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Four Decades of Federal Civil Rights Litigation

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Four Decades of Federal Civil Rights Litigation

*Theodore Eisenberg**

I. INTRODUCTION

Civil rights litigation has been a prominent part of the federal docket in the decades since Dr. King's speech. The speech came in the midst of two seminal events in the modern history of civil rights legislation: (1) the 1961 decision in *Monroe v. Pape*¹ that revitalized using 42 U.S.C. § 1983 to redress constitutional violations by state officials, and (2) a statutory achievement of the civil rights movement, passage of the Civil Rights Act of 1964² with its prohibition in Title VII³ against private employment discrimination.

Section 1983 cases, often referred to as constitutional tort cases, and employment discrimination cases, including Title VII cases, numerically dominate the civil rights case docket in federal court. There are, of course, other important statutes designed to protect civil rights. These include the ban on race discrimination in federally funded programs in Title VI of the 1964 Act,⁴ the ban on sex discrimination in education programs or activities that receive federal funding in Title IX of the Education Amendments of 1972,⁵ the Age Discrimination in Employment Act of 1967,⁶ the Americans with

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Ted prepared a draft of this article incident to his participation in a New York Law School Law Review Symposium in 2013. Ted tragically passed away prior to this article's completion. Professors Kevin Clermont, Dawn Chutkow, and Michael Heise assisted with bringing Ted's article to completion and publication. Els Baum provided outstanding research assistance to this effort.

¹365 U.S. 167 (1961).

²Pub. L. No. 88–352, 78 Stat. 241 (1964) (enacted July 2, 1964).

³42 U.S.C. §§ 2000e et seq.

⁴42 U.S.C. §§ 2000d et seq.

⁵42 U.S.C. § 1681 (2006).

⁶29 U.S.C. §§ 621 et seq.

Disabilities Act of 1990,⁷ the Rehabilitation Act of 1973,⁸ the Equal Pay Act of 1963,⁹ the Voting Rights Act of 1965,¹⁰ and surviving civil rights statutes from the post-Civil War era.¹¹ The Civil Rights Act of 1968,¹² which prohibits discrimination in housing, was enacted shortly after the assassination of Dr. King. For the last four decades, however, litigation under Section 1983 and the employment statutes has constituted the largest fraction of the nonprisoner federal civil docket.¹³ This article examines the pattern of trials, their outcomes, and settlements in these two areas from 1979 to 2013.

From the beginning of the modern civil rights era of litigation in the 1960s, concerns have been expressed about the treatment of civil rights litigants in court. Kevin Clermont and Stewart Schwab found that federal employment discrimination plaintiffs, compared to non-civil rights plaintiffs, “manage fewer resolutions early in litigation, and so they have to proceed to trial more often. They win a lower proportion of cases during pretrial and at trial. . . . On appeal, they have a harder time both in preserving their successes and in reversing adverse outcomes.”¹⁴ Laura Beth Nielsen, Robert Nelson, and Ryon Lancaster’s classic study of federal employment discrimination cases filed from 1988 to 2003 showed that employment discrimination cases suffered 19 percent early dismissals and 18 percent losses on summary judgment.¹⁵ Figure 1, based on Nielsen et al.’s similar figure, shows the pattern of employment case disposition.

⁷42 U.S.C. §§ 12101 et seq.

⁸29 U.S.C. §§ 791 et seq.

⁹29 U.S.C. § 206(d) (2006).

¹⁰42 U.S.C. §§ 1973 et seq. (invalidated in part by *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013)).

¹¹42 U.S.C. §§ 1981, 1982, 1985 (2006).

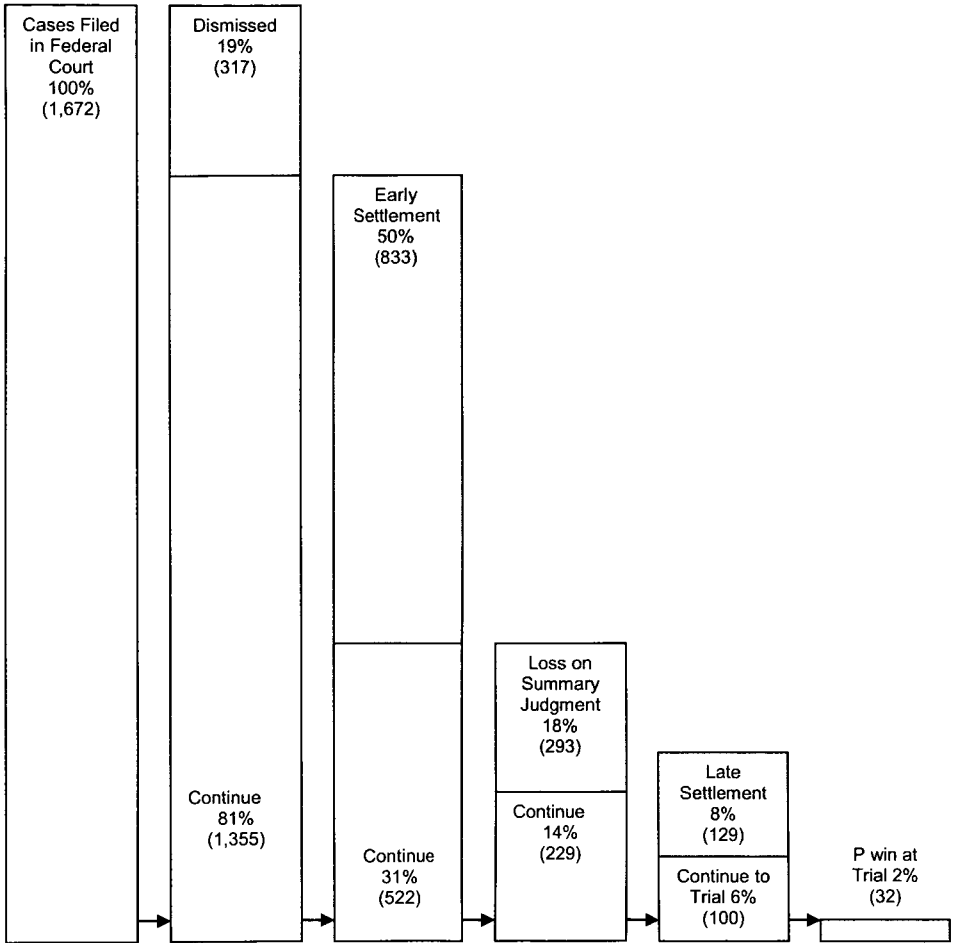
¹²42 U.S.C. § 3601 et seq.

¹³E.g., U.S. Courts, *Caseload Statistics 2013: Table C-2, U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2012 and 2013*, available at <<http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C02Mar13.pdf>>. For fiscal year 2013, these data show 14,078 employment filings, 2,020 Americans with Disabilities Act employment filings, and 16,405 other civil rights filings in federal district court. Only prisoner case categories (habeas corpus and prison conditions) had comparable or greater numbers of filings. *Id.* Overlap exists among the civil rights case categories. For example, an employment race discrimination case against a state employer could be filed under Section 1983 and Title VII. The court data’s classification of a case is based on the classification of it by the attorney at the time of filing. For discussion of civil rights action cause of action overlap, see Theodore Eisenberg & Stewart J. Schwab, Comment, *The Importance of Section 1981*, 73 *Cornell L. Rev.* 596, 601 *tbl.III* (1988) (showing that cases filed under 42 U.S.C. § 1981 include employment cases that could also be Title VII cases, and police misconduct cases that could also be Section 1983 cases).

¹⁴Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 *Harv. L. & Pol’y Rev.* 103, 103 (2009).

¹⁵Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 *J. Empirical Legal Stud.* 175 (2010). This study was significant because it provided detailed procedural stage information that was previously unavailable.

Figure 1: The paths of federal employment discrimination cases: a sequential model of outcomes, 1988–2003.



The 58 percent total settlement rate for employment cases is well below the settlement rate in other areas of law. Studies report settlement rates of 73 percent in federal non-civil-rights cases, 75 percent in tort cases,¹⁶ and 70–80 percent in general.¹⁷ Of 1,672 cases filed, 32, about 2 percent, resulted in plaintiff wins at trial compared to 4 percent for

¹⁶Theodore Eisenberg & Charlotte Lanvers, What Is the Settlement Rate and Why Should We Care? 6 J. Empirical Legal Stud. 111, 119 (non-civil-rights cases), 120 (tort cases) (2009).

¹⁷Id. at 122–23.

defendants.¹⁸ This one-third trial win rate is below that of most other civil litigation.¹⁹ Other studies show that, on appeal, employment discrimination plaintiffs fare worse than almost every other kind of case.²⁰

Similar patterns exist for constitutional tort cases brought under Section 1983. No study of Section 1983 contains case outcome data as precisely coded as Nielsen et al.'s outcome data for employment cases. Nevertheless, it is clear that Section 1983 plaintiffs also fare poorly compared to non-civil-rights plaintiffs. Pretrial judgment rates for plaintiffs are lower than in other classes of cases,²¹ pretrial dismissal rates are higher than for other class of cases²² and have plaintiff trial win rates of 30 percent or less, which is lower than the rates for most classes of civil litigation.²³ Constitutional tort cases have settlement rates well below the 70–80 percent rate in non-civil-rights cases.²⁴ On appeal, plaintiffs in constitutional tort litigation who succeeded at trial suffer much higher reversal rates, over 50 percent, than defendants in constitutional tort cases who prevailed at trial, who suffer reversal in less than 20 percent of appeals by plaintiffs.²⁵

Employment discrimination and Section 1983 plaintiffs not only have suffered longstanding worse results than other plaintiffs. Both classes of plaintiffs suffered increased pretrial dismissal rates relative to other plaintiffs after the Supreme Court's heightening of pleading standards in *Bell Atlantic Corp. v. Twombly*.²⁶ The negative effect was especially strong in pro se cases.²⁷

¹⁸Nielsen et al., *supra* note 15, at 187.

¹⁹See Figure 6 (showing higher trial win rates in federal tort and contract cases).

²⁰Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. Empirical Legal Stud. 659 (2004); Theodore Eisenberg & Henry S. Farber, *Why Do Plaintiffs Lose Appeals? Biased Trial Courts, Litigious Losers, or Low Trial Win Rates?* 15 Am. L. & Econ. Rev. 73 (2013).

²¹Theodore Eisenberg, *The Relationship Between Plaintiff Success Rates Before Trial and at Trial*, 154 J. Royal Statistical Soc'y 111, 115–16 (1991).

²²Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Supreme Court*, available at <<http://ssrn.com/abstract=2347360>>.

²³See Figure 6; 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, 728, 733 (1988).

²⁴Eisenberg & Lanvers, *supra* note 16, at 122, 133.

²⁵Eisenberg & Farber, *supra* note 20, at 99.

²⁶550 U.S. 544 (2007) (dismissing an antitrust complaint that alleged an agreement in conclusory terms based on information and belief, with the lack of detail owing to the fact that the plaintiffs had no proof in hand without discovery). *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), clarified the broad applicability of *Twombly* and the intricate workings of the new plausibility test. For the adverse affect of these cases on employment discrimination and Section 1983 plaintiffs, see, e.g., Clermont & Eisenberg, *supra* note 22.

²⁷Clermont & Eisenberg, *supra* note 22.

The last broad-based empirical assessment of employment cases was Clermont and Schwab's 2009 study, which ended with data from 2006. No similar recent summary exists for Section 1983 cases, though patterns over time for some outcomes have been reported for earlier years.²⁸ With data through fiscal year 2013 now available, it is appropriate to again examine the long-term litigation patterns for both employment cases and constitutional tort cases, collectively referred to in this article as "civil rights cases." Except when reporting data on all terminations, this analysis does not include prisoner civil rights cases.²⁹

To summarize what follows, civil rights cases constitute about 14 percent of federal court civil terminations, which constitutes a decline from a peak of about 17 percent in the late 1990s.³⁰ Trial outcomes, as in other areas of law, constitute a small fraction of case terminations.³¹ The distribution of employment discrimination trials between judge trials and jury trials has changed over time.³² The number of employment discrimination trials before judges has been in decline for about 30 years, a trend also evident in contract and tort cases.³³ Pretrial dismissals partly explain the striking decline in the number of trials. In calendar year 2012, there were 39 employment discrimination judge trials compared to a peak of 1,008 judge trials in 1984.³⁴ Employment jury trials declined from a 1997 peak of 851 to 264 in 2012, the lowest since 1983.³⁵ The number of judge trials in constitutional tort cases has declined from 395 in 1982 and 1983 to 55 in 2012.³⁶ Constitutional tort cases had 570 trials in 1998 and 463 in 2012.³⁷

The number of employment trials before juries increased substantially after the enactment of the Civil Rights Act of 1991 but has been in decline since 1997.³⁸ In consti-

²⁸Theodore Eisenberg, *Civil Rights Legislation: Cases and Materials* (5th ed. 2004).

²⁹Cases brought by prisoners have their own AO numeric code numbers and can be separated from nonprisoner cases.

³⁰See Figure 3.

³¹Figure 2 shows a fairly steady number of constitutional tort terminations since the late 1990s and a peak of employment discrimination filings in the late 1990s followed by a decade-long decline in their number. Figure 4 shows a long-term decline in the number of judge trials and no increase in the number of jury trials; so the rate of trials has been in long-term decline.

³²See Figure 5.

³³See Figure 4.

³⁴*Id.*

³⁵*Id.*

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

Constitutional tort cases, the number of judge trials has been declining steadily for about 30 years; the number of jury trials has been reasonably constant over that time period.³⁹ Civil rights plaintiff win rates at trial have been steady in both judge trials and jury trials for at least a decade.⁴⁰ The success of civil rights litigation, as measured by trial win rates and settlement rates, has been quite low compared to contract and tort cases.⁴¹ Median awards in civil rights trials have increased more than the rate of inflation but median trial awards in both constitutional tort cases and employment cases are below the awards in contract cases and tort cases.⁴²

The patterns over time suggest an important shift in the nature of employment cases being filed. The declining number of employment cases over time and an increase in employment case settlement rates over time are evidence that plaintiffs, or their attorneys, are shifting the profile of cases filed. This is likely in response to low success rates and doctrinal development such as *Twombly-Iqbal*. The pattern differs somewhat for constitutional tort cases. After almost tripling in the number of terminations from 1979 to 2004, the number of constitutional tort terminations has since been in decline. Settlement rates in constitutional tort cases and employment cases were similar until the late 1980s but then separated, with lower settlement rates in constitutional tort cases ever since. Constitutional tort case settlement rates have been increasing since the early 1990s but have not achieved the distinct historical highs that employment cases are achieving. This may be evidence that constitutional tort plaintiffs, or their lawyers, have reacted differently to low success rates than have employment discrimination litigants. The Supreme Court's hostility to constitutional tort plaintiffs may be more difficult for attorneys to accept and adjust to than its treatment of employment claims. Cases such as the Court's shielding of conscious prosecutorial misbehavior that leads to wrongful death sentences for innocent people,⁴³ and shielding people who conduct admittedly unconstitutional strip-searches of innocent schoolchildren,⁴⁴ may have been difficult to forecast even for a Court regarded as being extremely conservative.

Section II of this article describes the data. Section III provides a more detailed presentation of the results, which are discussed in Section IV. Section V concludes.

³⁹Id.

⁴⁰See Figure 6.

⁴¹With respect to trial win rates, see *id.* With respect to settlement rates, see Eisenberg & Lanvers, *supra* note 16, at 143.

⁴²See Figure 9.

⁴³*Connick v. Thompson*, 131 S. Ct. 1350 (2011) (5–4 decision).

⁴⁴*Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009).

II. THE DATA

To explore the litigation patterns, I use the computerized Administrative Office of the U.S. Courts (AO) data, assembled by the Federal Judicial Center, and disseminated by the Inter-University Consortium for Political and Social Research.⁴⁵ These data include all cases terminated in the federal courts since fiscal year 1970, but this study covers 1979 through 2013. In 1979, the AO started to include in the data whether judgment was entered for plaintiff or defendant. I use the data from 1979 through September 2013, the most recent time for which data are available as of this writing. To help place the results for these two civil rights areas in perspective, I also report results for contract cases and for personal injury tort cases in federal district courts.⁴⁶

When a civil case terminates in a federal district court, the court clerk transmits to the AO information about the case, including the names of the parties, the subject matter category (chosen from about 100 case categories, including specific branches of civil rights, contract, tort, and other areas of law) and the jurisdictional basis of the case (the United States as a party, federal question jurisdiction, or diversity jurisdiction), the case's origin in the district as original or removed or transferred, the dates of filing and termination in the district court, the procedural stage of the case at termination, the procedural method of disposition, and, if the court entered judgment or reached a decision, the prevailing party and the relief granted. The computerized database contains over 9,745,605 district court civil case outcomes from 1979 to 2013.⁴⁷

The data include information about many cases more than once, due to case reopenings after closings for statistical purposes, remands from appeals, transfer of cases,

⁴⁵See Theodore Eisenberg & Kevin M. Clermont, *Courts in Cyberspace*, 46 *J. Legal Educ.* 94 (1996).

⁴⁶Information about AO case category codes is in the codebooks accompanying the data. E.g., Federal Judicial Center, Inter-University Consortium for Pol. & Soc. Research, *Federal Court Cases: Integrated Data Base*, Study No. 25002 (2008). The civil rights cases included in the analysis consist of AO nature of suit code 440 for constitutional tort cases, AO nature of suit codes 442 and 445 (added during the period of the study) for employment cases, AO nature of suit code 190 for contract cases, and AO nature of suit codes 310 to 368 for personal injury tort cases. Cases coded as employment cases, code 442, consist of cases filed under Title VII of the Civil Rights Act of 1964, under the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2006) (ADA), under 42 U.S.C. § 1981 (2006), under the Age Discrimination in Employment Act, 42 U.S.C. §§ 621–634 (2006), and under the Family Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2006) (FMLA). Actions under 42 U.S.C. § 1983 (2006) can also be included in code 442 cases. AO code 442 should include actions under 42 U.S.C. §§ 1981, 1983, or the ADA only if they were related to employment. Many actions under these statutes should be included in AO code 440, which is labeled “Other Civil Rights.” As Clermont and Schwab note, the coding is not perfect.

[F]or example, some FMLA cases end up in other codes, such as code #790, “Other Labor Litigation,” or code #890, “Other Statutory Actions,” and so escape our count. Moreover, in fiscal year 2005, the AO peeled ADA cases off into new codes #445, ADA-Employment, and #446, ADA-Other. . . .

Clermont & Schwab, *supra* note 14, at 104 n.4. This article combines the new ADA code for employment cases, 445, with the cases coded as 442 to create a single employment case category. Employment cases filed under the ADA prior to the 2005 ADA codes should be included in the 442 category.

⁴⁷Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 *Cornell L. Rev.* 119, 127–29 (2002), more fully describes this database and its strengths and weaknesses.

Table 1: Federal District Court Terminations, 1979–2013

	<i>Tot.</i> <i>Terminations</i>	<i>Number of Trials with Judgments</i>				<i>Med. Trial Award</i>
		<i>Jury Trial Judgments</i>		<i>Judge Trial Judgments</i>		
		<i>For P</i>	<i>For D</i>	<i>For P</i>	<i>For D</i>	
Const. tort	462,982	4,162	9,309	1,725	3,653	\$101,866
Contract	632,007	5,100	2,754	6,619	3,608	\$210,916
Employment	491,506	4,650	7,344	2,474	9,541	\$153,463
Tort, pers. inj.	949,952	14,856	15,733	5,967	5,341	\$231,880

NOTE: P = plaintiff, D = Defendant. Table 1 reports data from all federal district court civil terminations for calendar year 1979 through September 30, 2013. There were 8,382,535 unique terminations across all categories but the table is limited to the four major case categories studied in this article. These categories include 2,536,447 terminations. Cases are included only once in the analysis even if they appeared multiple times in the original AO data. The trials with judgments include only cases in which a judgment for plaintiff or defendant was entered after trial. Trial awards are in inflation-adjusted 2013 dollars using the Consumer Price Index for All Urban Consumers. The awards include only cases with a judgment for plaintiff at trial and a positive award amount.

SOURCES: Federal Judicial Center; Inter-University Consortium for Political and Social Research.

and consolidation of cases. The data analyzed below eliminate multiple observations of cases by reducing to one observation cases filed in the same district on the same day, then terminated in that district on the same day, and that had the same case category, procedural stage at disposition, and outcome. Table 1 shows the total number of terminations and aggregate information about trial outcomes. Trial win data are shown separately for jury trials and judge trials.

III. RESULTS

I first report results about overall terminations, trials, and trial judgments. I then explore the patterns of trial awards over time.

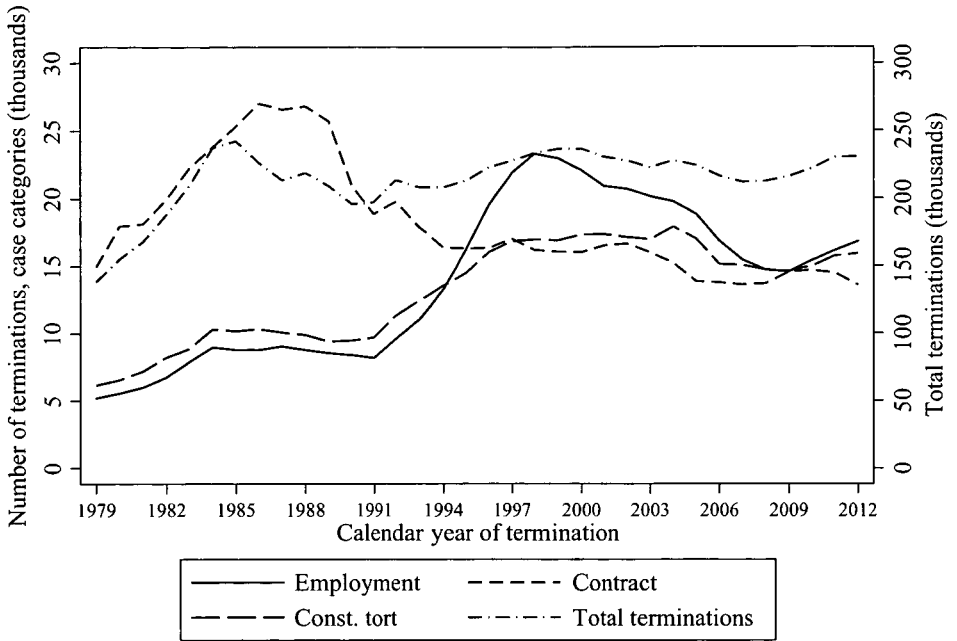
A. *The Declining Prominence of Civil Rights Cases on the Docket: Terminations*

Figure 2 shows, on its right axis, the total number of terminations in federal district court in each year. Total terminations have increased reasonably steadily for most of the study period, with the exception of the mid- to late-1980s when substantial increases in the number of terminations were followed by declines. The peak in total terminations around 1985 is largely attributable to government collection actions. The case categories that generate the peak are “Recovery of Student Loans,” “Recovery of Overpayments of Vet Benefits,” and categories related to Social Security benefits.⁴⁸

The left axis of Figure 2 shows the number of terminations for each of three major case categories: employment, constitutional tort, and contract. In 1979, employment cases and constitutional tort cases each had about 5,000 federal terminations, and contract cases

⁴⁸The AO category codes are 150, 152, 153, and 863. See, e.g., Federal Judicial Center, *supra* note 46.

Figure 2: Number of terminations over time, federal courts by major case category.

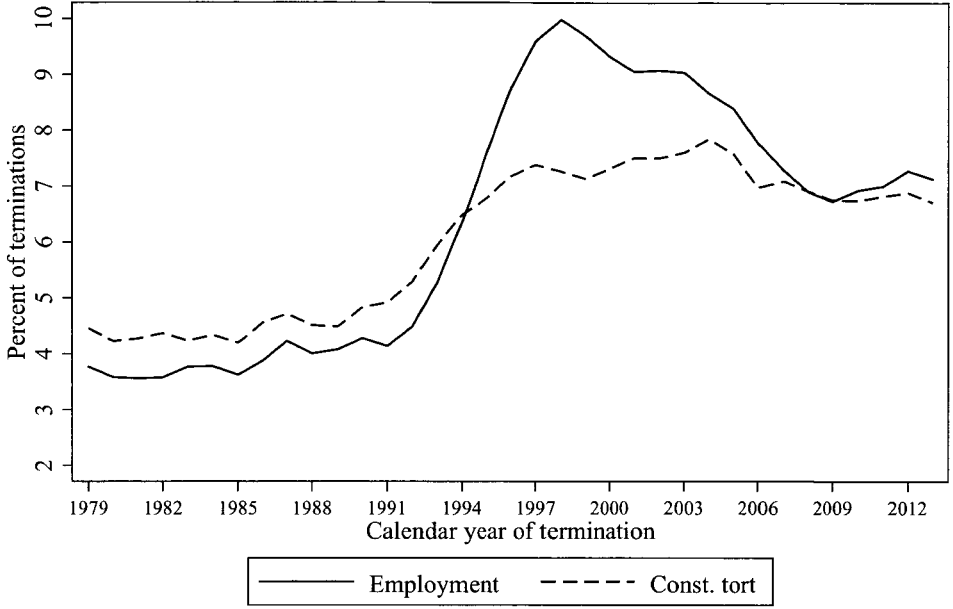


constituted about 15,000 out of 150,000 total terminations. Employment terminations peaked at 23,317 in 1998, and receded to 16,789 in 2012, a decline of 28.0 percent. Constitutional tort terminations peaked at 17,900 in 2004 and declined to 15,885 in 2012, a decline of 11.3 percent. By 2010, both constitutional tort and employment cases had about 15,000 terminations in the year, which increased to about 16,000 each by 2012. Data for 2013 are not shown because the AO fiscal year includes only nine months of data for calendar year 2013.

As percentages of total terminations, Figure 3 shows that the major two civil rights categories combined, as reported above, peaked at about 17 percent of federal terminations in 1998 and have since declined to a combined share of about 14 percent of terminations. The decline puts them at levels of about two decades earlier. So both the absolute numbers of employment cases and their percentage of the docket have been in steady decline. Based on these declines, with data available through 2006, Clermont and Schwab observed in 2009 that “results in the federal courts disfavor employment discrimination plaintiffs, who are now forswearing use of those courts.”⁴⁹ The employment case decline

⁴⁹Clermont & Schwab, *supra* note 14, at 104.

Figure 3: Employment and constitutional tort cases, percent of federal court terminations.



continued and, since 2004, a decline in constitutional tort litigation in number and percent has also occurred. Both patterns of decline leveled off after 2009. I discuss these patterns in Section IV.

B. Trials Over Time

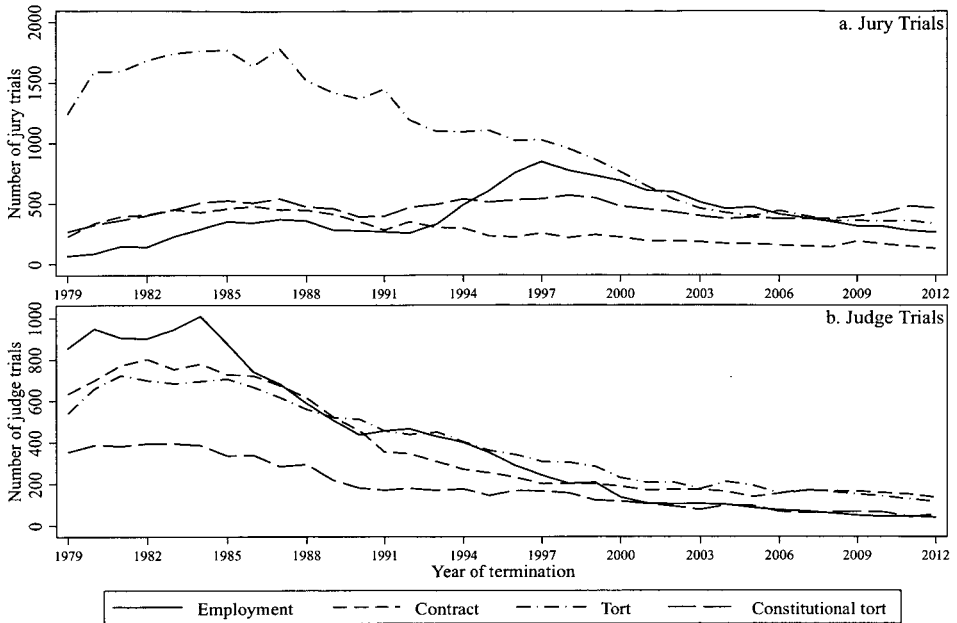
The vast majority of U.S. trials are in state court⁵⁰ and differences between federal and state cases should therefore be kept in mind in a study limited to federal trials. Among other differences, prior research suggests that trial awards in federal courts are on average substantially higher than awards in state court.⁵¹

One theme common to federal and state courts is the decline in trials. Marc Galanter’s work on vanishing trials highlighted a long-term decline in trials across many

⁵⁰Theodore Eisenberg, John Goerd, Brian Ostrom & David Rottman, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U.L. Rev. 433, 437 tbl.1 (1996) (showing numbers of state and federal trials for different samples of cases).

⁵¹Id. at 439 tbl.2 (showing median awards at trial).

Figure 4: Number of trials over time, federal courts.



case categories,⁵² a finding replicated in at least one detailed study of state courts.⁵³ The absolute number of federal civil trials had not grown since the 1960s despite substantial increases in filings.⁵⁴

Figure 4 reports the number of jury trials (Figure 4a) and judge trials (Figure 4b) from 1979 through 2012. The pattern across the major case categories is not uniform. Figure 4b shows substantial declines in the number of judge trials all four categories since 1979. All four case categories are reaching a point where there is little room to decline as there are fewer than 200 or 100 judge trials per year.

With respect to jury trials, the number of employment trials increased until about 1988, declined until the early 1990s, and then dramatically increased until 1997. The increase in employment case jury trials after 1991 likely is attributable to the Civil Rights Act of 1991, which broadened access to jury trials in employment cases.⁵⁵ After a peak in 1997,

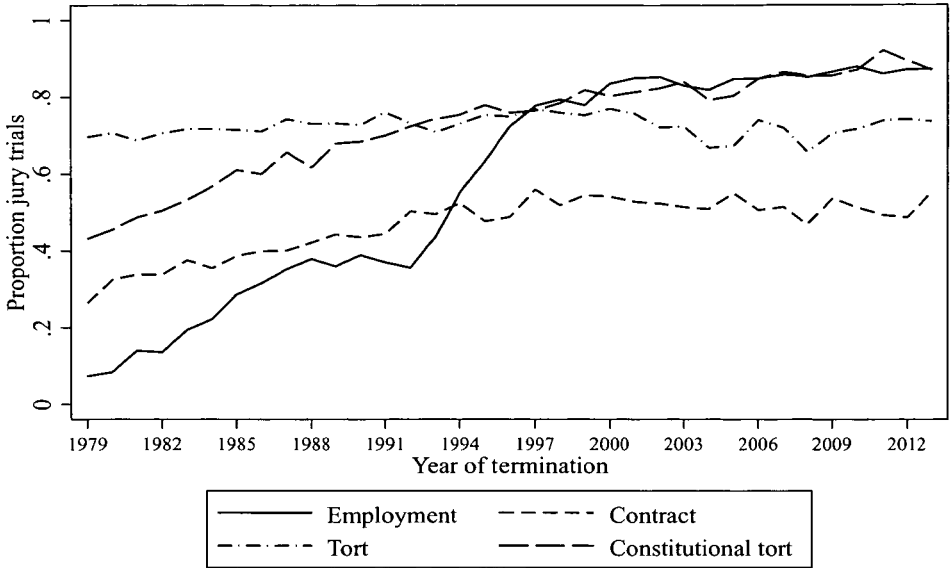
⁵²Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004).

⁵³Robert Moog, *Piercing the Veil of Statewide Data: The Case of Vanishing Trials in North Carolina*, 6 J. Empirical Legal Stud. 147 (2009).

⁵⁴Galanter, *supra* note 52.

⁵⁵42 U.S.C. § 1981a (2006).

Figure 5: Proportion of trials that are jury trials over time, federal courts by major case category.



the number of employment case jury trials steadily declined for the remaining 15 years. The number of constitutional tort case jury trials had been fairly steady since the mid-1980s. The number of tort jury trials has shown a long-term decline from the mid-1980s to 2012. The number of contract trials has also been in long-term decline.

The differing patterns for judge and jury trials have led to a substantial shift in the dominant mode of trial. Figure 5 shows the proportion of trials that comprise jury trials. Judge trials in employment and constitutional tort cases are both few in number, as shown in Figure 4, and a small proportion, less than 20 percent, of trials. The pattern over time is almost monotonically increasing in the jury trial proportion, with a notable increase in slope for employment trials after the Civil Rights Act of 1991. The jury proportion of tort trials has been steady at around 70 percent, with some extremes due to consolidated trial dispositions in aggregated actions. The proportion of tort jury trials is higher, in some years over 90 percent, if one limits the sample to tort cases in federal court based on diversity jurisdiction. Actions in which federal jurisdiction is based on the United States as a defendant have an average of 6.9 percent jury trials, presumably because usually no jury trial right exists in such cases.⁵⁶ The contract proportion of jury trials has been steady in the 40–50 percent range for about 15 years.

⁵⁶Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1136 (1992) (“When the United States is a defendant, usually no jury right exists.”).

The likely impact of the Civil Rights Act of 1991 on total terminations emerges in Figures 2 and 3. Its influence on the allocation of trials between judges and juries in employment cases is evident in Figures 4 and 5.

C. Trial Win Rates Over Time

Civil rights plaintiff win rates at trial over time have not fluctuated wildly. Figure 6 shows that in constitutional tort cases a noticeable decline from over 30 percent plaintiff win rates to less than 30 percent plaintiff win rates occurred around 1993 and the win rate has not recovered. In employment cases, plaintiff win rates slowly increased to 1991, with an increasingly favorable rate following the Civil Rights Act of 1991. Some decline occurred after 2001 but the win rate for plaintiffs remains above its level before the mid-1990s.

The change in the employment case pattern of win rates over time appears to be largely a function of the changing mix of judge and jury trials over time, as shown in Figure 5. This is because, as Figure 7 shows, plaintiff win rates in jury-tried employment cases have not noticeably increased over time. Figure 8 shows that plaintiff win rates in judge trials also have not noticeably increased over time. What did change over time, as Figure 5 shows, is the mix of judge and jury trials. Plaintiffs consistently win at higher rates in jury trials than in judge trials. Over time, judge-tried employment cases consistently show plaintiff win rates around 20 percent. Jury-tried employment cases long hovered around 40 percent win rates with a recent decline into the 30 percent range. As the mix of trials

Figure 6: Plaintiff trial win rate over time, federal courts by major case category.

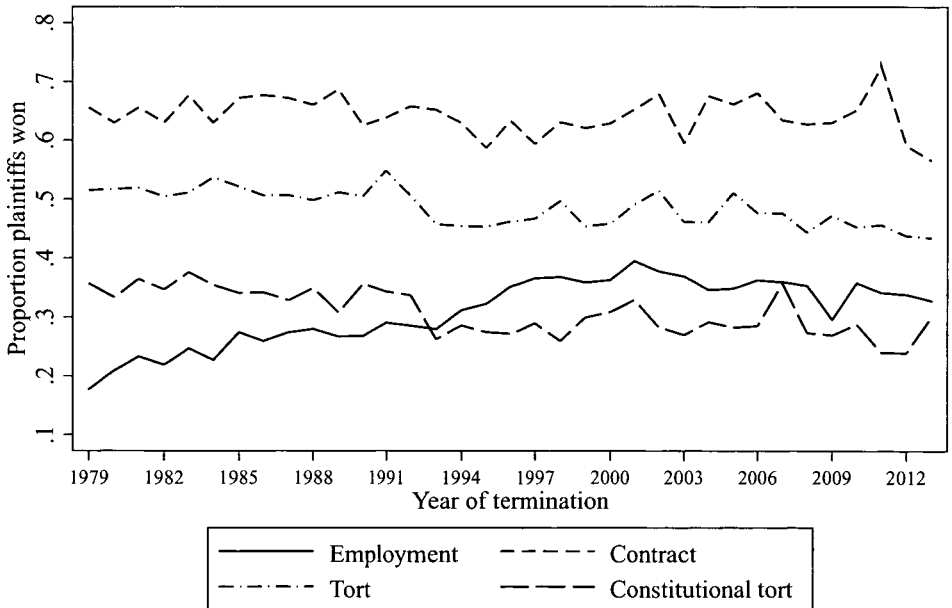


Figure 7: Plaintiff jury trial win rate over time, federal courts by major case category.

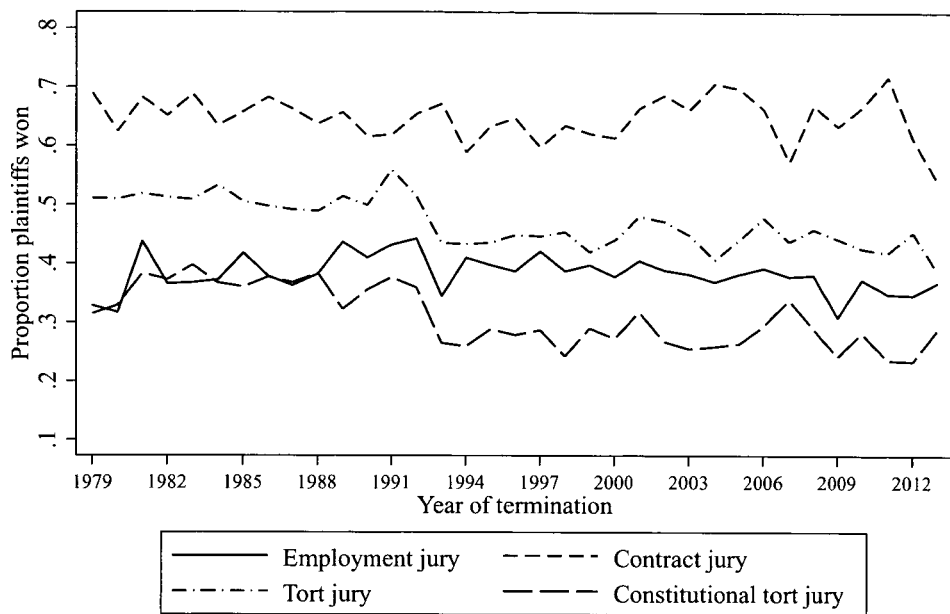
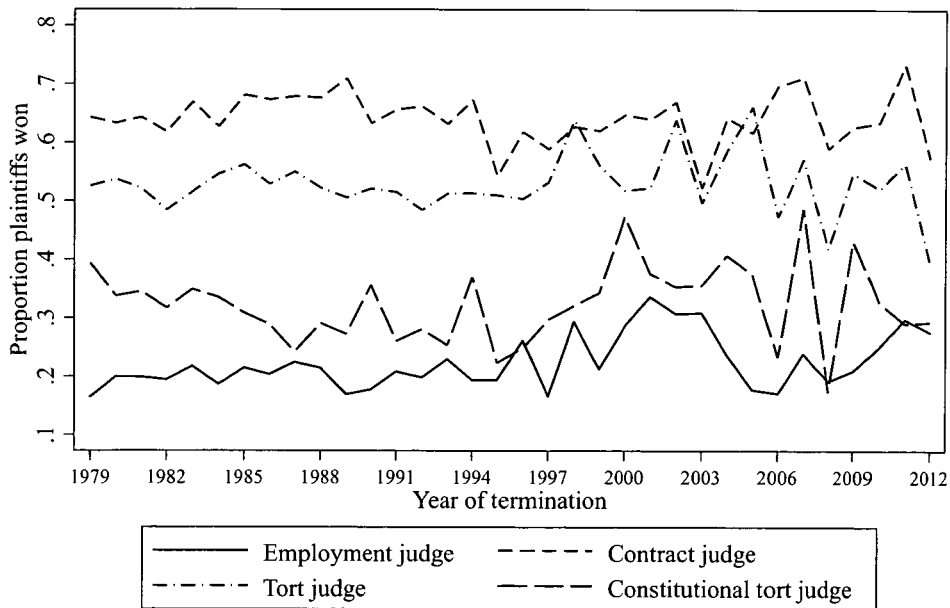


Figure 8: Plaintiff judge trial win rate over time, federal courts by major case category.



migrated over time toward a higher proportion of jury trials, the overall win rates in the pooled group of trials increased without an increase in win rate within either trial category. This variation in win rates across judge and jury trials is not present in constitutional tort cases, in which plaintiff win rates are around 30 percent for both adjudicators.

The differences in judge and jury trial win rates in employment cases are, as Clermont and Schwab observed, “as easy to misinterpret as they are hard to explain.”⁵⁷ The challenge arises because judges and juries observe different cases and the routing of cases between them is not random.⁵⁸ Nevertheless, evidence exists that in general judges and juries act similarly,⁵⁹ and judges, as well as juries, demonstrate cognitive biases that can affect decision making.⁶⁰

Some progress toward an explanation for the differences exists. Clermont and Schwab note that trial judges may be more demanding of plaintiffs in part because of “a well founded fear of any judgments for plaintiffs being more likely reversed.”⁶¹ Courts of appeals reversal rates in appeals from employment discrimination trials are asymmetric and unfavorable to plaintiffs who prevailed at trial.⁶² When plaintiffs win at trial and defendants appeal, one large study shows the reversal rate is 43 percent, compared to a 10 percent reversal rate when defendants win at trial and plaintiffs appeal.⁶³ If appellate court pressures cause trial courts to lean against plaintiffs in judge trials, the parties at the trial court level may not fully perceive this. When judges disfavor plaintiffs more than expected, plaintiffs suffer a lower trial win rate in judge trials than in jury trials because juries feel no appellate pressure. “The parties’ misperceptions therefore produce a persistently lower win rate in judge trials than in jury trials.”⁶⁴ Whatever the cause—different treatment by judges or

⁵⁷Clermont & Schwab, *supra* note 14, at 130.

⁵⁸Clermont & Eisenberg, *supra* note 56, at 1132–33.

⁵⁹*Id.* at 1152–53 (“The fact that jury and judge show a high degree of agreement is better supported.”); Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel’s *The American Jury*, 2 *J. Empirical Legal Stud.* 171, 181 (2005) (showing consistent evidence over time that judges and juries agree on conviction in criminal cases about 75–80 percent of the time).

⁶⁰Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 *Cornell L. Rev.* 777, 777 (2001) (“Judges, it seems, are human. Like the rest of us, their judgment is affected by cognitive illusions that can produce systematic errors in judgment.”).

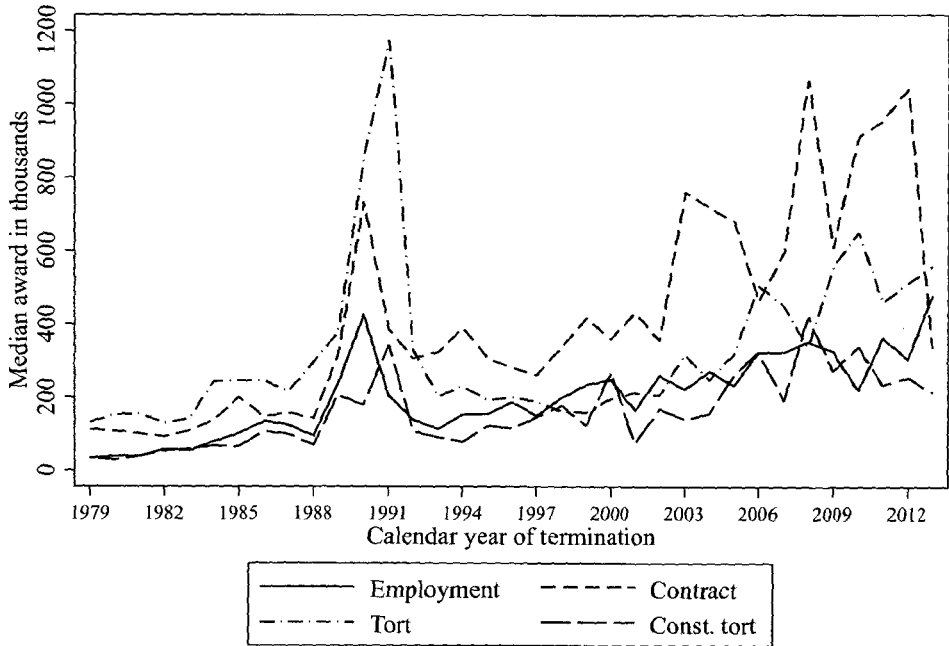
⁶¹Clermont & Schwab, *supra* note 14, at 130–31.

⁶²Eisenberg, *supra* note 20; Eisenberg & Farber, *supra* note 20.

⁶³Eisenberg & Farber, *supra* note 20, at 99 tbl.7 (showing reversal rates for the “Jobs” category). The asymmetrical reversal rates do not vary substantially between judge and jury trials. Eisenberg, *supra* note 20, at 682 tbl.6.

⁶⁴Clermont & Schwab, *supra* note 14, at 130–31. One might expect a similar effect in constitutional tort cases, which also suffer anti-plaintiff asymmetric reversal rates on appeal. Eisenberg & Farber, *supra* note 20, at 99 tbl.7 (showing reversal rates for the “other civil rights” (constitutional tort) category). It may be that, in constitutional tort cases, trial judges’ reaction to reversal rates is balanced by jurors’ antipathy toward typical civil rights plaintiffs. Jon O. Newman,

Figure 9: Median trial awards.



different cases being routed to judges—persistent differences in employment trial win rates exist.

D. Trial Award Amounts

Figure 9 shifts the focus from who won at trial to the amount of the trial award in cases won by plaintiffs.⁶⁵ The AO data do not provide reliable estimates of the mean trial award, but evidence suggests the data supply reasonable estimates of the median award.⁶⁶ I therefore

Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 453 (1978); Kirchoff v. Flynn, 786 F.2d 320, 323-24 (7th Cir. 1986) (Easterbrook, J.) (saying that plaintiffs may encounter juries sympathetic to law enforcement defendants). The result is a lower than expected plaintiff trial win rate before both judges and juries. In employment discrimination cases, the typical plaintiff may be more appealing to juries than the typical constitutional tort case plaintiff, who often has had encounters with police. Newman, supra.

⁶⁵For information on settlement amounts in employment discrimination cases, see Stewart J. Schwab & Michael Heise, Splitting Logs: An Empirical Perspective on Employment Discrimination Settlements, 96 Cornell L. Rev. 931, 942 (2011) (showing that mean employment case settlement in the Northern District of Illinois from 1999 to 2004 was \$65,950 in 2004 dollars).

⁶⁶An audit of AO damage award data showed that the median awards in the AO data offered a reasonable upper-level estimate of the median damages awarded to prevailing plaintiffs. The AO median damage award for tort cases

report only the median awards for the case categories. Amounts are in inflation-adjusted 2013 dollars. Another limitation of the data is that the diminishing number of trials makes year-by-year estimates of amounts less precise over time. For example, the estimate of award amounts for employment cases in 1997 is based on 290 plaintiff wins at trial. In comparison, the estimate of award amounts for 2012, the most recent full calendar year in the data, is based on only 72 trials. It is therefore preferable to focus on the overall trend rather than the absolute level of trial awards in any particular year.

The award trend in employment cases has fairly steadily increased since about 1993. It is tempting to attribute this to the shift toward jury trials and the allowance of additional damages under the Civil Rights Act of 1991, but the upward trend in employment awards is at least matched by the trend in other areas of law. Each major case category has shown median award growth well above the inflation rate. Part of this increase in contract and tort cases is likely attributable to increases in the federal jurisdictional amount for diversity cases. The amount increased from \$10,000 to \$50,000 in 1988 and to \$75,000 in 1996.⁶⁷ The annual median award in the two civil rights categories is almost always lower than in tort and contract cases.

IV. DISCUSSION

I discuss four aspects of the results. The first involves a declining number of civil rights cases and the limits of what one can infer from the decline. Second, with respect to employment cases, evidence exists that behavior has in fact changed. The relative lack of success in district court, while persisting relative to contract and tort, has shifted over time. Employment plaintiff win rates at trial have been steady in both judge trials and jury trials for at least a decade, but trial success is an incomplete measure of plaintiff success. This is because, in the vast majority of cases in which plaintiffs achieve success, they do so via a payment or nonmonetary relief pursuant to a settlement agreement.⁶⁸ I present evidence that plaintiff success rates have long been improving in employment cases. The gap in success rates between employment plaintiffs and other plaintiffs is noticeably smaller in counseled cases. In the most recent year for which data are available, the settlement rate in counseled employment cases does not materially differ from the settlement rate in contract cases.

Third, the increased settlement rate in employment cases is not mirrored in constitutional tort cases. I speculate that constitutional tort attorneys have had difficulty with anticipating the depth of the Supreme Court's antipathy to civil rights. Fourth, change is

terminated by trial was 10 percent higher (\$151,000) compared to the \$137,000 median award calculated from PACER docket sheets. Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 *Notre Dame L. Rev.* 101 (2003).

⁶⁷28 U.S.C. § 1332(a) (2006).

⁶⁸Eisenberg & Lanvers, *supra* note 16.

also evident in the increasing levels of damages awarded at trial. The increasing amounts likely do not reflect increased generosity by juries and judges and instead relate to attorney selectivity about cases to pursue in the context of a Supreme Court that has long been unreceptive to civil rights claims.⁶⁹

A. *The Declining Number of Civil Rights Cases*

The decline in employment cases may be attributable to potential plaintiffs reacting to low success rates by forswearing use of the federal courts.⁷⁰ Over time, plaintiffs may have become less likely to sue or more likely to seek relief in state courts. The sad truth is that we must be tentative about explanations of case filing changes affecting observable court outcomes because we lack the essential information that should most influence filings. We do not know how many acts of employment discrimination occurred in society that might lead to lawsuits. We therefore cannot tell if plaintiffs have become more or less likely to file lawsuits over time in relation to the number of acts of discrimination. Civil rights litigation policy and other civil justice policy cannot be expected to be optimal absent such basic information.⁷¹

Some observations are nevertheless possible. With respect to employment claims, the decline may have a contributing factor tied to an atypical increase in filings. The bulge in employment terminations in the 1990s, which is the peak from which the number of employment cases declined, may have been the result of a kind of filings bubble. In a short time period, several important statutory developments occurred in the employment area. The Civil Rights Act of 1991 and the Americans with Disabilities Act of 1990⁷² were passed in a short period of time in the early 1990s.⁷³ The 1991 Act reversed restrictive Supreme Court interpretations of employment discrimination statutes, allowed for jury trials in Title VII cases, and authorized punitive damages under Title VII in cases of intentional discrimination.⁷⁴ The ADA likely led to increases in employment filings to vindicate newly created employment rights. If increased employment filings temporarily resulted from the confluence of statutory developments, the decline in employment cases evident in Figure 2 since 1997 is partly attributable to statutory developments that may have led to temporary case increases while new rights were preliminarily explored.

⁶⁹Clermont & Eisenberg, *supra* note 14.

⁷⁰See, e.g., Clermont & Eisenberg, *supra* note 14.

⁷¹Theodore Eisenberg, *The Need for a National Civil Justice Survey of Incidence and Claiming Behavior*, 37 *Fordham Urb. L.J.* 17 (2010).

⁷²Pub. L. No. 101-336, 104 Stat. 327 (enacted July 26, 1990) (codified at 42 U.S.C. § 12101).

⁷³Act effective Aug. 5, 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. § 2601).

⁷⁴*University of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2526 (2013); *Ricci v. DeStefano*, 557 U.S. 557, 624 (2009) (Ginsburg, J., dissenting).

With respect to constitutional tort filings, Figure 2 shows that, after two and a half decades of increasing numbers of cases, the number suffered a long-term decline after 2004. No obvious statutory developments occurred to which to attribute the decline. It may be that the number of actionable constitutional deprivations by police and other government officials has declined. Equally plausible is that constitutional tort plaintiffs finally became discouraged to some degree by decades of low settlement rates, low trial win rates, appellate level setbacks, and Supreme Court groups of five justices who have been unsympathetic to civil rights plaintiffs.

B. Changing Success Rates in Employment Cases

The AO disposition codes are limited in their capacity to yield precise estimates of settlement rates. Parties may end a settled case with various formal dispositions, such as voluntary dismissal, express mention of settlement, or entry of judgment for a party. Some of these formal dispositions are consistent with nonsettlement. So the AO disposition codes cannot be expected to yield precise estimates of settlement rates.⁷⁵ I use the AO disposition codes that are consistent with settlement to estimate a proxy for settlement rates. There is some noise in the estimate since some of the cases coded as settlements will have been disposed of otherwise. Assuming that the degree of noise is not associated with particular case categories, my estimate of settlement rates can provide information about the relative rates of settlement across case categories and over time.

Computing a settlement rate requires a numerator estimating the number of settlements and a denominator estimating the number of cases that are candidates for settlement. The AO employs 21 disposition codes to capture the outcomes of cases.⁷⁶ I include cases with the following disposition codes in the settlement rate numerator: (1) judgment

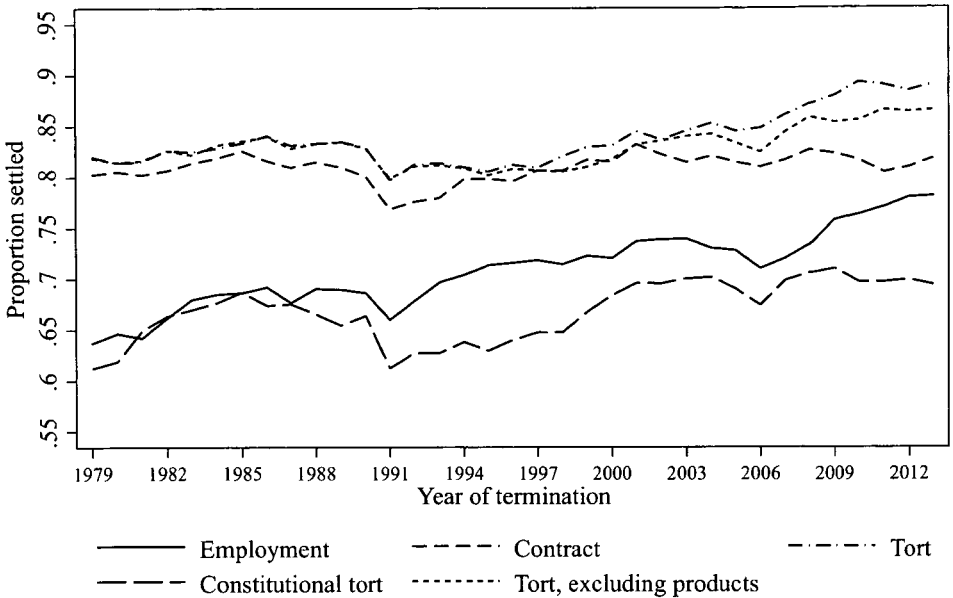
⁷⁵Eisenberg & Lanvers, *supra* note 16.

⁷⁶*Id.* The AO disposition codes are:

0 = Transfer/remand: transfer to another district	11 = Transfer/remand: remanded to U.S. agency
1 = Transfer/remand: remanded to state court	12 = Dismissals: voluntarily
2 = Dismissals: want of prosecution	13 = Dismissals: settled
3 = Dismissals: lack of jurisdiction	14 = Dismissals: other
4 = Judgment on: default	15 = Judgment on: award of arbitrator
5 = Judgment on: consent	16 = Judgment on: stayed pending bankruptcy
6 = Judgment on: motion before trial	17 = Judgment on: other
7 = Judgment on: jury verdict	18 = Judgment on: statistical closing
8 = Judgment on: directed verdict	19 = Judgment on: appeal aff'd (magistrate judge)
9 = Judgment on: court trial	20 = Judgment on: appeal denied (magistrate judge)
10 = Transfer/remand: multidistrict litigation	

See ICPSR, Inter-University Consortium for Pol. & Soc. Research, Federal Court Cases: Integrated Data Base, 1970–2000, ICPSR Study No. 8429 (2001), and the codebooks for related federal court databases in subsequent years. E.g., Inter-University Consortium for Pol. & Soc. Research, Federal Court Cases: Integrated Data Base, 2007, ICPSR Study No. 22300 (2008). Clermont and Schwab note that “Code 3 switched in usage about 1991 from voluntary dismissal to dismissal for lack of jurisdiction.” Clermont & Schwab, *supra* note 14. So I included its earlier usage with settlement and its later usage with nonsettlements.

Figure 10: Proxy for settlement rate over time, federal courts by major case category.



on: consent, (2) dismissals: voluntarily, (3) dismissals: settled, (4) dismissals: other. For the denominator, I add the following additional disposition codes: (1) judgment on: motion before trial, (2) judgment on: jury verdict, (3) judgment on: directed verdict, (4) judgment on: court trial, (5) judgment on: award of arbitrator, (6) judgment on: other, (7) judgments on appeals from magistrate judges. I do not include in the settlement rate calculation dispositions coded as transfer to another district, remand to state court, transfer to a panel on multidistrict litigation, remand to a U.S. agency, stay pending arbitration, stay pending bankruptcy, or statistical closing. Cases with these dispositions have not settled as of the coding of the AO disposition, but they also have not had an initial alternative adjudicative disposition. They may settle before dismissal or trial; we just do not know as of the time of coding.

Figure 10 shows the settlement rates thus calculated for the four major case categories, with a line added for tort cases other than products liability cases. I emphasize that these likely are not actual settlement rates. They probably overestimate the settlement rate because some of the cases coded as settlements likely did not settle but the data do not allow identification of those cases. The settlement rate estimates are reasonable to the extent these falsely coded settlements appear at roughly the same rates across case categories.

On that assumption, the important information in Figure 10 is the relative position of the case categories and the trends over time. The figure shows a clear and persistent settlement rate hierarchy. Employment cases and constitutional tort cases settle at noticeably lower rates than contract and tort cases. The gap between the two civil rights case

categories and other cases is broad and persists through the 35 years of available data. The rates never approach one another.

A reasonably clear trend over time is evident in employment cases. Employment cases have shown steadily increasing settlement rates for over 30 years. For most of the period of the study, the increase in settlement rates has been more evident than in the other case categories. This employment case trend could be evidence that plaintiffs' attorneys have been getting the message. Success rates at trial do not move over time but a higher fraction of employment cases settle over time. This is consistent with attorneys becoming more selective about the employment cases they bring. The roughly 10 percent increase in settlements could help explain where employment case trials have gone: they are tending to settle, presumably because the more selective groups of cases are on average stronger over time. This interpretation is consistent with the declining number of cases in Figure 2 as well as with the vanishing trial. The trend is less clear in constitutional tort cases, though there have been increasing rates of settlement there since 1991.

The remaining differences in success rates between civil rights and other cases are reduced once one accounts for pro se litigants. The AO data began in 1999 to include the pro se status of the parties. Outside the area of prisoner litigation, constitutional tort and employment cases have by far a higher proportion of pro se actions than other major civil case categories. In recent years, over 35 percent of constitutional tort terminations are pro se cases and about 20 percent of employment cases are pro se cases. In tort and contract, less than 5 percent of terminations involve pro se plaintiffs. Cases not brought by attorneys are less likely to take account of the low rate of civil rights plaintiff success since the pro se litigant presumably is less able to forecast the chances of success. Lawyers can in fact make a difference.⁷⁷

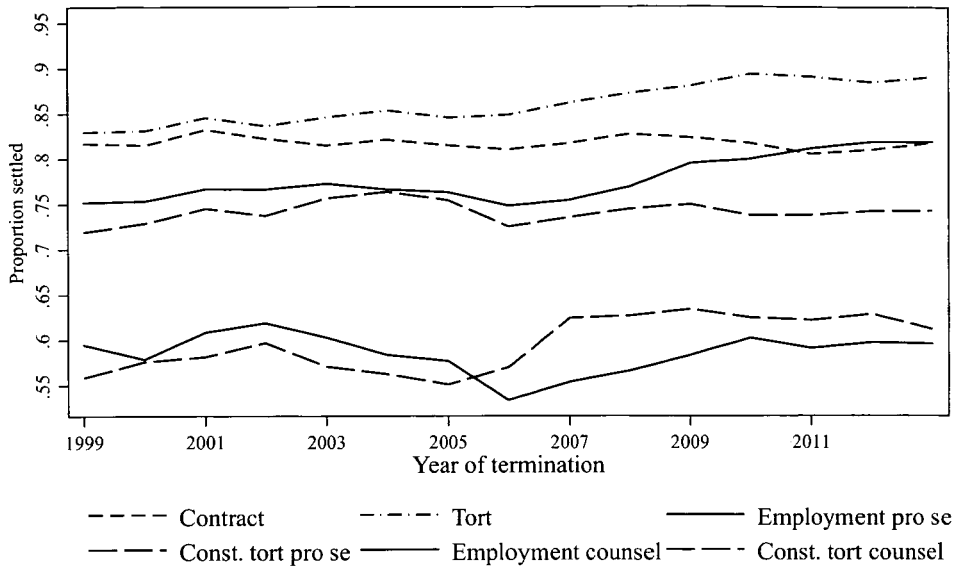
I reestimated settlement rates separately for pro se and counseled civil rights cases rather than aggregate them as in Figure 10. Accounting for pro se status substantially reduces the gap in settlement rates between civil rights and other cases. Figure 11 is similar to Figure 10 except that it divides the employment and constitutional tort cases into pro se and counseled components. It is limited to years since 1999 because that is when the AO data started to consistently code pro se status. As noted, pro se cases are a trivial fraction of contract and tort cases so I do not show separate lines for pro se litigants for those categories.

Figure 11 shows that more than half the settlement gap between civil rights and other cases disappears once one accounts for pro se status.⁷⁸ The gap between settlement rates in pro se and counseled employment and constitutional tort cases is larger than the settlement

⁷⁷See, e.g., Orley Ashenfelter, David E. Bloom & Gordon B. Dahl, *Lawyers as Agents of the Devil in a Prisoner's Dilemma Game*, 10 *J. Empirical Legal Stud.* 399 (2013).

⁷⁸Pro se case prevalence may help explain low settlement rates, but it is not a satisfactory explanation for the low trial success rate because such a small fraction of pro se cases reach trial. From 1999 through 2011, pro se cases comprised 510 out of 6,431 (7.9 percent) constitutional tort cases reportedly reaching a trial judgment for plaintiffs or defendants. Pro se cases comprised 667 of 7,246 (9.2 percent) employment cases reaching trial judgment. The pro se cases that do reach trial fare abysmally, with approximately 14 percent plaintiff win rates in both constitutional tort and employment cases. The low proportion of trials consisting of pro se cases prevents the low pro se win rate from substantially influencing the overall trial win rate and thus from explaining the low civil rights win rates at trial.

Figure 11: Proxy for settlement rate over time, federal courts employment and constitutional tort cases by pro se status.



gap between contract cases and the civil rights case categories. A striking result in Figure 11 is that the proxy for settlement rate in counseled employment cases (the higher solid line in the figure) was in 2010 and after about the same as the proxy for settlement rate in contract cases. Since, as noted above, success for plaintiffs comes almost always in the form of settlements,⁷⁹ this is surprising evidence that, at least by one measure, counseled employment cases are about as successful as contracts cases.

C. Employment Cases Versus Constitutional Tort Cases

The decreasing gap between employment case settlement rates and other case category settlement rates is not echoed in the constitutional tort case trend. If my proxy for settlement rates is reliable, Figure 11 communicates an important change over time in the relative success of employment cases and constitutional tort cases. While counseled employment cases approach contracts cases in settlement rates, a gap in settlement rates between counseled employment cases and counseled constitutional tort cases has grown since 2006. A question separable from the cause of declining filings is why such a gap has arisen and is growing.⁸⁰

⁷⁹Eisenberg & Lanvers, *supra* note 16.

⁸⁰Both constitutional tort plaintiffs and employment plaintiffs are entitled to attorney fees if they prevail. 42 U.S.C. § 1988(b) (2006) (constitutional tort cases); 42 U.S.C. § 2000e-5(k) (2006) (employment cases).

Characteristics of constitutional tort plaintiffs and defendants may contribute to the gap. Constitutional tort cases face the additional obstacle of always challenging governmental behavior. Substantial evidence exists that governmental litigants are especially challenging opponents. Governmental litigants differ in their behavior and case processing from other litigants.⁸¹ Constitutional tort plaintiffs often have backgrounds that do not resonate favorably with juries.⁸²

Whatever the contribution of these factors, they cannot easily explain why low success rates persist over time. Attorneys should absorb the information that constitutional tort cases are relatively unsuccessful and shift the merits profile of cases they choose to bring, which in turn should shift their success rates closer to those of other civil cases. Constitutional tort lawyers have as strong an incentive to screen cases as do employment lawyers and contingency fee tort lawyers. Civil rights plaintiffs generally cannot afford substantial hourly rates so the lawyers do not expect payment unless they prevail. Failure carefully to screen likely is economic suicide for civil rights attorneys just as it would be for other contingent-fee attorneys. The usual likely compensating factor for lower success rates is higher awards, but constitutional tort cases plainly do not have higher awards, as Figure 9 shows. Another possibility is that constitutional tort attorneys are less concerned with traditional monetary success than are other attorneys. That may explain some institutionally brought cases but they are a small fraction of the thousands of constitutional tort actions brought each year.⁸³ What else could explain the persistent failure of a shift in constitutional tort case success over time?

Constitutional tort attorneys may have more difficulty anticipating the Supreme Court's willingness to narrowly interpret civil liberties, and the effect of its decisions on lower courts. Constitutional tort cases cover a wider range of behavior than employment cases. Much can go wrong in the workplace, but an even broader range of potential civil rights grievances exist in encounters with governments and their officials. Constitutional tort claims can include employment claims, but also include due process claims, First Amendment claims, Fourth Amendment claims, other actions against police, nonemployment discrimination claims, and other matters.⁸⁴ Congress sometimes acts as a check on Supreme Court decisions unfavorable to employee victims.⁸⁵ It has not similarly acted on behalf of constitutional tort victims.

⁸¹Theodore Eisenberg & Henry Farber, *The Government as Litigant: Further Tests of the Case Selection Model*, 5 *Am. L. & Econ. Rev.* 94 (2003); Herbert M. Kritzer, *The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts*, in *In Litigation: Do the "Haves" Still Come Out Ahead?* (Herbert M. Kritzer & Susan Silbey eds., 2003); Schwab & Eisenberg, *supra* note 23.

⁸²Newman, *supra* note 64.

⁸³Schwab & Eisenberg, *supra* note 23, at 767–68.

⁸⁴Schwab & Eisenberg, *supra* note 23, at 734.

⁸⁵Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5; Civil Rights Act of 1991, Pub. L. No. 102–116, 105 Stat. 1071–1100 (codified as amended in scattered sections of 42 U.S.C. (Supp. III 1992)).

In constitutional tort litigation, the depths of five justices' antipathy to individual rights seems to continuously evolve in surprising, unidirectional, and sometimes shocking ways. The naked amorality of a decision such as *Connick v. Thompson*,⁸⁶ in which an exonerated victim of 18 years in prison, 14 of which were on death row, cannot recover from a city whose employees intentionally and unconstitutionally withheld exonerating evidence, may be difficult to anticipate. Under *Florence v. Board of Chosen Freeholders of the County of Burlington*,⁸⁷ innocent people wrongly arrested and suspected of no violent crime can be strip-searched and have their body cavities inspected. Under *Safford Unified School District #1 v. Redding*,⁸⁸ innocent schoolgirls can be unconstitutionally strip-searched on the basis of bare, unverified allegations of their classmates, yet there will be no recovery against the searching officials due to qualified immunity. A lower court interpreted this case as not clearly establishing the law for purposes of qualified immunity because the precise facts claimed to support the search of another schoolgirl's bra differed from those in *Safford*. "[I]s it clearly established that a student-informant's tip that she had seen plaintiff put marijuana or marijuana paraphernalia in her bra earlier that day [is] insufficient to warrant reasonable suspicion to search plaintiff's bra? *Safford* does not clearly establish this more particularized issue."⁸⁹ No investigation or reasonable questioning beyond the bare allegation was required to search the innocent student.

A lawyer might assume it to be unconstitutional for a state to execute someone known to be innocent of the crime of which he was convicted. Judges acceding to execution of innocent persons would feel like fodder for future ex post moral historicism. How could 21st-century judges in a modern democratic state look aside while an innocent person who sought relief was executed? Yet some justices have not yet been able to find a constitutional prohibition against executing innocent people.⁹⁰ This unclear state of the law might protect from liability those people responsible for the execution of people known to be innocent.⁹¹ While punitive damages awards against corporations that are too great a multiple of compensatory awards can be unconstitutional under the due process clause,⁹² some justices seem more reluctant to give innocent persons constitutional protection against wrongful execution.

⁸⁶131 S. Ct. 1350 (2011) (5–4 decision).

⁸⁷132 S. Ct. 1510 (2012) (5–4 decision).

⁸⁸557 U.S. 364 (2009).

⁸⁹S.S. ex rel. Sandidge v. Turner Unified Sch. Dist. # 202, No. 05–2522–KHV, 2012 WL 6561525, *4 (D. Kan. Dec. 14, 2012).

⁹⁰In re Davis, 130 S. Ct. 1, 2 (2009) (Scalia & Thomas, JJ., dissenting).

⁹¹But see In re Davis, No. CV409–130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010). For a review of cases addressing this issue, see DiMattina v. United States, Nos. 13–CV–1273, 11–CR–705, 2013 WL 2632570 (E.D.N.Y. June 13, 2013).

⁹²See, e.g., *BMW v. Gore*, 517 U.S. 559 (1996).

Many reasonable attorneys likely cannot anticipate five justices' unwillingness to protect basic human rights such as life and intimate personal privacy. Figure 2's post-2004 decline in the number of constitutional tort cases may be evidence that attorneys are beginning to get the message. Figure 11's growing gap between employment cases and constitutional tort cases may suggest that they nevertheless have difficulty accepting the degree of justices' hostility and continue to bring claims rather than accept what strikes them as incredible. Perhaps they are psychologically incapable of accepting that they operate in a legal system in which *Connick* could occur.

D. Increasing Trial Awards

Figure 9 shows that trial awards in all case categories are far outpacing inflation. This development is consistent with lawyers' reduced willingness to bring low-value cases. Lawyers cannot afford to bring lower-stakes claims and victims cannot persuade them to do so. A similar phenomenon has been observed in the medical malpractice area as state laws limit amounts that can be recovered.⁹³

V. CONCLUSION

This article presents evidence that civil rights plaintiffs are making less use of federal courts over time. Nonprisoner civil rights cases are a declining fraction of federal civil cases. Trials continue to disappear, and evidence exists that some of the low trial rate is attributable to increasing civil rights case settlement rates. This should be of some interest since so much attention has focused on increased pretrial dismissal rates based on heightened pleading standards⁹⁴ as a possible source of declining trial rates.

Civil rights plaintiffs continue to enjoy less success than other civil plaintiffs, as measured both by settlements and trial outcomes, but evidence suggests that changes are occurring. The number of employment cases has declined over time and a proxy for settlement rates shows increases that indicate that stronger, or at least more settleable, employment cases are being filed. Although the number of constitutional tort cases has also declined, a growing gap exists in the settlement rate for counseled constitutional tort and employment cases. The broader range of activity encompassed by constitutional tort actions, and the Supreme Court's extreme protection of governments and officials, may have made it more difficult for constitutional tort attorneys to absorb the changes in law that increasingly preclude recovery. This would lead constitutional tort cases to have less success, relative to employment cases.

⁹³Seth A. Seabury, Nicholas M. Pace & Robert T. Reville, Forty Years of Civil Jury Verdicts, 1 J. Empirical Legal Stud. 1 (2004).

⁹⁴See, e.g., David Freeman Engstrom, The *Twiqbal* Puzzle and Empirical Study of Civil Procedure, 65 Stan. L. Rev. 1203 (2013).