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Special Incentives to Sue

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ABSTRACT

In an effort to strengthen private enforcement of federal law, Congress regularly employs plaintiff-side attorneys’ fee shifts, damage enhancements, and other mechanisms that promote litigation. Standard economic theory predicts that these devices will increase the volume of suit by private actors, which in turn will bolster enforcement and encourage more voluntary compliance with the law. This Article challenges the conventional wisdom. I use empirical evidence to demonstrate that special incentives to sue do not dependably generate more litigation. More crucially, when those incentives do work, they often trigger a judicial backlash against the very rights that Congress sought to promote. This dynamic has been neglected in the academic commentary to date, which has focused on litigant behavior alone while ignoring the role that judges play in any enforcement regime that depends on litigation. I show that caseload pressures and concerns about excessive litigation have driven judges to adopt procedural rules that dampen the effects of fee shifts and damage enhancements. Furthermore, judges have offset incentives to sue by narrowly interpreting the relevant substantive provisions of federal law.

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INTRODUCTION

The effective content of federal law depends in large part on the procedural choices legislators make about statutory implementation. Congress can opt for public or private enforcement, and can modulate the level of enforcement through mechanisms that encourage or discourage suit, or that make it more or less likely that plaintiffs will prevail. This Article focuses on devices designed to increase the rate of private litigation: attorneys’ fee shifts for prevailing plaintiffs, and damage enhancements such as multipliers or punitive damages. The avowed purpose of such provisions is to strengthen private enforcement of the statutes affected. Boosting enforcement is, of course, a contestable goal, implicating longstanding debates about excessive litigation and deterrence of valuable activity. But debates about the optimal level of enforcement have taken

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2 This Article explores the effects of litigation incentives, which tend to boost the level of private enforcement. For a discussion of mechanisms that decrease enforcement, thereby ameliorating problems of overdeterrence, see generally Richard A. Bierschbach & Alex Stein, Overenforcement, 93 GEO. L.J. 1743 (2004).

3 See, e.g., Richard A. Posner, Antitrust Law: An Economic Analysis 35 (1976) (noting that private antitrust actions, which Congress has encouraged through treble damages, have “produced enormous, and I think justified, concern about the overexpansion of the antitrust laws and their increasing use to retard rather than promote competition”); Donald I. Baker, Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?, 16 LOY. CONSUMER L. REV. 379, 384 (2003) (“Over-deterrence and unpredictability are recurring problems in various antitrust areas subject to the rule of reason, and the risks of litigating close questions are simply magnified by the presence of mandatory treble damages to punish any ‘wrong’ action.”); Frank B. Cross, Rethinking Environmental Citizen Suits, 8 TEMP. ENVTL. L. & TECH. J. 55, 66 (1989) (arguing that environmental citizen suits, which Congress has encouraged through one-way fee shifts, may lead to over-enforcement of environmental laws); see also infra notes 182-185 and accompanying text (discussing complaints that litigation incentives lead to excessive and sometimes frivolous litigation).
place without a full understanding of how suit-boosters actually work. Although a few scholars have studied the effects of particular incentives in context,4 there has been no effort to assess the efficacy of fee shifts or damage enhancements as a general enforcement strategy, or to consider their impact on judges and the law.

I argue that litigation incentives may not, in fact, result in stronger enforcement. First, it is not clear that incentives—particularly fee shifts—work in the sense of generating more litigation. Economic theory predicts that plaintiff-side fee shifts and damage enhancements will increase the number of claims filed under the relevant statutes. Fee shifts reduce the costs of litigation; enhanced damages increase the benefits. The available empirical evidence tells a different story. The evidence supports the theoretical prediction that enhanced damages will generate more suits, but it suggests that one-way attorney’s fee shifts do not consistently lead to higher filing rates.

Second, when special incentives do work, they may trigger a judicial backlash against the very rights that Congress sought to promote. It bears emphasis that the term “private enforcement” is a misnomer. Private litigants do not have the power to enforce the law directly, in the sense of ordering coercive remedies against statutory violators. At most, private litigants can activate an enforcement regime that ultimately is controlled by courts. Given that most federal statutes contain gaps and ambiguities, the judicial enforcement regime is not mechanical but entails an important degree of discretion.5 Through the process of statutory enforcement and interpretation, judges determine the ultimate content of the law. Unlike legislators, however, judges cannot pick their opportunities for lawmaking. Judges can only decide the cases that are brought before them, and not all cases are created equal. It is well known that advocacy groups seeking to push the law in a particular direction do not litigate any old case, but try to find the best possible vehicle—a case with a sympathetic plaintiff and bad facts for the defendant.6 Similarly, repeat-player litigants take special care to settle any cases that might generate unfavorable precedent that will affect operations going forward.7 Both practices reflect a recognition that the law is shaped by the cases judges are asked to decide and the resources the parties bring to the table.

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6 See, e.g., Lee Epstein & C.K. Rowland, Interest Groups in the Courts: Do Groups Fare Better?, in ALLAN J. CIGLER & BURDETT A. LOOMIS, EDs., INTEREST GROUP POLITICS 275, 281 (2d ed.) (“Rather than bringing just any case to the court, interest groups try to pick ‘winners,’ cases that they cannot only win, but also those that will help them to build favorable precedent.”); Leandra Lederman, Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?, 75 NOTRE DAME L. REV. 221, 241 (1999) (“[T]he strategy of picking cases with favorable facts and sympathetic plaintiffs explains how interest groups can rely on the path-dependence of precedent to influence the development of the law despite standing doctrine. In effect, interest groups can weight both the pool of docketed cases by picking cases with favorable facts and the pool of which cases go to trial by being unwilling to settle these favorable cases.”); Emily Zackin, Popular Constitutionalism’s Hard When You’re Not Very Popular: Why the ACLU Turned to Courts, 42 LAW & SOC’Y REV. 367, 380 (2008) (discussing the American Civil Liberties Union’s “careful selection of test cases”).

7 See infra notes 138-140 and accompanying text; Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC’Y REV. 95, 100-03 (1974).
By altering the behavior of private litigants, special incentives to sue change the cases that courts hear, with important consequences for the substance of the law. When they work, mechanisms like fee shifts and damage enhancements increase litigation rates. There are at least two possible judicial responses: backlash, and what I call judicial learning—a better understanding of, and sympathy for, the claims involved. I explain that the structure of the judicial system does not lend itself to learning, and that judges are prone to react with hostility to any marked increases in the number of claims filed under a given statute, especially if they were not favorably inclined toward those claims in the first place. Indeed, the very existence of litigation incentives seems to fuel such hostility, as judges assume that the prospect of recovering enhanced damages and attorneys’ fees encourages plaintiffs and their attorneys to file weak claims. The available empirical evidence, while limited, is consistent with that conclusion.

Recent events may begin to shed some light on the risk of judicial backlash, which has gone largely unnoticed to date. In December 2009, the Federal Trade Commission (FTC) filed a highly publicized complaint against Intel Corporation, charging that the company has illegally used its dominant market position to stifle competition in computer chips. The FTC took pains to ground its complaint in the FTC Act, though it easily could have asserted a violation of the Sherman Antitrust Act. The critical difference, from the agency’s perspective, is that the Sherman Act authorizes suit by private plaintiffs as well as government agencies, and promises prevailing plaintiffs treble damages. As the FTC Chairman explained, “concern over class actions, treble damages awards, and costly jury trials have caused many courts in recent decades to limit the reach of antitrust. The result has been that some conduct harmful to consumers may be given a ‘free pass’ under antitrust jurisprudence, not because the conduct is benign but out of a fear that the harm might be outweighed by the collateral consequences created by private enforcement.”

Since the same substantive provisions are involved in both public and private antitrust enforcement, any doctrinal limitations crafted in response to private antitrust enforcement “slop[] over” to enforcement efforts by federal agencies. But the FTC Act, which does not permit private litigation, is free from such distortions.

Judicial trimming of the Sherman Act is one instance of the larger problem this Article exposes. Statutory mechanisms designed to strengthen enforcement by increasing litigation rates can backfire, prompting judges to adopt procedural rules that counteract the effect of fee shifts and damage enhancements, and to interpret the substantive provisions of the relevant statutes narrowly. Litigation incentives, then, may not be as valuable as their supporters believe—and may in fact be counterproductive.

The remainder of this Article proceeds in three parts. Part I provides a brief overview of the purpose and scope of litigation incentives. Part II focuses on how special incentives to sue affect the behavior of litigants. By juxtaposing economic theory and empirical facts, I show that one-way attorney’s fee shifts and damage enhancements often do not work in the way that

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11 Id. (concluding that, “although . . . there is reason to believe that the alleged conduct also violates Section 2 of the Sherman Act, . . . insofar as the case proceeds on the basis of any Sherman Act ‘tag-along’ claims, the Commission acts contrary to the public interest”).

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conventional understandings of litigation incentives would suggest. In Part III, I consider how fee shifts and damage enhancements affect the behavior of judges. I demonstrate the many ways that judicial decision-making may be affected by the content of courts’ dockets, and argue that the likely effect of litigation incentives will be a negative one, at least from the perspective of the interest groups and legislators who supported the incentives.

I. WHY ENCOURAGE LITIGATION?

Congress enacts legislation, but it does not enforce or interpret it. Instead, Congress relies on other actors to implement the statutes it creates. The power to “execute[]” the law lies with the executive branch,12 and executive-branch actors—typically administrative agencies—have a central role in enforcing federal legislation.13 Statutory interpretation likewise happens outside of Congress. Congress rarely enacts perfectly specified legislation. Statutory language may be vague or ambiguous because legislators agree on general principles but not on particulars,14 or because legislators hope to take credit for addressing a pressing social problem while avoiding blame from constituents disappointed with the details.15 Even if legislators wish to control policy as much as possible, uncertainty about future events may make perfect specification unwise or impossible.16 Often the best Congress can do is enact a general policy and leave the fine points to others who can interpret the statute in light of current conditions. Again, Congress typically vests such interpretive authority in administrative agencies. Agencies can develop the expertise necessary to understand how complex regulatory schemes work on the ground.17 Unlike Congress, moreover, agencies can adjust their interpretations relatively easily, making for more flexible and responsive policy.18

Reliance on agencies for enforcement and interpretation carries with it certain risks. Agencies are subject to significant influence by the President, whose policy goals may differ from Congress’s.19 Research has shown that agency behavior, particularly in the realm of enforcement,

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12 U.S. CONST’N, ART. II, § 3 (stating that the President “shall take Care that the Laws be faithfully executed”).
13 See Steven P. Crole, Theories of Regulation: Incorporating the Administrative Process, 98 COLUM. L. REV. 1, 3 (1998) (“In many profound ways, the innumerable activities of every day life—working, traveling, transacting, recreating, indeed eating, drinking, and breathing—are affected by the work of federal administrative agencies . . . .”).
15 See Lisa Schultz Bressman, Chevron’s Mistake, 58 DUKE L.J. 549, 568 (2009) (“Congress may aim to write just enough policy to receive a positive response for its action, while deflecting any negative attention for the burdensome details to the agency.”).
16 See Richard J. Pierce, Jr., Political Accountability and Delegated Power: A Response to Professor Lowi, 36 AM. U. L. REV. 391, 401 (1987) (“Given the nature and level of governmental intervention that Congress now authorizes, it could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually.”).
17 See David Epstein & Sharyn O’Halloran, The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach, 20 CARDozo L. REV. 947, 967 (1998) (“[T]he executive branch is filled (or can be filled) with policy experts who can run tests and experiments, gather data, and otherwise determine the wisest course of policy, much more so than can 535 members of Congress and their staff.”).
18 See id. at 954 (noting that “one of the primary reasons for delegating” is “the ability of agencies to respond flexibly to changing conditions”).
19 The President appoints agency heads (subject to the advice and consent of the Senate), and—with the exception of so-called independent agencies—can remove them from their offices. Modern presidents also have exercised control through
often changes as presidential administrations change. Agencies also are subject to influence and control by future congresses, which might have different commitments and priorities from those of legislative coalition that enacted the statute in question. The result is that agencies may implement statutes in a way that pushes policy away from the preferences of the enacting legislators.

For legislators concerned about agency policy drift, one option is to look beyond agencies to other potential enforcers and interpreters. Congress can delegate primary interpretive and/or enforcement authority to courts rather than agencies. Congress also can utilize the help of ordinary citizens by authorizing or encouraging them to sue statutory violators. Although private parties do not exercise formal governmental authority, they nevertheless can play an important part in enforcing the law through litigation.

So-called “private enforcement” of federal legislation offers several advantages over enforcement by agencies. Private enforcement can supplement public efforts, picking up the slack where agency resources run out. Private enforcement may be especially valuable in areas where statutory violations are hard to detect; individuals and firms may have access to information that is inaccessible to enforcement agencies. An additional benefit, from Congress’s perspective, is executive orders requiring review of proposed agency actions and regulatory plans by the executive Office of Management and Budget and the Office of Information and Regulatory Affairs. See Nicholas Bagley & Richard L. Revesz, Centralized Oversight of the Regulatory State, 106 COLUM. L. REV. 1260, 1263 (2006) (arguing that the requirements of centralized review provide the President with a “powerful tool” to shape agency policy); Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2281-309 (2001) (describing how President Clinton used administrative oversight to promote desired policy ends). For a discussion of President Reagan’s Executive Order 12,498, which was adopted until recently by subsequent Presidents, see Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. CHI. L. REV. 1, 3 (1995). For a discussion of President George W. Bush’s Executive Order 13,422, see Peter L. Strauss, Overseer, or ‘The Decider”? The President in Administrative Law, 75 GEO. WASH. L. REV. 696, 701-02 (2007).

20 See Margaret H. Lemos, The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII, ___ VAND. L. REV. ___ (forthcoming 2010) (describing shifts in the EEOC’s enforcement practices during the Reagan administration, and showing that the agency’s interpretive approach proved to be less susceptible to presidential manipulation); Terry Moe, Regulatory Performance and Presidential Administration, 26 AM. J. POL. SCI. 197 (1982) (finding variation in the enforcement efforts of the National Labor Relations Board, the Federal Trade Commission, and the Securities and Exchange Commission based on the presidential administration in office); B. Dan Wood & Richard Waterman, The Dynamics of Political Control of the Bureaucracy, 85 AM. POL. SCI. REV. 801 (1991) (finding significant executive influence on the behavior of seven agencies, especially those situated within executive departments).


24 See Caroline R. Albiston & Laura Beth Nielsen, The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General, 54 UCLA L. REV. 1087, 1094 (2006) (“[P]rivate enforcement avoids the need for a large governmental enforcement apparatus.”); Stewart & Sunstein, supra note 1, at 1214 (“Public enforcement is . . . frequently inadequate because of budget constraints; private actions can be a useful supplementary remedy by providing additional enforcement resources.”).

25 Bucy, supra note 1, at 4-5 (“A public regulatory system will always lack the one resource that is indispensable to effective detection and deterrence of complex economic wrongdoing: inside information . . . . Private justice can supply the resource of inside information.”); Myrtam E. Gilles, Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights, 100 COLUM. L. REV. 1384, 1387 (2000) (noting that a centralized enforcement scheme loses out on “the eyes, experiences, motivation, and resources of millions of Americans who bear witness to institutionalized wrongdoing and are willing to endure the expense of rooting it out”).
that private enforcement runs on “autopilot”: It chugs along, fueled by the financial, emotional, or ideological incentives of those injured by statutory violations, without the need for government intervention.\textsuperscript{26} As such, and unlike enforcement by agencies, private enforcement tends to be unaffected by changes in presidential administration.\textsuperscript{27}

Merely authorizing private enforcement may not result in the desired level of enforcement, however. Although American society frequently is denounced as excessively litigious, the reality is that only a tiny fraction of those who encounter potentially justiciable problems consult a lawyer, much less sue.\textsuperscript{28} Litigation is expensive, and the benefits to the individual plaintiff may not be worth the costs. That is so even if the overall benefits from the lawsuit would be substantial. Litigation often generates positive externalities that will be shared widely by all, or at least many, citizens. Environmental suits can lead to cleaner air and water; antitrust suits to more competition and lower prices; civil rights suits to better police practices. Yet, as Richard Stewart and Cass Sunstein have explained, “[w]hen the social benefits of eliminating an unlawful activity are widely shared, the stake of any individual is often small and each individual can enjoy a ‘free ride’ on the enforcement efforts of others. As a result, no individual may have sufficient incentive to bring suit.”\textsuperscript{29}

Moreover, few individuals can sue successfully without the help of an attorney, and few can afford to pay an attorney out of pocket. Attorneys’ fees typically account for most of the cost of litigation, and under the “American rule” for fees, each party pays its own attorney regardless of who wins and who loses.\textsuperscript{30} Although contingency fee or “no win, no pay” arrangements may be available to low-income plaintiffs,\textsuperscript{31} high litigation costs coupled with a low expected recovery can make finding a lawyer difficult indeed.\textsuperscript{32} The problem is especially acute in areas where relief

\textsuperscript{26} Farhing, supra note 4, at 3 (“Legislators recognize in private litigants and attorneys, mobilized to the desired extent with economic incentives, a form of auto-pilot enforcement that will endure even when the enacting coalition loses power.”).

\textsuperscript{27} Alexandra Kalev & Frank Dobbin, Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time, 31 LAW & SOC. INQUIRY 855, 856 (2006) (“Presidents can alter enforcement by changing the level of regulatory enthusiasm more easily than they can alter enforcement by influencing case law.”); Lemos, supra note 20 (showing that the ideological direction of the Supreme Court’s decisions in Title VII cases were not linked to the politics of the President in office).

\textsuperscript{28} See Kevin M. Clermont & Theodore Eisenberg, Litigation Realities, 88 CORNELL L. REV. 119, 136 (2002) (discussing the results of a survey of more than five thousand households and reporting that “even for . . . substantial grievances, litigation is by no means a knee-jerk or common reaction in America, as overall only about 5% of the survey’s grievances ultimately resulted in a court filing”); Gillian K. Hadfield, Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans (ssrn) (explaining that Americans who experience potentially litigable problems are relatively less likely to obtain legal advice than residents of other countries); David Luban, A Flawed Case Against Punitive Damages, 87 GEO. L.J. 359, 377 (1998) (“[A]part from automobile-related injuries, Americans are extremely reluctant to sue. A large ICJ study found that claims were made in 44% of motor vehicle injuries, 7% of work-related injuries, and 3% of other injuries—all in all, in about one accidental injury in ten.”); Laura Beth Nielsen & Aaron Beim, Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation, 15 STAN. L. & POL’Y REV. 237, 241 (2004) (“Research on the prevalence of discrimination in the workforce . . . demonstrates that more than one-third of those who reported unfair treatment took no further action, and only 3% reported suing their employer.”).

\textsuperscript{29} Stewart & Sunstein, supra note 1, at 1214 n.72.

\textsuperscript{30} See Frances Kahn Zemans, Fee Shifting and the Implementation of Public Policy, 47 LAW & CONTEMP. PROBS. 187, 188 (1984) (“The United States is the only common law jurisdiction in which attorney fees do not follow the event. Absent an express statutory exception, each party must bear the total expense of compensating his or her attorney.”).


\textsuperscript{32} See Virginia G. Maurer, Robert E. Thomas & Pamela A. DeBooth, Attorney Fee Arrangements: The U.S. and Western European Perspectives, 19 NW. J. INT’L L. & BUS. 272, 297 (1999) (“[T]he contingency fee does not provide complete access or ideal gatekeeping. Meritorious claims with important legal implications but limited pecuniary prospects will not be
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is likely to come in the form of an injunction rather than damages,\(^{33}\) but even monetary claims that are substantial from the perspective of the plaintiff may be too small—relative to the expense of litigation—to attract an attorney.\(^{34}\)

Recognizing the potential obstacles to private enforcement, Congress has taken steps to encourage litigation through mechanisms that reduce the cost or increase the expected benefits of suit.\(^{35}\) With respect to costs, Congress has carved out exceptions from the American rule for attorney’s fees so that successful plaintiffs need not dig into their winnings in order to fund their representation. In a comprehensive study of federal litigation incentives enacted between 1887 to 2004, political scientist Sean Farhang found 245 statutes containing one-way fee shifts, allowing prevailing plaintiffs (but usually not defendants) to recover attorney’s fees from their adversaries.\(^{36}\) Examples include the Civil Rights Attorney Fee Awards Act, which prescribes a fee shift for victorious plaintiffs in a variety of civil rights actions;\(^{37}\) the Privacy Act, which shifts fees for plaintiffs who successfully sue a federal agency for failing to provide adequate access to personal records or to maintain those records accurately;\(^{38}\) the Fair Debt Collection Act, which prohibits “abusive and deceptive” conduct by creditors and contains an automatic fee-shift for prevailing plaintiffs;\(^{39}\) and the Age Discrimination in Employment Act, which entitles plaintiffs who prove unlawful discrimination to recover a reasonable attorney’s fee.\(^{40}\)

On the other side of the equation, Congress has permitted prevailing plaintiffs to recover damages beyond their actual losses. Farhang’s study revealed 104 statutes containing damage enhancements, either in the form of a multiplier (e.g., double or treble damages) or punitive damages.\(^{41}\) Treble damages may be assessed, for example, for violations of antitrust,\(^{42}\) racketeering,\(^{43}\) and intellectual property protection statutes;\(^{44}\) and punitive damages are available...
to plaintiffs who sue successfully under statutes prohibiting discrimination in housing, employment, and the provision of credit. Another form of damage enhancement is a qui tam provision, which permits plaintiffs who have not been injured at all to share in an award. A prominent example is the False Claims Act, which encourages individuals to come forward with information about fraud against the government by promising them part of any eventual government recovery. Finally, statutory damages can in some circumstances serve as an enhancement if they exceed the amount of actual damages. Statutory damages are available in several statutes prohibiting violations of privacy, for example, where actual damages are difficult to prove.

As these examples suggest, Congress has provided for one-way fee shifts and enhanced damages in a wide variety of contexts, ranging from consumer protection to communications to civil rights. Farhang’s study makes clear that litigation incentives “are not the unique province of any particular ideological or partisan program.” They have been deployed by Democratic and Republican-controlled congresses alike, although Democratic majorities are somewhat more likely to make use of private enforcement regimes than Republican ones.

The obvious purpose of statutory provisions like one-way fee shifts and enhanced damages is to encourage more private litigation. Interest groups—particularly legal advocacy groups—

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45 Fair Housing Act, as amended, 42 U.S.C. § 3613(c).
47 Equal Credit Opportunity Act, 15 U.S.C. § 1691 (punitive damages available up to $10,000)
49 See, e.g., Stored Communications Act, 18 U.S.C. § 2707(c) (providing for statutory and punitive damages for unauthorized access to stored electronic communications such as e-mail); Wire Interception and Interception of Oral Communication Act, 18 U.S.C. § 2520 (stating that any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of the act can, in certain circumstances, recover statutory and punitive damages); Sheila B. Scheuerman, Due Process Forgotten: The Problem of Statutory Damages and Class Actions, 70 MISSOURI L. REV. 103, 110 (2009) (“Statutory damages provide an incentive to pursue a lawsuit where actual damages are small or difficult to ascertain.” (internal quotation marks omitted)).
50 FARHANG, supra note 4, at 95.
51 Id. at 104. Farhang found that Congress’s use of litigation incentives was positively and statistically significantly associated with divided government and with the risk of electoral losses. Id. at 103-04. Those findings provide important empirical support for the notion, discussed above, that legislators will turn to private enforcement when they have reason to fear that public enforcement will be skewed by an ideologically distant President, or by future congresses controlled by the other party. Id. at 3 (“[C]onflict between Congress and the president over control of the bureaucracy, a perennial feature of the American state, creates incentives for Congress to bypass the bureaucracy and provide for enforcement via private litigation.”); Joseph L. Smith, Congress Opens the Courthouse Doors: Statutory Changes to Judicial Review Under the Clean Air Act, 58 POL. RES. Q. 139, 140 (2005) (“[J]udicial review provisions are tools of inter-branch conflict. By expanding the powers of courts to supervise regulatory agencies, Congress transfers authority from the executive branch to the courts.”).
52 See FARHANG, supra note 4, at 90 (arguing that one-way fee shifts and enhanced damages are “totally unambiguous in their purpose and influence” (emphasis in original)). That is not to say that encouraging litigation is the only goal of such mechanisms, which may serve compensatory purposes as well. See, e.g., William Breit & Kenneth G. Elzinga, Private Antitrust Enforcement: The New Learning, 28 J.L. & ECON. 405, 406 (1985) (noting that one of the purposes of private antitrust enforcement is to compensate parties injured by antitrust violations); Harold J. Krent, Explaining One-Way Fee Shifting, 79 VA. L. REV. 2039, 2044-45 (1993) (explaining that one-way fee shifting may help “ensure more complete compensation for parties injured by government wrongdoing or by the failure of private entities to comply with government directives”). Moreover, damage enhancements may be designed to promote voluntary compliance, thereby reducing the need
often lobby for such provisions. The legislative histories of statutes that contain litigation incentives are replete with statements by legislators and witnesses that optimal enforcement of the relevant statutes depends on private litigation, and that some form of inducement is necessary in order to facilitate suit. Just as Congress can craft agency procedures in a way that “stack[s] the deck” in favor certain constituencies, it can use fee shifts and damage enhancements in an effort to ensure that particular individuals or groups have the ability and incentive to enforce federal legislation. Not surprisingly, the legislators who support litigation incentives tend to be the same people who champion the policies embodied in the relevant bill. Legislators vote for such procedural mechanisms in the belief that they will help promote the substance of the statute.

Although litigation incentives are commonplace in federal statutory law, it is not at all clear how they actually work. In Part II, I consider how one-way fee shifts and enhanced damages affect the behavior of litigants. In Part III, I consider the likely effect on the law.

II. CONSEQUENCES FOR LITIGANT BEHAVIOR

Do litigation incentives in fact generate more lawsuits seeking to enforce federal statutory law? In this Part, I approach that question from two perspectives, one theoretical and the other empirical. From the perspective of standard economic theory, the answer is straightforward: All else equal, enhanced damages and one-way fee shifts should lead to more complaints being filed. The available empirical evidence provides only partial support for the theoretical predictions, however. It is fairly clear that enhanced damages result in higher filing rates at least some of the

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53 See FARHANG, supra note 4, at 104 (reporting that “the presence of more witnesses representing issue oriented citizen groups in hearings on regulatory legislation is associated with increased utilization of private enforcement regimes’’); Zemans, supra note 30, at 200 (noting that Congress has not encouraged litigation “in any systematic fashion. Instead, it appears that legislative action on this issue as on any other, has been dependent upon the persuasion of interested parties.’’).


56 See Smith, supra note 51, at 140 Tbl. 1 (showing that, at three stages of amendment of the Clean Air Act, supporters of stricter protection for the environment advocated adding, or strengthening, private litigation incentives, while opponents of stricter protection of the environment opposed such provisions).

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time, but there is very little evidence that one-way fee shifts have the same effect.

**A. The Theoretical Model**

Given that only a small fraction of disputes result in litigation, what makes some people decide to sue and others to “lump it”\(^{57}\)? Law and economics scholars have argued that the decision to sue can be understood largely in financial terms. On that view, a potential plaintiff will sue if the expected value of litigation outweighs the cost.\(^{58}\) The expected value of litigation is the amount of damages (or other relief) the plaintiff expects to recover if she prevails, multiplied by the probability of a plaintiff win.\(^{59}\) Thus, if the plaintiff believes she has a 70% chance of recovering a $10,000 judgment, the expected value of litigation is $7,000. The plaintiff’s costs are simply the expense of litigation (filing fees, foregone wages, etc.) plus her attorney’s fees. In this example, so long as the plaintiff’s anticipated legal costs are less than $7,000, it would be rational for her to sue.

Litigation incentives such as enhanced damages and one-way fee shifts change the cost-benefit calculus and should theoretically lead to more litigation. Enhanced damages raise the expected value of litigation by increasing the amount of the judgment. For example, if our hypothetical plaintiff is considering filing suit under a statute with mandatory treble damages, she can expect to recover $30,000 in damages rather than $10,000. If she continues to believe that she has a 70% chance of prevailing, then the expected value of the litigation will be $21,000 rather than $7,000. Plainly, the likelihood that the expected value of the litigation will exceed the cost—and therefore that this plaintiff will decide to sue—is significantly higher than in the original example.\(^{60}\)

While enhanced damages raise the expected value of litigation, one-way fee shifts decrease the expected costs and so, again, should lead to more claims being filed.\(^{61}\) Consider our original example, where the expected value of litigation is $7,000. Under the American rule for fees, if the potential plaintiff anticipates that her attorney’s fees will run to $9,000 if the case goes to trial, it bears emphasis that the analysis here focuses on one-way fee shifts, under which a prevailing plaintiff can recover attorney’s fees but a prevailing defendant typically cannot. See supra note 36. Commentators agree that a one-way fee shift should—in theory and with other factors held constant—increase the number of claims filed. See, e.g., Krent, supra note 52, at 2040 (explaining that the rate of litigation should be highest under a fee-shifting system favoring the plaintiff); Shavell, supra note 58, at 60-61 (same); Schwab & Eisenberg, supra note 4, at 746 (“[T]he fee-shifting statute, by allowing plaintiffs to avoid incurring attorney’s fees if they prevail, increases the proportion of disputes that plaintiffs are willing to bring as lawsuits.”). The effects of a two-way fee shift (also known as the “British rule” for fees), under which any prevailing party can recover fees, are far less clear. See Kritzer, supra note 31, at 1948 (“There is surprisingly little agreement among those who have undertaken . . . theoretical analyses” of the effects of the American vs. British fee systems, and “the empirical literature confirms that the effects of fee shifting are complex and difficult to ascertain”).

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57 Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 14 (1983) (“Even where injuries are perceived, a common response is resignation, that is, ‘lumping it.’”).

58 See, e.g., Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58 (1982) (“[U]nder the American system, the plaintiff will bring suit if and only if his expected judgment would be at least as large as his legal costs.”).

59 Mathematically, the expected value of the litigation for the plaintiff can be understood as \(E = Pp \times J\), where \(Pp\) is the plaintiff’s assessment of the probability of a plaintiff win, and \(J\) is the expected amount of the judgment.

60 If enhanced damages are available but not mandatory, as typically is the case with punitive damages, the plaintiff will have to consider not only the probability of winning the case and recovering compensatory damages, but also the probability of winning punitive damages. Her computation will involve an additional step, but the result will be the same: Even a relatively small probability of recovering punitive damages will increase the expected value of litigation over the traditional actual-damages model, and hence will increase the likelihood of suit.

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she will not sue. Her decision will be different if the statute in question provides that prevailing plaintiffs will recover their attorneys’ fees. Recall that this plaintiff believes that she has a 70% chance of prevailing if she sues. It follows that she has only a 30% chance of holding the bill for her attorney’s fees. Accordingly, under a one-way fee-shifting statute, her expected legal costs are $2,700—or 30% of $9,000—and she will sue.

The economic model of litigation is stylized, of course. It assumes that plaintiffs are rational utility-maximizers, that they are risk-neutral, and that their litigation decisions are driven exclusively by economic concerns and not, for example, a desire for revenge or to have a “day in court.” If real plaintiffs do not share those characteristics, or if other factors intervene that skew the litigation decision, then litigation incentives may not have their intended effect.

Unfortunately, there is relatively little empirical evidence regarding the actual consequences of enhanced damages and one-way fee shifts. Although such incentives can be found in hundreds of statutes, most were enacted at the same time that Congress created the private cause of action. In such circumstances, it is impossible to tell whether the relevant incentives altered the quantity or quality of litigation that would have occurred in their absence. In a handful of statutes, however, Congress created a private cause of action and then added a fee shift and/or damage enhancement some years later. Those statutes provide an opportunity to gauge the effects of litigation incentives by comparing the rate of filings before and after the relevant amendments. To that end, I canvassed existing studies of the amended statutes in an effort to determine whether the litigation incentives made a difference. Only a very few studies have investigated the effects of litigation incentives directly; most of the studies discussed in this Part were focused on other issues. Nevertheless, they can provide useful insights on how fee shifts and damage enhancements have operated in practice. The results are somewhat surprising: While there is empirical support for the notion that enhanced damages increase filing rates, the available evidence with respect to one-way fee shifts is at best inconclusive, and could be read to suggest that fee-shifts do not serve their intended purpose of encouraging litigation.

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62 That is so even if the plaintiff is suing in an area where “no win, no pay” arrangements are available, as a plaintiff focused on economic factors (as the theory assumes) will not pursue litigation if her entire recovery will be eaten up in attorney’s fees. On the other hand, the plaintiff in a “strike suit”—a meritless suit brought in the hope of extracting a settlement from the defendant—might sue even when the cost of going to trial exceeds the expected recovery, because she will never plan on going to trial. See David Rosenberg & Steven Shavell, A Model in Which Suits Are Brought for Their Nuisance Value, 5 INT’L REV. L. & ECON. 3 (1985).

63 Note that the effects of a one-way fee shift are greatest when the plaintiff is optimistic about her chances of success. The more confident the plaintiff is that she will win, the more she will discount the expected costs of her legal representation. Thus, not only should one-way fee shifts encourage more claims, they should encourage relatively stronger claims. See Kieth N. Hylton, Fee Shifting and the Predictability of the Law, 71 Chi.-Kent L. REV. 427, 445 (1995) (“[U]nlke the American rule, and like the British rule, the Pro-plaintiff rule gives the greatest amount of encouragement to high probability claims.”); Schwab & Eisenberg, supra note 4, at 747 (“A [one-way] fee shifting statute may affect not only the volume of litigation but also the quality of the claims brought. . . . The fee-shifting statute has the greatest effect on cases that the plaintiff is most likely to win . . . .”).

64 See Shavell, supra note 58, at 57, 61 (explaining how the calculations change if the potential plaintiff is risk-averse).


66 See Farhang, supra note 4, at 7-8 (“Together, the individual-level effects of noneconomic motives, bounded rationality, and media distortion, coupled with the effects of broad gauged cultural and socioeconomic forces, may dilute the effects of legislative manipulation of expected value to the vanishing point.”).

67 The effect of litigation incentives on parties’ choice between settlement and trial is even less clear. Economic theory predicts that damage enhancements would lead to fewer settlements between risk-neutral parties, see George L. Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. LEGAL STUD. 65, 65, 67 (1977) (explaining that “litigation is
B. Empirical Evidence

1. Enhanced Damages

Title VII of the Civil Rights Act of 1964 provides a useful window onto the consequences of enhanced damages as a suit-booster. Title VII prohibits discrimination in employment on the basis of race, sex, national origin, and religion. As enacted, the statute provided that prevailing plaintiffs could recover only equitable relief, such as back-pay, job seniority, and benefits (as well as a reasonable attorney’s fee). Thus, an employee who was denied a promotion for discriminatory reasons could recover only the difference between her existing salary and the salary she would have received had she been promoted, and a plaintiff who suffered sexual harassment but remained in her job typically could recover nothing at all. In 1991 amendments to Title VII, Congress substantially increased the amount of damages available, permitting prevailing plaintiffs to recover any economic damages they suffered as a result of unlawful discrimination, as well as non-economic damages (e.g., for emotional distress) and punitive damages in amounts ranging from $50,000 to $300,000, depending on the size of the employer.68

Several studies of employment discrimination litigation have found that Title VII litigation in federal court increased sharply—nearly tripling in frequency—following the 1991 amendments, at a time when other civil litigation rates stayed flat or declined.69 The authors hypothesized that the increase was due at least in part to the 1991 amendments, but they did not attempt to confirm that claim through formal statistical analysis.70 Sean Farhang’s study of claims filed with the Equal

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68 See Clermont & Schwab, supra note 69, at 15; Nielson et al., supra note 69; Selmi, supra note 1, at 1435-36.

69 Relying on data provided by the Administrative Office of the Federal Courts (AO), Kevin Clermont and Stewart Schwab report that “employment discrimination cases exploded from 8,303 cases terminated in 1991 to 23,722 cases terminated in 1998, a 286% increase.” Kevin M. Clermont & Stewart J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, ___ HARV. L. & PUB. POL’Y REV. ___ (ms. at 3-5) (2009). Using the same data, Michael Selmi has shown that employment discrimination litigation increased 200% between 1991 and 1994, with “the rise in cases . . . felt most acutely in 1994,” which “marked the time when post-1991 cases would most likely emerge from the administrative process.” Selmi, supra note 1, at 1435-36. Both studies focus on litigation concerning employment discrimination generally, because the most specific category available for study is what the AO classifies as “job discrimination” litigation. That category includes Title VII cases as well as litigation under other anti-discrimination statutes. But Title VII cases account for 70% of the cases in the category, suggesting that Title VII claims did increase after 1991. See Clermont and Schwab, supra, at 14-16. That implication finds support in a study by Laura Beth Nielsen, Robert Nelson, and Ryon Lancaster, who examined the files from a random sample of 2100 cases involving claims of employment discrimination. Nielsen and her co-authors report that employment discrimination litigation nearly tripled between 1992 and 1997, and that the increase is due in part to increased filings by Title VII claimants. Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States (ssrn) (discussing Figures 1 and 2).

70 See Clermont & Schwab, supra note 69, at 15; Nielson et al., supra note 69; Selmi, supra note 1, at 1435-36.
Employment Opportunity Commission (EEOC) provides more direct evidence of the influence of the 1991 amendments. Before a plaintiff can file suit in court under Title VII, he must file a claim with the EEOC, giving the agency an opportunity to investigate and perhaps conciliate the claim. Thus, every claim that results in litigation must pass through the EEOC. Farhang found that Title VII claims rose dramatically after 1991. After controlling for other factors (such as unemployment and bureaucratic ideology) that could have sparked an increase in claim filing in the 1990s, Farhang concluded that the effect of the 1991 amendments was positive and statistically significant.

Litigation under the Fair Housing Act has followed a similar pattern. As enacted in 1968, the Fair Housing Act provided that the victims of discrimination in housing could recover actual damages and up to $1,000 in punitive damages. Because “out-of-pocket damages in most housing cases are de minimis,” litigation rates remained relatively low. Congress responded in 1988, when it amended the Act to remove the cap on punitive damages. As Fair Housing Act litigation became more profitable, litigation rates shot up. Between 1984 and 1988, an average of 254 private cases were filed each year. The filing rate increased mildly by 1990, when 284 private cases were initiated. By 1996, the annual filing rate had reached 829 cases, an “increase of nearly 200% over the 1990 level of activity.”

The qui tam provision of the False Claims Act provides an additional example. Enacted in 1863 in response to charges of widespread military procurement fraud during the Civil War, the qui tam provision permits a private citizen, or “relator,” with evidence of fraud against the United States to bring a civil action against the wrongdoer on behalf of the government. The False Claims Act was amended in 1986, making it easier—and more lucrative—for relators to sue.

Clermont and Schwab compared the rate of employment discrimination litigation to the unemployment rate, which was decreasing during the 1990s as the number of employment discrimination claims shot up. They conclude that “business cycles do not explain the upward trend in cases during the economic good times of the 1990s”). Clermont & Schwab, supra note 69, at 18. Similarly, Selmi found that the level of government activity in enforcing the relevant statutes decreased in the 1990s, and reasoned that, “[i]f general economic conditions were responsible for the surge in [private] court filings, we would expect the government cases to have increased at a rate similar to the private bar.” Selmi, supra note 1, at 1437.

71 Farhang, supra note 4.
72 See id. at 16.
73 See id. at 17-18.
74 Id. at 26-27. Farhang also compared the rate of claims filed under the Age Discrimination in Employment Act, which did not undergo similar amendment in 1991, and found no similar pattern—suggesting that the post-1991 “increases in Title VII charges were not driven by broader social or legal factors affecting employment discrimination claiming in general, and [buttressing] the inference that the true cause was [the 1991 amendments to Title VII].” Id. at 27.
75 Robert G. Schwemm, Private Enforcement and the Fair Housing Act, 6 YALE L. & POL’Y REV. 375, 380 (1988); id. at 381 (“The result is that relatively few fair housing cases are filed.”); Selmi, supra note 1, at 1404 n.9 (noting that although limited damages were available pre-1988, “prevailing plaintiffs obtained damages that were so low as to provide almost no deterrent effect”).
77 Selmi, supra note 1 at 1418-19.
79 After a relator files a claim with government, the government has 60 days to decide whether to intervene. If the government decides not to proceed, the relator can conduct the suit alone. 31 U.S.C. § 3730(b). In either case, the relator receives a share of the recovery. 31 U.S.C. § 3730(d).
80 See F. Paul Bland, Why “Qui Tam” is Necessary, NAT’L L.J., Nov. 4, 1991, at 13, 14 (“[A] major reason for revitalizing qui tam suits was that public prosecutors did not have the time or resources to go after a high proportion of reported significant fraud.”).
Most relevant here, the 1986 amendments increased the penalties that could be imposed on a defendant from double to treble damages, and increased the relator’s recovery for a successful suit to up to 30% if the government does not intervene and 25% if it does.81 The amendments worked. Prior to 1986, the Department of Justice received approximately six qui tam cases each year.82 That number rose into the hundreds after the 1986 amendments, as a total of 4,704 qui tam cases were filed between 1986 and September 2004, resulting in $8.4 billion in recovery for the government.83

The patterns of filings under Title VII, the Fair Housing Act, and the False Claims Act provide some empirical support for the notion that legislative measures that increase the expected value of litigation also will increase the amount of that litigation. It is important, however, not to overstate the strength of the available evidence. First, with the exception of Farhang’s study of claims filed with the EEOC, none of the studies discussed here sought to prove empirically that increased litigation rates were caused by, rather than simply correlated with, the availability of enhanced damages. And each of the relevant statutory amendments made several changes, in addition to increasing the possible recovery for prevailing plaintiffs, which also should work to fuel litigation rates.84 It would be a mistake, then, to ascribe the rise in litigation under the three statutes entirely to the new damage enhancements. But while it is impossible to pinpoint just how much litigation was spurred on by such incentives, the empirical evidence is at least consistent with the predictions of economic theory.

Second, it is important to note that damage enhancements may “work” without increasing the rate of litigation. In the antitrust context, for example—where treble damages are mandatory upon a plaintiff win—enhanced damages are justified primarily in terms of deterrence. The problem is not so much that plaintiffs would have inadequate incentives to sue in the absence of an enhancement, but rather than antitrust violations are so difficult to detect that the expected cost of a violation would be inadequate to deter illegal conduct. Firms, so the theory goes, will weigh the expected gains from anticompetitive conduct against the expected costs, taking into account both the likelihood of detection and sanction and the size of the available penalty. Where detection is unlikely and violations are lucrative, firms will opt to violate the law. One response is to increase the penalty, thereby raising the expected cost of violations even if the likelihood of detection and sanction remains relatively low.85 Making violations costly should lead more firms

81 31 U.S.C. §§ 3729(a), 3730(d).
82 See Bucy, supra note 1, at 48.
83 See Broderick, supra note 78, at 955; see also Bucy, supra note 1, at 48 (reporting that 3326 qui tam actions were filed between the effective date of the 1986 amendments and October 30, 2000).
84 The 1988 amendments to the Fair Housing Act extended the substantive protections of the Act to claims based on disability and familial status, extended the statute of limitations, and removed a “financial need” limitation on the recovery of attorney’s fees by prevailing plaintiffs. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. §§ 3601-3619 (2006)). The 1986 amendments to the False Claims Act contained provisions that made it easier for relators to sue. For example, the amendments permitted the plaintiff to continue as a party to the claim even if the government decided to intervene (3730(c)(1)); removed the requirement that the court dismiss a claim if the government declined to intervene and the evidence was based on information the government had at the time the claim was filed; and provided protection to the relator against retaliatory actions by employers (31 U.S.C. § 3730(h)). And the 1991 amendments to Title VII, inter alia, extended the statute of limitations, adjusted the burden of proof for certain claims, and provided that Title VII applies extraterritorially. Pub. L. No. 102-166, 105 Stat. 1071 (codified at scattered sections of 42 U.S.C.).
85 See William Breit & Kenneth Elzinga, Private Antitrust Enforcement: The New Learning, 28 J.L. & ECON. 405, (1985) (“As the probability of apprehension and conviction falls the fine increases to compensate for the fall in the expected cost of punishment. This is the intellectual justification for the use of multiple damages rather than single damages as a deterrent.”); William M. Landes, Optimal Sanctions for Antitrust Violations, 50 U. CHI. L. REV. 652, 678 (1983) (“The
to comply with the law voluntarily, just as an astronomical fine for speeding will induce drivers to slow down even if the risk of being pulled over is small.\textsuperscript{86} The important point for present purposes is that this approach will not necessarily result in more antitrust litigation (or speeding tickets); indeed, it might reduce litigation rates by reducing the number of violations.\textsuperscript{87}

Finally, damage enhancements can operate in a variety of ways—they can be mandatory or discretionary, capped or uncapped, and can apply across the board or only to certain types of claims—and may not always have the same effects in every area. For example, studies of trademark litigation show no notable change in filing rates after 1984 amendments to the Lanham Act provided for mandatory treble damages for use of a counterfeit trademark.\textsuperscript{88} It is not clear why that provision has had such a limited effect, but the example suggests the need for more research into how enhanced damages operate in specific statutory contexts. Two factors that may be particularly important are the average amount of damages pre-enhancement and the average wealth of defendants. Where damages are ample to begin with, enhancements may not generate significantly more litigation. This may help explain why damage enhancements seem to have changed the pace of employment and housing discrimination litigation (where the available damages had been very low) but not the number of cases involving counterfeiting (where purely compensatory damages tend to be high). Similarly, damage enhancements are unlikely to work if defendants cannot pay them. Many counterfeiting defendants are effectively judgment-proof, making the promise of treble damages more theoretical than real.\textsuperscript{89} In sum, the link between damage enhancements and litigation rates is complicated and context-dependent. Higher damages need not—and in fact do not—always mean more litigation.

2. One-Way Fee Shifts

Although one-way fee shifts theoretically should increase the rate of litigation by reducing its cost, the data available on the consequences of fee-shifting call into question its efficacy in that respect. The statute most prominently associated with one-way fee shifting also provides a unique opportunity for testing its effects. The Civil Rights Attorney Fee Awards Act of 1976 (CRAFAA) made fees available to prevailing plaintiffs in a variety of civil rights actions, including constitutional tort claims filed under 42 U.S.C. § 1983. Importantly, CRAFAA only shifted fees; it did not contain other provisions that might work to boost, or depress, the rate of litigation. As such, it offers an unusually neat way of testing the effects of a one-way fee shift.

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\textsuperscript{87} See Salop & White, \textit{supra} note \textit{\textcopyright}, at 1020 & n.67 (explaining that treble damages may increase or decrease the number of suits).


\textsuperscript{89} See Christopher M. Dolan, \textit{Fits Over Counterfeiting: Legislative Accomplishments and Directions}, 27 AIPLA Q.J. 233, (1999) (“The treble damages provision was originally ballyhooed as a superior preventative tool. However, time has proved it to be inadequate in terms of prevention. The counterfeiters were often judgment proof, or otherwise adept at hiding their resources.”). Cf. Molly Shaffer Van Houweling, \textit{Distributive Values in Copyright}, 83 \textit{Text. L. Rev.} 1535, 1545-46 (2005) (noting how copyright penalties are largely useless due to the number of judgment-proof infringers).
Stewart Schwab and Theodore Eisenberg have analyzed the patterns of constitutional tort litigation, but were unable to find any clear evidence that the enactment of CRAFAA in 1976 resulted in an increase in filing rates.\textsuperscript{90} Although civil rights filings increased by eight percent in the period immediately following CRAFAA’s effective date, Schwab and Eisenberg explain that, “[i]n the perspective of the growth of civil rights filings over time, . . . the eight percent growth rate for that period seems ordinary.”\textsuperscript{91} Comparing civil rights filings to a control group of all private filings, Eisenberg and Schwab find a nine-percent increase in the relative growth rate of civil rights filings during the same period following the enactment of the fees provision.\textsuperscript{92} That finding might suggest the influence of CRAFAA,\textsuperscript{93} but the bump is short-lived. Eisenberg and Schwab conclude that if “change over a long period is the predicted effect of a fee-shifting statute, the available data cannot confirm it.”\textsuperscript{94}

Schwab and Eisenberg’s findings with respect to CRAFAA are consistent with what we know about Title VII and the Fair Housing Act, discussed in the previous section. Both statutes contained a one-way fee shift when enacted, although the Fair Housing Act’s provision originally was limited to cases of financial need.\textsuperscript{95} In both cases, the amount of litigation under the original statutes was relatively low, leading to demands for corrective legislation. And in both cases, litigation rates showed a sharp increase only when Congress augmented the available damages. There is no way to compare litigation under Title VII and the Fair Housing Act with and without fee-shifting—fee shifting always has been available under both statutes. Nevertheless, the widespread perception that enhanced damages were needed in order to encourage suit under both statutes, and the fact that litigation rates in fact went up after the available damages were increased, suggest that statutory mechanisms that decrease the expected cost of litigation may not provide as potent an inducement as those that increase the expected value.

The Freedom of Information Act (FOIA) may provide a counter-example, but too many factors are involved to permit a firm conclusion. The Act permits citizens to request information from the government, and provides a private cause of action against agencies that wrongfully withhold requested materials. FOIA was amended in 1974 to provide (among other things) that courts may award attorney’s fees to plaintiffs who “substantially prevail[.]”\textsuperscript{97} The rate of FOIA litigation “increased dramatically” after 1974.\textsuperscript{98} But, in addition to the fee-shifting provision, the 1974 amendments also contained additional alterations that worked a major change in the nature of FOIA’s operation and substantive reach. For example, the amendments imposed strict

\begin{itemize}
  \item \textsuperscript{90} Schwab & Eisenberg, supra note 4, at 757-58; see also id. at 766 (explaining that “[t]here is no ‘smoking gun’ case law development that predictably would mask the effect of a statute that would otherwise lead to increased filings”).
  \item \textsuperscript{91} Id. at 758
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} Id. (“We cannot reject the existence of any effect of the fees act on filings because of this crest in the filing rate.”).
  \item \textsuperscript{94} Id.
  \item \textsuperscript{96} See supra note 54 and accompanying text (discussing the legislative history of amendments to both statutes).
  \item \textsuperscript{97} 5 U.S.C. § 552(a)(4)(e).
  \item \textsuperscript{98} Patricia M. Wald, The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values, 33 EMORY L.J. 649, 659-60 (1989) (“After 1974, the number of FOIA requests and the amount of litigation challenging agency denials increased dramatically. In 1966, the annual costs of administering FOIA requests were projected at $50,000. In 1981, the most conservative estimate of FOIA costs government-wide was $47 million; the Office of Management and Budget's figure was $250 million.”); accord Mark H. Grunewald, Freedom of Information Act Dispute Resolution, 40 ADMIN. L. REV. 1, 7 & n.40 (1988).
\end{itemize}
deadlines on agencies, authorized reviewing courts to inquire into the propriety of agencies’ classification decisions, and narrowed several statutory exceptions to the required disclosure of requested documents. While it is possible that the fee-shifting provision of the 1974 amendments contributed to the rise in litigation rates, no study to date has sought to isolate its effect.

The history of litigation under the Individuals with Disabilities Education Act (IDEA) further complicates the story. Enacted in 1970 as the Education for All Handicapped Children Act, IDEA imposes various requirements on states for educating children with disabilities. Congress amended the Act in 1975, adding procedural protections for disabled children and their parents, as well as a private cause of action for parents aggrieved by a violation of IDEA’s substantive guarantees. In 1986, Congress added a provision permitting courts, in their discretion, to award attorneys’ fees “to the parents or guardian of a handicapped child or youth who is the prevailing party.”

Studies have shown that the volume of litigation under IDEA increased during the 1980s, and experienced a steep bump in 1987—the year after attorneys’ fees were made available. Importantly, however, it appears that the increase in reported IDEA cases may be due to litigation over fees themselves rather than an increase in the number of claims filed. One study found that 11.1% of all cases reported between 1978 and 1995 concerned the provision for attorneys’ fees—notwithstanding the fact that the fee-shifting provision did not even exist prior to 1986. Disputes over attorneys’ fees accounted for more litigation than claims concerning, for example, IDEA’s substantive requirement that disabled children be placed in the “least restrictive environment”, or the responsibility for funding special education. Indeed, the provision of attorneys’ fees was one of the two most frequently litigated issues, second only to “procedural matters” such as the statute of limitations, exhaustion of administrative remedies, and the admission of evidence.

Several factors may explain the apparent failure of one-way fee shifts to increase the rate of claim-filing. One is that the cost of litigation, at least in certain areas, may be high enough that potential plaintiffs and attorneys are unwilling or unable to sink substantial funds into a lawsuit.
based on a mere possibility of recovering them in the end.\textsuperscript{109} As discussed in the following Part, judicially created doctrines limit the availability and amount of fee awards.\textsuperscript{110} And, as the IDEA example illustrates, potential plaintiffs and their counsel have to factor in the cost of any satellite litigation that may occur over the award of fees themselves. The resulting game may not be worth the candle. Another possibility is that potential plaintiffs (as opposed to their attorneys) do not focus much on the possibility of a fee shift,\textsuperscript{111} paying more attention to the likely amount or consequences of a favorable judgment.\textsuperscript{112} Potential plaintiffs may not even be aware of fee-shifting provisions, especially if they have not yet consulted an attorney.\textsuperscript{113} Still another possibility is that attorneys who typically work on a contingency-fee basis (as is common in the civil rights area, for example), do not place much value on fee shifts. Such attorneys usually can expect to be paid if the plaintiff wins, and may not care whether the money comes from the plaintiff or the defendant. Indeed, they may prefer to work without a fee shift so as to avoid the risk of costly satellite litigation over any fee award.

Legislative discourse on litigation incentives tends to assume that damage enhancements and one-way fee shifts will generate more litigation seeking to enforce federal law. As the next Part will show, many judges appear to share the same view—and the related concern that special incentives are contributing to a flood of questionable litigation.\textsuperscript{114} The available empirical evidence raises doubts about these familiar narratives. While it is possible that damage enhancements are working in the sense of improving voluntary compliance without the need for more litigation, it strains reason to suggest that the distant and doubtful prospect of attorneys’ fees has a significant effect on deterrence. It follows that litigation incentives—particularly fee shifts—may not be as valuable as their proponents appear to believe.

Perhaps even more important, the enforcement-boosting value of litigation incentives is not determined solely by the lobbyists and legislators who push them into federal law. Once enacted, mechanisms like fee shifts and damage enhancements enter the province of judges, whose decisions about the incentives themselves—as well as the substantive law in which they are embedded—can have significant effect for would-be enforcers. Indeed, judges have the capacity to cancel out the positive effects of litigation incentives, rendering them ineffective at

\textsuperscript{109} See Bucy, supra note 1, at 35 (discussing environmental statutes with one-way fee shifts and explaining that, “[b]ecause of their cost and complexity, well-organized and funded groups bring most citizen suits. Although attorneys’ and expert witnesses’ fees potentially are available to successful citizen suit plaintiffs, paying the up-front costs can be so prohibitive that only well-funded groups can afford to bring citizen suits.”); see also Kathleen C. Engel, Moving up the Residential Hierarchy: A Remedy for an Old Injury Arising From Housing Discrimination, 77 WASH. U. L. Q. 1153, 1188-90 (1999) (discussing litigation under the Fair Housing Act and arguing that the high cost of litigation combined with relatively low damages awards and settlements and a low plaintiff win rate mean that an attorney “can expect to be poorly compensated if she accepts the case”).

\textsuperscript{110} See infra notes 187-190 and accompanying text; FARHANG, supra note 4, at 302-03 (discussing restrictive judicial interpretations of Title VII’s provision for fees, resulting in a “‘judicially constructed mine field through which many attorneys have decided not to travel’” (quoting Ray Terry, Eliminating the Plaintiff’s Attorney in Equal Employment Litigation: A Shakespearian Tragedy, 5 THE LABOR LAWYER 63, 72 (1989))).

\textsuperscript{111} See Schwab & Eisenberg, supra note 4, at 780 (suggesting that “[i]f fee-shifting statutes have less than the expected effects, it may be due to differences between the attorney-client as an entity and the attorney and client as distinct entities”).

\textsuperscript{112} Farhang, supra note 4, at 8-9.

\textsuperscript{113} See Susan M. Olson, How Much Access to Justice from State ‘Equal Access to Justice’ Acts? 71 CHI.-KENT L. REV. 547, 582 (1995) (suggesting this possibility as a way of explaining the relatively “low utilization of the federal [Equal Access to Justice Act] (compared to the estimates made at the time of its passage) and the seemingly low number of claims under the state EAJAs in the years they have been in effect”).

\textsuperscript{114} See infra notes 177-185 and accompanying text.
best and counterproductive at worst. Policymakers and commentators have ignored that risk, but it may help explain why many of the incentives explored here failed to generate litigation. In the remainder of this Article, I explore the connection between litigation incentives and judicial decision-making in more detail. We have seen how special incentives to sue affect litigants. How do they affect the law?

III. CONSEQUENCES FOR THE LAW

Mechanisms like fee shifts and enhanced damages seem to rest on the twin assumptions that (a) they will encourage more private litigation seeking to enforce the substantive provisions of the relevant statute, and (b) as more plaintiffs sue, more plaintiffs will prevail, meaning that more victims of statutory violations will be compensated for their losses and more potential violators nudged into compliance. Part II showed that the first assumption stands on shaky footing. In this Part, I argue that the second assumption is equally questionable, as it depends on the notion that increased litigation rates will have no effect on judicial decisionmaking.

Suppose, for present purposes, that litigation incentives do work to encourage more litigation—as no doubt they sometimes do. There are several reasons to suppose that a rise in the number of law suits filed under a given statute will affect how judges interpret and enforce that statute. By changing the range of cases that judges hear, litigation incentives may alter judicial behavior as well as the behavior of private litigants.

A. How Cases Affect Judges

Most commentators agree that judges’ decisions are shaped by their personal views and life experiences.\(^{115}\) There is a great deal of debate about the extent to which judicial decisionmaking is based on “the law” or on judges’ ideology,\(^ {116}\) upbringing\(^ {117}\) or gender\(^ {118}\) or breakfast choices.\(^ {119}\) Yet virtually everyone agrees that non-legal considerations play some role in the work of a judge,\(^ {120}\) even if they operate on a wholly subconscious level.\(^ {121}\) As Justice Cardozo put it,

\(^{115}\) See, e.g., Jack B. Weinstein, Limit on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How Many Judges Learn?, 36 ARIZ. L. REV. 539, 541-42 (1994) (“Of course every judge brings an enormous background of knowledge to the bench—both factual and ideological—which will be utilized in drawing inferences about facts and making policy on law.”).


\(^{117}\) See RICHARD A. POSNER, HOW JUDGES THINK 95-96 (2008) (describing studies that show that “in the period from 1916 to 1988 a Justice was more likely to favor civil rights plaintiffs if he was from the North, if he was from an urban area, if his father than not been a government official, or if he had never worked as a prosecutor”).

\(^{118}\) Researchers have found that gender has an effect on judging that is independent of ideology. See Christina L. Boyd, Lee Epstein & Andrew D. Martin, Untangling the Causal Effects of Sex on Judging (SSRN); see also David R. Songer, Sue Davis and Susan Haire, A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals, 56 J. POL. 425 (1994) (finding that gender plays a role in employment discrimination cases but not in search and seizure and obscenity cases).

\(^{119}\) The famous adage that the law is what the judge ate for breakfast typically is attributed to Jerome Frank. See Tonja Jacobi, The Impact of Positive Political Theory on Old Questions of Constitutional Law and the Separation of Powers, 100 NW. U. L. REV. 259, 263 & n.19 (2006) (“[J]udicial decisions might even be determined by ”what the judge had for breakfast. . . . This phrase is often used to summarize the views of the Legal Realists, and is often ascribed to Jerome Frank.”).  

\(^{120}\) POSNER, supra note 117, at 47 (“Attitudinalists and legalists disagree about the extent of political judging rather than about its existence.”)."
“[w]e may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.”122

One of judges’ major life experiences is, of course, the time he or she has spent on the bench. A common theme in the literature on judicial decisionmaking is that a judge’s prior employment—e.g., whether he served as a prosecutor or defense attorney, or as a legal academic or small-town lawyer—may affect his decisions as a judge.123 But there is no reason to think that the impact of work experience ends the moment a judge dons the black robes. Just as a judge’s pre-judicial employment helps define who he is as a person—which in turn influences how he behaves as a judge—so too will a judge’s experiences as a judge.

Although the link between judicial experience and judicial decisionmaking has received surprisingly little scholarly attention, several studies have found evidence that judicial experience does indeed make a difference.124 For example, researchers have determined that Supreme Court Justices with prior service on the bench tend to cast more liberal votes on economic issues,125 and on equal protection claims,126 than those without judicial experience. Similarly, federal trial judges with prior experience on state courts tend to rule for the plaintiff in cases involving questions of subjective intent more frequently than other judges.127 Few of the studies attempt to explain how or why the time spent on the bench affects judges’ decisions, but they provide empirical support for the basic intuition that judges do not stop evolving as people when they take the oath of office.128

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123 See Lee Epstein, Jack Knight & Andrew D. Martin, The Norm of Prior Judicial Experience and its Consequences for Career Diversity on the U.S. Supreme Court, 91 Cal. L. Rev. 903, 954-56 (2003) (discussing the literature and reporting that 70% of relevant studies found some sort of a relationship between career experience and judicial choices).

124 See, e.g., William M. Landes & Richard A. Posner, Judicial Behavior: A Statistical Analysis (SSRN) (finding that, after adjustment for other factors, Supreme Court Justices appointed from the courts of appeals are more liberal than other Justices, probably because they have been socialized by their judicial experience to respect precedent, and the most controversial Supreme Court precedents tend to be run in the liberal direction); Gregory C. Sisk, Michael Heise, & Andrew P. Moriss, Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning, 73 N.Y.U. L. Rev. 1377, 1477 (1998) (finding that federal district court judges with prior judicial experience at state/local level were more likely than other judges to reject constitutional challenges to the federal Sentencing Guidelines and concluding that “the effect of prior judicial experience cannot be dismissed in empirical study and bears further investigation in other contexts”); Frank B. Cross, Decision Making in the U.S. Courts of Appeals 86 (2007) (finding that appellate judges with prior experience on a district court are more likely than their colleagues to affirm district court decisions that depart from their own ideological preferences).


128 Additional support can be found in the literature about judicial preference change. See Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, Ideological Drift Among Supreme Court Justices: Who, When, and How Important?, 101 Nw. U. L. Rev. 1483, 1486 (2007) (“[C]ontrary to the received wisdom, virtually every Justice serving since the 1930s has moved to the left or right.”); Linda Greenhouse, Justices Who Change: A Response to Epstein et al., 101 Nw. U. L. Rev. 1885, 1885 (2007) (“For nearly one-third of my tenure on the Supreme Court beat, there was no change in the..."
If judges’ decisions are affected by their own experiences as judges, it stands to reason that a judge’s views—and ultimately her decisions—may be affected by nature of the cases on her docket. The job of a judge can vary significantly from jurisdiction to jurisdiction, and from trial to appellate to Supreme Court. There are significant case-load differences among the federal courts of appeals, for instance, with the Ninth Circuit hearing a disproportionate share of immigration cases and the District of Columbia Circuit hearing most administrative law cases.

At the trial level, judges’ dockets differ markedly in the proportion of criminal and civil cases, and “the types of crime that different judges sentence vary widely, with some judges sentencing as many as 60 percent violent crimes, and others sentencing drug cases almost exclusively.” In short, “judicial experience” can mean many different things, and it would be surprising if the variation in case load played no role in shaping judges’ views and expectations about the legal issues they confront. For example, trial judges who hear a high proportion of violent criminal cases may become inured to the severity of violent crime, and therefore “establish a higher threshold for evaluating serious crime.”

The content of a judge’s docket also may affect her decisions in a more direct way. As noted in Part I, statutory interpretation is not a mechanical exercise, as most statutes contain gaps and ambiguities that leave substantial discretion in the hands of those who must interpret them. In the course of implementing such statutes, judges do not simply apply the law laid down by Congress.}

Court’s membership, yet clearly the Court changed between 1994 and 2005.”; Theodore W. Ruger, Justice Harry Blackmun and the Phenomenon of Judicial Preference Change, 70 Mo. L. Rev. 1209 (2005) (discussing growing evidence that judicial preferences might vary significantly over time). Interestingly, that literature does not consider the possibility that Justices’ experiences as Justices might change their views on certain issues. Instead, it focuses on factors like the “political environment in which a Justice operates,” public opinion, and context (i.e. the influence of other Justices). Epstein et al., supra, at 1520 & n.132. Those factors may well be important, but judicial experience warrants a place on the list of possible influences. Cf. John Paul Stevens, Learning on the Job, 74 FORDHAM L. REV. 1561, 1567 (2006) (“[L]earning on the job is essential to the process of judging. At the very least, I know that learning on the bench has been one of the most important and rewarding aspects of my own experience over the past thirty-five years.”).

See Burt Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1125-26 (1977) (arguing that state judges may be less likely to enforce federal constitutional rights than their federal counterparts because “[s]tate trial judges, . . . especially at the criminal, family, and lower civil court levels, are steadily confronted by distasteful and troubling fact patterns which can sorely test abstract constitutional doctrine and foster a jaded attitude toward constitutional rights”).


Id. at 269; see also Robert M. Emerson, Holistic Effects in Social Control Decisionmaking, 17 L. & SOC’Y REV. 425, 426 (1983) (“[T]he makeup of the overall ‘stream of cases’ . . . provides a background against which the classification of particular cases in organizationally relevant ways will be made.”). Lawrence Baum has offered a similar hypothesis regarding the effect of judicial service on the Foreign Intelligence Surveillance Court:

If judges hear a succession of similar cases, they may ascribe the attributes of past cases to current cases. The work of the Foreign Intelligence Surveillance Court is a possible example. Although the surveillance court constitutes part-time duty for the federal judges who sit on it, each of those judges typically hears several dozen requests a year for warrants to conduct electronic surveillance. The surveillance court almost never denies these requests, largely because of the lenient statutory requirements for approval, so judges may develop a strong expectation that any given warrant request is justified.

Lawrence Baum, Probing the Effects of Judicial Specialization, 58 DUKE L.J. 1667, 1677 (2009).

Johnson, supra note 132 at 288.
Judges make law. Importantly, however, judicial lawmaking must occur within the contours of an actual case. And as others have argued, the nature of the case—whether the plaintiff is a sympathetic character, say—can have real consequences for the content of the law.\(^\text{135}\)

Once one recognizes that a judge’s decision on a given legal question may be shaped by the characteristics of the case in which the question is presented, it becomes clear that litigants’ choices can exert significant influence on the content of the law. Judges, after all, do not reach out and choose the cases they hear.\(^\text{136}\) Litigants decide which cases to file, which cases to settle, and which cases to appeal.\(^\text{137}\) Those decisions determine which disputes are presented for judicial decision, and when—which can affect the substance of legal doctrine. For example, commentators have argued persuasively that repeat-player litigants can “engineer favorable precedents” through their settlement behavior.\(^\text{138}\) Consider the case of a car manufacturer sued for a defective design element. Although the plaintiff’s personal damages may not amount to much, the case may be worth millions to the defendant because a ruling that the design is defective will have far-reaching consequences, including future suits by other injured consumers, low sales, redesign costs, and so on. In that scenario, the defendant will be anxious to settle all but the strongest cases for its side, because the cost of an adverse ruling is so high.\(^\text{139}\) The upshot is that the cases that are presented for judicial decision will tend to have especially strong facts for the repeat-player manufacturer and weak facts for the plaintiff consumers, which in turn will tend to generate a set of precedents favor manufacturers.\(^\text{140}\)

Thus, judges’ decisions may be affected by the cases they hear in at least two ways. First, judges’ case loads help define their experiences as judges, which—like other types of life experience— influence their views of the world. Judges’ views of the world, in turn, play a role in shaping their legal decisions. Second, judges make legal decisions in the context of particular cases, and the content of their decisions may vary in important ways based on the nature of the

\(^{135}\) See generally Fredrick Schauer, Do Cases Make Bad Law?, 73 U. CHI. L. REV. 883 (2006). As Schauer explains, “[i]f judges have a hard time avoiding what they see as the right result for the particular case in all of its contextual richness, and if they are at the same time making law for future cases, then the combination of the salience of the particular case and the pull to decide it correctly may produce a rule that is unrepresentative of the full range of future cases that can be expected to be decided under it.” Id. at 900.

\(^{136}\) That is so even for courts, like the U.S. Supreme Court, with discretionary dockets. Although the Supreme Court generally cannot be forced to hear a case that the Justices do not wish to decide, the Justices have no power to create opportunities for decisionmaking but must wait for cases to be brought to their attention.


\(^{138}\) Cross, supra note 65, at 7-8; see also Lederman, supra note 6, at 234 (“Parties’ settlement behavior will influence the substantive content of precedent.”). Cf. Hylton, supra note 63, at 427 (“One can think of procedural rules as gates that determine the flow of claims into courts, which are constantly reshaping legal doctrine; open the gate a little wider, and the emerging doctrine takes a different shape.”).

\(^{139}\) To illustrate, imagine that while the plaintiff in the example above stands to recover $10,000 if she wins, the defendant believes that the full costs of a judgment in the plaintiff’s favor would be $100,000. It should be clear that the parties will tend to settle in this scenario, because the defendant will be willing to offer more than the plaintiff will demand. For an argument that asymmetric stakes reduce settlement more generally, see George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1, 24-29 (1984).

\(^{140}\) See Steven C. Salop & Lawrence J. White, Economic Analysis of Private Antitrust Litigation, 74 GEO. L.J. 1001, 1048 (1985) (arguing that the relatively high settlement rate in antitrust, coupled with a low plaintiff win rate in cases that do not settle, “suggests antitrust defendants employ a careful and conservative approach in deciding which cases should be allowed to go to judgment”). For an argument linking the evolution of precedent to the respective resources of the parties, see Richard Startz & Albert Yoon, Litigant Resources and the Evolution of Legal Precedent (unpublished manuscript on file with author).
cases presented to them.

B. Judicial Responses to Increased Litigation Rates

Litigation incentives are designed—and for present purposes we are assuming that they work—to change the range of cases that judges hear, and in particular to increase the number of cases filed under particular statutes. I have argued that such incentives are likely to have some effect on judges’ decisions. The remaining question is how heightened litigation rates are likely to affect judicial behavior. That question has received virtually no attention to date. To the extent that scholars have considered the link between litigation incentives and legal doctrine, they have assumed that if more suits are filed by a certain constituency, the law probably will develop in favor of that constituency—or at least will not move in the other direction. For example, Joseph Smith has the following to say about the Clean Air Act:

By expanding the opportunity for suits seeking stricter enforcement, but not for suits seeking less enforcement, Congress increased the opportunities of the courts to move policy toward Congress’s preferences, but did not increase opportunities to move policy away from its wishes. The institutional passivity of courts means that they need appropriate cases as vehicles for policymaking. It is relatively difficult for a court to use a case seeking stricter environmental regulation to move policy toward less strict regulation. Because Congress can fine-tune the direction of the influence courts exert over policy, it can safely expand judicial influence even when the courts are dominated by the other party.141

Smith does not explain why it is “relatively difficult” for courts to use cases seeking to strengthen statutory protections to cut back on those protections, and the basis for that assumption is unclear. Every case has two sides, and a plaintiff’s efforts to move the law in a favorable direction can backfire, resulting in a legal rule that is worse (from the plaintiff’s perspective) than the status quo. That is why legal advocacy groups choose their cases carefully and avoid advancing envelope-pushing arguments in weak vehicles.142

In short, unless one believes that judges decide cases by flipping coins, there is little reason to assume that more cases seeking a particular form of relief will result in more decisions granting such relief. That happy result certainly is possible, but it is not inevitable. In this Section, I consider two very different ways judges might respond to increases in the rate of litigation under particular statutes. Exposure to more cases of a certain type could improve judges’ understanding of, and support for, the underlying claims. On the other hand, statutory mechanisms designed to strengthen private enforcement of federal statutes could trigger a judicial backlash against the very rights that Congress sought to advance.

1. Judicial Learning?

One might imagine that judges, even those who are otherwise inclined to view a certain class of claims with boredom or hostility, would become more sympathetic to such claims after seeing case after case presenting similar facts.143 Experience with multiple cases might counteract

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141 Smith, supra note 51, at 148. Sean Farhang, whose excellent study of litigation incentives is discussed in Part I, argues along similar lines that Congress rationally might respond to the judicial decisions that cut back on statutory protections, thereby making litigation less attractive to potential plaintiffs, by increasing the possible judgment or decreasing the cost of those suits. FARHANG, supra note 4, at 62-63.

142 See supra note 6 and accompanying text.

143 One example of an apparently sympathetic judicial response can be found in the context of immigration. Due to a variety of legal changes (but not to litigation incentives), appeals from removal decisions by the Board of Immigration Appeals to the circuit courts skyrocketed in the early 2000s. See Sydenham B. Alexander III, A Political Response to Crisis in the Immigration Courts, 21 GEO. IMMIGR. L.J. 1, 10 (2006) (“During a four year period [from 2002 through 2005],...
whatever biases (conscious or unconscious) judges begin with. For example, there are troubling suggestions in both case law and commentary that some judges do not take sexual harassment claims seriously.\footnote{John H. Doyle et al., Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, 1997 ANN. SURV. AM. L. 117, 352 (noting that trial judges in the 2d Circuit sometimes “exhibited impatience with [sexual harassment] claims, as well as stereotyped thinking about the seriousness of sexual harassment”).} That sentiment is captured by one judge’s statement in open court that a sexual harassment claim “was not serious because [the plaintiff's] employer only stared at her breasts, rather than touching them, and ‘most women like that.’”\footnote{Id. at 348.} Such stereotyped thinking typically is grounded in ignorance, and in theory could be combatted by mechanisms like diversity training,\footnote{See generally Louise F. Pendry, Denise M. Driscoll & Susannah C.T. Field, Diversity Training: Putting Theory Into Practice, 80 J. OCCUPATIONAL & ORG’L PSYCH. 27 (2007) (discussing the nature, and efficacy, of diversity training in the workforce).} as well as by more informal experience and learning. After seeing multiple cases demonstrating that many women do not enjoy being ogled by their employers, a judge might gain a more sophisticated understanding of the dynamics of workplace harassment.

The nature of the litigation process does not lend itself to this type of judicial learning, however. In a fascinating study of judicial decisionmaking, Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich show that judges frequently rely on intuitive rather than deliberative thinking.\footnote{Guthrie, et al., supra note 121; see also POSNER, supra note 117, at 107 (“Intuition plays a major role in judicial as in most decision making. The faculty of intuition that enables a judge, a businessman, or an army commander to make a quick judgment without a conscious weighting and comparison of the pros and cons of the possible courses of action is best understood as a capability for reaching down into a subconscious repository of knowledge acquired from one’s education and particularly one’s experiences . . . .”).} Intuition can be used constructively, but it is also “the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system.”\footnote{Id. at 31-32.} The authors emphasize that “the capacity to use intuitive thinking successfully may require years of ‘effortful study’ as well as accurate and reliable feedback on earlier judgments.”\footnote{Id. at 33-35. The authors note that “errors seldom have adverse consequences for judges” and “indirect consequences may be insufficient to guarantee good or improved performance.” Moreover, while “most judges want their colleagues to respect them, one judge seldom learns the details of another judge’s potentially erroneous decision making.” Id.} Unfortunately, judges’ intuitions typically develop in what Guthrie and his co-authors call “wicked” environments that are not conducive to learning. Judges often handle only part of a case, so they “do not learn how things went at a later stage, [and] they cannot gauge the long-term effectiveness of their decisions.”\footnote{Id. at 31.} Similarly, most trial judges rely on magistrate judges to handle settlement negotiations, and so do not see the full range of disputes that generate complaints. The cases that go to trial (or summary judgment) do not represent a random sample of justiciable disputes. Any immigration appeals septupled from 1,760 to 12,349 per year. . . . The increase is appeals is so large that it qualifies as one of the most important changes in all of federal appellate practice.’”). Appellate judges have not taken well to the startling rise in appeals, but they have directed their hostility to the government processes that generate the appeals rather than to the claims themselves. See, e.g., Benslimane v. Gonzales, 430 F.3d 828, 828 (7th Cir. 2005) (Posner, J.) (“In the year ending on the date of the argument, different panels of this court reversed the Board of Immigration Appeals in whole or in part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits. The corresponding figure, for the 82 civil cases during this period in which the United States was the appellee, was 18 percent. Our criticisms of the Board and of the immigration judges have frequently been severe.”); see also Alexander, supra, at 15 (“One benefit of the surge in appeals is that many circuit judges have seen so many immigration cases that they are able to identify patterns of error.”); Adam Liptak, Courts Criticize Judges' Handling of Asylum Cases, N.Y. TIMES, Dec. 26, 2005, at A1.
cases that contain particularly strong facts for either side are likely to be settled, meaning that the cases that trial judges actually do see will tend to be close. ¹⁵¹ When reasonable minds can disagree on what inferences to draw from a set of facts, judges are likely to fall back on their pre-existing assumptions about the world rather than reconsidering those assumptions in light of new information.  Making matters worse, judges rarely get the feedback they would need in order to learn from their mistakes.  Guthrie et al. explain that:

judges are unlikely to obtain accurate and reliable feedback on most of the judgments they make; indeed, they are only likely to receive external validation (or invalidation) of the accuracy of their judgments when their rulings are challenged on appeal. The appeals process, however, does not provide reliable feedback. Many cases settle before appellate courts resolve the appeal; collateral policy concerns influence the outcome of some appeals, clouding the meaning of appellate decisions for the trial judge; and finally, appeals commonly take years to resolve, heavily diluting the value of any feedback. Moreover, the standards of review require appellate courts to give deference to trial judges on many of their discretionary decisions. ¹⁵²

The prospects for judicial learning are even more dim on the appellate courts. For any category of cases, appellate judges see only a tiny fraction of disputes. They are not confronted with flesh-and-blood plaintiffs and defendants, but instead get the facts from the paper record—including from the trial judge’s own decision. Appellate judges are unlikely to be aware of the rate of settlement, and so may erroneously equate a low plaintiff win rate at trial (or typically weak plaintiff facts at trial) with low plaintiff success rates overall. ¹⁵³ Given the rarity of en banc review ¹⁵⁴ or review by the Supreme Court ¹⁵⁵ together with the strong tradition of horizontal precedent on the courts of appeals, ¹⁵⁶ appellate judges seldom get useful feedback on their decisions. Although judges’ opinions may be criticized by academics or journalists, objective criteria for evaluating judicial performance are hard to come by, making it all too easy for judges to dismiss academic criticism of their work “as being the product of politics (plus envy and ignorance of judicial working conditions) and to dismiss journalistic criticism as likewise the product of politics and ignorance.” ¹⁵⁷

While most features of the appellate decision-making process seem poorly suited to learning,
the fact that appellate judges decide cases in panels of three might cut in the other direction.\textsuperscript{158} Studies have found compelling evidence that the composition of an appellate panel can affect case outcomes. For example, a panel made up of two judges appointed by Democratic presidents and one judge appointed by a Republican president will behave differently from one that is all Democratic, or all Republican.\textsuperscript{159} Similarly, an all-male panel in a sex discrimination case is likely to reach a different decision than a panel that consists of two men and one woman.\textsuperscript{160} One explanation for such "panel effects"\textsuperscript{161} is that the Republican or female judge injects unique insights into the panel’s deliberations, thereby opening her colleagues’ eyes to arguments or points of view they might otherwise have missed.\textsuperscript{162} The possibility that judges learn from their co-panelists in that way may have important implications for litigation incentives, as it suggests that judges who hear a high volume of cases of the same type may change their views over time. Each judge will encounter the same claims over and over, but in the company of different colleagues who may broaden his perspective and deepen his understanding of the issues involved.

While such learning is theoretically possible, the temporary nature of panel effects suggests that they are better explained by a desire to avoid dissent. Dissent is quite rare in the courts of appeal, occurring only 6 to 8\% of all cases, including those in “particularly contentious issue areas, where measures of individual judges’ voting and measures of panel outcomes show wide ideological variation.”\textsuperscript{163} Judges do not like to dissent because it takes up valuable time with no legal effect. And judges do not like it when their colleagues dissent, because “[j]udges do not like to be criticized, to bother having to revise a draft opinion in order to parry any solid punches thrown by the dissent, or, worst of all, to lose the third judge to the dissenter.”\textsuperscript{164} The result is a strong norm of unanimity, which encourages judges serving on a panel together to reach a result acceptable to all. Thus, male judges may vote for the plaintiff in a sexual discrimination case not because they have been persuaded that such discrimination is a serious problem, but because their female colleague feels strongly about the issue and will dissent from a pro-defendant ruling.\textsuperscript{165} It is difficult to separate out the effects of compromise and learning, but existing research strongly suggests that the former is driving observed panel effects. Studies show that judges behave differently depending on the identity of their current co-panelists, not that they continue to behave differently after serving on a heterogeneous panel. If judges truly were learning from one

\textsuperscript{158} See Jonathan Remy Nash & Rafael I. Pardo, \textit{An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review}, 61 VAND. L. REV. 1745, 1748 (2008) (noting that “there is an argument that the collegial nature of multimember appellate panels contributes to reflective decisionmaking and thus to the quality of appellate review”).

\textsuperscript{159} See POSNER, supra note 117, at 31 n.26 (citing studies).


\textsuperscript{162} See POSNER, supra note 117, at 31; Farhang & Wawro, supra note 160, at 308.

\textsuperscript{163} Farhang & Wawro, supra note 160, at 306.

\textsuperscript{164} Posner, supra note 117, at 32.

\textsuperscript{165} See id.; Farhang & Wawro, supra note 160, at 308 ("In the consensus through bargaining scenario, the minority judge does not change the minds of majority group members of the panel, but rather trades her vote for a change in the content of the opinion relative to that ideally preferred by the majority group judges."). The judge in the minority on the panel likewise will adjust her vote to meet her other two colleagues somewhere between their respective ideals. See Miles & Sunstein, supra note 161, at 863 (“Usually judges show a ‘collegial concurrence,’ in accordance with which Republican appointees display relatively liberal voting patterns when sitting with two Democratic appointees, and Democratic appointees display fairly conservative voting patterns when sitting with two Republican appointees).
another—rather than moderating their votes (and perhaps the content of their opinions) in order to achieve unanimity—one would expect to see lasting changes in their votes. An all-male panel in a sex discrimination case might vote one way in an early case, but if the same panel were reconvened after each judge had encountered similar cases while sitting with a female colleague, the result should be different. The research on panel effects contains no evidence of that phenomenon, and indeed it suggests the opposite. Whatever learning occurs on a panel, then, seems to evaporate with the next assignment. Finally, it is not clear that simply seeing case after case of the same type will give judges the information they need in order to understand the legal claims involved. For example, scholars have argued persuasively that Title VII doctrine, with its focus on conscious discrimination, simply asks the wrong question, as many forms of bias operate wholly subconsciously. Thus, the judge who sees countless Title VII cases where the defendant seems like a nice enough fellow, and certainly not a bigot, may erroneously conclude that most claims of discrimination are overblown. Increased litigation rates will not lead to judicial learning if a sophisticated grasp of cognitive psychology is required in order to comprehend the nature of employment discrimination. The same is true for other areas of the law. Antitrust scholars often complain that judges do not understand the economic concepts relevant to claims of anti-competitive behavior. And securities-law scholars argue that few judges have an accurate sense of investor and organizational behavior. As Stephen Bainbridge and G. Mitu Gulati have explained, “[t]hat is not an expertise that can be gained by seeing a lot of cases. That is expertise that can be gained only by looking at the academic research on these topics (assuming that the judge is not out doing empirical research on his or her own).”

2. Judicial Backlash

The nature of the litigation process suggests that increased litigation rates are unlikely to have a positive effect on judges who are not naturally inclined to favor the claims involved. Indeed, far from leading inexorably to a plaintiff-friendly set of precedents, increased litigation rates under a particular statute may well push case law in the opposite direction. Federal judges long have complained about overcrowded dockets and inadequate resources, and judicial decisions frequently invoke the specter of a “flood of litigation.” Such concerns are particularly common in the context of employment discrimination and civil rights litigation—two areas where Congress has used litigation incentives to encourage more cases. In 1993, just as the effects of the 1991 amendments to Title VII were beginning to be felt in federal courts, a former federal judge published an editorial in the New York Times contending that employment discrimination cases take up too much judicial time because they are “rarely settled, are characterized by high levels of acrimony and subjective claims of victimization; they are immensely time consuming and are

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167 See Lauren K. Robel, Private Justice and the Federal Bench, 68 IND. L.J. 891, 896 (1993) (discussing the “caseload crisis” of the federal courts and the judicial reaction to it, including efforts by judges to shift their caseloads, for example by encouraging settlement, in order to make time for the cases they feel are most professionally rewarding); Lauren K. Robel, Caseload and Judging: Judicial Adaptations to Caseload, 1990 BYU L. REV. 3, 6-11 (recounting judges’ responses to a survey by the Federal Courts Study Commission regarding caseload pressures); see also Bainbridge & Gulati, supra note 166, at 102 (“That federal judges, at both the trial and circuit court levels, are under severe resource and expertise constraints is well-documented.”).

controlled by legal standards that, lacking sufficient precision, are overgeneralized and of marginal use.”169 Another judge wrote an article arguing that special Article I courts should be created to deal with claims that are overloading the federal courts, including Title VII claims in that category.170 The same judge repeated that recommendation several years later in a decision in a Title VII case, explaining:

“This case shows once again the need to adjust our anti-discrimination laws. The evidence needed to make a prima facie case is much too low. It seems that almost anyone not selected for a job can maintain a court action. It is for this reason that the federal courts are flooded with employment cases... It is obvious that amendatory legislation is required. What is needed is a better screening mechanism as a pre-requisite for gaining access to the nation’s federal court system. If an appropriate screening mechanism cannot be devised, then at a minimum a new Article I court should be created to hear this flood of cases. The point is some change is urgently needed.”171

These are not the isolated comments of a few disgruntled judges. One of the recommendations of the Long Range Plan for the Federal Courts, commissioned in the early 1990s, was that cases involving “economic or personnel relations or personal liability arising in the workforce” be diverted to state courts or handled by administrative agencies.172 A Second Circuit Task Force on Gender, Ethnic, and Racial Fairness in the Courts found that “[m]any federal judges... appear to believe that the proliferation of small [employment discrimination] cases involving individual claimants clog up the federal courts and divert judges’ attention from larger, purportedly more significant, civil cases.”173 The D.C. Circuit’s Task Force on Gender, Race, and Ethnic Bias reported that 16-17% of court employees observed “a judge treat an employment discrimination case as unimportant or a waste of time—a higher percentage than for any other case category apart from prisoner petitions.”174 The same report stated that three judges in the circuit spoke “unfavorably about employment discrimination cases,” and another judge told researchers that some judges had an “attitude” about Title VII plaintiffs, whom they viewed as “disgruntled employee[s].”175 Similarly, the Eighth Circuit’s Gender Fairness Task Force found that 10.9% of judges agreed or strongly agreed with the statement that discrimination cases are undeserving of federal court time because “the issues are trivial.”176

It bears emphasis that judicial perceptions about litigation rates may be influenced by litigation incentives themselves. For example, as explained in Part II, Congress’s enactment of CRAFAA in 1976 appears not to have had any clear effect on the number of civil rights actions filed under statutes like 42 U.S.C. § 1983. Yet Justice Powell, dissenting in a case involving the award of fees under CRAFAA, argued that “harassing litigation and its potential for intimidation increases in suits where the prevailing plaintiff is entitled to attorney's fees... [CRAFAA] has become a major additional source of litigation. Since its enactment in 1976, suits against state

172 See Doyle et al., supra note 144, at 343.
173 Id.
174 Id. at 102.
175 Id. at 102.
officials under § 1983 have increased geometrically.”177 Another Supreme Court Justice told researchers that the Court is “‘swamped’” by civil rights cases fueled by fee shifts, and that there is a “‘ceiling on how much time [the Court] can give to these issues.’”178

Thus, even when litigation incentives do not in fact increase the number of claims filed, judges may believe that they do.179 Part of the problem is that litigation incentives often generate significant satellite litigation over procedural issues such as the appropriate amount of attorney’s fees or enhanced damages, or what it takes for a plaintiff to “prevail” and therefore qualify for a one-way fee shift.180 Moreover, a belief that litigation incentives are generating more and more lawsuits often goes hand in hand with an assumption that many of those lawsuits are frivolous.181 Concerns about frivolous litigation have been voiced in many contexts where litigation incentives are available, ranging from qui tam actions under the False Claims Act182 to civil RICO183 to antitrust184 to the Americans With Disabilities Act185 and beyond.

177 Pulliam v. Allen, 466 U.S. 522, 555-56 (1984). Another judge voiced the same complaint more colorfully:

Fee applications under [CRAFAA] and kindred statutes have become a burgeoning form of satellite litigation in the federal courts… [T]he counsel fee tail cannot be permitted to wag the client’s dog. There are storm clouds on the horizon which suggest that there may be a developing inclination on the part of the organized bar to view such statutes as a road-map to a perceived pot of gold at the end of the courtroom rainbow. Any such auxetic tendency to nourish litigation for the cardinal sake of fee generation must be stopped in its tracks. Should the scales tip in this direction, counsel fees will become the raison d’etre for suits; the good intentions of the Congress will be distorted beyond recognition; and, if the Court may be permitted to mix zoological metaphors, the bar’s cart will figuratively be placed before the public’s horse.


178 Karen O’Connor and Lee Epstein, Bridging the Gap Between Congress and the Supreme Court: Interest Groups and the Erosion of the American Rule Governing Awards of Attorney’s Fees, 38 W. POL. Q. 238, 246 (1985)

179 Another source of judicial (mis)perception of litigation rates is the media, which notoriously over-reports plaintiff victories (especially big ones), fueling the sense that certain kinds of cases are both easy to bring and easy to win. See, e.g., Nielsen & Beim, supra note 28, at 243 (“In the aggregate, the media represents plaintiff victories in tort cases far more frequently than they actually occur and jury awards as far greater than they actually are.”).

180 See Pulliam, 466 U.S. at 556 n.18 (Powell, J., dissenting) (“Regrettably, disputes over the reasonableness of . . . fee awards often become the major issue in the entire litigation.”).

181 But cf. supra note 63 (explaining that one-way fee shifts should encourage the filing of relatively strong claims).


183 See, e.g., Wolin v. Hanley Dawson Cadillac, Inc., 636 F. Supp. 890, 891 (N.D. Ill. 1986) (“RICO's lure of treble damages and attorney's fees draws litigants and lawyers . . . like lemmings to the sea.”); AMERICAN BAR ASSOCIATION, RICO COORDINATING COMMITTEE REPORT 3 (1987) (stating that curtailing civil RICO “would save the federal courts from a virtual flood of unwarranted litigation”); Elwyn Berton Spence, The Improper Civil RICO Claim: If Such a Thing Exists, Can it be Battled with Sanctions?, 51 ALA. L. REV. 290, 292 (1990) (“As a result of its attractive civil remedies and a statement of purpose commanding courts to construe it liberally, RICO has been the basis of suits filed against almost anyone, with only the . . . creativity and imagination of plaintiff's lawyers serving as a limit . . . . (A)t some extremely indeterminate point, creativity and imagination become frivolity.”).

184 See, e.g., Edward D. Cavanaugh, Detrebling Antitrust Damages: An Idea Whose Time Has Come?, 61 TUL. L. REV. 777, 822 (arguing that the availability of treble damages for antitrust violations “encourages filing of claims which are at best marginal and at worst frivolous”).


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Special Incentives to Sue

Judges have ample tools with which to combat what they view as frivolous or simply excessive litigation, some procedural and others substantive. Scholars have recognized as much at the level of the individual case, detailing how “managerial judges” may pressure parties to settle cases, or make aggressive use of mechanisms like early dismissal and summary judgment. But judges’ capacity to cut back on litigation extends well beyond such reactive measures. Judges also can use doctrine proactively to reduce the number, or change the complexion, of the cases that will fill up their dockets going forward.

On the side of procedure, judges can cut back on litigation incentives themselves, by interpreting the relevant statutory provisions narrowly. For example, citing the need to encourage settlement, the Supreme Court interpreted the term “prevailing party”—which appears in many fee-shifting provisions—to apply only to those plaintiffs who obtain a “material alteration of the legal relationship of the parties,” such as a favorable judgment on the merits or a consent decree. The consequence is that a plaintiff whose suit induces the defendant to change its conduct voluntarily cannot collect fees. Courts likewise have limited the amount of fees recoverable by prevailing plaintiffs’ attorneys, have held that defendants may make a waiver of fees a condition of settlement, and have refused to permit pro se litigants to collect fees. As for damages, courts have limited the availability of both statutory and punitive damages in cases where plaintiffs cannot prove actual damages. Such decisions reduce the value, and hence the

produces absurd lawsuits).

See David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, Docketology, District Courts, and Doctrine, 85 WASH. U. L. REV. 681, 706 (2007) (“One obvious way to expedite dockets . . . is to find ways to encourage settlement. The public and bar often praise judges for bringing about settlements and rarely vilify them. The bench has several powerful tools in its arsenal to settle cases.”); see generally Judith Resnik, Managerial Judges, 95 HARV. L. REV. 374 (1982).

See Buckhannon Board & Care Home, Inc. v. West Virginia Department of health & Human Resource, 532 U.S. 598, 604 (2001). For critical commentary see, for example, Albiston & Nielson, supra note 24; David Shub, Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney’s Fees Awards For Civil Rights Plaintiffs, 42 DUKE L.J. 706 (1992); see also Schwab & Eisenberg, supra note 4 (reporting that there are relatively few fee awards in civil rights cases, even where the plaintiff plainly has prevailed). Cf. Andrea Saltzman, Incorporating Statutes Into the Common Law: The Judicial Response to Statutes Shifting Attorneys’ Fees, 30 ST. LOUIS U. L.J. 1103 (1985) (describing state court hostility to fee-shifting statutes).

Samuel R. Bagenstos, Thurgood Marshall, Meet Adam Smith: How Fee-Shiftiing Statutes Provide a Market-Based System for Promoting Access to Justice (Though Some Judges Don’t Get It) (ssrn), at 4 (“Driven by the view that ‘civil rights litigation “is not part and parcel of ordinary practice, but is more in the nature of charity or volunteer work,’” judges insist that fee-shifting statutes ‘were not designed as a form of economic relief to improve the financial lot of attorneys.’ They accordingly have elaborated doctrinal rules that presume that civil rights lawyers ought not to care whether or how much they get paid, and they often vigorously police fee requests for signs that plaintiffs’ counsel is getting greedy.” (quoting Jeffrey S. Brand, The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees, 69 TEX. L. REV. 291, 373 (1990))).


See Hong, supra note 54 (criticizing a Supreme Court decision narrowly interpreting the Privacy’s Act’s award of statutory damages); Justin W. Ristau, Should Punitive Damages Be Recoverable Absent A Finding of Actual Damages Under the Federal Fair Housing Act? 70 U. CIN. L. REV. 343 (2001) (criticizing a decision narrowly interpreting the Fair Housing Act’s provision for punitive damages); see also Timothy J. Moran, Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy, 36 HARV. C.R.-C.L. L. REV. 279, 282 (2001) (arguing that “[l]ower courts continue to hinder the effectiveness of punitive damages in fair housing cases” by refusing to let the issue of punitive damages go to the jury and holding that punitive damages are not available if the jury does not award compensatory damages). Although typically focused on state rather than federal statutory cases, the Supreme Court’s decisions limiting the amount of punitive damages on constitutional grounds likewise “serve anti-litigation ends.” Andrew M. Siegel, The Court

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likely effect, of litigation incentives.

Similarly, by restricting standing to sue under particular statutes, judges can decrease the number of plaintiffs who can access incentives such as enhanced damages. The Supreme Court has done just that in the antitrust context, holding that only direct purchasers have antitrust standing to bring treble-damages actions under the Clayton Act. The Court emphasized that suits by indirect purchasers could subject the defendant to double liability—to both direct and indirect purchasers of the good in question. But, as others have noted, the provision for treble damages no doubt played an important role in the decision: “[T]he reality that any double recovery would be six fold recovery was . . . a key reason why the majority was willing to adopt a much narrower standing rule than applies in modern tort law.”

Judges also can craft procedural rules of more general application. For example, in _Bell Atlantic v. Twombly_ the Supreme Court adopted a new and more restrictive rule governing pleading, explicitly linking its decision to concerns about meritless strike suits designed to extract settlements from defendants anxious to avoid the crushing cost of antitrust discovery and the risk of treble damages. The Court recently reaffirmed—and arguably extended—_Twombly_ in _Ashcroft v. Iqbal_, where it threw out a _Bivens_ constitutional tort claim against high-ranking government officials on the ground that the complaint lacked sufficient factual allegations of discriminatory intent. As _Iqbal_ makes clear, _Twombly_’s new rule applies across to all categories of federal civil litigation, making it more difficult for plaintiffs to get through the courthouse door.

Most important for present purposes, judges may respond to increased litigation rates (imagined or not) with narrow interpretations of the substantive provisions of the relevant statute. The suggestion, quoted above, that anti-discrimination laws should be adjusted to make it harder for a plaintiff to make a prima facie case, illustrates this possibility. And reports of judicial hostility to, and backlash against, employment discrimination statutes are legion in the academic literature. The result is a body of case law that makes employment discrimination

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Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence, 84 TEX. L. REV. 1097, 1147 (2006).

192 Illinois Brick Co. v. Illinois, 431 U.S. 720, reh’g denied, 434 U.S. 881 (1977); see also Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) (holding that labor unions may not sue for non-business indirect harms of alleged antitrust violations); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (holding that the plaintiff in a private antitrust case for damages must show not only anticompetitive conduct but also that the harm suffered by the plaintiff was of the kind that the antitrust laws were intended to prevent). _Cf._ Blue Shield of Virginia, Inc. v. McCready, 102 S. Ct. 2540, 2547 (1982) (“Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.”).


194 Baker, supra note 3, at 384-85 (emphasis omitted); see also Breit & Elzinga at 420 (noting the Court’s “obvious concern with ruinous awards”).


197 _Id._ at 1953.

198 See Lawrence M. Friedman, _Legal Rules and the Process of Social Change_, 19 STAN. L. REV. 786, 800 (1967) (noting that judges may react to caseload pressures with the “adoption of ‘hostile’ substantive rules . . . whose effect would be to discourage litigants from using the courts”).

199 Supra note 171 and accompanying text.

200 See, e.g., Theresa M. Beiner, _The Misuse of Summary Judgment in Hostile Environment Cases_, 34 WAKE FOREST L. REV. 71 (1999) (arguing that courts have become increasingly hostile to harassment cases brought under Title VII, and

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cases extremely difficult to win.

Employment discrimination plaintiffs win about 30% of the cases that go to trial,\(^201\) compared to a win rate of 50-60% for plaintiffs in tort and contract cases.\(^202\) They tend to do even worse in cases that are decided prior to trial on a motion to dismiss or for summary judgment, winning less than 10% of those cases\(^203\) while tort and contract plaintiffs win slightly more than 30%.\(^204\) Employment discrimination plaintiffs also fare terribly on appeal\(^205\)—a phenomenon that scholars have attributed to an erroneous belief on behalf of appellate judges that trial judges are too plaintiff-friendly.\(^206\) Moreover, while litigation rates shot up after Congress made non-economic and punitive damages available to Title VII plaintiffs in 1991, the plaintiff win rate went down\(^207\).

Granted, the settlement rate in employment discrimination cases increased somewhat after 1991.\(^208\) If settlements are counted as “wins” for plaintiffs, then the overall success rate stayed roughly the same notwithstanding the drop in pro-plaintiff judgments. But there are several reasons to hesitate before deeming the 1991 amendment a success in this respect. One is that, while plaintiffs usually get something of value out of settlement, studies of employment discrimination cases suggest that settlement amounts are often quite low, and “typically [do] not provide what [the parties] would view as justice.”\(^209\) A second reason is that a low rate of success attributing such hostility to the huge increase in Title VII claims after 1991); Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. Cal. L. Rev. 791, 809 (2002) (discussing judicial hostility to sexual harassment claims and the various tactics courts use to dispose of such cases); Nielsen et al., *supra* note 69 (“Employment civil rights are the most common type of case on the federal civil docket which may be part of the reason that federal courts have become increasingly hostile to these claims, and why judges forcefully urge the parties to settle.”); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?* 61 LA. L. Rev. 555 (2001) (arguing that judges wrongly perceive employment discrimination cases as too easy to bring and typically unmeritorious, and that as a result of judicial hostility it will become even harder for plaintiffs to recover, particularly in sexual harassment cases); Anand Swaminathan, *The Rubric of Force: Employment Discrimination in the Context of Subtle Biases and Judicial Hostility*, 3 AM U. MODERN AM. 21 (2007) (discussing judicial hostility to employment discrimination cases during the 1990s, when litigation rates were at their peak).

\(^201\) See Nielsen et al., *supra* note 69 (reporting that plaintiffs win 33% of all employment discrimination cases that result in judgment after trial); Clermont & Schwab, *supra* note 69, at 30 (reporting a 28.47% win rate for employment discrimination plaintiffs at trial).


\(^203\) Id.; see also Clermont & Schwab, *supra* note 69, at 29 (“Over the period of 1979-2006 in federal court, employment discrimination plaintiffs have won 3.59% of the pretrial adjudications, while other plaintiffs have won 21.05% of pretrial adjudications.”); Nielsen et al., *supra* note 69 (“Of the cases that do not settle early, plaintiffs lose the motion for summary judgment in more than half of these cases (57% of remaining cases or 19% of filings overall).”)

\(^204\) Clermont & Schwab, *supra* note 202, at 457. Clermont and Schwab report a total win rate for employment discrimination plaintiffs (including both pretrial and trial adjudication) of 15%, compared to 51% for nonjobs cases. Clermont & Schwab, *supra* note 69, at 28 (covering the period of 1979-2006 in federal court).

\(^205\) Clermont & Schwab, *supra* note 69, at 7-8 (“In federal employment discrimination cases, another clear fact is that the defendants’ reversal rate far exceeds the plaintiffs’ reversal rate . . . . The statistically significant differential prevails for appeals from wins at the stage of pretrial adjudication (30% compared to 11%), and it becomes somewhat more pronounced for appeals from wins at the trial stage (41% compared to 9%).”). The plaintiff-defendant spread is in employment appeals even more extreme than for other civil cases, which have a 35% reversal rate for Ds and 15% reversal rate for Ps. See id.


\(^207\) Clermont & Schwab, *supra* note 202, at 457.

\(^208\) See Clermont & Schwab, *supra* note 69, at 20-21; see also Clermont & Schwab, *supra* note 202, at 457 (reporting that 67.20% of jobs cases settled pre-1992; 70.31% post-1991). The authors were not focused on the possible effects of the 1991 amendments on settlement, and made no effort to control for other factors that might have affected the settlement rate..

\(^209\) Nielsen et al., *supra* note 69.
in cases that go to judgment may reflect a body of case law that is relatively unfriendly to plaintiffs. Some scholars have sought to explain the low win rate for employment discrimination plaintiffs on the ground that defendants in employment cases often will be repeat players, who— for the reasons discussed above—have an incentive to settle all but the strongest cases so as to avoid rulings with adverse consequences for other cases or for business practices more generally. That theory does not necessarily signal good news for employees. As already explained, judge-made law can be shaped in powerful ways by the cases in which legal questions are presented. If the class of litigated cases is dominated by those that are strong for the defendant and weak for the plaintiff, the result is likely to be not only a high defendant win rate, but also a set of precedents that favors defendants. That is especially true at the appellate level, where rulings often establish principles that will affect decisions in later cases. In the long run, the adverse effects of defendant-friendly substantive law may far outweigh the benefits to plaintiffs of increased settlements, especially if those settlements tend to be small.

To be sure, there are many reasons why employment discrimination cases are hard to win. Perhaps the most prominent are judicial bias and the difficulty of proving discriminatory intent. My claim here is not that litigation incentives are entirely to blame for the low win rate in employment discrimination litigation. Rather, it is that litigation incentives may not help as much as their supporters seem to believe, and may make matters worse.

Employment discrimination is not the only area where litigation incentives may have triggered an adverse judicial response. Antitrust scholars have argued, along similar lines, that the Supreme Court has made it increasingly difficult for antitrust plaintiffs to prevail. Like the FTC commissioners discussed in the introduction, many of those same scholars have identified treble damages as the fuel for such decisions. Concerned that the prospect of treble damages

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210 See supra notes 138-140 and accompanying text.
211 See Kotkin, supra note 67, at 117.
212 See Cross, supra note 65, at 8; Lederman, supra note 6, at 233-34.
213 As noted above, employment discrimination plaintiffs fare very poorly on appeal. See supra notes 205-206 and accompanying text.
214 See Swaminathan, supra note 200, at 26 (discussing the impact of subconscious biases on employment discrimination and on judicial decisionmaking in these cases, noting that “[t]here is little reason to believe that federal judges, who are predominantly white and the majority of whom are men, are any less susceptible than the general population to cognitive or implicit biases in decision making”); Selmi, supra note 200, at 562 (suggesting that judicial bias has a large impact on the outcome of employment discrimination cases and that the biases vary depending on the type of discrimination); Lianne C. Knych, Note, Assessing the Application of McDonnell Douglas to Employment Discrimination Claims Brought Under the Americans with Disabilities Act, 79 MINN. L. REV. 1515, 1543 (1995) (discussing difficulties of proving discriminatory intent in ADA cases); Elizabeth Bartholet, Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens, 70 CAL. L. REV. 1201, 1203 (1982). (“Evidence of illicit intent may be extremely difficult to obtain, whether the responsible individuals are conscious of their bias, and therefore likely to try to hide it, or whether they are expressing unconscious bias through some discretionary decisionmaking process.”).
215 Breit & Elzinga, supra note 52, at 413-14 (“The litigation process for a prevailing private [antitrust] plaintiff is sometimes divided into three hurdles: (1) antitrust liability must be shown . . .; (2) the fact of damage must be shown . . .; and (3) the amount of damage must be shown . . . . [A]t an earlier time, both hurdle number 2 and hurdle number 3 were lower than they now are.”).
216 Salop & White, supra note 140, at 1039 (“As the potency of treble damages has come to be recognized . . ., the courts may have been trimming plaintiffs’ powers and strengthening defendants’ powers in the other dimensions, so as to regain the desired overall balance.”); Baker, supra note 3, at 384 (“Mandatory trebling [in antitrust] can distort judicial decision making on substantive and procedural questions because it necessarily makes judges more reluctant to impose liability in close cases and more willing to erect narrower standing rules.”); Breit & Elzinga, supra note 52, at 443 (“As the courts have recognized the inefficiencies of private actions, and yet have been constrained by the Clayton Act’s mandatory trebling provision, their response has been an indirect reduction of the reach and pecuniary magnitude of private actions.
will encourage “lawyers to turn every conceivable tort and contract dispute into an antitrust action," and wary of imposing excessive penalties “where the [defendant’s] conduct seems ambiguous and complicated,” courts have adopted deliberately underinclusive rules for antitrust liability. Not surprisingly, plaintiffs’ win rates in private antitrust actions are lower than average.

The courts’ treatment of predatory pricing claims is instructive. The crux of a predatory pricing claim is that the defendant is charging artificially low prices in order to drive competitors out of business. But low prices are not inevitably a bad thing—quite the contrary. The trick, then, is to draw the liability line in a way that condemns predatory conduct while permitting socially optimal pricing. Treble damages complicate that task, because the prospect of a ruinous damages award may induce firms to steer well clear of conduct that might possibly subject them to liability. The gains a firm can expect from lowering prices are likely to be less than the cost of a treble damages award (plus attorney’s fees), should a competitor sue successfully. Recognizing that treble damages increase the costs of false positives in private antitrust suits, courts have “sharply constricted the right of action for predatory pricing.”

Comparable claims have been made about judicial treatment of civil suits under the Racketeer Influenced and Corrupt Organizations Act (RICO), which, like the antitrust statutes, promises damages and attorney’s fees to successful plaintiffs. Judges have become increasingly frustrated with “the novel—and often imaginative—ways in which civil plaintiffs have attempted to use [RICO’s] flexibility in order to exploit [its] provisions for treble damages and attorneys fees.” And, as in the antitrust arena, judges have expressed concerns that the lure of treble damages awards may encourage strike suits, as “judicial hostility to the onslaught of ‘racketeers,’ will have a strong interest in

This has taken the form of stricter standards regarding liability, standing, and damage estimation.”}), supra notes 8-11 and accompanying text.


219 Id.; see also Daniel A. Crane, Technocracy and Antitrust, 86 Tex. L. Rev. 1159, 1210 (2008) (“Often, concerns about the chilling effect of the treble-damages remedy and abusive private litigation influence the courts to implement underinclusive liability norms in private suits.”); Lemos, supra note 5, at 466 (discussing the connection between underinclusive liability rules, concern about treble damages, and concern about unpredictable jury awards).


221 See Daniel A. Crane, The Paradox of Predatory Pricing, 91 Cornell L. Rev. 1, 41, 43 (2005) (discussing the cost/benefit analysis from the perspective of predators and innocent competitors, respectively)


223 See David Kurzweil, Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause, 30 Colum. J.L. & Soc. Probs. 41, 42, 45-46 (1996) (arguing that “judicial hostility to the onslaught of private actions brought under RICO has led courts to construe RICO’s civil provisions strictly”).

224 Id. at 45 (quoting Doe v. Roe, 958 F.2d 763, 763 (7th Cir. 1992)); see also G. Robert Blakey & Scott D. Cessar, Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?, 62 Notre Dame L. Rev. 526, 580 (1987) (arguing that the lower courts are “hostile to civil RICO” and that “[j]udicial efforts to narrow the scope of the statute continue largely unabated”).

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settling the dispute.” Courts have accordingly construed RICO’s civil provisions strictly, leading to a “stunningly awful final success rate” for plaintiffs. Notably, they have done so in the face of an explicit congressional instruction that the statute’s terms are to be “liberally construed.”

Constitutional tort litigation, which Congress facilitated with a one-way fee shift enacted in 1976, provides a final cautionary example. Stewart Schwab and Theodore Eisenberg have found that, “[u]nder any measure of tangible success, constitutional tort plaintiffs are less successful than non-civil rights plaintiffs.” Constitutional-tort plaintiffs settle fewer cases than other civil plaintiffs. They also win far fewer of the cases that go to judgment. And matters only got worse after 1976. Schwab and Eisenberg report that “the plaintiff-defendant spread [in win rates] became sharply more negative for civil rights plaintiffs in the two years (1977 and 1978) immediately following enactment of the fees act, at a time when the [plaintiff-defendant] spread for non-civil-rights actions was increasing sharply.”

As some of the examples here suggest, hostility to litigation incentives may have an important political component. As noted in Part I, although Democratic and Republican congresses alike have made use of litigation incentives, mechanisms like damage enhancements and fee shifts are used most frequently by liberal legislative majorities. And, while it is possible to point to examples of litigation incentives in conservative legislation, such statutes pale in comparison to the many important environmental and anti-discrimination statutes that shift fees and/or enhance damages for prevailing plaintiffs. Thus, it should come as no surprise that the judges who are unsympathetic to the substantive rights that Congress has sought to promote through litigation incentives, and who are therefore likely to resent an increase in the number of claims filed, largely fall right of center. An aversion to litigation incentives also may be linked to judicial hostility to litigation more generally, based on a conception of the judicial role that seeks to minimize the opportunities for judicial intervention into social problems. Several commentators have found evidence of an anti-litigation bias in the work of the modern Supreme Court, particularly among the more conservative Justices. If judges who hold conservative political views in fact tend to ascribe to a vision of judging that sees private litigation as a threat to democratic governance, then such judges will naturally disfavor litigation incentives regardless of the substance of the relevant statute.

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226 See Blakey & Cessar, supra note 224, at 580-90 & nn.230-239 (citing cases); Kurzweil, supra note 223, at 70-77, 86-88 (same).
227 Bucy, supra note 1, at 22.
229 Schwab & Eisenberg, supra note 4, at 740.
230 Id. at 759
231 Id.
232 Id. at 760. The authors note that the plaintiff-defendant spread was in decline between 1975 and 1976, making it unclear whether the further downturn after 1976 can be attributed to the enactment of CRAFAA. Id. at 760 n.140.
234 See Andrew M. Siegel, Notes Toward an Alternate Vision of the Judicial Role, 32 SEATTLE U. L. REV. 511, 511 & n.1 (2009) (arguing that in recent years “the Supreme Court has grown increasingly skeptical about the efficacy of litigation, increasingly parsimonious in construing federal statutes that facilitate litigation, and increasingly uninterested in insuring the availability of functional remedies for the violation of federal rights” and citing representative commentary).
The risk of judicial backlash, then, depends to a large degree on judges’ views about the claims that Congress is seeking to encourage. When Congress and the federal bench are ideologically aligned, litigation incentives may offer benefits at relatively little cost. But, while Congress tends to rely less on administrative agencies when the executive branch is controlled by an ideologically distant President,\(^\text{235}\) there is no evidence that Congress has taken account of the ideological make-up of the federal judiciary when it enacts provisions like fee shifts and damage enhancements. Instead, legislators seem to have assumed, as commentators have, that more claims mean more wins—or at least that higher litigation rates will not make matters any worse for the plaintiff class.

Consider the situation confronting the Democrat-controlled Congress in 1990. The Supreme Court had just handed down five decisions interpreting Title VII, each of which favored the defendant employer.\(^\text{236}\) The most controversial was _Wards Cove Packing Co. v. Atonio_, which made it significantly more difficult for plaintiffs to prevail on disparate impact claims (claims based on discriminatory effect rather than intent). Prior to _Wards Cove_, the prevailing rule was that, once a plaintiff established a disparate impact, the burdens of production and persuasion shifted to the defendant to justify the challenged practice. The Supreme Court had not provided clear guidance on what would suffice for justification, and the lower courts were split on whether the defendant had to show that the practice was necessary or merely related to success on the job.\(^\text{237}\) _Wards Cove_ appeared to adopt a standard more lenient than either of the two prevailing contenders, explaining that the defendant need only show that the practice “serves, in a significant way, the legitimate employment goals of the employer.”\(^\text{238}\) The Court also shifted the burden of persuasion to the plaintiff on the justification point.\(^\text{239}\) Interest groups demanded a legislative response. Congress considered several amendments to Title VII, some procedural and others substantive, but faced a veto threat from President George H.W. Bush.\(^\text{240}\) On the _Wards Cove_ issue, the proposed override provision obligated employers to demonstrate that the challenged practice was “required by business necessity,” and defined that term to mean “essential to effective job performance.”\(^\text{241}\) For the Bush administration, such a requirement would “all but

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\(^\text{235}\) **David Epstein & Sharyn O’Halloran**, _Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers_ 147, 158 (1999) (showing that Congress is less likely to delegate at all during periods of divided government, and, when it does delegate, more likely to choose independent agencies than executive agencies subject to greater presidential control).

\(^\text{236}\) Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989) (holding that unsuccessful intervenors are responsible for the plaintiff’s attorney’s fees only when their actions were “frivolous, unreasonable, or without foundation”); Lorance v. AT&T Technologies, 490 U.S. 990, 905 (1989) (requiring plaintiffs to file challenges to a discriminatory seniority system at the time the system was adopted, not when its effects were felt); Martin v. Wilks, 490 U.S. 755, 761-69 (1989) (holding that white firefighters are not precluded from challenging employment decisions implemented as the result of a consent decree); Price Waterhouse v. Hopkins, 490 U.S. 228, 237-58 (1989) (holding that the defendant can rebut a mixed-motive claim of gender discrimination by proving by a preponderance of the evidence that it would have made the same decision regardless of sex); _Wards Cove Packing Co. v. Atonio_, 490 U.S. 642, 650-55 (1989) (revising the burdens of pleading and proof in disparate impact claims).


\(^\text{238}\) 490 U.S. at 659 (disclaiming any requirement “that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business”).

\(^\text{239}\) _Id._ at 659-60.

\(^\text{240}\) For a detailed discussion of the legislative override process, see Farhang, _supra_ note 4, at ch. 6.

compel employers to adopt quotas by making Title VII liability hinge on bad numbers.”242 Bush accordingly vetoed the first bill that emerged from Congress. Congress came close to overriding the veto, but fell short by one vote in the Senate.243 The bill’s supporters went back to the drawing board in an effort to reach a compromise. They were aided in their efforts by outside events that weakened the opposition from congressional republicans.244 Nevertheless, Congress capitulated on the Wards Cove issue, opting to omit any definition of the key term “business necessity” and focusing instead on procedural questions such as the amount of enhanced damages and the length of the statute of limitations.245 The Civil Rights Act of 1991, which was eventually adopted by both houses and signed by the President, was heavy on procedure but did little to improve the prospects for disparate-impact plaintiffs.246

In sum, faced with a hostile judiciary and a social problem that is not easily illuminated through adversary litigation, Congress’s response was to encourage more law suits. Perhaps that was the most that could be expected, given the political climate.247 But it would be a mistake to view the 1991 amendments as an unvarnished success for civil rights advocates. Although litigation incentives certainly provide some benefits to litigants and their attorneys, they also have costs—and may prove to be counterproductive. Interests groups and legislators should heed those potential costs, and should not view mechanisms like one-way fee shifts and enhanced damages as an easy fix or a substitute for substantive statutory change.


See FARHANG, supra note 4, at pt 2 298-300 (discussing Anita Hill’s charges of sexual harassment by Supreme Court nominee Clarence Thomas, and the national media attention to Republican gubernatorial candidate David Duke, a “former Klansman turned self-styled “white nationalist”).

Cf. Farhang, supra note 4, at 11 (describing the provisions for enhanced damages as “by far the most significant changes wrought” by the 1991 amendments).

Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.). As enacted, the 1991 Act shifted the burden to the defendant to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity,” but did not define the key term. See Dansicker, supra note 237, at 13 n.78 (“The 1991 Act sidestepped the issue of disparate impact and Griggs because the Act did not specifically define the term ‘business necessity.’ The difficult task of interpreting this vital term was left to the courts.”). Moreover, the Act contained a provision limiting the legislative history that courts could use to supply meaning to the term “business necessity.” Civil Rights Act of 1991, Pub L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (1992). The only authorized source of legislative history is an interpretive memorandum stating that “the terms ‘business necessity’ and ‘job related’ are intended to reflect the concepts enunciated by the Supreme Court” in cases “prior to” Wards Cove. 137 Cong. Rec. 28,680 (1991). Rebecca Harner White has argued that the proviso about legislative history demonstrates that Congress was well aware that “its phrasing of the employer’s burden . . . was fraught with ambiguity.” See Rebecca Harner White, The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation, 1995 UTAH L. REV. 51, 52 (noting as well “many additional ambiguities” in the 1991 Act). Indeed, the lower courts are still split on the appropriate test for disparate impact cases. See Christine Nardi, Comment, When Health Insurers Deny Coverage for Breast Reconstruction Surgery: Gender Meets Disability, 1997 Wis. L. REV. 777, 802 n.153 (noting that “courts are split as to whether an employer must provide a legitimate business reason or a compelling justification” (citations omitted)). Compare Michael Carvin, Disparate Impact Claims Under the New Title VII, 68 NOTRE DAME L. REV. 1153 (1993) (arguing that Wards Cove is still good law after Civil Rights Act of 1991); with Susan S. Grover, The Business Necessity Defense in Disparate Impact Discrimination Cases, 30 GA. L. REV. 387 (1996) (arguing for a strict business necessity standard under the Act).

244 See FARHANG, supra note 4, at (pt 2) 304-09. The best alternative seems to be substantive change to Title VII, which would increase the probability of success for plaintiffs.
C. Is Backlash So Bad?

I have argued that litigation incentives may have the unfortunate and unintended consequence of pushing the law in a direction adverse to the rights that Congress and interested groups sought to promote. Courts may adopt procedural mechanisms (such as stricter rules for pleading) that make it more difficult for plaintiffs to proceed very far through the courthouse door, and they may cut back on substantive protections in ways that make it more difficult for plaintiffs to prevail. Thus, while litigation incentives may encourage more plaintiffs to sue, they may eventually cause more plaintiffs to lose.

One possible objection to this argument is that, even if the risk of judicial backlash is realized, litigation incentives will leave potential plaintiffs no worse off than if the incentives had never been enacted. Recall the economic theory discussed in Part II, which predicts that a rational plaintiff will sue if the expected value of litigation exceeds the expected costs. Suppose that, at the moment Congress is considering amending a given statute to add a litigation incentive—double damages for prevailing plaintiffs, for example—the relevant body of case law is such that the average plaintiff has a 60% chance of success at trial. And suppose that, prior to any statutory amendment, the average plaintiff can expect to recover $50,000 if she wins. The expected value of litigation for the average plaintiff is $30,000 (.6 x $50,000). If Congress amends the statute to provide for mandatory doubling, the available judgment will increase to $100,000 and the expected value of litigation will increase to $60,000 (.6 x. $100,000). Assuming that the average plaintiff does not anticipate attorney’s fees in excess of $60,000, the rate of litigation should increase.

Now suppose that judges react to the new stream of cases with decisions that reduce the average plaintiff’s likelihood of success. Even if new judicial doctrine reduces the average plaintiff’s chances by half—pushing the probability of success down to 30%—the expected value of litigation will be no worse than before the amendment. (A 30% chance of recovering $100,000 is equal to $30,000, which is the same as a 60% chance of recovering $50,000.) If the average plaintiff’s expected costs are roughly equivalent to what they were pre-amendment, then the ultimate rate of litigation under this hypothetical statute also will be no lower than the pre-amendment status quo. Fewer plaintiffs will prevail, but those who do win will recover twice the amount of damages.

Arguably, then, this hypothetical litigation incentive has had a positive (if temporary) effect, even though the law has changed in ways that favors defendants. For a while, more plaintiffs were suing and roughly 60% of them were recovering more money—$100,000 instead of $50,000. Eventually the case law responded, and the probability of plaintiff success decreased accordingly. But the end result is at worst the same as the status quo pre-amendment.

The difficulty with this line of argument is that it ignores the importance of compensation for individual plaintiffs. Although the total transfer from defendants to plaintiffs is the same pre- and post-amendment, the upshot of the damage enhancement is that only half as many plaintiffs are able to share in the recovery. In areas where victim compensation is an important policy goal, that result is neither normatively desirable nor normatively equivalent to the pre-amendment situation where 60% of plaintiffs recovered $50,000. Decreasing the number of plaintiffs who

Assume that 100 plaintiffs would sue prior to the amendments, and 100 will sue after the statute is amended and judicial doctrine adjusts accordingly. Under the first scenario, 60 of the plaintiffs would recover $50,000, for a total of $3,000,000. Under the second, 30 of the plaintiffs will recover $100,000, which yields the same result.

Compensating victims is not always a central goal of litigation. In the context of environmental citizen suits, for
prevail also may have negative consequences for the market for legal services. In areas where contingency fee or “no win, no pay” arrangements are common, more plaintiffs losing means more attorneys going without payment. Attorneys may be less willing to take cases that have a low probability of success, particularly if the costs of litigation are relatively high.\textsuperscript{250} Bear in mind that the relevant costs may include satellite litigation over the incentive itself. If our hypothetical statute included a fee shift instead of or in addition to the damage enhancement, both plaintiffs and defendants could anticipate significant additional costs sunk into disputes over fees.\textsuperscript{251} As a result, the total social cost of litigation may be higher after the amendment even if the same number of cases are filed.

A second possible objection is that increased litigation rates are valuable in their own right because they increase deterrence.\textsuperscript{252} For example, Sean Farhang has argued that the 1991 amendments to Title VII had the laudable effect of increasing voluntary compliance by employers. Farhang shows that the 1991 amendments increased the number of claims filed under Title VII (as discussed in Part II), and that “[t]he rate of private job discrimination litigation is a statistically and substantively significant force driving organizations’ adoption of [certain effective] compliance strategies.”\textsuperscript{253} Other studies call into question the link between Title VII litigation and improvements in the employment prospects for minorities and women,\textsuperscript{254} even at firms that had been subject to suit themselves.\textsuperscript{255} Still others dispute the core premise that private litigation has positive effects on compliance.\textsuperscript{256} Of course, if private litigation does not lead to more deterrence generally, then increasing the rate of litigation is unlikely to improve matters.

\textsuperscript{250} Attorneys and advocacy groups that handle a large number of similar cases may be able to spread costs across cases, so that they can absorb the costs of litigating four cases without compensation so long as the fifth case yields a large recovery. But for those who have a choice between litigating, say, employment discrimination cases or contract cases, the low probability of success (and hence payment) in the former context may well push the choice toward the latter. \textit{Cf}. Zemans, supra note 30, at 203 (“[W]ith fees dependent upon a successful outcome, cases not likely to win are screened out of court.”).

\textsuperscript{251} Robert W. Fioretti & James J. Convery,\textit{ Attorney’s Fees: The Mushrooming Cloud of Litigation}, 34 DePaul L. Rev. 943, 947 (1984) (“With the proliferation of fee-shifting statutes, litigation to determine the amount of the awards has also multiplied. The result has been an alarming growth in attorney’s fees litigation.”); Krent, supra note 52, at 2082-83 (acknowledging that “one-way fee shifting statutes have significant impact in increasing overall litigation costs”)

\textsuperscript{252} For a discussion of the link between litigation and deterrence, as well as the important difference between specific and general deterrence, see \textit{Farhang}, supra note 4, at pt 2 352-59.

\textsuperscript{253} \textit{Id.} at pt 2 371.

\textsuperscript{254} \textit{See, e.g.,} John J. Donohue III & Peter Siegelman, \textit{The Changing Nature of Employment Discrimination Litigation}, 43 Stan. L. Rev. 983, 1032-33 (1991) (arguing that Title VII suits have become more common but less effective over time, in part because early litigation targeted the most obvious forms of discrimination, and in part because litigation tends to focus on firing rather than hiring and so may discourage employers from hiring women and minorities).

\textsuperscript{255} Kalev & Dobbins, supra note 27, at 889-90 (finding that while lawsuits sometimes had positive effects on the employment of women and minorities, “first lawsuits had no effects on black women and men in the 1980s, and negative effects on both in the 1990s”); \textit{id.} at 860 (discussing a study that found declines in managerial diversity in supermarkets following a settlement or award associated with litigation); Lynn Perry Wooten & Erika Hayes James, \textit{When Firms Fail to Learn: The Perpetuation of Discrimination in the Workplace}, 13 Management Inquiry 23 (2004) (finding that many of the employers surveyed had faced repeated Title VII lawsuits because they had not changed their employment practices in response to earlier suits).

\textsuperscript{256} \textit{See, e.g.,} Cross, supra note 3, at 66-67 (arguing that private environment litigation may lead to “inconsistent and unfair” enforcement of environmental law, “destroy ongoing cooperative compliance,” and “spawn a culture of resistance” (internal quotation marks omitted)).
However, even if one assumes that there is a positive connection between private litigation and deterrence, it does not follow that litigation incentives necessarily will generate more deterrence. The reason why potential violators are thought to respond to the rate of litigation is that they will weigh the costs and benefits of proposed actions, and will act only if expected gains outweigh expected losses.\textsuperscript{257} As explained in Part II, when the action being contemplated is some form of illegal conduct, the potential violator will consider the expected gains from the conduct (increased profits, \textit{e.g.}) as well as the likelihood of detection, litigation, and an adverse judgment, and the costs of those events.\textsuperscript{258} Clearly, as the rate of litigation rises in the relevant area, so does the likelihood of suit, with all its attendant costs. But, equally clearly, potential violators will factor in the likelihood of \textit{losing} those suits and facing damages awards and other sanctions.\textsuperscript{259} All else equal, any judicial decisions that make it more difficult for plaintiffs to prevail will reduce the deterrent effects of litigation by decreasing the risk of sanction. Doctrinal changes that reduce the probability of plaintiff success likewise will reduce litigation rates, which will dampen deterrence even more.

In the context of Title VII, litigation rates increased following the 1991 amendments but have been dropping sharply since 1998. There is no indication that the drop in litigation is due to a drop in discrimination. Instead, the decrease in the number of claims filed seems to reflect “a growing awareness, especially with the prolonged lack of success on appeal, that employment discrimination plaintiffs have a tough row to hoe.”\textsuperscript{260} If deterrence is tied to litigation rates, deterrence is declining. Yet, because the 1991 amendments increased the damages available to prevailing plaintiffs, the expected costs of discrimination for employers weighing the costs and benefits of a possible personnel decision may still be higher now than in 1991. My claim here is not that litigation incentives always, or even usually, will lead to a net loss in deterrence. Rather, it is that commentators, advocates, and legislators should not assume too quickly that litigation incentives will generate more litigation and more deterrence. The level of voluntary compliance, like the level of litigation, depends in important part on the content of the relevant law. If judges react to heightened litigation rates with hostility, moving the law in an anti-plaintiff direction, fewer violators will be sued and fewer will be sanctioned. Voluntary compliance will decrease accordingly.

CONCLUSION

Congress frequently relies on mechanisms like one-way attorney’s fee shifts and enhanced damages in order to encourage so-called “private enforcement” of federal statutes. Yet there is surprisingly little information about how litigation incentives work. The available empirical evidence calls into question whether statutory mechanisms designed to raise litigation rates will serve their intended purpose. In at least some contexts, litigation incentives seem to serve a largely symbolic role: Congress appears to be doing something to advance a particular substantive cause, but not much changes in practice.

To date, commentary on litigation incentives has not considered how mechanisms designed to increase litigation rates will be received by judges. My analysis suggests that when litigation incentives work, they may backfire. A judge who believes that a given type of claim is

\textsuperscript{257} See Farhang, \textit{supra} note 4, at pt 2 354.
\textsuperscript{258} See \textit{supra} notes 85-87 and accompanying text.
\textsuperscript{259} See Salop & White, \textit{supra} note 140, at 1019.
\textsuperscript{260} Clermont & Schwab, \textit{supra} note 69, at 19.
uninteresting or unimportant is unlikely to react favorably to an increase in the number of those claims filed in his court. While it is theoretically possible that the judge would become more sympathetic to the claims after hearing more and more of them, the structure of the litigation system is not conducive to judicial learning. A more likely result is that the judge will react to the increase in litigation rates by invoking tools that help him dispose of the cases more quickly—or to discourage them from being filed in the first place. In fact, judges have cut back on litigation incentives themselves by interpreting them narrowly, and have shaved away at the substantive provisions of statutes that contain incentives.

The risk of judicial backlash is just that: a risk. I have emphasized that hostility is not the only possible response to increased litigation rates, and that the likelihood of an adverse judicial response to a given incentive will depend in important respects on the ideological make-up of Congress and the judiciary. But, like any other consequence that is both negative and uncertain, the possibility of judicial backlash decreases the worth of litigation incentives for those who seek to advance the substantive project of a given statute. Legislators and interest groups should recognize as much, and should avoid over-valuing litigation incentives when bargaining over statutory policy.