
Article

Special Incentives to Sue

Margaret H. Lemos[†]

INTRODUCTION

The practical meaning of federal law depends in large part on the choices legislators make about enforcement. Congress can opt for public or private enforcement,¹ 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.² 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 affected statutes. Boosting enforcement is, of course, a contestable goal, implicating longstanding debates about excessive litigation and deterrence of valuable activity.³ But debates about the optimal

[†] Associate Professor, Benjamin N. Cardozo School of Law. Thanks to Scott Hemphill, Max Minzner, Rafael Pardo, Uriel Procaccia, Alex Reinert, Neil Siegel, Kevin Stack, Alex Stein, Stewart Sterk, Julie Suk, Mark Weiner, and participants at a faculty workshop at the Cardozo School of Law for helpful comments on earlier drafts of this Article, and to Alexa Fang for outstanding research assistance. Copyright © 2011 by Margaret H. Lemos.

1. For a small sampling of the vast literature on the choice between public and private enforcement, see generally Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1 (2002); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1283–315 (1982).

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 over-deterrence, see generally Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743 (2005).

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 “induced enormous, and I think jus-

level of enforcement have taken 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 statutory mechanisms designed to advance the goals of federal law through private litigation 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. To begin with, it is not clear that litigation incentives, particularly fee shifts, work in the sense of strengthening enforcement. Economic theory predicts that plaintiff-side fee shifts and damage enhancements will increase the number of claims filed under the relevant statutes, either by reducing the cost of litigation or by increasing 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 attorneys' fee shifts do not consistently lead to higher filing rates. The upshot is that litigation incentives seem to be encouraging litigation where we

tified, 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 (2004) ("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 187–90 and accompanying text (discussing complaints that litigation incentives lead to excessive and sometimes frivolous litigation).

4. See Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. EMPIRICAL LEGAL STUD. 1, 15–31 (2009) [hereinafter Farhang, *Congressional Mobilization*] (examining the effects of a damage enhancement on Title VII claiming behavior); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 746 (1987). The most comprehensive treatment of litigation incentives to date is SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010) [hereinafter FARHANG, *LITIGATION STATE*]. Farhang focuses in large part on the political forces that lead to the enactment of litigation incentives, and he provides a detailed discussion of the causes, and some of the effects, of the 1991 amendments to Title VII that added enhanced damages.

need it least—in areas where the threat of multiple or punitive damages operates to deter violations.

When special incentives do boost litigation rates, moreover, 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, judicial enforcement is not mechanical but entails an important element 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

5. See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 428–34 (2008) (discussing the policymaking discretion that courts inevitably exercise when interpreting statutes).

6. See, e.g., Lee Epstein & C.K. Rowland, *Interest Groups in the Courts: Do Groups Fare Better?*, in INTEREST GROUP POLITICS 275, 281 (Allan J. Cigler & Burdett A. Loomis eds., 2d ed. 1986) (“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) (“The 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 Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 100–03 (1974); *infra* notes 141–43 and accompanying text.

the cases judges are asked to decide and the resources the parties bring to the table.

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. Mechanisms like fee shifts and damage enhancements are designed to—and sometimes do—increase litigation rates. Hearing more cases of the same type might lead judges to develop a better understanding of, and sympathy for, the claims involved. But the structure of the judicial system does not lend itself to such judicial learning. Instead, 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. 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. Thus, litigation incentives are not only less valuable than their supporters assume; they 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 attorneys' fee shifts and damage enhancements often do not work in the way that conventional understandings of litigation incentives would suggest. Part III moves from litigants to judges, highlighting the unintended consequences of litigation incentives for legal doctrine. I demonstrate the many ways that the content of courts' dockets may influence judicial decisionmaking, and explain why increased filing rates are likely to inspire a negative judicial response. By encouraging litigation as an enforcement mechanism, I argue, Congress may diminish the substantive rights it sought to protect. Legislators and interests groups should heed that risk when bargaining over statutory policy.

I. WHY ENCOURAGE LITIGATION?

Congress enacts legislation, but it does not enforce or interpret it.⁸ Instead, Congress relies on other actors to implement the statutes it creates. The power to “execute” the law lies

8. U.S. CONST. art. I, § 1.

with the executive branch,⁹ and executive-branch actors—typically administrative agencies—have a central role in enforcing federal legislation.¹⁰ 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,¹¹ or because legislators hope to take credit for addressing a pressing social problem while avoiding blame from constituents disappointed with the details.¹² Even if legislators wish to control policy as much as possible, uncertainty about future events may make perfect specification unwise or impossible.¹³ Often, the best that Congress can do is to 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.¹⁴ Unlike Congress, moreover, agencies can adjust their

9. *Id.* art. II, § 3 (stating that the President “shall take Care that the Laws be faithfully executed”).

10. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 3 (1998) (“In many profound ways, the innumerable activities of everyday life—working, traveling, transacting, recreating, indeed eating, drinking, and breathing—are affected by the work product of federal administrative agencies . . .”).

11. See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 595 (2002) (discussing the prevalence of “deliberate [statutory] ambiguity,” and reporting that congressional staffers “viewed deliberate ambiguity . . . as justified by the felt need for action or the perceived threat that inflexible political positions would thwart passage of any bill at all”); David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 406, 432–33 (2002) (“Slender majorities of both houses of Congress may favor legislation aimed at a new policy goal, but different subsets of those slender majorities may oppose some of the particulars in each potential approach to achieving that goal.”).

12. See Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 568 (2009) (“Congress might aim to write just enough policy to receive a positive response for its actions, while deflecting any negative attention for the burdensome details to the agency.”).

13. See Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404 (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.”).

14. See David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 967 (1999) (“[T]he executive branch is filled (or can be filled) with policy experts who can run tests and experiments, gather data, and otherwise

interpretations relatively easily, making for more flexible and responsive policy.¹⁵

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 those of Congress.¹⁶ Research has shown that agency behavior, particularly in the realm of enforcement, often changes as presidential administrations change.¹⁷ Agencies also are subject to influence and control by future Congresses, which might have different commitments and priorities from those of the legislative coalition that enacted the statute in question.¹⁸ The result

determine the wisest course of policy, much more so than can 535 members of Congress and their staff.”)

15. *Id.* at 954 (noting that “one of the primary reasons for delegating” is “the ability of agencies to respond flexibly to changing conditions”).

16. 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 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).

17. See Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 414–17 (2010) (describing shifts in the Equal Employment Opportunity Commission’s (EEOC) 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, 207–21 (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 W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 806–21 (1991) (finding significant executive influence on the behavior of seven agencies, especially those situated within executive departments).

18. See Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 784–87 (1999) (discussing various avenues for congressional control of the bureaucracy).

is that agencies may implement statutes in a way that pushes policy away from the preferences of the enacting legislators.¹⁹

For legislators concerned about 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.²⁰ Congress also can utilize the help of ordinary citizens by authorizing or encouraging them to sue statutory violators.²¹ Although private parties do not exercise formal governmental authority, they nevertheless can play an important role in enforcing the law through litigation.

So-called private enforcement of federal law offers several advantages over enforcement by agencies. Private enforcement can supplement public efforts, picking up the slack where agency resources run out.²² 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.²³ An additional benefit, from Congress's perspective, is that private enforcement runs

19. See, e.g., Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 62–63 (1995) (discussing the problem of “bureaucratic drift”); David Epstein & Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 699–702 (1994) (same).

20. See generally Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982); Lemos, *supra* note 17; Lemos, *supra* note 5; Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006).

21. Alternatively, Congress can empower states to enforce federal law. See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. (forthcoming 2011) (manuscript at 3), available at <http://ssrn.com/abstract=1685458>.

22. See Catherine 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 (2007) (“[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.”).

23. 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.”); Myriam 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”).

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.²⁴ As such, and unlike enforcement by agencies, private enforcement tends to be unaffected by changes in presidential administration.²⁵

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.²⁶ 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. For instance, environmental suits can lead to cleaner air and water; antitrust suits to more competition and lower prices; and civil rights suits to better po-

24. Farhang, *Congressional Mobilization*, *supra* note 4, at 5 (“[T]his sticky status quo creates an incentive for legislators and their interest group constituents to rely upon private enforcement regimes, which provide a form of autopilot enforcement, via market incentives, that will be difficult for future legislative majorities, or errant bureaucrats pursuing their own goals, to subvert.”).

25. 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 17, at 404–18 (showing that the ideological direction of the Supreme Court’s decisions in Title VII cases was not linked to the politics of the president in office).

26. 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*, 37 FORDHAM URB. L.J. 129, 143 (2010) (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 workplace . . . demonstrates that more than one-third of those who reported unfair treatment took no further action, and only 3% reported suing their employer.”).

lice 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.”²⁷

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.²⁸ Although contingency fee or “no win, no pay” arrangements may be available to low-income plaintiffs,²⁹ high litigation costs coupled with a low expected recovery can make finding a lawyer difficult indeed.³⁰ The problem is especially acute in areas where relief is likely to come in the form of an injunction rather than damages,³¹ 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.³²

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.³³ With respect to costs, Congress has carved out excep-

27. Stewart & Sunstein, *supra* note 1, at 1214 n.72.

28. 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.”).

29. See Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1944, 1966–67 (2002) (describing different types of fee arrangements).

30. See Virginia G. Maurer et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT’L L. & BUS. 272, 296 (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 pursued under contingency fee arrangements . . .”).

31. See Zemans, *supra* note 28 (“[U]nlike large monetary claims that may be pursued on a contingency fee basis, suits seeking equitable relief of even a very serious nature are inhibited by the anticipated high legal fees.”).

32. See Albiston & Nielson, *supra* note 22, at 1090.

33. The focus of this Article is on statute-specific incentives, but it bears mentioning that Congress can facilitate litigation through more wholesale measures, such as by authorizing class actions. See FED. R. CIV. P. 23; Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 49 (1975) (“A key feature of the class action is that it holds the potential for making feasible the compensation of the

tions 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 275 statutes containing one-way fee shifts, allowing prevailing plaintiffs to recover attorney's fees from their adversaries.³⁴ Examples include the Civil Rights Attorney's Fees Awards Act, which prescribes a fee shift for victorious plaintiffs in a variety of civil rights actions;³⁵ 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;³⁶ the Fair Debt Collection Act, which prohibits "abusive and deceptive" conduct by creditors and contains an automatic fee shift for prevailing plaintiffs;³⁷ and the Age Discrimination in Employment Act, which entitles plaintiffs who prove unlawful discrimination to recover a reasonable attorney's fee.³⁸

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,³⁹ either in the form of a multiplier (e.g., double or treble damages) or punitive damages.⁴⁰ A court may

victims of mass wrongs even though each victim has a loss that is too small to justify an individual action."); Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 475 ("Class actions are, at their root, an aggregation device for separate claims . . ."); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 108-31 (2006) (discussing the compensation justification for class actions).

34. FARHANG, LITIGATION STATE, *supra* note 4, at 66. The precise language of statutory fee shifts varies, but a common formulation is that fees may (or must) be awarded to "prevailing part[ies]." Although that language suggests that either a victorious plaintiff or defendant may recover attorneys' fees, courts consistently have interpreted such statutes in a way that favors the plaintiff. *See* Albiston & Nielsen, *supra* note 22, at 1093 n.24 ("Courts generally interpret 'prevailing party' fee-shifting statutes to permit asymmetrical recovery: Prevailing plaintiffs generally recover fees as a matter of course, but prevailing defendants recover their fees only when the plaintiff's action was 'frivolous, unreasonable, or groundless.'" (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978))).

35. 42 U.S.C. § 1988 (2006).

36. 5 U.S.C. § 552a(g)(4) (2006).

37. 15 U.S.C. § 1692(k) (2006).

38. 29 U.S.C. § 626(c) (2006).

39. FARHANG, LITIGATION STATE, *supra* note 4, at 66.

40. *See id.* at 62-65.

award treble damages, for example, for violations of antitrust,⁴¹ racketeering,⁴² and intellectual property protection statutes;⁴³ and punitive damages are available to plaintiffs who sue successfully under statutes prohibiting discrimination in housing,⁴⁴ employment,⁴⁵ and the provision of credit.⁴⁶ Another form of damage enhancement is a *qui tam* provision, which permits plaintiffs who have not been injured 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.⁴⁷ 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.⁴⁸

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."⁴⁹ They have been deployed by Democratic- and Republican-controlled Congresses alike, although Dem-

41. Clayton Act, 15 U.S.C. § 15 (2006).

42. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (2006).

43. 15 U.S.C. § 1117(b) (2006) (providing for treble damages for the use of a counterfeit trademark); 35 U.S.C. § 284 (2006) (allowing for treble damages for willful patent infringement).

44. 42 U.S.C. § 3613(c) (2006).

45. *Id.* § 1981a(b) (allowing punitive damages to be available up to \$300,000, depending on the size of the employer); 42 U.S.C.A. § 2000e-5(e)(3)(B) (West Supp. 2010) (making available to Title VII claimants "any relief authorized by section 1981a of [the] title").

46. 15 U.S.C. § 1691(e) (2006) (authorizing punitive damages up to \$10,000).

47. 31 U.S.C. § 3730(d) (2006).

48. *See, e.g.*, 18 U.S.C. § 2520 (2006) (stating that "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of" the Act can, under certain circumstances, recover statutory and punitive damages); *id.* § 2707(c) (providing for statutory and punitive damages for unauthorized access to stored electronic communications such as e-mail); Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 110 (2009) ("[S]tatutory damages provide an incentive to pursue a lawsuit where actual damages are small or difficult to ascertain." (internal quotation marks omitted)).

49. FARHANG, LITIGATION STATE, *supra* note 4, at 67–68.

ocratic majorities are somewhat more likely to make use of private enforcement regimes than Republican ones.⁵⁰

The obvious purpose of statutory provisions like one-way fee shifts and enhanced damages is to promote compliance with federal law by making violations more costly. Potential violators will weigh the benefits of law-breaking against the expected penalty, which can be understood as the amount of damages multiplied by the probability that any given violator will be found liable and forced to pay. The higher the expected penalty, the greater the deterrent effect the penalty will have. A one-way fee shift permits more people to sue to enforce the relevant statute, thereby increasing the likelihood that violators will face sanctions. A damage enhancement raises the amount of damages available, and so should deter violations even if the rate of litigation stays the same.⁵¹ But damage enhancements also encourage more private litigation by offering plaintiffs and their attorneys a larger recovery.⁵²

Thus, both mechanisms “work”—at least in part—by boosting litigation.⁵³ The legislative histories of statutes that contain

50. *Id.* at 229–30. 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 79. 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 5 (“[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.”).

51. Indeed, a conventional justification for enhanced damages is that a damage multiplier is needed in order to account for the fact that only a fraction of offenders are sanctioned. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874 (1998) (“[I]f the harm is \$100,000 and there is a twenty-five percent chance that the injurer will be found liable for the harm for which he is legally responsible, the harm should be multiplied by . . . 4, so total damages should be \$400,000. Because the injurer will pay this amount every fourth time he generates harm, his average payment will be \$100,000 (= \$400,000/4). Thus, on average, the injurer will pay for the harm he causes, and appropriate deterrence will result.”).

52. *See infra* note 59 and accompanying text.

53. *See FARHANG, LITIGATION STATE, supra* note 4, at 62 (arguing that one-way fee shifts and enhanced damages are “unambiguous in their purpose

litigation incentives are replete with statements by legislators and witnesses that optimal enforcement depends on private litigation, and that some form of inducement is necessary in order to facilitate suit.⁵⁴ Interest groups, including legal advocacy

and influence”). 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 governmental directives”). Moreover, damage enhancements may be designed to promote voluntary compliance, thereby reducing the need for litigation. *See infra* notes 90–92 and accompanying text.

54. *See, e.g.*, FARHANG, LITIGATION STATE, *supra* note 4, at 4 (“Legislators and the interest groups that influenced their behavior, with a high degree of self-consciousness, and centrally motivated by policy goals, constructed Title VII’s enforcement provisions with the objective of mobilizing private litigants to execute the enforcement function in court.”); Eugene R. Gaetke & Robert G. Schwemm, *Government Lawyers and Their Private “Clients” Under the Fair Housing Act*, 65 GEO. WASH. L. REV. 329, 334–35 (1997) (discussing the legislative history of the 1988 amendments to the Fair Housing Act); Haeji Hong, *Dismantling the Private Enforcement of the Privacy Act of 1974: Doe v. Chao*, 38 AKRON L. REV. 71, 103 (2005) (“Congress included the civil remedy provision to encourage private enforcement of the Privacy Act. Recognizing that federal agencies have little incentives to enforce the Privacy Act, Congress intended to provide incentives for the ‘widest possible citizen enforcement.’” (quoting S. REP. NO. 93-1183, at 83 (1974), reprinted in JOINT COMM. ON GOV’T OPERATIONS, LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974: SOURCE BOOK ON PRIVACY 236 (1976))); Vickie J. Williams, *Dead Men Telling Tales: A Policy-Based Proposal for Survivability of Qui Tam Actions Under the Civil False Claims Act*, 83 NEB. L. REV. 1073, 1081–82 (2005) (discussing the legislative history of the 1986 amendments to the Civil False Claims Act, and arguing that Congress enhanced the recovery available under the Act in order to encourage private suits); Darren A. Craig, Note, *Actions Founded on Statutory Liability: Adopting a Limitations Period for Attorneys’ Fees Actions Brought Under the Individuals with Disabilities Education Act*, 79 IND. L.J. 493, 495 (2004) (discussing the legislative history behind Congress’s addition of a one-way fee shift to the Individuals with Disabilities Education Act); Anne M. Mellen, Note, *Awarding Attorneys’ Fees Under the Lanham Act: Egregious Litigation Conduct in the “Exceptional” Case*, 74 U. CIN. L. REV. 1111, 1115–16 (2006) (discussing the legislative history of the 1975 amendments to the Lanham Act, which added a provision for shifting attorneys’ fees to prevailing parties in “exceptional” cases); Andrew Robert Schein, Note, *Attorney Fees for Pro Se Plaintiffs Under the Freedom of Information and Privacy Acts*, 63 B.U. L. REV. 443, 444 (1983) (explaining that Congress added a fee-shift to the Freedom of Information Act in order to encourage citizen enforcement by removing economic barriers to litigation).

groups, often lobby for such provisions.⁵⁵ Just as Congress can craft agency procedures in a way that “stack[s] the deck” in favor of certain constituencies,⁵⁶ 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.⁵⁷ 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 function in practice. In Part II, I consider how one-way fee shifts and enhanced damages affect the behavior of litigants. In Part III, I consider their likely effect on judicial decisionmaking and 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. Yet the available empirical evidence provides only partial support for that theoretical prediction. It is fairly clear that enhanced damages result in higher filing rates at least some of the time, but there is very little evidence that one-way fee shifts have the same effect.

55. See FARHANG, LITIGATION STATE, *supra* note 4, at 79 (reporting that “the presence of more witnesses representing issue-oriented citizen groups in hearings on regulatory legislation is associated with increased enactment of private enforcement regimes”); Zemans, *supra* note 28, 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. Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 267–68 (1987).

57. See Smith, *supra* note 50, at 140 tbl.1 (showing that, at three stages of the 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 resisted such provisions).

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?”⁵⁸ 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.⁵⁹ 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 that she will win.⁶⁰ Thus, if the plaintiff believes she has a seventy percent chance of recovering a \$10,000 judgment, the expected value of litigation is \$7000. 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 \$7000, 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 seventy percent chance of prevailing, then the expected value of the litigation will be \$21,000, rather than \$7000. 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.⁶¹

58. 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.’”).

59. 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.” (emphasis omitted)).

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

61. If enhanced damages are available but not mandatory, as typically is the case with punitive damages, see, e.g., 42 U.S.C. § 1981a(b)(1) (2006), the plaintiff will have to consider not only the probability of winning the case and recovering compensatory damages, but also the probability of winning puni-

While enhanced damages raise the expected value of litigation, one-way fee shifts decrease the expected costs and so, again, should induce more plaintiffs to file claims.⁶² Consider our original example, where the expected value of litigation is \$7000. Under the American rule for fees, if the potential plaintiff anticipates that her attorney's fees will run to \$9000 if the case goes to trial, she will not sue.⁶³ Her decision will be different if the statute in question permits prevailing plaintiffs to recover their attorneys' fees. Recall that this plaintiff believes she has a seventy percent chance of prevailing if she sues. It follows that she has only a thirty percent chance of holding the bill for her attorney's fees. Accordingly, under a one-way fee-shifting statute, her expected legal costs are \$2700—or thirty percent of \$9000—and she will sue.⁶⁴

tive 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.

62. It bears emphasis that the analysis here focuses on one-way fee shifts, under which a prevailing plaintiff can recover attorneys' fees but a prevailing defendant typically cannot. See *supra* note 34 and accompanying text. 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 53, at 2040 (explaining that fewer suits should arise under a system without fee shifting); Schwab & Eisenberg, *supra* note 4 (“[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.”); Shavell, *supra* note 59, at 60–61 (noting that the frequency of suit will be highest under a fee-shifting system favoring the plaintiff). The effects of a two-way fee shift (also known as the “English Rule” for fees), see, e.g., Kritzer, *supra* note 29, at 1946, under which *any* prevailing party can recover fees, are far less clear. *Id.* at 1948 (“There is surprisingly little agreement among those who have undertaken . . . theoretical analyses [of the effects of the American versus English fee systems, and] the empirical literature confirms that the effects of fee shifting are complex and difficult to ascertain.”).

63. 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 attorneys' 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 D. Rosenberg & S. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 3 (1985).

64. 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 Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71 CHI.-KENT L. REV. 427, 445

The economic model of litigation is stylized, of course. It assumes that plaintiffs are rational utility maximizers, that they are risk neutral,⁶⁵ 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.”⁶⁶ 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.⁶⁷

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. This Part now turns to a review of the available evidence.

B. EMPIRICAL EVIDENCE

Very few studies have investigated the effects of litigation incentives directly; most of the studies discussed in this Part focused on other issues. Nevertheless, they provide useful insights about how fee shifts and damage enhancements have op-

(1995) (“[U]nlike the American rule, and like the [English] 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 . . .”).

65. See Shavell, *supra* note 59, at 57, 61 (explaining how the calculations change if the potential plaintiff is risk averse rather than risk neutral).

66. Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 19–23 (2000) (discussing litigants’ noneconomic motives).

67. See Farhang, *Congressional Mobilization*, *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.”).

erated in practice. The results are somewhat surprising. While there is empirical support for the notion that enhanced damages increase filing rates, the 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.⁶⁸

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 plaintiffs whom prevailed 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

68. The effect of litigation incentives on the 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 n.8 (1977) (explaining that "litigation is more likely than settlement where, *ceteris paribus*, the stakes of a case are greater" because "for a given distribution of the parties' subjective probabilities of winning, greater stakes lead to greater differences between plaintiffs' minimum settlement offers and defendants' maximum settlement offers"). Economic theory also predicts more settlements where at least one of the parties is risk-averse. See Jeffrey M. Perloff et al., *Antitrust Settlements and Trial Outcomes*, 78 REV. ECON. & STAT. 401, 408 (1996) ("[T]he size of the risk aversion effect increases with the size of damages awarded . . ."). All else being equal, a one-way fee shift should (marginally) reduce the rate of settlement in cases where both parties are optimistic about their chances of winning at trial. See Shavell, *supra* note 59, at 67 ("There will be a greater likelihood of litigation under [a one-way fee shift system] than under the American system because (when the plaintiff's estimate of the chances of prevailing exceeds the defendant's) the joint expected legal costs tend to be lower under [that system] than the joint costs under the American system."). Empirical evidence on settlements is hard to come by, in part because many settlements are confidential, and in part because it is much easier to collect data on case outcomes than on settlements. See Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?* 5–6 (Cornell Legal Studies, Research Paper No. 08-30, 2008), available at <http://ssrn.com/abstract=1276383> (noting the limitations of settlement-rate statistics based on outcomes); cf. Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 113 (2007) ("[E]mployment discrimination settlements are almost uniformly governed by private contracts containing confidentiality clauses."). What little evidence is available regarding the connection between settlement and litigation incentives is therefore inconclusive.

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 the 1991 amendments to Title VII, Congress substantially increased the amount of damages available for intentional discrimination, 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.⁶⁹

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.⁷⁰ These 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.⁷¹ Sean Farhang's study of claims filed with the Equal

69. 42 U.S.C. § 1981a(b)(3) (2006).

70. 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?*, 3 HARV. L. & POL'Y REV. 103, 116 (2009). Using the same data, Michael Selmi has shown that employment discrimination litigation doubled 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 Code #442, “Civil Rights: Jobs” or “Employment.” See, e.g., Clermont & Schwab, *supra*, at 104 n.4 (explaining the relevant classification system). That category includes Title VII cases as well as litigation under other antidiscrimination statutes. *Id.* But Title VII cases account for nearly seventy percent of the cases in the category, suggesting that Title VII claims did increase after 1991. See *id.* at 115–17 (noting “across-the-board” increases in employment discrimination caseloads). 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. Laura Beth Nielsen et al., *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States* (Am. Bar Found. Research Paper Series, Paper No. 08-04, 2008), available at <http://ssrn.com/abstract=1093313>. 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. *Id.* at 13–14, 41 fig.1.

71. See Clermont & Schwab, *supra* note 70 (observing the correlation without attempting to prove causation); Nielsen et al., *supra* note 70, at 14 (reporting that employment discrimination cases increased sharply after 1991

Employment Opportunity Commission (EEOC) provides more direct evidence of the influence of the 1991 amendments.⁷² Before a plaintiff can file suit in court under Title VII, she must file a claim with the EEOC, giving the agency an opportunity to investigate and perhaps conciliate the claim.⁷³ Thus, every claim that results in litigation must pass through the EEOC. Farhang found that Title VII claims rose dramatically after 1991.⁷⁴ After controlling for other factors that could have sparked an increase in claim filing in the 1990s (such as unemployment and bureaucratic ideology), Farhang concluded that the effect of the 1991 amendments was positive and statistically significant.⁷⁵

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 \$1000 in punitive damages. Because “out-of-pocket damages in most housing cases are *de minimis*,” litigation rates remained relatively low.⁷⁶ Congress responded in 1988, when it amended the Act to remove the cap on punitive

and reasoning that “it appears that the expansion of rights and remedies was having its intended effect,” though the precise cause of the increase remains unknown); Selmi, *supra* note 1, at 1435–36 (discussing the strong possibility that the increase resulted from the 1991 amendments, while not attempting to statistically verify it). Clermont and Schwab point out that the rate of unemployment was decreasing during the 1990s as the number of employment discrimination claims shot up, concluding that “[b]usiness cycles do not explain the upward trend in cases during the 1990s.” Clermont & Schwab, *supra* note 70, at 119–20. 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.

72. Farhang, *Congressional Mobilization*, *supra* note 4.

73. *Id.* at 16.

74. *Id.* at 17.

75. *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 [but-tressing] the inference that the true cause was [the 1991 amendments to Title VII].” *Id.* at 27.

76. 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”).

damages.⁷⁷ 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.⁷⁸ The filing rate increased mildly by 1990, when 284 private cases were initiated.⁷⁹ By 1996, the annual filing rate had reached 829 cases, an “increase of nearly 200% over the 1990 level of activity.”⁸⁰

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,⁸¹ 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.⁸² The False Claims Act was amended in 1986, making it easier—and more lucrative—for relators to sue.⁸³ Most relevant here, the 1986 amendments increased the available penalties from double to triple damages, and increased the relator’s recovery for a successful suit to up to thirty percent if the government does not intervene and twenty-five percent if it does.⁸⁴ The amendments worked. Prior to 1986, the Department of Justice received approximately six *qui tam* cases each year.⁸⁵ That number rose into the hundreds after the 1986 amendments, as a total of 4704 *qui tam* cases were filed between 1986 and September 2004, resulting in \$8.4 billion in recovery for the government.⁸⁶

77. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 813(c), 102 Stat. 1619, 1633–34 (codified at 42 U.S.C. § 3613(c) (2006)).

78. Selmi, *supra* note 1, at 1419 n.72.

79. *Id.* at 1418.

80. *Id.* at 1418–19.

81. See Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest*, 107 COLUM. L. REV. 949, 953 (2007).

82. After a relator files a claim with the government, the government has sixty days to decide whether to intervene. 31 U.S.C. § 3730(b)(2) (2006). If the government decides not to proceed, the relator can conduct the suit alone. *Id.* § 3730(b)(4)(B). In either case, the relator receives a share of the recovery. *Id.* § 3730(d).

83. See F. Paul Bland, *Why “Qui Tam” Is Necessary*, NAT’L L.J., Nov. 4, 1991, at 13–14, available at 11/4/91 NLJ 13 (Westlaw) (“[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.”).

84. 31 U.S.C. §§ 3729(a), 3730(d) (2006).

85. See Bucy, *supra* note 1, at 48.

86. See Broderick, *supra* note 81, 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).

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 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 fuel litigation rates.⁸⁷ 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 such incentives produced, the empirical evidence is at least consistent with the predictions of economic theory.

Second, 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 the 1984 amendments to the Lanham Act provided for mandatory treble damages for use of a counterfeit trademark.⁸⁸ It is not clear why that provision has

87. 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)) (amending Pub. L. No. 90-284, 82 Stat. 73 (1968)). The 1986 amendments to the False Claims Act contained provisions that made it easier for relators to sue. Pub. L. No. 99-562, 100 Stat. 3153 (1986) (codified at 31 U.S.C. § 3730) (amending Pub. L. No. 78-213, 57 Stat. 608 (1943)). For example, the amendments permitted the plaintiff to continue as a party to the claim even if the government decided to intervene (31 U.S.C. § 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 in scattered sections of 42 U.S.C.) (amending Pub. L. No. 88-352, 78 Stat. 241 (1964)).

88. See Intellectual Prop. Inst., *Yearly Totals - Mitchell Study on Trademark Litigation*, WM. MITCHELL C.L., <http://www.wmitchell.edu/intellectual>

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 preenhancement 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.⁸⁹

Finally, 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 that antitrust violations are so difficult to detect that the expected penalty for a violation would be inadequate to deter illegal conduct. Recall that firms will weigh the expected gains from anticompetitive conduct against the expected costs, taking into account both the size of the available penalty and the likelihood of sanction.⁹⁰ 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

-property/?page=326 (last visited Nov. 30, 2010); see also William M. Landes, *An Empirical Analysis of Intellectual Property Litigation: Some Preliminary Results*, 41 HOUS. L. REV. 749, 771 tbl.3 (2004) (reporting the number of trademark trials during different periods and showing a drop in number from the 1978–1984 period to the 1985–1989 period).

89. See Christopher M. Dolan, *Fits over Counterfeiting: Legislative Accomplishments and Directions*, 27 AIPLA Q.J. 233, 246 (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.”).

90. See Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 673, 690–91 (2010) (arguing in favor of deterrence as the primary purpose of antitrust enforcement because “[d]ecisionmakers in dominant firms will perceive that they are better off not engaging in antitrust violations given the likelihood of detection multiplied by the penalty”); *supra* text accompanying note 51.

likelihood of detection and sanction remains relatively low.⁹¹ Making violations costly should lead more firms 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.⁹² The key point for present purposes is that this approach does not depend on more antitrust litigation (or more speeding tickets). Indeed, there is good reason to fear that increasing both the size of the penalty *and* the likelihood of sanction will result in over-deterrence.⁹³ Thus, it is impossible to determine in the abstract whether a damages enhancement is working well or poorly if litigation rates go up.

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 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. § 1983.⁹⁴ 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.

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

91. See William Breit & Kenneth Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 409 (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 optimal penalty should equal the net harm to persons other than the offender, adjusted upward if the probability of apprehension and conviction is less than one.”). See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (concluding that optimal policies to combat illegal behavior are part of an optimal allocation of resources).

92. See Crane, *supra* note 90, at 698–702 (describing and critiquing the theory that treble damages deter antitrust violations).

93. See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 15 (1975) (describing the “overenforcement theorem”).

94. 42 U.S.C. § 1988 (2006).

resulted in an increase in filing rates.⁹⁵ 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."⁹⁶ 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.⁹⁷ That finding might suggest the influence of CRAFAA,⁹⁸ 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."⁹⁹

The Freedom of Information Act (FOIA) may provide a counterexample, 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 materials a citizen has requested.¹⁰⁰ FOIA was amended in 1974 to provide (among other things) that courts may award attorney's fees to plaintiffs who "substantially prevail[.]"¹⁰¹ The rate of FOIA litigation "increased dramatically" after 1974.¹⁰² 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 deadlines on agencies, author-

95. Schwab & Eisenberg, *supra* note 4, at 756–58. The authors note 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." *Id.* at 766.

96. *Id.* at 758.

97. *Id.*

98. *Id.* ("We cannot reject the existence of any effect of the fees act on filings because of this crest in the filing rate.")

99. *Id.*

100. 5 U.S.C. § 552 (2006).

101. *Id.* § 552(a)(4)(E).

102. 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, 660 (1984) ("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).

ized reviewing courts to inquire into the propriety of agencies' classification decisions, and narrowed several statutory exceptions to the required disclosure of requested documents.¹⁰³ 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 of the Handicapped Act,¹⁰⁴ 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.¹⁰⁵ 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."¹⁰⁶ Studies have shown that the volume of litigation under IDEA increased during the 1980s¹⁰⁷ and experienced a steep bump in 1987,¹⁰⁸ 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 percent of all cases reported between 1978 and 1995 concerned the provision for attorneys' fees—

103. See Elias Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 764–67 (1975) (describing the 1974 amendments and emphasizing the importance of procedures designed to speed agency processes and increase agency responsibility, together with those targeted at the cost of litigation).

104. Pub. L. No. 91-230, 84 Stat. 175 (1970).

105. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. § 1415(i)(2) (2006)).

106. Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified as amended at 20 U.S.C. § 1415(i)(3)(B)(i)(I)).

107. One study found that reported special education decisions in the federal courts "increased dramatically from the 1970s to the 1990s while the overall volume of education litigation in federal courts declined." Perry A. Zirkel & Anastasia D'Angelo, Commentary, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. LAW REP. 731, 733–34 (2002) (discussing Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 EDUC. LAW REP. 341, 348–49 (1997)). It made no effort to explain the jump in cases, however, or to break down decisions by statute or by year.

108. See SUSAN GORN, WHAT'S HOT, WHAT'S NOT: TRENDS IN SPECIAL EDUCATION LITIGATION 32 fig.14 (1996) (depicting reported decisions in non-class-action IDEA cases).

notwithstanding the fact that the fee-shifting provision did not even exist prior to 1986.¹⁰⁹ 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"¹¹⁰ (9.4 percent), or the responsibility for funding special education (9.6 percent).¹¹¹ 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.¹¹²

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.¹¹³ As discussed in the following Part, judicially created doctrines limit the availability and amount of fee awards.¹¹⁴ 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

109. MELINDA MALONEY & BRIAN SHENKER, *THE CONTINUING EVOLUTION OF SPECIAL EDUCATION LAW* 15 (1995); see also Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 EDUC. LAW REP. 35, 36 (2005) (noting the "disconcertingly notable residual segment [of cases] addressing attorneys' fees").

110. MALONEY & SHENKER, *supra* note 109.

111. *Id.* at 36.

112. GORN, *supra* note 108, at 34 fig.16; MALONEY & SHENKER, *supra* note 109, at 1.

113. 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." (footnotes omitted)); 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").

114. See FARHANG, *LITIGATION STATE*, *supra* note 4, at 191 (discussing restrictive judicial interpretations of Title VII's provision for fees, which result 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 LAB. LAW. 63, 72 (1989))); *infra* notes 195-98 and accompanying text.

the candle. Another possibility is that potential plaintiffs (as opposed to their attorneys) do not focus much on the possibility of a fee shift,¹¹⁵ paying more attention to the likely amount or consequences of a favorable judgment.¹¹⁶ Potential plaintiffs may not even be aware of fee-shifting provisions, especially if they have not yet consulted an attorney.¹¹⁷ 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 nominally comes from the plaintiff or the defendant. If anything, they may prefer to work without a fee shift so as to avoid the risk of costly satellite litigation over any fee award.

In sum, the available empirical evidence raises doubts about the efficacy of one-way fee shifts and damage enhancements. 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. Plaintiff-side fee shifts work, if at all, by generating litigation. Yet there is no evidence that they have done that. Paradoxically, there *is* empirical support for the notion that damage enhancements have boosted litigation rates. But such a boost may be unnecessary from a deterrence perspective, and may in fact be undesirable.

Perhaps even more important, the deterrent 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 consequences for would-be enforcers. Indeed, judges have the capacity to cancel out the positive effects of litigation incentives, rendering them ineffective

115. See Schwab & Eisenberg, *supra* note 4, at 780 (“If 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.”).

116. Farhang, *Congressional Mobilization*, *supra* note 4, at 8–9.

117. 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” (footnote omitted)).

at best and counterproductive at worst. Policymakers and commentators have ignored that risk, but it may help explain why many of the statutory provisions explored here have failed to generate litigation. In the remainder of this Article, I explore the connection between litigation incentives and judicial decisionmaking in more detail. We have seen how special incentives to sue affect litigants. How do they affect judicial decisionmaking and the law?

III. CONSEQUENCES FOR THE LAW

Part II showed that the link between fee shifts, damage enhancements, and litigation rates is complicated and context-dependent. Nevertheless, it is clear that litigation incentives do—or at least *may*—generate more suits some of the time. The proponents of such mechanisms seem to assume that increased filing rates will have no effect on judicial decisionmaking. As more plaintiffs sue, therefore, more plaintiffs will prevail. This Part challenges that assumption. There are several reasons to suppose that an uptick in the number of lawsuits 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. Far from leading inexorably to a plaintiff-friendly set of precedents, heightened litigation rates may well push case law in the opposite direction.

A. HOW CASES AFFECT JUDGES

Most commentators agree that judges' decisions are shaped by their personal views and life experiences.¹¹⁸ There is a great deal of debate about the extent to which judicial decisionmaking is based on "the law" or on judges' ideology,¹¹⁹ upbringing-

118. See, e.g., Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May 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.").

119. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64–72 (1993) (describing the influence of judges' ideology in the attitudinal model); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 812–13 (1995) (finding an eighty-percent correlation between Supreme Court Justices' ideological values and their votes in civil liberties cases).

ing,¹²⁰ gender,¹²¹ or even breakfast choices.¹²² Yet virtually everyone agrees that non legal considerations play *some* role in the work of a judge,¹²³ even if they operate on a wholly subconscious level.¹²⁴ As Justice Cardozo put it, “[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.”¹²⁵

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.¹²⁶ But there is no reason to think that the impact of work experience ends the moment a judge

120. See RICHARD A. POSNER, HOW JUDGES THINK 95–96 (2008) (describing studies that show that “in the period 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 had not been a government official, or if he had never worked as a prosecutor”).

121. Researchers have found that gender has an effect on judging that is independent of ideology. See Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 401 (2010); see also Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 436 (1994) (finding that gender plays a role in employment discrimination cases but not in search and seizure and obscenity cases).

122. The famous adage that the law is what the judge ate for breakfast typically is attributed to U.S. Court of Appeals Judge 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.’” *Id.* at 263. “This phrase is often used to summarize the views of the Legal Realists, and is often ascribed to Jerome Frank . . .” *Id.* at n.19.

123. POSNER, *supra* note 120, at 47 (“Attitudinalists and legalists disagree about the extent of political judging rather than about its existence.”).

124. See *id.* at 65–68 (explaining that “such things as temperament, personal background characteristics (such as race or sex), life experiences, and ideology” can affect judges’ decisions unconsciously); cf. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779–80 (2001) (finding that judges are susceptible to various forms of cognitive errors, and that “wholly apart from political orientation and self-interest, the very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations”).

125. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921).

126. See Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903, 954–56 (2003) (discussing the literature and reporting that seventy percent of relevant studies found some sort of a relationship between career experience and judicial choices).

dons the black robe. 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 on the bench.

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.¹²⁷ For example, researchers have determined that Supreme Court Justices with prior service on the bench tend to cast more liberal votes on economic issues,¹²⁸ and on equal protection claims,¹²⁹ 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.¹³⁰ 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

127. See, e.g., 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); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1477–78 (1998) (finding that federal district court judges with prior judicial experience at the 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”); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 37 (John M. Olin Law & Econ. Working Paper, Paper No. 404, 2008), available at <http://ssrn.com/abstract=1126403> (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 more liberal).

128. C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355, 362–63 (1981); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88*, 35 AM. J. POL. SCI. 460, 477–78 (1991) (building on prior study and confirming that prior judicial experience has a significant impact on economic liberalism).

129. Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277, 280–81 (1988).

130. Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1190 (1991) (controlling for other case characteristics).

judges do not stop evolving as people when they take the oath of office.¹³¹

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 the nature of the cases on her docket.¹³² The job of a judge can vary significantly from jurisdiction to jurisdiction, and from trial to appellate to supreme court. There are significant caseload differences among the federal courts of appeals, for instance, with the Ninth Circuit hearing a disproportionate share of immigration cases¹³³ and the District of Columbia Circuit hearing most administrative law cases.¹³⁴ 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

131. Additional support can be found in the literature about judicial preference change. See Lee Epstein et al., *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 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, 1225–26 (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 the 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. See 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 last thirty-five years.”).

132. 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”).

133. Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979–1990*, 45 STAN. L. REV. 115, 130 (1992).

134. Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1201–12 (1992).

others sentencing drug cases almost exclusively.”¹³⁵ In short, “judicial experience” can mean many different things, and it would be surprising if the variation in caseload 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.”¹³⁶ That may help explain why judges who sentence a higher proportion of violent crimes tend to impose fewer, and shorter, sentences of incarceration.¹³⁷

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. 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.¹³⁸

135. Brian D. Johnson, *The Multilevel Context of Criminal Sentencing: Integrating Judge- and County-Level Influences*, 44 CRIMINOLOGY 259, 278 (2006).

136. *Id.* at 269; see also Robert M. Emerson, *Holistic Effects in Social Control Decision-Making*, 17 LAW & 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, 1678 (2009).

137. Johnson, *supra* note 135, at 288.

138. See generally Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) (assessing the efficacy of live disputes in the common law system). 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

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.¹³⁹ Litigants decide which cases to file, which cases to settle, and which cases to appeal.¹⁴⁰ Those decisions determine which disputes are decided by judges, 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.¹⁴¹ 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.¹⁴² The upshot is that the cases presented for judicial decision will tend to have especially strong facts for the repeat-player manufacturer and weak facts for the plaintiff

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.

139. 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. *See, e.g.,* *Ponte v. Real*, 471 U.S. 491, 502 (1985).

140. J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* 17 (1981) (“Litigants, not judges, set court agendas.”).

141. Cross, *supra* note 66, at 7–8 (laying out the economic case for this strategy); *see also* Lederman, *supra* note 6, at 234 (“[P]arties’ settlement behavior will influence the substantive content of precedent.”); *cf.* Hylton, *supra* note 64, 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.”).

142. 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).

consumers, which in turn will tend to generate a set of precedents that favor manufacturers.¹⁴³

Thus, judges' decisions may be affected by the cases they hear in at least two ways. First, judges' caseloads 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 cases presented to them.

B. JUDICIAL RESPONSES TO INCREASED LITIGATION RATES

Litigation incentives are designed—and for present purposes I assume that they work—to change the range of cases that judges hear, and in particular to increase the number of claims 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 safe-

143. See Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1043 (1986) (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 generally Richard Startz & Albert Yoon, *Litigant Resources and the Evolution of Legal Precedent* (Sept. 8, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1475350>.

ly expand judicial influence even when the courts are dominated by the other party.¹⁴⁴

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.¹⁴⁵

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. On the one hand, 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. I argue that the latter response is more likely. At the very least, it is a risk that legislators should consider, particularly “when the courts are dominated by the opposite party.”¹⁴⁶

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.¹⁴⁷ Experience

144. Smith, *supra* note 50, at 148. Sean Farhang, whose excellent study of litigation incentives is discussed in Part I, argues along similar lines that Congress might rationally respond to the judicial decisions that reduce statutory protections, thereby making litigation less attractive to potential plaintiffs, by either increasing the possible judgment or decreasing the cost of those suits. FARHANG, LITIGATION STATE, *supra* note 4, at 61–68.

145. See *supra* note 6 and accompanying text.

146. Smith, *supra* note 50, at 148.

147. 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*

with multiple cases might counteract 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.¹⁴⁸ That sentiment is captured by “[o]ne judge [who] was alleged to have said 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.’”¹⁴⁹ Such stereotyped thinking typically is grounded in ignorance, and in theory could be combated by mechanisms like diversity training,¹⁵⁰ 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,

Courts, 21 GEO. IMMIGR. L.J. 1, 10 (2006) (“During a four-year period [from 2002 through 2005], immigration appeals septupled from 1,760 to 12,349 per year. . . . The increase in 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. *E.g.*, *Benslimane v. Gonzales*, 430 F.3d 829, 829 (7th Cir. 2005) (“In the year ending on the date of the argument, different panels of this court reversed the Board of Immigration Appeals in whole or 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, available at 2005 WLNR 20942331.

148. 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 Second Circuit sometimes “exhibited impatience with [sexual harassment] claims, as well as stereotyped thinking about the seriousness of the sexual harassment”).

149. *Id.* at 348.

150. *See generally* Louise F. Pendry et al., *Diversity Training: Putting Theory into Practice*, 80 J. OCCUPATIONAL & ORGANIZATIONAL PSYCH. 27 (2007) (discussing the nature and efficacy of diversity training in the workforce).

rather than deliberative, thinking.¹⁵¹ 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.”¹⁵² 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.”¹⁵³ Unfortunately, judges’ intuitions typically develop in what Guthrie and his coauthors 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.”¹⁵⁴ 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 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.¹⁵⁵ When reasonable minds can disagree on what inferences to draw from a set of facts, judges are likely to fall back on their preexisting 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 and his coauthors explain that:

[J]udges 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

151. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007); see also POSNER, *supra* note 120, 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 . . .”).

152. Guthrie et al., *supra* note 151, at 31.

153. *Id.* at 31–32.

154. *Id.* at 34. The authors note that “errors seldom have adverse consequences for judges,” and “indirect consequences may be insufficient to guarantee good or improved performance.” *Id.* 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.* at 35.

155. See Priest & Klein, *supra* note 142, at 14–15 (explaining why close cases are more likely to be litigated than cases that are skewed in favor of one or the other party).

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.¹⁵⁶

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.¹⁵⁷ Given the rarity of en banc review¹⁵⁸ or review by the Supreme Court,¹⁵⁹ together with the strong tradition of horizontal precedent on the courts of appeals,¹⁶⁰ 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

156. Guthrie et al., *supra* note 151, at 32.

157. See Clermont & Eisenberg, *supra* note 26, at 138 n.106 (citing *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–300 (7th Cir. 1995) (noting that the *Rhone-Poulenc* court used defendant-drug companies’ 92.3 percent win rate in prior cases brought by other hemophiliacs to justify denial of class action status to the hemophiliac plaintiffs, and describing this as a “disturbing example” of the tendency to focus on trial outcomes and ignore settlements).

158. Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 818 (1993) (reporting that, between 1982 and 1991, each circuit decided an average of 7.5 cases on en banc review per year).

159. Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1483 (2003) (“While the circuit courts decide tens of thousands of cases per year, the Supreme Court recently has reviewed fewer than one hundred of those decisions, or less than 3% of the petitions filed, per year. Hence, . . . ‘the decision of the court of appeals was left undisturbed in 99.7[%] of [those courts’] cases.’” (quoting DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 17 (2000))).

160. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1017 (2003) (“Litigants feel precedent’s preclusive effect most keenly in the courts of appeals, which candidly describe their approach to stare decisis as ‘strict,’ ‘binding,’ and ‘rigid.’”).

working conditions) and to dismiss journalistic criticism as likewise the product of politics and ignorance.”¹⁶¹

While most features of the appellate decisionmaking process seem poorly suited to learning, the fact that appellate judges decide cases in panels of three might cut in the other direction.¹⁶² 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.¹⁶³ 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.¹⁶⁴ One explanation for such “panel effects”¹⁶⁵ 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.¹⁶⁶ 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 appeals, occurring in only six to eight percent of all cases, including those in “particularly contentious issue areas, where measures of individual judges’ voting and measures of

161. POSNER, *supra* note 120, at 39.

162. See Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1748 (2008) (“[T]here is an argument that the collegial nature of multimember appellate panels contributes to reflective decisionmaking and thus to the quality of appellate review.”).

163. See POSNER, *supra* note 120, at 31 & n.26 (citing studies).

164. See Boyd et al., *supra* note 121; Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 320 (2004).

165. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 851–52 (2006) (describing panel effects).

166. See POSNER, *supra* note 120, at 31; see also Farhang & Wawro, *supra* note 164, at 308.

panel outcomes show wide ideological variation.”¹⁶⁷ 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.”¹⁶⁸ The result is a strong norm of unanimity, which encourages judges serving on a panel together to reach a decision 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.¹⁶⁹

It is difficult to disentangle 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 copanelists, *not* that they *continue* to behave differently *after* serving on a heterogeneous panel. If judges truly were learning from one 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. On the contrary, by demonstrating that judges’ decisionmaking changes from one panel to the next, the panel-effects literature indicates that any learning that occurs on a panel evaporates with the next assignment.

167. Farhang & Wawro, *supra* note 164, at 306.

168. POSNER, *supra* note 120, at 32.

169. *See id.*; Farhang & Wawro, *supra* note 164, 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 165, 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.”).

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.¹⁷⁰ 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. For example, 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 only be gained by looking at the academic research on these topics (assuming that the judge is not out doing empirical research on his or her own).”¹⁷¹

In sum, while it is possible that more cases of a particular kind will lead to judicial learning and to more pro-plaintiff outcomes, the nature of the litigation process suggests that increased litigation rates are unlikely to have a positive effect on judges—particularly those who are not inclined to favor the claims involved. The more likely result is judicial backlash against litigation incentives and the substantive rights they were designed to promote.

2. Judicial Backlash

Federal judges have long complained about overcrowded dockets and inadequate resources,¹⁷² and judicial decisions fre-

170. See generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1991) (asserting that many employment decisions often result from unintentional judgment errors, rather than motivational bias).

171. Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 86 n.6 (2002).

172. See 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); Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 896–97 (1993) (discussing the “caseload crisis” of the federal courts and the judicial

quently invoke the specter of a “flood of litigation.”¹⁷³ 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 federal courts were beginning to feel the effects of the 1991 amendments to Title VII, 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 controlled by legal standards that, lacking sufficient precision, are overgeneralized and of marginal use.”¹⁷⁴ Another judge wrote an article arguing that Congress should create special Article I courts to deal with claims that are overloading the federal courts, including Title VII claims in that category.¹⁷⁵ 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 prerequisite for gaining access to this 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.¹⁷⁶

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

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); see also Bainbridge & Gulati, *supra* note 171, at 102 (“That federal judges, at both the trial and circuit court levels, are under severe resource and expertise constraints is well-documented.”).

173. See Toby J. Stern, Comment, *Federal Judges and Fearing the “Floodgates of Litigation,”* 6 U. PA. J. CONST. L. 377, 383 (2003) (tracing judicial use of the “flood of litigation” metaphor to the 1800s).

174. Kenneth Conboy, Op-Ed., *Trouble in Foley Square*, N.Y. TIMES, Dec. 27, 1993, at A17, available at 1993 WLNR 3360187.

175. Stanley Sporin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 757–59 (1992).

176. *Tschappat v. Reich*, 957 F. Supp. 297, 299 (D.D.C. 1997).

handled by administrative agencies.¹⁷⁷ The 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.”¹⁷⁸ The D.C. Circuit’s Task Force on Gender, Race, and Ethnic Bias reported that sixteen to seventeen percent 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.”¹⁷⁹ 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].”¹⁸⁰ Similarly, the Eighth Circuit’s Gender Fairness Task Force found that 10.9 percent of judges agreed or strongly agreed with the statement that discrimination cases are undeserving of federal court time because “the issues are trivial.”¹⁸¹

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 officials under § 1983 have increased geometrically.”¹⁸² Another Su-

177. Doyle et al., *supra* note 148, at 343.

178. *Id.*

179. SPECIAL COMM. ON GEND., DRAFT FINAL REPORT OF THE SPECIAL COMMITTEE ON GENDER TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC BIAS 101 (1995).

180. *Id.* at 102.

181. EIGHTH CIRCUIT GEND. FAIRNESS TASK FORCE, FINAL REPORT AND RECOMMENDATIONS (1997), *reprinted in* 31 CREIGHTON L. REV. 9, 72–73 (1997).

182. 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

preme 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.”¹⁸³

Thus, even if litigation incentives do not in fact increase the number of claims filed, judges may believe that they do.¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶ Scholars and judges have voiced concerns about frivolous litigation in many contexts where litigation incentives are available, ranging from *qui tam* actions under the False Claims Act,¹⁸⁷ to civil RICO,¹⁸⁸ to antitrust,¹⁸⁹ to the Americans With Disabilities Act,¹⁹⁰ and beyond.

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’être* 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.

United Nuclear Corp. v. Cannon, 564 F. Supp. 581, 592–93 (D.R.I. 1983).

183. Karen O’Connor & Lee Epstein, *Bridging the Gap Between Congress and the Supreme Court: Interest Groups and the Erosion of the American Rule Governing Awards of Attorneys’ Fees*, 38 W. POL. Q. 238, 246 (1985) (quoting an unidentified Supreme Court Justice interviewed in the 1983–1984 academic year).

184. Another source of judicial misperception 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 26, 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.”).

185. 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.”).

186. *But cf. supra* note 64 (explaining that one-way fee shifts should encourage the filing of relatively strong claims).

187. See, e.g., William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1855 (1996) (“[T]he *qui tam* mechanism provides inadequate disincentives for relators to file meritless suits.”); Joan H. Krause, “Promises to Keep”: *Health Care Providers and the Civil False Claims Act*, 23 CARDOZO L. REV. 1363, 1383

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.¹⁹¹ More broadly, Bert Huang’s recent study of appellate decisionmaking shows that judges may respond to increased rates of appeal by reversing fewer cases across the board.¹⁹²

Judges’ capacity to cut back on litigation extends well beyond such reactive measures, however. Judges also can use doctrine proactively to reduce the number, or change the complexion, of the cases that will fill up their dockets going for-

(2002) (suggesting that “meritless lawsuits” may be to blame for the increase in *qui tam* litigation).

188. 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 attorneys’ fees draws litigants and lawyers . . . like lemmings to the sea.”); Am. Bar Ass’n, *RICO Coordinating Committee Report*, 112 ANN. REP. A.B.A. 277, 280 (1987) (arguing that curtailing civil RICO suits “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. LAW. 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.”).

189. See, e.g., Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 815 (1987) (arguing that the availability of treble damages for antitrust violations “encourages filing of claims which are at best marginal and at worst frivolous”).

190. See, e.g., Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 43 n.184 (2001) (“Since the ADA’s enactment, its critics have argued that the right to file employment discrimination complaints under the ADA has inspired a barrage of frivolous charges brought by people with ‘bad backs,’ ‘psychological stress,’ and other ‘nonserious’ disabilities”); James Bovard, *The Disabilities Act’s Parade of Absurdities*, WALL ST. J., June 22, 1995, at A16 (suggesting that the ADA produces absurd lawsuits).

191. See David A. Hoffman et al., *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*, 96 HARV. L. REV. 374 (1982).

192. Bert I. Huang, *Lightened Scrutiny* 20–21 (Sept. 30, 2010) (unpublished manuscript) (on file with author).

ward. 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.¹⁹³ 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,¹⁹⁴ have held that defendants may make a waiver of fees a condition of settlement,¹⁹⁵ and have refused to permit pro se litigants to collect fees.¹⁹⁶ As for damages, courts have limited the availability of both statutory and punitive damages in cases where plaintiffs cannot prove actual damages.¹⁹⁷ Such decisions reduce the value, and hence the likely effect, of litigation incentives.

193. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603–04 (2001) (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 498 U.S. 782, 792 (1989)); cf. Andrea Saltzman, *Incorporating Statutes into the Common Law: The Judicial Response to Statutes Shifting Attorneys’ Fees*, 30 ST. LOUIS U. L.J. 1103, 1142 (1986) (describing state court hostility to fee-shifting statutes). For critical commentary, see generally Albiston & Nielson, *supra* note 22, and David Shub, *Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney’s Fees Awards for Civil Rights Plaintiffs*, 42 DUKE L.J. 706 (1992).

194. Samuel R. Bagenstos, *Thurgood Marshall, Meet Adam Smith: How Fee-Shifting Statutes Provide a Market-Based System for Promoting Access to Justice (Though Some Judges Don’t Get It)* 4 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 150, 2009), available at <http://ssrn.com/abstract=1407275> (“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 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))).

195. *Evans v. Jeff D.*, 475 U.S. 717, 737–38 (1986).

196. See generally Susan L. Keilitz, Note, *Attorney Fees, Freedom of Information, and Pro Se Litigants: Per Se Prohibitions Frustrate Policies*, 26 WM. & MARY L. REV. 349 (1985) (criticizing courts’ refusal to permit awards under the Freedom of Information Act of attorneys’ fees to pro se litigants).

197. See Hong, *supra* note 54, at 72–73 (criticizing a Supreme Court decision narrowly interpreting the Privacy Act’s award of statutory damages); Justin W. Ristau, *Should Punitive Damages Be Recoverable Absent A Finding of*

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.¹⁹⁸ 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.¹⁹⁹ 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.”²⁰⁰

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 defend-

Actual Damages Under the Federal Fair Housing Act?, 70 U. CIN. L. REV. 343, 362–64 (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 Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1147 (2006).

198. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); see also *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526–29 (1983) (holding that labor unions may not sue for nonbusiness 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 Va., Inc. v. McCready*, 457 U.S. 465, 477 (1982) (“Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover three-fold damages for the injury to his business or property.”).

199. *Ill. Brick*, 431 U.S. at 730–31.

200. *Baker*, *supra* note 3, at 384–85 (emphasis omitted); see also Breit & Elzinga, *supra* note 53, at 420 (noting the Court’s “obvious concern with ruinous awards”).

ants anxious to avoid the crushing cost of antitrust discovery and the risk of treble damages.²⁰¹ 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.²⁰² As *Iqbal* makes clear, *Twombly*'s new rule applies to all categories of federal civil litigation, making it more difficult for plaintiffs to get through the courthouse door.²⁰³

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.²⁰⁴ The suggestion, quoted above, that antidiscrimination laws should be adjusted to make it harder for a plaintiff to make a *prima facie* case, illustrates this possibility.²⁰⁵ And reports of judicial hostility to, and backlash against, employment discrimination statutes are legion in the academic literature.²⁰⁶ The result is a body of case law that makes employment discrimination cases extremely difficult to win.

201. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–60 (2007).

202. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948–49 (2009).

203. *Id.* at 1953.

204. 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 case-load pressures with the “adoption of ‘hostile’ substantive rules” effectively discouraging “litigants from using the courts”).

205. *Supra* note 176 and accompanying text.

206. See, e.g., 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); Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 72–73 (1999) (arguing that courts have become increasingly hostile to harassment cases brought under Title VII, and attributing such hostility to the huge increase in Title VII claims after 1991); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556, 569 (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 MODERN AM. 21, 26 (2007) (discussing judicial hostility toward employment discrimination cases during the 1990s, when litigation rates were at their peak); Nielsen et al., *supra* note 70, at 9 (“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.”).

Employment discrimination plaintiffs win about thirty percent of the cases that go to trial,²⁰⁷ compared to a win rate between fifty to sixty percent for plaintiffs in tort and contract cases.²⁰⁸ 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 ten percent of those cases,²⁰⁹ while tort and contract plaintiffs win slightly more than thirty percent.²¹⁰ Employment discrimination plaintiffs also fare terribly on appeal²¹¹—a phenomenon that scholars have attributed to an erroneous belief among appellate judges that trial judges are too plaintiff friendly.²¹² Moreover, while litigation rates shot up after Congress made noneconomic and punitive damages available to Title VII plaintiffs in 1991, the plaintiff win rate went down.²¹³

Granted, the settlement rate in employment discrimination cases increased somewhat after 1991.²¹⁴ If settlements are

207. See Clermont & Schwab, *supra* note 70, at 129 (reporting a 28.47 percent win rate for employment discrimination plaintiffs at trial); Nielsen et al., *supra* note 70, at 19 (reporting that plaintiffs win thirty-three percent of all employment discrimination cases that result in judgment after trial).

208. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 457 (2004).

209. *Id.*; see also Clermont & Schwab, *supra* note 70, at 128 (“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 70, at 19 (“Of the cases that do not settle early, plaintiffs lose the motion for summary judgment in more than one-half of these cases (57% of remaining cases or 19% of filings overall).”).

210. Clermont & Schwab, *supra* note 208. Clermont and Schwab report a total win rate for employment discrimination plaintiffs (including both pretrial and trial adjudication) of 16.71 percent, compared to 52.9 percent for non-jobs cases. Clermont & Schwab, *supra* note 70, at 128 & display 14.

211. Clermont & Schwab, *supra* note 70, at 111 (explaining that in appeals of federal employment discrimination cases, a “statistically significant differential exists for appeals from wins at the stage of pretrial adjudication (thirty percent compared to eleven percent), and it becomes more pronounced for appeals from wins at the trial stage (forty-one percent compared to nine percent).”). The plaintiff-defendant spread is more extreme in employment appeals than for other civil cases, which have a thirty-five percent reversal rate for defendants and a fifteen percent reversal rate for plaintiffs. *See id.*

212. *Id.* at 113; Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 949.

213. See Clermont & Schwab, *supra* note 208, at 433, 457.

214. See Clermont & Schwab, *supra* note 70, at 20–21; see also Clermont & Schwab, *supra* note 208 (reporting that 67.2 percent of jobs cases settled pre-1992, while 70.31 percent settled post-1991). The authors were not focused on

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.”²¹⁵ A second reason is that a low rate of success 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 above²¹⁶—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.²¹⁷ 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.²¹⁸ That is especially true at the appellate level, where rulings often establish principles that will affect decisions in later cases.²¹⁹ 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.²²⁰ My claim here is not that litigation incentives are en-

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. Clermont & Schwab, *supra* note 70, at 20–21.

215. Nielsen et al., *supra* note 70, at 35.

216. See *supra* notes 144–46 and accompanying text.

217. See Kotkin, *supra* note 68, at 117.

218. See Cross, *supra* note 66, at 8; Lederman, *supra* note 6, at 234–35.

219. As noted above, employment-discrimination plaintiffs fare very poorly on appeal. See *supra* notes 211–12 and accompanying text.

220. See Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CALIF. L.

tirely 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.²²¹ Many of those same scholars have identified treble damages as the fuel for such decisions.²²² Concerned that the prospect of treble damages will encourage “lawyers to turn every conceivable tort and contract dispute in-

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.”); Selmi, *supra* note 206, 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); Swaminathan, *supra* note 206 (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”).

221. Breit & Elzinga, *supra* note 53, 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.”).

222. 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 53, at 443 (“As 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. This has taken the form of stricter standards regarding liability, standing, and damage estimation.”); Salop & White, *supra* note 143, at 1039 (“As the potency of the treble damages remedy 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.”). The Federal Trade Commission agrees. See Intel Corporation, Docket No. 9341, 2009 WL 4999728 (2009) (“[C]oncern 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.”).

to an antitrust action,”²²³ and wary of imposing excessive penalties “where the [defendant’s] conduct seems ambiguous and complicated,”²²⁴ courts have adopted deliberately underinclusive rules for antitrust liability.²²⁵ Not surprisingly, plaintiffs’ win rates in private antitrust actions are lower than average.²²⁶

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.²²⁷ 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.²²⁸ 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.”²²⁹

223. HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 8 (2005).

224. C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 675 (2009).

225. *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 and concerns about treble damages and unpredictable jury awards).

226. See Salop & White, *supra* note 143, at 1011–12; see also WILLIAM BAXTER, *THE POLITICAL ECONOMY OF ANTITRUST: PRINCIPAL PAPER BY WILLIAM BAXTER* 16–21 (Robert D. Tollison ed., 1980) (reporting that plaintiffs in private antitrust actions between 1964 and 1970 won 15.2 percent of the time and attributing that low rate to the relatively greater stakes in antitrust cases to defendants).

227. See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1399 (7th Cir. 1989).

228. 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).

229. Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 41 (2008); see also Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 23 n.88 (1995) (noting that predatory pricing plaintiffs “must overcome deliberately underinclusive liability rules”).

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 treble damages and attorney's fees to successful plaintiffs.²³⁰ 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 [sic] fees."²³¹ And, as in the antitrust arena, judges have expressed the concern that the lure of treble damages awards may encourage strike suits, as "the defendant, facing a tremendous financial exposure in addition to the threat of being labeled a 'racketeer,' will have a strong interest in settling the dispute."²³² Courts have accordingly construed RICO's civil provisions strictly,²³³ leading to a "stunningly awful final success rate" for plaintiffs.²³⁴ Notably, they have done so in the face of an explicit congressional instruction that the statute's terms are to be "liberally construed."²³⁵

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."²³⁶ Constitutional tort plaintiffs settle fewer cases than other civil plaintiffs.²³⁷ They also win far fewer of

230. 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); *id.* at 42 ("[J]udicial hostility to the onslaught of private actions brought under RICO has led courts to construe RICO's civil provisions strictly . . .").

231. *Id.* at 45–46 (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*, 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").

232. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting).

233. For a discussion of relevant case law, see Blakey & Cessar, *supra* note 231, at 580–90 & nn.230–39; Kurzweil, *supra* note 230, at 70–77, 86–88.

234. Bucy, *supra* note 1, at 22.

235. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904, 84 Stat. 922, 947.

236. Schwab & Eisenberg, *supra* note 4, at 740.

237. *Id.* at 759–60 & fig.3.

the cases that go to judgment.²³⁸ 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.”²³⁹

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,²⁴⁰ such statutes pale in comparison to the many important environmental and antidiscrimination statutes that shift fees and/or enhance damages for prevailing plaintiffs. Thus, it should come as no surprise if 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.²⁴¹ If judges

238. *Id.* at 760–61 & fig.4.

239. *Id.* at 760. Schwab and Eisenberg 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. Recall, however, that Schwab and Eisenberg concluded that “scant evidence exists to support a filing increase attributable to the fees act.” *Id.*; see also *supra* notes 95–99 and accompanying text. They also emphasized that a plaintiff-side fee shift should have the greatest effect on meritorious cases. Schwab & Eisenberg, *supra* note 4, at 747. Thus, it is unlikely that CRAFAA prompted an increase in the proportion of weak claims filed, which in turn caused the drop in plaintiffs’ success rates.

240. See FARHANG, LITIGATION STATE, *supra* note 4, at 68 (discussing the Taft-Hartley Act of 1947, the Cuban Liberty and Democratic Solidarity (Liber-tad) Act of 1996, and the Partial-Birth Abortion Ban Act of 2003).

241. 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 fa-

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.

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,²⁴² 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.²⁴³ The most controversial was *Wards Cove*

cilitate litigation, and increasingly uninterested in insuring the availability of functional remedies for the violation of federal rights” and citing representative commentary); Paul B. Stephan, *Empagran—Empire Building or Judicial Modesty?* 6 (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Paper, Series No. 2010-07, 2010), available at <http://ssrn.com/abstract=1559879> (“However widely Republican appointees may diverge on cultural or political issues, they may share . . . a skepticism about civil justice as a litigation rationale.”).

242. DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 147, 158–60 (1999) (showing that Congress is less likely to delegate at all during periods of divided government, and, when it does delegate, Congress is more likely to choose independent agencies than executive agencies subject to greater presidential control).

243. *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 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 Techs.*, 490 U.S. 900, 905 (1989) (requiring that plaintiffs 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); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–55 (1989) (revising the burdens of pleading and proof in disparate impact claims); *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).

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).²⁴⁴ 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.²⁴⁵ *Wards Cove* appeared to adopt a standard that was 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.”²⁴⁶ The Court also shifted the burden of persuasion to the plaintiff on the justification point.²⁴⁷ 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.²⁴⁸ 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.”²⁴⁹ For the Bush Administration, such a requirement would “all but compel employers to adopt quotas by making Title VII liability hinge on bad numbers.”²⁵⁰ 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.²⁵¹ 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

244. *Wards Cove*, 490 U.S. at 645–46.

245. See Andrew M. Dansicker, *A Sheep in Wolf’s Clothing: Affirmative Action, Disparate Impact, Quotas, and the Civil Rights Act*, 25 COLUM. J.L. & SOC. PROBS. 1, 16 & nn.15–16 (1991).

246. *Wards Cove*, 490 U.S. at 659 (disclaiming any requirement “that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business”).

247. *Id.* at 659–60.

248. For a detailed discussion of the legislative override process, see FARHANG, LITIGATION STATE, *supra* note 4, ch. 6.

249. S. 2041, 101st Cong. §§ 3(o), 4(k)(2) (1990).

250. William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 639 (1991).

251. See Neil A. Lewis, *President’s Veto of Rights Measure Survives By 1 Vote*, N.Y. TIMES, Oct. 25, 1990, at A1, available at 1990 WLNR 2946688.

opposition from congressional Republicans.²⁵² 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.²⁵³ 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.²⁵⁴

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 lawsuits. Perhaps

252. See FARHANG, LITIGATION STATE, *supra* note 4, at 187–88 (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’”).

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

254. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1992) (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. § 105(a)(1), 105 Stat. at 1074; see also Dansicker, *supra* note 245, 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.” § 105(b), 105 Stat. at 1075. 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 Hanner 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.” Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 52 n.12 (noting as well the “many additional ambiguities” in the 1991 Act). Indeed, the lower courts are still split on the appropriate test for disparate impact cases. See Cristine Nardi, Comment, *When Health Insurers Deny Coverage for Breast Reconstructive 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, 1164 (1993) (arguing that *Wards Cove* is still good law after the enactment of the Civil Rights Act of 1991), with Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 388 (1996) (arguing for a strict business necessity standard under the Act).

that was the most that one could have expected, given the political climate.²⁵⁵ But, as described above, 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. Interest 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.

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 sixty percent 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 stat-

255. The primary alternative to a “private enforcement” regime—greater enforcement by the relevant agency, which in the context of Title VII is the EEOC—was not a promising solution from the perspective of Congress in the early 1990s. The EEOC had a dismal record of enforcement under the Reagan Administration, and seemed unlikely to improve under President Bush. See FARHANG, LITIGATION STATE, *supra* note 4, at 190–93. The best alternative seems to be *substantive* change to Title VII, which would increase the probability of success for plaintiffs.

ute 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 thirty percent—the expected value of litigation will be no worse than before the amendment.²⁵⁶ 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 favor defendants. For a while, more plaintiffs were suing and roughly sixty percent 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,²⁵⁷ 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 sixty percent of plaintiffs recovered \$50,000.²⁵⁸ De-

256. A thirty-percent chance of recovering \$100,000 is equal to \$30,000, which is the same as a sixty-percent chance of recovering \$50,000.

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

258. Compensating victims is not always a central goal of litigation. In the context of environmental citizen suits, for example, private plaintiffs do not recover any personal damages—any judgment is paid into the U.S. Treasury. In such circumstances, it should make no difference (from the perspective of

creasing the number of plaintiffs who 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.²⁵⁹ 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.²⁶⁰ As a result, the total social cost of litigation may be higher after the amendment even if plaintiffs file the same number of claims.

A second possible objection is that increased litigation rates are valuable in their own right because they increase deterrence.²⁶¹ Farhang has argued, for example, that the 1991 amendments to Title VII had the laudable effect of increasing voluntary compliance by employers. Farhang has shown 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.”²⁶² Other studies call into question the link between Title VII litigation and im-

compensation) whether thirty percent or sixty percent of plaintiffs prevail. The important number is the total amount of recovery from defendants.

259. 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. *Cf. Zemans, supra* note 28, at 203 (“[W]ith fees dependent upon a successful outcome, cases not likely to win are screened out of court.”).

260. Robert W. Fioretti & James J. Convery, *Attorney’s Fees: The Mushrooming Cloud of Litigation*, 34 DEPAUL L. REV. 943, 947 (1985) (“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 53, at 2082–83 (acknowledging that “one-way fee shifting statutes have significant impact in increasing overall litigation costs”).

261. For a discussion of the link between litigation and deterrence, as well as the important difference between specific and general deterrence, see FARHANG, LITIGATION STATE, *supra* note 4, at 8–9, 203–04.

262. *Id.* at 204.

provements in the employment prospects for minorities and women,²⁶³ even at firms that have been subject to suit themselves.²⁶⁴ Still others dispute the core premise that private litigation has positive effects on compliance.²⁶⁵ Of course, if private litigation does not lead to more deterrence generally, then increasing the rate of litigation is unlikely to improve matters. 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. Economic theory predicts that potential violators will weigh the costs and benefits of violating the law and will act only if expected gains outweigh expected losses, taking into account the likelihood of detection, litigation, and an adverse judgment.²⁶⁶ 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 probability of *losing* those suits and facing damages awards and other sanctions.²⁶⁷ 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.

263. See, e.g., John J. Donohue III & Peter Siegelman, *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).

264. Kalev & Dobbin, *supra* note 25, 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”); *id.* at 860 (discussing the 2001 Skaggs study that found declines in managerial diversity in supermarkets following a settlement or award associated with litigation); Lynn Perry Wooten & Erika Hayes James, *When Firms Fail to Learn: The Perpetuation of Discrimination in the Workplace*, 13 MGMT. INQUIRY 23, 30 (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).

265. 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)).

266. See FARHANG, LITIGATION STATE, *supra* note 4, at 8–9, 22; *supra* notes 91–92 and accompanying text.

267. See Salop & White, *supra* note 143, at 1019.

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 too tough a row to hoe.”²⁶⁸ 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 will always 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 attorneys’ fee shifts and enhanced damages in order to encourage 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 judges respond to mechanisms designed to increase litigation rates. My analysis suggests that when litigation incentives “work,” they may backfire. A judge who believes that a given type of claim is uninteresting or unimportant is unlikely to react favorably to an increase in the number of

268. Clermont & Schwab, *supra* note 70, at 121.

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 respond to the increase in litigation rates by invoking tools that help him dispose of the cases more quickly—or to discourage plaintiffs from filing them 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 rights that the incentives were designed to promote.

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 overvaluing litigation incentives when bargaining over statutory policy.