970-2000 [Computer file]. Conducted by the Federal Judicial Center. ICPSR08429-v7. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [producer and distributor], 2005-04-29.

[42] PACER is the Public Access to Court Electronic Records system of the federal courts. See http://pacer.psc.uscourts.gov/.

[43] Code 890 is a residual category that includes a broad range of "other statutory actions." Those actions that fit into case categories otherwise included in the study, but that were coded as 890, were included in the sample.

groups.

Because the 2001 and 2002 subsamples were selected differently—one based on terminated cases and one based on filed cases—one possible concern is that they produce heterogeneous samples that cannot reasonably be combined. We therefore explored the relation between the summary judgment rates in the 2001and 2002 subsamples for the EDPA and NDGA. The 95% confidence intervals for the summary judgment rates overlap for each of the five components of the 2001 and 2002 samples (jobs, other civil rights, other, contract, and tort), within each district.[44] It is therefore reasonable to combine the 2001 and 2002 samples at the district level for purposes of this analysis.

Data fields for the 2001-02 data were coded primarily from docket sheets and complaints available via PACER. Thus, the procedural stage, including whether summary judgment was entered, the case category, and time-related information were obtained directly from court records. But entire case files were not scrutinized. Additional coding information about the 2001-02 data is reported elsewhere.[45]

B. The 1980-81 Data and the 1975-76 Data

The 1980-81 data analyzed here for all three districts were gathered as part of a study of all civil rights cases filed in fiscal year 1980-81,[46] which covered the time period October 1, 1980 through September 30, 1981. For each district, information about all civil rights cases was gathered, with civil rights cases being determined by the AO case code categories. In addition, for each district information was gathered on a random sample of noncivil rights cases.

The 1975-76 data covered the calendar years 1975 and 1976 and included all section 1983 cases filed in the Central District of California filed in those years.[47] The study counted as a section 1983 case any case in which a section 1983 claim had been made.[48] It includes 136 nonprisoner cases filed in 1975 and 140 nonprisoner cases filed in 1976.[49] The 1975-76 data do not include a control group or other classes of civil rights cases.

C. Summary of Summary Judgment Rates by District, Case Category, and Time

For purposes of this analysis, we further divided the noncivil rights case control groups in the 2001-02 data and the 1980-81 data into subcategories consisting of contract,

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[44] These results are available from the authors.

[45] Lanvers, supra note 34, at 394.

[46] Eisenberg & Schwab, supra note 39, at 642 n.1, 657-58; Schwab & Eisenberg, supra note 39, at 721, __; .

[47] Eisenberg, supra note 40, at 524.

[48] The study counted as a section 1983 case any case in which a section 1983 claim was made, even if the plaintiff erroneously relied on section 1983, as when suing only private parties. This sort of error did not occur frequently enough to materially affect results. Eisenberg, supra note 40, at 526.

[49] Id.

tort, and other cases. Table 3 describes the resulting sample of 5,550 cases, including 508 summary judgments, analyzed here. To promote compatibility of the control groups across the two major time periods, we exclude from both time periods' control groups cases with AO codes excluded in whole or in part from the 2001-02 control groups, as shown in the text note at the base of Table 3.

Table 3. Number of Cases and Summary Judgment Rate

District	Case category	Time period	Number of cases	Summary judgment rate
CDCA	job disc.	1980-81	224	0.05
CDCA	other civil rights	1980-81	216	0.08
CDCA	other civil rights	1975-76	260	0.05
CDCA	other	1980-81	157	0.03
CDCA	contracts	1980-81	213	0.01
CDCA	torts	1980-81	77	0.00
EDPA	job disc.	1980-81	108	0.13
EDPA	job disc.	2001-02	444	0.08
EDPA	other civil rights	1980-81	234	0.09
EDPA	other civil rights	2001-02	616	0.09
EDPA	other	1980-81	44	0.16
EDPA	other	2001-02	198	0.07
EDPA	contracts	1980-81	56	0.00
EDPA	contracts	2001-02	199	0.05
EDPA	torts	1980-81	78	0.01
EDPA	torts	2001-02	369	0.02
NDGA	job disc.	1980-81	176	0.11
NDGA	job disc.	2001-02	571	0.24
NDGA	other civil rights	1980-81	126	0.11
NDGA	other civil rights	2001-02	303	0.20
NDGA	other	1980-81	42	0.10
NDGA	other	2001-02	229	0.05
NDGA	contracts	1980-81	97	0.06
NDGA	contracts	2001-02	197	0.05
NDGA	torts	1980-81	94	0.13
NDGA	torts	2001-02	222	0.07

"Other" terminations and filings were a random sample of noncivil rights cases, excluding social security appeals, U.S. foreclosures on student loans, incorporation of foreign judgments (AO codes 863-865, 625, 690, 152, some 890 (see note 43 supra)) and all cases with AO codes 441, 442, 443, 510-555.

Systematic computerized PACER searches for cases by category were not available for the time periods 1980-81 data and 1975-76 data. Cases were identified as being in relevant case categories and districts over 20 years ago by using Administrative Office filing

and termination data, furnished on computer tapes in the course of earlier studies.[50] The tapes supplied docket numbers and the data were coded from physical inspection of court files at the offices of the three studied districts. The procedural stage and other information used were thus obtained directly from court records.

The complex observational sample constructed suggests the use of weights in our statistical analysis because the probability of a case being included in the sample varied by district, case category, and time.[51] In the results below, probability weights are used where appropriate, with the weight assigned to a case being the inverse of the probability of the case being in the sample.

IV. Results

A. Overall Summary Judgment Rates

The summary judgment rate in 1980-81 for the three districts combined was 4.5%. Given that the three districts combined for 8.1% of all federal nonbankruptcy civil filings in the 1980-81 time period,[52] 8.7% of the population, and have reasonable geographic diversity, this 4.5% rate would not be an unreasonable national federal district court estimate. But the aggregate figure combines noticeably different rates across the three districts. The overall summary judgment rate was 5.0% in EDPA, 9.6% in NDGA, and 2.2% in CDCA. The interdistrict difference in rates is highly statistically significant ($p<0.001$). For the two districts for which 2001-02 data are available, EDPA and NDGA, the 1980-81 rate was 6.5% and the difference between them was statistically significant ($p=0.044$).

For 2001-02, the combined summary judgment rate was 7.0% for the EDPA and NDGA combined, a slight increase over the 6.5% 1980-81 rate for these two districts. The aggregate 2001-02 figure again masks heterogeneity. The 2001-02 summary judgment rate for EDPA was 5.0% compared to 10.9% for NDGA, a result significantly different at $p<0.001$. Thus, even a two-district study suggests risks in reading much into aggregated rates.

The within-district changes over time were not statistically significant. EDPA had a 5.0% summary judgment rate in both time periods. The NDGA rate increase from 9.6% in 1980-81 to 10.9% in 2001-02 is only significant at $p=0.526$. The difference over time for these two districts combined is far from statistically significant ($p=0.700$).

But district-level results can themselves oversimplify because of variation across case categories. As the FJC Memorandum suggests for 2006, summary judgment rates vary

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[50] See Schwab & Eisenberg, supra note 39, at 722. The AO and the FJC have since made federal court data publicly available through the electronic data archive maintained by the Interuniversity Consortium for Political and Social Research.

[51] See Roderick J. Little, To Model or Not to Model? Competing Modes of Inference for Finite Population Sampling, 99 J. Am. Statistical Ass'n 546 (2004).

[52] Schwab & Eisenberg, supra note 39, at 721 n.8

substantially by case category.[53] A district with a high proportion of cases in categories with high summary judgment rates might not be comparable to a district with a low proportion of such cases. To account for district, time, and case type, it is helpful to report separate summary judgment rates for each of these characteristics.

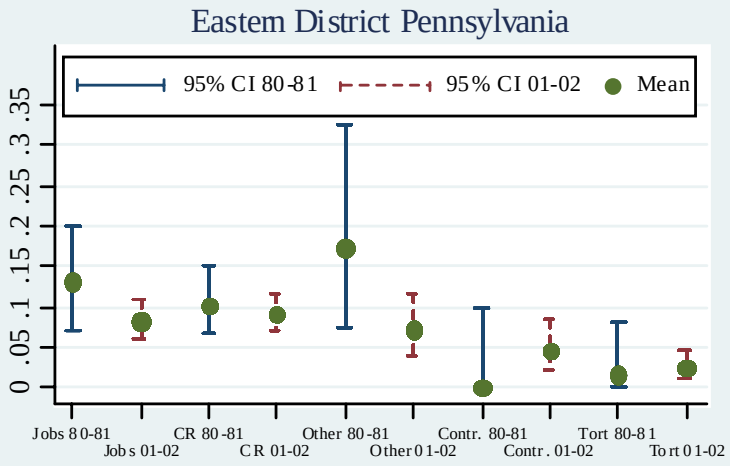
B. Summary Judgment Rates by Case Category, Locale, and Time

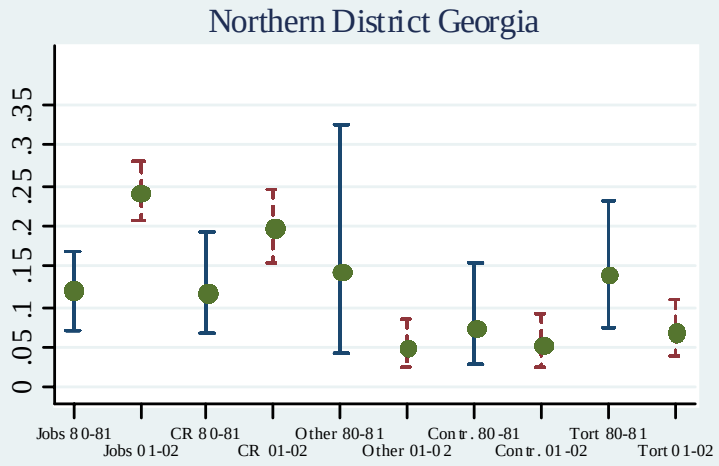
Figure 1 breaks down summary judgment rates by district, time, and case category. Each of the three graphs in the figure represents one of the three studied districts. The two upper graphs show results for the two districts with 1980-81 and 2001-02 data, EDPA and NDGA. The lower graph shows the results for CDCA for 1975-76 (other civil rights case only) and 1980-81. Within each graph, the figure shows the summary judgment rates over time (when available for a case category for more than one time), as indicated by the solid and dashed vertical lines. The figure also accounts for case categories, as labeled on the x-axis. For each of the five case categories in the top two graphs, the vertical bar representing the 95% confidence interval for the 1980-81 time period appears next to the vertical bar representing the 95% confidence interval for the 2001-02 time period.[54] For the CDCA case categories, in the lower graph, the time dimension is shown only for the other civil rights case category because data over time were only available for that category. The circular symbol on each bar shows the observed summary judgment rate.

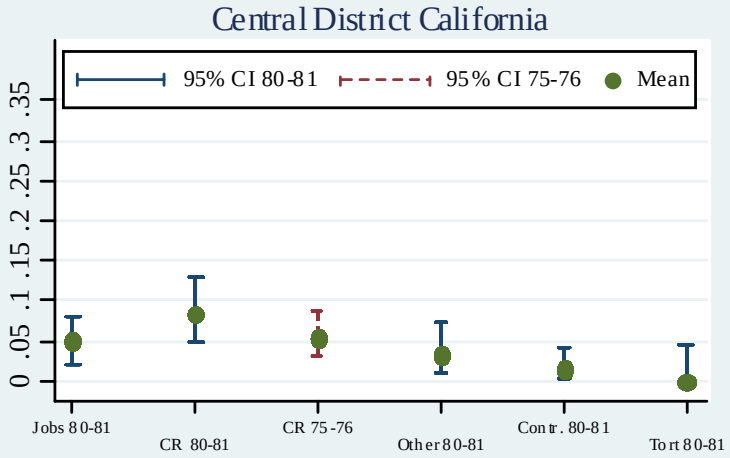
[53] Cecil et al., supra note 2.

[54] For employment discrimination cases in 1980-81 and 2001-02, and other civil rights cases in those years and in 1975-76, our data include all cases, not a sample. For discussion of applying principles of classical statistical inference to populations, see, e.g., Little, supra note 51; M.A. Summerfield, Populations, Samples and Statistical Inference in Geography, 35 Prof. Geographer 143 (1983).

Figure 1. Summary Judgment Rates, Three Federal Districts, 1975-76, 1980-81 & 2001-02







The figure shows that, in the EDPA, summary judgment rates decreased in jobs (employment discrimination), other civil rights, and other cases. Rates increased in contract and tort cases. The overlap of all of the time-paired EDPA 95% confidence intervals indicates that one cannot reject the hypothesis of no statistically significant change in summary judgment rates over time within any of the reported case categories.

The NDGA results are similar to those for the EDPA for noncivil rights cases. In all three noncivil rights categories–other, contract, and tort– NDGA summary judgment rates decreased, although not to a statistically significant degree. Indeed, Figure 1 shows no statistically significant summary judgment rate difference, within or across the two districts, for contract, tort, or other cases. In NDGA other civil rights cases, the summary judgment rate noticeably increased but the increase was not statistically significant. In jobs cases, however, the summary judgment rate approximately doubled and the non-overlapping confidence intervals in the NDGA graph show that the increase was statistically significant. The inter-district jobs and other civil rights difference did not exist in 1980-81. The striking development is thus the increase in jobs discrimination cases in the NDGA, with a somewhat less striking increase in NDGA other civil rights cases.

The CDCA results in the bottom part of Figure 1 show, consistently with the other two districts' results, that the civil rights categories have higher rates of summary judgment than the noncivil rights categories. The rates for the noncivil rights categories are low and consistent with those in the EDPA. The other civil rights summary judgment rate increased from 1975-76 to 1980-81 but not statistically significantly.

C. Summary Judgment Rates by Category of Employment Discrimination Case

The substantial increase in NDGA employment discrimination summary judgment rates over time suggests looking more deeply for the source of the increase. Both the 1980-81 and 2001-02 data allow subdividing the employment discrimination cases into those alleging age, race, or sex discrimination. For each class of discrimination, one can assess changes over time in summary judgment rates.

Table 4 reports the results represented by the jobs portion of Figure 1's results. The NDGA showed a substantial and statistically significant increase ($p=0.002$) in job discrimination case summary judgment rates, from about 11% to over 24%, while the EDPA showed a noticeable, but not statistically significant decline ($p=0.12$), from about 13% to about eight percent, in job discrimination summary judgment rates.

Table 4. Employment Discrimination Case Summary Judgment Rates Over Time

District	Time period	Number of cases	Summary judgment %
EDPA	1980-81	108	13.0
EDPA	2001-02	444	8.1
NDGA	1980-81	176	10.8
NDGA	2001-02	571	24.2

But job discrimination cases are heterogeneous. Differences in case outcome

characteristics have been observed between types of employment discrimination cases.[55] Table 5 reports summary judgment rates over time for age, race, and sex cases for the two districts.[56] The pattern in the NDGA is consistent, with the three classes of employment discrimination cases showing substantially increased summary judgment rates over time. Indeed, all three rates more than doubled. In the EDPA, however, the pattern differs. The insignificant EDPA change over time shown above in Table 4 is a consequence of combining age and race cases, which show increased summary judgment rates, with sex cases, which show a substantial and statistically significant decrease in summary judgment rates. While the NDGA rate of summary judgment in sex cases approximately tripled from about seven percent to about 21%, the EDPA sex case rate shrank to less than one-quarter of its 1980-81 level.

Table 5. Class of Employment Discrimination Cases and Summary Judgment Rate

District	Case category	Time period	Number of cases	Summary judgment %
EDPA	race	1980-81	40	2.5
EDPA	race	2001-02	119	9.2
EDPA	sex	1980-81	29	17.2
EDPA	sex	2001-02	122	4.1 ‡
EDPA	age	1980-81	13	0.0
EDPA	age	2001-02	72	11.1
NDGA	race	1980-81	115	11.3
NDGA	race	2001-02	225	27.6 †
NDGA	sex	1980-81	60	6.7
NDGA	sex	2001-02	197	20.8 ‡
NDGA	age	1980-81	7	0.0
NDGA	age	2001-02	53	28.3*

Notes. * indicates change in summary judgment rate from 1980-81 to 2001-02 is statistically significant at p<=0.1; ‡ indicates change is significant at p<=0.05; † indicates change is significant at p<=0.001. Significance levels are computed using probability weights to account for differential sampling proportions.

V. Discussion

Aside from displaying variation in summary judgment rates, Figure 1 also suggests that civil rights advocates' concerns about summary judgment may be well founded. Summary judgment rates in employment discrimination and other civil rights cases are

[55] David B. Oppenheimer, Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities, 37 U.C. Davis L. Rev. 511 (2003).

[56] Disability and other categories of employment discrimination cases included in Table 4 are not included in Table 5. For discussion of disability and other employment discrimination case categories, see Lanvers, supra note 34.

consistently higher than rates in contract and tort cases. Indeed, within districts and with only a single exception, summary judgment rates in employment discrimination and other civil rights cases are always higher than summary judgment rates in contract and tort cases. The one exception is the tort case summary judgment rate in NDGA in 1980-81. That 14% summary judgment rate exceeded the rate for employment discrimination cases and other civil rights cases in NDGA for the same time period. The 14% rate may be aberrational since no other tort or contract rate for the three districts for any time period reached even eight percent. And the confidence interval around the 14% rate is wide, spanning from less than 10% to more than 20%.

At the descriptive level, our EDPA results are consistent with summary judgment rates reported by Burbank for EDPA for the fiscal years 2001 and 2002. The overall summary judgment rate for our 2001 and 2002 EDPA data is 5.0%. Burbank reports a three to four percent rate for the fiscal years including our time period. Our higher rate likely is attributable to our exclusion of various classes of cases from the control group. Most importantly, Burbank included prisoner cases and we have excluded them.[57] For those portions of our sample for which data were gathered for prisoner cases, those cases uniformly showed lower rates of summary judgment than nonprisoner cases.[58] By excluding the low-rate prisoner cases, our summary judgment rate is elevated compared to Burbank's but is consistent with his.

Our results, consistently with the FJC studies, raise the question of how observers could consistently report increased summary judgment rates since the Supreme Court trilogy. One possible reason is attaching weight to interpretation of court doctrine against a background of an expected effect. It is a small step from believing that summary judgment rates increased to finding evidence of that increase in the language of opinions.

Many factors could contribute to varying summary judgment rates across districts, case categories, subcategories of employment discrimination cases, and time. Since this study focuses on identifying variation in rates, it does not address the causes of variation. We merely note here some leading possible explanatory factors. These include the set of factors used to try to explain case outcomes in other contexts. For example, changes in civil rights doctrine or law could contribute to observed changes in case outcomes over time.[59] As a specific change-of-law example, the wider availability of jury trial in employment discrimination cases after enactment of the Civil Rights Act of 1991 may have shifted judicial behavior.[60] Perhaps judges, concerned about allowing cases to proceed to trials no longer conducted by them, increased use of summary judgment to retain greater control of

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[57] For discussion of the exclusion of prisoner cases, see Cecil et al., supra note 2, at 881 n.60.

[58] We have data on prisoner cases for the 1980-81 period.

[59] Schwab & Eisenberg, supra note 39.

[60] Pub. L. No. 102-166, 105 Stat. 1071. The 1991 Act amended Title VII of the Civil Rights Act of 1964. Pub. L. No. 88-352, 78 Stat. 241.

cases.

But such single, global explanations must confront the pattern of variation over time observed across districts. Such explanations cannot fully account for NDGA's increase over time and EDPA's simultaneous decrease over time in employment discrimination case summary judgment rates. Other explanations might employ case selection theory—plaintiffs may have changed the nature or quality of the cases they brought. Or litigants might have changed the patterns of prosecuting and settling cases, leaving varying residues of cases for court adjudication.[61] Still other explanations could be based on an attitudinal model of judicial behavior.[62] Perhaps the changing makeup of the judiciary explains interdistrict or time variations.

VI. Conclusion

Subject to the limited years and districts studied, we find no evidence of a broad-based increase in summary judgment rates after the Supreme Court's 1986 trilogy. Rather, our evidence suggests that a single summary judgment rate across case types can be misleading, as Burbank suggested.[63] We do find a tendency for civil rights cases (including employment discrimination cases) and noncivil rights to have different rates of summary judgment, with rates tending to be higher in civil rights cases. And a statistically significant increase in summary judgment rates occurred over time in employment discrimination cases in the NDGA, while the EDPA trended in the opposite direction in such cases. Contract and tort cases have reasonably uniform low summary judgment rates, with results across our districts and time periods that are all consistent with rates being less than 10%.

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[61] E.g., Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124 (1992).

[62] E.g., Jeffrey A. Segal & Harold J. Spaeth. 2002, The Supreme Court and the Attitudinal Model Revisited (2002); Theodore Eisenberg & Michael Heise, Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal, 38 J. Legal Stud. (2009) (forthcoming).

[63] Burbank, supra note 13.