

Dear All,

The attached material comes from a book manuscript with Stephen Burbank titled *Rights and Retrenchment: The Counterrevolution against Federal Litigation*. This paper gives an overview of the book, and particularly emphasizes the evidence in two chapters. I look forward to the discussion.

Sean

# ***Rights and Retrenchment: The Counterrevolution against Federal Litigation***

Stephen B. Burbank and Sean Farhang†

## **Chapter 1**

### **Retrenching Rights in Institutional Context: Constraints and Opportunities**

In the wake of an outpouring of rights-creating legislation from Democratic Congresses in the 1960s and 1970s, much of which contained provisions designed to stimulate private enforcement, the conservative legal movement within the Republican Party devised a response. Recognizing the political infeasibility of retrenching substantive rights, the movement's strategy was to weaken the infrastructure for enforcing them. Although largely a failure in the elected branches and only modestly successful in the domain of court rulemaking, the project flourished in the federal courts. Incrementally at first but more boldly in recent years, over the past four decades the Supreme Court has transformed federal law from friendly to hostile toward private enforcement of rights through lawsuits. This aspect of the retrenchment campaign – with victories achieved in rulings ostensibly centered on procedural and other seemingly technical issues – has been little noticed by the American public. It has, however, emerged in recent years as an axis of ideological conflict among Supreme Court Justices even more factious than conflicts over substantive rights. Before turning to the counterrevolution, it is important to be clear about what it was mobilizing against: The Litigation State.

### **The Rise of the Litigation State**

In the past decade, more than 1.25 million private federal lawsuits were filed to enforce federal statutes, spanning the waterfront of federal regulation.<sup>1</sup> From a rate of three lawsuits per 100,000 population in 1967 – a rate that had been stable for a quarter century – it increased by about 1000% over the following three decades (13 by 1976, 21 by 1986, and 29 by 1996) (Farhang 2010: 15). We emphasize two things about this phenomenon. First, it is closely associated with self-conscious choices of statutory design by members of Congress seeking to mobilize private enforcers. Second, among the multiple factors that led to these choices, Congress's growing distrust of bureaucracy under leadership that it regarded as increasingly hostile to its policy goals was particularly important.

It is primarily a legislative choice to rely on private litigation in statutory implementation. In Title VII of the Civil Rights Act of 1964, for example, Congress decided to make the prohibition against job discrimination enforceable in court by including an express private right of action (Farhang 2010: ch. 3). When Congress chooses to rely on private enforcement, it faces

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<sup>1</sup> See Administrative Office of the US Courts, Judicial Business of the United States Courts, 2006–15, table C-3, available at [www.uscourts.gov/data-table-numbers/c-3](http://www.uscourts.gov/data-table-numbers/c-3)

a series of additional statutory design choices that together have profound consequences for how much or little private enforcement litigation is actually mobilized. These choices include who has standing to sue, which parties will bear the costs of litigation, what remedies will be available to prevailing plaintiffs, and whether a judge or jury will make factual determinations and assess damages. We refer to this system of rules as a statute’s “private enforcement regime” (Farhang 2010: ch. 2). In Title VII, as amended in 1991, Congress sought to ensure active use of the private right of action by supplementing attorney’s fee awards with, in certain cases, compensatory and punitive damages and the right to trial by jury (Farhang 2010: ch. 5). By design, Title VII is among the most litigated statutory provisions in federal court.

**Figure 1: Private Enforcement Regimes, 1933-2004, and Private Statutory Litigation Rates, 1942-2004**

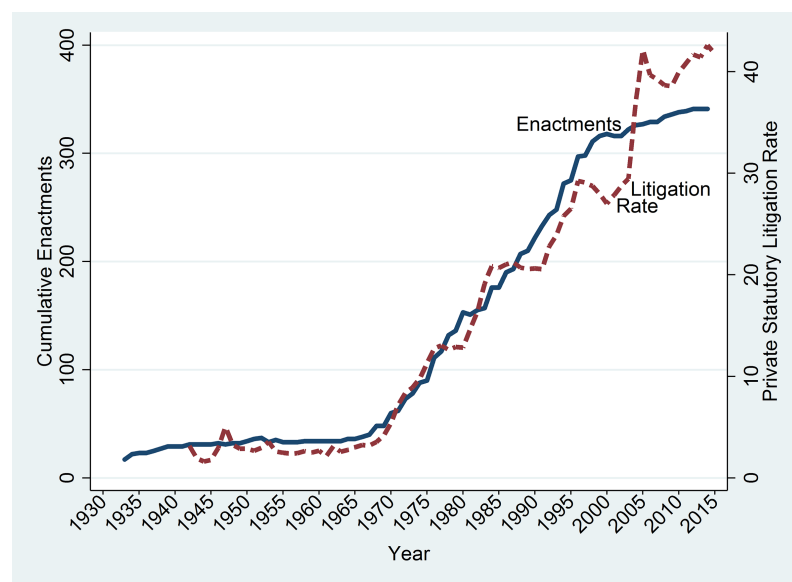


Figure 1 provides some support for our claim that the growth in private litigation enforcing federal statutes is a function of statutory design. The solid line reflects the cumulative number of fee-shifting provisions and damages enhancements (double, triple, or punitive) attached to private rights of action existing in federal statutory law in each year from 1933 to 2014. The line reflects the structural environment of private enforcement regimes in existence annually. Historical evidence demonstrates that by the start of this period Congress had long deployed fee shifting and damages enhancements with the intent of stimulating private enforcement (Farhang 2010: 63-64). The dashed line is the annual rate, per 100,000 population, of private federal statutory enforcement litigation (it is only possible to distinguish privately from governmentally filed actions beginning in 1942). The strikingly close association between these two variables, and particularly the coincident sharp upward shift in both at the end of the 1960s, reinforces the significance of legislatively designed private enforcement regimes in mobilizing private litigants and creating the modern Litigation State.<sup>2</sup>

<sup>2</sup> For a discussion of the data underlying Figure 1, see Farhang (2010: 3-18, 60-84). Farhang (2009) and Farhang and Spencer (2014) demonstrate the association between increases in economic incentives for enforcement in individual private enforcement regimes and increases in legal claiming behavior under the specific statute.

Congress's choice of whether and how much to rely on private enforcement of statutory mandates must be understood in institutional context. The primary alternative is to empower and fund administrative authorities to perform that enforcement function (Fiorina 1982; Lemos 2010; Stephenson 2006). Conflict between Congress and the president over control of the bureaucracy is a perennial feature of the American state, and this creates incentives for Congress, seeking an alternative or supplement to bureaucracy, to provide for enforcement via private litigation. This incentive increases with the degree to which Congress distrusts the president to use the bureaucracy to carry out statutory mandates (Melnick 1994: 49; Burke 2002; Farhang 2010). Private enforcement is thus a form of insurance against the president's failure to use the bureaucracy to carry out Congress's will.

This reason to choose private enforcement has become much more significant to American public policy since the late 1960s, when divided party control of the legislative and executive branches became the norm and relations between Congress and the president became more antagonistic. In the first 68 years of the 20<sup>th</sup> century, the parties divided control of the legislative and executive branches 21% of the time. In the subsequent 32 years (from Richard Nixon through George W. Bush), the figure was 81%. Growing ideological polarization between the parties exacerbated the institutional antagonism arising from divided government (Jacobson 2003; McCarty, Poole, and Rosenthal 2006). Both quantitative and qualitative empirical scholarship have demonstrated that these political-institutional conditions were critically important in causing the greater congressional reliance on private litigation to enforce federal statutes that is reflected in Figure 1 (Farhang 2010, 2012).

Moreover, it is important to the story we tell that the chief configuration was Democratic Congresses facing Republican presidents in the years of divided government from Richard Nixon's assumption of office through the end of George W. Bush's presidency. Thus, the Democratic Party, with its stronger propensity to undertake social and economic regulation (Poole and Rosenthal 1997), and with liberal public interest groups occupying a critical position in the party coalition (Shefter 1994: 86-94; Vogel 1989: 93-112), predominately controlled Congress. This legislative coalition largely faced an executive branch in the hands of Republicans, a party more likely to oppose social and economic regulation and for which business groups are a core constituency (Vogel 1989; Poole and Rosenthal 1997). If antagonism between Congress and the president encourages private enforcement regimes, this will be especially consequential when the more regulation-prone Democratic Party controls Congress (and is writing regulatory mandates), and the less regulation-prone Republican Party controls the presidency (and is appointing the leadership of agencies tasked with implementing them). The bulk of the foundation for the litigation state was laid under this configuration of divided government (Farhang 2010, 2014).

## **Counterrevolution**

Although the movement that propelled the growth of the Litigation State was successful, as time went on, it was contested, and ultimately it gave rise to a countermovement that is the subject of this book. The counterrevolution's strategy was to leave substantive rights in place while retrenching the infrastructure for their private enforcement. We divide our investigation of

the counterrevolution according to its three main institutional strategies: (1) amend existing federal statutes to reduce opportunities and incentives for private enforcement; (2) amend existing or fashion new Federal Rules of Civil Procedure to do the same; and (3) use litigation to elicit federal court interpretations of private enforcement regimes and Federal Rules that demobilize private enforcers. The counterrevolution's legislative strategy was largely a disappointment, and its efforts to change Federal Rules achieved only modest and sporadic success. In notable contrast, its campaign in the courts – we focus on the Supreme Court – has proved, by far, the most successful for the project of retrenching the private enforcement legal infrastructure. We argue that institutional theory provides important insights that help to explain the variation we observe across institutional sites in the success of the campaign to retrench private enforcement.

In Chapter 2, we trace the emergence, growth, and substantial failure of a movement in the elected branches to constrict opportunities and incentives for the enforcement of federal rights. We show that the growth of litigation as an instrument to implement social and economic regulation beginning in the mid-to-late 1960s soon met opposition emanating primarily from the emergent conservative legal movement and the Republican Party. The campaign crystallized in the first Reagan administration, and the strategy it fashioned was to curtail, through legislation, the incentive structure that encouraged the private bar to enforce the rights embodied in the outpouring of rights-creating statutes beginning with the Civil Rights Act of 1964. Congressional Republicans followed suit, introducing a dramatically escalating series of bills beginning in the early 1980s that sought to amend existing federal statutes to limit fees and damages, and later, to amend federal procedural law by statute so as to constrict private enforcement.

Ultimately, we document the substantial failure of this Republican legislative project in the elected branches and the reasons for that failure. The Reagan administration abandoned private enforcement retrenchment through legislation, having concluded that it was broadly perceived as “anti-rights,” threatening unacceptably high political and electoral costs to the administration, and thwarting any realistic prospects of success in the legislative process. Congressional Republican proposals, we show, largely failed as well, even after Republicans achieved unified control of Congress in the mid-1990s. Although some notable retrenchment bills did become law beginning in 1995, they were few in number, usually required years to enact, clustered in a few discrete policy areas, and did not seriously challenge the Litigation State as conservative activists had set out to do. By the 2014, we find that retrenchment of private enforcement has largely disappeared from the legislative agenda.<sup>3</sup>

Significant retrenchment of existing private enforcement regimes proved unattainable on the institutional terrain of democratic politics. Why? We argue that, in addition to the inherent stickiness of the status quo arising from America's fragmented legislative institutions, the distinctive political and electoral challenges to retrenching existing rights with broad public resonance proved to be more than the movement could surmount.

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<sup>3</sup> It is back on the legislative agenda as of 2017, and it will be interesting to see whether proponents of retrenchment can overcome the institutional barriers, even in periods of unified Republican government, that we discuss in Chapter 2.

In Chapter 3, we trace the counterrevolution's pursuit of retrenchment through court rulemaking. The Supreme Court wields power, delegated to it by Congress, to create and revise the Federal Rules of Civil Procedure (Federal Rules). Court rulemaking occupies intermediate lawmaking space that bridges legislative and judicial power (Burbank 2004). Chief Justices appoint all members of the Advisory Committee on Civil Rules, the body that has primary responsibility for drafting Federal Rules. The Federal Rules, such as those governing class actions, pleading, and discovery, determine both access to court and likelihood of success for those seeking to enforce federal rights through litigation. They can profoundly enable or limit private enforcement.

Court rulemaking had been a powerful engine driving private enforcement through the 1960s, but it became the focus of retrenchment efforts starting in 1971, under the leadership of Chief Justice Warren Burger, the first of a succession of Chief Justices appointed by Republican presidents who have held that position up to the present. He had hopes for bold retrenchment, which reflected both institutional (docket) concerns and, increasingly as time went by, his own views about litigation as a "mass neurosis" in the United States (Burger 1985: 5). We present evidence showing that Chief Justices Rehnquist and Roberts, too, regarded rulemaking as a potentially fruitful vehicle for retrenchment. One key strategy that Chief Justices have used to pursue retrenchment through rulemaking is to appoint rulemakers they regarded as more likely to be sympathetic to the counterrevolution's goals.

We demonstrate, however, that few of the Advisory Committee's proposals in the long period we study were pertinent to private enforcement, and that among those that were, ambitious retrenchment efforts have been less frequent than one might have predicted based on salient characteristics of committee members. We conclude that notwithstanding the preferences of Republican-appointed Chief Justices, reflected in their committee appointment choices and in other historical evidence, court rulemaking has been a site of only episodic and modest retrenchment. The chapter explores reasons for this outcome, placing emphasizes on reforms to the rulemaking process in the 1980s – undertaken partly in response to retrenchment efforts – that made it more open and participatory, rendering the status quo stickier.

In Chapter 4, we show that those wishing to retrench private enforcement of social and economic regulation also waged a campaign in the courts. Their goal was the same: to constrict opportunities and incentives for the enforcement of federal rights, again focusing on such issues as standing, damages, fee awards, and class actions. They learned that retrenching rights enforcement by changing statutory law was politically and electorally perilous and unlikely to succeed, and that an increasingly public and participatory rulemaking process would yield only modest and episodic retrenchment.

They thus pressed federal courts to interpret, or reinterpret, existing federal statutes and procedural rules to achieve the same purposes. The federal courts were increasingly staffed by judges appointed by Republican presidents, some of whom had participated in the Reagan administration's failed efforts to retrench rights through legislation. In marked contrast to its substantial failure in Congress and modest success in the domain of rulemaking, the counterrevolution against private enforcement of federal rights achieved growing rates of

support, especially over the past several decades, from an increasingly conservative Supreme Court. We find empirically that, in cases with at least one dissent, plaintiffs' probability of success when litigating private enforcement issues before the Supreme Court has been in decline for over 40 years, and that by 2014 they were losing in the vast majority of cases.

Moreover, we demonstrate that the effect of ideology on justices' votes in private enforcement cases has grown significantly larger over time, especially since about the mid-1990s, during which time the Court's private enforcement docket has come to focus increasingly on business regulation cases, and has been associated with increasing advocacy against private enforcement by the Chamber of Commerce and conservative law reform organizations. Remarkably, we show that on the current Supreme Court justices are more ideologically polarized over apparently technical rules of private enforcement than they are over the actual substantive rights in statutes. Ultimately, we argue that the Court's decisions on rights enforcement, because of their low public visibility, are less constrained by public opinion and therefore less tethered to democratic governance.

In Chapter 5 we explore that claim empirically. The media are the primary source of the public's information about Supreme Court decisions (Davis 1994; Franklin and Kosaki 1995; Hoekstra 2003). We created an original dataset based on content analysis of newspaper coverage of Supreme Court decisions affecting private enforcement, such as decisions on damages, fees, and class actions, and of decisions on related merits issues. The data allow us to compare the extent of coverage of Supreme Court decisions (1) ruling on substantive rights (e.g., whether conduct was racially discriminatory), and (2) ruling on opportunities and incentives to enforce those rights (e.g., whether a plaintiff can recover attorney's fees in a racial discrimination claim). These data demonstrate that Supreme Court decisions on laws relating to the enforcement of rights receive dramatically less press coverage than their decisions on the rights themselves. The media's role in informing the public about the work of the Supreme Court declines precipitously when one moves from rulings on rights to rulings on their enforcement.

In the concluding chapter, we elaborate an institutional account that helps to explain the outcome we document: the long-term erosion of the infrastructure of enforcing rights through lawsuits, despite the substantial failure of the counterrevolution's policy project in democratic politics and in the intermediate lawmaking space of court rulemaking. We emphasize distinctive institutional properties of the judiciary. First, the Court is governed by a streamlined decisional process and simple voting rules, making it capable of unilateral action on controversial issues (Whittington 2007: 124–34). Second, life-tenured Federal judges are largely insulated from the forces and incentives of democratic politics, affording the Court greater freedom to act decisively on divisive issues (Graber 1993; Gillman 2002). Third, in eras of divided government and party polarization, the Court faces less credible threats of statutory override and correspondingly enjoys more policymaking discretion (Eskridge 1991a, 1991b; Whittington 2007: ch. 5; Hasen 2012). Fourth, the law governing or driving private enforcement, perceived by most observers as legalistic and technical, provides the Court a pathway to retrenchment that is remote from public view, and this subterranean quality is reinforced by the slow-moving, evolutionary nature of case-by-case policy change (Graber 1993; Barnes and Burke 2015). Finally, we take up normative concerns that arise when potentially crucial decisions bearing on the fate of broadly

popular rights, most of which are conferred by statute, are not the result of public deliberation and democratic politics – indeed, when they are little noticed by the public at all.

## **Chapter 2**

### **Legislative Counterrevolution: Emergence, Growth, and Disappointment**

#### **The Reagan Administration**

By the late 1970s and early 1980s, a deregulatory movement was afoot, primarily catalyzed by businesses, trade associations, state and local officials, and newly emergent conservative public interest groups. President Reagan came to power on the wave of this movement, and it was clear that regulatory reform was high on the policy agenda from the outset of his administration (O'Connor and Epstein 1984; McGarity 1986; Decker 2009). Some of his close associates, including high-ranking members of his California gubernatorial administration who followed him to the White House, had been instrumental in founding the conservative legal movement, including conservative law reform organizations (O'Connor and Epstein 1984: 495; Teles 2008: 60-61; Decker 2009: 54-76). Indeed, Reagan appointed numerous leaders and activists from the emergent conservative legal movement to important positions in the federal bureaucracy (Decker: 238-56).

Leaders of the administration well understood that private enforcement of federal regulatory statutes had been growing steeply, and they saw it as an obstacle to their regulatory reform agenda. Reagan himself was openly hostile to liberal public-interest lawyers, characterizing them in the early-to-mid-1970s as “a bunch of ideological ambulance chasers doing their own thing at the expense of the . . . poor who actually need help,”<sup>4</sup> and as “working for left-wing special interest groups at the expense of the public” (Decker 2009: 74). Statutory provisions that forced business and government to pay the attorney’s fees of plaintiffs who launched lawsuits regarded as invasive, disruptive, and costly were a particular target of criticism. Conservative activists and leading business associations also believed that liberal public interest groups used litigation and courts to shape the substantive meaning of the new social regulatory statutes to their liking, thereby making regulatory policy that was injurious to the interests of business and government (O'Connor and Epstein 1984; Greve 1987: 91; Teles 2008; Decker 2009: 15). They had witnessed, with dismay, the rate of private enforcement lawsuits under federal statutes increase by 352% between Nixon’s assumption of office in 1969 and Reagan’s in 1981 (Farhang 2010: 15).

With little prospect of actually repealing or modifying substantive legislative mandates in the new social regulatory statutes, the administration’s principal strategy for effectuating its deregulatory agenda was to demobilize the administrative regulatory enforcement apparatus (Litan and Nordhaus 1983: 119-32; McGarity 1986: 260-70; Vogel 1989: 246-65; Farhang 2010: 172-213; Farhang 2012). However, the deregulatory value of weakening administrative

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<sup>4</sup> Ronald J. Ostrow, *Legal Services Agency Battles Reagan Attempt to Cut Off Its Funding*, L.A. TIMES, Apr. 12, 1981, at B1.



enforcement would be diminished if extensive private enforcement continued, or increased to fill gaps left by withdrawn administrative enforcement. Administration leadership thus initiated proposals to curtail economic incentives for private enforcement (particularly fee awards) under federal regulatory statutes. They sought to retrench private enforcement through legislation.

### **Attacking the Private Enforcement Infrastructure**

Two major legislative initiatives to retrench private enforcement were considered. The first was a cross-cutting bill that would have amended over 100 statutes by limiting attorney's fee awards to successful plaintiffs in suits against government. The second involved amending the Civil Rights Act of 1871 with the goal of diminishing opportunities and incentives for private civil rights actions against state officials for violating federal rights. We explore both episodes with archival documents from the Reagan Library and the National Archives. These episodes are informative for two reasons. First, as we show below, they occurred at the moment that the Republican party undertook the project of retrenching private enforcement, and thus the evidence illuminates the motives of the counterrevolution's founders. Second, the reasons for the initiatives' failure were critical in directing the counterrevolution's strategy toward the federal courts, and the evidence illuminates the strategic self-consciousness of this turn.

Starting in 1981, the OMB, with David Stockman as Director and Michael Horowitz as general counsel, developed a fee-cap bill that focused on suits against federal and state government defendants. Horowitz, who played a leading role in developing and advocating the bill, was an important figure in the conservative legal movement (Teles 2008: ch. 3). Advocates of the fee-cap bill believed that the extensive fee-shifting legislation since the Civil Rights Act of 1964 was a critical part of the incentive structure generating excessive litigation, and the goal of the fee-cap proposal was to "drive a stake through that incentive structure" (Decker 2009: 177). Initially titled "The Limitation of Legal Fees Awards Act of 1981," the proposed bill would amend over 100 federal statutes allowing recovery of attorney's fees in successful suits against government, ranging across suits under, for example, civil rights, environmental, antitrust, public health and safety, and freedom of information statutes, among many others.

The initiative went through a number of permutations from 1981 to 1984. Some core attributes of the initial version were: (1) a fee cap of \$53 per hour for private attorneys representing paying clients; (2) a bar on fee awards for public interest organizations with staff attorneys, legal services organizations receiving federal funds, or for-profit attorneys representing plaintiffs on a *pro bono* basis; and (3) a reduction of the \$53 per hour fee award by 25% of any money judgment.<sup>5</sup>

Shortly after work on The Limitation of Legal Fees Awards Act of 1981 began, a related proposal emerged in the Department of Justice (DOJ), in some ways narrower and in other ways broader. In the summer of 1982, John Roberts (then Special Assistant to the Attorney General) and Kenneth Starr (then Counselor to the Attorney General) made a request to the Office of

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<sup>5</sup> Mike Horowitz to David Stockman and Edwin Harper, June 22, 1982, Reagan Library, John G. Roberts, Jr. Files, box 5, Attorney's Fees (folder 1 of 3) (attachments B and C); Fred Barbash, "... And Uncle Sam Wants to Save on His Legal Fees," *Washington Post*, February 10, 1982, A25; Mary Thornton, "Plaintiffs' Legal Fess Attacked by OMB," *Washington Post*, August 12, 1982, A21; Percival and Miller (1984).

Legal Policy (OLP) in DOJ for “a memorandum outlining the range of legislative changes that could be considered” to the Civil Rights Act of 1871, commonly known as Section 1983.<sup>6</sup> Section 1983 is the broadest federal civil rights statute and among the most consequential. It provides a private cause of action against any person who, “under color of” state law, causes the deprivation of rights secured by the “Constitution and laws” of the United States.<sup>7</sup>

In the internal administration debate that John Roberts and Kenneth Starr helped to ignite, there emerged a consensus (judging from archival documents) that on the policy merits Section 1983 required substantial amendments to limit the growth of private lawsuits enforcing it. The statute was narrowly construed and rarely invoked during its first 90 years on the statute books (Note 1969). That changed in the 1960s, and even more in the 1970s, when Section 1983 actions began to grow significantly alongside other types of civil rights litigation and private federal statutory filings in general.

As internal Justice Department memoranda put it, civil rights litigation in general had “mushroomed” and “ballooned” in the past two decades, with the surge concentrated in private civil rights suits. One memo observed: “The number of ‘private’ civil rights suits filed in the federal district courts totaled 280 in 1960; 3,586 in 1970; 11,485 in 1980; and 13,534 in 1981. ... Thus, since 1960 there has been an increase of almost 5,000%.”<sup>8</sup> Administration officials questioned the merits of much of the growing civil rights litigation, with one memo opining that “[n]o grievance seems too trivial to escape translation into a § 1983 claim.”<sup>9</sup> Amendments to Section 1983 were necessary “to stanch the flood of litigation it has engendered.”<sup>10</sup>

The potential amendments to Section 1983 that were ventilated within DOJ were wide-ranging. They included: (1) abolishing or limiting attorney’s fees awards in Section 1983 cases by capping hourly rates, eliminating the use of multipliers, or limiting awards to plaintiffs who decline a settlement offer and do not achieve a better result at trial; (2) barring the award of punitive damages under Section 1983; (3) immunizing state and local officials from money damages under Section 1983 if there is a sufficient remedy in state law; (4) creating a good-faith defense for municipalities under Section 1983; and (5) requiring that state remedies be exhausted as a precondition to filing a Section 1983 action.<sup>11</sup>

## **Demobilizing the Private Bar**

The archival record makes clear that those seeking private enforcement retrenchment were concerned about, and responding to, the growing scale of enforcement activity by the private bar. Conservative activists had long been critical of litigation by liberal public interest

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<sup>6</sup> Jonathan C. Rose to Edward C. Schmults, August 6, 1982 (cover memo), National Archives, John G. Robert, Jr. Files, box 125, Section 1983.

<sup>7</sup> 42 U.S.C. § 1983 (2012).

<sup>8</sup> Rose to Schmults 8/6/1982; Jonathan C. Rose to William French Smith, June 15, 1983, National Archives, Carolyn B. Kuhl Files, box 15, Section 1983.

<sup>9</sup> Rose to Schmults 8/6/1982.

<sup>10</sup> Rose to Smith 6/15/1983.

<sup>11</sup> See Rose to Schmults 8/6/1982; Rose to Smith 6/15/1983; Michael Robinson to Geoffrey Stewart, April 20, 1983, National Archives, Carolyn B. Kuhl Files, box 15, Section 1983; Michael Robinson to Geoffrey Stewart, June 14, 1983, National Archives, Carolyn B. Kuhl Files, box 15, Section 1983.

groups, but their focus now turned to for-profit plaintiffs' attorneys as well. Greve observes that when the Reagan administration sought to curtail fee awards, "a sizeable portion of attorneys' fees [was] collected not by public interest groups but by big, for-profit law firms" (Greve 1987: 103). This became an important theme and concern among Reagan White House advocates for retrenching private enforcement, articulated repeatedly in support of the fee bill. In a 1983 memo discussing the problem that the fee bill sought to address, Horowitz explained: "Not only the 'public interest' movement but, *more alarmingly*, the entire legal profession is becoming increasingly dependent on fees generated by an open-ended 'private Attorney General' role that is authorized under more than 100 statutes,"<sup>12</sup> a large portion of which had been enacted since the Civil Rights Act of 1964.

Writing to OMB Director Stockman, Horowitz characterized the fee-cap bill as "designed in part to bar fee awards to entrepreneurial attorneys who now engage in contingency litigation"<sup>13</sup> under federal statutes. "A literal industry of public interest law firms has developed," he continued, "as a result of the legal fee awards with such groups regarding attorney's fees as a permanent financing mechanism," and one central to their commercial viability and business model.<sup>14</sup> In the same vein, a Justice Department memo to Counselor to the President Edwin Meese, reporting on the content of the fee-cap bill, stated that it was meant to address the problem of the "growing industry of attorneys capitalizing on civil fee awards."<sup>15</sup>

Reagan administration advocates of retrenching private enforcement were surely right, from the standpoint of a deregulatory agenda, that the statutory enforcement activity of the for-profit bar, mobilized by fee awards, was more alarming than the activity of the non-profit bar. The year Reagan took office, about 90% of actions enforcing federal statutes were privately prosecuted, and the fraction was rising.<sup>16</sup> Non-profit groups prosecuted a tiny fraction of the cases. One study found that non-profits prosecuted 2% of a sample of federal statutory actions that spanned from 1960 to 2004 (Farhang 2010: 11). To the extent that the "regulatory relief" sought by Reagan involved, in part, less aggressive enforcement of existing statutory mandates, and the private enforcement infrastructure posed a problem to presidential control, the problem was emanating overwhelmingly from the for-profit bar responding to market incentives enacted by Congress.

John Roberts, an initiator of the proposals to amend Section 1983, was also an active participant in deliberations over the fee-cap bill. Notwithstanding differences of opinion within the administration about the political wisdom of pursuing the bill, Roberts joined those advocating it. In explaining why, he stated, "This legislation will, of course, be opposed by the self-styled public interest bar, but the abuses that have arisen in the award of attorney's fees against the government clearly demand remedial action." Antonin Scalia endorsed the fee bill as well. Writing as a University of Chicago law professor and editor of the American Enterprise Institute's *Regulation* magazine (just months before his appointment to the D.C. Circuit), he

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<sup>12</sup> Mike Horowitz to Dick Hauser and Bob Kabel, June 16, 1983, Reagan Library, James W. Cicconi Files, box 23, Department of Justice (folder 1) (emphasis in original).

<sup>13</sup> Horowitz to Stockman and Harper 6/22/82.

<sup>14</sup> Ibid.

<sup>15</sup> Joseph R. Wright, Jr. to Edwin Meese, III, July 25, 1983, Reagan Library, box 9094, Attorney Fee Reform Legislation.

<sup>16</sup> Judicial Business of the United States Courts, Administrative Office of the United States Courts, 1981, Table C-2.

argued that recent D.C. Circuit pro-fee award decisions were a “bad dream” in need of the administration’s legislative remedy and that the bill would surely be opposed by the “private attorney general industry.”<sup>17</sup> As we shall see, after their legislative advocacy failed, Roberts and Scalia were to become among the most anti-private enforcement justices to serve on the Supreme Court in a period spanning more than 50 years.

The Reagan administration’s private enforcement retrenchment initiatives failed. Examining the reasons why provides insights into the political and institutional dynamics of litigation retrenchment. Before turning to the reasons for failure, we first explore private enforcement retrenchment efforts in Congress and how they fared.

### **Private Enforcement Retrenchment Proposals in Congress**

There previously existed no data with which to map the legislative movement for private enforcement retrenchment and its partisan configuration in Congress. To fill that gap, we identified all bills that sought to amend federal law so as to (1) reduce the availability of attorney’s fees to plaintiffs or increase plaintiffs’ liability for defendants’ fees; (2) reduce the monetary damages that plaintiffs can recover; (3) reduce opportunities and incentives for class actions; (4) strengthen the operation of sanctions against counsel; and (5) strengthen the operation of offer of judgment rules.<sup>18</sup> These provisions fall into two groups. The fees and damages provisions seek to reduce directly the economic recovery available to successful private enforcers and thereby to reduce economic incentives for enforcement by would-be plaintiffs and their attorneys. The class action, sanctions, and offer of judgment provisions seek to modify the Federal Rules in ways that disadvantage private enforcers.

Our search captured 500 bills from 1973 (when the Library of Congress bill database starts) to 2014. Table 1 shows the percentage of these bills containing each of our five anti-private enforcement items. Table 2 reflects the distribution of policy areas covered by the bills (for policy areas comprising 2% or more of the data). The largest share (25%) is represented by bills targeting civil rights and civil liberties issues, prominently including bills focused on policing, prisoners, discrimination, religion, and abortion. Multiple civil rights bills sought to amend Section 1983 and the Civil Rights Attorney’s Fees Awards Act of 1976 so as to reduce litigation under them. Other important policy areas included antitrust, environmental, labor, securities, and consumer policy.

The bills had an average of eleven co-sponsors, yielding a total of 6,133 instances of legislators sponsoring or co-sponsoring a bill containing at least one retrenchment item. There were 3,608 episodes of legislators supporting a bill with a provision limiting damages, 2,913 with an attorney fee provision, and 2,501 with procedural provisions. Summing across all items, there were 9,022 instances of a legislator supporting our five retrenchment items.

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<sup>17</sup> “The Private Attorney General Industry: Doing Well by Doing Good,” *Regulation*, May/June 1982, at 5–7; Horowitz to Stockman and Harper 6/22/82 (including ex. H).

<sup>18</sup> We excluded bills that sought to affect incentives for asserting rights in administrative proceedings or for judicial review of administrative action. Our focus is on private lawsuits to enforce federal rights against the objects of statutory regulation.

**Table 1: Types of Private Enforcement Issues in Bill Data**

Private Enforcement Issues	Percent of Total Bills in Data*
Damages	61%
Attorney's Fees	47%
Class Actions	14%
Sanctions	10%
Offers of Judgment	6%

\*This column sums to more than 100% because one bill can seek to amend existing law with respect to more than one of our private enforcement issues.

**Table 2: Policy Distribution of Bills**

Policy Area	Percent of Cases
Civil Rights and Liberties	25%
Policing	(5%)
Prisoner	(2%)
Equality	(5%)
Religion	(3%)
Abortion	(4%)
Other	(6%)
Civil Rules*	12%
Antitrust	11%
Environmental	6%
Suits Against Government**	6%
Labor and Employment	5%
Intellectual Property	5%
Securities	4%
Consumer	4%
Transportation	4%
Public Health & Safety	3%
Other	15%

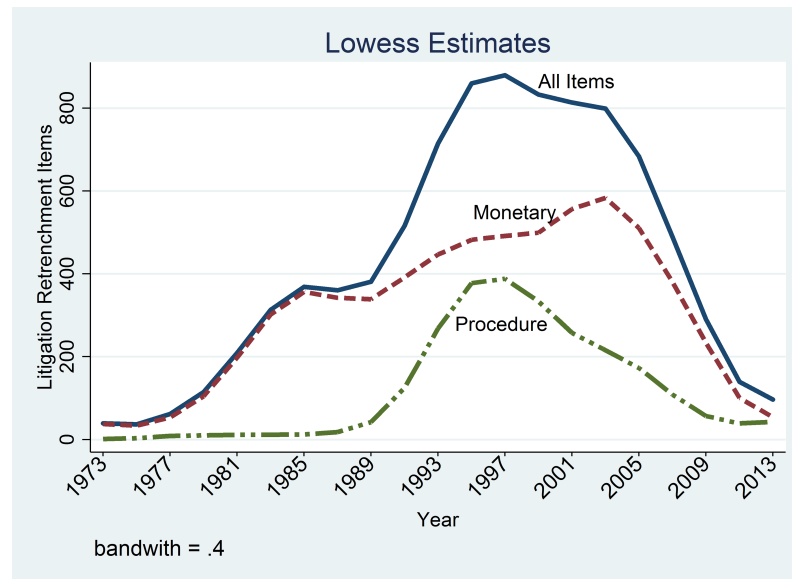
\*Civil Rules includes proposals to amend existing general rules governing federal civil actions. These include primarily amendments to Federal Rules of Civil Procedure, but also other proposals to create transsubstantive rules to govern all federal civil actions, such as a loser pays fee rule.

\*\*Suits Against Government includes rules which specify that they govern suits against government in general, such as a rule cutting across all policy areas to cap legal fees or damages available in actions against government.

In order to analyze the relationship between legislators' party and the likelihood that they would support anti-private enforcement proposals, we constructed the following dataset. Separately for each of our items and for each legislator who served in Congress from 1973 to 2014, we calculated the total number of episodes of sponsorship or co-sponsorship per Congress. That is, the unit of analysis is a Congress-legislator count of the total number of times that each legislator in each Congress sponsored or co-sponsored one of our five items. Figure 2 fits a curve to the count, per Congress, of the total number of episodes of legislator support for anti-private enforcement provisions; the aggregation of proposals to reduce damages and fees (monetary recoveries); and the aggregation of proposals to change class action, sanctions, and offer of

judgment rules (procedural rules). Years on the horizontal axis designate Congresses seated in that year.

**Figure 2: Annual Number of Private Enforcement Retrenchment Items: Damages, Attorney’s Fees, Class Actions, Sanctions, Offers of Judgment, 1973–2014**



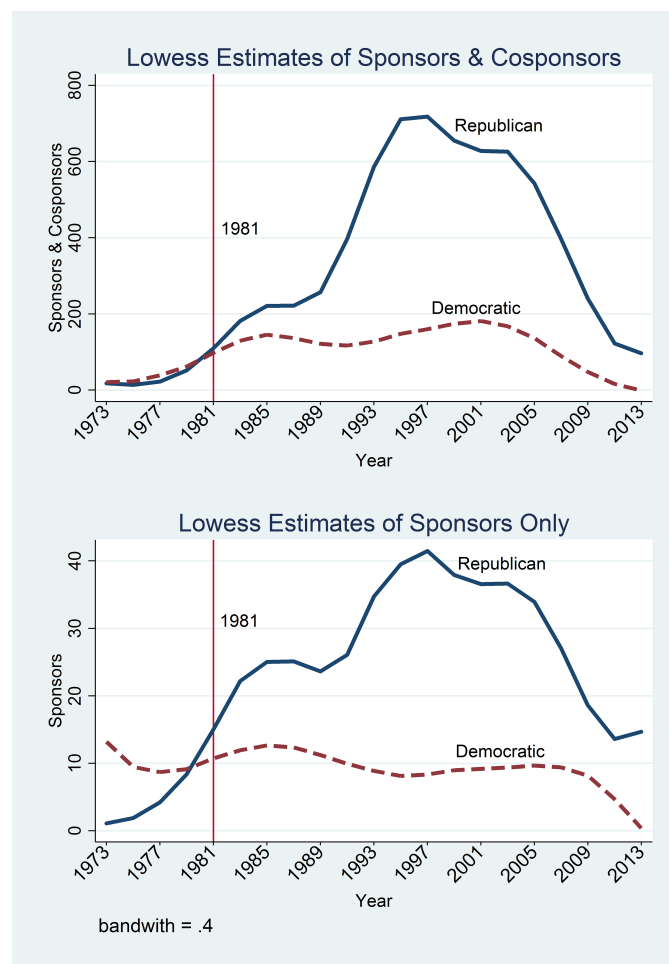
Two things stand out in these data. First, support for anti-private enforcement bills grew strongly in the Reagan years. Because the regression curve smooths over year-to-year fluctuations, it does not reveal sharp breaks in the data, and thus the raw underlying data are instructive. During the Carter presidency, there was an average of 71 episodes per Congress of legislative support for one of our anti-private enforcement items. In Reagan’s first term, the figure rose to 243 per Congress, and in his second term it rose to 458 per Congress – 545% higher than in the Carter years. The growth peaked in the 104th Congress (1995–6), when Republicans took control. It has since declined considerably, continuing its downward slope to the present, with estimated values in the last two Congresses comparable to the late-1970s. Second, in the first half of the 1980s, episodes of support for procedural proposals were negligible in number and flat, while fee and damages proposals exploded. Procedural proposals, however, grew significantly starting in the early 1990s, peaked in the 105th Congress (1997–8) and subsequently declined, a trend continuing to the present.

Figure 3 provides an initial sense of the significance of ideology and party affiliation by presenting separate regression curves for the number of Democratic and Republican sponsors and co-sponsors in the top panel, and sponsors only in the bottom panel.<sup>19</sup> Until Reagan took office, Democrats provided more support for these proposals than Republicans, and there was an even larger partisan disparity in sponsorship. Again, smoothed regression estimates are not useful for locating year-to-year changes. The raw data reveal that in each of the four Congresses

<sup>19</sup> This figure is intended to convey a broad descriptive sense of longitudinal patterns. We employ statistical models with significance tests to formally test the effect of party and how it changed over time.

from 1973 to 1980, while the volume of proposals was very low, Democratic support exceeded Republican support modestly when sponsors and co-sponsors are aggregated, and did so to a greater extent in sponsorship. The 97th Congress (1981–2) is the first in our dataset in which Republican support for anti-private enforcement measures exceeds Democratic support, and this is true both when sponsors and co-sponsors are aggregated and when sponsorship alone is examined. Once Reagan took office, Republican members emerged as the chief advocates of retrenchment, and the partisan gap on this issue exploded, peaking in the 105th Congress (1995–6). As the number of Republican proposals declined after this peak, so also did the absolute size of the gap between the two parties.<sup>20</sup>

**Figure 3: Republican and Democratic Support for Private Enforcement Retrenchment, 1973–2014**



In order to test systematically the relationship between legislator party and support for anti-private enforcement proposals, we use negative binomial count models. We employ Congress fixed effects to address the possibility of potential confounding factors, including the political and public salience of the private enforcement issue, the lobbying priorities of business

<sup>20</sup> Note that Figure 3 is based on raw figures of support and does not attempt to make adjustments for the share of seats controlled by each party. This is addressed in our statistical models.

and state governments that may wish to reduce private enforcement pressures, and election cycles. This approach leverages only variation in the relationship between legislators' party and their bill support *within* Congresses to estimate the effects of party. This approach allows us to estimate the effects of party most effectively because it holds constant the influence of any variables that would take the same value for each legislator in a given Congress, and in this sense these estimates of the effects of party are net of the effects of any such variables (Greene 2003: ch. 13). Standard errors are clustered on legislator.

In our statistical models (not reported here), we subset the data by time periods in order to assess the effect of party before and after Reagan's assumption of office. We estimate separate models for (1) the pooled number of episodes of support for all five types of anti-private enforcement provisions; (2) the aggregation of proposals to reduce damages and fees (monetary recoveries); and (3) the aggregation of proposals to change class action, sanctions, and offer of judgment rules (procedural rules). In our measure of legislator support in the models, we use counts that include both sponsorship and co-sponsorship. We do so because we are interested in the degree of legislative support for litigation retrenchment proposals. To neglect co-sponsors would be to treat a bill that a legislator introduces only for herself as equivalent to one that dozens of other members of Congress wish to support.

For the period from 1973 to 1980, we find no statistically significant party effect in the model for pooled episodes and the model for monetary recoveries. We do find a statistically significant effect with respect to procedural provisions, and the sign on the coefficient reflects that *Democrats* were more likely to support such bills. We are not inclined to make much of this result because only about 4% of members of Congress sponsored such a bill during this period – procedure had not yet emerged as a locus of significant bill activity. For the 1981–2014 period, the results change dramatically. The party variable is statistically significant in the expected direction in all three models. In the model of all anti-private enforcement provisions, moving from Democrat to Republican is associated with an increase in legislators' predicted count by 249%. The figure is 229% in the model of fees and damages and 344% in the model of procedural provisions. Interestingly, the effect of party on the level of support is highest among the procedural provisions. The chapter goes on to discuss a series of Congress-by-Congress models, which we do not discuss in this chapter summary, charting variation in the size of the party effect over time.

## **Failure of Private Enforcement Retrenchment in Congress**

The legislative project of private enforcement retrenchment mounted by the Republican Party was largely a failure. Reagan's fee bill was unable to gain traction even in the Republican-controlled Senate (Percival and Miller 1984). Numerous proposals by congressional Republicans fared little better in the ensuing years, even when they controlled both chambers of Congress. Some of the fees and damages proposals were transsubstantive bills that would have cut across the whole landscape of the Litigation State, such as bills requiring federal courts to award attorney's fees to prevailing defendants in all civil actions<sup>21</sup> or to impose a general loser pays

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<sup>21</sup> See, e.g., Frivolous Suit Reduction Act of 1995, H.R. 64, 104th Cong.; Frivolous Suit Reduction Act of 1994, H.R. 5189, 103rd Cong.



fee-shifting rule.<sup>22</sup> Another transsubstantive proposal would have capped punitive damages in all civil actions in federal court against small businesses, while increasing the burden of proof for establishing entitlement to such damages.<sup>23</sup>

Many other Republican proposals targeted particularly active areas of federal civil litigation and sought to reduce economic incentives: A 1981 bill proposed full immunity from civil damages suits for police officers who conducted illegal search and seizures in violation of the Fourth Amendment.<sup>24</sup> A 1982 bill proposed to repeal the attorney fee-shifting provision in the Civil Rights Attorney's Fees Awards Act of 1976.<sup>25</sup> A 1987 bill proposed to amend the Clayton Act to reduce the amount recoverable in many private antitrust actions from treble to actual damages.<sup>26</sup> A 1992 bill proposed to eliminate class actions under the Truth in Lending Act.<sup>27</sup>

Although a substantial majority of the Republicans' procedural proposals would have amended specific statutes, some were transsubstantive, and these were overwhelmingly bills amending Rules 11 and 23. Of the Rule 11 bills, a substantial majority sought to reverse the 1993 amendments by making sanctions mandatory rather than discretionary.<sup>28</sup> Of transsubstantive bills targeting Rule 23, a substantial majority were precursors to the Class Action Fairness Act of 2005.<sup>29</sup>

Republican successes were few in number. Three are well known: the Private Securities Litigation Reform Act of 1995,<sup>30</sup> the Prison Litigation Reform Act of 1996,<sup>31</sup> and the Class Action Fairness Act of 2005 (CAFA).<sup>32</sup> We do not deny the significance of these laws. However, excluding the jurisdictional provisions of CAFA, which themselves do not directly affect federal rights,<sup>33</sup> the three are narrowly focused.

Beyond these major laws, only eight more Republican-proposed private enforcement retrenchment bills in our database passed. More telling than their number is how limited the bills were in substantive scope. They included three antitrust bills limiting multiple damages: one in

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<sup>22</sup> See, e.g., Loser Pays Legal Fee Fairness Act of 2005, H.R. 3497, 109th Cong.; Loser Pays Act of 1993, H.R. 2880, 103rd Cong.

<sup>23</sup> See, e.g., Small Business Lawsuit Abuse Protection Act of 1998, H.R. 3382, 105th Cong.; see also Small Business Liability Reform Act of 2001, S. 865, 107th Cong.

<sup>24</sup> House Resolution 4259 proposed to amend titles 18 and 28 of the United States Code to eliminate, and provide an alternative to, the exclusionary rule in federal criminal proceedings. H.R. 4259, 97th Cong. (1981).

<sup>25</sup> Judicial Reform Act of 1982, S. 3018, 97th Cong.

<sup>26</sup> Trade, Employment, and Productivity Act of 1987, H.R. 1155, 100th Cong.

<sup>27</sup> Community Bank Regulatory Relief Act of 1992, S. 2794, 102nd Cong.

<sup>28</sup> See, e.g., Small Business Growth Act of 2007, H.R. 1012, 110th Cong.; Civil Justice Fairness Act of 1995, S. 672, 104th Cong.

<sup>29</sup> See, e.g., Class Action Fairness Act of 2004, S. 2062, 108th Cong.; Class Action Fairness Act of 2000, S. 353, 106th Cong.

<sup>30</sup> Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered section of 15 U.S.C.).

<sup>31</sup> Pub. L. No. 104-134, 110 Stat. 1321-66 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

<sup>32</sup> Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

<sup>33</sup> As we discuss in [Chapter 4](#), CAFA significantly increased the number of state law class actions that were governed by a transsubstantive and ever-more-conservative federal class action jurisprudence. It therefore may have encouraged anti-private enforcement class action jurisprudence that also governs enforcement of federal rights.

1982 applying only to actions by foreign governments,<sup>34</sup> one in 1984 applying only to narrowly defined “joint research and development venture[s],”<sup>35</sup> and one in 2004 applying only to antitrust violators who report their own cartel activity to the Justice Department and cooperate in its ensuing investigation.<sup>36</sup> They also included three bills limiting fee awards to disabled students or their families suing schools: two of these capped only fee awards paid from monies appropriated for the District of Columbia in each of two years, without permanent limits,<sup>37</sup> and the third limited fee recovery by (or imposed some fee liability on) plaintiffs’ counsel for frivolous or unreasonable litigation behavior.<sup>38</sup> In 1995, a Republican-proposed bill passed imposing a five-month moratorium on certain consumer class actions, again with no permanent effects.<sup>39</sup> In 1996, a Republican proposal passed foreclosing fee awards in Section 1983 actions against judges for actions taken in a judicial capacity.<sup>40</sup>

In sum, Republican successes across the issues in our database, over the three and a half decades from the emergence of the issue on the Republican agenda in 1981 until 2014, nibbled around the edges of the Litigation State. They did not challenge it seriously.

### **Why Private Enforcement Retrenchment by Legislation Failed**

The story of the failure of the Reagan administration’s fee-cap bill and initiative to amend Section 1983 teaches some important lessons about the long-run resilience of the private enforcement infrastructure against retrenchment through democratic policymaking processes. It is also important, in itself, because the failure helped to drive the retrenchment project into the federal courts, where, as we demonstrate in Chapter 4, quite significant changes in law have been effected. To appreciate the lessons, it is useful first to highlight several institutional factors that make retrenchment of rights difficult.

An institutionally fragmented legislative process empowers many actors to block legislation, making legislative change difficult on contentious issues and leading to the stickiness of the status quo (Moe 1990; Brady and Volden 2005). This is especially true when the legal change sought involves divesting groups of existing rights, and even more so when those rights enjoy a broad base of support. In his work on welfare state retrenchment, Paul Pierson observes that rights-retrenching reforms confront serious political hurdles. The legal rights and interests that retrenchers seek to remove often have already given rise to “resources and incentives that influence the formation and activity of social groups ... [and] create ‘spoils’ that provide a strong

<sup>34</sup> Act of December 29, 1982, Pub. L. No. 97–393, 96 Stat. 1964 (codified at 15 U.S.C. § 15 (2012)).

<sup>35</sup> National Cooperative Research Act of 1984, Pub. L. No. 98–462, § 2(a)(6), 98 Stat. 1815, 1815 (codified as amended at 15 U.S.C. § 4301 (2012)).

<sup>36</sup> Standards Development Organization Advancement Act of 2004, Pub. L. No. 108–237, §§ 106–107, 118 Stat. 661, 664–65 (codified at 15 U.S.C. §§ 4304–4305 (2012)).

<sup>37</sup> Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109–115, 119 Stat. 2396 (2005); District of Columbia Appropriations Act, 2005, Pub. L. No. 108–335, 118 Stat. 1322 (2004).

<sup>38</sup> Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446, § 615(i)(3), 118 Stat. 2647, 2724–25 (codified at 20 U.S.C. § 1415 (2012)).

<sup>39</sup> Truth in Lending Class Action Relief Act of 1995, Pub. L. No. 104–12, § 2, 109 Stat. 161, 161 (codified as amended at 15 U.S.C. § 1640 (2012)).

<sup>40</sup> Federal Courts Improvement Act of 1996, Pub. L. No. 104–317, § 309(c), 110 Stat. 3847, 3853 (codified as amended at 28 U.S.C. § 2412 (2012)).

motivation for beneficiaries to mobilize in favor of programmatic maintenance or expansion” (Pierson 1994: 40). In the context we investigate in this book, rights-oriented interest groups – which propelled the growth of private enforcement, see it as critical to their policy missions, and rely on fee awards to support litigation campaigns – together with private plaintiff bar groups, can be counted on to mobilize against efforts to retrench private enforcement, in which they have a direct interest.

Pierson also emphasizes that the phenomenon of “negativity bias” (or an “endowment effect”) leads people to be substantially more likely to mobilize to avoid the imposition of losses of existing rights and interests, as compared to securing new ones. It also leads voters to be more likely to punish politicians that have impaired their interests than to reward politicians who have benefited them, and politicians know this (Pierson 1994: 17–19, 39–46; see also Eskridge and Ferejohn 1995: 1560). Thus, retrenchment of statutory rights is difficult because: (1) institutional fragmentation facilitates blocking policy reforms; (2) existing rights often contribute to group capacity to defend them; and (3) “negativity bias” enlivens group mobilization to block rights retrenchment, heightening the electoral threat to retrenching politicians. These forces produce a policy status quo that is durable against change through democratic lawmaking processes.

### **Political Costs of Retrenchment**

Ultimately, Justice Department leadership elected not to proceed with sponsoring a bill to amend Section 1983. Department officials concluded that Section 1983 amendments to limit opportunities and incentives for private civil rights enforcement, though desirable, were a losing proposition. They believed that a bill simply could not pass Congress, would taint the administration as anti-civil rights, and was electorally disadvantageous.

A memo by the head of the OLP, after embracing the desirability of Section 1983 amendments, recommended against pursuing a bill, explaining: “any effort by the administration to reform Section 1983 will become enmired in controversy and labeled as yet another assault upon the civil rights laws. Of course, it goes without saying that legislation to amend the Section will stand virtually no chance of success in Congress, particularly with a presidential election around the corner.”<sup>41</sup> In the same vein, another OLP memo stated:

Section 1983 clearly needs an extensive overhaul to correct its many inadequacies. ... However, more modest proposals in the 97<sup>th</sup> Congress met with considerable opposition from affected groups, particularly those in the civil rights community. More important, the public perception of this Administration’s record on civil rights may make it politically unwise for the Administration to sponsor any legislative proposals to restrict what most people would consider key provisions of civil rights laws.<sup>42</sup>

Although the fee cap bill made it further in the legislative process, it ultimately failed for the same reasons. A number of high-ranking members of the Reagan administration regarded the

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<sup>41</sup> Rose to Smith 6/15/1983.

<sup>42</sup> Robinson to Stewart 6/14/1983.

bill's likely political and electoral costs as much too high. Several DOJ memoranda on potential Section 1983 amendments advanced the view that the generality of the fee-cap bill – attacking “abuses” in fee awards in general – made it more politically viable, and less politically dangerous, than “singling out civil rights statutes as the place to start cutting back attorneys’ fees.”<sup>43</sup>

However, important administration leaders were extremely doubtful that the terms of the debate over the fee-cap bill could be managed to avoid focus on underlying substantive rights. Instead, they foresaw opponents successfully turning the battle into one over the preservation of substantive rights protected by the statutes to be amended – rights to be free of racial and gender discrimination, to be shielded from predatory business practices, to drink clean water and to breathe clean air. That is, they knew that the administration would be attacked by liberal public interest groups and the plaintiffs’ bar, and be perceived by a material segment of the voting public, as seeking to take popular rights away from vulnerable groups.

They were correct. Liberals regarded the proposal as “designed expressly to discourage public interest litigation by reducing the incentive effect of fee shifting statutes” (Percival and Miller 1984: 244). National media coverage conveyed such groups’ dismay to the public. The *Washington Post* alone ran at least three articles on the fee bill in 1982. Leaders of the ACLU, the NAACP, the Wilderness Society, Public Citizen, and the Alliance for Justice – an umbrella organization representing a wide range of liberal public interest law groups – were among those that attacked the proposal in the pages of national newspapers. They emphasized its impact in the areas of civil rights, the environment, consumer welfare, labor, and social welfare benefits. They characterized its likely consequences as “crippling,” “choking off,” and “devastating” to the enforcement of rights in these fields. The losers, they maintained, would be racial minorities, environmentalists, workers, and the poor. The winners would be the wealthy.<sup>44</sup>

Following this reporting and as if he had been reading it, Attorney General William French Smith observed that striking too severely at attorney’s fee awards risked “excessive controversy.” He emphasized that in the public relations battle the administration would be cast as “anti” rights. “Attorney’s fee cap proposals,” Smith wrote, “are thought by public interest litigating organizations to strike at a vital source of their financial support. Accordingly, these groups have characterized fee cap proposals as ‘anti-civil rights’ or ‘anti-environmental’ proposals.”<sup>45</sup> Opponents of the proposal would be able to beat it back with “the rhetoric of rights and justice,” as one supporter put it (Greve 1987: 104). Smith also observed that the timing of the bill seemed particularly bad with an election on the horizon.<sup>46</sup> When the bill was sent to the

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<sup>43</sup> Rose to Schmultz 8/6/1982; Robinson to Stewart 4/20/1983.

<sup>44</sup> Fred Barbash, “... And Uncle Sam Wants to Save on His Legal Fees” *Washington Post*, February 10, 1982, A25; Mary Thornton, “Plaintiffs’ Legal Fess Attacked by OMB,” *Washington Post*, August 12, 1982, A21; Mary Thornton, “Administration Readies Legislation to Cut Down Legal Fees Set by Courts,” *Washington Post*, November 20, 1982, A3; Stuart Taylor, “Fees of Public Interest Lawyers Under Attack,” *New York Times*, February 19, 1982, A14; “Cutting Off Lawyers, and Law,” *New York Times*, December 31, 1983, 1.22; The *Wall Street Journal* provided favorable editorial coverage. “Ambulance Chasers?,” *Wall Street Journal*, February 26, 1981, 26; “Lawyers on the Dole,” *Wall Street Journal*, September 8, 1982, 32.

<sup>45</sup> William French Smith to Cabinet Council on Legal Policy, June 15, 1983, Reagan Library, James W. Cicconi Files, box 23, Department of Justice (folder 1).

<sup>46</sup> *Ibid.*

president's staff to be cleared in December 1983, Counsel to the President Fred Fielding echoed Attorney General Smith's deep concern as to both the bill's political risks and its questionable electoral timing:

The circumstances in which attorneys' fees are awarded to parties prevailing against the government ... typically involved civil rights litigation, welfare entitlement suits, environmental litigation, and the like. Since the "fee cap bill" would have its greatest impact in these areas, I remain deeply concerned that it will be viewed and portrayed as yet another Administration effort to limit the delivery of legal services to minorities, the poor, and the aged. ... I am not convinced that this is the time to open another front in the ongoing battle over our record in these areas.<sup>47</sup>

### **Lack of Moderate Republican Support in Congress**

In light of this political calculus, it is not surprising that the fee-cap bill was ultimately unable to attract the support of moderates in Congress, even among Republicans. Administration officials assessing the bill's prospects expressed little optimism that the bill could even pass the Republican-controlled Senate (Decker 2009: 184).<sup>48</sup> Indeed, despite its efforts, the administration was unable even to find a Republican sponsor for The Limitation of Legal Fees Awards Act of 1981, which died without one (Percival and Miller 1984: 234 n. 8).<sup>49</sup> Some conservative activists recognized, with disappointment, that support within Congress for civil rights, environmental, and consumer groups was very broad, including many moderate Republicans, either because of their sincere preferences or because they feared being cast as an enemy of rights that enjoyed broad public support (Greve 1987: 101–2).

After the initial versions of Reagan's fee-cap bill failed to find a congressional sponsor even within the president's own party, the administration developed a more moderate version of the proposal. In 1984, hearings were held on this bill in a Senate subcommittee chaired by Orrin Hatch (R. UT), who championed the bill, known as the Legal Fee Equity Act of 1984.<sup>50</sup> Despite Hatch's alignment with conservatives in the administration who sought to retrench the private enforcement infrastructure, he was unable to muster support for the bill in his own Republican-controlled committee, where it died.

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<sup>47</sup> Fred F. Fielding to Richard G. Darman, December 16, 1983, Reagan Library, John G. Roberts, Jr. Files, box 31, Legal Fees Reform Act (folder 2 of 3). For additional expressions of this concern, see Fred F. Fielding to Richard Darman, September 21, 1983, Reagan Library, John G. Roberts, Jr. Files, box 31, Legal Fees Reform Act (folder 1 of 3); Edward C. Schmults to Michael Horowitz, June 1, 1983, Reagan Library, JL007 Case File 20054, Attorneys' Fees Reform Bill.

<sup>48</sup> Edward C. Schmults to Edwin Meese III, October 31, 1983, Reagan Library, James W. Cicconi Files, box 23, Department of Justice (folder 1); Jonathan C. Rose to Edward C. Schmults, October 27, 1983, Reagan Library, James W. Cicconi Files, box 23, Department of Justice (folder 1).

<sup>49</sup> See Mary Thornton, "Plaintiffs' Legal Fees Attacked by OMB," *Washington Post*, August 12, 1982, A21.

<sup>50</sup> *Hearings on the Legal Fee Equity Act (S. 2802) Before the Subcommittee on the Constitution of the Senate Judiciary Committee*, 98th Cong., 2nd Sess., 1984, 1–3.

## Alternative Pathway of Courts

Many scholars have observed that the Reagan administration's law-reform objectives were profoundly inhibited by Democratic control of one or both chambers of Congress (Litan and Nordhaus 1983: 119–32; McGarity 1986: 260–70; Greve 1987: 101–04; Vogel 1989: 246–65; Farhang 2010: 172–213; Farhang 2012). One particular strand of work is relevant to the long-run inter-institutional story of private enforcement retrenchment. That strand argues, we believe persuasively, that the Reagan administration saw the federal judiciary as an important alternative avenue to effect legal change that could not be accomplished through Congress. As Mark Graber put it, “[t]he Reagan administration sought to achieve its social agenda primarily by staffing the Justice Department and judiciary with movement conservatives” (Graber 1993: 63; see also Murphy 1990: 219–21; Pickerill and Clayton 2004: 241–2; Whittington 2007: 226–7). It sought thereby to lay the foundation for law reform through federal litigation and federal judges – without the aid of legislators. Although this claim has generally focused on the administration's constitutional commitments, we argue that the strategy played out on the issue of private enforcement retrenchment as well.

In the OLP memorandum concluding that Section 1983 amendments “will become enmired in controversy and ... stand virtually no chance of success in Congress, particularly with a presidential election around the corner,” Jonathan Rose, head of OLP, went on to propose the alternative pathway of courts. What could not be accomplished by statutory amendment could be accomplished by statutory interpretation.

I would ... suggest that the Department study the possibility of pursuing changes to the Section through a program of *amicus* participation in Section 1983 actions in the courts of appeals and the Supreme Court. ... I believe that the Department's participation in selected Section 1983 cases might have an important influence on the outcome of these cases and provide significant interim relief to states and cities until Congress enacts a legislative solution.<sup>51</sup>

The Rose memo went on to identify, as an example for *amicus* participation, a case pending before the Supreme Court “involving several important issues concerning the availability and means of calculating attorneys' fee awards in Section 1983 actions.”<sup>52</sup>

In the same vein, writing to then-Counselor to the President Edwin Meese, Deputy Attorney General Edward Schmults expressed both his skepticism that Congress could achieve private enforcement retrenchment via statutory amendment, and his optimism that the Supreme Court could achieve the underlying goals via statutory interpretation. About the Reagan fee bill, he wrote:

From a political standpoint ... it is probable that a serious fee reform bill would sharply divide Congress ... [and] like other controversial legislation, it is unlikely that the bill would be enacted into law. ... As in the past, real progress in

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<sup>51</sup> Rose to Smith 6/15/1983.

<sup>52</sup> Ibid.

curtailing abuses in the award of attorneys' fees is likely to be gained through the Supreme Court, where we have enjoyed considerable success in recent years...<sup>53</sup>

Schmults went on to detail successful efforts by the Justice Department to curtail statutory fee awards in civil rights, employment, and environmental litigation in federal courts, including the Supreme Court.

Data on amicus filings confirm that the Reagan administration undertook an amicus campaign in earnest on private enforcement issues. We coded counts of the number of amicus briefs filed in each of our private enforcement cases (discussed in Chapter 4) that contained only the private enforcement issue, so that we can know that the briefs actually addressed the private enforcement issues (279 of 365 cases). In this body of cases, the Nixon–Ford administrations and the Carter administration filed five, six, and four amicus briefs in their three successive presidential terms. In the three presidential terms comprising the Reagan–Bush years, the numbers were 19, 17, and 18. No subsequent administration through 2014 has equalled this level.

Rose and Schmults were optimistic that the federal judiciary, which they worked hard to staff with ideological allies, would prove the most promising terrain for a private enforcement retrenchment campaign that had proven politically divisive and electorally risky, and that had no chance of success in Congress. We show in Chapter 4 that they were right.

### **Chapter 3**

#### **Rulemaking Counterrevolution: Birth, Reaction, and Struggle**

In Chapter 3, we show that the counterrevolution also pursued retrenchment through court rulemaking. The federal judiciary can frustrate or enable legislative policy concerning private enforcement in many ways. In order to understand and measure the extent of that phenomenon, one of the legal domains we explore comprises matters on which the judiciary was long ceded the first, and essentially the final, word: federal procedural law. The federal judiciary's procedural lawmaking is not confined to creating and interpreting rules while deciding cases in the exercise of judicial power under Article III of the Constitution. In the Rules Enabling Act of 1934 and its statutory successors,<sup>54</sup> Congress has delegated to the Supreme Court the power to promulgate prospective, legislation-like rules of procedure to govern proceedings in the federal trial courts – the Federal Rules of Civil Procedure (Federal Rules).

To exercise these powers, the federal judiciary and Congress have together created an administrative process within the judiciary. In this system, the Advisory Committee on Civil Rules has primary responsibility for drafting the Federal Rules. All members of the Advisory Committee – who are judges, practitioners, and academics – are appointed by the Chief Justice. The Federal Rules govern federal civil litigation, prescribing, for instance, criteria for whether multiple persons with similar claims can proceed in a class action, what a compliant must plead to survive a motion to dismiss, and what potential evidence parties are able to discover from one

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<sup>53</sup> Schmults to Meese 10/31/1983.

<sup>54</sup> Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064. For the current statutory authority, *see* 28 U.S.C. §§ 2072–74 (2012).

another during the pretrial process. Determining both access to court and likelihood of success for those seeking to enforce federal rights through litigation, the Federal Rules can profoundly enable or limit private enforcement.

Rulemaking was an ally of private enforcement from 1938, when the original Federal Rules became effective, through the 1960s. It became a focus of retrenchment efforts starting in 1971 under the leadership of Chief Justice Warren Burger, a decade before the counterrevolution took off and became a partisan project in the elected branches. Burger had hopes for bold retrenchment, which reflected both institutional (docket) concerns and, increasingly as time went by, his own views about litigation as a “mass neurosis” in the United States (Burger 1985: 5). Using qualitative and quantitative evidence, we first chronicle rulemaking’s role in stimulating private enforcement, and we then identify its role in the counterrevolution.

To investigate how Chief Justices have exercised their appointment power with respect to the Advisory Committee, and to gauge likely Advisory Committee preferences, we compiled original data, spanning 1960 to 2014, in which we identified every person who served on the committee. We recorded rulemakers’ key characteristics salient to our study, including party of the appointing president for federal judges, and type of practice for practitioners (e.g., corporate versus individual representation, or defense versus plaintiff-side). We show that under Chief Justice Warren Burger and his successors, all of whom were appointed by Republican presidents, the Advisory Committee came to be dominated by federal judges appointed by Republican presidents and, among its practitioner members, by corporate lawyers (and in recent years by corporate defense lawyers).

The ideological slant of federal judge appointments to the committee, on average, has been fairly stable from Burger through Roberts. We explore this relationship in statistical models (not reported here) with controls, including year fixed effects to account for the pool of Article III judges eligible to be appointed, and other potentially confounding year-level variables. We find that Republican-appointed federal judges have had about double the probability of service on the committee. We also present models demonstrating extremely large party effects in service and appointment as chair of the Committee. The chair is an especially important appointment, having the capacity to influence, if not control, the Committee’s agenda (Cooper 2014: 592). If chief justices have disproportionately selected Republican-appointed judges for the Committee in an effort to influence rulemaking, one would expect the effect to be larger in the selection of the most consequential member of the Committee. This is precisely what we find. At a descriptive level, the percentage of Republican-appointed judges on the federal bench serving as chair is 17 times larger than the percentage of Democratic-appointed judges so serving. Statistical models confirm the huge partisan effect in the selection of Advisory Committee chair.

To investigate the Advisory Committee’s output over the period 1960-2014, we collected every amendment to the Federal Rules proposed by the Advisory Committee (there were 262 proposals at the rule-level), evaluated each, and identified those salient to private enforcement and whether they were pro or anti-plaintiff in the direction of their likely effects. We demonstrate that the Committee’s proposals that were salient to private enforcement increasingly disfavored it. After increasing in the early 1960s, the predicted probability that a proposed



amendment would favor plaintiffs declined from 87% in the mid-1960s to 19% by the end of the series.

However, we emphasize that few of the Advisory Committee's proposals in the long period we study were pertinent to private enforcement. Further, based on qualitative evaluation of those proposals, we also stress that ambitious retrenchment efforts have been less frequent than one might have predicted based on salient characteristics of committee members. While Chief Justice Burger was successful in stanching the 1960s' flow of Federal Rules that favored private enforcement, his hopes for bold retrenchment through rulemaking were largely frustrated. We conclude that notwithstanding the preferences of Republican-appointed Chief Justices, reflected in their committee appointment choices and in other historical evidence that we present in the chapter, court rulemaking has been a site of only episodic and modest retrenchment.

To explain the limited success we observe in legal retrenchment through court rulemaking, we place particular emphasis on important institutional reforms to the rulemaking process in the 1980s. When influential rights-oriented interest groups and Democratic members of Congress came to believe that the Advisory Committee was embracing the goals of the counterrevolution – in the early 1980s – the Committee's anti-enforcement work product caused a backlash. The resulting changes in the rulemaking process, including some imposed by a democratically controlled Congress through legislation in 1988, required public meetings; widened opportunities for interest group participation; enlarged the Committee's burdens of justification to support rule changes; and enhanced opportunities for legislative veto of rule changes.

Drawing on institutional scholarship on congressional oversight of bureaucracy (McCubbins and Schwartz 1984; McNollgast 1987, 1999), we argue that the effect, and for some proponents, the purpose of these changes was to insulate the (pro-enforcement) status quo. The 1980s reforms ensured that interest groups with a perceived stake in the subject of proposed rulemaking could provide pertinent information to the rulemakers and serve as whistleblowers or fire alarms for members of Congress in the event they thought something was seriously wrong. They also effectively increased the evidentiary burden on the Advisory Committee when seeking to change the status quo, and increased the threat of veto. The reforms were a control strategy designed to ease the legislative costs of monitoring the rulemakers *ex post*, while at the same time increasing monitoring capacity *ex ante*. We conclude that the reforms did, in fact, contribute to the stickiness of the rulemaking status quo, making bold retrenchment since the 1980s difficult to achieve, even for those who were ideologically disposed to it.

The 1980s Enabling Act process reforms contributed to an inclusive and transparent rulemaking process, and the controversies from which they arose helped to elicit, at least from some rulemakers, commitments to seek and take seriously reliable empirical data to support rule changes, and not to overreach the Enabling Act's charter by abridging substantive rights. Such commitments are recognized by rulemakers, we believe, as fostering the perceived legitimacy of the Enabling Act process, which serves the judiciary's institutional interest in control of procedure; it helps the judiciary resist legislatively imposed procedure. We argue in the chapter that the tendency of the current rulemaking process to inhibit or derail major changes to Federal Rules that would affect private enforcement is furthered by such commitments, by the reluctance

of most judges (when acting as rulemakers) to be part of a public controversy perceived as political, let alone partisan; and by the potential for override of Advisory Committee proposals within the judiciary and by the Congress. All of these factors contribute to the stickiness of the rulemaking status quo.

Our evidence also demonstrates, however, that, notwithstanding a designedly sticky process, the Chief Justice and the leaders of the rulemaking committees can exercise important influence on the ambition or restraint of proposed reforms. Viewed in that light, the 2015 amendments to the discovery rules may suggest that the prior period of relative restraint by the rulemakers was an interlude in an ongoing struggle. Among those disposed to the goals of the counterrevolution, it is a struggle in which concerns about the perceived legitimacy of the Enabling Act process vie with the desire to exercise power. Another plausible view of those amendments, however, sees them as confirming the difficulty of ambitious retrenchment through rulemaking, with the struggle moved to the domain of interpretation by the federal courts.

## **Chapter 4**

### **Counterrevolution in the Supreme Court: Succeeding through Interpretation**

In this chapter we deploy qualitative and quantitative evidence to document the course of the counterrevolution in the Supreme Court of the United States. One result emerges with striking clarity. When acting under Article III rather than as a delegated lawmaker under the Rules Enabling Act, the Court has been far more successful than either Congress or the rulemakers in changing the law that governs private enforcement.

The Supreme Court's jurisprudence affecting private litigation has been a frequent topic of attention by scholars, particularly over the last decade. Although some of the literature has focused on civil rights and other areas in which Congress has sought to promote private enforcement of federal law (Karlson 2003; Dodd 2015), other articles have broadened the field of inquiry to include court access more generally (Siegel 2006; Chemerinsky 2012; Staszak 2015). This literature has usually focused on the recent past, particularly the Rehnquist Court. Much of it asserts or assumes that the phenomenon in question is a manifestation of the ideological preferences of an increasingly conservative Supreme Court (see, e.g., Chemerinsky 2003: 540, 556).

There has been no systematic attempt to analyze the Supreme Court's private enforcement decisions, let alone to do so over time. That is our goal in this chapter. Before turning to our data, the chapter focuses on qualitative analysis of selected Supreme Court decisions in the areas of offers of judgment (under Rule 68), pleading (under Rule 8), and class actions (under Rule 23). Our goal in this qualitative analysis is to illustrate how the decisions in question can be illuminated by an institutional perspective that draws on our discussion in earlier chapters of attempts to retrench private enforcement through legislation and court rulemaking on the same issue-terrain. In this summary of the chapter, we discuss just one of the cases.

## Offers of Judgment

In Chapter 2 (focusing on legislative retrenchment), we refer to a number of bills from the early 1980s, put forward by the Reagan Administration or originating in Congress, which sought to reduce the incentives for private enforcement through changes to the law governing attorney's fees. The bills in question targeted suits against federal, state, or local government. Although different in their particulars, all of them included provisions that, without reference to Federal Rule 68, would have denied recovery of statutory attorney's fees incurred after an offer of judgment (an offer to settle the case) that was rejected by a prevailing party and that was more favorable to that party than the judgment ultimately entered in the case. Under Federal Rule 68 a plaintiff in that situation must pay the "costs incurred after the offer was made." The early 1980s bills would have increased the penalty on a plaintiff who declined to accept a settlement and then failed to do better at trial. None of the bills was enacted.

Contemporaneously with much of this legislative activity, as we show in Chapter 3 (focused on retrenchment by rulemaking), the Advisory Committee advanced proposals to amend Rule 68 that would have measurably increased the risks of declining an offer of judgment. The 1983 and 1984 proposals were lightning rods that galvanized support by liberal interest groups for changes in the process that governs how proposals are considered under the Rules Enabling Act, including greater opportunities for public participation. The controversy became a focal point of hearings that an influential member of Congress – who chaired a House Committee with jurisdiction over the federal judiciary – convened to consider such changes. Some of the advocacy by liberal groups in favour of changing the rulemaking process linked the Rule 68 proposals to the Reagan fee bill discussed in Chapter 2. Chapter 3 also highlights the fact that Chief Justice Burger was persistently outspoken in his support for the rulemaking effort, even after it was a source of controversy both in that domain and in congressional hearings.

At the same time that attorney's fees in the context of offers of judgment were the subject of congressional bills and rulemaking proposals – and a source of controversy in congressional hearings on the Enabling Act process – a case was wending its way through the federal courts that posed that issue under the existing Federal Rule. In *Marek v. Chesny*,<sup>55</sup> the Supreme Court held that, although the plaintiff in a Section 1983 civil rights action brought against three police officers had secured a jury verdict for \$60,000, he was not entitled to the portion of his costs, including attorney's fees, that was incurred after rejecting the defendant's Rule 68 offer of judgment in the amount of \$100,000. Eighty-one percent of the total costs, including attorney's fees, sought by the plaintiff was incurred after declining the offer of judgment.

In an opinion for a six-justice majority, Chief Justice Burger held that "costs" for purposes of Rule 68 takes its meaning from the governing fee-shifting statute. In *Marek* that statute, the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988), defined attorney's fees as part of the taxable costs that can be awarded to a prevailing party. The Court thus reversed a panel of the Seventh Circuit, which, in an opinion by Judge Posner, had rejected the "rather mechanical linking up of Rule 68 and section 1988" because such a reading would put "Rule 68 into conflict with the policy behind section 1988," which is "intended to encourage the bringing of meritorious civil rights actions," and "designed ... to achieve a substantive

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<sup>55</sup> 473 U.S. 1 (1985).

objective – compliance with the civil rights laws.” Posner had concluded that reading Rule 68 to cut off post-offer fees under the statute would violate the Rules Enabling Act’s command that a Federal Rule “shall not abridge, enlarge or modify any substantive right.”<sup>56</sup> Justice Brennan, joined by Justices Marshall and Blackmun, dissented.

The Court’s opinion in *Marek* is notable for two, arguably related, reasons. First, the majority’s reasoning, particularly concerning the implications of the holding for the institutional balance of power among the Court, Congress, and rulemaking, is thin. Indeed, the Court says not a word about the Enabling Act issue that was clearly presented as a result of Judge Posner’s opinion, the parties’ briefs (and most amicus briefs as well), and Justice Brennan’s dissent (Burbank 1986: 437–8). Second, in order to forge a majority, it was necessary for two justices to abandon positions they had taken only a few years before in another case involving Rule 68. One of them was Chief Justice Burger, who had joined Justice Rehnquist’s dissenting opinion in *Delta Air Lines v. August*.<sup>57</sup> As one of the arguments in support of his position that “costs” in Rule 68 does *not* include attorney’s fees, Rehnquist had observed that including them would “seriously undermine the purposes behind the attorney’s fees provision of the Civil Rights Act.”<sup>58</sup>

In *Marek* Rehnquist wrote a two-sentence concurrence disavowing this view as to the meaning of “costs” on the ground that “further examination of the question convinced [him] that this view was wrong.”<sup>59</sup> Chief Justice Burger offered no explanation for his change of position, but an explanation is at hand. By the time *Marek* was decided (in late June 1985), Burger must have realized that neither legislation nor rulemaking was likely to succeed as a vehicle for invigorating the offer of judgment mechanism, a goal that he had vigorously and tenaciously championed. *Marek* provided an opportunity to have part of a loaf – in those cases where the fee-shifting provision, like Section 1988, defines attorney’s fees as part of costs.

We go on to argue that recent Supreme Court decisions in the areas on class actions and pleading reveal a similar dynamic: the Court changed the law through reinterpretation of Federal Rules in ways that it could not be changed through legislation or rulemaking.

## Private Enforcement Case Dataset

We endeavored to collect systematic data with which to evaluate issue outcomes and the voting behavior of justices concerning private enforcement. We identified issues that legislators, judges, and scholars (in the literature discussed above) have commonly associated with private enforcement. For the period from 1960 to 2014, we identified all Supreme Court decisions requiring justices to vote on (1) the existence or scope of a private right of action, either express or implied; (2) whether a party has standing to sue under either Article III or prudential analysis; (3) the availability of attorney’s fees to a prevailing plaintiff; (4) the availability of damages to a prevailing plaintiff; (5) whether an arbitration agreement forecloses access to court to enforce a

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<sup>56</sup> *Chesny v. J. Marek*, 720 F.2d 474, 478–80 (7th Cir. 1983).

<sup>57</sup> 450 U.S. 346 (1981).

<sup>58</sup> *Ibid.* at 378 (Rehnquist, J., dissenting). Justice Rehnquist was assuming, however, that the penalty under Rule 68 could include not just the plaintiff’s own post-offer attorney’s fees, but the defendant’s as well.

<sup>59</sup> *Marek*, 473 U.S. at 13 (Rehnquist, J., concurring).

federal right; and (6) an interpretation of a Federal Rule of Civil Procedure that bore on opportunities or incentives for private enforcement.

We coded the outcome of each private enforcement issue as pro-private enforcement (=1), anti-private enforcement (=0), or as unclassifiable. We discarded unclassifiable cases. We treated outcomes as pro-private enforcement if they:

- favored recognition of an express or implied private right of action;
- found that standing requirements were satisfied;
- took an approach favorable to plaintiffs' fee awards relative to other options presented by the case;
- took an approach favorable to more expansive availability of damages relative to other options presented by the case;
- concluded that a plaintiff should have access to enforce federal rights in court rather than being restricted to arbitration; and
- construed a Federal Rule of Civil Procedure so as to enlarge opportunities or incentives for private enforcement relative to other options presented by the case.

We treated votes in the opposite direction as anti-private enforcement. At least one of the authors read each majority, concurring, and dissenting opinion in order to assign codes to justices' votes.

Our search yielded 365 cases from 1961 to 2014 (there was none in 1960). Some cases contained multiple discrete private enforcement issues across and within the six private enforcement issue areas. For example, a case might contain two discrete attorney's fee issues or both a private right of action issue and a standing issue. The 365 cases captured by our searches contained 404 issues.

Table 3 displays the proportion of private enforcement issues (comprising at least 2% of total issues in the data) by policy area. The table makes clear that, assuming our data are representative, the Court's private enforcement decisions range widely across federal regulation. Among the most prominent are anti-discrimination law and other areas of civil rights and civil liberties, labor and employment, securities, social welfare, antitrust, and environmental policy.

We note that civil rights constitute a distinctive focus of the Court's private enforcement cases. According to Administrative Office of US Courts data, since 1981, when the counterrevolution began in earnest, civil rights have accounted for an annual average of 21% of federal statutory actions.<sup>60</sup> Over the same period, the civil rights classifications enumerated in Table 3 amounted to 36% of the Supreme Court's private enforcement decisions in our data. If we classify all Section 1983 actions – which seek damages for the violation of any federal right by a state officer – as civil rights (as the Administrative Office does), then 43% of the Court's private enforcement decisions since 1981 fall into the civil rights category. What is primarily added by including all Section 1983 actions, in addition to the civil rights categories in Table 3, is the subset of Section 1983 actions that are brought to enforce rights under federal social

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<sup>60</sup> Administrative Office of the United States Courts, Judicial Business of the United States Court, Table C-2, 1981–2014.

welfare statutes. It is notable that, under this broader definition, from 1981 to 2014 civil rights accounts for more than double the share of the Supreme Court’s private enforcement docket than it does of the federal courts’ civil statutory docket.<sup>61</sup> Some combination of litigant behavior and Supreme Court decisions to grant review have led to a disproportionate level of Supreme Court attention to private enforcement issues in civil rights cases. This has been true over the period during which the Court has grown ever more likely to limit opportunities and incentives for private enforcement (as we will demonstrate shortly).

**Table 3: Policy Distribution of Private Enforcement Issues**

Policy Area	Percent of Cases
Civil Rights	36%
Employment Discrimination	(11%)
Education Discrimination	(4%)
Other Discrimination	(8%)
Policing	(4%)
Prisoner	(3%)
Voting and Elections	(3%)
Other Civil Rights	(3%)
Civil Liberties	9%
Freedom of Expression	(4%)
Establishment/Free Exercise Clause	(3%)
Abortion & Contraception	(2%)
Securities	11%
Labor and Employment	10%
Social Welfare Benefits & Programs	8%
Antitrust	6%
Environmental	6%
Torts *	2%
Governance **	2%
Other Economic Policy	6%
Other Social Policy	4%

\*Torts enter the data as causes of action in FRCP cases.

\*\*Governance concerns issues bearing on the operation of American government not captured by more specific policy classifications, such as the legislative veto or the line item veto.

Table 4 displays the percentage of our private enforcement issues in cases in which various types of plaintiffs and defendants appear, listing party types that appeared in at least 2% of the issues in our data. Plaintiff types, in descending order, are individuals (55%), classes of individuals (19%), businesses (18%), and non-profits, which include NGOs (9%) and unions (2%). Defendant types, in descending order, are businesses (46%), state and local government (33%), federal government (17%), individuals (4%), and unions (3%). Examination of the data shows that in the cases that contain 81% of our private enforcement issues, there is an individual, class of individuals, non-profit, or union plaintiff. If one looks only at individuals and classes of individuals, the figure is 74%. In the cases that contain 94% of our private enforcement issues, there is a business or government defendant. Thus, in the vast bulk of the Supreme Court’s

<sup>61</sup> If we examine only the 79% of our cases asserting a federal statutory claim, it remains the case that civil rights (under the expanded definition) accounts for 44% of them.

private enforcement cases in our data, individuals, classes of them, and non-profits are seeking to enforce regulatory policy against business and government.

**Table 4: Party Types in Private Enforcement Issues**

Type of Party	Percent of Issues
<i>Plaintiffs</i>	
Individual	55%
Classes of Individuals	19%
Business	18%
NGO/Non-Profit	9%
Union	2%
Other	7%
<i>Defendants</i>	
Business	46%
State/Local Government	33%
Federal Government	17%
Individual	4%
Union	3%
Other	3%

\*The numbers under both the plaintiff and defendant headings sum to more than 100 because some cases contain multiple party types.

We also coded the ideological direction of the underlying claim for each suit. For example, if an issue concerned whether to imply a cause of action for a claim by an environmental group against a business for alleged water pollution, we assigned a liberal ideological direction to the underlying environmental claim. In assigning codes, we followed the definition of liberalism used in the Spaeth Supreme Court Database, which is the most widely used source of data in empirical studies of Supreme Court behavior. As Lee Epstein and Andrew Martin (2010: 272) observe:

The database's classifications generally comport with conventional understandings. "Liberal" decisions are those in favor ... of women and minorities in civil rights cases; of individuals against the government in First Amendment, privacy, and due process cases; of unions over individuals and individuals over businesses in labor cases; and of the government over businesses in cases involving economic regulation. "Conservative" decisions are the reverse.<sup>62</sup>

Eighty-five percent of our private enforcement issues had liberal underlying claims; only 7% concerned conservative underlying claims. The remaining 8% could not be assigned an

<sup>62</sup> For further details on the Spaeth rules for defining of liberal versus conservative, see generally *Online Code Book, The Supreme Court Database*, available at <http://scdb.wustl.edu/documentation.php?var=decisionDirection> (last visited January 31, 2016).

ideological direction. Thus, the vast majority of private enforcement issues in our data were presented in cases asserting liberal underlying claims.

In sum, we can characterize the body of our private enforcement issues decided by the Supreme Court over the past half-century as: (1) ranging broadly across federal social and economic regulation, with civil rights being especially prominent; (2) overwhelmingly prosecuted by individuals, classes of them, and non-profit organizations; (3) almost entirely against business and governmental defendants; and (4) asserting rights of a generally liberal nature.

### **Justice Votes and Case Outcomes over Time**

Having identified this set of issues, we coded the votes of each justice as pro-private enforcement (=1), anti-private enforcement (=0), or missing if the justice did not address the private enforcement issue. We coded *votes* as pro versus anti-enforcement according to the same rules described above for pro versus anti-enforcement *outcomes*. Each justice's vote on each private enforcement issue in our data was assigned on the basis of at least one of the authors reading each majority, concurring, and dissenting opinion. This rendered a total of 3,495 justice votes on private enforcement issues.

Our primary interest is to model the relationship between justices' ideological preferences and their votes on private enforcement issues. For our measure of justice ideology, we rely on Martin-Quinn scores. These "ideal point" scores for the justices are based on the voting behavior and alignments of justices in non-unanimous decisions (Martin and Quinn 2002). They are fluid, changing from one term to the next with changes in justices' voting behavior over time. Higher values are associated with more conservative justices. Use of these scores allows us to assess empirically whether private enforcement belongs in the family of issues associated with the left-right divide, such as civil rights and economic regulation. In a secondary analysis we obtain very similar results when substituting Segal-Cover scores for Martin-Quinn scores. Segal-Cover ideology scores are based on pre-confirmation newspaper editorials on the nominations, and thus are independent of justices' voting behavior (Segal and Cover 1989).

We pay particular attention to the set of issues with dissents (218 or 54% of our 404 issues). We do so because we believe that the presence of one or more dissents suggests the possible influence of ideology on the justices' views about the meaning of law and how it should develop. Thus, many scholars studying the role of ideology in the Supreme Court's decisions have paid particular attention to non-unanimous decisions (Segal and Spaeth 2002; Ho and Quinn 2010; Epstein, Landes, and Posner 2013b), and we too regard them as especially informative.

To attribute the Court's decisions exclusively to the ideological preferences of the justices, however, would neglect "the messiness of lived experience" (Burbank 2011: 53), which teaches that judges – even judges on a court that has the final word (at least within the judiciary) on issues of constitutional law – make decisions based on a number of considerations, including the law as they understand it. The many unanimous decisions that the Court issues every year



(46% of our issues) likely reflect the influence of law, including precedent (Cross 2011: 92, 100), and the justices' belief in rule of law values, including stability and predictability (Kritzer and Richards 2005: 33, 35; Burbank 2011: 56).

In cases implicating the volume and mix of litigation, institutional self-interest is another consideration or influence that may affect a justice's vote. Supreme Court justices are surely aware of the supposed workload of the lower federal courts, some determinants of which are canvassed each year in the Chief Justice's Year-End Report.<sup>63</sup> Finding a suitable proxy for the workload of the lower federal courts, however, is difficult.<sup>64</sup> This helps to explain our preference for statistical models (discussed below) that allow us to control for all variables that take the same value for each justice in the case (such as caseload in the federal courts).

Table 5 lists the raw percentage of pro-private enforcement votes, relative to total votes, for all justices on the 218 issues (containing 1,903 votes) where at least one justice dissented. Two things stand out: First, the distribution from lowest to highest pro-private enforcement votes appears straightforwardly to track the conservative-liberal dimension. The five most pro-private enforcement scores, in order, are those of Douglas, Sotomayor, Ginsburg, Stevens, and Brennan. The five most anti-private enforcement scores, in order, are those of Scalia, Roberts, Thomas, Alito, and Rehnquist. Moreover, the two most anti-private enforcement justices out of the 29 listed (Roberts and Scalia) were advocates of the unsuccessful Reagan legislative litigation retrenchment efforts that we discuss in Chapter 2. Roberts and Scalia voted against private enforcement at 88% and 89%, respectively. We note that, in relative terms, Roberts is more anti-private enforcement (ranking second behind Scalia) than he is conservative across-the-board (ranking seventh most conservative in Martin-Quinn score). It appears that private enforcement issues have remained particularly salient for him since his formative years in the Reagan Justice Department.

Indeed, the justices with the four most anti-private enforcement voting scores in the past half-century, who together voted against private enforcement on average 87% of the time in cases with at least one dissent, until recently served on the Court at the same time. In characterizing the conservative majority in recent years as distinctively anti-private enforcement by historical standards, we are mindful of the possibility that change over time in case characteristics may confound comparisons of justices across time. To address this, we examined a logistic regression model with justice vote as the dependent variable, case fixed effects (discussed at the beginning of the next section) to control for case facts, and a dummy variable for each justice, with standard errors clustered on justice. This allows evaluating justices' relative degree of anti-enforcement voting while controlling for all case-level covariates. The model results (not displayed), like Table 5, rank Justices Scalia, Roberts, Thomas, and Alito as the four most anti-enforcement justices to serve since 1960, with Rehnquist ranked fifth, and Kennedy ranked sixth. Using this approach, then, the recent conservative majority of five were among the six most anti-private enforcement justices to serve since 1960.

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<sup>63</sup> There is a summary of annual case filing statistics in all such reports for the years 2000 through 2013, which is available online at [www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx](http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx)

<sup>64</sup> For the complexities of determining federal judicial workload, particularly given the institutional judiciary's goal of attracting more resources from Congress, see Burbank, Plager, and Ablavsky (2012: 23–31).

**Table 5: Percent Pro-Private Enforcement Votes in Private Enforcement Issues with Dissenting Votes**

Justice	% Pro-Priv. Enforcement	Number of Issues	Conservative	Avg. Martin-Quinn Score
Scalia	11	108	1	2.45
Roberts	12	32	1	1.30
Thomas	14	79	1	3.47
Alito	16	31	1	1.88
Rehnquist	17	163	1	2.84
Harlan	18	17	1	1.74
Powell	20	86	1	.93
O' Connor	23	111	1	.88
Burger	23	91	1	1.85
Kennedy	24	101	1	.68
Stewart	36	73	1	.54
White	41	135	1	.44
Clark	45	11	0	.23
Warren	53	17	0	-1.26
Fortas	57	7	0	-1.11
Souter	60	68	0	-.93
Blackmun	69	127	0	-.11
Black	72	18	0	-.79
Breyer	75	72	0	-1.27
Kagan	79	14	0	-1.66
Marshall	79	122	0	-2.83
Brennan	81	131	0	-2.10
Stevens	82	157	0	-1.72
Ginsburg	83	75	0	-1.60
Sotomayor	88	16	0	-1.92
Douglas	93	43	0	-6.04
<b>Less than five votes</b>				
Goldberg	0	1	0	-.61
Whittaker	0	2	1	1.24
Frankfurter	0	3	1	1.86

Table 5 also indicates whether a justice is “conservative” (=1) or “liberal” (=0), dividing them according to whether they are above or below the median of the average annual Martin-Quinn scores for justices in our data. The conservative-liberal divide that this yields is fairly consistent with conventional understandings. This simple division of the justices above and below the Martin-Quinn median maps to Republican and Democratic appointments, with the exception of justices widely regarded as having departed from expectations: White and Frankfurter are classified as conservatives in this division, and Brennan, Souter, Blackmun, and Stevens are classified as liberals.

Any dichotomous ideology variable is surely a blunt instrument, and we use more granular measures in our statistical models. However, looking at a simple and plausible dichotomous ideology measure is a good first reality check on both the underlying continuous measure and on our data. The Martin-Quinn median does a very good job of dividing the justices into two categories. Further, these two categories do an excellent job of predicting whether a justice is above or below the median of the percentage of pro-private enforcement votes for justices who voted in at last five cases. When all cases are pooled, the conservative-liberal dichotomy yielded by the Martin-Quinn scores perfectly divides our percentage of pro-private enforcement votes in the following sense: every “conservative” has a lower pro-private enforcement voting rate than every “liberal.” A second notable feature of the table is the large disparity between conservative and liberal justices’ voting ratios. The scale ranges from Scalia voting in favor of private enforcement 11% of the time to Douglas at 93%.

**Figure 4: Probability of Pro-Private Enforcement Outcomes and Justice Votes in Private Enforcement Issues, 1960–2014**

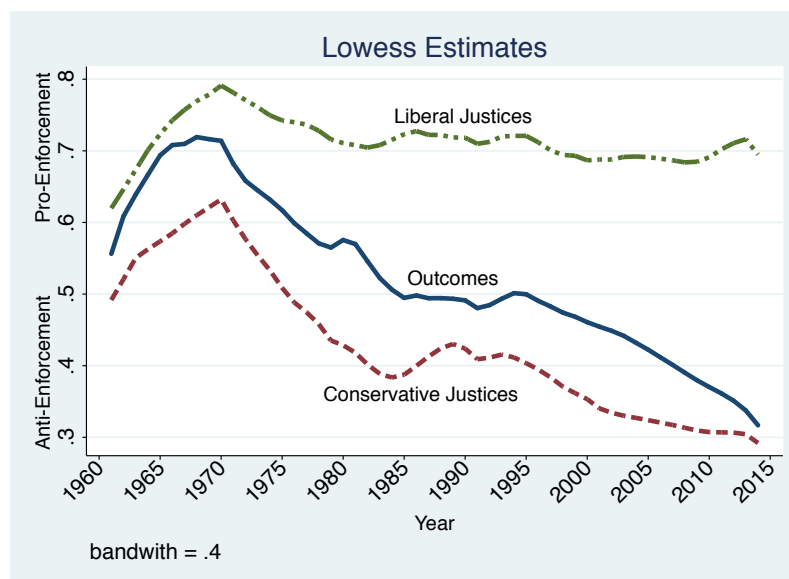


Figure 4 plots a regression line estimating the probability of an outcome in favor of private enforcement, and the separate probabilities of conservative and liberal justices’ votes in favor of private enforcement, for all of our private enforcement issues (including unanimous cases).<sup>65</sup> The figure reflects that the estimated probability of a pro-private enforcement vote was increasing in the 1960s. It then turned down at the start of the 1970s, undergoing a long decline from 71% in 1970 to 32% in 2014.

This decline has been substantially driven by the votes of conservative justices, whose estimated probability of a pro-private enforcement vote declined from 63% to 29% over this period. The probability of a pro-private enforcement vote declined for liberal justices by a much

<sup>65</sup> These figures are intended to convey a broad descriptive sense of longitudinal patterns. We employ statistical models with significance tests to formally test the effect of ideology and how it changed over time.

smaller degree, falling from an estimated 79% in 1970 to 70% in 2014. Conservative justices achieved a five-justice majority in 1972 and have held it since, with the exception of a six-justice majority from 1991 to 1993. Thus, by 2014, the Court’s private enforcement outcomes converge with the votes of conservative justices.

Further, the ideological distance between liberal and conservative justices’ voting in private enforcement cases grew materially over the period we examine. This is reflected in the distance between the liberal and conservative justice vote lines. The distance widened from 16% in 1970 to 32% in the early 1980s. That difference remained roughly stable until about 2000, after which it began growing again, reaching 40% by 2014. The growing polarization between the justices on private enforcement issues is driven primarily by the increasingly anti-private enforcement votes of the conservative justices.

Scholars have made similar findings concerning the Court’s business decisions, and a similar phenomenon may explain both these trends: “the increasing conservatism of the Court resulted in the Court’s taking cases in which the conservative position was weaker than previously, leading to more opposition by liberal Justices,” and thus growing distance between liberals and conservatives (Epstein, Landes, and Posner 2013a: 1470). It takes only four justices to grant review, and thus a determined majority of five has the power to pursue an issue when they know they will only narrowly prevail in achieving their desired outcome.

**Figure 5: Probability of Pro-Private Enforcement Outcomes and Justice Votes in Private Enforcement Issues with Dissents, 1960–2014**

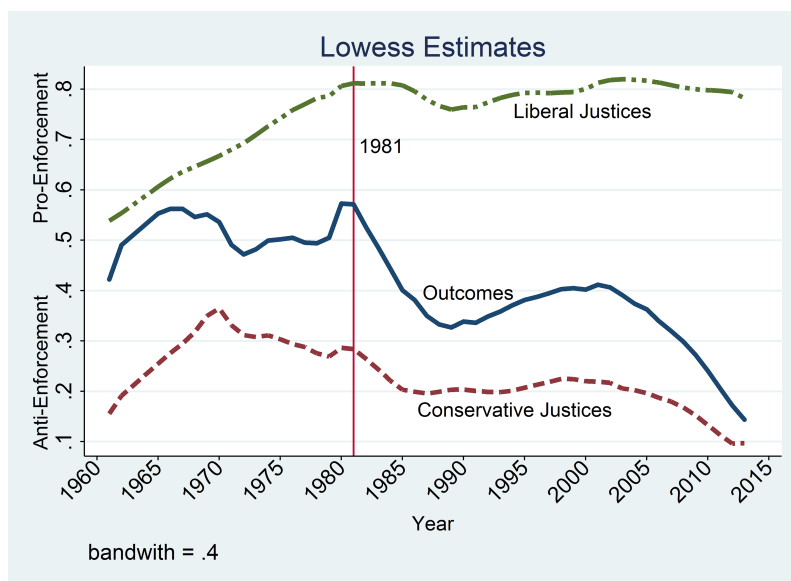


Figure 5 replicates the regressions in Figure 4, restricting the analysis to cases with at least one dissent. The basic structure of the results is very similar, with a few notable differences. In these cases most likely to have presented substantial legal issues, the early 1980s was an important turning point on the Court in an anti-private enforcement direction. Further, the estimated probability of a pro-private enforcement vote declined to materially lower levels, from 54% in about 1970 to 14% at the end of the series, at which time conservative justices were

voting in the pro-private enforcement direction only 10% of the time. Thus, by 2014, when the issue in question elicits any disagreement at all, the pro-private enforcement side is losing an estimated 86% of the time, with conservative justices voting against private enforcement 90% of the time. Over the same period, the probability of a pro-private enforcement vote by liberal justices actually increased from 67% to 78%. The distance between liberals and conservatives grows strongly from 30 percentage points in 1970 to 68 in 2014.

A natural question is how the patterns we describe – the substantial long-run decline in the probability of a pro-private enforcement vote, and the growing polarization in voting between liberal and conservative justices – compare to the Court’s federal rights decisions more broadly. Do the patterns we have observed simply reflect the Court’s treatment of federal rights, or is something distinctive going on in the domain of private enforcement? We focus the comparison on cases with dissents. It is informative to contrast the patterns displayed in Figure 5 (private enforcement cases with dissents) with the same patterns occurring in the full body of the Court’s civil actions asserting federal rights with at least one dissenting vote. To do so, we draw on the Spaeth Supreme Court Database to identify all such cases from 1960 to 2014.<sup>66</sup>

**Figure 6: Probability of Pro-Private Enforcement Outcomes and Justice Votes in All Federal Statutory and Constitutional Rights Civil Issues with Dissents, 1960–2014**

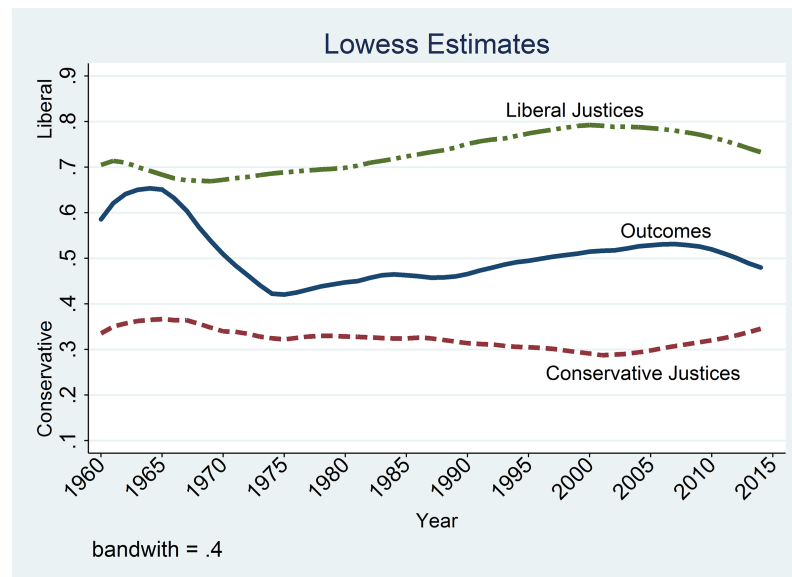


Figure 6 depicts the estimated probability of a liberal case outcome in those cases, as well as the estimated probability of a liberal vote separately for liberal and conservative justices. From 1970 to 2014, the probability of a liberal outcome was fairly stable, averaging 48%. We observe nothing resembling the sharp decline that we see in the probability of a pro-private enforcement outcome – from 54% in 1970 to 14% at the end of the series (Figure 5). Similarly, at the end of the series, in cases with dissents, the estimated probability of a liberal outcome (48%), and of a liberal vote by conservative justices (35%), in the federal rights cases are notably

<sup>66</sup> In the Spaeth issue-level data, we used cases with the “law type” variable coded federal statutory or constitutional (lawType=1, 2, or 3), and excluded cases with the “issue area” variable coded criminal procedure (issueArea=1).

higher than the estimated probability of a pro-private enforcement outcome (14%), and of a pro-private enforcement vote by conservative justices (10%).

In all federal rights cases with dissents, the distance between liberal and conservative justices' voting was materially more stable than it was on the private enforcement issues. It did not have a clear trajectory of growth over the period we study; and at the end of the period it was much smaller in absolute terms. From 1970 to 2014, there was a net increase of 6 percentage points in distance from liberals to conservatives, from 33 to 39 percentage points. Thus, when all federal rights cases are pooled, we observe nothing like the net increase of 38 percentage points, from 1970 to 2014, in the distance between liberals and conservatives in private enforcement issues, moving from a 30 to 68% (Figure 5). The Court has become much more polarized on private enforcement issues than on federal rights in general.

We recognize the possibility that our private enforcement cases arise in a distinctive set of policy fields and that their outcome and voting patterns may differ from those characteristic of federal rights cases in general. That is, if we focused only on Spaeth cases in the same policy fields as our private enforcement cases, perhaps we would observe similar patterns. In addition, we are interested in comparing votes on private enforcement issues to merits votes on underlying causes of action, and although Spaeth's federal rights cases include such votes, they are not limited to them. To address these two issues, drawing on the Spaeth data, we constructed a parallel sample of cases that match the policy distribution of our private enforcement cases and contain only votes on substantive merits issues. This allows a more focused comparison of votes on private enforcement with merits votes on substantive liability issues in the same policy areas as our private enforcement cases. That exercise (presented in the chapter, but not here) yielded voting patterns substantially the same as those just discussed for all federal rights cases. Thus, the precipitous decline in pro-private enforcement outcomes and the polarization we observe on these issues in recent years do not track votes in civil litigation of federal rights generally, nor do they track merits votes in the policy fields that underlie our private enforcement issues. These effects are distinctive in private enforcement cases.

## **Models of Private Enforcement**

We next construct a model using the votes of justices on private enforcement issues as our dependent variable and the justices' ideology scores as our key independent variable. We use case fixed effects to address the possibility of potential confounding factors that could be influencing justice votes in private enforcement cases, ranging from case characteristics (facts, parties, salience, etc.), to variation across policy areas, to the political-institutional environment, to the clarity or indeterminacy of precedent, to caseload pressures faced by the federal judiciary. The case fixed effects approach leverages only variation in the relationship between justices' ideology and their votes *within* cases to estimate the effects of ideology. This approach allows us to estimate the effects of ideology most effectively because it holds constant the influence of any variables that would take the same value for each justice vote in a case, and in this sense these estimates of the effects of ideology are net of the effects of any such variables (Greene 2003: ch. 13).

The case fixed effects approach comes at the cost that it uses only information from cases with variation across justices' votes, meaning that it can be used only for cases with at least one

dissenting vote. However, as we have previously observed, we regard such cases as most informative concerning the influence of ideology on justice votes. Further, 57% of our cases (207 of 365), and 54% of our issues (218 of 404), have dissents, and thus dissents on private enforcement issues are the norm rather than the exception, and our case fixed effect models use most of our data.

In addition to the direct incorporation of the ideology measure into our models, we also assess whether ideology had a greater effect on justices' votes on private enforcement issues after the mid-1990s. We do so for several reasons. First, Republicans took Congress in the 1994 elections and have held at least one chamber almost continuously since, materially reducing the probability of legislative override. The logic of this theory is that justices' votes may be constrained by the perceived threat of legislative override, and the diminution of that threat after 1994 may have widened their perceived range of policymaking discretion (Eskridge 1991a, 1991b; Harvey and Friedman 2006: 548). Certainly, shortly prior to 1994 and in response to many of its civil rights decisions bearing on private enforcement, the Court had experienced a vigorously negative congressional response in the form of the Civil Rights Act of 1991 (Farhang 2010: 129–71).

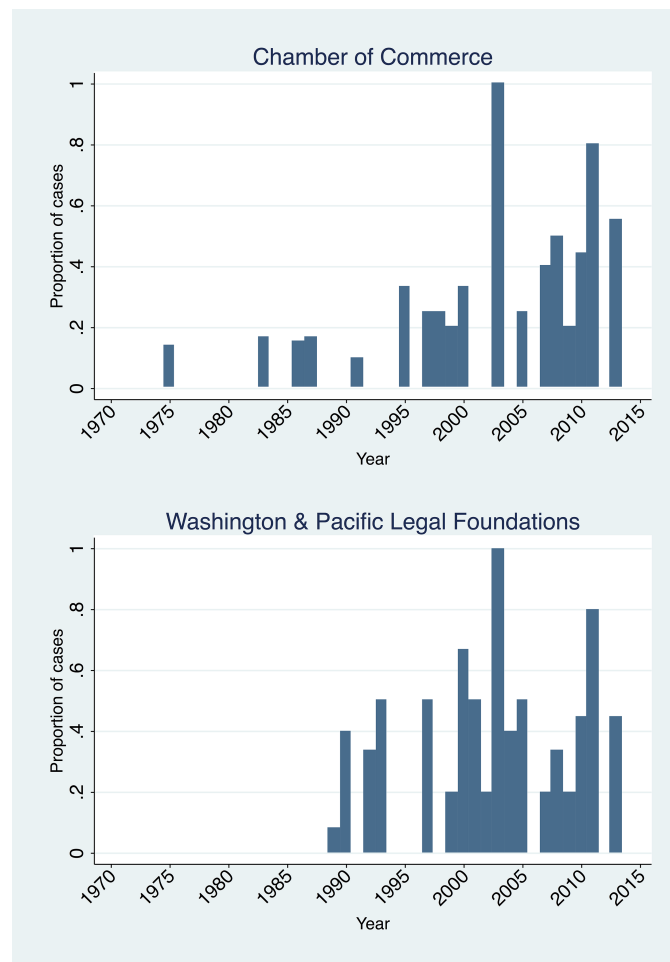
Moreover, civil litigation retrenchment became a more salient issue in the Republican Party, and the locus of more partisan conflict, at about the same time, playing a notable role in Gingrich's "Contract with America" in the 1994 campaign, and in the Republican anti-litigation legislative program mounted in 1995 (Tobias 1998; Kaplow and Shavell 2001: 1185 & n. 533). This elevation of litigation retrenchment on the Republican Party agenda corresponded to an increasing focus on private enforcement issues by important advocacy groups associated with the Republican Party, specifically including business groups and conservative law reform organizations.

A window on this pattern can be found in amicus filings in our private enforcement cases. We coded counts of the number of amicus briefs filed in each of our private enforcement cases that contained only the private enforcement issue, so that we can know that the briefs actually addressed the private enforcement issues (279 of 365 cases). In that set of cases, we identified all cases in which the United States Chamber of Commerce filed amicus briefs. The top panel of Figure 7 displays the annual proportion of these private enforcement cases in which the Chamber filed an amicus brief from 1970 to 2014 (none was filed in the 1960s). Cases in our data occurred in each year with the result that blank years in the figure represent zero amicus filings when there were some cases decided. By measuring amicus attention as a proportion of cases in which a brief was filed, rather than as an absolute number of briefs, we are better able to gauge the level of concern.

The Chamber paid modest attention to private enforcement issues before 1995. From 1970 to 1994, it filed amicus briefs in 6 of 165 (or about 4%) of these private enforcement cases. The Chamber's attention to private enforcement increased sharply in 1995. From 1995 to 2014, it filed amicus briefs in 27 of 88 (or about 31%) of these private enforcement cases. The Chamber's National Litigation Center has filed amicus briefs since it was founded in 1977 (Franklin 2009: 1023). However, the Chamber's turn to issues of procedure and court access – as contrasted with regulatory policy – was signalled by its founding in 1998 of the Institute for

Legal Reform, which characterizes itself as “the country’s most influential and successful advocate for civil justice reform.”<sup>67</sup> Its focus has included limiting class actions, discovery, and damages, and promoting mandatory arbitration (Rutledge 2008; Scheuerman 2008: 881 n. 1; Beisner 2010). Growth in the Chamber’s amicus filings in the mid-1990s was part of a wider, concerted campaign of litigation retrenchment.

**Figure 7: Proportion of cases with Chamber of Commerce Amicus Briefs, and with Washington or Pacific Legal Foundation Briefs, 1970–2014**



Conservative law reform organizations also materially elevated their amicus attention to private enforcement issues in the 1990s. Among these groups, the two that participate most frequently, by far, as amicus filers in private enforcement cases are the Pacific Legal Foundation and the Washington Legal Foundation. The Pacific Legal Foundation is often characterized as the first conservative public interest law organization, founded in Sacramento in 1973 with help from members of the Reagan gubernatorial administration and with support from the California Chamber of Commerce (Zumbrun 2004: 42–3; Teles 2008: 61–2; Decker 2009: 3–5). The Washington Legal Foundation was founded in 1977, according to its mission statement, in part “to defend and promote the principles of free enterprise” (Hrina 1999: 311, n. 75). The Pacific

<sup>67</sup> Available at [www.instituteforlegalreform.com/about-ilr](http://www.instituteforlegalreform.com/about-ilr)



Legal Foundation was filing amicus briefs by 1977,<sup>68</sup> and the Washington Legal Foundation was doing so by 1979.<sup>69</sup> They largely ignored private enforcement issues in the 1980s, filing only one brief in 82 (or about 1%) of these private enforcement cases in that decade. Beginning in the 1990s, and even more in the 2000s, these groups went from passive to active on private enforcement issues. From 1990 to 2014, they filed in 33 of 87 (or about 38%) of the cases. Thus, the elevation of litigation retrenchment on the Republican Party agenda in the mid-1990s appears to have been associated with a surge in demand for it by the Chamber of Commerce and conservative activists.

We therefore create a variable that takes the value of 0 from 1961 to 1994, and 1 beginning in 1995, and interact it with the Martin-Quinn ideology score. This interaction term tests whether ideology had a different effect on justices' votes on private enforcement issues after 1994. Because Figure 5 suggests widening distance between liberal and conservative justices around 2000, we examine alternative specifications placing the break in 2000 rather than 1995, and we observe very similar results in those models.

### Summary of Model Results

We estimate logit models with justice votes as the dependent variable, and the following explanatory variables: justice Martin-Quinn score, a post-1994 time dummy, its interaction with Martin-Quinn score, and case fixed effects. Standard errors are clustered on justice. We summarize the key results from a series of models presented in this chapter (not reported here). In the 1960-94 period, moving from the average liberal to the average conservative justice is associated with a 32 percentage point reduction in the probability of a pro-private enforcement vote. In the 20-year period from 1995 to 2014, the reduction in the probability of a pro-private enforcement vote moving from the average liberal to conservative justice grew materially larger, to a 53 percentage point reduction.

We next examine the same models, but with the data divided into cases in which there was a government defendant, and cases in which there was a business defendant, each of which constitute about half of the data. While the effect of ideology remains potent in both models, the pattern of growth is concentrated in the business defendant models. In the 1961-94 period, moving from the average liberal to conservative justice in business defendant cases is associated with only a 25 percentage point reduction in the probability of a pro-private enforcement vote (notably less than in government defendant cases). In the 1995-2014 period, the effect more than doubled, growing to 64 percentage points (notably more than in government defendant cases). The separate models show that the business defendant cases are driving the significance of the post-1994 interaction – capturing growth in the ideology effect – in the model run on all of the cases.

We also show that since about the mid-1990s, business defendant cases have comprised an increasing share of our private enforcement cases, reaching 72% by 2014. Thus, the growing effect of ideology has been concentrated in business defendant cases, which have grown to be the

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<sup>68</sup> See *National Welfare Rights Organization v. Mathews*, 533 F.2d 637 (D.C. Cir. 1976).

<sup>69</sup> See *Association of National Advertisers, Inc. v. Federal Trade Commission*, 627 F.2d 1151 (D.C. Cir. 1979).

lion's share of the Court's private enforcement docket, and the locus of rising amicus attention by the Chamber of Commerce and conservative legal organizations.

For a comparative sense of the magnitude of the effects of ideology in all federal rights issues as compared to private enforcement issues, we ran the same regression on all federal rights issues (drawing on the Spaeth data, pictured in Figure 6). The results indicate that moving from the average liberal to conservative justice was associated with a 32 percentage point reduction in the probability of a liberal vote in the 1960–94 period. The interaction between justice ideology and the post-1994 dummy is insignificant, meaning that the estimated effect did not change in the post-1994 period. Thus, the effect of ideology on private enforcement issues was similar to that in all federal rights issues in the 1960–94 period (32 percentage points in all federal rights issues, and 35 in private enforcement issues). It then grew to be substantially larger in the 1995–2014 period (32 percentage points in all federal rights issues, and 53 in private enforcement issues). Justices are now more ideologically divided over private enforcement issues than they are over federal rights issues in general.

We report a similar comparison to the parallel sample of cases that match the policy distribution of our private enforcement cases and contain only votes on substantive merits issues. We find a 41 percentage point reduction, moving from the average liberal to conservative justice, in the probability of a liberal vote throughout. The 1995 interaction is insignificant. Thus, since 1995 justice ideology has had a larger influence in our private enforcement issues – when conservative justices have been 53 percentage points less likely to vote in favor of private enforcement than liberal justices – than in votes on substantive rights in the same policy areas.

Finally, we examine a model focused only on our Federal Rules issues. In the 1961–94 period, moving from the average liberal to conservative justice is associated with a 21 percentage point reduction in the probability of a pro-private enforcement vote. The magnitude of the effect is notably less than the percentage point reduction we observed in the model that pooled all of our private enforcement issues (35), in the model of merits votes in the same policy fields as those underlying our private enforcement data (41), and in the model of votes in all federal rights issues (32). Although there is statistically significant ideological voting on Federal Rules private enforcement issues in the 1961–94 period, the issues are characterized by a notably smaller degree of it relative to these other domains. During this period, procedure is different. It is less ideological.

In the roughly two decades from 1995 to 2013, the reduction in the probability of a pro-private enforcement vote associated with moving from a liberal to a conservative justice in the Federal Rules issues is 60 percentage points. Remarkably, in 1995–2013, the effect of ideology on these procedure votes about tripled relative to the 1961–94 period. The estimated effect of ideology went from notably less than merits votes in policy areas underlying our private enforcement data, and votes on all federal rights issues, to being materially larger than both. Overall, our results show just how far we have come from the traditional conception of, and rhetoric about, procedure as technical details or adjective law.

Longitudinal patterns in the Court's private enforcement decisions are especially striking when viewed alongside the legislative story. At the same time that retrenchment of private

enforcement receded from the legislative agenda, ideological polarization on the issue was at its highest point ever on the Court. Moreover, as suggested by the data on amicus filings that we present in Chapter 4, the issue remained a high priority of the Chamber of Commerce and conservative law reform organizations. On the surface this may appear anomalous. But from the institutional perspective we advance in this book, it is readily explicable. By the late 1990s, it must have become evident to congressional Republicans that major retrenchment of private enforcement would not come from Congress. The institutional hurdles were simply too high. At the same time, it must have become clear to the conservative justices that significant retrenchment would come from the Supreme Court or not at all. As the conservative wing of the Court granted review and prevailed in cases that were more and more polarizing, congressional Republicans focused legislative efforts elsewhere, knowing that the counterrevolution was in the hands of those best equipped institutionally to achieve its goals.<sup>70</sup>

## Chapter 5

### Subterranean Counterrevolution: The Supreme Court, the Media, and Public Opinion

In Chapter 5, we undertake an empirical investigation of our claim that the Court's private enforcement decisions have been little noticed by the public. The Court recognizes that public standing and perceived legitimacy are important to its institutional power, and it therefore is cautious about straying too far or for too long from public opinion (Stephenson 2004; Friedman 2009; Clark 2011). The Court's need for broad public support places limits on its ability to scale back highly visible and popular substantive rights directly. Consequently, when seeking to retrench enforcement of rights that enjoy broad public support, the Court benefits from strategically steering this project onto apparently technical and legalistic terrain, where the public is less likely to learn of the decisions at all. Ultimately, we argue that the Court's decisions on rights enforcement, because of their lower public visibility, are less constrained by public opinion and therefore less tethered to democratic governance.

The media are the primary source of the public's information about Supreme Court decisions (Davis 1994; Franklin and Kosaki 1995; Hoekstra 2003). When we suggested, without data, that the lower visibility of private enforcement cases enlarged conservative justices' latitude to pursue the retrenchment project with little public notice, we encountered this objection: how do we know? After all, some private enforcement cases, such as *Wal-Mart Stores Inc. v. Dukes*<sup>71</sup> and *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>72</sup> have elicited controversy and attracted extensive public attention. Moreover, reporters covering the Court draw on sources who are highly sophisticated observers of American law, including liberal activists and representatives of public interest law organizations, many of whom are intensely aware of and aggrieved by the Court's private enforcement decisions.

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<sup>70</sup> Again, it will be interesting to see whether congressional retrenchment initiatives since the return of unified Republican government in 2017 fare better than (most of) their predecessors.

<sup>71</sup> 564 U.S. 338 (2011).

<sup>72</sup> 550 U.S. 618 (2007).

There are reasons to be doubtful about the premises underlying this line of questioning. In discussing the difficulties of using newspaper coverage as a measure of case importance, the authors of a recent study observe that coverage, “being motivated by journalistic concerns, may bear little relation to the legal importance of a case.” They give as an example the fact that the *New York Times* gave front page coverage to one 2009 case that has been cited in 2,160 decisions by 2015, but not to a 2009 pleading case (*Ashcroft v. Iqbal*, discussed in Chapter 3) that, “[a]lthough less interesting to the average newspaper reader,” has been cited “in nearly 69,000 decisions” (Epstein, Landes, and Posner 2015: 999). The over-representation by the media of controversial or sensational cases has been well documented in empirical studies (MacCoun 2006; Haltom and McCann 2009).

Finding no data on the question, we undertook an empirical study to test our intuitions. Beyond that, we seek to provide concrete information about actual magnitudes of differences (if any exist), and how they vary (if they do) for distinct types of coverage, such as aggregate coverage, prominent coverage, or opinion and editorial coverage. We are also interested in longitudinal trends, and in particular whether growing ideological polarization among justices over private enforcement in the past several decades, which has attracted increasing attention by scholars, has garnered heightened media attention as well. These sorts of questions can only be answered with systematically collected data.

We created an original dataset based on content analysis of coverage in the *New York Times*, the *Washington Post*, and the *Wall Street Journal* of Supreme Court decisions on our private enforcement issues (discussed in Chapter 4), and of their decisions on merits issues in the same policy areas. This data allows us to compare the extent of coverage of Supreme Court decisions (1) ruling on substantive rights (e.g., whether conduct was racially discriminatory), and (2) ruling on opportunities and incentives to enforce those rights (e.g., whether a plaintiff can recover attorney’s fees in a racial discrimination claim).

With respect to each case, coders read all articles covering it and collected the following information on coverage of the private enforcement or merits issue in question: (1) the total number of articles discussing the issue at all; (2) the number of articles discussing the issue that were reporting *only* on the case in question, as contrasted with roundup articles that cover numerous cases; (3) the number of articles discussing the issue that were reporting only on the case in question and appeared on the front page; and (4) the number of editorial and opinion pieces covering the issue. In a series of negative binomial count models, we find that reporting on merits issues as compared to private enforcement issues was associated with a 166% increase in the predicted count of total articles, a 278% increase for single-case articles, a 371% increase for editorial and opinion pieces, and a 464% increase for front page single-case articles. These results demonstrate that Supreme Court decisions relating to the enforcement of rights receive dramatically less press coverage than decisions on the rights themselves, and that the gap is largest for the most salient types of coverage.

Further, we constructed a composite scale of the volume of total coverage from the above four counts. Viewing the volume of coverage of private enforcement issues over time, it appears to have been unaffected by the conservative majority’s increasingly strong push against private enforcement, escalating polarization on the Court over it, and growing criticism of these

developments by scholars and commentators. Rather than observing growing press attention to these issues over the last several decades, the volume has gradually and consistently declined over the study period (though only modestly after the early 1980s).

Aware that, from a normative perspective, these results might not cause concern if the Court's private enforcement decisions merely tracked public opinion, we set out to test that proposition (which was urged upon us by some readers of our work). To do this we constructed models to explore the relationship between our private enforcement data and the most widely used measure of liberalism in public opinion (James Stimson's "public mood" measure). We initially replicate existing work demonstrating that, when the Supreme Court's docket is examined as a whole, liberalism in case outcomes is statistically significantly and positively correlated with liberalism in public opinion. This result has been cited as consistent with the theory that the Court recognizes that public standing and perceived legitimacy are important to its institutional power, and it therefore is cautious about straying too far or for too long from public opinion (Friedman 2009; Clark 2011). We then substitute case outcomes in our private enforcement cases as the dependent variable, and the association disappears or becomes negative. Whatever explains the significant and positive correlation between public opinion and case outcomes when aggregating the Court's full docket, the relationship is wholly absent in our low-visibility private enforcement cases.

## **Chapter 6**

### **Rights, Retrenchment, and Democratic Governance**

#### **Why the Court Succeeded**

The Supreme Court, which became increasingly conservative as a result of appointments by Republican presidents over the period we study, had greater success in advancing the goals of the counterrevolution against private enforcement than did Republican presidents, Congress, or the rulemakers. The Court's posture toward private enforcement underwent a transformation from highly supportive in the early 1970s to antagonistic today. Its retrenchment attention has been disproportionately trained on civil rights cases. Why did the Court succeed when those sympathetic to the counterrevolution's goals in the other lawmaking sites largely failed? The preceding chapters highlight a host of distinguishing institutional characteristics that theory and our evidence suggest are pertinent when comparing the results of the counterrevolution's project to change law governing or influencing private enforcement across lawmaking sites. We believe that four have the greatest explanatory value in assessing the reasons for the Supreme Court's success in implementing that project.

First, as contrasted with the institutional fragmentation of the legislative and rulemaking processes, the Court is governed by a more streamlined decisional process and simple voting rules, making it comparatively more capable of unilateral action on controversial issues (Whittington 2007: 124–34). Four justices suffice to put an issue on the Court's agenda, and bare majorities routinely win in decided cases, although they rarely do to enact legislation (or to send forward Federal Rules). Indeed, in Chapter 4 we suggest that the growing polarization between conservative and liberal justices over private enforcement issues, which is particularly striking in

the Court's Federal Rules decisions, may reflect a narrow but determined conservative majority pressing its advantage in pursuit of the counterrevolution's goals, and the liberal justices' response.

Second, legislators and presidents are democratically accountable through elections. This accountability limits their ability to retrench existing rights that enjoy broad popularity (Pierson 1994: 17–19; Graber 1993). Retrenching rights is electorally dangerous. By reason of the phenomenon of “negativity bias” (or an “endowment effect”), people are substantially more likely to mobilize to avoid losing existing rights and interests than they are to secure new ones. Politicians understand that, for the same reason, voters are more likely to punish those who have impaired their interests than to reward those who have benefited them (Pierson 1994: 39–46; Eskridge and Ferejohn 1995: 1560–2). Chapter 2's account of the birth of the counterrevolution in the first Reagan administration demonstrates that prominent among the influences that doomed the administration's legislative initiatives was the fear, abetted by extensive press coverage of its fee-capping bill, that the public would regard the bills as further evidence that it was hostile to civil rights and punish the bills' elected sponsors in the 1984 elections.

Members of the Advisory Committee on Civil Rules are not elected. Yet, as we observe in Chapter 3, rulemaking under the Enabling Act involves the exercise of delegated legislative power. We also note there that, concerned by rulemaking controversies that were fueled by the 1983 amendments to Rule 11 and the 1983 and 1984 proposals to amend Rule 68, Chief Justice Burger was prepared to disengage the Supreme Court from the process. His concern was about the effects of those controversies on the perceived legitimacy of the Court as such. Similar concerns, we suggest, may have contributed to the restraint evident in rulemaking during much of the period following the process reforms of the 1980s. Widespread public perception that the members of the Advisory Committee, including in particular its Article III judge members, are engaged in ordinary politics (Burbank 2007), might not cause them to lose their rulemaking jobs directly. It could, however, bring the process itself into disrepute, putting at risk the major source of the federal judiciary's power to craft rules of procedure. Moreover, if that were to happen, the damage might extend to the public's view of the judiciary – the problem that concerned Burger.

Federal judges (when acting as such, rather than serving as rulemakers) are far more insulated from the forces and incentives of democratic politics than elected officials or rulemakers, which gives the Court greater freedom to act decisively on divisive issues (Graber 1993; Gillman 2002). As Mark Graber observes, the Court's electoral insulation and streamlined decisional rules are especially advantageous in pursuit of a policy agenda as to which elements of a potential legislative coalition are internally divided. As we show in Chapter 2, that was true of Republicans in their attitudes towards the Reagan administration's fee-capping bill.

To be sure, as we discuss in Chapter 5, the Court is not immune to public opinion. Its power in the long run – its independence – depends on the continued existence of a well of diffuse support, the depth of which could be adversely affected by a series of unpopular decisions, including in particular decisions perceived to deprive people of rights enjoying broad support. Therein lies the brilliance of the counterrevolution's judicial strategy as implemented by conservative majorities of the Court in the cases that are the subject of Chapter 4. The justices understand that the Constitution's formal protections would not effectively shield the federal

judiciary against a concerted attack by an inflamed Congress (Burbank and Friedman 2002). The strategy of retrenching private enforcement of rights, rather than the rights themselves, enables justices who share the goals of the counterrevolution to avoid eroding diffuse support for the Court, even when the decisions in question do not track public opinion, because the public is unlikely to be aware of them.

Third, in an era of divided government and party polarization, the Court has faced less credible threats of statutory override, and correspondingly has enjoyed a wider range of policymaking discretion (Eskridge 1991a; Eskridge 1991b; Whittington 2007: ch. 5). With Republicans controlling at least one chamber of Congress nearly continuously since 1994, the prospect of Congress overriding the decisions of a conservative majority of the Court has usually been vanishingly small (Harvey and Friedman 2006: 548; Hasen 2012). The growth of the influence of ideology on justices' votes on private enforcement issues, both procedural and non-procedural, after 1994, which we discuss in Chapter 4, is consistent with the hypothesis that the Court has exercised wider policy-making discretion during this period, with the conservative majority pushing the law of private enforcement more assertively in the anti-enforcement direction, eliciting greater opposition from the liberal minority.

Finally, the Court's success was fostered by the lower visibility of its retrenchment efforts as compared to those of Congress or the Advisory Committee. A number of scholars have suggested that when potentially controversial issues must be addressed, the judiciary can be a less visible and politically safer policymaking site, lowering the probability of public notice and controversy (Graber 1993: 42–43; Frymer 2008: 7, 14). Two inter-related institutional features of courts promote the comparatively low visibility of their decisions relative to legislation and rulemaking: the potential for highly incremental change, and the obscuring effects of legalistic justification.

Courts can (although they need not) move policy very slowly and incrementally over long time-horizons through case-by-case adjudication. The six issue areas in our data encompassed 404 issues. And these are but a subset of a wider constellation of the Court's jurisprudence affecting private enforcement. The story of retrenchment of private enforcement by court decision is one of substantial change effected in large part by many comparatively small acts of lawmaking over decades, few of which garnered much public or press attention.

Efforts at legal change through legislation and rulemaking stand in marked contrast. Like the Reagan administration's fee-capping bill, they are often characterized by high levels of policy disjuncture. For legislators or rulemakers to accomplish the level of retrenchment achieved by the Supreme Court, a much smaller number of larger interventions would have been required. In addition, like both the fee-capping bill and the proposals that led to the 2015 discovery amendments, legislative and rulemaking proposals often present (or appear to present) stark alternatives that trigger powerful interest group mobilization and attract press coverage. This increases the probability that they will be obstructed.

A second institutional feature of courts that diminishes visibility concerns the nature of legal justification. Courts benefit from popular "belief that judicial decisions are based on autonomous legal principles" and "that cases are decided by application of legal rules formulated

and applied through a politically and philosophically neutral process of legal reasoning,” with outcomes framed in “legalistic” terms dictated by such sources as detailed legal text, legislative history, and precedent. Political scientists call these beliefs “the myth of legality” (Scheb and Lyons 2000: 929; see also Gibson, Caldeira, and Baird 1998: 345; Ginsburg 2003: 32). When courts elect a strategy of incremental and evolutionary change, their opinions will typically frame each step using this style of legal justification. Moreover, survey research suggests that “elite acceptance of [these beliefs] conditions public discourse about the Court” (Scheb and Lyons 2000: 929). The media, we believe, likely pay less attention to decisions that they regard as merely applying well-established legal rules of a technical nature.

Congress and the rulemakers (who act in a legislative capacity) are not similarly insulated. A bill or rule proposal to amend existing law, by its explicit form, is a proposal offered to change (or occasionally to clarify) the legal status quo, and cannot feasibly be characterized as dictated by existing law. Moreover, the nature of legislative and rulemaking hearings, convened to evaluate the wisdom and desirability of such changes, frequently will lead to public ventilation of substantive policy tradeoffs implicated by the proposed change – tradeoffs that can be obscured by legalistically framed court decisions. Indeed, we argue in Chapter 3 that one effect of the Enabling Act reforms of the 1980s, which contributed to a more inclusive and participatory rulemaking process, was to diminish the capacity of rulemakers to present consequential rule changes as merely technical. As contrasted with court opinions that use doctrinal and legalistic justifications to present decisions as dictated by existing law, we believe that the products of the legislative and rulemaking processes, where the merits of proposed legal change are openly contested, will receive more attention from the press and the public.<sup>73</sup>

We have been discussing institutional differences between the Supreme Court on the one hand, and Congress and the rulemakers on the other, as they relate to the visibility of their retrenchment efforts. The discussion of the role of legal justification is also important in highlighting how the question of visibility may shape the justices’ strategic calculus regarding how best to pursue their agendas. Specifically, we believe that the “hypothesis ... that judges ... play to public opinion in the visible cases while pursuing their agendas in less visible ones” (Burbank and Friedman 2002: 3) has substantial explanatory power for our work. If the Court’s public standing and legitimacy are important to its institutional power (Stephenson 2004; Friedman 2009; Clark 2011), the need for broad public support and concern about negativity bias place some limits on its discretion to scale back highly visible substantive statutory rights directly. From the standpoint of legitimacy, the strategy of focusing on private enforcement issues, particularly those implicated in the Federal Rules of Civil Procedure, is preferable.

Scholarship highlights how, to some degree, judges can strategically tap into the beliefs about the objectivity and neutrality of courts by self-consciously “framing” decisions in legalistic and technical terms (Gibson, Caldeira, and Baird 1998: 345; Scheb and Lyons 2000: 929). Although we agree that this is true, we believe that it is much more likely in some types of cases

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<sup>73</sup> We emphatically do not maintain that beliefs associated with the “myth of legality” are universally shared, nor do we doubt that many regard courts as political institutions. We maintain only that the press and the public are more likely to regard judicial decision-making as legalistic, technical, and neutral, than to so regard policymaking by legislatures or rulemakers since the process reforms of the late 1980s.



than others. As contrasted with substantive merits decisions (where the court may feel constrained by public opinion), decisions focused on private enforcement issues in general, and procedural issues in particular, offer justices more opportunities for technical and legalistic forms of legal justification. They therefore allow justices more effectively to harness beliefs about the objectivity and neutrality of courts, and to deflect attention from substantive policy consequences, minimizing press interest and public attention, and helping to forestall public perceptions that justices are legislators in black robes.

The expressive consequences of rules and decisions are matters of social meaning which do not turn solely on the purposes of the rules or the decisionmaker's intent. Means matter. Facially neutral procedural and evidentiary rules that make liability more difficult to prove minimize the appearance of overt tradeoffs [of values and interests]. And it is these overt tradeoffs that the public is likely to see as morally and expressively offensive. (Bierschbach and Stein 2005: 1779).

The results we report in Chapter 5 are consistent with this theory. They support our view that a large transformation in law governing or influencing private enforcement resulted from a succession of hundreds of court decisions, distributed over decades, few of which may have appeared monumental in isolation. Focusing on welfare state retrenchment, Jacob Hacker (2004) has noted that, because of obstacles to overtly retrenching rights and programs with a substantial base of support, developments toward retrenchment in the welfare state have taken the form of strategically chosen “subterranean,” “covert,” and “hidden” processes that often involve lower-visibility decisions of bureaucrats in the course of administering a statute without formally changing it. Similarly, Paul Pierson has suggested that, in contrast with attempting change through legislation at one or a few moments in time, slow-moving and low-visibility historical processes of policy change may be capable of overcoming the obstacles to retrenching rights in a democratic polity. As Pierson puts it, such slow-moving processes of retrenchment may be “invisible at the surface” while producing “long-term erosion” – like “termites working on a foundation” (Pierson 2007: 33).

## **Retrenchment and Democracy**

Our empirical findings and qualitative analysis raise normative questions. One set of questions concerns how the Court's success in retrenching law governing or influencing private enforcement should be understood from the standpoint of democracy. Here, it is important to emphasize that a majority of the cases in our data involved the interpretation of private enforcement regimes in federal statutes, and that in 79% of the cases, plaintiffs were asserting federal statutory rights. We regard this as an important feature that distinguishes the cases in our study from cases triggering judicial review under the Constitution.

The role of courts in statutory implementation, we believe, is a very different normative environment than constitutional judicial review. It is one in which the primary questions concern the appropriate means and methods for implementing ordinary statutory commands where no questions of constitutionality are implicated. The American constitutional order contemplates democratic control of legislative rules. By design, the Congress, in which the Constitution lodges

“all legislative powers,” is the branch of government most tied to the people – through decentralized geographic representation and periodic elections. Federal judges, by contrast, are appointed and entitled to serve for life absent removal through the impeachment process. In this respect, on the dimension of democratic control and accountability, the Supreme Court is the antithesis of the House of Representatives. Judicial resistance to legislative will is, in our view, more problematic when Article I lawmaking is indisputably constitutional than when there is an appropriate occasion for judicial review.

One need not subscribe to naïve or simplistic views of federal courts as wholly beyond democratic control, or of Congress as resembling a New England town meeting, in order to believe that judicial subversion of legislation raises troubling questions from the standpoint of democratic values. We recognize that in countless ways – including several highlighted in the literatures we turn to shortly – federal courts are squarely embedded in American democracy; they do not exist above or outside it. We also recognize that representation in Congress is often parochial, and that some (powerful) interests receive far greater representation and solicitude than other (less powerful) interests. However, in a world painted in shades of grey, one can still discern meaningful variation. Rejection of ideal types – judges who are independent of politics and representatives who are perfectly in tune with and faithful to the preferences of their constituents – need not lead to the view that the Supreme Court is as democratically accountable and responsive as the House of Representatives. To us, such a view is no less preposterous than the ideal types we reject.

The “counter-majoritarian difficulty” is among the most enduring debates in American law. There is an enormous literature, which continues to grow, addressing the question whether the Court is responsive to the preferences of the elected branches and to public opinion. This literature reflects a widespread belief, at least among scholars, that serious normative issues of democratic governance may arise if the Court’s decisions on important issues of public policy are not associated with the preferences of the elected branches or the public. Although most prominent in work discussing judicial review, these normative issues are, in fact, most salient when federal courts interpret indisputably constitutional statutes.

Federal courts have long faced democratic legitimacy challenges when making important new public policy through the interpretation of statutes. A number of scholars have questioned whether this democratic challenge is well-founded, highlighting how, in many areas in which the Court has been attacked on these grounds, one might better regard it as wielding purposefully delegated legislative power (Graber 1993; Lovell 2003; Frymer 2007). Focusing on judicial interpretations of statutes in the fields of antitrust, labor, and civil rights, this work highlights how Congress intentionally and knowingly failed to resolve foreseeable and controversial issues for strategic reasons, delegating (or punting) policymaking authority to courts.

Read together, this line of work suggests the following explanation for such implicit delegations. In some circumstances, the ruling coalition is internally divided and not capable of coordinating on a specific policy, and yet its capacity to govern would be disrupted by allowing the issue to remain unresolved on the agenda. A majority of legislators may seek electoral or policy benefits from “doing something” in response to public pressures for legislative action, while wishing to avoid the political costs of actually resolving some core controversial issues.

Indeed, in some circumstances seeking to resolve important issues could make legislation impossible to pass (Rodriguez 1992; Mashaw 1997: 155–6; Lovell 2003). Thus, vague legislation is passed that intentionally empowers courts – and effectively requires them – to legislate through interpretation. From this perspective, regarding the ensuing judicial policymaking as undemocratic is mistaken. Democratically accountable legislators intentionally licensed courts to resolve issues left unaddressed. The existence of a more insulated (unelected, life-tenured) policymaking venue, allowing the resolution of issues that cause the elected branches to seize up, actually facilitates democratic governance rather than frustrating it.

This influential line of work offers an important perspective. However, it serves to highlight, rather than resolve, the normative questions we raise. It is manifestly a rebuttal of critiques of courts as undemocratic founded on the notion that elected officials licensed courts to make controversial decisions. This account does not fit the Court’s increasingly assertive anti-private enforcement posture. There is no legislative license for retrenchment through judicial interpretation. To the contrary, the private enforcement infrastructure on which the Litigation State is founded was the product of self-conscious legislative design. The design was animated by the goal of promoting enforcement of statutory mandates.

Congress chooses private enforcement for a variety of reasons. They include the provision of insurance against wilful executive under-enforcement; insurance against bureaucratic timidity, apathy, careerism, and capture; shifting costs of implementation from bureaucracy to private actors; and accommodating anti-statist resistance to administrative state-building within legislative coalitions (Vogel 1981; Melnick 1994; Lipset 1996; Kagan 2001; Burke 2002; Farhang 2010, 2012). Although this list is not exhaustive, the key point is that the Litigation State has been produced by self-conscious legislative design choices whose purpose was to mobilize private lawsuits as a central – and often the primary – vehicle of regulatory enforcement. The bulk of the laws were passed by Democratic Congresses distrustful of an administrative state under Republican presidential leadership (Farhang 2010, 2014). The conservative wing of the Court’s campaign against private enforcement has been mounted with the goal of demobilizing those private lawsuits. Rather than carrying out an implicit legislative delegation to make policy choices that Congress sought to avoid, the conservative wing of the Court is better understood as seeking to enfeeble legislative policy with which it disagrees.

There is a second, perhaps more prominent, line of research in political science and law that questions democratic legitimacy challenges to federal judicial power. Numerous scholars have disputed the proposition that the Supreme Court is unaccountable to the other institutions of government when deciding cases (Dahl 1957; Rosenberg 1992; McCloskey 1994; Peretti 1999; Devins 2004). Taken together, this work suggests that federal judges are drawn from, often share the preferences of, and are responsive to pressures by, political coalitions in power in the elected branches, and that the Court therefore does not often stray very far or for very long from what the majority wants. Moreover, as Barry Friedman puts it, “there is general agreement among political scientists, and increasing recognition among legal academics, that more often than not the outcomes of Supreme Court decisions are consistent with public opinion” (Friedman 2004: 114; see also Klarman 1996; Epstein and Martin 2010 (reviewing political science studies)). If the Court’s decisions track what the public wants, the argument goes, this takes the bite out of the counter-majoritarian critique.

This literature provides an important perspective on debates over the extent to which democratic concerns about federal judicial power are warranted. However, it again serves to heighten rather than dissipate the concerns about democratic legitimacy and accountability raised in this book. We argue in Chapter 5 that the oft-observed correlation between public opinion and Supreme Court decision-making is likely explained, in part, by the Court's incentive to maintain institutional legitimacy, and that this incentive is significantly diluted in fields of law with lower levels of public visibility. The Court recognizes that its public standing is not hurt by decisions that the public does not learn about. We show empirically that the public receives dramatically less information about decisions governing private enforcement than decisions addressing underlying substantive rights. We also show that, although the Court's full docket of decisions is correlated with long-run trends in "public mood," its private enforcement decisions are not.

Further, this argument against the urgency of the counter-majoritarian difficulty focuses on the preferences of the current coalition in power and the current public that put them there. On Dahl's classic formulation, to the extent that the Court is reflecting the preferences of the current governing coalition as it develops constitutional law when engaging in judicial review, it will be unlikely to do harm to the current majority's governing project by negating the laws they pass. In this sense judicial review does not present a real threat to democracy because the current majority is being allowed to govern through enactment of legislation. Critically, in this literature the *successful enactment of legislation* is regarded as the core democratic expression of the polity's preferences, and hence invalidation of legislation by an unelected court gives rise to countermajoritarian difficulty.

The domain that we have investigated in this book is primarily legislative. The normative issues we have raised are rooted specifically in the fact that current governing coalitions were *not* able to muster the consensus necessary to pass legislation to achieve the counterrevolution's goals, due in part to apprehension concerning how the public would vote in response. We reject the notion – and in fact have never seen it maintained – that when interpreting legislation courts may legitimately privilege the will of a current legislative coalition unable to enact its preferences over the will of an earlier one that was. Although this may be an accurate positive account of what has happened, in our view it provides no normative shelter.

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