

December 1995

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Recommended Citation

Susan M. Olson, *How Much Access to Justice from State Equal Access to Justice Acts*, 71 Chi.-Kent L. Rev. 547 (1995).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol71/iss2/7>

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HOW MUCH ACCESS TO JUSTICE FROM STATE "EQUAL ACCESS TO JUSTICE ACTS"?

SUSAN M. OLSON*

I. INTRODUCTION

Many Americans subscribe to two popular political ideologies: the antigovernment sentiment that believes an unregulated free market is virtually always preferable to government involvement and the antilitigation sentiment that views our country as imperiled by too many lawyers and too much litigation. President George Bush's Counsel on Competitiveness expressed these views when it called for "unleash[ing] the creative energy and incentives of the free market" from "regulations that are outdated and unnecessary"¹ and also recommended various steps to counter what it perceived as "excessive, needless litigation."² More recently, the Republicans' 1994 "Contract with America" included planks calling for both less regulation and limits on litigation.³

Although many people subscribe to both ideologies, the two can easily be in tension with each other. Furthermore, when the two come head to head, the antigovernment sentiment frequently prevails. According to Robert Kagan, America's widely decried, yet pervasive, "adversarial legalism" is primarily a function of a political culture that wants a government that protects its citizens from environmental harms and injustices, but does not trust concentrated power and thus divides and checks governmental authority.⁴ Litigation brought to

* Associate Professor, The University of Utah. I would like to thank Tawni Hanseen and Hector Carbajal for outstanding research assistance at many stages throughout this research. Frank Bell, Heidi Gurgel, and Lisa Tolk also provided able assistance in earlier stages of the project and Heidi Franco in the final stages. I appreciate the interest shown by Harold Krent, Gregory Sisk, Thomas Rowe, Susan Mezey, and Bert Kritzer. The research was supported by the National Science Foundation under Grant No. SES-9211693. I especially appreciate the personal support shown by Program Director Susan White.

1. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *THE LEGACY OF REGULATORY REFORM: RESTORING AMERICA'S COMPETITIVENESS*, at Cover Memorandum (1992).

2. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA*, at Cover Memorandum (1991) [hereinafter *AGENDA FOR CIVIL JUSTICE*].

3. See Newt Gingrich et al., *Common Sense Legal Reform Act*, in *CONTRACT WITH AMERICA* (Ed Gillespie & Bob Schellhas eds., 1994); Newt Gingrich et al., *Job Creation and Wage Enhancement Act*, in *CONTRACT WITH AMERICA* (Ed Gillespie & Bob Schellhas eds., 1994).

4. Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 *LAW & SOC. INQUIRY* 1, 7-8 (1994).

check government wrongdoing and overreaching is a more specific example of opposition to government trumping opposition to litigation. As much as some people say they dislike litigation, those same people willingly use it to challenge government activity that they dislike even more.

By facilitating access to the courts to challenge government action, Equal Access to Justice Acts (EAJAs) exemplify the predominance of antigovernment over antilitigation ideology. EAJAs are statutes in which, under specified circumstances, the government reimburses the attorney fees of private parties prevailing in litigation against it. Their antigovernment ideological thrust is evident in their origins in the deregulatory climate of the 1980s and their explicit purpose to encourage small businesses to resist governmental actions.

EAJAs are one species of the larger genus of statutes shifting attorney fees and other costs of litigation to the opposing party. Along with other mechanisms that facilitate access to the courts, such as subsidized legal services for the poor, organizational standing to sue, group legal insurance, lower filing fees or jurisdictional dollar limits, and citizen standing, fee-shifting statutes have been featured in the ideological debate over the pros and cons of litigation and the role of the legal system in American society.

Opinions about these mechanisms turn not just on ideology, of course, but also on their redistributive implications, and fee-shifting statutes are explicitly redistributive. Although EAJAs are a small, and in some ways atypical, subset of fee-shifting statutes, their relatively broad scope makes them significant examples of fee shifting in operation. EAJAs potentially make more equal the litigation resources of private parties and the government. This Article examines the extent to which such equalization actually occurs. How much redistribution takes place under EAJAs and who benefits from it depend on at least three factors: the terms of the statutes themselves, who chooses to use them, and how the courts interpret and apply the statutes in the cases that come before them.

This Article empirically examines the scope and use of state Equal Access to Justice Acts and compares them to prior research findings on the federal EAJA.⁵ Part II puts EAJAs into the larger context of fee-shifting statutes of all sorts in the United States and the normative debate about fee shifting. Part III then discusses the his-

5. Susan G. Mezey & Susan M. Olson, *Fee Shifting and Public Policy: The Equal Access to Justice Act*, 77 JUDICATURE 13 (1993).

tory and purposes of EAJAs at the federal and state levels, including their connection with the deregulation ideology. The types of cases expected to benefit most from EAJAs are identified. Part IV discusses the varying characteristics of state EAJAs, emphasizing the provisions that are most important in determining how many and what types of claimants will benefit from the laws. Finally, in Part V a data set of primarily appellate cases applying the state laws reveals the trends in claims and awards under these laws and compares these trends with prior research about the federal EAJA.

The study finds that EAJAs have produced a rather modest degree of redistribution of resources from the government to private parties.⁶ More because of the fiscal implications of redistribution and explicit support for government regulation than because of antilitigation ideology, the EAJAs have been written in ways that limit their antigovernmental effect. Moreover, the actual beneficiaries of the redistribution have differed somewhat from the beneficiaries envisioned by the laws' deregulatory ideology. The legislative history and statutory language of EAJAs at both the federal and state levels suggest that their principal intended beneficiary was the small business community, but most permit individual claimants as well. Where individuals are eligible, they bring more EAJA claims than do businesses. On the other hand, businesses have been more common claimants under state EAJAs in the aggregate than under the federal EAJA. Thus, use of state EAJAs is more consistent with the deregulatory ideology than is use of the federal EAJA, even though most states patterned their statutes on the federal model.

II. THE STATUS OF FEE SHIFTING IN THE UNITED STATES

Traditionally, the American legal system has operated on the presumption that both sides in a lawsuit will pay their own litigation costs, the bulk of which is likely to be attorney fees. This "pay your own way" procedure is known as the "American rule" because the so-called "English rule," in which the losing party in a lawsuit pays the expenses of the winner, is much more common in other Westernized countries, including Great Britain and the Commonwealth. Although the American rule goes back at least to the eighteenth century in the United States,⁷ numerous exceptions to it began appearing after 1950,

6. See *infra* Part V.C.

7. Frances K. Zemans, *Fee Shifting and The Implementation of Public Policy*, 47 *LAW & CONTEMP. PROBS.* 187, 188-89 (1984).

and the rule has been significantly eroded at both the federal and state levels since 1970.⁸

A crucial aspect of fee-shifting statutes is the distinction between one-way and two-way shifts. The English rule is a two-way loser-pays procedure that, on its face at least, treats most plaintiffs and defendants identically. In the United States, more fee-shifting statutes are one-way shifts, usually pro-plaintiff, under which a prevailing plaintiff can collect costs from a losing defendant, but a prevailing defendant cannot collect from a losing plaintiff. One variant is a two-way shift with a more difficult standard of recovery for defendants than plaintiffs. Federal civil rights actions are the best known example of this pattern.⁹ Another variant, which is the focus of study for the present research, is the one-way shift in litigation against the government, in which the private party may potentially collect as either plaintiff or defendant.¹⁰

The form that a fee-shifting law takes depends upon its purpose.¹¹ For example, statutes designed to prevent abuse of the judicial system tend to award fees against either a plaintiff bringing a frivolous claim or a defendant raising a defense in bad faith. Other two-way statutes might be intended simply to indemnify a party and enable it to establish a legal claim without financial burden, as with the English rule. In contrast, possible purposes of a one-way shift are to equalize the litigation strengths of the parties (as, for example, in divorce cases or EAJAs) or to encourage litigation because it is perceived as being in the public interest (another purpose of most EAJAs).

In recent years, debates over fee shifting have moved from the legal community to the broader political arena. The normative pros and cons of the English rule had been debated extensively in American legal scholarship even before the dramatic increase in U.S. fee-

8. Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?* 47 LAW & CONTEMP. PROBS. 321, 321 (1984); see also 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 (1985).

9. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), the Supreme Court set a much higher standard for a prevailing defendant to collect fees in Title VII employment discrimination cases than it had set for plaintiffs under the same provision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The Court also applied the higher standard to § 1988 defendants in *Hughes v. Rowe*, 449 U.S. 5, 14-16 (1980).

10. Although they are included in this study, three state EAJAs are technically two-way because they authorize judges to award fees to the government from a losing private party if the latter's position was based on bad faith: HAW. REV. STAT. § 661-12(b) (1995); TENN. CODE ANN. § 29-37-104(2)(B) (1995); WIS. STAT. ANN. § 814.245(11) (1995).

11. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651.

shifting statutes occurred in the Seventies.¹² A 1984 symposium in *Law & Contemporary Problems* documented this increase and examined it from many angles.¹³ Vice President Dan Quayle brought greater popular attention to the subject of fee shifting in August 1991, when he publicized the proposals of the Council on Competitiveness for both a two-way "loser-pays" rule for all federal cases based on diversity of citizenship jurisdiction and a moratorium on one-way fee shifts.¹⁴ President Bush's Executive Order 12,778¹⁵ implemented some of the Council's proposals, including a required cost-benefit analysis of any new federal one-way fee shifts. President Clinton has not rescinded the order. Proposed federal tort reform legislation in 1995 also included fee shifting among sanctions for frivolous litigation.¹⁶

The normative debate tends to find people divided into two camps, depending on their view of the proper role of courts and litigation. On one side are Quayle and others who perceive that Americans are excessively litigious,¹⁷ and assume that a loser-pays rule would deter frivolous claims. On the other side are persons who focus on those Americans who are not litigious but, on the contrary, are excluded from using the legal system because of inability to pay the costs required.¹⁸ These persons' support for or opposition to laws that shift legal fees from one party to another would depend on the likelihood they would increase "access to justice" for legitimate claims.

Views on one-way fee shifting, even more clearly than those on two-way fee shifting, reflect controversy about the role of the legal system in American society. Proponents of pro-plaintiff fee shifting

12. See sources cited in Philip Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26, 27 (1969).

13. The articles that emphasize one-way shifts and thus are especially relevant to EAJAs include Bruce Fein, *Citizen Suit Attorney Fee Shifting Awards: A Critical Examination of Government-"Subsidized" Litigation*, 47 LAW & CONTEMP. PROBS. 211 (1984); Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233 (1984); Zemans, *supra* note 7, at 187.

14. AGENDA FOR CIVIL JUSTICE, *supra* note 2, at 24-26.

15. Exec. Order No. 12,778, WEEKLY COMP. PRES. DOC. (Oct. 23, 1991).

16. S. 565, 104th Cong., 1st Sess. (1995).

17. See J. Anthony Kline, *Law Reform and the Courts: More Power to the People or to the Profession*, 53 CAL. ST. B.J. 14 (1978); Philip Kurland, *Government By Judiciary*, 2 U. ARK. LITTLE ROCK L.J. 307 (1979); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977); Walter K. Olson, *System Overload*, A.B.A. J., Oct. 1991, at 70; Laurence Tribe, *Too Much Law, Too Little Justice: An Argument for Delegalizing America*, ATLANTIC MONTHLY, July 1979, at 25; .

18. See, e.g., 1 ACCESS TO JUSTICE (Mauro Cappelletti & Bryant Garth eds., 1978); Alan M. Dershowitz, *Heroes and Hired Guns*, A.B.A. J., Oct. 1991, at 72; Laura Nader & Linda Singer, *Dispute Resolution*. . ., 51 CAL. ST. B.J. 281 (1976).

tend to see it as increasing access to justice for low- and moderate-income people or for public interest litigants whose individual financial stake in a controversy would be too small for them to bear the costs of litigation personally.¹⁹ Opponents, on the other hand, see pro-plaintiff fee shifting as encouraging frivolous "nuisance" suits²⁰ and, in the public realm, as just one more step toward removing policymaking from appropriate decision makers and putting it in the hands of the judiciary.²¹

Exactly how much fee shifting takes place in the United States is difficult to determine. Most of the deviation from the American rule has come piecemeal, attached to specific pieces of substantive legislation, rather than as a wholesale shift.²² One authority on fee shifting identifies 153 federal statutes with one or more fee-shifting provisions.²³ At the state level a 1983 survey identified 1,974 laws providing for some type of fee shifting.²⁴ My update of this survey produced an estimate that the number of state fee-shifting statutes had almost doubled to 3,918 as of May, 1993—a remarkable increase in a decade.²⁵

For several reasons, however, simply knowing how many statutes are on the books does not tell much about the amount of fee shifting actually occurring. First, many fee-shifting provisions are part of laws that probably do not get frequent use, such as Utah's Motor Fuel Marketing Act, which awards fees to persons injured by the sale of gas below cost.²⁶ Second, to collect under many fee-shifting statutes, par-

19. Percival & Miller, *supra* note 13, at 233.

20. See discussion in Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 150-53 (1984).

21. Fein, *supra* note 13.

22. Zemans, *supra* note 7, at 205. Alaska is the only state in the United States with the English rule of general two-way fee shifting. Alaska's Civil Rule 82 provides for the prevailing party to receive partial attorney's fees from the loser. Although the rule vests discretion in the trial judge to decide whether to award fees rather than mandating them, the judge may award them as a matter of course without a motion from the prevailing party. See Virginia Cella Antipolo, *The Impact of Economic Incentives on the Award of Attorney's Fees in Public Interest Litigation*, 1 ALASKA L. REV. 189 (1984); SUSANNE DIPIETRO ET AL., ALASKA JUDICIAL COUNCIL, ALASKA'S ENGLISH RULE: ATTORNEYS' FEE SHIFTING IN CIVIL CASES (1995) (funding provided by a grant from the State Justice Institute).

23. ALBA CONTE, 2 ATTORNEY FEE AWARDS 321-30 (2d ed. 1993).

24. Note, *supra* note 8, at 323.

25. This estimate is based on a Lexis search for *all* fee-shifting statutes in fourteen randomly selected states. The Lexis search ("litigation expense" or "attorney fees" or "attorney costs" or "fee shifting" or "equal access to justice" or "fee contracts" w/20 "award" or "reimbursement" or "reciprocal right" or "restitution" or "entitled") yielded 5,122 references in the fifty states. Applying the percentage of references eliminated as not fee shifts after they were all looked up in the fourteen states to the 5,122 produced the total of 3,918. For the fourteen states whose fee-shifting statutes were coded, more than half were enacted in 1984 or later.

26. UTAH CODE ANN. § 13-16-7 (1992).

ties must meet additional conditions beyond simply prevailing. Many apply only if the losing party did not just lose, but also acted badly in some way (e.g., frivolously, maliciously, or without a rational basis). The burden of proving or disproving such additional conditions may be given to either party, but is more likely to fall on the winning than the losing party. Third, although mandatory fee shifts are somewhat more common, many laws simply authorize the judge to award fees to the prevailing party. In my survey's sample, 54% of the statutes were mandatory and 42% discretionary (the remainder being unclear). Because judges have considerable discretion, even under mandatory fee shifts, in interpreting whether a party has indeed prevailed and met any additional conditions, one cannot know how much fee shifting actually takes place without a detailed study of case outcomes.

Despite these limitations on what one can learn from statutes alone, the distribution of types of fee shifts tells something about who is supposed to benefit from them. Pro-plaintiff statutes predominate at the state level.²⁷ The 1983 state survey found 54.4% of fee shifts benefit the prevailing plaintiff, 8.4% the prevailing defendant, and 23% the prevailing or "either" party.²⁸ The same survey found an additional 1.5% of statutes to have differential standards tilting in favor of the plaintiff.²⁹

In my more recent state survey, I found that one-way, pro-plaintiff statutes still prevail. They make up 52.5% of fee-shifting laws, compared to 7.9% one-way, pro-defendant statutes (e.g., eminent domain and prisoner litigation) and 37.6% two-way shifts.³⁰ Among the two-way statutes, 16.7% have standards favoring the plaintiff and 0.8% have standards favoring the defendant. Thus, only 30.9% of the statutes are even-handed, two-way shifts. Furthermore, the vast ma-

27. They apparently do at the federal level as well. Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2041 (1993) cites a Congressional Research Service report saying there are over one hundred one-way federal shifts, which would be a majority of federal fee shifts.

28. Note, *supra* note 8, at 330, tbl. 2. Since this survey apparently created a new category for each variation in statutory language, almost 15% of statutes fall into a variety of small categories.

29. *Id.* at 333, tbl. 4.

30. The remaining almost 2% are "other one-way" shifts, including shifts to third parties such as "personal representatives" in probate actions or interpleaders and shifts to persons deemed inherently disadvantaged against more powerful parties whether plaintiff or defendant (e.g., employees in workers compensation cases, wives in one divorce statute, and private parties litigating against the government).

jority of these are discretionary, not mandatory.³¹ In fact, mandatory, two-way statutes with the same standard of review for both sides make up only 6.0% of the total sample, and a substantial number of these appear to be intended to deter abuse of the judicial process (e.g., frivolous claims or defenses, or discovery abuse) more than to indemnify parties.

In short, the English rule has not made much headway in the United States. Other fee shifting has become quite common, however. Despite the normative debates about the merits of fee shifting, there have been few empirical studies of its actual use.³² This study of state EAJAs adds some such empirical evidence.

III. HISTORY AND PURPOSES OF EQUAL ACCESS TO JUSTICE ACTS

In 1980 the federal government passed the Equal Access to Justice Act,³³ which waives the government's general immunity from awards of attorney fees and affirmatively authorizes an award of fees to certain private parties prevailing against it in non-tort civil litigation³⁴ or adversarial administrative adjudications.³⁵ Reversing the classic pattern of federalism in which states act as laboratories for federal policy, many states followed the federal lead.³⁶ Within a decade

31. The discretionary, two-way shifts include laws where a party does not even have to prevail to receive fees, such as those authorizing judges in divorce cases to require the wealthier party to pay the other's fees.

32. These include, on one-way shifts: Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988); on two-way shifts: Don L. Coursey & Linda R. Stanley, *Pretrial Bargaining Behavior within the Shadow of the Law: Theory and Experimental Evidence*, 8 INT'L REV. L. & ECON. 161 (1988); Gary M. Fournier & Thomas W. Zuehlke, *Litigation and Settlement: An Empirical Approach*, 71 REV. ECON. & STAT. 189 (1989); Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON., & ORGANIZATION 345 (1990); and on offers of judgment: Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS. 13 (1988).

33. Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980).

34. 28 U.S.C. § 2412 (1994).

35. 5 U.S.C. § 504 (1994).

36. Before the federal EAJA, Oregon had passed a vague, discretionary provision for attorney fees following judicial review of administrative decisions in 1975 (OR. REV. STAT. § 183.495 (1981) (repealed 1985)). In 1981 it was supplemented by two new provisions, § 183.497 and § 182.090, which are more similar to the federal EAJA. Section 183.495 was repealed in 1985. Montana also passed its law, MONT. CODE ANN. § 25-10-711 (1993), a year before the federal version, but Congress had begun having hearings on expanding federal liability for attorney fees in 1977 (H.R. REP. NO. 1418, 96th Cong., 2d Sess. 6 (1980)). The American Bar Association had also proposed governmental assumption of private parties' fees in 1978. See Zemans, *supra* note 7, at 206. It is perhaps not coincidental that Montana is one of only two states with a stricter standard for recovery than the federal EAJA.

twenty-nine states had somewhat similar laws on their books.³⁷ After a six-year hiatus in new EAJAs, Washington state adopted one in 1995.³⁸ Table 1 lists these thirty statutes, the year of their passage, and some measures of use.³⁹

The passage of legislation can be viewed either in self-interested, public-choice terms of who directly benefits from the legislation or in more public-regarding terms. From the former perspective, research on the legislative history of the federal EAJA found that it was a product of the deregulatory climate of the early 1980s, passed largely at the instigation of small businesses to help them defend themselves against allegedly unreasonable government regulation.⁴⁰ Executive branch agencies opposed the legislation because they feared it would inhibit needed regulatory enforcement and because of the legislation's projected costs. Initially, liberal interest groups such as the Lawyers Committee for Civil Rights Under Law, the American Civil Liberties Union, and the Council for Public Interest Law also opposed the bill because of its anticipated effect on regulatory enforcement. By the time the law was permanently reauthorized in 1985, however, liberal groups joined the small business lobbyists in support because they had learned it could be useful for them, too.⁴¹ In theory, EAJA opponents could have invoked the antilitigation ideology, but being court-users themselves, they did not do so. Thus, antigovernment ideology was the terrain on which the battle over passage was fought.

What evidence is available on the state EAJAs' legislative histories suggests that they were passed for much the same purposes as the federal EAJA. Many of the state laws reflect the antiregulatory, pro-business slant even more strongly than the federal law. Nine states' EAJAs allow only businesses or persons licensed by the state to make

37. Several states also adopted the title of Equal Access to Justice Act: hence the acronym "EAJA" to refer to such laws generically.

38. 1995 Wash. Legis. Serv. ch. 403, § 901-905, 1516, 1548 (West), to be codified at WASH. REV. CODE §§ 4.84.902-905 (West 1988 & Supp. 1996).

39. My sources for identifying these state EAJAs were several journal articles—Christopher J. Costantini & Michael J. Skindell, *Fee Shifting in Ohio: An Overview of Ohio's Version of the Equal Access to Justice Act*, 18 CAP. U. L. REV. 201 (1989); Andrea Saltzman, *A Brief Look at Statutory Attorneys' Fees in Illinois*, 73 ILL. B.J. 266 (1985); Samuel A. Thumma & Barbara J. Dawson, *The Iowa Equal Access to Justice Act: Is Recovery Available?*, 39 DRAKE L. REV. 431 (1989-90); Dirk A. Williams, ". . . And Attorney Fees to the Prevailing Party": *Recovering Fees Under Montana Statutory Law*, 46 MONT. L. REV. 119 (1985); Symposium, *Utah Legislative Survey*, 1984 UTAH L. REV. 115—and a review of the entries under Attorney Fees in the index volumes of the remaining state codes.

40. Mezey & Olson, *supra* note 5, at 15.

41. Social Security claimants were the predominant users of the federal EAJA during the 1980s. *Id.* at 16-18.

TABLE 1
STATE EAJA STATUTES

State	Statute	Year Passed	No. Reported Appellate EAJA Cases	Average EAJA Cases per Year	Total Appellate Cases Filed 1992 in 1000s*	%EAJA Cases**	Rank in EAJA Use
AZ	ARIZ. REV. STAT. ANN. § 12-348 (1995)	1981	71	5.07	5.99	0.085	5
CA	CAL. CIV. PROC. CODE § 1028.5 (West 1995)	1981	7	0.50	27.03	0.002	24
CT	CONN. GEN. STAT. ANN. § 4-184a (West 1994)	1983	2***	0.16	1.68	0.010	18
FL	FLA. STAT. ANN. § 57.111 (West 1994)	1984	17	1.55	20.98	0.007	21
HA	HAW. REV. STAT. § 661-12 (1994)	1986	0	0.00	0.85	0.000	26
ID	IDAHO CODE § 12-117 (1994)	1984	21	.191	0.80	0.239	2
IL	5 ILCS 100/10-55 (Smith-Hurd 1995)	1982	20	1.54	9.99	0.015	14
IN	IND. CODE ANN. § 34-2-36 (West 1994)	1986	0	0.00	2.83	0.000	29
IA	IOWA CODE ANN. §§ 625.28-.29 (West 1995)	1983	5	0.42	2.08	0.020	12
KY	KY. REV. STAT. ANN. § 453.260 (Baldwin 1995)	1982	4	0.31	4.10	0.008	20
LA	LA. REV. STAT. § 49:965.1 (West 1995)	1982	6	0.46	12.27	0.004	23
MN	MINN. STAT. ANN. §§ 15.471-.475 (West 1994)	1986	12	1.33	3.38	0.039	7
MO	MO. ANN. STAT. §§ 536.085 & .087 (Vernon 1994)	1989	9	1.50	4.85	0.031	10
MT	MONT. CODE ANN. § 25-10-711 (1994)	1979	11	0.69	0.63	0.109	3
NE	NEB. REV. STAT. §§ 25-1802 to -1804 (1994)	1982	4	0.31	2.08	0.015	15
NY	N.Y. CIV. PROC. L. & R. §§ 8600-8605 (McKinney 1994)	1989	17***	2.83	17.82	0.016	13
NC	N.C. GEN. STAT. § 6-19.1 (1994)	1983	8	0.67	2.16	0.031	11
ND	N.D. CENT. CODE § 28-32-21.1 (1995)	1985	10	1.00	0.39	0.256	1
OH	OHIO REV. CODE ANN. § 2335.39 (Anderson 1994)	1985	16***	1.60	14.02	0.011	16
OK	OKLA. STAT. ANN. tit. 12, § 941 (West 1995)	1982	4	0.31	4.49	0.007	22
OR1	OR. REV. STAT. § 182.090 (1994)	1981	5	—	—	—	—
OR2	OR. REV. STAT. § 183.497 (1994)	1981	19	1.95	6.21	0.031	9
OR3	OR. REV. STAT. § 183.495 (1994) (repealed)	1975	15	—	—	—	—

TABLE 1 (Continued)

State	Statute	Year Passed	No. Reported Appellate EAJA Cases	Average EAJA Cases per Year	Total Appellate Cases Filed 1992 in 1000s*	%EAJA Cases**	Rank in EAJA Use
PA	71 PA. CONS. STAT. §§ 2031-35 (1995)	1982	18	1.38	14.41	0.010	17
RI	R.I. GEN. LAWS §§ 42-92-1 to -8 (1994)	1985	4	0.40	0.68	0.059	6
SC	S.C. CODE ANN. §§ 15-77-300 to -340 (Law. Co-op 1993)	1985	10	1.00	1.03	0.097	4
TN	TENN. CODE ANN. §§ 29-37-104 to -106(1994)	1984	0	0.00	3.37	0.000	30
TX	TEX. GOVT. CODE ANN. §§ 2006.011-016 (1995)	1987	1	0.13	16.66	0.001	5
UT	UTAH CODE ANN. §§ 78-27a-1 to -6 (1995)	1983	0	0.00	1.42	0.000	28
VA	V.A. CODE ANN. § 9-6.14:21 (Michie 1995)	1981	6	0.43	4.58	0.009	19
WA	WASH. REV. CODE §§ 4.84.902-05 (1988 & 1996 Supp.)	1995	0	0.00	5.24	0.000	26
WI	Wis. STAT. ANN. § 814.245 (West 1994)	1985	14	1.40	4.16	0.034	8

*Source: B.J. Ostrom et al., STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, Table 2, at 68, 70, 72 (National Center for State Courts, 1994).

** % is in 100s (.08%=.0008%).

***Trial court cases omitted.

claims but not other individual claimants, whom the federal EAJA does include.⁴² The role in lobbying for the law played by the National Federation of Independent Businesses, which was also a major supporter at the federal level, can be documented in at least one state.⁴³

Regardless of who lobbied for the laws, the alternative, public-regarding reasons for the passage of EAJA are articulated in formal statements of legislative findings. Several states' legislative findings are taken almost verbatim from their federal counterpart, to the effect that certain parties (they vary on who this is) "may be deterred from seeking review of or defending against unreasonable [or "substantially unjustified"] governmental action because of the expense involved in securing the vindication of their rights."⁴⁴

In his study of one-way fee shifting, Harold Krent breaks down the more public-regarding reasons for the passage of a one-way antigovernment shift into three potential public policy justifications: assisting the legislative branch in monitoring agency behavior, deterring agency wrongdoing, and more fully compensating victims of government wrongdoing.⁴⁵ Deterrence potentially occurs due to both the increased judicial review and the cost of paying attorney fee awards. The monitoring function comes about by providing persons with incentives to resist and thus increase the visibility of arguably inappropriate agency behavior, when such resistance would not occur without

42. This is true of the statutes in California, Florida, Hawaii, Indiana, Louisiana, Minnesota, Tennessee, Texas, and Utah. Indiana, Minnesota, and Tennessee also include small or tax-exempt organizations. See CAL. CIV. PROC. CODE § 1028.5 (West 1981); FLA. STAT. ANN. § 57.111 (West 1994); HAW. REV. STAT. § 661-12 (1994); IND. CODE ANN. § 34-2-36-5(4) (West 1994); LA. REV. STAT. ANN. § 49:965.1 (West 1995); MINN. STAT. ANN. § 15.471 (Subd. 6) (West 1994); TENN. CODE ANN. § 29-37-103 (1994); TEX. GOV'T CODE ANN. § 2006.013, .014 (West 1995); UTAH CODE ANN. § 78-27a-1, -4, -5 (1995). For small or tax exempt organizations, see IND. CODE ANN. § 34-2-36-5(4)(B) (West 1994); MINN. STAT. ANN. § 15.471 (Subd. 6) (West 1994); TENN. CODE ANN. § 29-37-103(B) (1994).

43. Discussed in *McMains v. Comm'r of Pub. Safety*, 409 N.W.2d 911 (Minn. Ct. App. 1987).

44. Compare the federal statement of findings and purpose (Title II of Pub. L. No. 96-481, 94 Stat. 2325 (1980)) to those in the following statutes: 1981 ARIZ. SESS. LAWS ch. 208 §§ 1, 3; FLA. STAT. ANN. 57.111(2) (West 1994); 71 PA. CONS. STAT. § 2031 (1995); UTAH CODE ANN. § 78-27a-2 (1995); 1995 WASH. LEGIS. SERV. ch. 403 § 901 (West). Rhode Island's statement of purpose is more elaborate. It notes the "tremendous power" of the state and finds this "often tempts state agencies to proceed against individuals or small businesses which are least able to contest the agency's actions," which are often not "in the best interest of the public. . . . [C]ontesting an unjust agency action" is "an important service to the public." R.I. GEN. LAWS § 42-92-1(a), (b) (1994).

45. See Krent, *supra* note 27.

incentives. Equalizing the strength of the litigating parties is in this way a byproduct of the monitoring function.⁴⁶

Krent applies these three purposes to the federal EAJA and finds that the goals of deterrence and compensation are probably not very well served by the law.⁴⁷ Some equalization of the parties and additional incentives to resist agency action are achieved, however, especially for certain types of cases. Drawing upon Thomas Rowe's theoretical work,⁴⁸ Krent expects the federal EAJA to be most successful at encouraging three types of claims: first, strong but small monetary claims in which the cost of litigating would otherwise swamp the amount won; second, nonmonetary claims; and third, targets of government enforcement efforts.⁴⁹ Litigants in these types of cases have little prospect of obtaining counsel on a contingent basis.⁵⁰ Krent argues further that providing incentives to litigate is especially important in cases initiated by the government because other means of oversight are greater for policymaking decisions within the bureaucracy, such as rulemaking, than for case-specific, policy implementation decisions, such as regulatory enforcement actions.⁵¹

46. Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 YALE L. & POL'Y REV. 458, 462 (1993).

47. *Id.* at 476, 478.

48. Rowe, *supra* note 20, at 142. The application of theoretical models to the subject of attorney fees dates to the burgeoning of the law and economics movement in the 1970s. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977). Despite the relative scarcity of true two-way, English rule statutes in the United States, however, scholarly theoretical and empirical literature has focused heavily on this variation from the American rule rather than the more common one-way shift. For a summary of the law-and-economics literature, including a brief discussion of attorney fee shifting, see Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1082-84 (1989). Important exceptions that do discuss one-way shifts, however, include, in addition to Rowe, *supra* note 20, Steven Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982) in the theoretical literature and Schwab and Eisenberg, *supra* note 32, in the empirical literature.

49. Krent, *supra* note 46, at 465.

50. Both contingent fees and one-way, pro-plaintiff statutes can be seen as vehicles for shifting risk away from plaintiffs. According to Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217, 246 (1994), "Congress chose to exclude tort cases from the scope of the [federal] EAJA because it believed alternative fee payment methods, such as contingency fee arrangements, were adequate to ensure that injured persons could obtain legal representation to seek redress for torts committed by government employees or entities." One-way fee shifting is presumably more favorable to winning plaintiffs than contingent fees because their attorney fees would be paid by their opponent rather than coming out of their award. On the other hand, unless the two systems were combined, plaintiffs bear fewer up-front costs with contingent fees than with fee-shifting (see Zemans, *supra* note 7, at 201). Moreover, losing plaintiffs would have to pay their attorneys themselves under a one-way shift, while the attorney would absorb the loss with a contingent fee agreement.

51. Krent, *supra* note 46, at 462-63.

The pattern of use of the federal EAJA to a large extent supports Krent's theoretical expectations, although not exactly in the way Congress expected. Mezey and Olson found that in the Eighties the federal EAJA was very successfully used by Social Security disability claimants whose benefits were terminated.⁵² These cases fit two of Krent's categories: the parties had small but strong monetary claims and were on the defensive against government action. In contrast, the small business parties, at whose urging Congress had passed the law, had used it relatively little.

This Article surveys state EAJAs to examine their redistributive effects by identifying who is using them for what types of issues. Furthermore, it seeks to compare their usage to that of the federal EAJA and to determine if business parties and challenges to government regulations are more prevalent under state EAJAs. The pattern of use will also be compared to two of the categories for which Krent expects EAJAs to be most useful: cases defending against government-initiated action, and nonmonetary claims.⁵³ Because the amount of redistribution that actually occurs under EAJAs and the identity of beneficiaries depend on the terms of the statutes themselves, who chooses to use them, and how they are interpreted and applied by courts in cases that come to them, each of these will be examined in turn.

IV. CHARACTERISTICS OF STATE EAJAS: THE STATUTES

Before discussing the considerable variation in state EAJAs, it is necessary to establish the essential characteristics of a statute that qualify it as an EAJA. Most states and the federal government have enacted various laws that shift fees to the government in suits under particular causes of action.⁵⁴ In contrast, EAJAs are free-standing laws that apply to a wide range of substantive actions. The key provisions of state EAJAs reimburse the attorney fees of persons who successfully appeal decisions of administrative agencies.⁵⁵ Many also

52. Mezey & Olson, *supra* note 5, at 17-18. These cases that flooded into the federal courts in the mid-1980s were ideal candidates for EAJA claims because the courts widely viewed the terminations as not substantially justified.

53. Krent's other category, strong but small monetary claims, could not be studied because of insufficient information about the size of claims.

54. See, e.g., UTAH CODE ANN. § 13-16-7 (1992); see also *supra* text accompanying note 26 (discussing the Motor Fuel Marketing Act).

55. Some also cover administrative proceedings even if they have not been appealed, but this Article concerns only fees in cases that have reached the judiciary. At least one state, Michigan, has a fee shift for administrative procedures, but not for judicial proceedings (MICH. COMP. LAWS § 24.323 (1984)).

cover civil actions other than appeals of administrative decisions, especially if the state initiates the action.⁵⁶

Furthermore, EAJAs apply only to litigation with the government, not between private parties. Thus I exclude two-way fee shifts penalizing all frivolous litigation, even if they are expressly applied to government as well as private litigants. Although I discuss EAJAs as one-way, antigovernment shifts, three states' laws are technically two-way shifts. The laws of Hawaii, Tennessee, and Wisconsin do permit the government to collect from private parties but under a more difficult standard, i.e., only if the case was frivolous or brought in bad faith.⁵⁷ These states' laws are included in the discussion that follows.

In general, EAJAs are far from being automatic fee shifts for parties prevailing in litigation with state governments, but their restrictions vary from state to state. They differ in the parties eligible to make claims under them, the types of legal actions covered and who must initiate the action, the governmental units covered, their mandatory or discretionary nature, the amount of fees recoverable, and the standard required to recover.⁵⁸

The majority of the thirty states' EAJAs have some limits on party eligibility. Nine state EAJAs are restricted to businesses or licensees and include limits on the size of eligible businesses.⁵⁹ These statutes reflect the pro-small business legislative origins of the federal EAJA more clearly than does the federal law itself, which permits individual as well as business claimants.⁶⁰ Of the states that include individuals and businesses, eleven have no limits on the wealth or size of eligible parties;⁶¹ ten have such restrictions.⁶² Limits for individuals

56. See *infra* text accompanying notes 75-77.

57. HAW. REV. STAT. § 661-12(b) (1994); TENN. CODE ANN. § 29-37-104(2)(B) (1994); WIS. STAT. ANN. § 814.245(11) (West 1994). In addition, KY. REV. STAT. ANN. § 453.260 (Baldwin 1995) and MO. ANN. STAT. § 536.087 (Vernon 1994) are written in terms of "prevailing parties" without language that explicitly excludes the state from collecting, but the conditions for receiving fees make sense only for private parties. Thus, I consider them one-way statutes.

58. Other ways in which the statutes vary, not discussed here, are whether fees are awarded for administrative as well as judicial proceedings, standards for prevailing (e.g., with respect to remands or settlements), and procedural requirements for making claims. All of these also potentially affect the likelihood of an award.

59. CAL. CIV. PROC. CODE § 1028.5 (West 1995); FLA. STAT. ANN. § 57.111 (West 1994); HAW. REV. STAT. § 661-12 (1994); IND. CODE ANN. § 34-2-36-5 (West 1994); LA. REV. STAT. ANN. § 49:965.1 (West 1995); MINN. STAT. ANN. § 15.471. (West 1994); TENN. CODE ANN. §§ 29-37-103, -104 (1994); TEX. GOV'T CODE ANN. §§ 2006.013, .014 (West 1995); UTAH CODE ANN. §§ 78-27a-1, -4, -5 (1995). Three of these also include small tax exempt organizations: IND. CODE ANN. § 34-2-36-5(4)(B) (West 1994); MINN. STAT. ANN. § 15.471 (Subd. 6) (West 1994); TENN. CODE ANN. § 29-37-103(B) (1994).

60. 28 U.S.C. § 2412(d)(2)(B) (1994).

61. ARIZ. REV. STAT. ANN. § 12-348(B) (1995); IDAHO CODE § 12-117 (1994); ILL. ANN. STAT. ch. 5, para. 100/10-55 (Smith-Hurd 1995); KY. REV. STAT. ANN. § 453.260 (Baldwin 1995);

range from New York's very low \$50,000 net worth⁶³ (the next lowest is Wisconsin's \$150,000 annual income⁶⁴ or Rhode Island's \$250,000 net worth⁶⁵) to Missouri's \$2 million net worth.⁶⁶ For businesses, eligibility limits range from Iowa's low of no more than twenty employees and \$1 million in annual gross receipts⁶⁷ to Missouri's high of 500 employees and \$7 million net worth.⁶⁸ Clearly, many more parties are eligible claimants in some states than others.

As noted earlier, all state EAJAs apply to successful appeals of administrative agency decisions.⁶⁹ Arizona, Iowa, Kentucky, Pennsylvania, and South Carolina, however, exempt specified types of administrative decisions, such as rate-fixing proceedings, which all five exclude.⁷⁰ In some instances these are substantial exclusions. For example, Pennsylvania excludes all, and South Carolina some, licensing proceedings,⁷¹ which are an important type of business regulation and generate a sizable number of cases in other states. Pennsylvania also excludes public employees' dismissals or suspensions, which again are generally a significant source of cases. Perhaps most significantly, Arizona, Iowa, and Kentucky exclude proceedings to determine eligibility or entitlement to a monetary benefit.⁷² Appeals from denials or terminations of public assistance and unemployment benefits are

MONT. CODE ANN. § 25-10-711 (1994); N.C. GEN. STAT. § 6-19.1 (1994); N.D. CENT. CODE § 28-32-21.1 (1995); OKLA. STAT. ANN. tit. 12, § 941 (West 1995); OR. REV. STAT. § 182.090 (1994); S.C. CODE ANN. § 15-77-300 (Law. Co-op. 1993); VA. CODE ANN. § 9-6.14:21 (Michie 1994).

62. CONN. GEN. STAT. ANN. § 4-184a(a)(1) (West 1994); IOWA CODE ANN. § 625.29(2) (West 1995); MO. ANN. STAT. § 536.085(2) (Vernon 1994); NEB. REV. STAT. § 25-1804 (1994); N.Y. CIV. PRAC. L. & R. 8602(d) (McKinney 1994); OHIO REV. CODE ANN. § 2335.39(A)(2) (Anderson 1994); 71 PA. CONS. STAT. § 2032 (1995); R.I. GEN. LAWS § 42-92-2(d) (1994); WASH. REV. CODE ANN. § 4.84.340(5) (West 1988 & Supp. 1996); WIS. STAT. ANN. §§ 814.245(2), (8) (West 1994).

63. N.Y. CIV. PRAC. L. & R. 8602(d) (McKinney 1994).

64. WIS. STAT. ANN. § 814.245(8) (West 1994).

65. R.I. GEN. LAWS § 42-92-2(d) (1994).

66. MO. ANN. STAT. § 536.085(2)(a) (Vernon 1994).

67. IOWA CODE ANN. § 625.29(2)(b) (West 1995).

68. MO. ANN. STAT. § 536.085(2)(b) (Vernon 1994).

69. The Illinois law, however, is limited to cases in which an administrative rule is invalidated. See ILL. ANN. STAT. ch. 5, para. 100/10-55(c) (Smith-Hurd 1995).

70. ARIZ. REV. STAT. ANN. § 12-348(H)(1) (1995); IOWA CODE ANN. § 625.29(1)(d) (West 1995); KY. REV. STAT. ANN. § 453.260(5)(a) (Baldwin 1995); 71 PA. CONS. STAT. § 2032 (1995); S.C. CODE ANN. § 15-77-300 (Law. Co-op. 1993).

71. For Pennsylvania, see 71 PA. CONS. STAT. § 2032 (1995); for South Carolina, S.C. CODE ANN. § 15-77-300 (Law. Co-op. 1993).

72. For Arizona, see ARIZ. REV. STAT. ANN. § 12-348(H)(1) (1995); for Iowa, IOWA CODE ANN. § 625.29(1)(d) (West 1995); and, for Kentucky, KY. REV. STAT. ANN. § 453.260(5)(a) (Baldwin 1995).

among the most common cases in other states.⁷³ To exclude such cases disadvantages the most needy citizens.⁷⁴

In addition to covering administrative appeals, the majority of state EAJAs cover at least some civil actions not originating in administrative agencies. In only five states (Idaho, Montana, New York, North Carolina, and Oregon), however, is the language so broad as to cover most actions a private party might initiate against the state.⁷⁵ Most either are limited to certain types of actions or cover only successful defenses of civil actions initiated by the state.

Who initiates the action in an administrative proceeding is also an issue in some states. Seven states limit coverage to administrative proceedings initiated by the state.⁷⁶ Sometimes this is interpreted extremely restrictively to mean initiating the litigation itself and not the underlying dispute. Ohio courts, for example, have denied fees on this ground to a person successfully appealing a decision of the Unemployment Compensation Board of Review to cancel unemployment benefits and require repayment of them, and to another person obtaining reinstatement following termination from a state job.⁷⁷

Like the rules on types of actions covered, rules about initiation of the controversy can also have class implications. For example, Kentucky's statute generally covers civil actions and judicial review of administrative decisions only if the legal action or administrative action was initiated by the state. The one exception is that the law covers civil actions brought by a private party if the action is to challenge taxes.⁷⁸ Those with the highest tax liabilities are potentially eligible for fee awards, since Kentucky's law also covers both businesses and individuals and has no upper size or wealth limits.⁷⁹

Another feature of the statutes, the number of units of government whose actions are covered, has great influence on how many

73. See *infra* tbl. 2.

74. Low-income citizens often have some access to assistance via legal aid societies, but such resources are quite limited.

75. IDAHO CODE § 12-117 (1994); MONT. CODE ANN. § 25-10-711 (1994); N.Y. CIV. PRAC. L. & R. 8602(a) (McKinney 1994); N.C. GEN. STAT. § 6-19.1 (1994); OR. REV. STAT. § 182.090(1), (3) (1994).

76. FLA. STAT. ANN. § 57.111(3)(b) (West 1994); KY. REV. STAT. ANN. § 453.260(1)(c) (Baldwin 1995); OHIO REV. CODE ANN. §§ 2335.39(B)(1)(c), (B)(2) (Anderson 1994); OKLA. STAT. ANN. tit. 12, § 941(A), (B) (West 1995); 71 PA. CONS. STAT. § 2033(a) (1995); TEX. GOV'T CODE ANN. §§ 2006.013, -014 (West 1995); UTAH CODE ANN. §§ 78-27a-4, -5 (1995).

77. Estate of Kirby v. Hamilton County Court of Common Pleas, 604 N.E.2d 1367 (Ohio Ct. App. 1992); Costa v. Ohio Bureau of Employment Servs., 578 N.E.2d 848 (Ohio Ct. App. 1989).

78. KY. REV. STAT. ANN. § 453.260(1)(a)-(c) (Baldwin 1995).

79. See *id.* § 453.260.

cases potentially arise. This also varies greatly from state to state. The broadest statutes apply to all state entities and political subdivisions. More limited EAJAs exclude political subdivisions, legislative and judicial branches, and/or a few named agencies. The narrowest apply only to state regulatory agencies or those authorized by law to make rules or decide contested cases.

Although there are always issues of interpretation requiring judicial discretion even when laws are phrased in mandatory terms, presumably more parties will receive fee awards if they are mandatory than if they are discretionary. Nineteen states phrase their laws in mandatory terms, stating that courts "shall" make awards when claimants meet the specified conditions.⁸⁰ Two of the nineteen states, North Dakota and Oregon, authorize discretionary awards when the conditions for a mandatory award are not met.⁸¹ Eleven other states merely authorize courts to make awards at their discretion when conditions are met.⁸²

Yet another feature, caps on fees, makes some statutes potentially less redistributive than others. Thirteen states' laws provide for payment of "reasonable" attorney fees,⁸³ which raises many complex issues about how to calculate what is reasonable,⁸⁴ but puts no extrinsic limit on them. In contrast, the other seventeen states specify a cap

80. ARIZ. REV. STAT. ANN. § 12-348(A) (1995); HAW. REV. STAT. § 661-12(a), (b) (1994); IDAHO CODE § 12-117(1), (2) (1994); IOWA CODE ANN. § 625.29(1) (West 1995); KY. REV. STAT. ANN. § 453.260(1) (Baldwin 1995); MINN. STAT. ANN. § 15.472(a) (West 1994); MO. ANN. STAT. § 536.087(1), (2) (Vernon 1994); MONT. CODE ANN. § 25-10-711 (1994); NEB. REV. STAT. § 25-1803(1) (1994); N.Y. CIV. PRAC. L. & R. 8601(a) (McKinney 1994); N.D. CENT. CODE § 28-32-21.1(1) (1995); OHIO REV. CODE ANN. § 2335.39(B)(1) (Anderson 1994); OKLA. STAT. ANN. tit. 12, § 941(A) (West 1995); OR. REV. STAT. § 182.090(1) (1994); 71 PA. CONS. STAT. § 2033(a) (1995); R.I. GEN. LAWS § 42-92-3(a) (1994); VA. CODE ANN. § 9-6.14:21(A) (Michie 1995); WASH. REV. CODE ANN. § 4.84.350(1) (West 1988 & Supp. 1996); WIS. STAT. ANN. § 814.245(3) (West 1994).

81. N.D. CENT. CODE § 28-32-21.1(1) (1995) and OR. REV. STAT. § 183.497 (1994).

82. CAL. CIV. PROC. CODE § 1028.5(a) (West 1995); CONN. GEN. STAT. ANN. § 4-184a(b) (West 1994); FLA. STAT. ANN. § 57.111(4)(d) (West 1994); ILL. ANN. STAT. ch. 5, para. 100/10-55(b) (Smith-Hurd 1995); IND. CODE ANN. § 34-2-36-5 (West 1994); LA. REV. STAT. ANN. § 49:965.1 (West 1995); N.C. GEN. STAT. § 6-19.1 (1994); S.C. CODE ANN. § 15-77-300 (Law. Co-op. 1993); TENN. CODE ANN. § 29-37-104(a)(1), (b) (1994); TEX. GOV'T CODE ANN. § 2006.013 (West 1995); UTAH CODE ANN. § 78-27a-4 (1995).

83. IDAHO CODE § 12-117(1) (1994); ILL. ANN. STAT. ch. 5, para. 100/10-55(a) (Smith-Hurd 1995); IOWA CODE ANN. § 625.28(1) (West 1995); MONT. CODE ANN. § 25-10-711(1) (1994); NEB. REV. STAT. § 25-1802(1) (1994); N.Y. CIV. PRAC. L. & R. 8601(a) (McKinney 1994); N.C. GEN. STAT. § 6-19.1 (1994); N.D. CENT. CODE § 28-32-21.1(1) (1995); OKLA. STAT. ANN. tit. 12, § 941(A) (West 1995); OR. REV. STAT. § 182.090(1) (1994); S.C. CODE ANN. § 15-77-300 (Law. Co-op. 1993); TEX. GOV'T CODE ANN. § 2006.013(a) (West 1995); VA. CODE ANN. § 9-6.14:21(A) (Michie 1995). It is certainly possible that some of these states have established fee caps by court rule.

84. See generally, Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 ARIZ. ST. L.J. 733, 745-69 (1993).

in the statutes themselves, most commonly \$75 per hour and/or a total amount of \$7500 (in ten states) or \$10,000 (in six states).⁸⁵ Again, one state caters to its taxpayers. Arizona permits fees of \$100 per hour for tax challenges, but only \$75 per hour for other actions.⁸⁶ Only four states (Arizona, Kentucky, Washington, and Wisconsin) provide statutorily for cost of living increases since the laws were passed, and only one more (Ohio) provides a general exception for a higher rate approved by the court.⁸⁷

More than any other feature of the statutes discussed thus far, what probably contributes most to making the laws difficult to use successfully is the standard required to recover. In all states but one, Arizona, parties cannot collect if they merely prevail, but only if the government conduct was wrongful.⁸⁸ The most common standards require proof that the government's position either "lacked a reasonable basis [both in law and fact]" or was not "substantially justified." The U.S. Supreme Court has deemed the two standards to be equivalent in the context of the federal EAJA.⁸⁹ The federal statute uses the latter phrasing, where it was crafted as a compromise between a fee shift only if "bad faith" were proved and a shift for any prevailing litigant.⁹⁰ Two state EAJAs (Montana and Texas) use the even more difficult standard of bad faith, groundless, or frivolous.⁹¹

85. For \$75.00 per hour caps see: ARIZ. REV. STAT. ANN. § 12-348(E)(2)-(5) (1995); HAW. REV. STAT. § 661-12(c) (1994); MO. ANN. STAT. § 536.085(4) (Vernon 1994); OHIO REV. CODE ANN. § 2335.39(A)(3) (Anderson 1994); 71 PA. CONS. STAT. § 2032(2) (1995); R.I. GEN. LAWS § 42-92-2(e)(1) (1994); WIS. STAT. ANN. § 814.245(5)(a)(2) (West 1994). For \$7500 total caps see: CAL. CIV. PROC. CODE § 1028.5(b) (West 1995); CONN. GEN. STAT. ANN. § 4-184a(a)(2) (West 1994); LA. REV. STAT. ANN. § 49:965.1(D)(1) (West 1995). For \$10,000 total fee caps see: ARIZ. REV. STAT. ANN. § 12-348(E)(2)-(5) (1995); IND. CODE ANN. § 34-2-36-7 (West 1994); KY. REV. STAT. ANN. § 453.260(4)(c) (Baldwin 1995); TENN. CODE ANN. § 29-37-104(a)(2)(A) (1994); 71 PA. CONS. STAT. § 2032(2) (1995); UTAH CODE ANN. § 78-27a-3(2) (1995). Two statutes with higher caps are FLA. STAT. ANN. § 57.111(4)(d)(2) (West 1994) and MINN. STAT. ANN. § 15.471(Subd. 5c) (West 1994).

86. ARIZ. REV. STAT. ANN. § 12-348(E)(2)-(5) (1995).

87. ARIZ. REV. STAT. ANN. § 12-348(E)(2) (1995); KY. REV. STAT. ANN. § 453.260(4)(b) (Baldwin 1995); OHIO REV. CODE ANN. § 2335.39(A)(3) (Anderson 1994); WASH. REV. CODE ANN. § 4.84.340(3) (West 1988 & Supp. 1996); WIS. STAT. ANN. § 814.245(5)(a)(2) (West 1994). Again, it is possible that in other states these issues are addressed by court rule.

88. Under OR. REV. STAT. § 183.497 (1994) and N.D. CENT. CODE § 28-32-21.1 (1995), judges "may" award fees if the standard for a mandatory award is not met.

89. *Pierce v. Underwood*, 487 U.S. 522 (1988). Only OR. REV. STAT. § 183.497 (1994) contains both standards and implies that they are different.

90. Mezey & Olson, *supra* note 5, at 15.

91. MONT. CODE ANN. § 25-10-711(1)(b) (1994); TEX. GOV'T CODE ANN. §§ 2006.011(1), .013(a)(3) (West 1995).

In at least five states,⁹² the difficulty of meeting this standard is reduced somewhat by putting the burden of proof on the government to show that its conduct was substantially justified, as is true under the federal EAJA.⁹³ Explicit information about who bears the burden is not available for most states, but presumably unless otherwise stated, the claimant bears the burden.

With all these restrictions that reduce the ability of many prevailing parties to qualify for an award of attorney fees, it is not surprising that most of the laws have not been heavily used. I turn next to what data are available about their use.

V. AMOUNT AND PATTERNS OF USE

A. *Method of Data Collection*

Rigorous testing of the theoretical literature comparing litigation activity under the American rule and one-way fee shifting would require equivalent data under the two cost-allocation methods. Unfortunately, in addition to all the problems associated with identifying a research setting that minimizes differences other than the fee arrangement, comprehensive data about claims under the state EAJAs are virtually impossible to obtain. Thirteen of the statutes require that reports of any claims paid be given to some legislative or administrative office.⁹⁴ Such a requirement is consistent with the purpose Krent identifies of aiding the legislature in monitoring agency behavior.⁹⁵ Nevertheless, inquiries to these offices yielded *no* information about awards under their EAJAs from all but four states. A few of the offices had never heard of the laws. Other attempts to obtain more thorough data from the states themselves also proved fruitless.⁹⁶

92. Florida: Department of Professional Regulation, *Div. of Real Estate v. Toledo Realty, Inc.*, 549 So. 2d 715 (Fla. Dist. Ct. App. 1989); Kentucky: KY. REV. STAT. ANN. § 453.260(2)(d) (Baldwin 1995); Missouri: *Melahn v. Otto*, 836 S.W.2d 525 (Mo. Ct. App. 1992). Ohio: OHIO REV. CODE ANN. § 2335.39(B)(2) (Anderson 1994); Oregon: OR. REV. STAT. §§ 182.090(2), 183.497(1)(b) (1994).

93. H.R. REP. NO. 1418, 96th Cong., 2d. Sess. 18 (1980).

94. CAL. CIV. PROC. CODE § 1028.5(h) (West 1995); HAW. REV. STAT. § 661-12(e) (1994); IDAHO CODE § 12-117(3) (1994); IND. CODE ANN. § 34-2-36-9 (West 1994); IOWA CODE ANN. § 625.29(7) (West 1995); LA. REV. STAT. ANN. § 49:965.1(C) (West 1995); MO. ANN. STAT. § 536.087(7) (Vernon 1994); NEB. REV. STAT. § 25-1806 (1994); N.Y. CIV. PRAC. L. & R. 8604 (McKinney 1994); 71 PA. CONS. STAT. § 2034(c), (d) (1995); TENN. CODE ANN. § 29-37-104(e) (1994); WASH. REV. CODE ANN. § 4.84.360 (West 1988 & Supp. 1996); WIS. STAT. ANN. § 814.245(10) (West 1985). *See also* FLA. STAT. ANN. § 57.111(7) (repealed 1995). Ironically, Florida is one of the four states that responded with data when asked in 1994.

95. Krent, *supra* note 27.

96. I also contacted court administrators to inquire whether court records could identify claims under their respective EAJAs. None of these inquiries proved fruitful. Letters to state

Consequently, the principal data source for the study is a Lexis search of judicial references under the statutory citation for each state's EAJA through June 30, 1995, as well as the statutory annotations in the printed volumes. In all but three states (Connecticut, New York, and one case in Ohio) this produced only appellate cases. These data undoubtedly understate the number of EAJA claims. Data from the four states (Arizona, Florida, New York, and Wisconsin) that sent specific information for a year or two worth of claims reveal a few claims being paid that do not get reported in the appellate cases.

The Lexis cases probably also understate somewhat the success of EAJA claims.⁹⁷ Initial decision makers more often deny fees than award them because of all the restrictions just discussed. Although in most states the agencies can appeal awards of fees against them, private parties denied fees probably have more incentive to appeal than the agencies do in the relatively few the agencies lose.⁹⁸ If so, fee denials are appealed at a higher rate than cases granting fees. Assuming appellate courts uphold trial courts more often than they overturn them, given normal standards of appellate review, the majority of initial denials are probably upheld.⁹⁹ Thus, the data presented here should be interpreted with caution and are not a definitive account of the use of state EAJAs. They are, however, the best data available on an important subject.

B. *Patterns of Claims*

A total of 340 appellate (plus fifteen trial) cases were reported in Lexis through June 30, 1995. As Table 1 reveals, the use of state EAJAs varies dramatically from state to state. Arizona has far more claims than any other state, notwithstanding its restrictions on types of claims covered. This suggests that the lack of a "substantially justi-

Attorneys General, who often defend the states in such actions, produced few responses and nothing but a little anecdotal data. In a number of states, court record keeping or state legal representation or both are not centralized, so information of this sort would have to be obtained from each local court or each state agency.

97. Use of federal EAJA cases from Lexis by Mezey and Olson, *supra* note 5, at 16, tended to understate claimants' success, compared to data from the Administrative Office of the Courts and from the Social Security Administration itself. The reported cases understated the dominance of Social Security claims, which have the highest success rate, Krent, *supra* note 46, at 487, but also appear to have understated the success of other types of claims, *id.* at 485.

98. *But see* Stephen E. Blackman, *Bad Faith and the EAJA: A Proposal for Strict Scrutiny of Government Fee Litigation under the EAJA*, 20 ENVTL. L. 975 (1990) (discussing the federal EAJA).

99. There may also be systematic differences in what cases are deemed sufficiently important to report. *See generally* Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782 (1992).

fied"¹⁰⁰ clause or a similar standard is the most important determinant of an EAJA's attractiveness to claimants. Oregon also stands out as having the second highest total, but it had an antigovernment fee shift four years earlier than any other state and a decade earlier than some. No other state has more than twenty-one reported cases in all the years since the statute went into effect. The states with the highest proportion of EAJA cases are the small-caseload states of North Dakota, Idaho, and Montana.

Especially when compared to its overall level of appellate filings, the state of California stands out for its small number of EAJA cases. At the extreme are four states in which the laws apparently go completely unused. *No* Lexis citations were found for the statutes in Hawaii, Indiana, Tennessee, and Utah. Moreover, the Attorneys General in all four states noted that they were unaware of any use of the statutes.¹⁰¹ One begins to suspect that at least in some states the passage of such statutes was purely an exercise in symbolic politics.¹⁰²

1. The No-Use States: Hawaii, Indiana, Tennessee, and Utah

It is tempting to try to determine if some features of the statutes are more "fatal" to their use than other features. The types of actions and units of government included in the four states' laws vary widely. A more consistent feature is that the laws in three of the four no-use states provide for discretionary, rather than mandatory, awards. On the other hand, nine other discretionary statutes have generated cases.

The only feature characteristic of all four no-use states is that only businesses (and not individuals) are eligible to make claims. The size limits on eligible businesses are quite low, too, ranging from thirty employees in Tennessee to 250 in Utah. On the other hand, four other states that exclude individual claimants (California, Florida, Louisiana, and Minnesota) have had cases. Florida, the state with the tightest eligibility limits (only businesses with no more than twenty-five employees and \$2 million net worth), has the most reported cases of these four, many in the area of professional licensing. Still, when adjusted for total appellate filings, California, Florida, and Louisiana

100. See *supra* text accompanying notes 88-91.

101. Letter from Charles F. Fell, Deputy Attorney General, State of Hawaii, to Susan M. Olson (Jan. 11, 1995); Letter from Anne P. Mullin, Deputy Attorney General, State of Indiana, to Susan M. Olson (Aug. 3, 1994); Letter from Andy D. Bennett, Associate Chief Deputy Attorney General, State of Tennessee, to Susan M. Olson (May 9, 1994); Telephone Interview with Richard C. North, Legislative Research Analyst, State of Utah (Oct. 15, 1993).

102. See generally MURRAY EDELMAN, *POLITICS AS SYMBOLIC ACTION: MASS AROUSAL AND QUIESCENCE* (1971).

tend to have fewer EAJA cases than those states that permit claims from individuals.¹⁰³

Thus, it is not really possible to determine that any particular characteristic of the statutes themselves is likely to deter claims, but presumably a combination of limiting conditions tends to do so. No doubt factors other than the characteristics of the statutes also play a role, such as the vigor of regulatory activities in the state and simply how well known the EAJA statute is.¹⁰⁴

2. States with Reported EAJA Cases

Restrictions in the statutes, level of governmental activity, and awareness of the EAJA obviously influence how many claims arise in a state as well as whether any claims at all arise. With states where there has been reported use of the statutes, however, one can compare the pattern of claims made and their success rates with data for cases under the federal EAJA and with the kinds of cases for which Krent says EAJAs are most valuable.

Table 2 displays each state that has had any EAJA cases reported in Lexis, the total number of those cases, the stakes in the underlying litigation (monetary or nonmonetary), the types of parties in the case, the party that initiated the case (government or private party), the type of underlying cases from which the EAJA claim arose, and the outcome of the fee claim.¹⁰⁵ All cases are appellate decisions except for a few in Connecticut, New York, and Ohio. The trial court decisions are included in the discussion that follows unless otherwise noted.

The categories of parties and claims used in Mezey and Olson's study of the federal EAJA are adopted here.¹⁰⁶ Types of parties include individuals, businesses, associations, unions, and governmental entities. Among the types of claims, challenges to government regula-

103. In addition, two of the three states with two-way shifts are among the four with no use reported in Lexis. On the other hand, the third state with a two-way shift, Wisconsin, has fourteen reported cases. Moreover, if a two-way shift were viewed as a serious risk for private parties litigating against state government, it would presumably deter the underlying substantive litigation and not just claims under the fee statute.

104. See generally Susan M. Olson, *Disseminating Information About Laws: The Equal Access to Justice Act (1990)* (unpublished paper prepared for delivery at the Annual Meeting of the Law and Society Association, Berkeley, CA).

105. The unit of analysis is the dispute, not the court decision. Thus, if a case was heard at more than one level of court, only the highest level court decision is coded. Similarly, if an appellate decision consolidated several trial cases with different fact situations, the cases are counted separately.

106. See Mezey & Olson, *supra* note 5.

TABLE 2
STATE EAJA CASES REPORTED IN LEXIS (THROUGH JUNE 30, 1995)
(Appellate Cases Unless Otherwise Noted)

State	No. Cases	Stakes			Party Type			Initiative			Claim Type					Award							
		M	N	?	I	B	A	U	G	P	G	?	1	2	3	4	5	?	Y	N	R	O	?
Arizona	71	37	34	0	22	41	5	0	3	14	57	0	20	28	14	7	2	0	30	38	0	2	1
California	7	1	6	0	0	6	1	0	0	2	5	0	5	1	1	0	0	0	1	6	0	0	0
Connecticut	2	0	2	0	1	0	1	0	0	2	0	0	0	0	0	1	1	0	0	2	0	0	0
CT (trial court)	13	1	12	0	10	2	1	0	0	5	8	0	9	1	1	2	0	0	3	10	0	0	0
Florida	17	2	13	2	3	14	0	0	0	3	14	0	13	1	2	1	0	0	6	5	4	0	2
Idaho	21	9	12	0	10	9	2	0	0	9	12	0	6	3	6	5	1	0	6	14	0	1	0
Illinois	20	8	12	0	6	12	0	0	2	4	16	0	11	4	0	5	0	0	7	12	1	0	0
Iowa	5	2	3	0	3	2	0	0	0	1	4	0	1	1	1	2	0	0	1	4	0	0	0
Kentucky	4	2	2	0	2	1	0	0	1	1	3	0	1	2	0	1	0	0	1	2	1	0	0
Louisiana	6	2	4	0	1	5	0	0	0	1	5	0	6	0	0	0	0	0	0	5	1	0	0
Minnesota	12	6	6	0	4	7	1	0	0	4	8	0	5	3	3	0	1	0	3	8	1	0	0
Missouri	9	2	7	0	6	3	0	0	0	0	9	0	6	2	1	0	0	0	1	7	1	0	0
Montana	11	5	6	0	8	1	2	0	0	3	8	0	3	4	3	1	0	0	1	10	0	0	0
Nebraska	4	3	1	0	4	0	0	0	0	2	2	0	1	0	1	2	0	0	0	3	0	1	0
New York	17	4	12	1	14	2	1	0	0	6	10	1	6	0	1	7	2	1	5	12	0	0	0
NY (trial court)	5	1	4	0	2	3	0	0	0	2	3	0	3	1	1	0	0	0	0	5	0	0	0
No. Carolina	8	2	6	0	3	5	0	0	0	1	7	0	5	0	0	2	1	0	3	3	2	0	0
No. Dakota	10	2	8	0	5	5	0	0	0	6	4	0	3	3	2	2	0	0	2	8	0	0	0
Ohio	16	2	14	0	9	7	0	0	0	8	8	0	7	0	4	5	0	0	1	13	2	0	0
OH (trial court)	1	1	0	0	0	1	0	0	0	0	1	0	1	0	0	0	0	0	1	0	0	0	0
Oklahoma	4	3	1	0	3	1	0	0	0	0	4	0	0	2	2	0	0	0	0	4	0	0	0
Oregon	39	17	22	0	21	12	2	3	1	18	21	0	11	3	3	17	5	0	6	30	3	0	0
Pennsylvania	18	10	8	0	15	3	0	0	0	6	12	0	7	1	5	4	1	0	4	12	2	0	0
Rhode Island	4	1	3	0	3	1	0	0	0	2	2	0	1	1	0	2	0	0	2	1	1	0	0
So. Carolina	10	4	6	0	7	3	0	0	0	7	3	0	2	1	3	4	0	0	4	5	1	0	0

TABLE 2 (Continued)

State	No. Cases	Stakes	Party Type	Initiative	Claim Type	Award
Texas	1	0	1	0	0	0
Virginia	6	2	4	3	0	0
Wisconsin	14	7	7	3	1	0
Totals	355	136	169	114	63	57
% of Total	100%	38%	48%	32%	41%	27%
		61%	45%	68%	18%	65%
		1%	5%	0%	15%	6%
			1%		22%	1%
			2%		4%	1%

Legend:

Stakes:
M=Monetary
N=Nonmonetary
?=N/A

Party Type:
I=Individuals
B=Business
A=Associations
U=Unions
G=Government

Initiative:
P=Private
G=Government
?=N/A

Claim Type:
1=Challenge to Government Regulation
2=Challenge to Government Valuation
3=Disputes over Government Operations
4=Claims for Rights/Benefits
5=Claims for Regulatory Enforcement
?=N/A

Award
Y=Yes
N=No
R=Remand
O=Other (usually award granted under different statute)
?=N/A

tion represent the prototypical EAJA case of a small business or licensee fending off regulatory enforcement. Cases such as motor vehicle licensing proceedings are also included in this category. The category of challenges to government valuations mostly consists of taxation cases, though it also includes a handful of eminent domain and child support cases. Challenges to government operations is the most eclectic category. Its largest component is cases concerning public employment, but it also includes some concerning government contracts and procedures such as forfeitures. Claims of rights/benefits are mainly public assistance and unemployment claims, but also a few civil rights or liberties cases. The final category, claims for regulatory enforcement, is small but significant. These are cases in which a third party is suing the government to get it to carry out some regulatory responsibility. These cases are the antithesis of those emphasized by sponsors of the federal and many state EAJAs, who viewed government regulation as excessive.

Compared to their federal counterpart, use of the state EAJAs is much more consistent with the deregulatory emphasis of the legislative history. Challenges to government regulation made up only 8.2% of the federal EAJA cases, and claims for rights predominated with 60.5%.¹⁰⁷ Use of the federal EAJA during the Eighties was dominated heavily by claims against the Social Security Administration, most from terminated disability recipients.¹⁰⁸ Among the state cases in contrast, as Table 2 indicates, challenges to government regulation are by far the largest type of claim (41%), with claims for rights/benefits a distant second (22%), followed by challenges to government valuations (18%) and to government operations (15%). Claims for regulatory enforcement are an even smaller percentage of state claims (4%) than they were of federal claims (6%). This distribution of claims suggests the state EAJAs more closely fulfill their sponsors' intentions, of aiding resistance to government regulation, than the federal EAJA did in the Eighties.

Another dimension for analyzing the use of the state EAJAs is by the type of party making the claim. Sponsors of EAJAs emphasized the small business constituency, but they may not be the principal beneficiaries of the statutes' redistributive effects once in operation. Indeed, Mezey and Olson found use of the federal EAJA to have been heavily dominated by individuals rather than businesses during the

107. *Id.* at 17 tbl. 2.

108. *Id.* at 17.

Eighties because of the Social Security cases. Individuals brought 73.8% of the cases, compared to 11.3% brought by businesses.¹⁰⁹

With all state EAJAs together, cases involving individuals (48%) slightly outnumber those involving businesses (45%) (Table 2). A few claims involving associations (5%), local units of government (2%), and unions (1%) have also arisen (Table 2).¹¹⁰ A few states, however, permit only businesses to make claims. If these states are excluded (California, Florida, Louisiana, Minnesota, and Texas), then the percentages of cases involving the different types of parties are individuals (51%), businesses (40%), and others (8%).¹¹¹ Thus, individuals do use state EAJAs more than businesses do, but the difference is not nearly as great as under the federal EAJA.

If one could assume that cases brought by individuals are likely to be smaller than those brought by organizations, these data would weakly support Krent's claim that one-way fee shifting is especially important for small claims that might otherwise be dwarfed by the costs of pursuing them.¹¹² There is some legitimacy to such an assumption, but the assumption is quite unreliable. Individuals who are licensees of the state (e.g., medical professionals, insurance agents, etc.) are coded here as businesses because their disputes with the state concern their occupation, and because they are eligible to bring claims even in states in which only businesses and not individuals are eligible.¹¹³ Such "businesses" may have as meager resources as many individuals.

The party data can shed somewhat more light on another of Krent's theoretical expectations. Krent suggests that one-way fee shifting is more needed for policy-implementation decisions than for policy-making decisions because of greater opportunities for more direct public oversight of the latter.¹¹⁴ To the extent that the vast majority of the state EAJA cases address individual grievances with little broader public interest, the EAJAs' use would be consistent with Krent's expectations.

109. *Id.* at 16 tbl. 1.

110. Percentages are rounded to the nearest whole number.

111. A few cases with individuals are coded for these five states because they also included business parties or because individuals made claims but were rejected because they were not eligible. The latter is especially true in Minnesota. The other four states that permit only businesses to make claims had no reported EAJA cases, and are excluded from Table 2.

112. Krent, *supra* note 46, at 465.

113. Public employees, in contrast, are coded as individuals.

114. Krent, *supra* note 46, at 462-63, 468-70.

It was not possible to code each case as a policy-making or policy-implementation decision without knowing a great deal about the substantive law at stake in each case, but a rough measure of broader interest in a case is whether the cases are class actions or include interest groups as either third parties or direct participants. In the entire population of 355 cases, five are class actions and twenty-six more cases include either one or more amici curiae, intervenors, or public interest law firms representing the private party.¹¹⁵ In addition to these cases, in nine more cases the associational plaintiffs were public interest groups rather than narrower associations such as property owners' groups. Thus, in about 11% of all the EAJA cases, there is evidence of a broader public interest in the case. This suggests that such groups clearly benefit from EAJAs, but by no means dominate them, as some critics of one-way fee shifting have suggested.¹¹⁶ Low-visibility cases are the major beneficiaries of EAJAs, as Krent thinks they should be.

Related to his distinction between policy-making and policy-implementation cases is Krent's corresponding distinction between actions initiated by a private party and those initiated by the government. Krent proposes that "fee shifting should encourage private parties who are sued by the government to challenge vigorously government policy."¹¹⁷ This prospect surely was part of the congressional intent for the federal EAJA, as evidenced by the allegations in the legislative history that the government targets small businesses for regulatory enforcement because they cannot afford to fight back.¹¹⁸

From the facts as stated in the cases, I coded each case as initiated by the government or the private party. For example, a private party initiates an application for benefits, while the government initiates a termination of benefits. Regulatory actions are usually initiated by the government, unless a third party, such as a union, acts to compel the government to enforce regulations. I coded tax cases as being initiated by the government, because the government determines that the taxpayer erroneously calculated its tax liability. Generally, I identified the point of initiation as being earlier than the start of formal legal action, in contrast to some states' narrower definitions.¹¹⁹

115. Legal service agencies representing low-income persons or prisoners are not included in these figures unless they appear as amicus curiae or are litigating the question of their own right to receive attorney fee awards.

116. See Fein, *supra* note 13.

117. Krent, *supra* note 27, at 2049.

118. Cited in Krent, *supra* note 46, at 465-66, n.32.

119. See *supra* text accompanying note 77.

Again, the empirical data seem consistent with Krent's theoretical analysis. Nationwide, 68% of state EAJA cases were initiated by the government, and 32% by the private party (Table 2). To be accurate, however, one should exclude the states that by statute include only actions initiated by the government: Florida, Kentucky, Ohio, Oklahoma, Pennsylvania, and Texas.¹²⁰ Ironically, the pattern is the same with these states omitted: 68% government-initiated and 32% private-initiated. This is because the state-initiative rule has been significantly litigated in Ohio and Pennsylvania, producing numerous cases in which the parties are denied fees because they initiated the controversy. By either measure, then, with more than twice as many claims for fee shifts in cases initiated by the government than the reverse, the state EAJAs are performing the function Krent deems appropriate.

The final theoretical variable Krent considers is the distinction between monetary and nonmonetary cases. Krent states that awards of attorney fees may be especially important for people with nonmonetary claims.¹²¹ The concept of the nonmonetary claim is not easily operationalized, however. It presumably includes affirmative litigation for injunctive or declaratory relief rather than for money damages, but certainly a party may seek to enjoin an action because of its potential financial impact. Probably most litigation has some monetary implications for the parties. For example, a professional facing potential license revocation from a licensing board faces the entire loss of livelihood, even though there is no ascertainable dollar amount involved in the immediate proceedings.

For this study, "nonmonetary" is operationalized as being cases in which the private party, if successful, would not directly receive money from the losing side. The theoretical justification of this choice is that persons who do receive money upon winning could use some of it to pay an attorney.¹²² Cases are considered monetary even if the party is seeking reimbursement of money previously paid, on the the-

120. FLA. STAT. ANN. § 57.111(3)(b) (West 1994); KY. REV. STAT. ANN. § 453.260(1) (Baldwin 1995); OHIO REV. CODE ANN. § 2335.39(B)(1)(c), (B)(2) (Anderson 1994); OKLA. STAT. ANN. tit. 12, § 941 (West 1995); 71 PA. CONS. STAT. § 2033(a) (1995); TEX. GOV'T CODE ANN. § 2006.013 (West 1995). The Utah statute (UTAH CODE ANN. § 78-27a-4, -5 (1995)) also covers only government-initiated actions, but it produced no cases in Lexis.

121. Krent, *supra* note 27, at 2049; see also HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 101 (1991).

122. This definition of monetary, of course, ignores the magnitude of the payment. The case of a person whose terminated public assistance benefits are restored is considered monetary as much as that of a corporation that wins back millions of dollars in taxes, even though obviously the latter has more resources with which to pay counsel.

ory that even the majority of damage awards (the prototypical monetary claim) are considered compensation for money lost or spent. Tax and civil penalty cases are considered monetary on the assumption that a party ordinarily has to pay the tax or penalty and then challenge it, though I realize that is not always the case.

Using this definition, the state EAJAs do appear to be invoked in more nonmonetary than monetary cases. Nationwide, 61% of the cases involve nonmonetary claims, while only 38% involve monetary claims (Table 2). The percentage of monetary cases is as high as it is because of the large proportion of monetary cases (slightly over half) in the state with by far the largest number of EAJA cases in total, Arizona. The Arizona statute explicitly authorizes challenges to tax assessments and will pay attorney fees at a higher rate in tax cases than in other types of cases.¹²³ The underlying claims in the other states in which monetary cases outnumber nonmonetary tend to be either primarily regulatory cases with civil penalties (Pennsylvania) or a handful of public benefit cases and back-pay actions (Nebraska). Again, the state EAJAs appear to be attracting the very cases Krent predicts they should.

C. *Patterns of Fee Awards*

The final important component of the data is the success rate. Success rates measure the degree of redistribution that EAJAs actually accomplish. Moreover, they can have an iterative effect on the use of a statute, as prospective claimants try to judge the likelihood of succeeding before filing an EAJA claim. If prospective claimants are aware that others have received awards, they presumably are more likely to proceed with a claim.

The federal EAJA's redistributive effect during the Eighties initially appears to have been very different for different types of parties. Individuals had a much higher success rate of 60%, compared to 28% for businesses, but this was because of the Social Security disability terminations, which courts widely held to be unlawful.¹²⁴ With Social Security cases excluded, however, the average success rate was 36%, with no statistically significant difference among types of parties.¹²⁵

123. ARIZ. REV. STAT. ANN. § 12-348(B), (E)(2) (1995).

124. Mezey & Olson, *supra* note 5, at 18, tbl. 4; see also SUSAN G. MEZEY, NO LONGER DISABLED: THE FEDERAL COURTS AND THE POLITICS OF SOCIAL SECURITY DISABILITY (1988).

125. This figure is from unpublished data in the author's possession.

For the state cases, EAJA claimants' overall success rate of 27% (Table 2) is noticeably lower than the success rate under the federal EAJA.¹²⁶ A more accurate comparison with the federal law, however, would include only those states with standards for recovery similar to the federal "substantial justification" standard, which would exclude Arizona, Montana, and Texas.¹²⁷ If these three states are excluded, claimants' success rate in the other states drops from 29% to 26% (excluding remands, awards under other statutes, and missing data). Thus, the state courts as a whole are less generous in granting EAJA claims under the "substantially justified" standard than the federal courts, even in non-Social Security cases.¹²⁸

The standard of recovery explains some, but not all, of the difference in success rates across states. The two states with the stricter, "bad faith" standard for recovery have among the lowest success rates: one successful case out of eleven in Montana; and only one case, unsuccessful, in Texas. On the other hand, the success rate in some states using the substantially justified standard is similarly low: no successes among six cases in Louisiana, one out of nine in Missouri, and two out of seventeen in Ohio.

At the upper end, three states using the substantial justification standard have success rates (remands excluded) equaling or exceeding 50%—Florida, North Carolina, and Virginia,¹²⁹ and two more exceed 40% (South Carolina and Wisconsin). The interesting case is Arizona, the one state without even a substantial justification standard and with by far the largest number of claims. Its success rate of 44% is well above average, but still more than half of claimants fail to receive fee awards. Apparently the Arizona courts have chosen to interpret other restrictions in the law as strictly as possible, perhaps to protect the public treasury from paying too many attorney fee awards.¹³⁰ The

126. The remand rate is slightly higher for state cases (6%) than for federal cases (5%). Subsequent state success rates presented here are calculated without remands, awards under other statutes, and missing data. Cases receiving any award were coded "yes," even if it was only a partial award.

127. See *supra* text accompanying notes 88-91.

128. In contrast, state courts show less deference to agencies on the merits than do federal courts to federal agencies, according to a rare empirical study of judicial review of state agencies. See Stephen I. Frank, *State Supreme Courts and Administrative Agencies*, 51 *STATE GOV'T* 119 (1978); Stephen Frank, *The Oversight of Administrative Agencies by State Supreme Courts: Some Macro Findings*, 32 *ADMIN. L. REV.* 477 (1980).

129. Virginia phrases its standard as reasonableness rather than substantial justification. VA. CODE ANN. § 9-6.14:21 (Michie 1995).

130. The Arizona statute (ARIZ. REV. STAT. ANN. § 12-348(H) (1995)) denies an award in cases where the government was a nominal party or adjudicated a dispute or issue between private parties, and in a few other types of actions. Other conditions, under which the court is

lack of a "substantially justified" standard (or other similar one) appears to have a greater effect on the number of claims than on those claims' success.¹³¹

In addition to differences in success by state or standard of recovery, there are modest differences among types of parties and types of claims, and between cases with monetary or nonmonetary stakes. Although the legislatures mostly had businesses in mind when they passed the laws, individuals not only brought more cases, but also won at a somewhat higher rate. Excluding the states that permit only businesses to make claims, fees were awarded in 33% of cases brought by individuals, compared to 28% of business cases and 16% of cases by other parties.¹³²

These differences may be due largely to the types of claims brought by different types of parties. Sixty percent of the cases brought by businesses were challenges to government regulations, just as the legislators intended, while only 23% of cases brought by individuals were of this type. In contrast, only 4% of business cases, but 41% of individual cases, were claims of rights (largely related to public entitlement programs). Thirty-six percent of cases involving claims of rights received fee awards, while only 27% of challenges to government regulations received awards, even though they are the type of case original EAJA supporters most had in mind. The discrepancy between awards to businesses and to individuals is no greater than it is because challenges to government valuations (largely tax claims) received fee awards 37% of the time, and businesses brought 68% of this type of claim.

With respect to the types of cases Krent expected to be most helped by one-way fee shifting, the picture is mixed. Although cases with nonmonetary stakes produced a majority of claims, cases with monetary stakes received awards at a higher rate (34%) than did nonmonetary cases (26%). The number of nonmonetary claims is sufficiently greater, however, that 55% of cases receiving fee awards are nonmonetary claims.¹³³ The other category Krent expected to be

statutorily authorized to reduce or deny the award, are if the prevailing party protracted the litigation, if the reason for prevailing is an intervening change in the applicable law, or if the prevailing party refused a settlement offer at least as favorable as the relief granted. Many of these conditions appear in other state EAJAs as well.

131. If the Arizona statute did not exclude monetary benefit claims, it no doubt would generate yet many more cases, since this claim type is common in some other states.

132. Levels of statistical significance are not reported for these and the following associations because the data are not from a random sample; they consist of *all* reported cases under state EAJAs.

133. See *supra* text accompanying notes 121-23.

helped, cases initiated by the government, received 69% of the fee awards granted because they were more numerous than cases initiated by the private party and had a success rate virtually the same (30.5%) as those initiated by the private party (29.5%).¹³⁴

In summary, the state EAJAs have generally attracted the types of cases that the legislators anticipated; more so than has the federal EAJA. There is no one type of state case that has dominated state EAJAs as Social Security claims have dominated the federal EAJA. Moreover, the state EAJAs have also generally attracted the types of cases that Krent theoretically predicted that the Acts should. These patterns of use occur despite patterns of fee awards that do not reinforce the use patterns. The most expected types of cases generally win fee awards at rates equal to, or lower than, cases with monetary stakes, cases initiated by private parties, cases brought by individuals, and cases challenging the government for reasons other than to resist regulations. The differences are generally not large, however, and these conclusions are limited to reported, primarily appellate, cases.

VI. CONCLUSIONS

This review of the use of state Equal Access to Justice Acts shows how laws often take on a life of their own that may be somewhat different from their sponsors' vision. A flurry of state EAJAs were passed in the wake of the federal EAJA, which clearly reflected antigovernment ideology and was seen initially as a benefit for small business owners. In at least some states, it is also evident that business was the primary intended constituency. Nonetheless, most of the statutes were written more broadly, which is entirely appropriate from the perspective of the public-regarding goals of one-way fee shifting.¹³⁵ Businesses are not unique in having disputes with the government, and the need to equalize resources for litigation applies to other parties at least as much as to businesses.

Because of the flood of Social Security disability cases, use of the federal EAJA deviated dramatically from that anticipated by its original supporters.¹³⁶ The state EAJAs, however, are by no means redis-

134. See *supra* text accompanying notes 117-20. States permitting only government-initiated cases were excluded from this calculation.

135. See *supra* text accompanying notes 45-46.

136. Mezey & Olson, *supra* note 5. It is possible that the pattern of use Mezey and Olson found of the federal EAJA may be peculiar to the particular time period they studied, but the proportion of federal EAJA claims arising from Social Security cases stayed very high at least through the 1989-90 year studied by Krent, *supra* note 46, at 485.

tributive mechanisms that award attorney fees primarily to those with the fewest resources. As noted, some statutes permit only businesses to make claims. Although the eligibility limits in many of the laws are intended to ensure that the wealthiest claimants do not benefit, these eligibility limits vary dramatically, and thirteen states have no such limits at all. Some exclude the kinds of cases most likely brought by low-income people: claims under public benefit programs. Others accord favored treatment to challenges of tax assessments, which benefits most those with the highest taxes.

As measured by actual use rather than the features of the statutes, at best only half of EAJA claimants in any state receive a fee award, and the national average is merely 27% (Table 2). More individuals than businesses make EAJA claims, where they are permitted to, and receive awards, but the distinction between individuals and businesses is too imprecise a measure to draw substantial conclusions about who benefits most from EAJAs. Claims for fee awards arise in a wide variety of cases. A substantially higher percentage of them occur in challenges to government regulation under state EAJAs than under the federal EAJA, which suggests that the usage pattern of the state laws is somewhat more consistent with the deregulatory ideology they share.¹³⁷ Although the success rate in these cases is not as high as in claims of rights, which probably benefit mainly lower-income people, the latter's success rates are matched by those in tax cases (and other challenges to government valuations), over two-thirds of which are brought by businesses.

Some critics have worried that one-way fee shifts have primarily benefited public interest groups.¹³⁸ There is no evidence from state EAJA data to support this conclusion. Not only do merely 11% of cases include parties indicative of wider public interest in a case,¹³⁹ but also the only type of case in which associations, unions, and governmental bodies predominate is the smallest and least successful. Cases seeking to compel the government to enforce regulations are virtually the opposite of the type of case most EAJA sponsors envisioned and that 60% of these cases involve associations, unions, or governmental bodies. Such cases make up only 4% of all state EAJA claims, however, and they win fee awards at the lowest rate: only 7%. Thus, only 1% of fee awards occur in regulatory enforcement cases.

137. See Mezey & Olson, *supra* note 5, at 18, tbl. 2.

138. Fein, *supra* note 13.

139. See *supra* text accompanying notes 115-16.

If one can generalize, then, about state EAJAs with so many variations among them, one would note that the beneficiaries of the EAJAs' redistributive effects are spread broadly across the populations, and across issues with which state governments are involved. Their redistributive effects are limited, however, no doubt in part due to the nearly universally used "substantial justification" or "reasonable basis" standards for recovery. The Arizona fee statute's lack of such a standard shows its importance in deterring claims, but the Arizona example also shows that other features of a statute can be used to limit awards and the risk of excessive litigation.

The "substantially justified" standard of recovery could be seen as striking a balance between antigovernment and antilitigation ideologies. The EAJAs provide some recourse against government action, but do not make a fee award so easy to get that they create a strong incentive to litigate where there would not be one otherwise. In fact, as a means to prevent overdeterrence of necessary government action, the substantially justified standard was a product more of direct opposition to the antigovernment ideology and of budgetary concerns than of antilitigation ideology. Furthermore, in operation, the standard has certainly not been a litigation-detering mechanism. The federal EAJA has generated significant secondary litigation over the issue of what constitutes substantial justification.¹⁴⁰ Adherents to the antilitigation ideology should support Krent's argument that the "substantially justified" standard could be dropped and prevailing parties automatically receive fees without risk of overdeterrence in many areas in which the government is protected by a deferential standard of review.¹⁴¹

Finally, although this study provides a first look at the impact of state EAJAs, much more empirical research is needed to test theoretical predictions about the effects of fee shifting. Within the limits of the data and the measures available, the patterns of use of the state EAJAs appear to be quite consistent with the types of cases in which Krent used economic theory to predict EAJAs would be most useful. Cases with nonmonetary stakes and cases initiated by the government received more fee awards than either cases with monetary stakes or those initiated by private parties. One needs to know at least the underlying number of potentially eligible cases under a fee statute to be able to draw firmer conclusions. Ideally, a controlled comparison of

140. Krent, *supra* note 46, at 479; see also Blackman, *supra* note 98.

141. Krent, *supra* note 46, at 475-76.

similar litigation under one-way fee shifting and the American rule is necessary to determine if fee shifting is having much effect.

This study also has implications for the theoretical literature on fee shifting. This literature needs to give more attention to one-way fee-shifting statutes because of their prevalence in this country. Furthermore, the study of EAJAs suggests an additional dependent variable that is not often addressed in this literature: the decision whether to claim fees if the party is eligible to do so. Presumably this variable has been ignored because the literature usually compares the American rule to the British rule, where fee shifting to the prevailing party is automatic. In contrast, under EAJAs and many other American fee-shifting statutes, parties must petition to receive fees. The low utilization of the federal EAJA (compared to the estimates made at the time of its passage¹⁴²), and the seemingly low number of claims under the state EAJAs in the years they have been in effect suggest that claiming fees when eligible should not be taken for granted. Persons may not be aware of available fee-shifting statutes, especially not at the stage when they are only considering whether to consult counsel.¹⁴³

Only when we have more controlled, empirical studies of litigation under different fee arrangements will we even be able to begin to weigh the competing ideologies and address the ultimate normative question of whether fee shifting facilitates "meritorious" litigation and deters "frivolous" litigation. Public policy made on the basis of mere assumptions about these matters is risky and short-sighted.

142. Mezey & Olson, *supra* note 5, at 19.

143. The persistence of high proportions of federal EAJA claims from Social Security cases after the roll-back of the Reagan administration's policy of reducing disability payments suggests that once a certain type of party (or, more accurately, the network of attorneys that serve them) discovers an EAJA, such parties will continue to use it.