Implementation of Anti-Discrimination Policy: Does Judicial Selection Matter?

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Abstract

One of the most striking changes in labor market policy of the past fifty years has come in the form of legislation to limit discrimination in the workplace based on race, gender, disability and age. If such measures are to be effective in ending discrimination, they need to be enforced. The latter is dependent on state and federal agencies such as the Equal Employment Opportunities Commission and ultimately the willingness of courts to find in favor of plaintiffs. Courts also play an important role in the evolution of anti-discrimination policy since past decisions create future precedent. This paper asks whether the number of charges filed with government agencies depends on the method by which judges are selected. Popularly elected judges should be expected to have more pro-employee preferences (*selection*) and should move closer to employee preferences (*incentives*). This should result in fewer anti-discrimination charges being filed in states that appoint their judges. In line with this prediction, this paper uses data on the number of employment discrimination charges filed for the period 1973-2000 and finds that states that appoint their judges have fewer anti-discrimination charges being filed.

I. Introduction

One of the most striking changes in labor market policy of the past fifty years has come in the form of legislation to limit discrimination in the work place based on race, gender, disability and age. But if such measures are to be effective in achieving their goals, they need to be enforced. The latter is dependent on agencies such as the Equal Employment Opportunities Commission and ultimately the willingness of courts to find in favor of plaintiffs who file for discrimination. Courts also play an important role in the evolution of anti-discrimination policy since past decisions create future precedent. If the enforcement process is too lax, discrimination will continue to remain unchecked. Yet, if it is too lenient, there is scope for "rent-seeking" with excessive numbers of charges being filed. Either way, we would expect the number of charges of discrimination filed to reflect court behavior.

This paper looks at a particular aspect of this issue by asking whether the number of charges filed depends on the method by which judges are selected. If judges are popularly elected, we would expect those with more pro-employee preferences (*selection*) and a move in decisions that are closer to employee preferences (*incentives*). This should result in fewer anti-discrimination charges being filed in states that appoint their judges.

We use state level data to investigate whether judicial selection methods affect the number of employment discrimination charges filed in a panel of states for the period 1973-2000. Such charges are an important source of evidence since the judiciary has played a key role in policy implementation in this area. Although a charge of discrimination may be resolved at the agency level, courts are the venues of last resort. Even though the vast majority of claims are settled outside the court, the generosity of settlements reached in court will affect the decision to file. This is because any pre-trial bargaining is affected by the expected outcome if there were litigation. Because both trial and appellate courts interpret statutes, judges are involved in creating policy. Court decisions expand or contract a given statute insofar as decisions involve a court's application of the statute to a particular set of facts. These statutory interpretations are binding decisions not only on the parties to the agreement but to future litigants. The fact that collectively the judiciary can change the thrust of policy towards those who perceive discrimination can also affect the decision to file a charge of discrimination.

Our results show that states that appoint their judges have lower levels of discrimination charges compared to those that use some form of election. This holds for aggregate discrimination charges and for charges disaggregated into racial, gender and age discrimination. The results hold up also when we instrument for whether a state uses judicial appointments using other similar institutions within the state (whether a state permits popular initiatives and referendums, and whether the state elects its public utility commissioners). Finally, we consider whether the results are driven by incentive or selection effects. Here we find evidence that it is submitting judges to *re-election* which matters rather than the mode of initial appointment.

This paper fits into an emerging literature by economists on judicial selection and its consequences.[1] None of this literature to date has looked at the impact of judicial selection on

[1] The existing body of work supports the view that appointed judges behave differently compared to elected judges. Suggestively, Bohn and Inman (1996) find that whether a constitutional restriction on deficit finance is

the decision to file a charge. Nonetheless, this is an important dimension affecting the use of resources in the enforcement process.

The remainder of the paper is organized as follows. In the next section, we discuss the background theoretical considerations that motivate our analysis. Section III discusses the background facts and the institutional settings of the state court systems and the employment discrimination statutes. Sections IV and V discusses data and the empirical estimation strategy while section VI develops the results. Section VII explores the issue of whether the results are driven by a selection or incentive argument. Conclusions and directions for future research are in section VIII.

II. Theoretical Considerations

The main idea of the analysis is that the expected return to filing a discrimination charge is higher in states where judges have preferences and incentives that make them more pro-employee.

A. The Decision to File

Suppose that employee i in state s at date t believes that an employer k has discriminated against her. Then in an economic model of the decision to file a charge, she will compute the expected return from doing so and compare it with expected costs. This expected return depends in general on three things: the employee's characteristics x_{ist}, the employer's characteristics y_{kst}, and features of the state judicial system φ_{st}. For simplicity, we suppose for the time being that the latter comprises only whether the judges in state s at time t are elected or appointed, i.e. $\varphi_{st} \in \{a, e\}$.

To be realistic, we suppose that only a small fraction of charges are actually litigated. We model this in a standard way.[2] Let $F(d : x_{ist}, y_{kst}, \varphi_{st})$ be the conditional distribution of damages. We assume that $F(d : x_{ist}, y_{kst}, a) < F(d : x_{ist}, y_{kst}, e)$, i.e. the distribution of

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effective depends on whether the responsible court is elected or appointed. Restrictions with appointed courts do not appear effective in their data. Hanssen (2000) tests the idea that appointment leads to greater judicial independence by looking at staffing levels in three budgetary agencies that are subject to judicial review: public utility commissions, insurance commissions and education bureaucracies. He argues that the kind of defensive activity that more independent judiciaries engage in will result in them having more staff. Using cross-sectional data for 1983, he shows that states with elected judges have significantly smaller bureaucracies after controlling for a number of other observables. Hanssen (1999) looks at whether states that elect their judges have more or less litigation activity, arguing that this may reflect the degree of uncertainty in the operation of courts. Using data from all 50 states, he tests whether there are significantly more public utility disputes (1978-83), and High Court and Trial Court Filings (1985-94) in states that elect their judges. The main finding, identified from cross-sectional differences, after controlling for a number of economic and demographic variables, is that appointing states have significantly higher rates of judicial activity in public utility disputes and High Court Filings, but not in Trial Court Filings.

[2] This asymmetric information model follows Bebchuk (1984). The basic thrust of our argument would also hold in the well-known model of Priest and Klein (1997) where potential litigants are symmetrically informed, but uncertain about the outcome from litigating.

damages in an appointing state first order stochastically dominates the distribution of damages in an electing state. Below, we will discuss reasons why we would expect this to be true. We suppose that only a small fraction of charges are actually litigated. We model pre-trial bargaining in a standard way. The employer is assumed to be fully informed about the likelihood of success and circumstances of the discrimination case. The uninformed party (the employee) then makes a take-it-or-leave-it offer to the employee of b_{ikst}. The employer then accepts or rejects the offer. If he rejects, then the case goes to trial, while if he accepts, then the case is settled out of court. Let court costs be C_{kst} for the employer and c_{ist} for the employee. The offer will be accepted if

$$b_{ikst} < (d_{ikst} + C)$$

since, by assumption, realised damages d_{ikst} are observable to the employer. The optimal pre-trial offer maximizes:

$$b(1 - F\left(b - C_{kst} \ : \ x_{ist}, y_{kst}, \varphi_{st}\right) + \int_0^{b-C_{kst}} \left(z - c_{ist}\right) dF\left(d \ : \ x_{ist}, y_{kst}, \varphi_{st}\right).$$

This yields:

$$(1 - F\left(b^*_{ikst} - C_{kst} \ : \ x_{ist}, y_{kst}, \varphi_{st}\right) - \left(C_{kst} + c_{ist}\right) F\left(b^*_{ikst} - C_{kst} \ : \ x_{ist}, y_{kst}, \varphi_{st}\right) = 0.$$

This defines a cut off level of damages above which all cases are settled. From this equation, it is clear that the system of election or appointing judges does not have a clear-cut prediction for the amount of litigation even if damages are more lenient under one regime.[3] This is because it is the hazard function of the distribution of damages which determines b^*_{ikst}. However, there is a clear-cut prediction on the expected return from filing:

$$E\left(R \ : \ x_{ist}, y_{kst}, \varphi_{st}\right) = b^*_{ikst}(1 - F\left(b^*_{ikst} - C_{kst} \ : \ x_{ist}, y_{kst}, \varphi_{st}\right) + \int_0^{b^*_{ikst}-C_{kst}} \left(z - c_{ist}\right) dF\left(\varepsilon \ : \ x_{ist}, y_{kst}, \varphi_{st}\right).$$

This is lower in states that have appointed judges. Hence, for a given distribution of costs, we should expect fewer charges to be filed (other things being equal) in states that appoint their judges.

B. Judicial Selection

A key premise of the analysis above is that judicial selection affects the distribution of damages. We now discuss the theoretical justification for this.

Selection: Even though politicians who appoint judges are themselves accountable to the electorate, there is likely to be a difference between the kinds of judges who are elected and appointed because issues are "bundled" in general elections.[4] This allows organized interests to have a greater influence on non-salient policy issues in general elections. Since anti-discrimination is unlikely to be salient for a large group of citizens, this suggests that employers – who are typically more organized than workers -- are able to influence judicial appointments more in states that appoint judges. States that use elections give a direct say to citizens and are likely to yield populist judges who weight employee interests more heavily.

[3] This parallels some of the results on the incidence of strikes in asymmetric bargaining models – see, for example, Hayes (1984).

[4] Besley and Coate (2000, 2003) make this argument formally and apply it to citizens' initiatives and elected versus appointed regulators.

Incentives: Electing judges can also influence the decisions that they make when seeking re-election. This argument is developed in Maskin and Tirole (2004). Their argument hinges on the fact that voters are less informed about the correct judicial decision than judges. By making more employee friendly judgements, an elected judge will signal that their preferences are more congruent with those of the electorate.

In either case, the welfare consequences of judicial selection are uncertain. If the political system is biased against employees in the first place, then electing judges can help to redress this balance. However, it can also lead to a system which creates long-run costs on all citizens if leniency in anti-discrimination policy becomes a punitive tax on businesses. Some charges brought may constitute a form of rent-seeking which can create social waste.

III. Institutional Background

This section provides background details on the process of filing charges and selecting judges.

A. The Role of Courts in Interpreting State Laws

For a matter to be heard by a state court, the state must prohibit the type of alleged discrimination in a statute or in its constitution.[5] Protection against employment discrimination can be covered by state and/or federal law. The federal law was intended to serve as an umbrella statute providing universal protection for all workers regardless of the existence of a state law. Most states, however, have enacted a statute prohibiting employment discrimination that is broader than the federal law. In general, it is expected that a claim of employment discrimination will be pursued using the state court process and then pursued in federal court as a last resort. To protect one's rights in both federal and state courts, however, a charge of discrimination must be filed with the state or federal agency responsible for overseeing such charges within a fixed period subsequent to the alleged act of discrimination. Once a charge is filed in one agency (state or federal), there is a process in place whereby the other agency will be notified, thus reducing the cost of having to file separate charges in both the state and the federal agencies, thus ensuring that an individual's rights are protected under both sets of laws.

Once filed, a charge may be resolved by the agency (e.g. through an investigation, mediation, or agency action) or the individual may decide to drop his claim. If the matter is not resolved or dropped, the individual will have the option of bringing a court action in the appropriate state trial court.[6] A trial court is considered to be a court where the judge and/or jury are a "trier of fact." As the trier of fact, after hearing the evidence the trial court will decide whether an employer unlawfully discriminated against the employee based on its interpretation of how the facts fit the law upon which the charge of discrimination is based. If the losing party is dissatisfied with the decision of the trial court, that party can only appeal the decision if the party disagrees with the court's interpretation of the law. Thus, the courts that oversee the

[5] A description of these state laws is provided in the next section.

[6] Alternatively, the individual could bring an action in federal court. In most instances, the state law will apply first with the federal law providing protection when the state law is not applicable.

actions taken by the trial courts are known as appellate courts. These courts can reverse the findings of a trial court only if the trial court erred in its interpretation of the law. Appellate courts do not have the authority to re-try a case and these courts cannot re-interpret the facts of the case.

In some states there is only one level of appellate courts. In other states there are two levels. In the instance where there is only one level, once that court has rendered its decision, there is no further recourse for the parties in the state court system. In the instance where there are two levels of appellate courts, then a decision made at the lowest appellate level can be appealed to the highest appellate court. In most states, the second level of appellate court (often called the state "Supreme Court") has some discretion over the matters which it will agree to hear. Thus, an aggrieved party that failed to win at the first level of appellate court may or may not be able to pursue an appeal at the second level of appellate courts.[7]

The path an aggrieved employee will follow through the court system is illustrated in Figure 1. The first step begins with an employee or a job applicant deciding that he has been discriminated against by an employer. In the case of an employee, this could stem from the employee not getting a promotion or salary raise, being demoted, or being forced to retire or resign. Once the alleged discrimination occurs, the employee (or job applicant) has to decide whether to file a charge of discrimination with the federal Equal Employment Opportunities Commission ("EEOC") or relevant state agency within a fixed period. In states for which there is no state law against the particular type of discrimination, the charge must be filed within 180 days of the date on which the alleged discrimination occurred. In states for which there is a state law against the particular type of discrimination, the charge must be filed within 300 days of the date of the alleged discrimination.

Once a charge is filed with one agency (federal or state), the agency then is required to contact the employer and to seek conciliation between the employee and employer.[8] At the agency level, there are several possible resolutions, three of which are described as follows. First, the agency can dismiss the charge if the employee has failed to provide the necessary information to support his claim of discrimination. Second, the agency can investigate the matter and decide whether to issue a "right to sue" letter. At this point, the agency may encourage the parties, through mediation or some other process, to settle the matter. Third, the agency can decide to bring a lawsuit on behalf of the employee against the employer for the alleged discrimination.

Although the agency may be involved in investigating the alleged discrimination, the actions of the agency are not binding on the parties. Depending on the type of alleged discrimination (age, race, sex, disability, etc), after a certain period has passed, regardless of the actions (or inaction) the agency has taken, the employee may ask the agency for a right to sue letter and move the matter into the judicial system. Only in the case where the agency has

[7] For a more comprehensive review of state judicial process, see Carp and Stidham (2001). For an overview of the issues concerning judicial selection, see Hall (2001).

[8] With respect to age discrimination, the state agency has exclusive jurisdiction over the matter for the first 60 days. After that, however, the matter may be handled by either the state agency or the EEOC.

decided to initiate a lawsuit on behalf of the employee is the employee prohibited from bringing his own lawsuit.[9]

Under some state laws, an employee may not be required to file a charge of discrimination with the state agency (or EEOC) before filing a state court action. In these states, however, if an individual decides to pursue a state court action without filing a charge with the EEOC, that individual loses her right to have the charge investigated. Given the cost of filing a charge is nominal we should expect that an individual will file a charge before pursuing the state action. The fee for filing a charge is nominal given a lawyer is not needed for an agency investigation, and the agency will undertake the expense associated with investigating the charge. To pursue a court action, an individual is likely to incur the expenses of retaining a lawyer, will have to pay court filing fees, and pay for legal fees associated with pursuing the preliminary aspects of the case (e.g. discovery). Thus, we expect that, in most instances, an employee will pursue a charge before seeking court action.[10] We explore this issue further in Section IV.

B. Judicial Selection

Historically, legislative and constitutional requirements for the selection of judges have relied very little on individual characteristics. Indeed, there are few qualifications to become a judge. Moreover, there is no prescribed training program for would-be judges. Judges have tended to be older white males (Carp and Stidham, 2000, p. 269). The average starting age of a state trial judge is 46 while that of a state appellate judge is 53. On the whole, the party affiliation of a state judge mirrors that which dominates in the judge's state. Regardless of the method used to select the judges, most judges were politically active before assuming the bench.

At the federal level, all judges are appointed and serve for life. At the state level, judges may be appointed, elected, or selected using a combination of appointment and election. In all but a few states (Massachusetts, New Hampshire, and Rhode Island), judges serve a limited term and must be re-selected to serve additional terms. The methods used to select judges, in general, have followed four historic phases. With the founding of the United States, judges were initially selected through some type of appointment by either the state legislature or the governor. In the 1820s, during the period of Jacksonian Democracy, many states switched their selection scheme to one that involved a partisan election. By 1860, 24 of the 34 states in existence selected their judges under this method.

In the Progressive era at the end of the 19th century, many states switched to non-partisan election of judges. This was viewed as a compromise between giving the voters a say in selection and limiting politicking in the process. The early to mid-1900s saw heated debates over judicial selection. These debates lead to arguments in favor of a hybrid scheme that combined elements of appointment and election. This hybrid scheme was first adopted by Missouri in 1940 whereby a judge was first appointed by a governor after he consulted with a

[9] One of the benefits associated with having the agency initiate a lawsuit on behalf of the employee is that the employee is not responsible for retaining or paying fees of the lawyer that is needed to pursue the lawsuit.

[10] Our empirical analysis confirmed that the issue of whether a state allows an individual to go directly into court has no affect on the issue of whether the selection method of judges.

nominating commission comprised of lawyers and non-lawyers. For subsequent terms, however, the judge would have to withstand a retention election in which voters could decide in a yes or no vote whether to keep the judge in office.[11] Thus, while the judge does not have to run against another candidate to retain his office, he is subject to the whims of the voters in terms of whether he will be retained.

The current situation reflects a patchwork of arrangements determined by historical circumstance.[12] Most states use the same selection method for trial and appellate court judges.[13] We have grouped the states into three categories based on the method used for appellate court judges: appointed, elected, and hybrid. An appointed state is one that uses only appointment as the means of selecting and retaining judges. The appointment may include the use of a nominating commission and is by the governor or the state legislature. An elected state is one that uses elections to select and retain judges. These elections may be partisan or non-partisan elections. A hybrid state is one that directs the governor to select a judge by appointment but then shortly thereafter (usually within two years of the initial appointment) the judge must be retained through a retention election.

Table 1 puts the 48 continental states in one of three categories: those that elect their judges (22 states), those that appoint their judges (11 states), and those that use a combination of appoint and elect – the "hybrid" system -- (15 states). There are striking regional patterns. Most of the states in the eastern region of the U.S. appoint their judges, whereas most of those in the mid-west and southern regions elect their judges. The states in the western regions of the U.S. either elect or use the hybrid method of judge selection. There are two main regions where there is significant within region variation – regions 2 and 5. These regions will receive particular attention in the empirical analysis below.

Although many states tried to change their judicial selection method between 1970 and 2000, few succeeded – a list is in column (4) of Table 1.[14] In most states the selection method is dictated by the state's constitution and to change the constitution requires approval by the state legislature, governor, and the voters. The most prevalent reform has been from a non-partisan election method to a hybrid scheme. Wyoming (1972), Arizona (1974), South Dakota (1980), and Florida (1976) enacted this type of change. The next most popular change was from a partisan election method to a non-partisan election method. This happened in Florida (1972), Louisiana (1974), Georgia (1983), Mississippi (1994), and Arkansas (2000). Indiana (1970) and Tennessee (1994) switched from a partisan election method to a hybrid method. New York (1977) switched from an appointment method that was based on partisan elections in the lower courts to an appointment method (with a nominating commission). A handful of states,

[11] This method of selection is also referred to as a "merit" selection plan. It is termed merit because the initial appointment is by the governor in consultation with a nominating committee. Throughout the paper, however, we use the term "hybrid" instead of merit. In part this is due to the fact that some states are considered "merit" plan even if the appointment method is used for subsequent terms of a judge because the appointment is done in conjunction with a nominating commission. We have chosen to treat these types of states as "appointed" states.

[12] See Bowers (2002) for a more complete history of judicial selection methods.

[13] As of 2000, the following states use a different selection method for some or all of the trial court judges: Arizona, California, Florida, Indiana, Kansas, Missouri, North Carolina, and South Dakota.

[14] For a more comprehensive description of selection methods and the history of state changes in these methods, see www.ajs.org.

Maryland (1974), Vermont (1974), Delaware (1977), New York (1977), Wisconsin (1983), South Carolina (1996), added a nominating commission to its existing selection method. Rhode Island (1994) switched from a method that appointed a judge via legislative election to an appointment by the governor in consultation with a nominating commission. New Mexico (1988) added to its partisan election method a retention election for judges seeking additional terms.

C. Employment Discrimination Statutes

Most employees are covered by several federal statutes that prohibit employment discrimination based on such things as race, color, sex, age, national origin, religion, and disability. With the exception of the statute concerning disabilities, the federal statutes were first enacted in the mid- to late 1960s.[15] The statute covering disabilities was first enacted in 1990 and became effective in 1992.[16] The agency responsible for enforcing these laws is the Equal Employment Opportunity Commission ("EEOC"). Prior to 1972, however, the EEOC was considered a "toothless tiger" because it did not possess sufficient enforcement power to pursue violators of the federal statutes. EEOC's authority was expanded in the Equal Employment Opportunity Commission Act of 1972. Initially, the EEOC was not responsible for overseeing charges of age discrimination. This changed in 1980 when authority over the Age Discrimination in Employment Act was given to the EEOC.[17]

In addition to the federal statutes, many states have enacted statutes that are similar to the federal statutes. The state statutes often are more broadly worded and cover more types of employers and/or employees. For example, in some states age discrimination applies to all individuals over the age of 18, whereas the federal statute only covers individuals over the age of 40. In some states, discrimination is prohibited for such things as marital status, sexual orientation, smoking, having a family history of certain diseases, and/or participating in political activities outside of the workplace. Most of the federal statutes require the EEOC to defer charges it receives to the state agencies so that the agencies can first try to resolve the disputes using state laws, thereby treating the federal law as a "law of last resort."[18]

Although most state statutes reflect federal laws, there is variation when they were first enacted. In some states, the statutes were enacted before the federal laws were enacted. In other states, the statutes were enacted subsequent to the federal laws. A few states still do not have a statute that prohibits employment discrimination in the private sector.

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[15] The significant pieces of federal legislation are: The Equal Pay Act (enacted in 1963; requires equal pay for equal work), Title VII of the Civil Rights Act (enacted in 1964; makes it illegal to discriminate in hiring, discharge, compensation, etc., on the basis of race, color, religion, sex, or national origin), the Age Discrimination in Employment Act (enacted in 1967; makes it illegal to discriminate against individuals over the age of 40 unless age is considered a bona fide occupational qualification).

[16] Enacted in 1990, the Americans with Disabilities Act requires employers to offer reasonable accommodation to disabled employees and bans discrimination against the disabled in wage determination, hiring, and firing.

[17] For a more detailed report on the role played by the EEOC in pursuing charges of discrimination and the federal laws covering, see www.eeoc.gov.

[18] Information regarding the relationship between the EEOC and state agencies and the role of state laws in resolving disputes can be found at www.eeoc.gov.

Table 2 reports the years in which prohibition of discrimination was first enacted on the basis of race, sex, age, or disability. This table does not reflect modifications to the statutes that occurred subsequently for such things as: marital status, sexual harassment, sexual orientation, mandatory retirement, and/or mental disability. With respect to prohibitions of race and sex discrimination, states in the southern part of the U.S. tended to be the last states to enact legislation. Alabama, Georgia, and Mississippi still do not have a statute for these types of discrimination. With respect to prohibitions of age discrimination, states in the middle part of the U.S. in addition to some southern states were the last states to enact legislation. With respect to the prohibition of discrimination with respect to disability, there is no clear-cut geographic distribution across the states.

IV. Data

The empirical analysis studies the effect of the judicial selection method on the number of charges of employment discrimination brought in a state (to either a state or federal agency). Studying the selection issue using employment discrimination charges is ideal for several reasons. First, initiating a charge is one-sided. Only an employee (or potential employee) may file a charge. Thus, our analysis is not confounded by the possibility of an employer (the other party with different interests) bringing a charge. Second, given the existence of the federal statutes prohibiting the key types of employment discrimination (race, sex, age, disability), the role played by the state statutes are likely to minimized.[19] As such, our analysis is able to concentrate on the role played by the method used to select judges and is not as confounded by the intricacies of the state statutes as might exist with another type of court action.

We obtained under the Freedom of Information Act data on all employment charges filed with the Equal Employment Opportunity Commission ("EEOC") since 1970; the charges concerning claims of age discrimination start in 1980.[20] The EEOC receives approximately 80,000 charges on alleged employment discrimination practices by private employers per year.[21] Approximately 39 percent of all charges are given priority investigative and settlement efforts due to the early recognition that discrimination has likely occurred. Approximately 57 percent of all charges require further investigation to determine if a violation has occurred. The remaining charges are dropped due to jurisdictional limitations or unsupported claims of discrimination.

[19] As revealed by Collins (2001), with respect to race, 98 percent of non-southern blacks were already covered by the state laws well before the adoption of the federal law. As such, in many instances the existence of the state laws well before our analysis also limits the impact of the laws on our analysis. Collins (2001) as well as Neumark and Stock (2001), however, do find modest impacts of these laws on the employment of blacks and women.

[20] EEOC's role with respect to age discrimination has changed over time. Initially, the Department of Labor maintained administrative responsibility for investigating claims pertaining to age discrimination. In 1979, the EEOC was given this responsibility. Given the state agencies and the EEOC communicate with each other concerning the filing of charges, the data we have from the EEOC reflect the pool of employees who are concerned enough about an employment practice to bring it to the attention of the government agency. Thus, we do not have data on alleged acts of discrimination that are not brought to the attention of a state or federal agency. Given that approximately 20 percent of all charges filed with the EEOC are closed because of reasons related to the employee not following up on the charge, there not being any statutory jurisdiction for the claim, or because the employee withdrew the charge, we think this is not a serious concern.

[21] Information on the charge and litigation statistics can be found at www.eeoc.gov.

Of total EEOC charges in 2001, 36 percent involved claims of race-based discrimination, 31 percent involved claims of sex-based discrimination, 20 percent involved claims of age-based discrimination, and 20 percent involved claims of disability-based discrimination.[22] Across these different categories, approximately 18 to 26 percent of the charges were closed without further action because of reasons related to the employee not following up on the charge, there not being any statutory jurisdiction for the claim, or because the employee withdrew the charge (which may or may not include private settlements between the employee and employer reached early in the charge process). For approximately 55 to 63 percent of the charges, the EEOC failed to find a reasonable cause to support the claim of discrimination. If the EEOC fails to find a reasonable cause, this does not preclude the employee from bringing a private court action. The remaining charges are settled quickly, go through some sort of conciliation process, and/or have a finding by the EEOC that there is a reasonable cause to support the alleged discrimination.

In rare cases, the EEOC files a lawsuit on behalf of an employee. In 2001, for example, only 32 age discrimination lawsuits (less than 10%) were initiated directly by the EEOC.[23] The majority of lawsuits initiated by the EEOC are filed for claims concerning race or sex-based discrimination. Even in these cases, it is still a small number relative to the charges brought.[24]

The data from the EEOC contain much information on each charge filed. Each record identifies the office in which the charge was filed, the basis for the alleged discrimination, characteristics of the employee, characteristics of the employer, and information on the actions taken by the EEOC (or related state agency) on the charge. Two datasets were provided to us. The first dataset covers the early years (up to 1988). The second dataset covers the period from 1988 to 2001. The first dataset provides information on the first three actions taken in the case**.** The second dataset provides information on the first five actions taken in the case.

To construct the data set that we use, we identified those charges that involved a claim of race discrimination because the employee was black, sex discrimination because the employee was female, age discrimination, and/or discrimination based on one's disability. We excluded those charge records for which the record was closed because it was a duplicate record. We then summed the number of charges filed per year in each state over the sample period.

We study five categories of charges: (1) all charges (1973-2000), (2) charges with a claim of race discrimination by a black individual (1973-2000), (3) charges with a claim of sex

[22] For any given charge, one may claim several types of employment discrimination. While we do not study them, there can also be claims of discrimination based on religion or national origin as well as claims of discrimination based on the Equal Pay Act.

[23] In general, EEOC initiated lawsuits represent big actions. For example, in 2000, the EEOC settled a class action suit for $300,000 of an age bias lawsuit against Enterprise Rent-A-Car in Texas. The lawsuit alleged that the company refused to hire individuals 40 years of age or older for management trainee positions. Also in 2000, EEOC agreed to an $8 million settlement of an age discrimination case against AlliedSignal of Arizona on behalf of 48 charging parties and approximately 300 class members. The lawsuit alleged that the company violated the Age Discrimination in Employment Act (ADEA) when it laid off older workers at its Tempe and Phoenix facilities in 1993 and 1994.

[24] A state agency could also pursue a lawsuit on behalf of the employee. Whether the state agencies possess this ability is determined at the state level. Information on the role the state agency plays beyond possessing powers similar to the EEOC to investigate charges, however, is difficult to obtain for all of the states.

discrimination by a female (1973-2000), (4) charges with a claim of age discrimination (1980-2000), and (5) charges with a claim of disability discrimination (1993-2000).

Table 3 reports the summary statistics of the EEOC charge data. In Panel A, we report the overall mean number of charges per year per state, the standard deviation, the mean number of charges per 100,000 population, and the number of observations, respectively. In column (1), we report the summary statistics across all states. In columns (2) to (4), we report the summary statistics based on the method of judicial selection. Overall, 2274 charges or 43 charges per 100,000 population are filed per year per state. Across the three selection methods, fewer charges are filed in states in which the judges are appointed. On average, there are 1444 charges or 32 charges per 100,000 population filed in these states. There is a minimal difference in the number of charges filed in the elect and hybrid states. On average, there are between 2469 and 2599 charges per year filed in these two types of selection states.

Panels B through E of Table 3 report the summary statistics for the four specific claims of discrimination that we are studying. Note that for any given charge, an individual may assert more than one type of discrimination. For example, a black woman may assert a claim of discrimination based on race and sex. In each panel, we report the average percent of charges that claim only that type of discrimination. On average, 85 percent of race charges claim only race discrimination; 81 percent of sex-based charges, 75 percent of age charges, and 73 percent of disability charges claim only one type of discrimination.

With the exception of a claim of discrimination based on one's disability, the fewest charges are filed in states in which the judges are appointed. For claims of discrimination based on one's disability, the average number of charges is lowest in the appointed states if we do not adjust for the population size. After adjusting for the population of a state, however, there is little difference across the three types of states.

Table 3 reveals that most of the charges involve a claim of racial discrimination. Most of these charges are from the states with a higher proportion of blacks in the population. The charges come primarily from the mid-atlantic, mid-western and southern regions of the United States. If we divide the states into two groups, one with an above median proportion of blacks in the population and one with a below median proportion of blacks in the population, the distribution of charges across the three types of judicial selection states is somewhat similar. For both groups, the fewest number of charges are filed in states in which the judges are appointed. In the states with an above median proportion of blacks, the highest numbers of charges are filed in the elected states. In the states with a below median proportion of blacks, the highest number of charges are filed in the hybrid states.[25]

[25] Appendix Table 1 reports the summary statistics for those states in regions 2 and 5 given these are the two regions with variations in the judicial selection method. We have broken the states into three groupings based on the type of selection method. In two states, Florida and New York, we report the summary statistics for the selection method that has been in place the longest over the sample period. The first column reports the average per capita charges (and standard deviation) for all states. Across all types of charges and the three types of judicial selection methods, the average charges for each state are within one standard deviation of the mean for all states in the category. There are two exceptions. The number of charges filed based on a claim of racial discrimination is above one standard deviation for Maryland and for Delaware. For these states, the average number of charges is within two standard

In addition to providing information on the initiation of the charge process and the claims of discrimination, the EEOC data also provide some information about the disposition of a charge. Because actions can be taken outside of the agency's purview (e.g. settlements or future trials), the disposition information provided by the EEOC is not complete. In addition, the disposition could change over time (e.g. if an attempt at conciliation fails the disposition could be listed as a conciliation failure or something else if later in the handling of the matter a right to sue letter is issued). Table 4, uses the information provided by EEOC to examine six types of dispositions:

1. the agency failed to find a cause of action,
2. benefits were given to the claimant (e.g. through conciliation or settlement)
3. the case is closed (e.g. the claimant fails to pursue the action through the agency)
4. the agency issued a right to sue letter,
5. an attempt to resolve the matter through conciliation failed
6. another type of disposition (e.g. the case went to trial)

The reasons for closing a charge action encompass the employee no longer cooperating with the agency and a settlement outside of the EEOC or state agency process. The "other" dispositions categories include things such as the EEOC pursuing a trial action and the EEOC becoming a party to a private lawsuit (one brought by the employee). The statistics reported in Table 4 is the average number of total employment discrimination charges per year by type of judicial section, and the average of the percentages these charges that are resolved under one of the six identified resolutions. It is important to note that the data reported in Table 4 should be viewed gingerly as it is difficult to reconcile the different dispositions with summary tables published by the EEOC. Across all judicial selection types, the majority of charges are ended at the EEOC stage with a finding of no cause or another type of disposition. Recall that even without a finding of cause an employee may still pursue a legal action. On average, there are more dispositions based on there being a no cause of action in the elected and hybrid states than in the appointed states. There is also a higher percentage of right to sue letters issued in the elected and hybrid states than in the appointed states. There are more charges closed with benefits in the appointed states than in the elected and hybrid states. Table 4 suggests, anecdotally, that the types of charges filed and their dispositions differ across the states based on the method of judicial selection.

If the employee does not gain a favorable settlement upon filing a charge of discrimination, he must decide whether to pursue a lawsuit against the employer in either state or federal court.[26] Because states vary in the statutes that govern discrimination, we created a series of indicator variables that capture differences in state laws. We use three dummy variables denoting whether the state statute covers race discrimination, age discrimination, and disability discrimination, respectively.[27] We also generate indicator variables that identify three types of changes in the state statutes. We have one variable that equals one if there was a change (in the

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deviations of the overall average. Thus, there is little evidence that any given state is an outlier with respect to the filing of charges.

[26]If there is a state statute prohibiting age discrimination, the employee must decide whether to pursue his rights in state court or federal court. In most instances, the state statute is broader than the federal statute and so the employee is likely to pursue an action in state court. The employee and the employer, however, under limited circumstances may pursue the action in federal court. The federal court may apply state or federal law, depending on the nature of its jurisdiction over the lawsuit.

[27] We do not have a dummy variable for gender discrimination because during the sample period, since if a state has a statute prohibiting race discrimination it usually also prohibits sex discrimination.

past three years) in the state statute that makes it easier for an employee to initiate a charge of discrimination. This would include, for example, extending the period in which an employee may file a charge and allowing for certain types of damages awarded to an employee. We also use a dummy variable which equals one if the state eliminates mandatory retirement for most employees in the private sector. This is a change in the statute that directly affects older workers, but also affects other types of workers because it expands the workforce by giving workers the right to work beyond the expected retirement age. Finally, we created a dummy variable which equals one if the state statute is broad enough to protect employees for such things as being a smoker, participating in legal activities outside of work, and/or having certain genetic characteristics. Potentially, as employment discrimination laws are amended to protect more characteristics of employees, the effectiveness of the laws is weakened.[28]

The state level economic and demographic measures reflect time-varying measures that could affect the conditions under which an employee may decide to pursue a charge of employment discrimination. For the economic measures we use the real per capita income (base year 1996), the unemployment rate and data on the structure of employment, specifically the proportion of employment in the service sector, financial sector and manufacturing.[29] For the demographic measures we use state population, the percentage of the state population between ages of 45 and 59, 60 and 64, and 65 and older, and the percentage of the state population that is black.[30] Table 5 reports the summary statistics for these measures.

V. Method

Our basic results are generated by the following specification:

$$C_{st} = \lambda_{rt} + \beta A_{st} + X_{st}\theta + S_{st}\pi + \varepsilon_{st}$$

where C is the total number of charges per 1000 population filed in state *s* in year *t*, λ is a set of region-year dummy variables, A is an indicator variable equal to one if the state appoints its judges to the highest level of appellate courts, X is a set of exogenous state level economic, and demographic measures, S is a set of measures identifying the types of state laws that prohibit employment discrimination, and ε is the residual. We allow the residuals to be clustered at the state level.

The inclusion of region specific year dummies implies that identification of the effecting of appointing judges is coming either from states that switched their method of appointment during our time period or from within region variation. This boils down to cross-sectional variation within two regions – the mid-Atlantic and the southern regions (regions 2 and 5 in Table 1).

[28] We have explored other measures to identify differences in the state statutes. The coefficients on these other measures were not precisely measured, however. As such, we have excluded them from our final analysis.
[29] These data come from the CPS.
[30] Note that for the year 2000, we do not have population estimates for the population between the ages of 45 and 59, 60 and 64, and the population that is black. As such, we use the 1999 values for 2000.

We also treat appointing judges as an endogenous variable. This tries to deal with the concern that the choice of judicial institutions can be correlated with the error due to such as things omitted "judicial culture". As our instrument we use whether the state elects its public utility commissioners and/or institutions of direct democracy. As we would expect if this is a measure of political culture and history, then the extent of democracy within a state characterized this way is negatively correlated with the probability that a state appoints its judges. It is plausible to believe that this variable is not directly related to the judicial culture within a state.[31] We report the results using a GMM estimator (*see* Baum, Schaffer, and Stillman, 2004) as well as a jackknife instrumental variable (JIVE) method (Angrist, Imbens, and Krueger (1999)).[32] The latter, which is argued to have better properties than standard two stage least squares in small samples, constructs an instrument that is orthogonal to the disturbance in the second stage equation by calculating the fitted first stage values and the leverage from the first stage equation.[33]

VI. Results

Table 6 reports results for all discrimination charges. Column (1) shows that there is negative and significant relationship between appointing judges and total charges per capita filed. The effect is equal to less than a one-standard deviation change in the number of charges filed per capita. Of the other regressors that are included, only the percentage of black population is significant at a p-value of less than .01, suggesting that more charges are filed in states with larger black populations. In addition, there are more charges filed in states with a higher proportion of employees in the financial sector. The economic and demographic controls are significant (F-test = 5.99, p-value =0.000). Column (2) adds in the statute controls. A change in the procedure in the past two years and a broadly worded statute are negatively correlated with filing charges as is the presence of another group statute. After controlling for statutes, there is evidence of an effect of unemployment on filing charges suggesting that workers are more likely to do so when it is more difficult to become re-employed.

In column (3), we check robustness by including three other measures of judicial institutions – whether the state has only one level of appellate courts, whether judges serve a life term, and judges salaries. There is a negative and significant effect of not having a second layer of appellate courts. This is also a negative and significant effect of life terms, suggesting that

[31] In addition to exploring the results for only regions 2 and 5, we also excluded the three states for which there is no state statute prohibiting discrimination based on race. The results when we exclude these states are similar to the results reported in the tables.

[32] The reported results under the IV GMM estimation are similar to the results if a standard 2SLS estimation is used. In both cases, however, if the instruments predicting the endogenous variable are only weakly correlated, the estimates are misleading. The JIVE estimation technique attempts to deal with the weak instruments problem. The methodology for the jive estimation is done in three steps: first, the first stage regression is estimated and the leverage and the predicted values of the endogenous measure are obtained. Second, an instrument ("jive") is created by subtracting the leverage multiplied by the observed endogenous measure from the predicted endogenous measure divided by one minus the leverage. Third, the constructed jive instrument is then used in a two stage least squares estimation. Because the jive measure is one-dimensional the 2SLS estimation is just identified.

[33] We report the results from the "JIVE2" estimator explained in Angrist, Imbens, and Krueger (1999).

such judges are less likely to find in favor of discrimination.[34] The size of the effect of appointing judges declines but the significance of the effect remains unaltered. The effect of having an appointed judge on the bench is approximately a .61 of one standard deviation change in the number of charges filed per capita. In column (4), we focus solely on the two regions that have within region variation. The result once again holds up and stays similar in sign and significance. Finally, columns (5) and (6) reports two stage least squares results which instruments the appointment variable using whether the state appoints or elects its public utility commissioners and rules for direct legislation, with column (6) reporting the results under the JIVE estimation method.[35] The result remains negative and significant.

Table 7 reports disaggregated charges for race, gender, age, and disability. For each set of charges we report six different specifications. In column (1), we consider a specification which controls only for state level economic and demographic variables. In column (2) we add controls for the discrimination statutes. Column (3) tests the robustness of the main findings by adding three other potentially relevant measures of judicial institutions – whether the state has only one level of appellate courts, the pay of judges, and whether the judges are granted life terms. Column (4) repeats the results only for the two regions that have within region variation for whether the state appoints it judges.[36] This is important as these regions are the ones from where most of the identification is coming.

Panel A reports results for race discrimination charges. The pattern of results is very similar to those in Table 6 with a robust negative and significant effect of appointing judges on charges filed. Under the specification reported in column (4), the effect here is approximately .70 of one standard deviation change. The results once again hold up across all specifications including the IV specification in columns (5) and (6). There is relatively little evidence of the importance of statutes in affecting the rate of filing.

Panel B looks at gender discrimination charges. Again, the correlation with appointing judges is negative and significant. The effect is approximately .50 of one standard deviation change in the left-hand side variable (specification reported in column (4)). The results are again robust across the different specifications.

In panel C we turn to age discrimination charges. The coefficient is around .80 of one standard deviation in the left hand side variable. The pattern of significance in the other variables seen in Table 6 is broadly repeated.

[34] Only four states appoint their judges for life: Massachusetts (Region 1), New Hampshire (Region 1), Rhode Island (Region 1), and New Jersey (Region 2). In New Jersey, a judge is initially appointed to a term of 7 year; upon reappointment the judge is then given a term of life.

[35] In the first stage regression for the estimation reported in column (5), the f-test on the instruments is quite strong with a heteroskedascticity robust statistic of 141.35. The over-identification test, however, is not satisfied. In the first stage regression for the estimation reported in column (6), the f-test on the jive estimate is 99.57.

[36] We include the judicial culture measure of whether there is no second level of appellate court but exclude the other judicial culture measures. We exclude the measure on the life term for the judge as only New Jersey gives their judges a life term in regions 2 and 5. We exclude the measure on judge's salaries given it is not statistically significant in the specification reported in column (3).

The findings in Table 6 do not hold up in panel D which looks only at disability discrimination. There are two possible reasons. First, there is a much shorter period in this case. Second, we might expect such discrimination charges to be less politicized and hence less influenced by judicial selection. Disability legislation expects employers to make "reasonable accommodations" in addition to simply prohibiting discrimination based on one's disability. As such, given that most employment discrimination claims are based on an existing employee being fired or demoted (as opposed to a potential employee not being hired), if the employers are not making the reasonable accommodation in the first place to hire the potential employee, the pool of employees who can allege that they have been unfairly treated because of their disability is very different from the pool of employees that may exist for other types of potential discriminatory practices.[37]

Overall, the results provide evidence that states with appointed judges have smaller numbers of charges being filed. The magnitude of the coefficient, however, ranges from .50 to 1.65 of one standard deviation of the number of charges filed. The effect of judicial selection is larger for charges involving a claim of race discrimination and smaller for charges involving a claim of sex discrimination.

The results are consistent with the idea that judges who are accountable directly to citizens are more likely to favor employees in the decisions that they reach. The results in columns (4) through (6) that look at the within regions 2 and 5 provide particularly compelling evidence since they look at variation in the judicial selection regime within culturally and historically similar groups of states.

VII. Selection versus Incentives

We now test whether it is selection or incentives that matter. Here, we make use of the fact that in the hybrid selection regime, judges are initially appointed, but subsequently held to account in retention elections. If selection is at work, then we would expect those judges who are appointed initially by politicians to be different from those who are elected. If incentive effects are at work, then we expect the results to show that it is judges who must be re-elected who are different (regardless of whether they were initially appointed or elected).[38]

To look at this, we create a dummy variable which is equal to one in all states that initially appoint their judges, whether or not they are subject to re-election.[39] Effectively, this amalgamates the hybrid and appointing regimes.[40] Table 8 reveals that this variable is not significant for any of the charges that we considered. This runs counter to the view that the

[37] See Jolls and Prescott (2002) for a description of the issues pertaining to disability legislation.

[38] It is important to note that in states in which judges are elected, if a judge leaves office prior to the expiration of his term, usually the governor will appoint a successor to fill the vacancy until the next election. Given this, the argument that the difference in the filing of charges due based on appoint/elect as a function of the selection effect is weakened if the judge who is appointed to fill the vacancy is also the judge that wins the subsequent election.

[39] In states that use election as their initial (and retention) method of selection, the governor often will appoint a judge before the first election if the retiring judge steps down prior to the election.

[40] For this analysis we use all 48 contiguous states as when we distinguish between appointed and hybrid schemes and election schemes there is within region variation for all regions except region 1.

selection of judges by politicians in appointment regimes reflects different preferences among the judiciary.

We now add in a variable that identifies those states that use a retention election for the subsequent terms held by the judge. The indicator variable on initial appointment is now negative and significant while that on the hybrid regime is positive and significant, more than offsetting the effect of appointment.[41] Thus judges who are re-elected by the citizens behave much as judges who are elected in the first place whereas judges who are only ever elected are behind the results. This finding is consistent with the incentive effect being important, but not with the view that selection is important.[42]

VIII. Concluding Comments

This paper shows that judicial selection matters in the implementation of anti-discrimination policy. States where judges are appointed see fewer charges for race, age and gender discrimination being brought. This suggests that courts tend to favor workers in such states. This comes both from the way in which individual judges affect outcomes and the collective precedents set by judicial intervention in interpreting statutes. The results suggest that it is the use of re-appointment of judges using elections that matter most. This is in line with the agency model of Maskin and Tirole (2004). The results that we find are robust to a wide variety of estimation methods and choices of controls.

The results confirm themes in the burgeoning empirical literature on the importance of judicial independence in affecting economic outcomes. La Porta et al (2003) argue persuasively that countries with greater judicial independence are also those with better economic and political outcomes. Traditionally, the main threat to judicial independence comes from the executive branch of government (see Glaeser and Shleifer (2002)). However, independence may also mean insulating judges from mass opinion. In this sense, the results are consistent with the view that appointing judges strengthens the independence of the judiciary as argued, for example, by Posner (1993).

That said, the empirical findings are consistent with appointed judges acting more as agents of employers while those seeking re-election are agents of employees. This has obvious distributional consequences. It may also affect real resource allocation by changing the incentive to use the filing process either to achieve redress against discrimination or as a form of rent-seeking.

[41] The reason why judges who face a retention election encourage more charges to be filed is not clear. It is consistent with the idea that there is some kind of selection effect at work which yields a difference between judges who are initially elected and those who face only a retention election. The exact mechanism at work here, however, is not entirely clear.

[42] Also consistent with the claim that incentives effects are paramount, we tested whether judges in appointing states appear to have significantly different ideologies compared to those in electing states. While we did find some weak evidence that judges are actually more liberal in appointing states, this does not hold up to conditioning on state level economic and demographic characteristics.

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Figure 1: Case Resolution Process

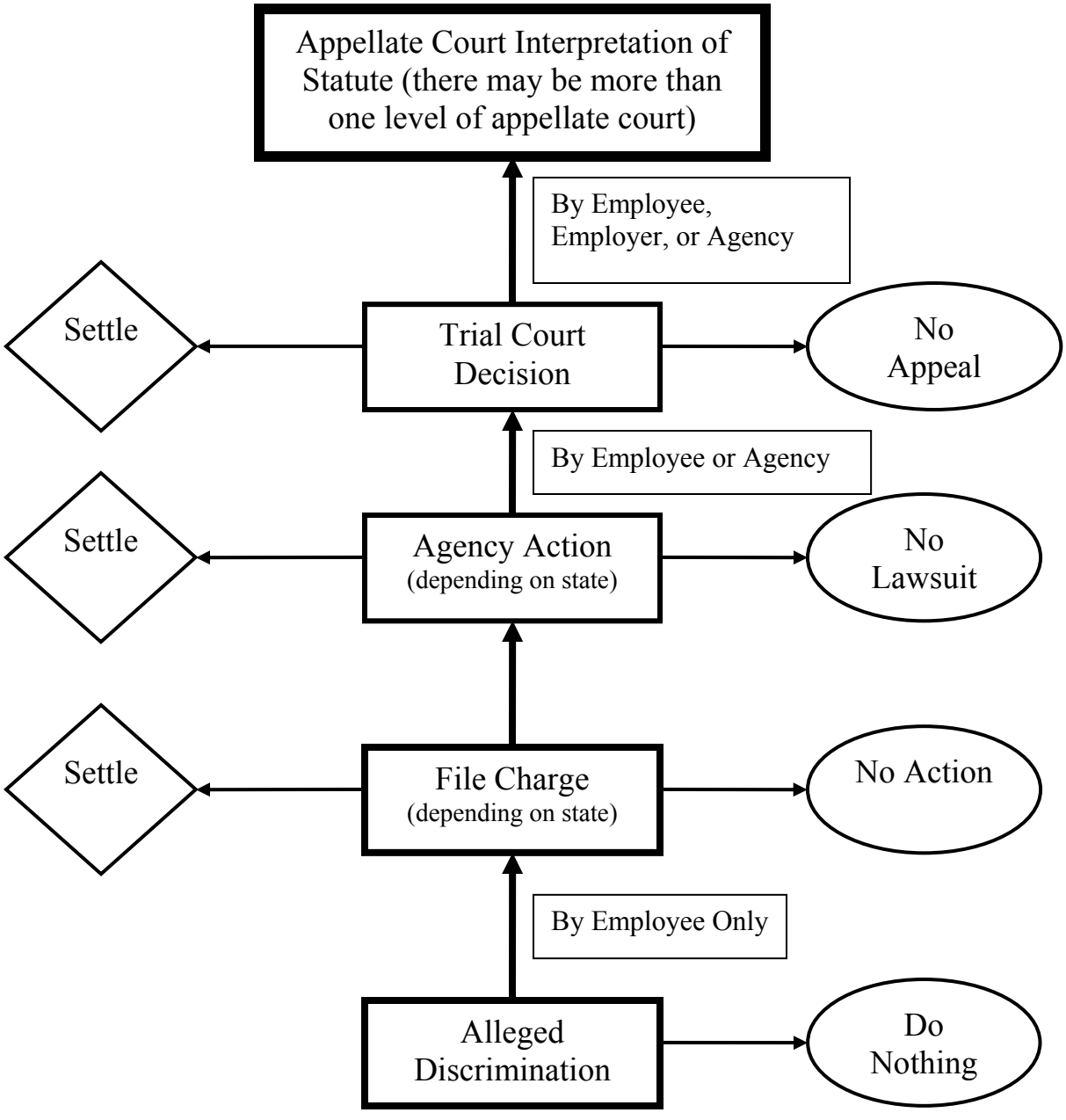

Table 1: Selection Method of Judges, by State

State	Appointed Judge States	Elected Judge States	Hybrid Judge States	Notes
Region 1				
Connecticut	Gov w/Nominating Commission			
Maine	Governor Only			
Massachusetts	Governor w/Nominating Commission			Nominating Commission is by Executive Order
New Hampshire	Governor Only w/Executive Council			Executive Council by Executive Order
Rhode Island	Governor w/Nominating Commission			In 1994 changed from appointment via legislative election
Vermont	Governor w/Nominating Commission			In 1974 switched from legislative appointment method
Region 2				
New Jersey	Governor Only			
New York	Governor w/Nominating Commission			In 1977 changed from Governor only appointment from elected lower court judges
Pennsylvania		Partisan Election w/Retention Election for Subsequent Terms		
Region 3				
Illinois		Partisan Election w/Retention Election for Subsequent Terms		
Indiana			Yes	In 1970 method was changed from partisan election
Michigan		Non-Partisan Election (considered Partisan)		No party affiliations on the ballot; candidates nominated at party conventions and run with party endorsements
Ohio		Non-Partisan Election (considered Partisan)		No party affiliations on the ballot; candidates run in partisan primary elections and run with party endorsements
Wisconsin		Non-Partisan Election		In 1983 the Governor established a council to recommend judicial candidates
Region 4				
Iowa			Yes	
Kansas			Yes	
Minnesota		Non-Partisan Election		
Missouri			Yes	
Nebraska			Yes	
North Dakota		Non-Partisan Election		
South Dakota			Yes	In 1980 method was changed from non-partisan election
Region 5				
Delaware	Governor w/Nominating Commission			In 1977 method was changed from Governor only appointment by Executive Order
Florida			Yes	In 1972 method was changed from partisan to non-partisan election; In 1976 method was changed from non-partisan election to present
Georgia		Non-Partisan Election		In 1983 method was changed from partisan election
Maryland			Yes	In 1974 method was changed from initial appointment by governor only to one requiring a nominating commission by Executive Order
North Carolina		Partisan Election		
South Carolina	Legislature w/Nominating Commission			In 1996 method added nominating commission
Virginia	Legislature			
West Virginia		Partisan Election		
Region 6				
Alabama		Partisan Election		
Kentucky		Non-Partisan Election		
Mississippi		Non-Partisan Election		In 1994 method was changed from partisan election
Tennessee			Yes	In 1994, method was changed from partisan election
Region 7				
Arkansas		Non-Partisan Election		In 2000 method was changed from partisan election

Louisiana		Non-Partisan Election (could be considered Partisan)		In 1974 method was changed from partisan election; currently party affiliations on ballot but candidates do not solicit party contributions and primaries open to all candidates
Oklahoma			Yes	
Texas		Partisan Election		
Region 8				
Arizona			Yes	In 1974 method was changed from non-partisan election
Colorado			Yes	
Idaho		Non-Partisan Election		
Montana		Non-Partisan Election		
New Mexico		Partisan Election w/Retention Election for Subsequent Terms		In 1988 method was changed from partisan election
Nevada		Non-Partisan Election		
Utah			Yes	
Wyoming			Yes	In 1972 method was changed from non-partisan election
Region 9				
California			Governor Appointment w/Retention Election	
Oregon		Non-Partisan Election		
Washington		Non-Partisan Election		

Table 2: First Year Discrimination Was Prohibited, by State and Type

State	Race	Sex	Age	Disability
Region 1				
Connecticut	1973	1973	1973	1973
Maine	1971	1973	1971	1974
Massachusetts	1972	1972	1972	1972
New Hampshire	1971	1971	1971	1975
Rhode Island	1971	1971	1971	1973
Vermont	1971	1971	1981	1974
Region 2				
New Jersey	1970	1970	1970	1972
New York	1971	1971	1971	1974
Pennsylvania	Before 1970	Before 1970	Before 1970	No Statute
Region 3				
Illinois	1971	1971	1971	1975
Indiana	1971	1971	1971	1975
Michigan	1972	1972	1972	1976
Ohio	1973	1973	1978	1976
Wisconsin	1974	1974	1974	1976
Region 4				
Iowa	1970	1970	1972	1970
Kansas	1970	1970	1983	1974
Minnesota	Before 1970	Before 1970	1977	1973
Missouri	1978	1978	1986	1978
Nebraska	1972	1972	1972	1973
North Dakota	1979	1979	1979	1983
South Dakota	1972	1972	No Statute	1986
Region 5				
Delaware	1971	1971	1971	1988
Florida	1977	1977	1977	1974
Georgia	No Statute	No Statute	1971	1981
Maryland	1970	1970	1970	1974
North Carolina	1977	1977	1977	1977
South Carolina	1979	1979	1979	1983
Virginia	1987	1987	1995	1975
West Virginia	1971	1971	1971	1981
Region 6				
Alabama	No Statute	No Statute	1997	No Statute
Kentucky	1972	1972	1972	1976
Mississippi	No Statute	No Statute	No Statute	1974
Tennessee	1978	1978	1980	1987
Region 7				
Arkansas	1993	1993	No Statute	1993
Louisiana	1983	1983	1978	1980
Oklahoma	1973	1973	1985	1981
Texas	1983	1983	1983	1975
Region 8				
Arizona	1974	1974	1980	1985
Colorado	Before 1970	Before 1970	Before 1970	1975
Idaho	Before 1970	Before 1970	Before 1970	No Statute
Montana	1971	1971	1974	1974

New Mexico	Before 1970	Before 1970	Before 1970	1973
Utah	1975	1975	1975	1979
Wyoming	1979	1979	1984	1985
Nevada	1973	1973	1973	1973
Region 9				
California	1970	1970	1970	1973
Oregon	Before 1970	Before 1970	Before 1970	1973
Washington	1971	1971	1971	1973

Table 3: Summary Statistics on Employment Discrimination Charges

	All States	Elected Judge States	Hybrid Judge States	Appointed Judge States
Panel A				
Total Charges				
Mean	2274.4	2468.7	2599.4	1444.4
(standard deviation)	(2609.9)	(2598.4)	(2997.1)	(1825.8)
Mean/100,000 Population	42.5	43.7	48.8	32.2
(standard deviation)	(21.5)	(21.5)	(21.4)	(17.5)
# of Observations	1344	656	384	304
Panel B				
Charges based on Race Discrimination (Black)				
Mean	832.6	1010.1	845.8	433.0
(standard deviation)	(925.8)	(1014.9)	(895.6)	(574.4)
Mean/100,000 Population	14.3	16.5	15.0	8.7
(standard deviation)	(10.8)	(11.6)	(10.1)	(7.6)
# of Observations	1344	656	384	304
Panel C				
Charges based on Sex Discrimination (Female)				
Mean	587.3	613.2	716.7	367.8
(standard deviation)	(669.9)	(617.0)	(843.6)	(442.3)
Mean/100,000 Population	11.8	11.6	14.0	9.4
(standard deviation)	(5.3)	(5.2)	(5.2)	(4.5)
# of Observations	1344	656	384	304
Panel D				
Charges based on Age Discrimination				
Mean	513.3	550.4	570.2	362.7
(standard deviation)	(572.1)	(586.5)	(623.2)	(432.0)
Mean/100,000 Population	9.6	9.5	11.2	7.8
(standard deviation)	(5.4)	(5.0)	(6.3)	(3.8)
# of Observations	1008	478	299	231
Panel E				
Charges based on Disability Discrimination				
Mean	638.4	661.7	741.2	453.4
(standard deviation)	(619.3)	(601.3)	(723.9)	(444.9)
Mean/100,000 Population	12.1	11.3	14.1	11.1
(standard deviation)	(4.4)	(3.7)	(4.9)	(4.3)
# of Observations	384	178	118	88

Note: Total charges and charges based on race or sex discrimination cover the period 1973 to 2000. Charges based on age cover the period 1980 to 2000. Charges based on disability cover the period 1993 to 2000. Only charges reported for the 48 contiguous states are used in the analysis.

Table 4: Distributions of Reported Resolutions of Charges by Type of Judicial Selection Method

	Elected Judge States	Hybrid Judge States	Appointed Judge States
Mean Total # of Charges	57839	35649	15682
(Standard Deviation)	(15948)	(14064)	(7170)
% of Total Charges by Resolution:			
No Cause of Action	39.6%	36.1%	27.6%
Closed w/Benefits	17.3%	15.2%	23.2%
Closed (no other action)	12.0%	11.7%	9.0%
Charges w/Right to Sue Letter	8.4%	9.0%	6.9%
Charges where Conciliation Failed	5.8%	5.6%	5.0%
Other Disposition	16.9%	22.3%	28.3%

Note: To create these statistics we summed per year across the three types of judge selection states and then took the average across all years. "No cause of action" means that the agency did not find evidence of the alleged discrimination. "Benefits" means that the case was closed after the employee was compensated for the alleged discrimination. "Closed" means that the case was closed. This could have occurred if the employee did not continue to pursue the charge of discrimination or if the case was settled outside of the agency's jurisdiction. "Right to sue" means that the employee was issued a right to sue letter by the agency. "Conciliation failed" means that the attempt by the agency to resolve the dispute through mediation or negotiation failed. "Other dispositions" covers all other types of dispositions which could include going to trial. These statistics should be viewed gingerly as the statistics do not necessarily reflect the final disposition of the alleged charge of discrimination.

Table 5: Summary Statistics of State Level Control Measures Used in the Regressions

Measure	Mean	S.D.
% Employed in Service Sector	24.87	5.32
% Employed in Financial Sector	7.02	1.46
% Employed in Durable Manufacturing Sector	8.62	4.07
% Employed in Non-Durable Manufacturing Sector	6.31	3.37
Real Per Capita Income (Per 1000, 1996 Base Year)	132.33	24.42
Unemployment Rate (*100)	6.11	2.11
State Population	5006296	5240564
% of Population aged 45 to 59 (*100)	15.29	1.55
% of Population aged 60 to 64 (*100)	4.23	0.46
% of Population aged 65 + (*100)	11.94	1.97
% of Population Black (*100)	10.78	9.12

Table 6: Regression Analysis, All Charges

Dependent Variable: Total Charges Per Capita	(1)	(2)	(3)	(4)	(5)	(6)
=1 if Appointed	**-19.347**	**-17.618**	**-13.043**	**-12.269**	**-11.923**	**-13.064**
	(4.357)	(4.525)	(5.083)	(3.395)	(2.374)	(3.836)
Real Per Capita Income (per $1000)	0.194	0.154	0.493	***1.222***	**0.832**	***1.244***
	(0.563)	(0.531)	(0.508)	(0.539)	(0.289)	(0.557)
Real Per Capita Income Squared	-2.812E-04	3.330E-06	-9.905E-04	*-0.003*	**-0.002**	*-0.003*
	(0.002)	(0.001)	(0.001)	(0.002)	(0.001)	(0.002)
Unemployment Rate	1.406	***1.688***	**2.037**	1.108	0.751	1.088
	(0.979)	(0.858)	(0.833)	(0.739)	(0.564)	(0.772)
% of Employed in Service Sector	0.339	0.481	0.192	**4.034**	**4.490**	**3.892**
	(0.389)	(0.426)	(0.466)	(0.931)	(0.757)	(0.986)
% of Employed in Financial Sector	**2.860**	**2.222**	*1.561*	1.212	***1.591***	1.195
	(1.021)	(0.920)	(0.938)	(0.809)	(0.640)	(0.825)
% of Employed in Durable Manufacturing Sector	0.397	0.392	0.192	***4.980***	**4.948**	***4.865***
	(0.679)	(0.600)	(0.524)	(1.629)	(0.912)	(1.525)
% of Employed in Non-Durable Manufacturing Sector	0.619	0.491	0.237	**0.941**	**1.016**	**0.947**
	(0.674)	(0.587)	(0.660)	(0.245)	(0.288)	(0.256)
State Population (per million)	0.497	0.558	-0.626	**-6.567**	**-6.595**	**-6.606**
	(0.923)	(0.789)	(0.940)	(1.513)	(0.986)	(1.571)
State Population Squared	-0.025	-0.022	0.020	**0.218**	**0.221**	**0.222**
	(0.028)	(0.025)	(0.027)	(0.060)	(0.043)	(0.065)
% of Population between 45 and 59	3.862	*4.202*	2.742	0.579	0.568	0.563
	(2.440)	(2.296)	(2.179)	(4.128)	(2.019)	(4.141)
% of Population between 60 and 64	-5.422	-6.764	-5.153	-14.969	**-14.811**	-14.747
	(7.310)	(7.284)	(7.691)	(9.077)	(3.992)	(9.118)
% of Population 65 and Older	-0.430	-0.040	0.160	1.581	1.564	1.557
	(1.616)	(1.646)	(1.705)	(1.866)	(0.893)	(1.886)
% of Population Black	**0.878**	**0.830**	**0.752**	0.304	0.312	0.315
	(0.235)	(0.238)	(0.259)	(0.212)	(0.203)	(0.199)
=1 if race statute		-3.041	-4.801	***-11.992***	**-11.765**	***-11.673***
		(3.863)	(3.778)	(5.365)	(2.693)	(4.837)
=1 if age statute		3.672	4.291	3.673	3.262	3.095
		(3.957)	(3.579)	(3.986)	(2.533)	(4.140)
=1 if disability statute		1.683	2.936	***-4.503***	*-4.365*	*-4.308*
		(4.288)	(4.772)	(1.954)	(2.378)	(2.354)
=1 if no mandatory retirement		-5.359	***-6.510***	2.554	2.697	2.755
		(3.335)	(2.922)	(3.798)	(2.054)	(4.207)
=1 if procedural change in last 3 years		**-5.652**	**-5.559**	-3.779	*-3.723*	-3.700
		(1.970)	(1.875)	(2.144)	(2.164)	(2.059)
=1 if broad state statute		***-4.937***	*-4.378*	-1.083	-1.284	-1.366
		(2.742)	(2.436)	(2.579)	(1.924)	(2.932)
No Second Level Appellate Court			***-12.032***	**-18.539**	**-18.353**	**-18.278**
			(5.428)	(1.987)	(2.921)	(2.319)
Judge's Real Salary			-0.118			
			(0.113)			
Judge Serves for Life			*-6.774*			
			(3.554)			
region== 5.0000				***27.772***	**28.592**	**26.880**
				(6.270)	(4.296)	(5.745)
Fixed effects	Region*Year	Region*Year	Region*Year	Region, Year	Region, Year	Region, Year
Instrument Variables Specification	No	No	No	No	GMM	JIVE
Observations	1344	1344	1344	308	308	308
R-squared	0.6488	0.6694	0.6967	0.8617	0.8569	0.8616

Note: Standard errors reported in parentheses. All regressions use robust standard errors, clustered at the state level. Columns (1) – (4) and (6) are clustered by state. Coefficients in bold are statistically significant a p-value <0.01. Coefficients in bold and italics are statistically significant at a p-value<0.05. Coefficients in italics are statistically significant at a p-value<0.10. The regressions reported in Columns (4) through (6) cover only regions 2 and 5.

Table 7: Regression Results, by Type of Discrimination

	(1)	(2)	(3)	(4)	(5)	(6)
Panel A						
Dependent Variable: Race Charges/Population Based on Being Black						
=1 if Appointed	**-12.391**	**-11.278**	**-10.119**	**-7.534**	**-8.248**	**-8.574**
	(2.214)	(2.141)	(2.247)	(2.014)	(1.376)	(2.279)
Observations	1344	1344	1344	308	308	308
R-squared	0.7939	0.8189	0.8276	0.8403	0.8354	0.8399
Panel B						
Dependent Variable: Gender Charges/Population						
=1 if Appointed	**-4.360**	**-3.819**	**-2.433**	**-2.578**	**-2.442**	***-2.455***
	(1.152)	(1.212)	(1.198)	(0.826)	(0.645)	(0.965)
Observations	1344	1344	1344	308	308	308
R-squared	0.5569	0.5896	0.6153	0.8063	0.7999	0.8063
Panel C						
Dependent Variable: Age Charges/Population						
=1 if Appointed	**-4.206**	**-3.871**	**-2.996**	**-4.423**	**-4.831**	**-5.405**
	(1.198)	(1.325)	(1.149)	(0.567)	(0.724)	(1.172)
Observations	1008	1008	1008	231	231	231
R-squared	0.4956	0.5064	0.5345	0.813	0.8094	0.8114
Panel D						
Dependent Variable: Disability Charges/Population						
=1 if Appointed	*-3.361*	-3.222	*-3.020*	*7.287*	**7.237**	2.913
	(1.871)	(2.763)	(1.684)	(3.453)	(2.655)	(10.304)
Observations	384	384	384	88	88	88
R-squared	0.4197	0.443	0.6306	0.8836	0.8822	0.8784
Controls	Demog	Demog, Laws	Demog, Laws, Court	Demog, Laws, Court	Demog, Laws, Court	Demog, Laws, Court
Fixed effects	Region*Year	Region*Year	Region*Year	Region, Year	Region, Year	Region, Year
Instrument Variables Specification	No	No	No	No	GMM	JIVE

Note: Standard errors reported in parentheses. All regressions use robust standard errors. Columns (1) – (4) and (6) are clustered by state. Coefficients in bold are statistically significant a p-value <0.01. Coefficients in bold and italics are statistically significant at a p-value<0.05. Coefficients in italics are statistically significant at a p-value<0.10. The regressions reported in Columns (4) through (6) cover only regions 2 and 5.

Table 8: Analysis of Selection v. Incentive Differences in Judicial Selection

Dependent Variable: Number of Charges per State based on Type of Discrimination	Total	Total	Race	Race	Gender	Gender	Age	Age	Disability	Disability
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
=1 if Judge Initially Appointed	3.601	**-11.086**	0.947	**-9.203**	1.275	**-1.871**	*1.600*	***-2.101***	1.810	-1.737
	(3.607)	(4.229)	(1.375)	(2.105)	(0.806)	(0.907)	(0.858)	(1.004)	(1.178)	(1.628)
=1 if Retention Election Used		**17.987**		**12.431**		**3.853**		**4.462**		**4.128**
		(6.243)		(2.124)		(1.413)		(1.311)		(1.564)
Controls	Demog, Laws, Court	Demog, Laws, Court	Demog, Laws, Court	Demog, Laws, Court	Demog, Laws, Court	Demog, Laws, Court	Demog, Laws, Court	Demog, Laws, Court	Demog, Laws, Court	Demog, Laws, Court
Fixed effects	Region*Year	Region*Year	Region*Year	Region*Year	Region*Year	Region*Year	Region*Year	Region*Year	Region*Year	Region*Year
Observations	1344	1344	1344	1344	1344	1344	1008	1008	384	384
R-squared	0.6900	0.7100	0.8042	0.8359	0.6157	0.6284	0.5300	0.5500	0.6325	0.5340

Note: Standard errors reported in parentheses. Coefficients in bold are significant at a p-value <0.01. Coefficients in bold and italics are significant at a p-value<0.05. All regressions report robust standard errors that are clustered on state. The regressions include states in all regions as there is variation in type of selection method when one differentiates between appointed, elected, and hybrid methods. The measure "judge initially appointed" groups the states in which an appointed or hybrid selection method is used.