

The Curious Incident of the Falling Win Rate

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Abstract

For 40 quarters starting in 1985, the plaintiff win rate in adjudicated civil cases in Federal courts fell almost continuously, from 70 percent to 35 percent, where it remained—albeit with increased volatility—for the next 15 years. We explore, and largely reject, several possible explanations for this surprising finding. Although the reason for the falling win rate remains a mystery, we conclude that courts may need to justify decisions not only in individual cases, but at a systemic level.

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I. Introduction: The Fact

Between 1985 and 1995, the plaintiff win rate in civil cases adjudicated in federal district courts fell dramatically and consistently. After 1995, win rates became substantially more volatile. Figure 1 graphs the win rate, by calendar quarter of termination, from 1980 to 2009.¹ It shows a steady rise from 1980-85, a substantial fall from 1985-1995, and variable but trendless behavior after that. The magnitude of the drop is astonishing: plaintiffs won almost 70 percent of the cases that were adjudicated to completion in the third quarter of 1985, but won only about 33 percent of those that were adjudicated in 2009. That's about 35 percentage point (or more than 50 percent) decrease. To get a sense of what this means, consider that if the win rate had remained at its highest level from the third quarter of 1985 through the third quarter of 2009 (and nothing else had changed), plaintiffs would have won 377,000 more cases than they actually did. At their maximal win rate of 70 percent, plaintiffs would have had to litigate for 8 more years to make up for this "shortfall." Of course, there is nothing normatively special about that particular baseline. One could just as correctly assert that if plaintiffs had won adjudicated cases between 1985:3 and 2009:3 at the 2009:3 rate, they would have had 184,000 *fewer* wins than they actually did.

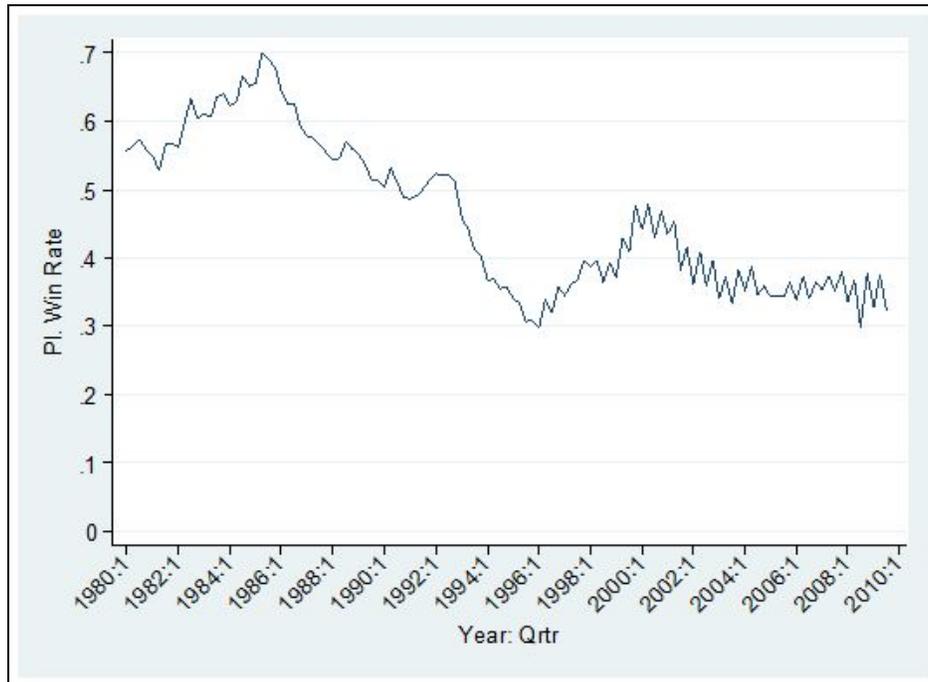


Figure 1: Plaintiff Win Rate in Adjudicated Cases, by Quarter of Termination: 1980-2009

¹ We use the Administrative Office of the US Courts (AO) Civil Terminations dataset. The data cover all federal district court civil cases that closed between Jan. 1, 1980 and Sept. 30, 2009. Here and throughout this essay, the win rate is defined as the share of all adjudicated cases (those for which the AO's *Judgmentfor* variable codes a win by either the Plaintiff or Defendant) that are won by the plaintiff. As used here, "adjudication" is not the same as a trial; it refers to any decision rendered by a court that ends a case (as opposed to ending by settlement).

We were astonished to uncover this phenomenon, and equally surprised to find that nobody seems to have noticed or commented on it to date. Nor is it predicted by the theoretical literature on the selection of disputes for adjudication. In this essay, we speculate about some possible causes, largely ruling out all the explanations we can think of (Part III). For example, while changes in the makeup of the federal caseload explain some of the drop in the plaintiff win rate, a substantial percentage (40%) of the win rate decline is unrelated to changes in the docket. A significant puzzle remains unsolved. We then provide additional evidence that, although not directly relevant to testing any theory, is potentially illuminating (Part IV). Part V concludes that the plaintiff win rate is a system-level outcome that requires justification beyond that provided in individual judicial decisions. Before considering possible explanations, however, we briefly discuss some relevant background.

II. Background

There is a substantial theoretical and empirical literature in law and economics on the determinants of win rates at “trial” (used loosely to mean all facets of adjudication).² The most famous contribution is probably the Priest-Klein hypothesis, which suggests that there should be a tendency towards a plaintiff win rate of 50 percent.³ As our finding shows, that is not the case in the federal court system. Unfortunately, none of theories yield broadly generalizable results about what drives aggregate win rates: plausible models of litigation can generate almost any conclusion, depending on initial assumptions about which party (if either) has private information and on subtle details of how settlement bargaining is structured.⁴

No model is robust enough to be applicable, across the board, to all civil litigation in federal district court over a 30 year period. Thus, there is actually no necessary relationship between win rates in adjudication and anything else. Suppose, for example, that for some

² Abraham Wickelgren, *The Law and Economics of Settlement*, Ch. 13, in J. Arlen, ed. RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS (2013) provides an excellent analytic synthesis. On what should count as a “trial” for purposes of the theory of adjudication/settlement, see 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). We use the term adjudication to mean any case that ultimately reached a judgment (as opposed to a case that was voluntarily dismissed for example) regardless of the procedural posture of the case at the time that judgment was reached.

³ George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). Whether the Priest-Klein hypothesis is valid as a theoretical matter remains disputed. See Yoon-Ho Alex Lee, Daniel Klerman, *The Priest-Klein Hypotheses: Proofs and Generality*, 48 INT'L REV. L. & ECON. 59 (2016) (offering more rigorous proof of some of the Priest-Klein conclusions); and Daniel Klerman and Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209 (2014) (showing that selection effects are “partial,” and thus that the plaintiff win rate in adjudicated cases generally *will* change when the legal standard changes, *contra* Priest and Klein’s original model).

⁴ The title of Steven Shavell’s short article aptly summarizes his overall conclusion: *Any Frequency of Plaintiff Victory at Trial is Possible*, 25 J. LEGAL STUD. 493 (1996) (showing that in models with asymmetric information favoring either plaintiffs or defendants the plaintiff win rate at trial can be anything between 0 and 1, and the probability of plaintiff victory in settled cases (if they were tried) can be either above or below the plaintiff win rate in tried cases). Or as Wickelgren puts it, *supra* n. 3 at 344, “under general conditions, settlement models cannot tell us very much about empirical win rates in trials.”

reason judges suddenly became more defendant-friendly starting in 1985 (and continuing for 10 years). Even if this were true, it is entirely possible that the win rate in adjudicated cases might not move at all in response. If all parties know that cases have become harder for plaintiffs to win, rational plaintiffs would bring fewer marginal (low probability of victory) cases and/or settle the cases they do bring on less-favorable terms, leaving win rates *in the cases that survive to an adjudication* largely unchanged.⁵ Similarly, other possible influences on the win rate—increases in (relative) litigation costs, or changes in the informational advantage of one side or another, in (relative) costs of discovery, or in the sequencing of motions—could have some effect on the win rate, or none at all, depending on the details of the underlying settlement/bargaining process that picks out cases for litigation.

All this does not mean, however, that the aggregate win rate is simply meaningless. It may be difficult to justify any overall success rate for plaintiffs, but we are not arguing that the win rate is “too high” or “too low.” Instead, we are pointing out that *something or things* caused the win rate to change, and depending on the nature of that cause or causes, we may have grounds for concern. If, for example, the changing win rate is caused by exogenous changes such as new, more restrictive laws or procedures, the change itself would not be a cause for concern, although one might question its normative desirability. If judges suddenly became more defendant-friendly, we might think about the falling win rate quite differently.

Turning from theory to empirical work, we have found several longitudinal studies of *adjudication* rates, but nothing that has considered the evolution of *win* rates over time.⁶ Marc Galanter’s important work on the “Vanishing Trial” looked at adjudication rates from 1962–2002, but did not explore win rates.⁷ More recent studies by Theodore Eisenberg and Kevin Clermont,⁸ Jonah Gelbach,⁹ and William H.J. Hubbard¹⁰ have attempted to measure the effect on the adjudication rate of key Supreme Court decisions regarding the standard for

⁵ This kind of logic was first explicated by Priest & Klein, *The Selection of Disputes for Litigation*, *supra* note 3.

⁶ A partial exception is John J. Donouhe III and Peter Siegelman, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest/Klein Hypothesis*, 24 *J. LEGAL STUD.* 427 (1995). They show that in the period from 1970–1989, plaintiffs brought more employment discrimination claims when the economy was in recession. Their explanation is that a weak economy extended the average duration of unemployment spells, driving up the back-pay damages that plaintiffs could collect if they prevailed in their discrimination claims. In turn, this made plaintiffs willing to accept a smaller chance of winning (since the amount they would win if they did prevail was greater). These recession-induced cases were more likely to settle, but not all of them did. As a result, both the adjudication rate and the plaintiff win rate declined (but the latter only very slightly) when the economy weakened.

⁷ Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. EMPIRICAL LEGAL STUD.* 459 (2004). For a careful analysis of what can be learned from the AO disposition data, see 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) (arguing that after correcting for coding errors, trials have actually been replaced by non-trial adjudications, not settlements).

⁸ Theodore Eisenberg, Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 *CORNELL L. REV.* 193 (2014)

⁹ Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 *STAN. L. REV.* 369 (2016).

¹⁰ William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to Bell Atlantic v. Twombly*, 42 *J. LEGAL STUD.* 35 (2013).

summary judgment and motions to dismiss, but did not consider win rates. Finally, some studies of plaintiff win rates take a narrower and/or cross-sectional approach, and therefore do not uncover the changes we observe.¹¹

On the doctrinal and normative side, legal scholars have identified an increasingly hostile view of litigation that began to be seen in judicial decisions in the late 1970s, as well as greater emphasis in the federal courts on settlement.¹² For example, then Chief Justice Warren E. Burger convened the Pound Conference decrying the increase in federal litigation in 1976.¹³ More popular accounts expressed concern about a rising tide of frivolous litigation, notably *after* the decline in win rates was well underway.¹⁴ Accordingly, this body of work sheds little light on the decline of win rates in the 1980s and 1990s, let alone the subsequent levelling off (and increased volatility) after 1995.

Finding little prior scholarship that bears directly on our observation of a falling win rate in civil cases, we now consider some possible explanations.

III. Rejecting Some Obvious Explanations

In this Part we consider the most obvious explanations for the falling win rate. We have identified no coding changes that could explain the observed decline. The changing composition of terminated cases does account for some of the decline, but a substantial share of the decline (40%) is not explained by these compositional changes. We also reject the idea that a reduction in the quality of filed cases over time explains the decline and subsequent volatility in win rates. Finally, we consider whether changing judicial attitudes or procedural retrenchment could be plausible explanations, and reject these hypotheses as well.

A. Coding Changes or Clerical Errors?

Is it possible that something about the way the Administrative Office (AO) defines “Plaintiff Win” changed in or around 1985? That might be a logical explanation for the

¹¹ See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (2002) (considering plaintiff win rates at the appellate level); Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 Stan. L. Rev. 1275 (2005) (studying win rates across different types of litigants). Hadfield, *supra* at 1314, did find that individual plaintiffs are more likely to have their cases adjudicated than organizational plaintiffs. And Marc Galanter found that individual plaintiffs suing organizational defendants were especially likely to lose. Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 Wis. L. Rev. 577, 593 (2001). Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOCIETY REV. 95 (1974).

¹² Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1861 (2014).

¹³ The proceedings were published in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (1979). See Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1157 (1993) (discussing the proceedings of the Pound Conference, hostility towards litigation and concerns over the growing federal docket).

¹⁴ See generally Walter K. Olson, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1992) (the title captures the thesis).

consistent drop over the following 10 years, but we have uncovered no evidence that this was actually the case.

The outcome data compiled by the AO prior to the advent of electronic filing, around 2003, were input by hand by clerks of the court, based on judicial orders. It is conceivable that these civil servants consistently erred in inputting the data in a way that biased the win rate in favor of plaintiffs, and that such mistakes were then gradually corrected for newer cases with the advent of electronic record-keeping. But we do not consider this a plausible explanation.

First, the party who won would almost always have been clear from the judge's order dismissing the case or entering a judgment, leaving little discretion to clerks. And the only study we know of that sought to "audit" the AO's coding of the outcome variable concluded that it was accurately entered in virtually all cases.¹⁵ Although scholars have raised significant doubts about the accuracy of *other* variables in the AO data (at least for the period before the advent of electronic records),¹⁶ the *Judgmentfor* variable seems immune from these problems. The likelihood of clerical errors that consistently favored one side (and that were then slowly corrected over a 10-year span starting before the advent of electronic record keeping) is so low as to approach zero.

Moreover, Figure 1 looks to be inconsistent with any discrete change in the administrative rules for coding who wins. It is difficult to explain how such a change could result in a slow and virtually monotonic decline in the win rate over a period of 40 calendar quarters. Even if there were variable lags in the adoption of new rules—and to be clear, we have not found anything that might qualify as new coding rules or systems—it is hard to see how they could drive a ten-year decline in the win rate of the magnitude we observe.

¹⁵ Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1460 (2003) checked AO records against PACER docket sheets for a sample of tort cases that terminated between Jan. 1 and Sept. 30, 2000 and another sample of inmate civil rights cases that closed in Fiscal Year 1993. They concluded that the AO data are very accurate when they report a judgment for plaintiff or defendant, except in cases in which judgment is reported for plaintiff but damages are reported as zero. As to this anomalous category (which is far more significant in the inmate sample than in the torts sample), defendants are frequently the actual victors in the inmate cases. In addition, when the data report a judgment for "both" parties (a characterization that is ambiguous even as a matter of theory), the actual victor is nearly always the plaintiff.

Id. at 1460. Both zero-award cases and "both-parties-prevail" cases are rare, and could not possibly account for our findings.

¹⁶ The prevailing party is arguably the single most important fact about a litigated dispute, and it is relatively easy for low-level clerks to get right, since it is based directly on a judicial order. By contrast, it is considerably more difficult (and less important) to measure other outcome-related variables correctly, and scholars have noted problems with, for example, the "disposition" variable. See, 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 (finding substantial error rates in many of the AO's disposition codes from 1979 to 2001). The "amount awarded" codes are also replete with errors: see, Eisenberg & Schlanger, *supra* n. 3, at 1465-67 for an extensive discussion; see also John J. Donohue III and Peter Siegelman, *Law & Macroeconomics: Employment Discrimination Litigation Over the Business Cycle*, 66 S. CAL. L. REV. 709, 760 n. 98 (1992-93) (noting unreliability of recorded awards in employment discrimination cases terminating between 1970 and 1987).

We do want to take note of an apparent record-keeping anomaly pointed out to us by William Hubbard. For some reason, “the *Judgmentfor* variable in the AO Data . . . apparently contains an unusual number of missing values for cases filed in the calendar years 2002 through 2007. [Moreover,] missing values are [disproportionately] likely to be dispositions in favor of the defendant, and thus ignoring missing values [in computing the win rate, as we do,] runs the risk of under-counting pro-defendant dispositions . . .”¹⁷ If there were actually even *more* pro-defendant judgments between 2002 and 2007 than we have calculated, however, the plaintiff win rate would be even lower, and our central puzzle would thus be even more perplexing.

B. Changing Composition of Terminated Cases, by Nature of Suit?

Another obvious explanation for the decline is that the mix of adjudicated cases might have shifted away from those that plaintiffs usually win (e.g., student loan) towards those in which plaintiffs rarely prevail (e.g., prisoner or civil rights). Similarly, perhaps the case mix shifted towards circuits where plaintiffs do less well. Or perhaps there are more *pro se* plaintiffs as a share of total cases, and *pro se* plaintiffs have always fared less well than those who are represented by counsel.¹⁸

We can begin to get a handle on these explanations, using a regression equation in which we control for Nature of Suit, Circuit, Pro Se status, and whether the plaintiff was proceeding *in forma pauperis*. That is, we can look at the win rate each year *after* taking account of any time-invariant effect of these factors, as well as a quadratic time trend. We do this using the set of all adjudicated cases and a simple linear probability model in which the dependent variable is 1 if the case was won by the plaintiff (0 otherwise).

The exact specification, estimated by Ordinary Least Squares, is:

$$PWin_i = \alpha + \beta_j Year_{ij} + \delta_c Circuit_{ic} + \lambda_j Jurisdiction_{ij} + \zeta_n NOS_{in} + \theta Pro Se_i + \nu IFP_i + \gamma Term-Quart^2_i + \varepsilon_{iv}$$

where:

$PWin_i = 1$ if plaintiff wins (0 if defendant wins)

$Year_j = 1$ if year = i (1980-2009, omitting 1980)

$Circuit_c = 1$ if Circuit = c .

$Jurisdiction_j = 1$ if basis of jurisdiction = j (US Plaintiff, US Defendant, Diversity, omitting Federal Question)

$NOS_n = 1$ if Nature of Suit = n (108 narrow Nature of Suit Categories)

$Pro Se = 1$ if plaintiff is *pro se*

$IFP = 1$ if Plaintiff is proceeding *in forma pauperis*

$Term-Quart^2 = (\text{Elapsed Quarters since Jan. 1, 1980})^2$ and

$\varepsilon_i =$ random error term.

Figure 2 shows the estimated year coefficients (\hat{b} s) from this regression. Each point thus represents the effect of being in Year X (as opposed to 1980), controlling for the factors listed

¹⁷ William H.J. Hubbard, *Effects of Twombly and Iqbal* (unopl. ms. on file with the authors) at 58.

¹⁸ But see, Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85. N. C. L. REV. 423 (2006-2007) (suggesting that in criminal trials, defendants who represent themselves do not experience higher conviction rates than defendants who have lawyers).

above. That is, each point plots our estimate of the “pure” effect of the passage of time since 1980, after removing any influence on the win rate attributable to time-invariant fixed-effects of Nature of Suit categories, Circuits, or *pro se* status.

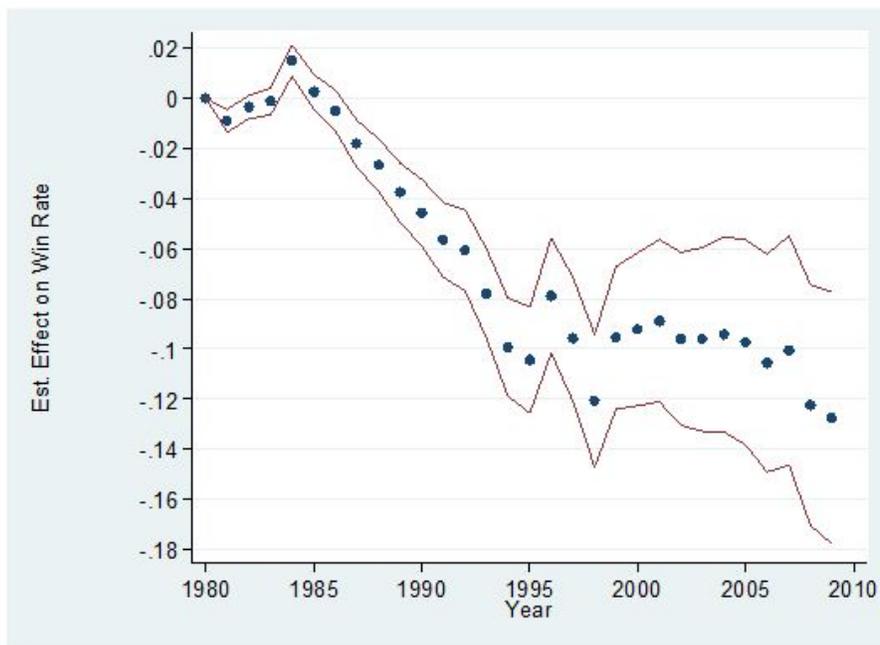


Figure 2: Estimated Year Effect on Win Rate, After Controls: 1980-2009¹⁹

The overall pattern in these data is strikingly similar to the unadjusted data in Figure 1—a rise between 1980 and 1985, a sharp decline for 10 years, and little secular change (albeit with considerable volatility) between 1995 and 2009.

The problem is that this regression only controls for the time-invariant effects of the independent variables, and we want to know how changes over time in the distribution of adjudicated cases across Nature of Suit types has affected the win rate. That is, did the aggregate win rate fall because of declines in the volume of adjudications in high win-rate suit types, or was there a drop in the win rate holding the distribution of suit types constant (or some combination of the two)?

The quantitatively-inclined reader will recognize that sorting out the relative importance of shifting litigation patterns vs changing win rates for each suit-type is a classic index number problem. The overall win rate in any period is just the weighted average of the win rate for each suit type, with the weights given by the number of suits in each category. Over time, however, both the win rates for each suit type and the *volume* of adjudications in each type can and do change. How, then, to decompose the change in the overall win rate between changes in weights (volume of cases adjudicated) and suit-level win rates? Unfortunately, as is well

¹⁹ Lines denote ± 2 standard errors.

known, there is no perfect solution to this problem.²⁰ When both quantity weights and win rates are moving around substantially (as here), there is no unique formulation that best captures changes in win rates over time. However, one plausible solution (among many) is the Walsh Index, which we use here. Define

W_t = value of win rate index in quarter t ,

n_{it} = number of suits adjudicated in Nature of Suit category i in quarter t , and

w_{it} = win rate in Nature of Suit category i in quarter t .

If we choose the third quarter of 1984 as our (arbitrary) base period, quarter 0, then W_0 is automatically assigned a value of 1.0, and the value of W in quarter t is given by:

$$W_t = \frac{\sum(w_{it}\sqrt{n_{i0}n_{it}})}{\sum(w_{i0}\sqrt{n_{i0}n_{it}})} \quad ^{21}$$

W_t thus measures the win rate in period t relative to its baseline value. Using the data in the Appendix for the 28 largest Nature of Suit categories (in 1985),²² Figure 3 plots the value of the win rate index for each quarter between 1980:1 and 2009:3.

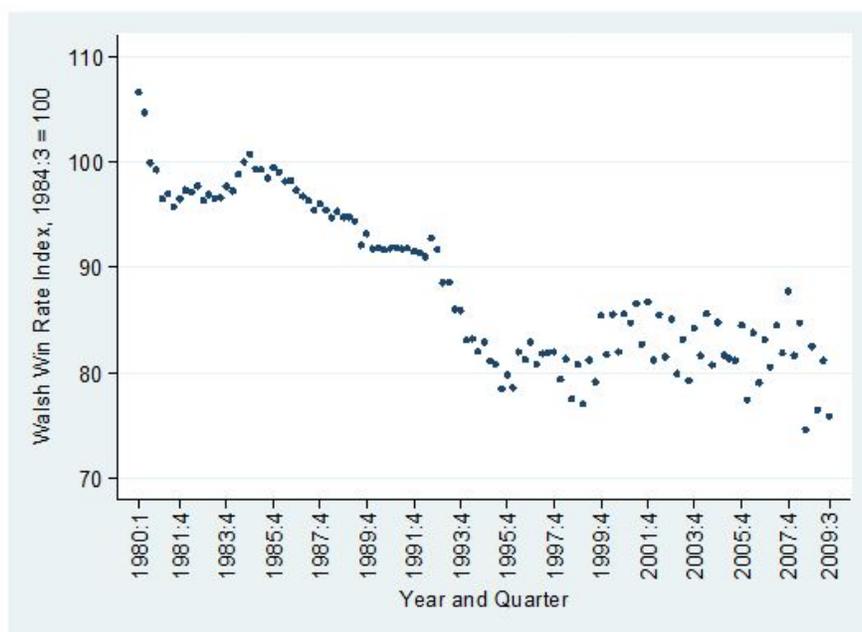


Figure 3: Win Rate Index, 1980:1-2009:3

²⁰ See, e.g., International Monetary Fund, DEVELOPING A REVISED MANUAL FOR THE PPI (2005), chapter 15, available at <https://www.imf.org/external/np/sta/tegppi/ch15.pdf> (discussing basic index number theory), visited June 3, 2017. In macroeconomics, the index number problem notably occurs in computing the rate of change of the overall price level (“inflation”). Here, Nature of Suit level win rates are analogous to “prices” and volume of suits adjudicated are analogous to “quantities of goods sold.”

²¹ The quantity weights used here are the geometric mean of the period-zero and period- t quantities. The choice of base period is arbitrary, since the index value only measures win rates in quarter t relative to whatever base period is chosen.

²² Together, these suit types accounted for 89,000 (92%) of the 97,000 adjudications in that year. Using the 60 largest Nature of Suit categories gives an identical result, since the remaining categories include too few litigated cases to make a difference in the overall calculation.

Visually, the pattern in the win rate index looks very similar to the overall win rate in Figure 1. From its value of 100 in the fourth quarter of 1980, the index fell to just under 80 in the fourth quarter of 1995. Over the next 14 years, there was no trend in the index: although it was highly volatile, its average value remained at about 80. That means that a plausible estimate of the “pure” win rate decline—apart from any reallocation of litigated cases across Nature of Suit types during the 1984-2009 period—is about $(1 - 0.8) = 20$ percent. Starting from a win rate of 70 percent, the decrease is thus about $(0.2 \times 0.7 = 0.14)$, or 14 percentage points. That is 40 percent ($14/35^{\text{ths}}$) of the *total* drop in the win rate between 1985 and 2009 of 35 percentage points, with the remaining 60 percent of the drop being explained by reallocation of cases across Nature of Suit categories.

Figure 4 further disaggregates these results to clarify the underlying patterns. It plots the percentage change in the win rate against the percentage change in the volume of adjudications between 1985 and 2009 for each of the 28 largest Nature of Suit categories in 1985. (See Appendix for the raw quantities, win rates, and the abbreviation key.) The key conclusion is that both win rates and adjudication volumes fell across a wide range of cases: most of the observations are located in the southwest quadrant, where both win rates and adjudication volumes declined.

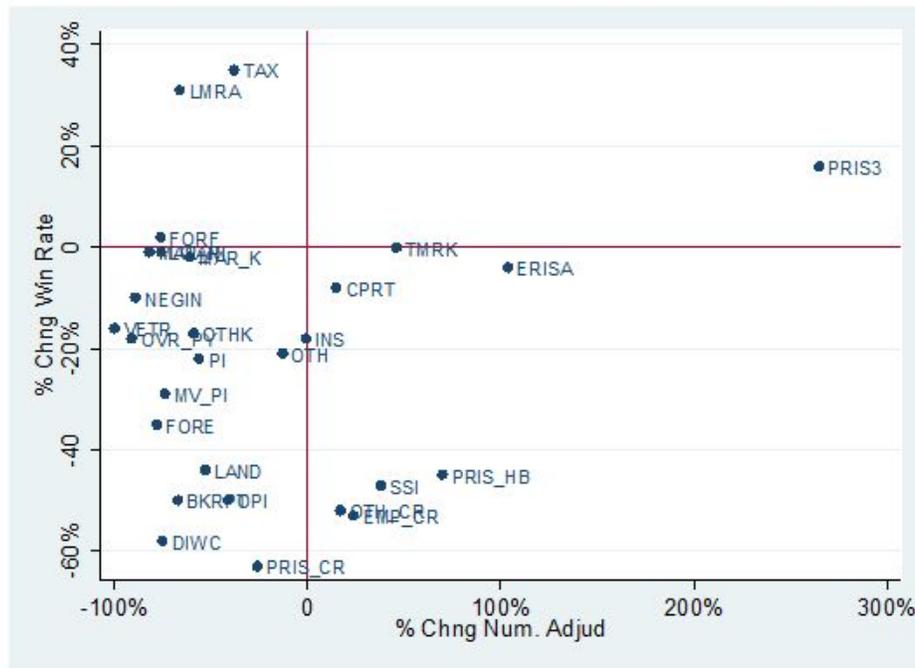


Figure 4: Percent Change in Plaintiff Win Rate vs Percent Change in Adjudication Volume,²³ 1985-2009: by Nature of Suit (for 28 Largest Nature of Suit Categories in 1985).

Only 5 of the 28 Nature of Suit categories (18 percent) had a higher win rate in 2009 than

²³ 2009 data extend only through September 30, so we annualized by multiplying by 4/3.

in 1985. Win rates declined for, among others, Land, Motor Vehicle Personal Injury, Contract, Copyright, Bankruptcy, and Insurance cases, as well as most Prisoner and Civil Rights cases (with the exception of prisoners petitioning to vacate their sentences²⁴). The fact that these case types have virtually nothing in common implies that some broader factor(s) must have been at work: the pattern cannot be explained with reference to doctrinal developments in any particular set of cases (e.g., changes to qualified immunity doctrine in civil rights cases).

The period also saw a drop in adjudication volumes overall, and for several case types in particular. Only 8 of the 28 Nature of Suit categories experienced an increase in the volume of adjudications, and many categories experienced sharp declines. Chief among these was Overpayment of Veterans Benefits, which accounted for by far the largest number of adjudications in 1985, amounting by itself to more than 25 percent of the total. This category had essentially vanished by 2009.²⁵ And since the government won almost every Veterans Benefits Overpayment case it brought, the drop in litigation volume was highly consequential for the overall win rate.

In sum, the drop in the overall win rate is not just the result of a reallocation of adjudications in favor of those Nature of Suit types where plaintiffs do less well. To be sure, there was a substantial fall in the volume of adjudicated cases in Nature of Suit categories with high win rates (e.g., Veterans Benefits Overpayments). To a much smaller degree, there was a rise in adjudications in categories with low win rates (e.g., “Prisoner Habeas” and “Prisoner Vacate Sentence”). On the other hand, win rates fell for many of the narrowly defined Nature of Suit classifications, and our calculations suggest a 20 percent drop in the “pure” win rate.

C. Suit “Quality” Effects: Filing and/or Selective Settlement?

Win rates in adjudicated cases result from a selection process that (sometimes) occurs via bargaining between plaintiffs and defendants. Depending on which parties have what information, and on how bargaining is structured, a change in plaintiff’s *filing* behavior might have no effect on the win rate, or a small or a large one. Nevertheless, we think it worth exploring whether the declining win rate might be connected to changes in the quality of cases being brought by plaintiffs. (To some extent we have already considered these issues in discussing the changing composition of the caseload.)

1. “Poorer” Cases Being Filed?

Perhaps the win rate drop reflects a fall in the “quality” of cases that are initially filed. Could it be that for 10 years, starting in 1985, plaintiffs brought increasingly less-meritorious lawsuits, and the drop in the win rate is simply the result of worse cases being brought?

We find that story unconvincing, for several reasons. First, it begs the question of why plaintiffs or their lawyers would suddenly start bringing worse cases in 1985, continue doing so

²⁴ There were only 600 “prisoner-vacate sentence” cases adjudicated in 1985, and although their numbers increased substantially, it was from a very small base. And the win rate for such cases rose only from 13 to 15 percent.

²⁵ The explanation for this drop-off is that Congress passed a law in 1988 creating a new tribunal for veterans appeals—after they go through that tribunal they appeal to the Circuit courts rather than to District courts. See, PL 100–687 (S 11), PL 100–687, November 18, 1988, 102 Stat 4105.

for 30 of the next 40 calendar quarters, and then abruptly decide to stop. The steady fall and sudden leveling off in win rates seems incompatible with almost any larger socio-legal trend we can think of.

Second, it is far from clear as a matter of theory that a fall in the average quality of filed cases would lead to a drop in the win rate: some or all of those new low-quality cases might settle out, leaving the ultimate win rate unchanged.

Finally, as Figure 5 illustrates, the total volume of filed cases was trending downward during this period. If more “bad” cases were being brought at the same time that total filings fell, plaintiffs would have had to bring fewer “good” cases at the same time that they filed more “bad” ones, which seems implausible.²⁶ Even if plaintiffs had a reason to bring more “bad” cases, it’s very difficult to imagine why they would also have a reason to bring fewer good ones.

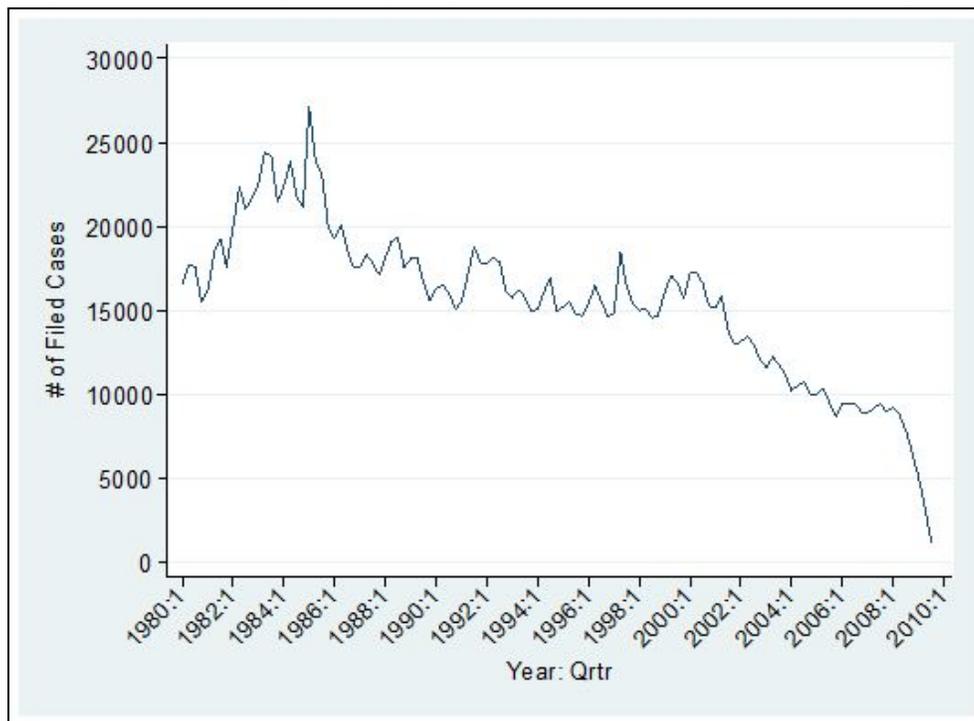


Figure 5: Volume of Cases, by Quarter of Filing: 1980-2009²⁷

2. “Poorer” Cases Being Litigated: More Aggressive Defendants or More Optimistic Plaintiffs?

²⁶ Suppose there are two kinds of cases, “good” and “bad.” We might posit that the drop in win rate was caused by an increase in the number of “bad” cases filed. But if the total volume of cases has fallen at the same time as the number of “bad” cases has declined, it must be the case that the number of “good” cases filed has also declined.

²⁷ Note: the data are based on terminated cases only—a case that was still pending as of September 30, 2009 is not included in the dataset. As a result of this censoring, the volume of *filed* cases appears to fall-off in the last few quarters before 2009:3. This artifact is unrelated to the declining win rates *among cases that have actually closed* during the period before 2008.

Perhaps the falling win rate reflected a growing willingness by defendants to adjudicate (winning) cases that they had previously settled,²⁸ or a growing—but mistaken—optimism on the part of plaintiffs about their chances of success. Either story could conceivably explain why the group of cases that do not settle came to contain a larger fraction of plaintiff losses over time. Unfortunately, both seem at odds with logic and the scant factual evidence.

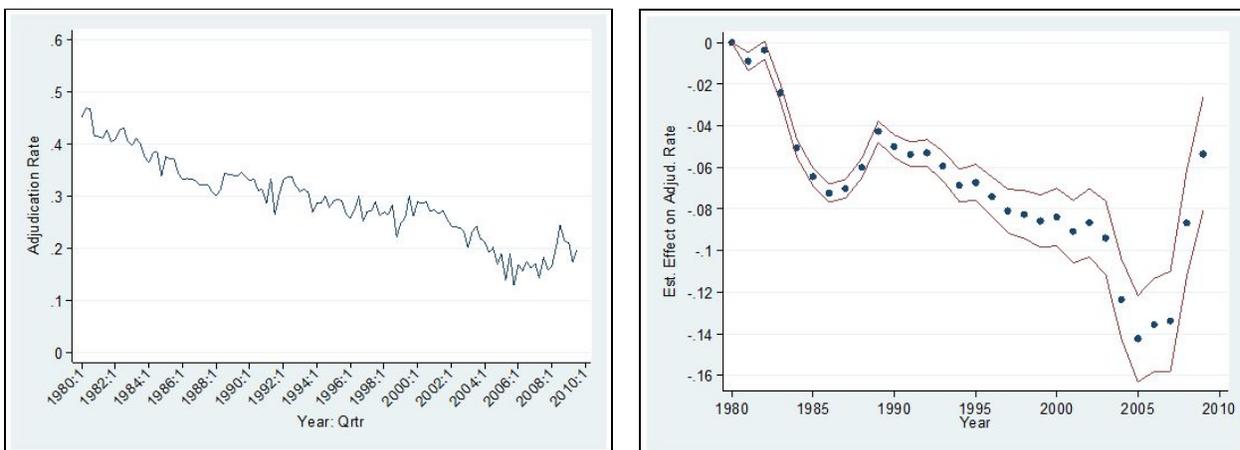
For one thing, both scenarios are subject to the same question-begging problem as the filing story we discussed earlier. It is hard to know what could have caused defendants en masse to begin changing their litigation strategy over a period of 10 years starting in 1985. What change in the background rules or culture could explain such a change in strategy? We are unaware of any change in the law on the books, or in other factors such as litigation costs, that might predict such a large and consistent decline.²⁹ The same is true for plaintiffs—why in 1985 should they start to adjudicate more losing cases that they formerly would have settled?

Moreover, both accounts also seem in tension with the minimal evidence on adjudication rates. If defendants started playing tough (or plaintiffs became irrationally exuberant), the adjudication rate—the share of all terminated cases that are won by either party, as opposed to settling—should have risen. Instead, as figures 6.A and 6.B illustrate, the opposite is true. Measured either as the “raw” rate or after controlling for Nature of Suit, Circuit, and *pro se* and *in forma pauperis* status, the adjudication rate has fallen steadily since 1980.³⁰ To explain both a falling adjudication rate and an increased number of plaintiff losses, we would have to posit not just a rise in the volume of ‘bad’ (plaintiff-losing) cases, but a drop in the number of ‘good’ cases as well. There is a selection effect theory that could account for this type of change, which is discussed in the next section, but as we shall see the limited available evidence does not bear it out.

²⁸ See, e.g., Benjamin Weiser, *To Curb Suits, City Now Opts to Fight Them*, N.Y. TIMES, February 26, 2013 at A1 (documenting new litigation strategy under which New York City announced that it would start to defend what it deemed were non-meritorious lawsuits that it had previously settled because the suits cost more to defend than the amount at stake). Of course, this is only a single defendant, and it occurred long after our data end.

²⁹ Other scholars have noted, however, that there was a change in the makeup and general ethos of the judiciary during the 1970s. We discuss this below.

³⁰ As with Figure 2, Figure 5 shows the “year effect” (here, on the adjudication rate), again controlling for Nature of Suit, Circuit, *pro se* and *in forma pauperis* status. The specification is exactly as for Figure 2, except that the dependent variable is 1 if the case is won by Plaintiff, Defendant, or “Both,” and the regression is estimated over all terminated cases (not just those won by Plaintiff or Defendant or Both).



A: Raw Adjudication Rate

B: Estimated Year Effect on Adjudication Rate, After Controls³¹

Figure 6: Adjudication Rate: 1980-2009

D. Case Selection and Pre-Trial Dispositive Motions?

Several readers have suggested to us that the decline in win rates might be attributed, at least in part, to an increase in selective settlement. For example, suppose defendants became better at figuring out which cases plaintiffs were going to win. That would allow defendants to settle-out the cases most favorable to plaintiffs, leaving only the “worst” cases to proceed to an adjudication and lowering the win rate among cases that ended in a judicial intervention. In this view, the win rate fell because the best cases started dropping out of the process earlier than formerly, so more plaintiff wins occurred off-stage and did not show up among the cases terminating with a judicial decision.³² Figure 6 shows that the Adjudication Rate was indeed falling over the period as a whole—a higher proportion of cases were settling-out without being resolved by a judicial intervention—which is consistent with this story, at least in part. And the story is also consistent with the 1983 revisions to Rule 16, which explicitly encouraged settlement as part of case management, and with the passage of the 1990 Civil Justice Reform Act, which encouraged experimentation with Alternative Dispute Resolution (ADR) in the federal courts.³³

While appealing, this story faces several problems.

First, as we observed earlier, it is hard to see how it is reconcilable with the time-series evidence on win rates. Why would selective settlement suddenly begin in the mid-1980s,

³¹ Lines denote ± 2 standard errors.

³² Of course, it might be that plaintiffs are settling-out winning cases on less-favorable terms—net of trial costs—than they would have obtained if they’d litigated the cases to an adjudicated outcome, but there is no way to know whether this is true.

³³ Fed. R. Civ. P. 16 (amended in 1983); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 *U. Pa. L. Rev.* 1969, 1984 (1989) (describing history of amendment to Rule 16); Donna J. Stienstra et al., *A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990: Report to the Judicial Conference Committee on Court Administration and Case Management*, Federal Judicial Center, January 1, 1997 (available at <https://www.fjc.gov/content/study-five-demonstration-programs-established-under-civil-justice-reform-act-1990-report-0>).

continue for 10 years, and then stop? And how is the trend in the Adjudication Rate—which drops more-or-less steadily from 1980 through 2009—consistent with the quite different trend(s) in the Win Rate, which declines only between 1985 and 1995? Finally, how would the selective settlement story fit with the increased volatility in the win rate we see in the period after 1995? In other words, the selection story more or less fits the trend observed from 1985 to 1995, but not before or after.

Second, any change in settlement practice capable of explaining the win rate decline would have to be asymmetric. If *both* sides became better at predicting adjudicated outcomes, we might expect fewer litigated cases, but no change in the success rate of the cases that make it to an adjudication. It is not obvious why selective settlement—even if it occurred—should have favored defendants. So, for example, an increase in the availability of ADR techniques can not explain the falling win rate unless it is coupled with a story about why ADR should disproportionately screen out cases that plaintiffs would formerly have won.

One such explanation might be an increased use of pretrial motions that go to the merits of the case. It is reasonable to assume that most dispositive pretrial motions are made by defendants. That means that when the defendant prevails on his motion, the case ends in an adjudication. But the plaintiff can only “survive” such a motion—if the defendant *loses*, the result is that the case moves forward, and will most likely settle later. Over the span of cases, one would predict that an increase in dispositive pretrial motion practice (such as motions for summary judgment or motions to dismiss for failure to state a claim) would likely *decrease* the plaintiff in rate in adjudicated cases. Some fraction of the cases in which plaintiffs survive summary judgment, would formerly have been plaintiffs wins at trial. These tend to settle-out in light of the additional information provided by the failure of defendants’ summary judgment motions, thereby lowering the win rate for the group of cases that are ultimately tried.³⁴

At the same time, however, this theory predicts an *increase* in the adjudication rate (contrary to fact). Because both defendant wins in dispositive motions and all trials are counted as adjudications, introducing pretrial motions will raise the rate. (To be sure, pretrial motions decrease the number of trials, but since trials were relatively rare to begin with and pre-trial motions are more common, the volume of pretrial motions adjudicated to a defendant win more than offsets the decrease in trials, resulting in a higher adjudication rate.)

It is difficult to test the selection hypothesis directly, especially with the limited information available in the AO dataset. But we can at least look at whether the degree of selection (by case type and quarter) is related to the plaintiff win rate among the cases that survive settlement. If the story is correct, cases that come from “more-selected” quarters or case-types should have lower plaintiff win rates; alternatively, the *higher* the adjudication rate for a given group of cases, the higher is the chance that plaintiffs will win in those cases that are adjudicated.

To test this prediction, we first compute the share of all cases filed in quarter t and case-type n that go on to reach an adjudicated outcome. That is, we define a date- and case-type-specific adjudication rate, ADJ_{tn} , and then ask whether this variable helps explain the probability that plaintiffs will win the cases from this group that are ultimately adjudicated.³⁵

³⁴ The win rate analysis follows that of Issacharoff and Loewenstein. Samuel Issacharoff & George Loewenstein *Second Thoughts About Summary Judgment*, 100 *YALE L.J.* 73 (1990).

³⁵ The t subscript indexes the quarter in which the case was filed, while the n subscript indexes the Nature of Suit code for that case. Note that we sort cases by *filing* date, rather than termination date as in the rest of this Essay.

To see how this might work, consider a hypothetical group of cases of Nature of Suit type n filed in quarter t . For example, suppose we find 100 Employment Civil Rights cases filed in 1984:3. Of these, 80 settle and 20 are adjudicated: $ADJ_{tn} = 20$ percent. Plaintiffs win 8, for a win rate of 40 percent. In another quarter and Nature of Suit type (say, Motor Vehicle Personal Injury cases filed in 1999:1), 75 cases are filed, 50 are “settled” and 25 are adjudicated: $ADJ_{t'n'} = 33$ percent. Plaintiffs win 15 of these adjudicated cases, for a win rate of 60 percent. So in this example, a rise in the adjudication rate from 20 percent to 33 percent is associated with a rise in the win rate from 40 percent to 60 percent. The less selection there is from among the filed cases, the higher is the plaintiff win rate among the cases that are adjudicated, which is what the theory predicts.

If this hypothetical pattern held true across a wide range of case types and filing quarters and after controlling for other variables (and it need not), it would provide support for the selection story. To test it, we estimate the following regression equation by Ordinary Least Squares:³⁶

$$PWin = b_0 + b_1Adj_{tn} + b_{2c}Circuit_c + b_{3j}Jurisdiction_j + b_4IFP + b_5Prose-Pl + b_{6n}NOS_n + b_7File-Quart + b_8File-Quart^2 + \varepsilon,$$

where:

$PWin = 1$ if plaintiff wins (0 if defendant wins)

Adj_{tn} = share of all cases filed in Quarter t in case type n that are adjudicated

$Circuit_c = 1$ if Circuit = c .

$Jurisdiction_j = 1$ if basis of jurisdiction = j (US Plaintiff, US Defendant, Diversity,

omitting

Federal Question)

$IFP = 1$ if Plaintiff is proceeding *in forma pauperis*

$Prose-Pl = 1$ if Plaintiff is proceeding pro se

$NOS_n = 1$ if Nature of Suit = n (108 narrow Nature of Suit Categories)

$File-Quart$ = Elapsed Quarters since Jan 1, 1980

$File-Quart^2$ = (Elapsed Quarters since Jan. 1, 1980)² and

ε = random error term.

The results are shown in Table 1. The first two columns suggest that the selection effect is positive, as predicted—cases filed in Quarter \times Nature of Suit cells with higher adjudication rates (less selection) are significantly more likely to be won by plaintiffs. With no controls except for a time trend, the estimated effect of the adjudication rate on the win rate is implausibly large; adding minimal controls for Circuit and Jurisdiction cuts the size of the effect by two orders of magnitude. Moreover, once we include a full set of fixed effects for each Nature of Suit type (Cols. 3 and 4),³⁷ as is appropriate, the effect of the adjudication rate becomes negative, meaning that plaintiffs do *worse* when the adjudication rate is higher. If anything, this is evidence against the selection hypothesis.

³⁶ Probit estimates yield qualitatively similar results.

³⁷ Including Nature of Suit dummies and time trends is appropriate. Omitting them means that the regression would mistakenly credit the suit \times quarter Adjudication Rate for the effects of these variables.

Table \selection effects\ : Plaintiff Win Rate as a Function of Filing Quarter- and Suit-Specific Adjudication Rate (OLS Regressions)

	(1)	(2)	(3)	(4)
	1980-2009	1980-2009	1980-2009	1980-2007 ³⁸
Adjudication Rate, by Quarter & Suit Type	1.071*** (0.00191)	0.0682*** (0.00245)	-0.220*** (0.00542)	-0.243*** (0.00580)
Time (Quarter)	-0.00432*** (4.20e-05)	-0.00305*** (3.50e-05)	-0.00250*** (3.30e-05)	-0.00252*** (3.65e-05)
Time ²	3.00e-05*** (3.64e-07)	3.10e-05*** (3.09e-07)	1.51e-05*** (2.74e-07)	1.47e-05*** (3.36e-07)
Pro Se Plaintiff		-0.301*** (0.000788)	-0.0867*** (0.000818)	-0.0791*** (0.000840)
<i>In Forma Pauperis</i>		-0.0491*** (0.00114)	0.00150 (0.00115)	0.00424*** (0.00127)
Constant	0.201*** (0.00138)	0.983*** (0.00302)	0.766*** (0.00407)	0.775*** (0.00418)
Dummies for Circuit & Jurisdiction?	N	Y	Y	Y
Dummies for Nature of Suit?	N	N	Y	Y
Observations	1,847,077	1,847,077	1,846,593	1,769,035
Adj. R ²	0.147	0.412	0.571	0.570

Note: Robust standard errors in parentheses. *** p<0.01, ** p<0.05, * p<0.1.

E. Changing Judicial Attitudes Towards Plaintiffs?

Perhaps judicial attitudes towards plaintiffs changed during this period, making judges more skeptical of plaintiff claims. This is a difficult theory to prove directly. And even if true, it wouldn't guarantee a falling win rate, because of offsetting selection effects discussed earlier. Nor is there a good explanation for why judges might have become increasingly hostile to plaintiffs for a ten year period and then abruptly stopped. Still, there is some evidence that the federal courts began to disfavor litigation beginning in the late 1970s. For example, Andrew Siegel has argued that the most reasonable explanation for the Rehnquist court's jurisprudence is its hostility to litigation.³⁹ Stephen Burbank and Sean Farhang have shown that the probability that the Supreme Court rules in a way that allows a plaintiff to bring a private enforcement action have fallen from around 68% in 1970 to 18% in 2013.⁴⁰

³⁸ Excludes cases filed after December 31, 2006 as a crude correction for possible censoring due to the end of the data in 2009.

³⁹ Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 *TEX. L. REV.* 1097, 1117-18 (2006).

⁴⁰ Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 *U. PA. L. REV.* 1543, 1574 (2014).

The judicial attitudes thesis is far from a perfect match with the win rate data, however. For one thing, the Burbank-Farhang study shows a consistent decline in pro-plaintiff sentiment over the entire period from 1970 to 2013, in line with Siegel's litigation hostility thesis. But the plaintiff win rate declines for a decade, only to stabilize around 1995. We also note that all of these scholars were looking at Supreme Court decisions, which may have little to say about what was going on at the district court level.⁴¹

A variant on this hypothesis is that the makeup of the federal judiciary changed during the period between 1985 and 1995, so that judges who were more generous to plaintiffs were gradually replaced by ones who were less so. If such a change in personnel stabilized in 1995, that might have given rise to a pattern like the one we observe.⁴² That is, as more plaintiff-friendly judges were displaced, the win rate might slowly decline, and when judicial personnel stabilized, the win rate would reach a new (lower) equilibrium. We have not tested this hypothesis,⁴³ but we note that it almost certainly can not explain the temporary (slight) rebound in the plaintiff win rate and the increased volatility of win rates (albeit within a narrow range).

F. Procedural Retrenchment?

Similar problems beset the argument that procedural retrenchment could explain the drop in win rates. To be sure, scholars have pointed out a series of procedural limitations that were predicted to affect plaintiffs negatively, starting in the early 1980s.⁴⁴ But our data show a rising win rate from 1980 to 1985, and then a precipitous decline through 1995, followed by stabilization thereafter. This is not consistent with the timing of pro-defendant procedural reforms, which began in the early 1980s and have consistently increased.

For example, Rule 16 was amended in 1983 to empower judges to manage cases and to dispose of meritless cases more easily.⁴⁵ In 1986 the Supreme Court decided the summary

⁴¹ A good example is the effect of changes to pleading doctrine. Compare Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015) (finding an effect on dismissal rates) with William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693 (2016) (finding no effect on dismissal rates).

⁴² We are hedging here because if all parties know about the shift in judicial attitudes, a Priest/Klein analysis would predict offsetting changes in settlement behavior, meaning that the win rate would not move (much) in response to a more defendant-friendly judiciary. Instead, parties would simply settle marginal cases that would formerly have been plaintiff wins.

⁴³ We think this story is logically coherent, but empirically not very plausible. The consequences of adding new cohorts of defendant-friendly judges on the win rate depends on the product of two effects:

1. The amount of judicial turnover; and
2. The degree to which new judges were less favorable to plaintiffs than those they replaced.

Unless there was a great deal of turnover and newer judges decided many cases differently than those they replaced, the win rate would not move much in response.

⁴⁴ A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 360 (2010) (describing various changes in procedural doctrine that make it harder for plaintiffs to bring and maintain lawsuits).

⁴⁵ Fed. R. Civ. P. 16(c)(2) ("[T]he court may consider and take appropriate action on the following matters: formulating and simplifying the issues, and eliminating frivolous claims or defenses....").

judgment trilogy, which made it easier for defendants to bring summary judgment motions.⁴⁶ But studies show that summary judgment motions were already increasing in the lower federal courts prior to these decisions.⁴⁷ Similarly, the Supreme Court tightened the pleading standards in 2007,⁴⁸ but it appears that pleading standards were already more restrictive than mere “notice pleading” in the lower federal courts long before those decisions.⁴⁹ Doctrinal trends at the Supreme Court level appear to have begun before the decline in win rates and to have continued long after the win rate stabilized at a new, lower and more volatile norm.

IV. Further Explorations

In this section, we abandon any pretense of hypothesis testing. Instead, we simply slice the data in various ways, looking for patterns that might suggest some candidate explanations for the win rate decline. At the risk of spoiling the suspense, we do not find any smoking-gun evidence that can explain what happened.

A. Jurisdictional Basis

We first consider the relationship between the jurisdictional basis of lawsuits and the win rate. The AO recognizes four distinct bases for federal court jurisdiction. Table 2 shows the proportion of each of these among the adjudicated cases that are the relevant population for our win rate analysis. Federal Question jurisdiction accounts for nearly half of all adjudicated cases, with another 25 percent consisting of cases brought by the US government. Diversity and Federal defendant cases make up the remaining 25 to 30 percent.

Table 2: Basis of Jurisdiction Among Adjudicated Cases, 1980-2009

<u>Basis of Jurisdiction</u>	<u>Frequency</u>	<u>Percent</u>
Federal Question	879,821	44.6%
US Plaintiff	502,234	25.5%
US Defendant	317,927	16.1%
Diversity	272,411	13.8%
Total	1,972,393	100.0%

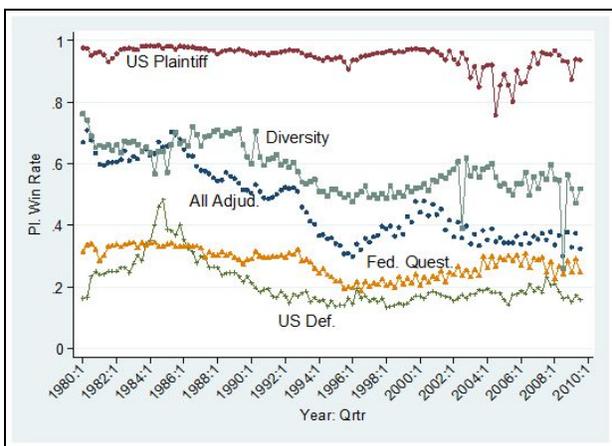
⁴⁶ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

⁴⁷ Joe S. Cecil et al., *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, Oct. 25, 2006 at 18-20, [http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=914147](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=914147)

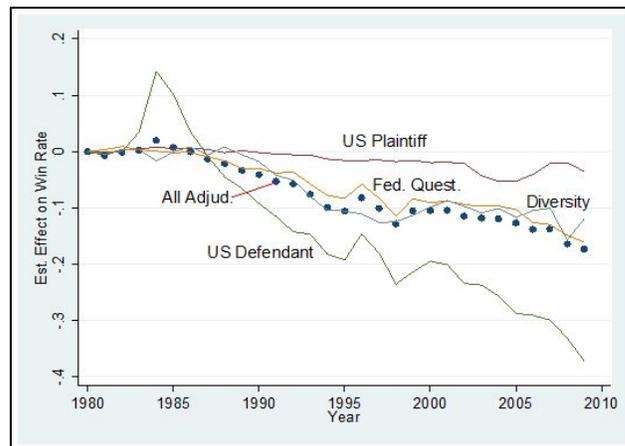
⁴⁸ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

⁴⁹ Christopher M. Fairman, *The Myth of Notice Pleading*, 45 *ARIZ. L. REV.* 987, 988 (2003). In a series of cases, the lower courts attempted to increase pleading standards in civil rights cases only to be struck down by the Supreme Court, demonstrating that the lower courts were making pleading more difficult in civil rights cases for years prior to *Twombly* and *Iqbal*. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (striking down heightened pleading standards for employment discrimination cases); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (striking down heightened pleading standards for civil rights cases against the government).

Figures 7A and 7B plot the raw win rate (by quarter) and the estimated year effect (the coefficient year dummy variables from separate regressions explaining the evolution of the win rate over time) for each of the four jurisdiction categories. Panel A shows that the raw win rate for cases brought *by* the US government didn't change much over time. Diversity and Federal Question plaintiffs experienced declines in success rates, but it was cases brought against the US government that exhibited the most substantial downward trend during the 1985-1995 period. Panel B looks at win rates separately by jurisdictional basis, but now with controls for narrow Nature of Suit categories, pro se status and the Circuit in which the case was filed.⁵⁰ The visual evidence reveals only a very slight decline in the win rate for cases brought by the US government, and a drop of roughly 10 percentage points in the estimated year effect for Diversity and Federal Question cases. But the perspective is distorted by the much larger negative estimated year effects for US Defendant cases. (Note that the dots in Figure 7.B represent the win rate effect for *all* adjudicated cases, and are identical to Figure 2.)



A: Raw Win Rate



B. Est. Year Effects, with Controls

Figure 7: Win Rates, by Jurisdictional Basis, 1980-2009

Clearly, part of what is driving the drop in overall win rates is the falling success rate for cases brought against the US government. So what accounts for the precipitous drop in win rates for this category? Table 3 presents some evidence on the composition of US Defendant cases across broad Nature of Suit categories.

There are only three U.S. Defendant cases types with significant numbers of adjudicated outcomes: Social Security, "Administrative," and Prisoner cases. Together, these account for almost 84 percent of all US Defendant adjudications. We can probe further by looking at the win rate decline for these three case types, as in Figure 6. We note, however, that US Defendant cases taken together are only 16 percent of all adjudicated cases; Social Security cases are only about 7 percent, and prisoner cases amount to only 4.5 percent of total adjudications. These suit

⁵⁰ We use the same methodology as in Figure 2, explained *supra* at 5. The regressions summarized in Fig. 5.B cannot control for jurisdiction, however, since they are already disaggregated on that basis.

types are thus not sufficiently numerous to drive the substantial decline in aggregate win rates we observed in Figures 1 and 2.

Table 3: Distribution of US Government Defendant Cases, by Broad Nature of Suit and Adjudication Status, 1980-2009

	All Cases	Adjudicated Cases	% of Adj'd. US Def. Cases	Win Rate
Social Security	410,395	145,044	45.7%	30.0%
Prisoner	259,828	88,948	28.0%	9.8%
Administrative	116,110	32,576	10.3%	21.0%
Tort/Property	100,111	22,718	7.2%	35.3%
Civil Rights	57,595	19,034	6.0%	8.7%
Commercial	24,104	5,607	1.8%	26.5%
Labor	4,717	1,543	0.5%	18.0%
Other	5,640	1,225	0.4%	19.8%
Bankruptcy	1,615	352	0.1%	21.0%
StudentLoan	672	377	0.1%	88.6%
Total	980,787	317,424	100.0%	32.4%

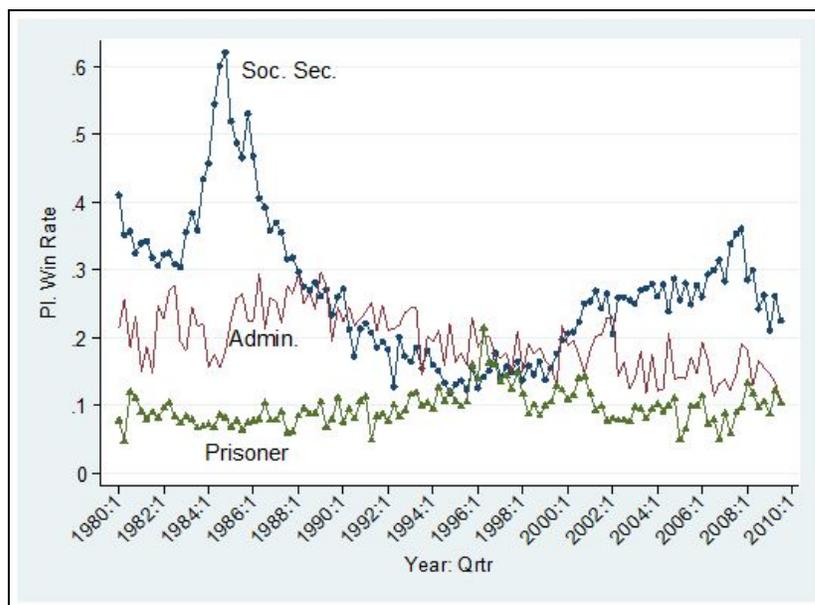


Figure 8: Plaintiff Win Rate in Adjudicated Cases, by Quarter of Termination: 1980-2009 (selected US Government Defendant case types)

The most dramatic pattern visible in Figure 8 is the declining win rate for Social Security cases, from 63 percent in 1984 to only about 10 percent by 1996; after that point, however, Social Security win rates trend back up to about 35 percent. Win rates for “Administrative” cases trended slightly downwards in the crucial 1985-1995 period, while Prisoner cases actually

became increasingly successful, although they have consistently been much less successful than other types of cases.

The bottom line is that Social Security cases “explain” part of the overall story of declining win rates, but since they constitute such a small share of all adjudications, there must be much more going on than just a drop in the success rate of Social Security plaintiffs.

B. Procedural Progress

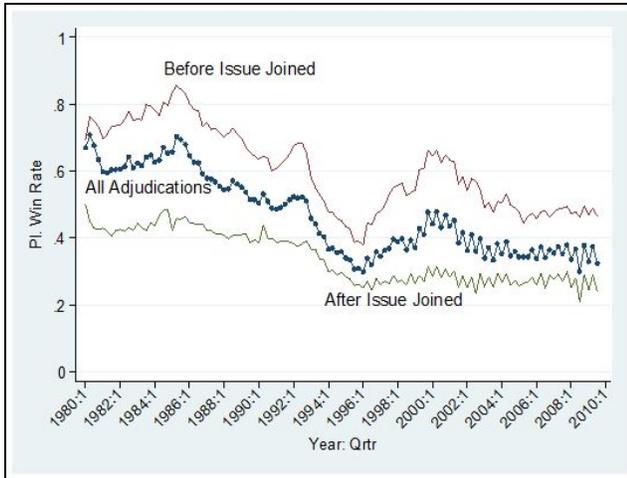
We next consider the relationship between procedural progress in a case and the win rate to rule out the effect of actions that are never prosecuted. Table 4 collapses the AO’s “Procedural Progress” codes into two categories—before and after “the issue is joined.” (“Before issue is joined” means that the defendant has filed no answer. Roughly half of all adjudicated cases are disposed of before the issue is joined.

Table 4: Procedural Progress at Termination
for Adjudicated Cases, 1980-2009

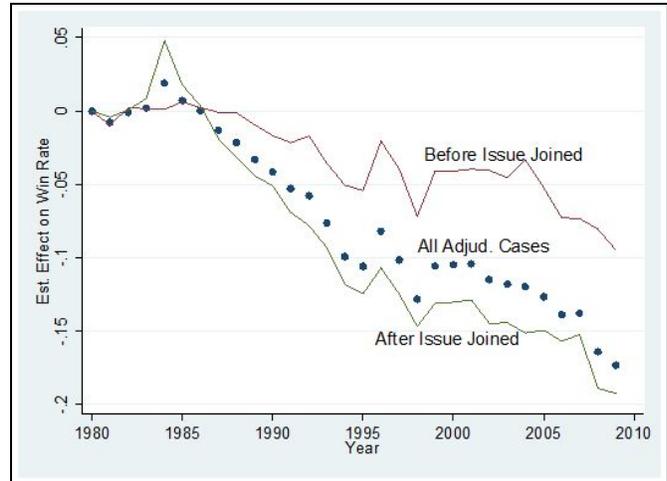
<u>Procedural Progress</u>	<u>Frequency</u>	<u>Percent</u>
Before issue joined	925,552	46.9%
After issue joined	1,047,462	53.1%
Total	1,973,014	100.0%

Figures 9.A and B use the same methods we adopted earlier. Figure 9.A plots the “raw” (unadjusted) win rate by quarter for cases that terminated before and after the “issue was joined.” Figure 9.B shows the estimated year effects on the win rate in adjudicated cases, with the same set of controls as earlier.⁵¹ Both parts of Figure 9 tell a story that is consistent with the overall pattern we have observed. Plaintiff win rates in cases decided before the issue was joined (either with or without controls) track the overall results quite closely. The declining win rate is not being driven by results from one stage of procedural progress.

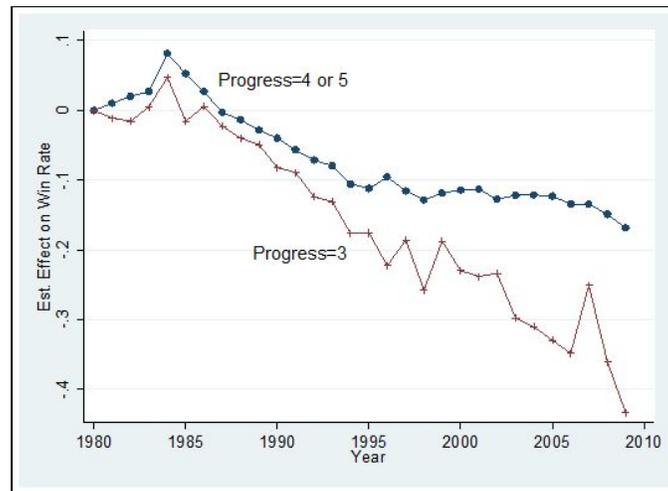
⁵¹ See *supra* at 6. We acknowledge there are grounds for econometric skepticism here. Unlike fixed-in-advance variables such as Nature of Suit or Jurisdictional Basis, a case’s procedural progress at termination is clearly endogenous with respect to its outcome. That is, the same factors that cause a case to end “before the issue is joined,” rather than after, could plausibly be correlated with the case’s ultimate outcome. These results should be understood as a way of summarizing the evidence, rather than as a robust statement about causal influence.



A: Raw Win Rate, by Quarter



B: Est. Year Effect, with Controls



**C: Estimated Year Effect (with Controls),
by Procedural Progress**

Figure 9. Win Rates in Adjudicated Cases, by Procedural Progress at Termination, 1980-2009

Figure 9.C further decomposes the “before issue joined” cases, distinguishing those that close with no court action at all (code 3) from those that did require some intervention before closing (codes 4 and 5).⁵² This disaggregation reveals that win rates declined most for cases in which there was no judicial action at all (rather than those in which there was an adjudicated motion, for example). This suggests that some of the reason why plaintiffs may be losing more cases is simply because they are not prosecuting them as vigorously as they once did. That does not mean, however, that these cases are meritless. Other factors, including economic

⁵² Cases decided on motion (code 4) and those in which a pretrial motion was held (code 5).

considerations or poor lawyering, may cause plaintiffs to abandon their cases. Moreover, win rates also decline in cases that do involve court action which suggests that judicial involvement is also influencing some of the decline in win rates.

C. Case Duration

We also considered the relationship between duration and win rates. Figures 10 and 11 plot the median duration of adjudicated cases by the quarter in which the case terminated.⁵³ It is apparent from Figure 10 that adjudicated cases won by plaintiffs are disposed of in considerably less time than those won by defendants: the median plaintiff win take only about half as long as the median defendant win. Moreover, both plaintiff and defendant wins have gotten longer over the past 30 years, by roughly 50 days.

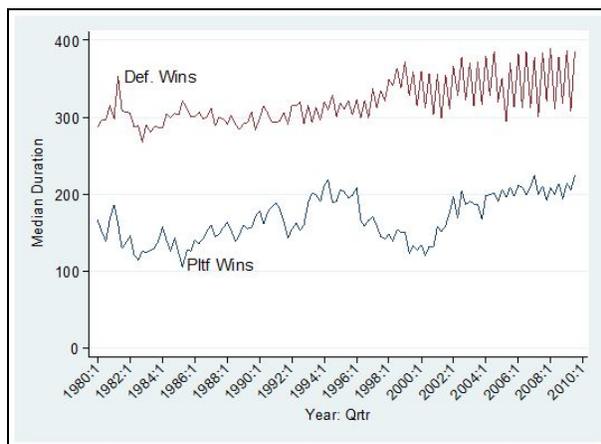


Figure 10: Median Duration (in Days) of Adjudicated Cases Won by Plaintiffs and Defendants, by Quarter of Closure, 1980-2009

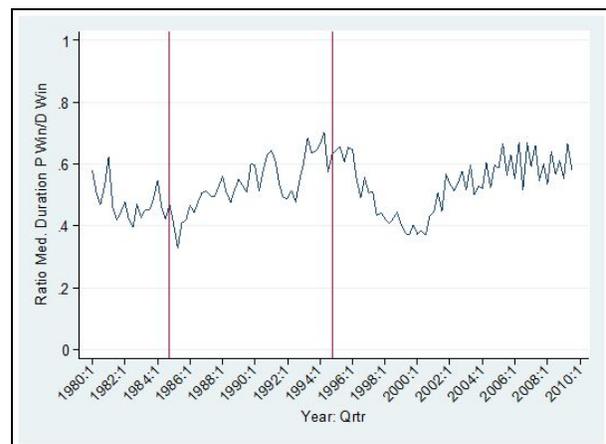


Figure 11: Ratio of Median Duration of Plaintiff Wins to Median Duration of Defendant Wins, by Quarter of Closure, 1980-2009

An interesting fact that emerges from Figure 11 is that cases won by plaintiffs started getting longer *relative to those won by defendants* around the end of 1984, and this trend continued through 1995, as indicated by the vertical red lines. This is precisely the period during which plaintiff win rates declined, and the two trends could be related.⁵⁴ Figures 10 and 11 (and the

⁵³ Cases with durations of more than 2,000 days are extreme outliers and are dropped in both figures. The same caveat about endogeneity that we raised with our analysis of procedural progress applies here as well. A case's duration and the party who prevails are clearly determined by some of the same factors, so the relationship between prevailing party and duration should not be given a causal interpretation.

⁵⁴ The increased length of plaintiff wins relative to defendant wins could, *by itself*, have had an 'algebraic' effect on the win rate. As an analogy, think of what happens to the share of women in all year-*i* deaths, as female life expectancy starts to lengthen relative to that of men. As successive cohorts of women start living relatively longer, they account for a smaller fraction of all annual deaths until at some point the life expectancy of new cohorts stops increasing. During that time, women make up a smaller fraction of all deaths in any given year than their share of all births (roughly one-half) in the year they were born. Similarly, if plaintiff-won cases are taking longer to adjudicate relative to defendant-won cases, that fact by itself will depress the plaintiff win rate for a period of time.

data on the procedural progress of cases from Figure 7) suggest that plaintiffs with winning cases may have faced more “uphill” battles, and litigated them longer and with more procedural hurdles, in the period of long decline (1985 to 1995) than previously.⁵⁵ But these changes do not in themselves afford much of an explanation for either the long decline in plaintiff win rates or the stability that emerged after ten years.

V. Conclusion

Plaintiff success rates in adjudicated cases are a matter of considerable policy importance. Almost 7 million civil cases were filed in the Federal Courts between 1980 and 2009. Depending on the time period, one-quarter to one-third of these ended in some kind of adjudication. Unlike Las Vegas, however, what happens in court does not stay in court: adjudicated outcomes cast a shadow on settlements—and indeed, on the underlying behavior by all parties that gives rise to litigation.⁵⁶ Decisions about how much care to take to prevent an accident, whether to breach a contract, or what policies a prison will adopt are all influenced by parties’ assessments of their ultimate chances of success in adjudication. A large and sustained change in the win rate will inevitably have an effect on primary conduct.

The 10-year win rate decline that we document has jurisprudential consequences that go beyond these policy issues, however. Small, random year-to-year variations in the win rate presumably do not raise significant normative concerns. But we think a large and durable change in the win rate does prompt questions about systemic legitimacy, especially if no explanation for the change can be found. (This would be as true for an unexplained *rise* in the win rate as for an unexplained fall.) The increased volatility in win rates after 1995 raises concerns for the same reasons.

The rule of law has traditionally been understood to require judges to give reasons justifying their decisions at the level of the individual case—hence, the judicial opinion.⁵⁷ But plaintiff win rates are a kind of “emergent” property of the system by which cases are brought and decided, and we suggest that the rule of law also requires a justification for this higher-order phenomenon in addition to the outcome of each case taken separately.

But wait: if every individual outcome is already justified *via* a judicial opinion, isn’t the aggregate outcome that emerges—the system-wide plaintiff win rate—just epiphenomenal? It is the consequence of individual judges’ decisions (and those of the parties), but if every decision

⁵⁵ See, e.g., Marc Galanter, *The Turn against Law: The Recoil against Expanding Accountability*, 81 TEX. L. REV. 285 (2002).

⁵⁶ Robert Cooter and Stephen Marks, with Robert Mnookin, *Bargaining in the Shadow of the Law*, 11 J. LEGAL STUDIES 225 (1982) (settlements reflect outcomes in litigated cases); Keith N. Hylton, *An Asymmetric-Information Model of Litigation*, 22 INT. REV. OF L. & ECON. 153 (2002) (theoretical model integrating defendants’ primary decisions about level of care with plaintiffs’ decisions to file suit and settlement/adjudication outcomes).

⁵⁷ See, e.g., Mathilde Cohen, *The Social Epistemology of Public Institutions*, in Maksymilian del Mar, ed., NEW WAVES IN PHILOSOPHY OF LAW (2011), pp.185-208; Fredrick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 638 (1995) (arguing that reasons are typically “propositions of greater generality than the conclusions they are reasons for,” which means that they serve as a constraint on future decision-making).

is appropriately explained, then mustn't the sum of these decisions also be justified, simply as the pattern that emerges from the bottom up?

The reason this explanation is unsatisfying is that one would predict that the pattern that would emerge from the aggregate of justified adjudications would be a stable win rate (after controlling for changes in the substantive law). But the pattern that we have uncovered is just the opposite, a declining and then highly volatile win rate that is not explicable. As a result, an overall explanation ought to be required.

Moreover, even if any aggregate win rate is justifiable, a *change* in the win rate such as we have documented seems to call for an explanation. This type of change is only visible at a systemic level; and it calls into question both judicial neutrality over time and the rule of law value of consistency in decision-making.

The questions raised by this finding, and the need for justification, seem to be largely ignored in existing scholarship in civil procedure and jurisprudence, both theoretical and empirical. Theorists of judicial reason-giving have understandably focused on the case or judge level,⁵⁸ rarely addressing what system-wide expectations are normatively appropriate. This case-level focus is also manifested in the lack of systematic data about the judicial system, much of which is still difficult for researchers to obtain.⁵⁹ Even the data that are made available to researchers are limited, so empirical research on the federal courts must often rely on hand-collected data sets to answer questions about the effects of procedural or substantive rule changes on outcomes.⁶⁰ (On the other hand, some rules applicable to the courts—such as the requirement that the names of judges with motions pending more than six months be published twice yearly—indicate system-wide concerns with case processing, at least with respect to the timing of decisions.⁶¹)

If an explanation for the falling win rate is called for, who should provide it, and what would it look like? Individual judges are clearly in no position to detect or assess system-wide changes in win rates. That must be a job for a person or institution with a broader perspective. The Chief Justice of the Supreme Court prepares an annual report on the federal judiciary that might serve as one venue for such a systemic overview.⁶² Another might be a periodic report by

⁵⁸ See *ibid.*

⁵⁹ For example, it took several months and significant procedural hurdles to be granted access to the data used in this essay, which had been held exclusively by the Intra-University Consortium on Political and Social Research at the University of Michigan. The data have now been made available by the Federal Judicial Center (May 16, 2017). But they are stripped of judge identifiers, and omit virtually all of the detailed information about what goes on between when a case is filed and when it closes, dramatically limiting their usefulness.

⁶⁰ See, e.g., Douglas M. Spencer & Sean Farhang, *Legislating Incentives for Attorney Representation in Civil Rights Litigation*, 2 *J.L. & COURTS* 241 (2014) (analysis based on hand collected data set).

⁶¹ Civil Justice Reform Act, 28 U.S.C. §§ 471-82 (1990). There have of course been many studies of system-level questions such as backlogs and delays, but neither courts nor scholars have analyzed the effect of this type of shaming sanction on judicial decisionmaking. But we have, see our article *Do Judges Respond to Incentives?* (draft ms.).

⁶² For a compilation of these reports, see <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>, visited June 4, 2017. In the last ten years, none of these (admittedly rather brief) reports has discussed plaintiff win rates in adjudicated cases.

the Federal Judicial Center, which regularly produces high-quality quantitative analysis of various problems confronting the federal courts, but has apparently never addressed the issues we discuss.⁶³ A final option, and our first choice, would be for the AO to provide researchers with access to the complete data, including Judge identifiers and data on motion filing and disposition. That would allow social scientists to test a much wider range of theories of win rate determination than is possible using the sparse data that are now available.

As to what kind of an explanation is called for, we are agnostic. If the falling win rate were found to be the result of an exogenous change in the quality of cases brought by plaintiffs, it would not seem to raise any normative problems for the courts as an institution, although it would still be quite puzzling from a socio-legal perspective. That same conclusion would presumably obtain if the win rate fell because defendants exogenously decided to litigate winning cases they would formerly have settled. On the other hand, if judges simply became more defendant-friendly, that *would* raise more serious questions about the rule of law and judicial neutrality, and would require a normative justification.

While we have been unable to provide a systemic explanation for the falling win rate, we hope we have at least encouraged others to try to get to the bottom of what happened and what it means. Our findings also point to a need for more theoretical work on what kinds of systemic justifications are required by the rule of law, in addition to those provided by judges' explanations of their holdings in individual cases.

⁶³ For a listing of recent reports, see <https://www.fjc.gov/research/selected-current-or-recently-completed-research-projects> (listing recent research by the FJC) (visited June 4, 2017). We agree that "Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations" is an important topic (see <https://www.fjc.gov/content/jurors-and-attorneys-use-social-media-during-voir-dire-trials-and-deliberations-report>), but we think the decline in win rates is at least as worthy of attention.

**Appendix: Win Rates and Adjudication Volumes, by Nature of Suit, 1985 and 2009
(for Nature of Suit Categories with > 500 Adjudications in 1985)**

Nature of Suit Category	Abbrev.	1985		2009		% Change in	
		Win Rt	# Adjud.	Win Rt	# Adjud.*	Win Rt	# Adjud.
Overpmt. Veterans Benefits	VETR	99.6%	24,829	83.3%	8	-16.4%	-100%
Recov. Default. Stud. Loans	LOAN	99.6%	7,752	99.0%	1,836	-0.6%	-82%
Other Contract Actions	OTHK	81.2%	7,514	67.3%	3,053	-17.1%	-70%
Disab. Ins. Worker/Widow	DIWC	51.0%	6,937	21.4%	1,729	-58.1%	-81%
Pris.-Civil Rights	PRIS_CR	4.2%	5,745	1.6%	4,249	-63.1%	-45%
Foreclosure	FORE	99.2%	4,820	64.9%	1,064	-34.6%	-83%
Pris.-Habeas Corpus	PRIS_HB	4.3%	4,146	2.4%	7,032	-44.9%	27%
Other Civil Rights	O_CR	20.2%	2,986	9.6%	3,499	-52.3%	-12%
Civil Rights-Jobs	EMP_CR	21.6%	2,532	10.1%	3,129	-53.0%	-7%
Negot. Instruments	NEGIN	97.0%	2,292	87.2%	251	-10.1%	-92%
Other Statutory Actions	OTH	57.5%	1,912	45.2%	1,661	-21.4%	-35%
Oth. Forfeiture/Penalty	FORF	95.7%	1,821	97.9%	439	2.3%	-82%
Pers. Inj.-Product Liab.	PI	15.5%	1,605	12.0%	701	-22.5%	-67%
ERISA	ERISA	84.2%	1,477	81.1%	3,019	-3.7%	53%
Other Personal Injury	OPI	38.5%	1,433	19.2%	849	-50.3%	-56%
Insurance	INS	48.6%	1,388	39.8%	1,369	-18.1%	-26%
SSI-Disab.	SSI	44.8%	1,189	23.8%	1,644	-47.0%	4%
Lab./Mgt. Relations Act	LMRA	49.8%	1,132	65.3%	384	31.0%	-75%
Overpmts-Enforc. of Judg.	OVR_PY	97.8%	1,017	80.6%	89	-17.6%	-93%
Marine Contract Actions	MAR_K	84.0%	938	82.7%	369	-1.6%	-70%
Motor Vehicle-Pers. Inj.	MV_PI	56.3%	907	40.0%	233	-29.0%	-81%
Tax Suits	TAX	49.9%	799	67.3%	493	34.8%	-54%
Bankruptcy & Appeals	BKRPT	33.9%	652	16.9%	213	-50.2%	-75%
Land Condemnation	LAND	29.2%	648	16.2%	304	-44.4%	-65%
Marine Personal Injury	MAR_PI	53.4%	631	52.9%	116	-1.0%	-86%
Trademark	TMRK	88.0%	625	88.0%	913	0.0%	10%
Copyright	CPRT	89.0%	618	81.7%	713	-8.2%	-13%
Pris. Petitions-Vac. Sent.	PRIS3	12.9%	598	14.9%	2,181	15.8%	174%
TOTAL			88,943		41,544		
% of All Adjudicated Cases			92.1		81.1		

*Note: 2009 volumes are annualized (based on data through Sept. 30 only). Abbreviations are keyed to Figure 4.