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Litigation Reform: An Institutional Approach


Stephen B. Burbank

Univ of Penn Law School, sburbank@law.upenn.edu

Sean Farhang

Goldman School of Public Policy, University of California, Berkeley, farhang@berkeley.edu

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ARTICLE

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STEPHEN B. BURBANK[†] & SEAN FARHANG^{††}

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INTRODUCTION

This Article is part of an ongoing study of the behavior of American political institutions, including courts, with respect to federal civil litigation.¹ We are particularly interested in litigation that involves statutory private enforcement regimes and other legal provisions that predictably affect incentives and opportunities for access to federal court to enforce federal rights. We believe that, in order to understand the modern history of federal law that affects private enforcement and access to court with respect to federal rights (collectively, “private enforcement”), it is necessary to view the salient events in their institutional context, recognizing that the institutions involved are competing to regulate social and economic life in the United States. As part of our inquiry into how interactions and competition among institutions have produced the contemporary state of federal civil litigation—and in recognition of the seventy-fifth anniversary of the Federal Rules of Civil Procedure—we consider ways in which the federal judiciary has affected private enforcement through control of procedure.

In Part I, we briefly discuss previously published evidence showing that, beginning in the late 1960s, when Democrats controlled Congress, there was a change toward greater reliance on private lawsuits to implement federal regulatory law. We highlight evidence that this transformation was rooted in conflict between Congress and the President over control of the bureaucracy, an alternative or supplementary venue to implement regulatory policy.

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[†] David Berger Professor for the Administration of Justice, University of Pennsylvania Law School.

^{††} Associate Professor of Political Science and Public Policy, University of California, Berkeley.

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¹ We use the phrase “litigation reform” to denote efforts to reduce opportunities and incentives for private lawsuits. Because our concern is the private enforcement of federal rights, tort reform—the most frequent subject of academic attention to litigation reform—is outside the scope of this Article.

In Part II, we show that this program of regulation through private litigation soon met opposition primarily from the Republican Party. During President Reagan's first year in office, the administration pressed an ambitious litigation reform proposal that would have restricted attorneys' fees available to private parties seeking to enforce over one hundred federal statutes. Although this Reagan administration proposal failed, it signaled the emergence of a movement.

Using an original data set of litigation reform bills spanning from 1973 to 2010, we show that the ninety-seventh Congress (1981–1982) occasioned the emergence of litigation reform as a Republican issue in Congress. This campaign for litigation reform among congressional Republicans, like the Reagan proposal, largely failed. So long as Democrats controlled at least one chamber of Congress, Republicans' litigation reform proposals had little chance of success. Even when Republicans secured control of both chambers (and for a time concurrently held the presidency), their litigation reform successes were modest and clustered in a few discrete policy areas. Congress proved inhospitable institutional terrain for the Republicans' litigation reform agenda.

In Part III, we show that the Supreme Court had greater success in the enterprise of litigation reform than did Republicans in the political branches. With an original data set of Supreme Court decisions on private rights of action, standing, attorneys' fees, and arbitration, we map the Court's behavior on private enforcement issues from 1970 to 2013. The data tell a story of transformation: once highly supportive of private enforcement, the Supreme Court, increasingly influenced by ideology and increasingly conservative, has become antagonistic.

We argue that retrenchment through the judiciary achieved important success while failing in Congress because (1) as contrasted with the institutional fragmentation of the legislative process, the Court is governed by a more streamlined decisional process that allows bare majorities to prevail on contentious issues; (2) as contrasted with legislators' and Presidents' need to pay attention to democratic accountability through elections, federal judges are insulated from both; and (3) as contrasted with the powerful interest group mobilization that is triggered by the stark alternatives that major legislative reform proposals present, the case-by-case, less visible, more evolutionary process of legal change via court decision is far less likely to activate massive group mobilization seeking to block policy change.

In Part IV, we turn to the impact of procedure on federal civil litigation reform. This is a lawmaking arena in which the judiciary has long been ceded considerable freedom and power—exercised primarily through the

promulgation of prospective, legislation-like rules of court. Starting in 1938 and at least until the 1970s, court rulemaking was a potent means to affect private enforcement, and prior to the 1980s the Federal Rules of Civil Procedure (“Federal Rules”) were litigation-friendly, and hence private enforcement–friendly.

Federal court rulemaking started to engender serious controversy in the 1970s with the proposed Federal Rules of Evidence, and the controversy spread to the criminal and civil rules. We show that members of Congress, urged on by individuals and groups with different grievances (some of which had ideological and partisan valence), were concerned (1) that the rulemaking process was insufficiently inclusive and transparent; (2) that the rulemakers were paying inadequate attention to the Rules Enabling Act’s prohibition against abridging, enlarging, or modifying substantive rights; and (3) that as a result, Congress was devoting too much time to rulemaking controversies. Chiefly through oversight hearings, these members of Congress pressured the federal judiciary to open up the process, and some of the process reforms, including a requirement of open meetings, were codified in 1988. They have made it more difficult to use the rulemaking process for major civil litigation reform.

Hence, just as the Supreme Court has been more successful in constricting private enforcement through decisions than Congress has been through legislation, so too, we argue, has the Court’s power to make procedural law constraining private enforcement through decisions—specifically its power to “interpret” Federal Rules—been more consequential than its power to promulgate Federal Rules. Two of the most striking examples of this phenomenon, where the turn to decisional law seems clearly linked to the constrained state of rulemaking, are the Court’s 2007 and 2009 pleading decisions.

Finally, just as ideology has had an increasing influence on the Justices’ votes and the Court’s decisions on private rights of action, attorneys’ fees, standing, and arbitration, so has it had an increasing influence on cases involving the Federal Rules. Ideology played a comparatively modest (although statistically significant and substantively important) role in the Justices’ voting behavior prior to 1994. Now, however, it appears to have a stronger influence on the Justices in Federal Rules cases—supposedly the heartland of procedure—than it has in cases presenting issues more obviously connected to substantive law.²

² See *infra* text accompanying notes 128-259.

I. THE RISE OF THE LITIGATION STATE

In 2013, private parties filed about 170,000 federal lawsuits to enforce federal statutes, spanning the waterfront of federal regulation.³ Although Congress has relied on private litigation to enforce federal statutes since the rise of the federal regulatory state in the late 1880s, the frequency with which it has done so exploded in the late 1960s. From a rate of 3 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 (reaching 13 by 1976, 21 by 1986, and 29 by 1996).⁴ Despite much vitriolic rhetoric (typically focused on tort litigation), serious empirical scholars have *not* established that there was a “litigation explosion” across American court systems as a whole during this period.⁵ There was, however, an unmistakable explosion of private lawsuits to enforce federal statutes.⁶ We emphasize two things about this phenomenon: First, it has resulted substantially from 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,⁷ Congress’s growing distrust of bureaucracy under leadership that it regarded as increasingly hostile to its policy goals was particularly important.

It is 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. When Congress chooses to rely on private enforcement, it faces 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.

³ See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2013 tbl.C-2 (2013), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/Co2Mar13.pdf>.

⁴ See SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 15 (2010).

⁵ See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 61-62 (1983); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1103 (1996).

⁶ See, e.g., FARHANG, *supra* note 4, at 118-19.

⁷ The literature addressing other factors is discussed in Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 645 (2013).

We refer to this system of rules as a statute’s “private enforcement regime.”⁸ In Title VII, as amended in 1991, Congress sought to ensure active use of the private right of action by supplementing attorneys’ fee awards with, in certain cases, compensatory and punitive damages and the right to trial by jury. By design, Title VII is among the most litigated statutory provisions in federal court.⁹

Figure 1: Private Enforcement Regimes, 1933–2004,
and Private Statutory Litigation Rates, 1942–2004¹⁰

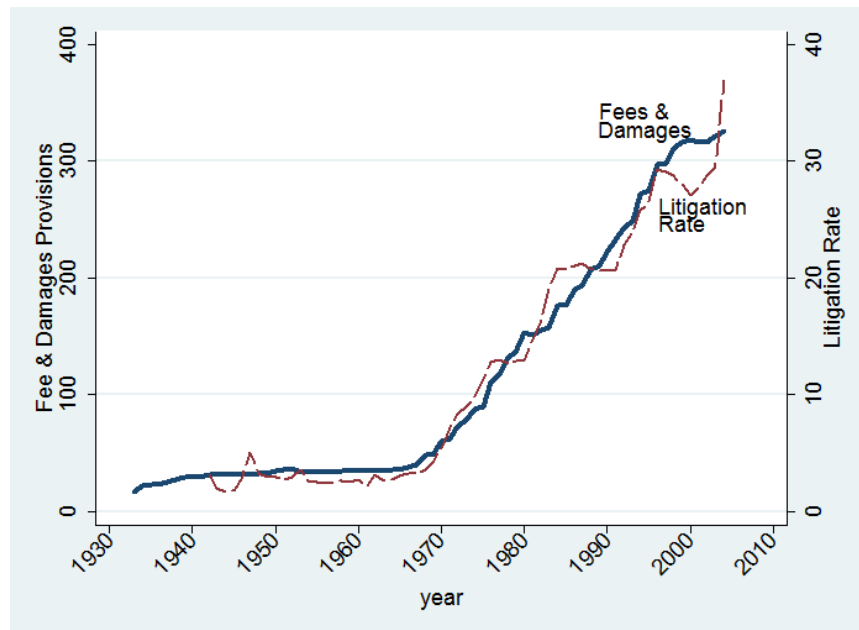


Figure 1 supports our claim that the growth in private litigation enforcing federal statutes is a function of statutory design. The solid line reflects the cumulative number of fee-shifting provisions and damages enhancements (double, triple, or punitive) attached to private rights of action existing in federal statutory law in each year from 1933 to 2004. The line reflects the structural environment of private enforcement regimes in existence annually. The dashed line is the annual rate, per 100,000 population, of private federal statutory enforcement litigation (it is only possible to distinguish privately

⁸ See FARHANG, *supra* note 4, at 19-60.

⁹ See *id.* at 94-128, 172-213.

¹⁰ *Id.* at 66.

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.¹¹

Congress's choice of whether and how much to rely on private enforcement of statutory mandates must be understood in an institutional context. The primary alternative is to empower and fund administrative authorities to perform that enforcement function.¹² 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.¹³ 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 sixty-eight years of the twentieth century, the parties divided control of the legislative and executive branches 21% of the time. In the subsequent thirty-two 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.¹⁴ Both quantitative and qualitative empirical scholarship have demonstrated that these political-institutional conditions were critically

¹¹ For a discussion of the data underlying Figure 1, see *id.* at 3-18, 60-84.

¹² See generally Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363 (2010); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006).

¹³ See FARHANG, *supra* note 4, at 36-37; see also THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 96-97 (2002); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 93-94 (2001); R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 49 (1994); R. Shep Melnick, *From Tax and Spend to Mandate and Sue: Liberalism After the Great Society*, in *THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM* 387, 405-06 (Sidney M. Milkis & Jerome M. Mileur eds., 2005).

¹⁴ See NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 194 (2006); Gary C. Jacobson, *Partisan Polarization in Presidential Support: The Electoral Connection*, 30 CONGRESS & PRESIDENCY 1, 3-4 (2003).

important in causing the greater congressional reliance on private litigation to enforce federal statutes that is reflected in Figure 1.¹⁵

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 regulation¹⁶ and with liberal public interest groups occupying a critical position in the party coalition, predominately controlled Congress.¹⁷ This legislative coalition largely faced an executive branch in the hands of the Republican Party, a party more likely to oppose social and economic regulation and for which business groups are a core constituency.¹⁸ 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 the less regulation-prone Republican Party controls the presidency. The bulk of the foundation for the litigation state was laid under this configuration of divided government.¹⁹

Although the genesis and growth of the litigation state have received extensive attention in recent years, we take up the little-studied responses that they have elicited from partisan and ideological adversaries and those seeking to serve different institutional interests. Especially little attention has been paid to the phenomenon that is central in the second half of this Article: how the trans-substantive Federal Rules of Civil Procedure have become a site of struggle and contest by interest groups, legislators, rulemakers, and judges who seek to control the procedural playing field on which private enforcement proceeds, thereby influencing its volume and effects.²⁰

¹⁵ See generally FARHANG, *supra* note 4; Sean Farhang, *Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law*, 37 LAW & SOC. INQUIRY 657 (2012).

¹⁶ See generally KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997).

¹⁷ See MARTIN SHEFTER, POLITICAL PARTIES AND THE STATE: THE AMERICAN HISTORICAL EXPERIENCE 86-94 (1994); DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 93-112 (1989) [hereinafter VOGEL, FLUCTUATING FORTUNES]; David Vogel, *The "New" Social Regulation in Historical and Comparative Perspective*, in REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS 155, 169-73 (Thomas K. McCraw ed., 1981).

¹⁸ See, e.g., VOGEL, FLUCTUATING FORTUNES, *supra* note 17, at 240-42.

¹⁹ See generally Sean Farhang, *Regulation, Litigation, and Reform*, in THE POLITICS OF MAJOR POLICY REFORM IN POSTWAR AMERICA (Jeffrey A. Jenkins & Sidney M. Milkis eds.) (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184562.

²⁰ An exception is Sarah Staszak, *Institutions, Rulemaking, and the Politics of Judicial Retrenchment*, 24 STUD. AM. POL. DEV. 168 (2010), which considers rulemaking among litigation reform responses to the growth of the litigation state.

Surveying these responses requires that we traverse multiple institutional sites of conflict over the scope and trajectory of the litigation state.

II. THE LEGISLATIVE PROJECT OF LITIGATION REFORM

A. *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. It was clear that regulatory reform was high on the policy agenda from the outset of his administration.²¹

Leaders of the Reagan 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. Statutory provisions that forced business and government to pay the attorneys' fees of plaintiffs who launched invasive, disruptive, and costly lawsuits 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.²²

Conservative activists and business associations mobilized and collaborated in forming a number of public interest law groups to pursue an agenda focused, in part, on limiting the new social regulation.²³ Reagan's close associates, including high-ranking members of his California gubernatorial administration who followed him to the White House, were instrumental in founding this movement.²⁴ Indeed, litigation by liberal public interest groups against the Reagan gubernatorial administration provoked members of his administration to establish the first conservative public interest law

²¹ See Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 MD. L. REV. 253, 261 (1986); see also Karen O'Connor & Lee Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law*, 7 HARV. J.L. & PUB. POL'Y 483, 493-94 (1984). See generally Jefferson Decker, *Lawyers for Reagan: The Conservative Litigation Movement and American Government, 1971-87* (2009) (unpublished Ph.D. dissertation, Columbia University), available at <http://search.proquest.com/docview/304863269?accountid=14707>.

²² See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 60-66 (2008); Michael S. Greve, *Why "Defunding the Left" Failed*, PUB. INT., Fall 1987, at 91, 91; O'Connor & Epstein, *supra* note 21, at 493-94; Decker, *supra* note 21, at 15.

²³ See *supra* note 22.

²⁴ See TELES, *supra* note 22, at 60-61; O'Connor & Epstein, *supra* note 21, at 495; Decker, *supra* note 21, at 54-76.

group in Sacramento—the Pacific Legal Foundation—which then served as a model for many others.²⁵ 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”²⁶ and as “working for left-wing special interest groups at the expense of the public.”²⁷ Moreover, he appointed numerous leaders and activists from the emergent conservative public interest law movement to important positions in the federal bureaucracy.²⁸ These individuals had witnessed the rate of private enforcement lawsuits under federal statutes increase by 352% between Nixon’s assumption of office in 1969 and Reagan’s in 1981.²⁹ Once in power, they sought to retrench private enforcement, in part, through a legislative project of litigation reform.³⁰

Attention to litigation reform in the first years of the Reagan administration focused squarely on *federal* rights, not torts. A 1981 bill capping fees in all federal actions against the government cut across virtually all fields of federal statutory regulation.³¹ Also in Reagan’s first term, the Justice Department’s Office of Legal Policy drafted a proposal that would have, among other things, curtailed fee awards for actions under section 1983, which provides for damages suits against state officials for violating federal rights.³² Discussion of the proposal elicited further suggestions to eliminate punitive damages and introduce a good faith defense.³³ Tort law was not an issue on the Reagan administration’s agenda until 1985, when it made tort reform a policy priority by forming the Tort Policy Working Group. In 1986, the Working Group issued a report calling for a series of

²⁵ See TELES, *supra* note 22, at 61-62; O’Connor & Epstein, *supra* note 21, at 495; Ronald A. Zumbun, *Life, Liberty, and Property Rights*, in BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT 41, 42-43 (Lee Edwards ed., 2004); Decker, *supra* note 21, at 57-62.

²⁶ Ronald J. Ostrow, *Legal Services Agency Battles Reagan Attempt to Cut Off Its Funding*, L.A. TIMES, Apr. 12, 1981, at B1.

²⁷ Decker, *supra* note 21, at 74.

²⁸ See *id.* at 155, 238, 242-45, 250, 255-56.

²⁹ See *supra* Figure 1.

³⁰ In characterizing anti-litigation reform as retrenchment, we follow Sarah Staszak. Although Staszak focused broadly on retrenchment of judicial power and autonomy, we focus narrowly on retrenchment of private enforcement of federal rights. These are different issues. For Staszak, diminution of judicial power over rulemaking would be retrenchment of judicial power even if its effect was to preserve or enlarge the enforcement of rights. See Staszak, *supra* note 20, at 169, 173. Our concepts of retrenchment are overlapping but distinct.

³¹ See *infra* notes 43-44 and accompanying text.

³² 42 U.S.C. § 1983 (2006); see Decker, *supra* note 21, at 180-84.

³³ Decker, *supra* note 21, at 183-84.

reforms, including limits on fees and caps on damages.³⁴ Litigation reform with respect to federal rights came first for the Reagan administration, and tort reform followed.

According to Michael Greve, a conservative legal activist and founder of the Center for Individual Rights, the Reagan administration saw federal statutory private rights of action with attorneys' fee awards as an obstacle to deregulation. Conservative activists pursued proposals to curtail fee awards under federal regulatory statutes and to reduce sources of funding for liberal public interest groups as part of a strategy to "defund the Left."³⁵

Private enforcement litigation was a "primary obstacle" to Reagan's deregulatory agenda because, with little prospect of actually being able to repeal or modify legislative mandates, his principal strategy for effectuating the agenda was to demobilize the administrative regulatory enforcement apparatus.³⁶ The value of withdrawing administrative enforcement would be weakened if extensive private enforcement continued. Based upon archival research, Jefferson Decker finds that some important members of the Reagan bureaucracy were deeply concerned that private rights of action, coupled with fee shifting in the new social regulatory statutes, were producing "a state-sponsored, private governing apparatus" that was beyond the control of the elected branches.³⁷

Advocates of retrenching private enforcement recognized that the proliferation of fee-shifting provisions in the 1970s had produced a private enforcement infrastructure not just among liberal public interest groups, but also, more significantly, among the for-profit American bar. Our own archival research reveals that this trend became an important concern among advocates of retrenching private enforcement, articulated repeatedly in support of an administration legislative proposal to cap fee awards. Michael Horowitz, general counsel of the Office of Management and Budget (OMB), played a leading role in developing the fee-cap proposal. In

³⁴ John J. Farley, III, *Robin Hood Jurisprudence: The Triumph of Equity in American Tort Law*, 65 ST. JOHN'S L. REV. 997, 1015-16 (1991); Paul Taylor, *The Federalist Papers, The Commerce Clause, and Federal Tort Reform*, 45 SUFFOLK U. L. REV. 357, 358 n.5 (2012). Professor Yeazell notes that President Carter proposed civil litigation reform in 1978, advocating "alternative dispute resolution, no-fault auto insurance and divorce regimes—all rational, government-sponsored alternatives," but that "[n]othing happened, and no subsequent Democrat has taken up that banner." Stephen C. Yeazell, *Unspoken Truths and Maligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1774-75 (2013).

³⁵ See generally Greve, *supra* note 22.

³⁶ See FARHANG, *supra* note 4, at 172-213; ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 119-32 (1983); VOGEL, FLUCTUATING FORTUNES, *supra* note 17, at 246-65; Farhang, *supra* note 19; Greve, *supra* note 22, at 101-04; McGarity, *supra* note 21, at 260-70.

³⁷ See Decker, *supra* note 21, at 181.

a 1983 memo discussing the problem that the proposal 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,” a large portion of which were enacted in the 1970s.³⁸

Writing to OMB Director David Stockman, Horowitz characterized the fee-cap bill as “designed in part to bar fee awards to entrepreneurial attorneys who now engage in contingency litigation” 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.³⁹

John Roberts, then working for the Reagan Justice Department, was another active participant in deliberations over the fee-cap bill.⁴⁰ Notwithstanding differences of opinion within the administration about the political wisdom of pursuing the bill, Roberts joined those advocating for 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.”⁴¹ Antonin Scalia also endorsed the fee bill. Writing as a University of Chicago law professor and editor of the conservative *Regulation* magazine (just months before his appointment to the D.C. Circuit), he 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.”⁴² As we shall see, Roberts and Scalia would become among the most anti-private enforcement Justices on the modern Supreme Court.

³⁸ Memorandum from Mike Horowitz to Dick Hauser & Bob Kabel (June 16, 1983) (on file with the Ronald Reagan Presidential Library).

³⁹ Memorandum from Michael J. Horowitz to David A. Stockman & Edwin Harper (July 22, 1982) (on file with the Ronald Reagan Presidential Library).

⁴⁰ See generally John G. Roberts, Jr. Papers, Box 5, Folders 1-3 (Attorneys’ Fees); Box 31, Folders 1-3 (Legal Fees Reform Act) (on file with the Ronald Reagan Presidential Library). Reagan Library logs indicating that memoranda written by Roberts are withheld from public view under the deliberative-process privilege further reflect Roberts’ substantive participation in debates over the bill.

⁴¹ Memorandum from John G. Roberts to Fred F. Fielding (Sept. 19, 1983) (on file with the Ronald Reagan Presidential Library); see also Memorandum from John G. Roberts to Fred F. Fielding (Nov. 17, 1983) (on file with the Ronald Reagan Presidential Library).

⁴² See *The Private Attorney General Industry: Doing Well by Doing Good*, REG., May/June 1982, at 5, 5-7; Memorandum from Michael J. Horowitz to David A. Stockman & Edwin Harper, *supra* note 39; *id.* at exhibit H.

Reagan administration advocates of retrenching private enforcement were surely right. For-profit counsel, not interest groups, prosecute the vast majority of federal statutory private suits.⁴³ Thus, to the extent that Reagan's sought-after "regulatory relief" involved less aggressive and stringent enforcement of existing statutory mandates, the for-profit bar's response to market incentives was part of the problem.

OMB's fee-cap bill focused on suits against federal and state government defendants. Initially titled "The Limitation of Legal Fees Awards Act of 1981," the bill proposed amending over one hundred federal statutes allowing recovery of attorneys' fees in successful suits against the government. The bill went through a number of permutations from 1981 to 1984. Some core attributes of the early versions 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 or to the extent that it was disproportionate to the plaintiff's actual damages.⁴⁴

Although this proposal's restrictions on fee awards were quite extreme as applied to suits against the government, it did not attempt to restrict fees in suits against the private (business) sector. It appears that key actors in the Reagan administration also wanted a more expansive retrenchment extending to the private sector.⁴⁵ If the proposal summarized above had been enacted, it likely would have been the thin end of the retrenchment wedge. This was not to be.

B. Litigation Reform Proposals in Congress

In order to map the legislative movement for litigation reform and its partisan configuration, we identified all bills that sought to amend federal law so as to (1) reduce the availability of attorneys' 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. These

⁴³ See FARHANG, *supra* note 4, at 3-18.

⁴⁴ See Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 242-43 (1984); Fred Barbash, . . . *And Uncle Sam Wants to Save on His Legal Fees*, WASH. POST, Feb. 10, 1982, at A25; Memorandum from Michael J. Horowitz to David A. Stockman & Edwin Harper, *supra* note 39, at exhibits B, C.

⁴⁵ See Greve, *supra* note 22, at 92-93; Decker, *supra* note 21, at 179-88.

provisions fall into two groups. The fees and damages provisions seek to reduce directly the economic recovery available to successful private enforcers. The class action, sanctions, and offer of judgment provisions seek to modify the Federal Rules in ways that disadvantage private enforcers.⁴⁶

Our search captured 503 bills from 1973 (when the Library of Congress bill database starts) to 2010. Thirty percent of these bills contained more than one litigation reform item, with an average of 1.4 items per bill. The bills had an average of 11 cosponsors, yielding a total of 6063 episodes of legislators sponsoring or cosponsoring a bill with a litigation reform item in it. There were 3620 episodes of legislators supporting a bill with a provision limiting damages, 2835 with an attorneys' fee provision, and 2257 with procedural provisions. Fifty-nine percent of the members of Congress who served from 1973 to 2010 supported one of our litigation reform provisions at least once.

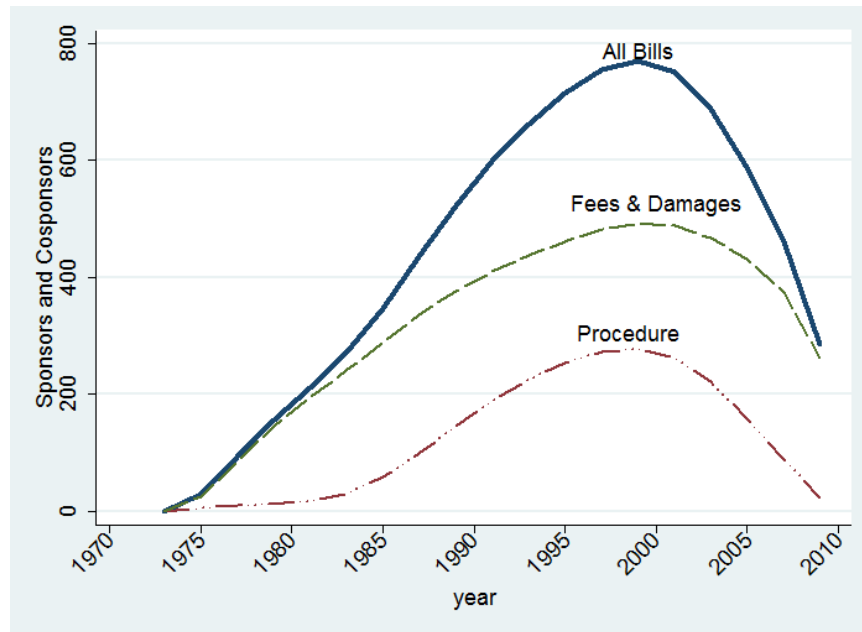
In order to analyze the relationship between legislators' ideology and the likelihood that they would support anti-litigation proposals, we constructed the following data set. Separately for each of our items and for each legislator who served in Congress from 1973 to 2010, we calculated the total number of episodes of sponsorship or cosponsorship 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 cosponsored one of our five items.⁴⁷ Figure 2 fits a locally weighted scatterplot smoothing (LOWESS) curve to the count, per Congress, of the total number of episodes of legislator support for anti-litigation 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).⁴⁸

⁴⁶ 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.

⁴⁷ We include both sponsors and cosponsors because we are interested in the degree of legislative support for litigation reform proposals. To neglect cosponsors 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.

⁴⁸ We use 80% bandwidth to estimate all LOWESS curves in this Article.

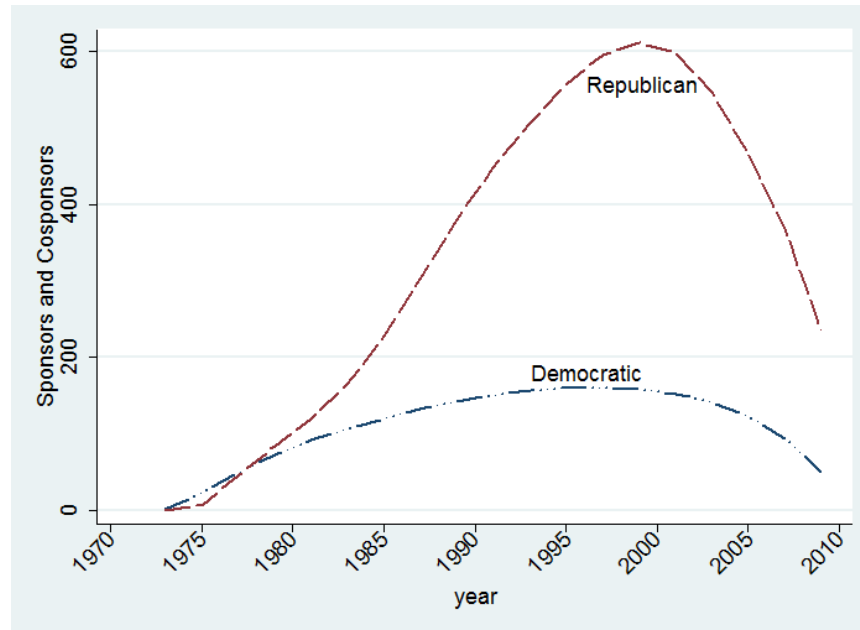
Figure 2: Legislator Support for Anti-Litigation Provisions



Two things stand out in these data. First, support for anti-litigation bills grew strongly in the Reagan years. Because the 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 70 episodes per Congress of legislative support for one of our anti-litigation items. In Reagan's first term, the figure rose to 257 per Congress, and in his second term it rose to 463 per Congress—a 561% increase over the Carter years. This growth continued and peaked at 1038 in the 104th Congress (1995–1996), when Republicans took control. It has since declined considerably, continuing its downward slope to the present.

Second, in the first half of the 1980s, episodes of support for procedural proposals were negligible in number and flat, while fees and damages proposals exploded. Procedural proposals, however, grew significantly starting in the early 1990s. The raw Congress-level counts again tell the story. In Ronald Reagan's second term, there were only 18 episodes per Congress of support for anti-litigation procedural proposals. In George H.W. Bush's term in office, the number rose to 62 per Congress, and in Bill Clinton's first term the figure grew to 360, more than a 1900% increase over Reagan's second term. It peaked at 582 in the 105th Congress (1997–1998) and subsequently declined, a trend continuing to the present.

Figure 3: Legislator Support for Anti-Litigation Provisions, by Party



Finally, 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 cosponsors. There was little difference between Democratic and Republican support until the early 1980s, when Reagan took office. The raw data reveal that, in the four Congresses from 1973 to 1980, the number of Democratic supporters actually exceeded the number of Republican supporters, but only marginally. The ninety-seventh Congress (1981–1982) is the first in our data set in which Republican support for anti-litigation measures exceeds Democratic support. From rough parity when Reagan took office, there emerged a partisan gap which grew until it peaked in the 105th Congress (1995–1996), with Republicans supporting anti-litigation proposals at a level about 563% above Democrats. As the level of Republican proposals declined after the 105th Congress, so too did the gap between the two parties.⁴⁹

⁴⁹ 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.

As with the Reagan administration's litigation reform proposals, our bill database shows that proposals in the field of federal rights led the way and tort reform followed. We collected bills containing the same set of five litigation reform items applying to state tort law. From 1973 through 1984 (the end of Reagan's first term), episodes of sponsorship and cosponsorship of bill provisions targeting federal statutory rights outnumbered those targeting tort by a margin of more than three to one. Only in the ninety-ninth Congress (1985–1986), corresponding exactly to Reagan's embrace of tort reform, did episodes of support for tort reform surge in Congress to levels rivaling, and sometimes surpassing, proposals targeting federal rights.

In order to test systematically the relationship between legislator party and legislator support for anti-private enforcement proposals, we use negative binomial count models. We code 0 for Democrats and 1 for Republicans. 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 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 votes *within* Congresses to estimate the effects of party.

We suggest in Section II.A that the Reagan administration's fee bill appeared to mark an important juncture in the Republican Party's anti-private enforcement campaign. The congressional session corresponding to Reagan's first two years in office was the first session of Congress in our data set in which Republican support for anti-litigation proposals exceeded Democratic support. In our statistical models, 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 negative binomial count models for (1) the pooled number of episodes of support for all five types of anti-litigation 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). We discuss modeling specifications and choices in the Appendix. In Table 1, we estimate the effects of legislator party on support for anti-private enforcement provisions for the period from 1973 to 1980. We find no statistically significant party effect in either the model for pooled episodes or the model for monetary recoveries. We do, however, find a statistically significant effect with respect to procedural provisions. Yet the sign on the

coefficient reflects that *Democrats* were more likely to support such bills. We do not make much of this result because only about 4% of members per Congress sponsored such a bill during this period—procedure had not yet emerged as a locus of significant bill activity. The key point is that prior to Reagan, litigation reform was an area of scarce legislative activity, and to the extent that it was an issue, it was not a Republican issue.

Table 1: Negative Binomial Model of Legislator Support for Anti-Private Enforcement Provisions with Congress Fixed Effects, 1973–1980

	All Bills		Monetary Recoveries		Procedure	
	Coef.	Marginal	Coef.	Marginal	Coef.	Marginal
Party	-.235 (.117)	-26%	-.109 (.176)	-12%	-1.43** (.528)	-318%
(Congress fixed effects not displayed)						
N=	2154		2154		2154	
Adj. Dev. R ² =	.10		.06		.24	

** .01; * < .05

Standard errors in parentheses, clustered on legislator

In Table 2, we estimate the same model for the 1981–2010 period. Things change greatly. The party variable is statistically significant in the expected direction in all three models: all types of provisions pooled, those reducing monetary recoveries only, and those affecting procedural issues only. In the All Bills model, moving from Democratic to Republican is associated with an increase in legislators' predicted count by 222%. The figure is 216% in the Monetary Recoveries model and 274% in the Procedure model. Interestingly, the effect of party on the level of support is highest among the procedural provisions.

Table 2: Negative Binomial Model of Legislator Support for Anti-Private Enforcement Provisions with Congress Fixed Effects, 1981–2010

	All Bills		Monetary Recoveries		Procedure	
	Coef.	Marginal	Coef.	Marginal	Coef.	Marginal
Party	1.17** (.051)	222%	1.15** (.051)	216%	1.32** (.073)	274%
(Congress fixed effects not displayed)						
N=	8093		8093		8093	
Adj. Dev. R ² =	.26		.22		.42	

** .01; * < .05

Standard errors in parentheses, clustered on legislator

Our negative binomial models pool data over about thirty years, raising two obvious questions: First, is the party effect present throughout this period? Second, has its magnitude changed over time? In order to answer these questions, we summarize the results from a series of models over time in Table 3. We aggregated the two Congresses associated with each presidential term from 1981 to 2008 (Ronald Reagan's first term to George W. Bush's second term).⁵⁰ The marginal effects column reflects the percent increase in legislators' predicted count moving from Democratic to Republican. Table 3 shows that, with respect to the fees and damages bills, the party effects are significant within each of the seven presidential terms. The magnitude of the party effect grew over the Reagan-Bush years and peaked in Bill Clinton's first term; it has since declined, though it remains large. In contrast, the effect of party on legislators' support for anti-litigation procedural items took slightly longer to emerge. There was no statistically significant effect with respect to the procedural items in Reagan's first term. By his second term, however, the party effect emerged as durably statistically significant, and by the 2000s, it was actually larger than the effect for monetary recoveries.

⁵⁰ Our data do not yet extend through President Obama's first administration.

Table 3: Negative Binomial Coefficients for Legislator Party in Models of Legislator Support for Anti-Private Enforcement Provisions, with Congress Fixed Effects, by Presidential Administration

	All Bills		Monetary Recoveries		Procedure	
	Coef.	Marginal	Coef.	Marginal	Coef.	Marginal
Reagan I (1981–1984)	.450**	57%	.478**	61%	.092	10%
Reagan II (1985–1988)	.806**	124%	.799**	122%	.982*	167%
H.W. Bush (1989–1992)	.912**	149%	1.04**	183%	.445*	56%
Clinton I (1993–1996)	1.77**	487%	2.0**	639%	1.44**	322%
Clinton II (1999–2000)	1.21**	235%	1.21**	235%	1.22**	239%
W. Bush I (2001–2004)	1.05**	186%	.821**	127%	1.72**	458%
W. Bush II (2005–2008)	1.60**	395%	1.50**	348%	2.0**	639%

** .01; * < .05

C. *The Failure of the Legislative Project of Litigation Reform*

The legislative project of litigation reform mounted by the Republican Party was largely a failure. Reagan's fee bill was unable to gain traction, even in the Republican-controlled Senate. Numerous proposals by congressional Republicans fared little better in the ensuing years, even when Republicans controlled both chambers of Congress. Some were trans-substantive bills that would have cut across the whole landscape of the litigation state, including bills requiring federal courts to award attorneys' fees to prevailing defendants in all civil actions⁵¹ or to impose a general loser-pays fee-shifting rule.⁵² Another trans-substantive 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.⁵³

⁵¹ See, e.g., Frivolous Suit Reduction Act of 1995, H.R. 64, 104th Cong. (1995); Frivolous Suit Reduction Act of 1994, H.R. 5189, 103d Cong. (1994).

⁵² See, e.g., Loser Pays Legal Fee Fairness Act, H.R. 3497, 109th Cong. (2005); Loser Pays Act of 1993, H.R. 2880, 103d Cong. (1993).

⁵³ See, e.g., Small Business Lawsuit Abuse Protection Act of 1998, H.R. 3382, 105th Cong. (1998); see also Small Business Liability Reform Act of 2001, S. 865, 107th Cong. (2001).

Many other Republican proposals targeted particularly active areas of federal civil litigation and sought to reduce economic incentives to bring cases: A 1981 bill proposed full immunity from civil damages suits for police officers who conducted illegal searches and seizures in violation of the Fourth Amendment.⁵⁴ A 1982 bill proposed to repeal the attorneys' fee-shifting provision in the Civil Rights Attorney's Fees Awards Act of 1976.⁵⁵ A 1987 bill proposed to amend the Clayton Act to reduce the amount recoverable in many private antitrust actions from treble to actual damages.⁵⁶ A 1992 bill proposed to eliminate class actions under the Truth in Lending Act.⁵⁷

Although a substantial majority of the Republicans' procedural proposals would have amended specific statutes, some were trans-substantive. Of 25 trans-substantive procedural bills in our data, 14 were proposals to bolster sanctions under Rule 11, and a substantial majority of these sought to reverse the 1993 amendments to Rule 11 by making sanctions mandatory rather than discretionary.⁵⁸ The remaining 11 bills targeted Rule 23, and a substantial majority of those were precursors to the Class Action Fairness Act of 2005.⁵⁹

Republican successes were few in number. Three are well known: the Private Securities Litigation Reform Act of 1995,⁶⁰ the Prison Litigation Reform Act of 1996,⁶¹ and the Class Action Fairness Act of 2005 (CAFA).⁶² We do not diminish the significance of these laws. However, excluding the jurisdictional provisions of CAFA, which themselves do not directly affect federal rights,⁶³ the three are narrowly focused.

⁵⁴ H.R. 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).

⁵⁵ Judicial Reform Act of 1982, S. 3018, 97th Cong. (1982).

⁵⁶ Trade, Employment, and Productivity Act of 1987, H.R. 1155, 100th Cong. (1987).

⁵⁷ Community Bank Regulatory Relief Act of 1992, S. 2794, 102d Cong. (1992).

⁵⁸ *See, e.g.*, Small Business Growth Act of 2007, H.R. 1012, 110th Cong. (2007); Civil Justice Fairness Act of 1995, S. 672, 104th Cong. (1995).

⁵⁹ *See, e.g.*, Class Action Fairness Act of 2004, S. 2062, 108th Cong. (2004); Class Action Fairness Act of 2000, S. 353, 106th Cong. (2000).

⁶⁰ Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

⁶¹ Pub. L. No. 104-134, 110 Stat. 1321-66 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

⁶² Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

⁶³ CAFA significantly increased the number of state law class actions that were governed by a trans-substantive 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.

Beyond these major laws, only eight more Republican-proposed litigation reform 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 1982 applying only to actions by foreign governments,⁶⁴ one in 1984 applying only to narrowly defined “joint research and development venture[s],”⁶⁵ 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.⁶⁶ 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,⁶⁷ and the third limited fee recovery by (or imposed some fee liability on) plaintiffs’ counsel for frivolous or unreasonable litigation behavior.⁶⁸ In 1995, a Republican-proposed bill passed, imposing a five-month moratorium on certain consumer class actions, again with no permanent effects.⁶⁹ In 1996, a Republican proposal passed, foreclosing fee awards in section 1983 actions against judges for actions taken while acting in a judicial capacity.⁷⁰

In sum, Republican litigation reform successes across the issues in our database, over the three decades from the emergence of the issue on the Republican agenda in 1981 until 2010, nibbled around the edges of the litigation state. They did not challenge it. To understand the substantial failure of the legislative project of litigation reform, it is useful to observe a couple of institutional factors that make retrenchment of rights difficult. An institutionally fragmented American separation of powers system empowers many actors to block legislative reform, making legislative change difficult

⁶⁴ Act of December 29, 1982, Pub. L. No. 97-393, 96 Stat. 1964 (codified at 15 U.S.C. § 15 (2012)).

⁶⁵ 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)).

⁶⁶ 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)).

⁶⁷ 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).

⁶⁸ 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)).

⁶⁹ 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)).

⁷⁰ 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)).

on contentious issues and leading to the stickiness of the status quo.⁷¹ 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 the polity.⁷² The phenomenon of “negativity bias” (or an “endowment effect”) means that people are substantially more likely to mobilize to avoid losses of existing rights and interests, as compared to securing new ones. It also leads voters to be more likely to punish politicians who have impaired their interests than to reward politicians who have benefited them, making retrenchment electorally hazardous. Politicians well understand this dynamic.⁷³

These forces make a private enforcement status quo, once constructed, extremely difficult to retrench. A number of high-ranking members of the Reagan administration regarded the political costs of the move to retrench private enforcement as much too high. 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. The same forces frustrated the administration’s efforts to build a coalition behind a retrenchment bill.

Attorney General William French Smith observed that striking too severely at attorneys’ fee awards risked “excessive controversy.”⁷⁴ He emphasized that in the public-relations battle, the Administration would be cast as “anti” rights, citing as examples attacks by civil rights and environmental groups.⁷⁵ Opponents of the proposal would be able to beat it back with “the rhetoric of rights and Justice,” as one supporter put it.⁷⁶ Smith also observed that the timing of the bill seemed particularly bad with an election on the horizon.⁷⁷ When the bill was sent to be cleared in

⁷¹ See, e.g., Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 229-30 (1990); Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? (John E. Chubb & Paul E. Peterson eds., 1989).

⁷² See PAUL PIERSON, DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT 17-19 (1994); William N. Eskridge, Jr. & John Ferejohn, *Virtual Logrolling: How the Court, Congress, and the States Multiply Rights*, 68 S. CAL. L. REV. 1545, 1560 (1995). See generally Jacob Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243 (2004).

⁷³ PIERSON, *supra* note 72, at 39-46; Eskridge & Ferejohn, *supra* note 72, at 1560-62. See generally Hacker, *supra* note 72.

⁷⁴ Memorandum from William French Smith, Att’y Gen., to The Cabinet Council on Legal Policy 5 (June 15, 1983) (on file with the Ronald Reagan Presidential Library).

⁷⁵ *Id.* at 2.

⁷⁶ Greve, *supra* note 22, at 104.

⁷⁷ See Memorandum from William French Smith to The Cabinet Council on Legal Policy, *supra* note 74, at 2.

December 1983, Fred Fielding, Counsel to the President, echoed Attorney General Smith's skepticism and stated that he was "deeply concerned" that it would "open another front in the ongoing battle over our record" concerning the rights of "minorities, the poor, and the aged."⁷⁸

The political difficulty of retrenching existing rights was also evident in the failure of the administration's strategy for building a coalition around the bill. Although the administration naturally anticipated opposition from public interest groups and plaintiffs' lawyers, it expected support from both states and business. With respect to states, it anticipated support because the bill would preserve state and city tax resources against fee awards and reduce incentives for suits against states and cities. However, two of the three groups representing state and city officials, whose support the administration sought, either declined to support the bill or threatened to oppose it publicly. To at least some officials, given the broad popularity of the rights that the fee bill would reach, the prospect of avoiding some of the costs of litigation was not sufficient to warrant the political hazards of supporting it.⁷⁹

Perhaps more surprising, the fee proposal threatened, as one administration strategy memo put it, to provoke the "wrath of the small business community," which is an important part of the Republican coalition.⁸⁰ Ironically, small businesses had themselves developed an interest in fee awards under the Equal Access to Justice Act of 1980, a law spearheaded by both Republicans and business that provides fee awards for small businesses (among others) that prevail against the federal government in proceedings in which they challenge the legitimacy of federal regulatory actions.⁸¹ When the fee-cap

⁷⁸ Memorandum from Fred F. Fielding, Counsel to the President, to Richard G. Darman, Assistant to the President (Dec. 16, 1983) (on file with the Ronald Reagan Presidential Library). For additional expressions of this concern, see Memorandum from Fred F. Fielding, Counsel to the President, to Richard G. Darman, Assistant to the President & Deputy to the Chief of Staff (Sept. 21, 1983) (on file with the Ronald Reagan Presidential Library).

⁷⁹ Farhang, *supra* note 19, at 26-29; Memorandum from Jonathan C. Rose, Assistant Att'y Gen., Office of Legal Policy, to Edward C. Schmults, Deputy Att'y Gen. (Oct. 27, 1983) (on file with the Ronald Reagan Presidential Library); see, e.g., Memorandum from Mike Horowitz to Lee Verstandig & Rick Neal (Oct. 19, 1983) (on file with the Ronald Reagan Presidential Library); Memorandum from Mike Horowitz to Dick Hauser & Bob Kabel, *supra* note 38.

⁸⁰ Memorandum from Jonathan C. Rose to Edward C. Schmults, *supra* note 79; see also Memorandum from Michael J. Horowitz to David A. Stockman & Edwin Harper, *supra* note 39; Memorandum from William French Smith to The Cabinet Council on Legal Policy, *supra* note 74.

⁸¹ Susan Gluck Mezey and Susan M. Olson, *Fee Shifting and Public Policy: The Equal Access to Justice Act*, 77 JUDICATURE 13, 13-16 (1993); Arlene S. Ragozin, *The Waiver of Immunity in the Equal Access to Justice Act: Clarifying Opaque Language*, 61 WASH. L. REV. 217, 219-21 (1986); Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct* (pt. 1), 55 LA. L. REV. 217, 220-29, 280 n.396 (1994).

bill became public, small business groups came out strenuously against it, accusing the administration of “break[ing] faith with the small business community.”⁸²

In light of the overall political calculus surrounding retrenchment of existing rights, it is not surprising that the fee-capping bill was ultimately unable to attract the support of moderates in Congress, including moderate Republicans.⁸³ Even if they were inclined to join the administration’s attack on the private enforcement infrastructure, the political and electoral calculus was against it. After the bill’s initial failure, the administration developed a compromise version in an effort to enlarge support. In 1984, a Republican-controlled Senate committee held hearings on the bill. The committee chairman, Republican Senator Orrin Hatch of Utah, described statutory fee-shifting rules as creating “exorbitant windfalls for lawyers,” leading to an “explosion of litigation” that had “clogged the courts.”⁸⁴ Hatch, however, was unable to muster support from even his own Republican-controlled committee, where the bill died.

D. *The 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.⁸⁵ One particular strand of work is relevant to the long-run inter-institutional story of litigation reform we tell in this Article. 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 Professor Graber put it, “[t]he Reagan administration sought to achieve its social agenda primarily by staffing the Justice department and judiciary with movement conservatives.”⁸⁶ It sought thereby to lay the foundation for law

⁸² *Small-Business Groups Protest Reagan’s Veto of Bill for Legal Fees*, WALL ST. J., Nov. 12, 1984, at 3.

⁸³ See Decker, *supra* note 21, at 184; Memorandum from Jonathan C. Rose to Edward C. Schmults, *supra* note 79; Memorandum from Edward C. Schmults, Deputy Att’y Gen., to Edwin Meese III, Counselor to the President (Oct. 31, 1983) (on file with the Ronald Reagan Presidential Library).

⁸⁴ *The Legal Fee Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 98th Cong. 1-3 (1984) (statement of Sen. Orrin Hatch, Chairman, Subcomm. on the Constitution of the S. Comm. on the Judiciary).

⁸⁵ See *supra* note 36.

⁸⁶ Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 63 (1993); see also SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 285-358 (1997); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S.*

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 litigation reform as well.

Writing to then-Counselor to the President Edwin Meese, Deputy Attorney General Edward Schmults expressed both his skepticism that Congress could achieve litigation reform 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 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. . . . An administration fee reform bill will bring to the public eye many of the policies we have been espousing before the courts.⁸⁷

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. In the next Part, we show that Schmults was correct.

III. THE SUPREME COURT'S RESPONSE

A. *The Existing Literature*

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,⁸⁸ other articles have broadened the field of inquiry to include court

HISTORY 226-27 (2007); Walter F. Murphy, *Reagan's Judicial Strategy*, in LOOKING BACK ON THE REAGAN PRESIDENCY 207, 219-21 (Larry Berman ed., 1990); David M. O'Brien, *The Reagan Judges: His Most Enduring Legacy?*, in THE REAGAN LEGACY: PROMISE AND PERFORMANCE 60, 60-67 (Charles O. Jones ed., 1988); J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. POL. 233, 241-42 (2004).

⁸⁷ Memorandum from Edward C. Schmults to Edwin Meese III, *supra* note 83, at 3.

⁸⁸ See, e.g., Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185.

access more generally.⁸⁹ 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.⁹⁰ With a few notable exceptions, there has been little attention to other possible influences on the results.⁹¹ None of the work of which we are aware deploys statistical analysis of systematic data.⁹²

Perhaps the most comprehensive contribution to this literature is Professor Andrew Siegel's interesting article arguing that hostility to litigation best explains the jurisprudence of the Rehnquist Court.⁹³ The author starts by surveying various scholarly attempts to capture the distinctive attributes of the Rehnquist Court (or Courts, as some scholars see two, and a few three, distinct periods during Rehnquist's tenure as Chief Justice), including federalism, advancement of conservative social and political values, judicial supremacy, and others.⁹⁴ He argues that some of those accounts are "under-theorized"⁹⁵ and that all of them miss one unifying theme in the Court's jurisprudence in the Rehnquist years, namely, hostility to litigation⁹⁶—a theme that helps to explain some otherwise inconsistent results.⁹⁷

Although Professor Siegel is generally careful not to exclude the operation of other influences,⁹⁸ he does not deal seriously with institutional considerations, such as the role of precedent and attention to the state of the docket of the lower federal courts. Moreover, his references to the

⁸⁹ See, e.g., Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 318 (2012); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1117-18 (2006).

⁹⁰ See, e.g., Erwin Chemerinsky, *Closing the Courthouse Door to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 540, 556 (2003). But see Lee Epstein, William A. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1433 (2013) ("[T]here is no uniform conservative or uniform liberal ideology. Instead there are multiple imperfectly overlapping ideologies.").

⁹¹ But see Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 823-40 (2011) (exploring a phenomenon the author calls "judicial backlash" and arguing that judicial concerns about overcrowded dockets and inadequate resources may cause the judiciary to seek to thwart congressional private-enforcement regimes through statutory interpretation and judicial control of procedure, particularly if the claims involved are otherwise disfavored); Siegel, *supra* note 89, at 1115-17.

⁹² But cf. Epstein et al., *supra* note 90, at 1448-70 (reporting the authors' analysis of data to test various claims about the business friendliness of the Roberts Court).

⁹³ See generally Siegel, *supra* note 89.

⁹⁴ See generally *id.*

⁹⁵ *Id.* at 1104.

⁹⁶ See *id.* at 1112-16.

⁹⁷ See *id.* at 1152-53.

⁹⁸ See *id.* at 1108.

“pointillist”⁹⁹ approach he takes signal realization that his data are not systematic, at least as presented. Indeed, for some of the areas he discusses, the selection seems designed to make his points.¹⁰⁰

We are particularly interested in Professor Siegel’s empirical claims about the role that liberal Justices have played in the phenomenon he describes. Refusing to assume that possible connections between “the Court’s hostility to litigation and the Justices’ instinctual distaste for the modern plaintiffs’ bar . . . stem directly or even principally from partisan politics,” the author adduces the “frequent participation—and occasional leadership—of the Court’s more liberal members in shaping a Court fundamentally hostile to litigation” as evidence of the need for a “more nuanced explanation.”¹⁰¹ He argues that any “prior ideological commitments” underlying the Court’s hostility to litigation “are just as likely to stem from the Justices’ class position or professional and educational experiences as from their partisan political allegiance.”¹⁰² We agree that the Justices’ ideological preferences need not stem from “partisan political allegiance,” although they may do so.¹⁰³ But such a strong claim about liberal Justices’ role “in shaping” a hostile Court cries out for systematic evidence. In that regard, we note the author’s conclusion that “the political valence of the Court’s decisions seems sufficiently correlated to the results of the case to demand careful historical consideration.”¹⁰⁴

B. *The Justices’ Votes in Private Enforcement Cases*

We endeavored to collect systematic data with which to evaluate the voting behavior of Justices concerning private enforcement (defined to include access to court). We identified issues that have been commonly associated with private enforcement, including in the literature discussed above. For the period from 1970 to 2013,¹⁰⁵ 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

⁹⁹ *Id.* at 1097, 1149, 1202.

¹⁰⁰ *See id.* at 1118, 1124–29.

¹⁰¹ *Id.* at 1116.

¹⁰² *Id.* at 1117.

¹⁰³ *See* Yeazell, *supra* note 34, at 1788 (“The recently concluded 2012 presidential campaign was the first in decades in which the topic of civil litigation appeared neither in party platforms nor in the candidates’ stump speeches.”).

¹⁰⁴ Siegel, *supra* note 89, at 1200.

¹⁰⁵ The data collection occurred before all 2013 cases had become available, and thus our cases for that year only are incomplete.

attorneys' fees to a prevailing plaintiff; and (4) whether an arbitration agreement forecloses access to court to enforce a federal right. We regard this body of cases, when pooled, as a strong measure of Justices' more general treatment of private enforcement.¹⁰⁶

Having identified this set of cases, 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 treated votes 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, or concluded that a plaintiff should have access to enforce federal rights in court rather than being restricted to arbitration. 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 241 cases: 80 presented a private right of action issue, 95 a standing issue, 56 a fee issue, and 15 an arbitration issue. Some cases contained multiple discrete private enforcement issues across and within our issue areas. The unit of analysis in our statistical models is the Justice's vote on the private enforcement issue. The 241 total cases captured by our search contained 266 issues. This rendered a total of 2298 Justice votes on private enforcement issues.

Our primary interest was to model the relationship between Justices' ideological preferences and their votes on private enforcement issues. For our measure of Justice ideology, we rely upon Martin-Quinn scores. These "ideal point" scores for the Justices are based on the voting behavior and alignments of Justices in non-unanimous decisions.¹⁰⁷ They are fluid, changing from one term to the next in accordance 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 an ancillary analysis reported in the Appendix, we obtain substantially similar results to those presented below (in Table 5) when substituting Segal-Cover scores for Martin-Quinn scores. Segal-Cover scores are based on

¹⁰⁶ We included such cases in our data only to the extent that they involved suits directly against the objects of legal regulation, and thus we excluded judicial review of administrative action. We also excluded cases in which the Court's analysis applied equally to public and private enforcers.

¹⁰⁷ See generally Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002).

pre-confirmation newspaper editorials on the nominations, and thus are independent of Justices' voting behavior.¹⁰⁸

Table 4: Percent Pro-Private Enforcement Votes in Private Right of Action, Standing, Attorneys' Fees, and Arbitration Cases

Justice	Pro-Private Enforcement Votes (%)	Number of Issues	Conservative	Average Martin-Quinn Score
Thomas	24	86	1	4.14
Alito	25	32	1	2.68
Roberts	27	33	1	2.39
Scalia	29	133	1	2.92
Rehnquist	35	223	1	2.86
Kennedy	38	123	1	.986
O'Connor	38	150	1	.900
Burger	41	128	1	1.85
Powell	42	118	1	.924
White	52	184	1	.587
Stewart	54	83	1	.478
Souter	58	80	0	-.814
Breyer	63	75	0	-.698
Ginsburg	65	79	0	-.875
Sotomayor	69	13	0	.241
Blackmun	70	182	0	-.184
Stevens	72	216	0	-1.47
Kagan	78	9	0	.333
Marshall	78	172	0	-3.16
Brennan	81	167	0	-2.74
Douglas	91	35	0	-6.57

Table 4 lists the raw proportion of pro-private enforcement votes, relative to total votes, for each Justice who voted in more than five cases in our data. Two things stand out: First, the distribution from lowest to highest pro-private enforcement votes appears straightforwardly to track

¹⁰⁸ See generally Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

the conservative–liberal dimension. The four most anti–private enforcement scores are those of Thomas, Alito, Roberts, and Scalia. We note that of the 21 Justices listed, two of the four most anti–private enforcement Justices (Roberts and Scalia) were advocates of the unsuccessful Reagan fee bill. The four most pro–private enforcement scores are those of Stevens, Marshall, Brennan, and Douglas. White and Stewart are in the center of the Court. The table 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 score for Justices in our data. Justices above (more conservative than) the median are Stewart, Harlan, White, Powell, Kennedy, O’Connor, Burger, Roberts, Alito, Scalia, Rehnquist, and Thomas. Justices below (more liberal than) the median are Douglas, Marshall, Brennan, Stevens, Ginsburg, Souter, Breyer, Blackmun, Sotomayor, and Kagan. 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 is classified as a conservative 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 divides the Justices into two categories that do an extremely good job of predicting whether a Justice is above or below the median ratio of pro–private enforcement votes. The conservative–liberal dichotomy yielded by the Martin–Quinn scores perfectly divides our ratio 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 Thomas voting in favor of private enforcement 24% of the time, to Douglas voting in favor of private enforcement 91% of the time, and there is a roughly continuous distribution of Justices between the two poles.

Figure 4: Case Outcomes and Justice Votes in Private Enforcement Cases

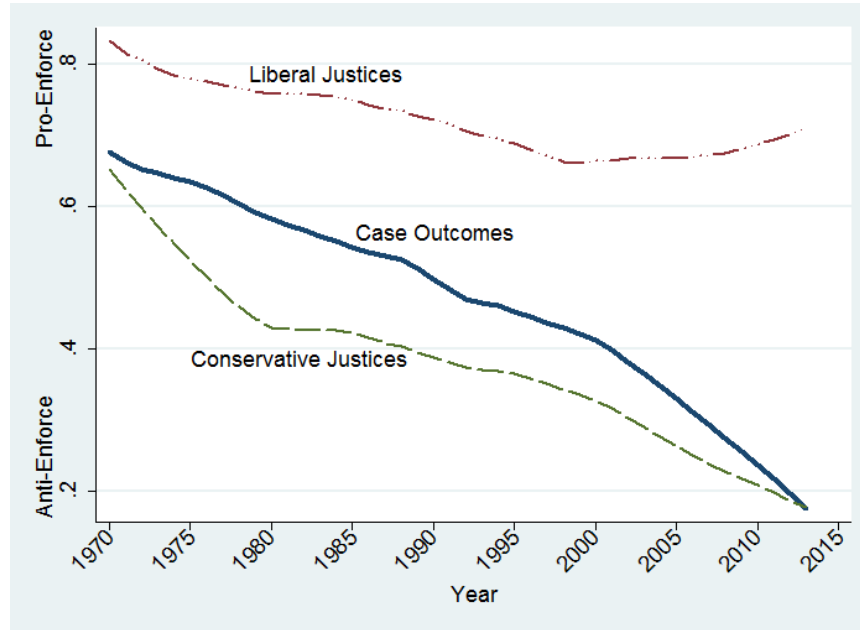


Figure 4 plots a LOWESS line estimating the probability of an outcome in favor of private enforcement, and the separate probabilities of conservative and liberal Justices' votes in favor of private enforcement. The figure reflects that the estimated probability of a pro-private enforcement outcome has undergone a long decline, from 68% in 1970 to 18% in 2013. This decline has been substantially driven by the votes of conservative Justices, whose estimated probability of a pro-private enforcement vote declined from 65% to 18% over this period. The probability of a pro-private enforcement vote declined for liberal Justices by a much smaller degree, falling from an estimated 83% in 1970 to 66% in the late 1990s, when it turned back up and grew to 71% by 2013. Thus, over the full period, the conservative decline of 47 percentage points was about quadruple the liberal decline of 12 percentage points. 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. By 2013, the Court's private enforcement outcomes converge with the votes of conservative Justices.

Further, the *difference*, or the ideological distance, between liberal and conservative Justices' voting in private enforcement cases grew over the period we examine, widening from 18 percentage points in 1970 to 33

percentage points in the early 1980s. That difference remained stable until around 2000, when it began growing again until reaching a 53 percentage point difference by 2013.

It is informative to contrast the patterns displayed in Figure 4 with the same patterns occurring in the full body of the Court's civil actions asserting federal rights. To do so, we draw upon the Spaeth Supreme Court Database.¹⁰⁹

Figure 5: Case Outcomes and Justice Votes in All Civil Federal Rights Cases

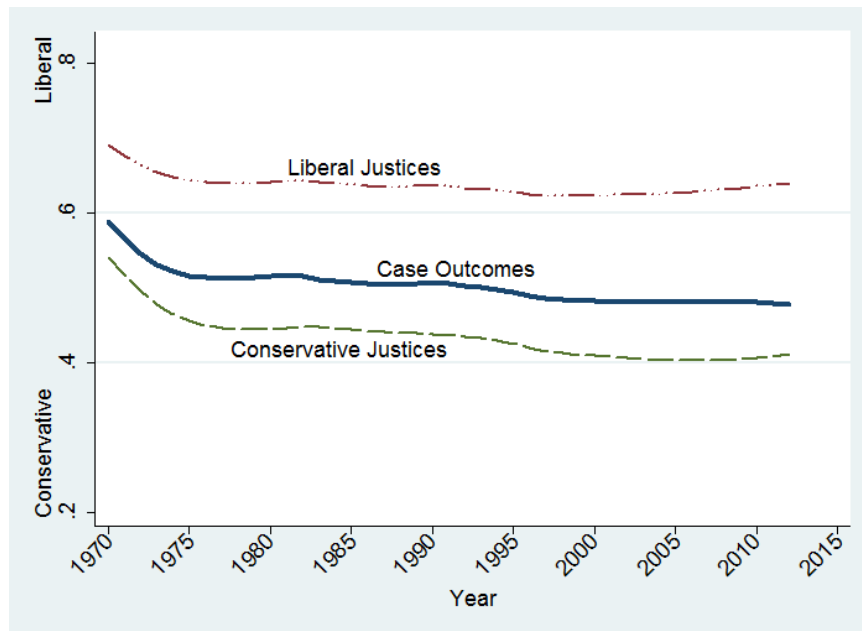


Figure 5 depicts the estimated probability of a liberal case outcome in civil actions asserting federal rights, as well as the estimated probability of a liberal vote separately for liberal and conservative Justices. Although there was a long-run 11 percentage point decline in the probability of a liberal outcome from 1970 to 2013, it was markedly smaller than the 50 percentage point decline in the probability of a pro-private enforcement vote over the same period. Further, although the difference between liberal and conservative Justices' voting in federal rights cases gradually widened from 15 to 20 percentage points over the course of the 1970s, it has since grown

¹⁰⁹ In the Spaeth data, available at <http://scdb.wustl.edu/>, we used cases with the "law type" variable coded as federal statutory or constitutional, and excluded cases with the "issue area" variable coded criminal.

only an additional 3 percentage points. As compared to this 8 percentage point growth in the difference between liberal and conservative voting in all federal rights cases over the full period, there was a 35 percentage point growth in private enforcement cases.

In our private enforcement cases, as compared to all civil cases asserting federal rights, the difference in voting between liberal and conservative Justices started out at similar levels in 1970, but then grew markedly larger in private enforcement cases by the early 1980s, where it stabilized until the end of the 1990s. It then accelerated sharply, with liberal and conservative Justices' voting separated by 53 percentage points by 2013—more than double the difference of 23 percentage points we observe in all civil actions asserting federal rights. Thus, the sharp decline in pro-private enforcement outcomes, and the polarization we observe on these issues between liberal and conservative Justices in recent years, do not track rulings in civil litigation of federal rights more generally. These effects are distinctive in private enforcement cases. Below we suggest an explanation for this notable disparity.

Figure 6: Private Enforcement Cases per Term, and Proportion with Dissents

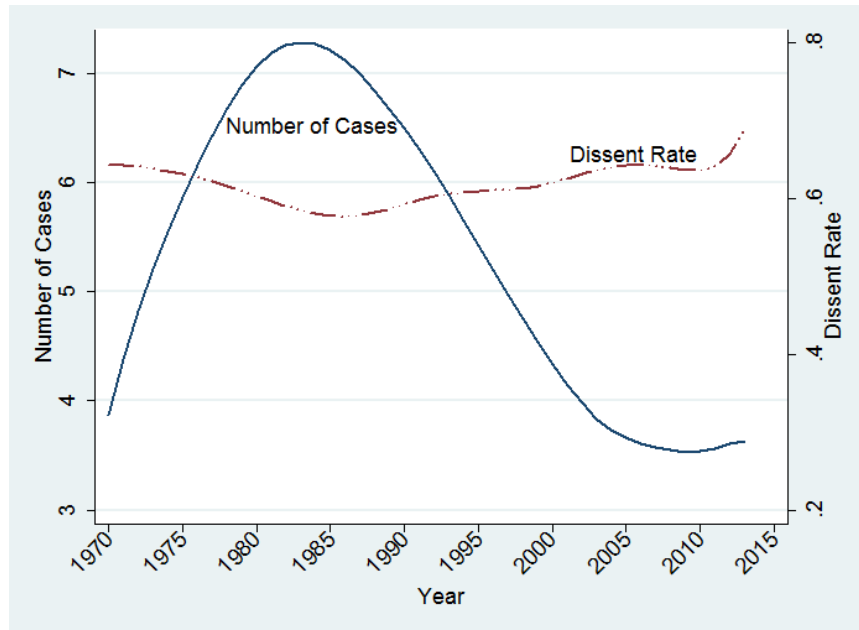


Figure 6 reflects LOWESS estimates of the number of private enforcement cases in our data that were decided each year, and the proportion of them in

which there was a dissent. The estimated number of such cases on the Court's docket grew from the early 1970s and peaked in the 1980s; it then declined until the early 2000s and plateaued until the present time. The percentage of cases with dissents has been relatively stable over the whole period, with predicted values ranging between 58% and 65%. The declining number of private enforcement cases on the docket and the relatively stable dissent rate are notable for purposes of comparison with cases interpreting the Federal Rules of Civil Procedure, which are discussed in Part IV.

We next construct a model using the votes of Justices on the private enforcement issues as our dependent variable and the Justices' ideology scores as our key independent variable. In addition to the direct incorporation of the ideology measure into our model, we also assess whether ideology had a greater effect on Justices' votes on private enforcement issues after 1994. 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.¹¹⁰ 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 1991.¹¹¹

In addition, there is a plausible case to be made that civil litigation reform grew to be 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 legislative program in 1995.¹¹² Finally, simply looking at Figure 4 reveals growing distance between liberal and conservative Justices beginning not long after 1995, suggesting the need to address this temporal dimension of the data in our empirical models.

We therefore create a variable that takes the value of 0 from 1970 to 1994, and 1 after 1994, and interact it with the Martin–Quinn ideology

¹¹⁰ See Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000*, 31 LEGIS. STUD. Q. 533, 548 (2006).

¹¹¹ See FARHANG, *supra* note 4, at 129–71.

¹¹² See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1185 & n.533 (2001); Carl Tobias, *Reforming Common Sense Legal Reforms*, 30 CONN. L. REV. 537 (1998).

score. This interaction term tests whether ideology had a different effect on Justices' votes on private enforcement issues after 1994.

We use case fixed effects to address the possibility of potential confounding factors ranging from case facts, to the clarity or indeterminacy of precedent, to changing institutional and political conditions. This approach leverages only variation in the relationship between Justices' ideology and their votes *within* cases to estimate the effects of ideology.

Although this approach allows us to estimate the effect of ideology most effectively, it comes at the cost that we cannot estimate the effects of variables that take the same value for each vote in the case. Still, the case fixed effects approach absorbs and holds constant any such influence, and in that sense, our estimates of the effects of ideology are net of any case-level or institutional variables that would take the same value for each Justice in a case.

Another limitation of case fixed effects is that it uses only information from cases with variation across Justices' votes, meaning that it can be used only for cases with a dissent. There are dissents in 60% of our cases, and thus dissents on private enforcement issues are the norm rather than the exception and our fixed effect models use most of our data. Nevertheless, the statistical models we use to estimate the effect of ideology on Justices' votes are analyzing only cases in which there was at least one dissenter. That said, we emphasize that the LOWESS plots in Figure 4, depicting trends in private enforcement case outcomes and liberal versus conservative Justices' votes, are based on all of our cases, not just those containing dissents.

Table 5: Logit Model of Justice Votes in Private Enforcement Cases, with Case Fixed Effects

	Coefficient	Marginal Effect
Ideology (Martin–Quinn)	-.66** (.09)	-.09
Ideology*Post-1994 Dummy	-.51* (.21)	-.07

N= 1739
Pseudo R²= .39

**<.01; *<.05

Standard errors in parentheses, clustered on Justice

Table 5 reports a logit model with case fixed effects. Further details of modeling specifications and choices are provided in the Appendix. The main effect of the ideology variable is significant. Because of the inclusion of the interaction, this variable reflects the effect of ideology only in the period from 1970 to 1994. The marginal effect for the coefficient is $-.09$, which means that for each unit increase in a Justice's Martin–Quinn score (which becomes more conservative as it increases), there is a corresponding reduction of 9% in the probability of a pro–private enforcement vote. To put this in substantive perspective, the distance between the mean ideology scores of conservative and liberal Justices (as defined above) is approximately 3.53. An increase of this magnitude in the ideology score moving in the conservative direction is associated with a 32% reduction in the probability of a pro–private enforcement vote.

The effect of ideology in the 1995 to 2013 period is given by summing the marginal effects of ideology ($-.09$) and its interaction with the post-1994 dummy variable ($-.07$), rendering a net marginal effect of $-.16$. In the period 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 is 57%. Relative to the average effect of ideology on Justices' votes from 1970 to 1994, it is 78% larger in the 1995 to 2013 period. It is evident that the effect of ideology on private enforcement votes became increasingly powerful over the last two decades. We discuss alternative specifications with the Segal–Cover scores substituted for the Martin–Quinn scores in the Appendix, where we observe similar results.

To attribute the Court's decisions in these areas exclusively to the ideological preferences of the Justices, however, would neglect “the messiness of lived experience,”¹¹³ which teaches that judges—even judges on a court that has the final word on matters of constitutional law—make decisions based on a number of considerations, including the law as they understand it. The many unanimous decisions that the Supreme Court issues every year likely reflect the influence of law, including precedent,¹¹⁴ and the Justices' belief in rule of law values, including stability and predictability.¹¹⁵

¹¹³ Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science, and Humility*, in *WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE* 41, 53 (Charles Gardner Geyh ed., 2011) [hereinafter Burbank, *Judicial Behaviors*].

¹¹⁴ See *id.* at 47; Frank B. Cross, *Law Is Politics*, in *id.* at 92, 100.

¹¹⁵ See Burbank, *Judicial Behaviors*, *supra* note 113, at 56; Herbert M. Kritzer & Mark J. Richards, *The Influence of Law in the Supreme Court's Search-and-Seizure Jurisprudence*, 33 *AM. POL. RES.* 33, 35 (2005).

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.¹¹⁶ Finding a suitable proxy for what we have termed "the supposed workload of the lower federal courts," however, is difficult.¹¹⁷ This helps to explain our choice of a statistical approach that allows us to control for all variables that take the same value for each Justice in the case (such as caseload in the federal courts), but that permits analysis only of cases in which there is a division of the Justices.

C. *Why the Court Succeeded Where Republicans in the Political Branches Failed*

The Supreme Court, which became increasingly conservative as a result of appointments by Republican Presidents over the period we study, had greater success in the enterprise of litigation reform than did Republicans in the political branches. Although gauging the actual effects of the Court's decisions on litigation is complex, difficult, and beyond the scope of this Article, it is clear that the Court was more successful than Republican legislative reformers in *shaping law* in the direction of litigation reform. The Court's posture toward private enforcement underwent a transformation from highly supportive in the early 1970s to antagonistic today. Why did the Court succeed where Republican reformers in the other branches failed? We believe that four institutional considerations are especially important.

First, as contrasted with the institutional fragmentation of the legislative process, the Court is governed by a more streamlined decisional process and simple voting rules, making a slim majority comparatively more capable of unilateral action on controversial issues.¹¹⁸ Four Justices suffice to put an issue on the Court's agenda, and bare majorities routinely win in decided cases, while they rarely do to enact legislation.¹¹⁹ This allows the Court to succeed in achieving policy objectives that are derailed in Congress.

¹¹⁶ There is a summary of annual case filing statistics in all such reports for the years 2000 through 2013, which is available online at <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>.

¹¹⁷ For the complexities of determining federal judicial workload, particularly given the institutional judiciary's goal of attracting more resources from Congress, see Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 23–31 (2012).

¹¹⁸ See WHITTINGTON, *supra* note 86, at 124–34.

¹¹⁹ See generally McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999); Moe, *supra* note 71.

Second, in contrast to legislators and Presidents who need to pay attention to democratic accountability through elections, federal judges are insulated from both, again allowing the Court to act more decisively on divisive issues.¹²⁰ In Part II, we suggest that some Reagan administration leaders and congressional Republicans saw potentially threatening electoral repercussions associated with litigation reform and the attendant charges of retrenching popular rights. Justices are institutionally positioned to weather such charges without threat to their continuation in office. The Court's electoral insulation and streamlined decisional and voting rules are especially advantageous when advancing a policy agenda as to which elements of a potential legislative coalition are internally divided,¹²¹ such as when Republican proponents of the fee bill were unable to marshal the support of moderate Republicans, small business, and state interests.

Third, although significant legislative reform proposals often present stark alternatives that trigger powerful interest group mobilization, the case-by-case, less visible, more evolutionary process of legal change via court decision is far less likely to trigger group mobilization than a major legislative intervention.¹²² It is therefore less likely to be obstructed.¹²³ A large transformation in private enforcement resulted from a succession of individual Court decisions, none of which may have appeared monumental in isolation.

The last two points are linked in an important way. The claim that the Court is less responsive to democratic pressures does not mean that it is not conscious of them at all. Many scholars have suggested that the Court recognizes that its public standing and legitimacy are important to its

¹²⁰ See Howard Gillman, *How Political Parties Can Use Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 521 (2002); Graber, *supra* note 86, at 65-68.

¹²¹ See Graber, *supra* note 86, at 65-68.

¹²² See *id.* See generally JEB BARNES & THOMAS F. BURKE, HOW POLICY SHAPES POLITICS: RIGHTS, COURTS, LITIGATION, AND THE STRUGGLE OVER INJURY COMPENSATION (forthcoming 2015).

¹²³ Scholars have suggested a number of indirect pathways through which interest group mobilization might be pertinent to federal judicial decisionmaking, ranging from Justices' desire to please elite audiences, see LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 89-90 (2006), to stimulating legislative attacks on the Court, see Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 376-78 (1992), to affecting the Court's perception of its public legitimacy, see generally BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

institutional power.¹²⁴ Thus, relatively broad public support for many regulatory rights, combined with the phenomenon of negativity bias, likely places some limits on the Court's perceived discretion to scale back substantive statutory rights by attacking them directly. From the standpoint of public legitimacy, the strategy of focusing on seemingly technical and legalistic issues, such as fee awards, standing, arbitration, and procedural rules, would seem a far better approach. When the Court is engaged in apparently procedural and legalistic decisionmaking, the public perceives it as more objective, neutral, and legitimate.¹²⁵ Indeed, the public is less likely to notice such decisions at all. This may explain the great disparity between the Court's overall decisions on federal rights and its decisions concerning private enforcement of federal rights, with the dramatically harder turn to the right in the latter set of cases.

Focusing on welfare state retrenchment, Jacob Hacker 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.¹²⁶ Similarly, Paul Pierson suggests the possibility that a process of retrenchment may be "invisible at the surface" while producing "long-term erosion"—like "termites working on a foundation."¹²⁷ The Court's treatment of opportunities and incentives for access to court to enforce rights over the past four decades has this quality.

¹²⁴ See generally, e.g., TOM CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* (2011); FRIEDMAN, *supra* note 123; Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J.L. ECON. & ORG. 379 (2004).

¹²⁵ See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 32 (2003); Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 104 (2000). See generally John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928 (2000).

¹²⁶ See generally Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243 (2004). We thank Sarah Staszak for suggesting this point to us.

¹²⁷ Paul Pierson, *The Rise and Reconfiguration of Activist Government*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 19, 33 (Paul Pierson & Theda Skocpol eds., 2007).

IV. THE ROLE OF PROCEDURE IN THE MOBILIZATION OR DEMOBILIZATION OF CIVIL LITIGATION

A. *The Federal Rules, 1938–1970: Opening the Courthouse Door*

The systematic evidence that we present in Part III supports and refines qualitative accounts of the Court's hostility to private enforcement over the last three decades, and it supports the view that the Court's decisions have had an increasingly ideological dimension.¹²⁸ Much of the data on which our analysis is based, however, are drawn from cases interpreting federal statutes. If one is interested in the federal judiciary's ability to influence private enforcement, it would be foolish to neglect the legal domain over which it has long been ceded the first, and for many decades essentially the final, word: federal procedural law.¹²⁹

The original Federal Rules of Civil Procedure became effective four years after the successful conclusion of a decades-long campaign to give the Court power to make prospective, legislation-like rules for the conduct of civil actions at law in the lower federal courts, akin to the rulemaking power it had long exercised under statutory delegation for suits in equity.¹³⁰ Promulgated under the Rules Enabling Act of 1934,¹³¹ following more than two years of work by an Advisory Committee appointed by the Court, the Federal Rules merged law and equity procedure, and equity emerged very much the senior partner.¹³²

The 1938 Federal Rules were litigation-friendly. To some extent, this was due to the influence of equity procedure, with the circumstances creating equity jurisdiction requiring (or the lack of a jury permitting) tolerance of claim and party joinder and of factual and legal ambiguity.¹³³ One of those circumstances made discovery, albeit limited in scope, essential, namely, the effect of common law rules categorically excluding relevant evidence on a

¹²⁸ See *supra* Part III.

¹²⁹ Here, as is usually the case when one posits dichotomies involving "procedure," numerous qualifications are in order. Some may view one of the case categories in the database for Part III—standing—as "procedural," and Professor Lemos even treats decisions interpreting statutory attorneys' fees provisions under that rubric. See Lemos, *supra* note 91, at 828. Indeed, it was partly to reduce room for argument on that score that we consider in this Part only the Federal Rules of Civil Procedure and cases interpreting them.

¹³⁰ See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1035-98 (1982) [hereinafter Burbank, *Rules Enabling Act*].

¹³¹ Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071-2077 (2012)).

¹³² See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922-26 (1987).

¹³³ See *id.* at 922.

party's ability to prove a claim or defense at trial.¹³⁴ In addition, equity's appetite for ambiguity and complexity served a hunger for justice, something that could hardly be said of the common law system of pleading.

It would be a mistake, however, to attribute the capacity of the 1938 Federal Rules to open the courthouse door primarily to the influence of equity procedure. In that respect, they are better seen as embodying the jurisprudential and social commitments of the individuals who were responsible for drafting them.¹³⁵ In rejecting common law pleading, with its obsessive quest to reach a single issue regardless of the facts, and code pleading, with its insistence on pleading all facts necessary to constitute a cause of action, the drafters of the 1938 Federal Rules embraced the insights of legal realism.¹³⁶ Pleadings are an inferior method to find out what actually happened (and if, as in common law procedure, they are often an exercise in fiction, they are useless for that purpose).

Of course, implementing the view that pleading should play but a minor role in litigation required other means to ascertain facts that did not share the inefficiencies of the common law trial. For that, the architects of the 1938 Federal Rules wrote rules that afforded much broader discovery than had been available in equity or in any of the merged systems in the states.¹³⁷ Such broad discovery appealed to the empirical commitments of the Legal Realists. But it also appealed to the commitments of the Progressive movement in American law, of which the chief architect of the Federal Rules on discovery had long been a proponent.¹³⁸ The Progressives gained prominence in the early twentieth century, reacting to the excesses of the

¹³⁴ See ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 204, 207 (1952).

¹³⁵ The most important members for this purpose were Charles E. Clark, the Reporter and Dean of Yale Law School, and Edson R. Sunderland, a professor at the University of Michigan Law School. On Clark, see Subrin, *supra* note 132, at 961-73. On Sunderland, see Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 596-603 (2004) [hereinafter Burbank, *Vanishing Trials*]. For an interesting article arguing that "there is a strong connection between the rise of Legal Realism and the prominence of legal procedure in America," see Paul MacMahon, *Proceduralism, Civil Justice, and American Legal Thought*, 34 U. PA. J. INT'L L. 545, 584 (2013).

¹³⁶ "Clark was impressed with the [realists'] observation that one could not define what was a fact, evidence, or ultimate fact in a scientific way, and that such terms were best seen as a continuum, without logical cutoff points." Subrin, *supra* note 132, at 966.

¹³⁷ See Burbank, *Vanishing Trials*, *supra* note 135, at 597-98; Edson R. Sunderland, *An Appraisal of English Procedure*, 24 MICH. L. REV. 109, 113-16 (1925) [hereinafter Sunderland, *Appraisal*]; Edson R. Sunderland, *Discovery Before Trial under the New Federal Rules*, 15 TENN. L. REV. 737, 738-40 (1939).

¹³⁸ See Sunderland, *Appraisal*, *supra* note 137, at 116 ("The spirit of the times calls for disclosure, not concealment, in every field . . ."); *id.* at 136 ("The legal profession alone halts and hesitates. If it is to retain the esteem and confidence of a progressive age it must itself become progressive."); see also Burbank, *Vanishing Trials*, *supra* note 135, at 597-98 n.20.

Industrial Revolution through a campaign for what they called “legibility”—we would say transparency. They contended that effective regulation was impossible without access to the facts concerning the regulated enterprise.¹³⁹ The system of broad discovery ushered in by the 1938 Federal Rules conferred on private litigants and their attorneys the functional equivalent of administrative subpoena power.¹⁴⁰

Thus, the architects of the 1938 Federal Rules constructed a broad highway for litigation that was free of some imposing obstacles characteristic of many other systems.¹⁴¹ The “highway effect” was not, however, evident for many years. More precisely, a small federal judiciary managed to dispose of a relatively small caseload without evident strain for more than twenty years after the Federal Rules went into effect.¹⁴² A fruitful way to home in on what changed—and what may explain the crowded federal litigation highway—is to consider conventional accounts of the so-called American litigation explosion.

¹³⁹ See Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, 16 *STUD. AM. POL. DEV.* 61, 83-85 (2002).

¹⁴⁰ See Paul D. Carrington, *Renovating Discovery*, 49 *ALA. L. REV.* 51, 54 (1997); Patrick Higginbotham, *Foreword*, 49 *ALA. L. REV.* 1, 4-5 (1997).

¹⁴¹ Of course, those who drafted the original Federal Rules were not free agents. On the non-academic members of the original Advisory Committee, see Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 *NOTRE DAME L. REV.* 1677, 1718 & n.184 (2004) [hereinafter Burbank, *Role of Congress*].

¹⁴² Annual Reports of the Director of the Administrative Office of the United States Courts yield the following case data for civil and criminal cases filed in district courts and for cases in the courts of appeals:

Selected Civil and Criminal Case Statistics, with Authorized Judgeships

Year	Civil Cases	District Courts		Courts of Appeals	
		Criminal Cases	Authorized Judgeships	Total Cases	Authorized Judgeships
1940	34,200	33,221	186, 2T	3446	57
1945	52,568 (28,359 OPA cases)	37,437	189	2780	59
1950	54,622	33,739	212	2830	65
1960	57,521	28,137	241	3899	68
1970	87,321	38,003	394, 1T	11,662	97

ADMIN. OFFICE OF U.S. COURTS, AUTHORIZED JUDGESHIPS - FROM 1789 TO PRESENT, available at <http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=uscourts/JudgesJudgeships/docs/all-judgeships.pdf>. For the hazards of using case filing data to determine workload, see *supra* note 117.

According to those accounts, the tremendous increase in civil cases in the 1970s¹⁴³ was the product of a litigious population, an imperial judiciary, and an entrepreneurial bar.¹⁴⁴ Whatever one thinks of the empirical basis for such accounts,¹⁴⁵ within them lies an important clue to the willingness and ability of more and more American individuals and firms to sue in federal court. The American bar did not wake up in 1970 and decide to become more entrepreneurial. Contingent fee arrangements “have a long history in the United States.”¹⁴⁶ Court decisions in the 1970s did disassemble some restrictive and anti-competitive rules of a self-regulating profession.¹⁴⁷ Much more important, however, was the fact that Congress provided incentives that made certain types of litigation which had not been financially feasible—or, if feasible, not sufficiently rewarding even on a contingent fee basis—promising opportunities for the investment of lawyers’ time and money.¹⁴⁸

Financial incentives, intended to encourage lawyers to represent those Congress endowed with a host of new statutory social and economic rights, were cabined by the substantive reach of the statutes providing them. In 1966, however, the rulemaking process produced amendments to Rule 23 that substantially expanded the scope of a trans-substantive financial incentive. That is because the 1966 amendments enlarged, potentially enormously, the domain of damages class actions, and such actions are subject to a judicially developed exception to the American Rule on fee shifting that permits one who has created a common fund to be reimbursed out of the fund.¹⁴⁹

¹⁴³ See *supra* text accompanying notes 3-4.

¹⁴⁴ See FARHANG, *supra* note 4, at 13-14, 69.

¹⁴⁵ “Notwithstanding a decades-long organized campaign by American business to demonize lawyers and litigation, there is robust empirical evidence supporting [Professor Robert] Kagan’s observation that ‘[m]any, perhaps most, Americans are reluctant to sue’” Burbank et al., *supra* note 7, at 646 (quoting KAGAN, *supra* note 13, at 34).

¹⁴⁶ See Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 744 (2002).

¹⁴⁷ See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 382, 384 (1977) (striking down Arizona’s ban on lawyer advertising); Burbank et al., *supra* note 7, at 647.

¹⁴⁸ See *supra* text accompanying notes 7-11. For an interesting and valuable account of the development of the plaintiffs’ bar as a business and the rhetorical challenges thereby posed for its champions in responding to anti-lawyer attacks, see Yeazell, *supra* note 34, at 1755. Professor Yeazell largely neglects, however, the role that statutory private enforcement regimes played in the evolution of the plaintiffs’ bar.

¹⁴⁹ See Burbank et al., *supra* note 7, at 654-55.

B. Procedure, Litigation, and Litigation Reform: 1971–1988

As we have seen, once the power of statutory private enforcement regimes and of the revised class action rule to stimulate litigation on the broad highway created by the 1938 Federal Rules became apparent, the Reagan administration advocated, and legislative opponents introduced, bills to dismantle or undermine private enforcement regimes. But, the stickiness of the legislative status quo, coupled with “negativity bias” or an “endowment effect,” makes repealing or consequentially amending legislation that confers popular rights more difficult than enacting it in the first place.¹⁵⁰

The judiciary is not similarly constrained—although, of course, courts are subject to other constraints¹⁵¹—which helps to explain why, as we demonstrate in Part III, an increasingly conservative Supreme Court had greater success in retrenching private enforcement. Moreover, the judiciary need not wait for cases requiring the interpretation of federal statutes to affect the volume or mix of litigation. Effective control of procedure ensures that means are available for a judiciary that is ideologically distant or driven by institutional self-interest to frustrate legislative preferences by constricting access to court.

1. Retrenchment by Rulemaking: A Brief Experiment

The perception that the institutional interests of the judiciary—in particular, the interest in active judicial management of a burgeoning docket—were no longer in sync with the interests of practicing lawyers, coupled with the desire to control the agenda of litigation reform, likely played an important role in the decision by the Chief Justice of the United States, who appoints all members of rulemaking committees, to change the balance of power on the key committees.¹⁵² The original 1930s Advisory Committee did not include even one sitting judge.¹⁵³ Representation of practitioners declined over time, but even in the 1960s, there were never

¹⁵⁰ See *supra* text accompanying notes 71–73.

¹⁵¹ See *supra* note 123.

¹⁵² See Burbank, *Role of Congress*, *supra* note 141, at 1714–15, 1720–23. “The risk of a rupture between federal judges and the bar was realized when, in response to a perceived crisis of expense and delay, judges pursued rulemaking strategies that either empowered them at the expense of lawyers and their clients (sanctions and active case management) or that simply disempowered lawyers (discovery reform).” *Id.* at 1722. For attempts by the federal judiciary to distance itself from the bar in this period, see Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 *YALE L. & POL’Y REV.* 33, 47 n.71 (2012).

¹⁵³ See Burbank, *Role of Congress*, *supra* note 141, at 1714 & n.167.

more than three judges, nor less than seven practitioners, on the Advisory Committee.¹⁵⁴ Under Chief Justice Burger, the key committees came to be dominated by judges, who are presumably more likely than lawyers or academics to protect institutional interests, as well as more susceptible to direction from on high.¹⁵⁵ Moreover, Burger's appointments of judges to the Advisory Committee markedly favored judges appointed by Republican Presidents, reinforcing our judgment that he sought to use appointments to influence the development of civil rules.¹⁵⁶ Burger made no secret of his antipathy toward the "litigation explosion" of the 1970s, a phrase that some credit him with coining.¹⁵⁷ One commentator observed that in the 1970s, "Chief Justice Burger frequently spoke out against what he and many others perceived as excessive litigation," and that "[s]cholars have characterized the Burger-organized Pound Conference in 1976 as the most important event in the counteroffensive against notice pleading and broad discovery."¹⁵⁸

In 1971, two months before he was nominated to the Supreme Court, Lewis Powell wrote a confidential memorandum to the chair of the Education Committee of the Chamber of Commerce, describing a "broad attack" on the "American economic system" and the steps that he recommended in response.¹⁵⁹ Powell observed that "American business and the enterprise system have been affected as much by the courts as by the executive and legislative branches of government" and argued that "especially with an

¹⁵⁴ These data are drawn from a database of the Advisory Committee's composition from 1960 to the present that we have compiled in connection with our next paper in the ongoing project. During the entire decade, judges constituted on average 18.15% of the Advisory Committee, while practitioners constituted 55.10%. The remaining members were academics (23.16%) and representatives from government serving ex officio (3.59%).

¹⁵⁵ See Burbank, *Role of Congress*, *supra* note 141, at 1714-15; Stephen C. Yeazell, *Judging Rules, Ruling Judges*, *LAW & CONTEMP. PROBS.*, Summer 1998, at 229, 237-38. For evidence of Chief Justice Burger's influence on the agenda and the rulemakers, see *infra* text accompanying note 172.

¹⁵⁶ See generally Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking: An Institutional Approach*, 15 *NEV. L.J.* (forthcoming 2014).

¹⁵⁷ Kenneth F. Dunham, *The Future of Court-Annexed Dispute Resolution Is Mediation*, 5 *JONES L. REV.* 35, 36 (2001). Although Burger clearly had major concerns with workload pressures, his critique of "litigiousness" also had a normative valence, reflected in his public statement that "mass neurosis . . . leads people to think courts were created to solve all the problems of society." *Chief Justice Urges Greater Use of Arbitration*, *N.Y. TIMES*, Aug. 22, 1985, at A21.

¹⁵⁸ Mike Tonsing, *Symposium on Proposed Changes to FRCP: An Introduction*, *FED. LAW.*, Sept. 2004, at 22, 25; see also Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform"*, *LAW & CONTEMP. PROBS.*, Spring/Summer 2001, at 197, 207; Carl Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 *ARIZ. ST. L.J.* 615, 620 (2002).

¹⁵⁹ Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce, *Attack on American Free Enterprise System 1* (Aug. 23, 1971), available at <http://law.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf>.

activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change.”¹⁶⁰ He further contended that “[o]ther organizations and groups, recognizing this, have been far more astute in exploiting judicial action than American business,” singling out the American Civil Liberties Union (ACLU) and noting that “[l]abor unions, civil rights groups and now the public interest law firms are extremely active in the judicial arena” and that “[t]heir success, often at business’ expense, has not been inconsequential.”¹⁶¹ Powell concluded that “[t]his is a vast area of opportunity for the Chamber.”¹⁶²

In 1980, Justice Powell, joined by two colleagues, dissented from the promulgation of proposed amendments to the Federal Rules on discovery that were designed to address the perceived problems of expense and delay in federal civil litigation, deriding the amendments as “tinkering changes” that would “delay for years the adoption of genuinely effective reforms.”¹⁶³ Thus goaded to propose stronger measures, the rulemakers sought to establish litigation sanctions and case management as the prime weapons with which to attack cost, delay, and perceived excessive litigation. The sanctions proposals, in particular the proposed amendments to Rule 11, lacked empirical or jurisprudential foundation, which helps to explain why they were controversial and elicited widespread opposition from the bar.¹⁶⁴ Indeed, the opposition to the Rule 11 proposals was so strong that opponents almost succeeded in blocking the 1983 proposed amendments in Congress.¹⁶⁵ The Democratic-controlled House passed a bill to prevent the proposed amendments from taking effect. In the Republican-controlled Senate, however, although “a bill to delay their effectiveness was sitting in the well of the Senate on the appropriate morning[,] . . . no one hauled it out.”¹⁶⁶

¹⁶⁰ *Id.* at 26.

¹⁶¹ *Id.* at 26-27.

¹⁶² *Id.* at 27.

¹⁶³ Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (dissenting statement of Powell, J., joined by Stewart & Rehnquist, JJ.).

¹⁶⁴ See RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 3 (Stephen B. Burbank reporter, 1989) [hereinafter RULE 11 IN TRANSITION]; Burbank, *Role of Congress*, *supra* note 141, at 1722-23.

¹⁶⁵ Since blocking proposed amendments requires legislation, opponents must navigate the separation of powers and checks and balances gauntlet previously discussed. See *supra* text accompanying notes 71-73.

¹⁶⁶ ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 1 (1984).

From sanctions and case management, the Civil Rules Committee turned its attention to Rule 68 on offers of judgment, which seeks to promote settlements through financial incentives that are keyed to a comparison of a rejected offer and a subsequent judgment.¹⁶⁷ In 1983, the rulemakers proposed amendments that were ostensibly designed to enhance the Rule's effectiveness, the most controversial of which was to add the opponent's attorneys' fees to costs as the price of guessing wrong about whether a judgment would exceed the offer.¹⁶⁸ One of the problems with amended Rule 11 was that it could be, and indeed was, used by some lower federal courts effectively to reverse the American Rule by employing attorneys' fees as the sanction for complaints found to violate the Rule.¹⁶⁹ The 1983 proposal to amend Rule 68 put at risk both the trans-substantive American Rule and one-way statutory fee-shifting provisions, notably those applicable to civil rights legislation.¹⁷⁰

It is suggestive of the Chief Justice's influence on federal court rulemaking in the early 1980s that the Advisory Committee, all appointed by Burger, elected to forge ahead. It had barely survived the Rule 11 override effort and had been forcefully and repeatedly alerted to serious problems with its 1983 proposal to amend Rule 68, including by Robert Kastenmeier, the Democratic chair of the subcommittee of the House Judiciary Committee with jurisdiction over the federal judiciary.¹⁷¹ Encouraged by the Chief Justice,¹⁷² the Committee substituted a 1984 proposal that sought to obscure

¹⁶⁷ See FED. R. CIV. P. 68.

¹⁶⁸ See *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 339, 361-67 (1983).

¹⁶⁹ See RULE 11 IN TRANSITION, *supra* note 164, at 10, 13, 37; Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1947 (1989) [hereinafter Burbank, *Transformation*].

¹⁷⁰ See Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425, 428 (1986) [hereinafter Burbank, *Proposals to Amend*].

¹⁷¹ In floor remarks on October 1, 1984, Representative Robert W. Kastenmeier argued that the 1983 proposal "would have crossed the line from procedural to substantive [under the Enabling Act]," and that "Congress conferred a substantive right by enacting the Civil Rights Attorney Fee Award Act." 130 CONG. REC. E4104, E4105 n.3 (daily ed. Oct. 1, 1984) (statement of Rep. Kastenmeier).

¹⁷² See WARREN E. BURGER, 1985 YEAR-END REPORT ON THE JUDICIARY 12 (1985). "The Chief Justice has nevertheless continued, both publicly and privately, to urge the adoption of [the 1984 Rule 68 proposal and a proposal to amend Habeas Rule 9]." Letter from Nan Aron, Laura Macklin, Judith Resnik, Dennis E. Curtis & William Genego to Hon. Robert W. Kastenmeier, Chairman, H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice 2 (June 5, 1985) [hereinafter Aron Letter], reprinted in *Rules Enabling Act of 1985: Hearing Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 99th Cong. 190, 191 (1985) [hereinafter *1985 House Hearing*].

the problems by switching from fee shifting to sanctions and from mandatory to discretionary consequences for failing to beat an offer of judgment.¹⁷³

Opposition persisted, including from Kastenmeier, who ultimately wrote a letter to the new Chair of the Advisory Committee giving notice that he was “very concerned” about the proposals.¹⁷⁴ Indeed, as we discuss below, over the course of three hearings in the House from 1983 to 1985, proposals to amend Rule 68 came to occupy center stage in the discussion of changes in the Enabling Act process.¹⁷⁵

2. Changes in the Process of Making Procedural Law by Federal Rule: Lessons in Control Strategy

The controversies over Rule 11 and Rule 68 in the early 1980s came on the heels of a decade in which Congress for the first time blocked proposed Federal Rules—the proposed Federal Rules of Evidence—from becoming effective, and thereafter blocked a number of other proposed amendments, albeit mostly proposed amendments to the Federal Rules of Criminal Procedure.¹⁷⁶ The 1970s was, moreover, a decade in which a number of thoughtful proposals for rulemaking reform appeared in the academic and professional literature, and in which a number of bills designed to implement reforms were introduced in Congress.¹⁷⁷ In addition, the rule-specific controversies of the early 1980s came at about the time when (1) the Federal Judicial Center published a study, undertaken at the request of Chief Justice Burger, that comprehensively reviewed the arguments for and against changes in the Enabling Act process,¹⁷⁸ and (2) the American Bar Association approved a policy that advocated substantial changes in that process.¹⁷⁹

Both the controversy concerning the Enabling Act process and controversies arising from specific rulemaking proposals led to a series of oversight hearings in the Democratic-controlled House of Representatives—one each in 1983, 1984, and 1985. The hearings were convened at the

¹⁷³ See Burbank, *Proposals to Amend*, *supra* note 170, at 426-30. For the text of the 1984 proposal, see *id.* at 428-29 n.20.

¹⁷⁴ Letter from Hon. Robert W. Kastenmeier to Hon. Frank M. Johnson, Jr. (July 31, 1985), *quoted in* Burbank, *Proposals to Amend*, *supra* note 170, at 440 n.81. Ultimately, however, the rulemakers did abandon ship. See Burbank, *Proposals to Amend*, *supra* note 170, at 439-40.

¹⁷⁵ See *infra* text accompanying notes 180-82, 200.

¹⁷⁶ See Burbank, *Rules Enabling Act*, *supra* note 130, at 1018-20 & n.10.

¹⁷⁷ See *id.* at 1020.

¹⁷⁸ See WINIFRED R. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES (1981); see also Burbank, *Rules Enabling Act*, *supra* note 130, at 1020-21.

¹⁷⁹ See American Bar Association Policy on the Rules Enabling Act (1982), *reprinted in* *Rules Enabling Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 98th Cong. 46 (1985) [hereinafter *1983 and 1984 House Hearings*].

instance of Representative Robert Kastenmeier who, as previously noted, was the Democratic chair of the subcommittee of the House Judiciary Committee with jurisdiction over the federal judiciary. The first hearing focused on general issues—in particular, on arguments that the Enabling Act process was insufficiently inclusive and insufficiently transparent. Much of the testimony at subsequent hearings addressed proposed legislation to implement comprehensive reforms that Kastenmeier had introduced.¹⁸⁰ Yet attention at those subsequent hearings increasingly turned to the question whether the rulemakers had acted, or were proposing to act, beyond the limits of the Enabling Act, thereby subverting congressional preferences. The proposals to amend Rule 68 assumed greater prominence in the 1984 and 1985 hearings, as did arguments that those proposals put at risk private enforcement regimes that Congress had carefully constructed to vindicate substantive civil rights law.

Although some of the testimony and discussion at the House hearings lacked obvious ideological or partisan valence, it is difficult to so describe most of the testimony and discussion concerning Rule 68.¹⁸¹ A submission by the Alliance for Justice—an umbrella organization representing a wide range of liberal public interest groups—about the 1983 and 1984 proposals specifically linked them to unsuccessful partisan attempts in Congress on behalf of the Reagan administration to curb fee shifting.¹⁸² There was substantial overlap between the liberal public interest organizations (and their individual representatives) opposing anti-private enforcement moves in the legislative and the rulemaking processes.¹⁸³ There was also substantial overlap between the organizations opposing the Rule 68 proposals, who sought to protect statutory private enforcement regimes, and the groups singled out by Powell in his 1971 memorandum as “extremely active in the

¹⁸⁰ See generally *1983 and 1984 House Hearings*, *supra* note 179.

¹⁸¹ Professor Staszak emphasizes the ideological and partisan motivation in the post-1994 rule reform activity of “Republican legislators and business lobbyists interested in retrenching tort and public interest litigation, primarily through class action reform.” Staszak, *supra* note 20, at 173; see also *id.* at 188. We agree, and we stress that there also existed ideological and partisan motivation among some who opposed the Rule 68 proposals and advocated rulemaking reform in the 1980s. Although it grew more intense in the mid-1990s, partisan and ideological conflict over the Federal Rules of Civil Procedure emerged in Congress in the early to mid-1980s.

¹⁸² See Testimony of the Alliance for Justice on the 1984 Proposal to Amend Rule 68 Before the Judicial Conference Advisory Committee on Civil Rules (Jan. 28, 1985), *reprinted in 1985 House Hearing*, *supra* note 172, at 113, 144 (referring to the fee bill discussed in Part II, *supra*).

¹⁸³ Both the ACLU and the Alliance for Justice had publicly attacked the Reagan fee bill. See Barbash, *supra* note 44, at A25; Mary Thornton, *Plaintiffs’ Legal Fees Attacked by OMB*, WASH. POST, Aug. 12, 1982, at A21; see also Memorandum from Jonathan C. Rose to Edward C. Schmults, *supra* note 79.

judicial arena.”¹⁸⁴ Burt Neuborne, then the National Legal Director of the ACLU, described the story told by the traditional rhetoric of procedure as “a myth” and intimated his willingness to acquiesce in “exempt[ing] . . . procedural rules from the traditional democratic process” only because (and so long as) the rulemakers produced “good rules” from his perspective.¹⁸⁵ Like others testifying at the hearings—most prominently Alan Morrison of Ralph Nader’s Public Citizen Litigation Group¹⁸⁶—Neuborne had in mind specific communities, in particular the civil rights community, whose views the Enabling Act process—with unrepresentative committees that did not actively seek a broad base of information—had tended to exclude.¹⁸⁷

These hearings culminated in amendments to the Enabling Act in the 100th Congress (1987–1988), which was the first in which Democrats controlled both chambers since the emergence of the civil rules controversies in the early 1980s. Scholars have disagreed about the extent to which the changes in the Enabling Act process that occurred during the 1980s and the changes that were formally prescribed by statute in 1988 should be attributed to the judiciary or to Congress.¹⁸⁸ The dichotomy is misleading. A dynamic of institutional dialogue in the shadow of possible legislation yielded different results—different winners and losers—on a range of matters that were important to those seeking reform. Spurred by the rulemaking controversies of the 1970s and by the Chief Justice’s apparent willingness to consider reform, the judiciary had experimented with some changes prior to the congressional hearings convened by Representative Kastenmeier,¹⁸⁹ but it was not institutionally committed to any of them until, avowedly in response to those hearings, the rulemakers finally made public a set of rulemaking procedures to which they could be held accountable (to the extent that a failure to follow internally generated procedures would have consequences).¹⁹⁰ Moreover, the judiciary sought to maintain as much power and autonomy as possible. Its representative, Judge Gignoux, thus

¹⁸⁴ See Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., *supra* note 159, at 26–27; see also *supra* text accompanying note 156.

¹⁸⁵ 1983 and 1984 House Hearings, *supra* note 179, at 150 (statement of Burt Neuborne, Legal Director, Am. Civil Liberties Union (ACLU)).

¹⁸⁶ See *id.* at 28, 29–30, 35 (statement of Alan Morrison, Director, Pub. Citizens Litig. Grp.); see also *id.* at 272 (statement of Burt Neuborne).

¹⁸⁷ See *id.* at 147–48 (statement of Burt Neuborne).

¹⁸⁸ See Burbank, *Role of Congress*, *supra* note 141, at 1724 n.206 (discussing differing views of Professors Bone and Geyh).

¹⁸⁹ See, e.g., 1983 and 1984 House Hearings, *supra* note 179, at 4–5, 10 (statement of Hon. Edward Thaxter Gignoux, Chairman, Standing Comm. on Rules of Practice and Procedure, Judicial Conference of the United States).

¹⁹⁰ See *id.* at 90 (statement of Judge Gignoux).

continued to resist legislatively prescribed rulemaking procedures, arguing that legislation would lack adequate flexibility and was largely unnecessary given the action taken by the judiciary.¹⁹¹ He also continued to resist a requirement of open meetings.¹⁹²

The rulemaking changes urged upon, and in some cases statutorily required of, the federal judiciary were similar to changes that Congress had imposed on executive branch advisory committees and administrative agencies in the 1970s.¹⁹³ In both domains, concern about abuse of delegated lawmaking power was attended by skepticism about the expertise of those exercising such power or the effective monopoly that deference to the claim of expertise conferred. In the 1988 legislation, Congress required rulemaking committees to hold open meetings preceded by “sufficient notice to enable all interested persons to attend,” to keep and make available to the public minutes of such meetings, and to provide an explanatory note with any proposed rule, as well as a report “including any minority or other separate views.”¹⁹⁴ It also lengthened the minimum period before proposed Federal Rules promulgated by the Court can become effective from three to seven months.¹⁹⁵ With these amendments, Congress ensured that interest groups with a perceived stake in the subject of proposed rulemaking could both provide pertinent information to the rulemakers and serve as whistleblowers in the event they thought something was seriously wrong. Congress also effectively increased the evidentiary burden on the Advisory Committee when seeking to change the status quo and increased the window of time for vetoing attempted rule changes.

The goal was not to “control” the rulemaking function by taking it over.¹⁹⁶ On the contrary, numerous participants in the lawmaking process

¹⁹¹ See, e.g., *id.* at 90, 100, 103 (statement of Judge Gignoux).

¹⁹² See, e.g., 1985 *House Hearing*, *supra* note 172, at 239, 249 (Statement of Hon. Edward T. Gignoux, Chairman, Standing Comm. on Rules of Practice and Procedure, Judicial Conference of the United States); 1983 and 1984 *House Hearings*, *supra* note 179, at 11, 18-19 (statement of Judge Gignoux).

¹⁹³ See 1983 and 1984 *House Hearings*, *supra* note 179, at 33, 35 (statement of Alan Morrison, Director, Pub. Citizen Litig. Grp.); Burbank, *Role of Congress*, *supra* note 141, at 1711.

¹⁹⁴ See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4649 (1988) (codified as amended at 28 U.S.C. § 2073(c)(2), (d) (2012)) [hereinafter 1988 Act].

¹⁹⁵ See *id.*

¹⁹⁶ Professor Staszak argues that by the 1990s “rulemaking authority had thoroughly shifted . . . to legislative dominance of the rulemaking process.” Staszak, *supra* note 20, at 183. In contrast, we emphasize that an oft-stated goal of 1980s reformers was to extricate Congress from routine ex post monitoring. In our view, the primary brake on rulemaking since the reforms of the 1980s has not been Congress itself, where blocking a proposed Federal Rule is difficult, but the stickiness of the *rulemaking* status quo for which the reforms were in part responsible. Cf. Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 253-64 (1987) (arguing that notice-and-comment

leading to the 1988 reforms lauded them for reducing the need for congressional action at the end of the process.¹⁹⁷ Reform was a control strategy designed, at the least, to free Congress from regular active involvement, easing the legislative costs of monitoring the rulemakers *ex post*. Such a strategy has no intrinsic ideological or partisan valence. However, the convergence of attacks by liberal public interest groups and Democratic members of Congress on specific products of one rulemaking process undertaken by a committee appointed by a Republican Chief Justice, and concurrent advocacy of changes to that process, reflect a more ambitious partisan or ideological agenda than is evident by considering either element in isolation.

A study of the political origins of the Administrative Procedure Act (APA) supports the hypothesis that New Deal Democrats changed their position on the APA in 1946 because they feared losing control of Congress and the presidency, and they were comfortable giving federal judges—most of whom had been appointed by President Roosevelt—the power to check the agencies they feared would come under Republican control. The New Deal Democrats' support represented, in part, a strategic use of statutory process to increase the cost and political difficulty for administrative agencies to change the status quo, in particular the laws and regulations enacted by a series of Democratic Congresses and agencies in the New Deal period.¹⁹⁸ This legislative strategy deployed formal administrative process in order to, among other things, empower and mobilize interest group monitoring of agency actions, and impose burdens of evidence and justification upon agencies seeking to change the status quo, thereby lessening the necessity of active oversight by Congress.¹⁹⁹

The changes to the rulemaking process advocated and promoted by interest groups and members of Congress in the 1980s served similar strategic goals. ACLU National Legal Director Burt Neuborne's testimony at the 1984 House hearing suggested a goal of using process changes to preserve "good rules" as the civil rights and civil liberties community would

requirements overcome informational inequalities and, together with a requirement of written justification based on evidence, can empower groups to oppose administrative action and increase the costs of administrators to implement policies that are opposed); *id.* at 254 ("[A]n important function of administrative procedures is to provide a means of inducing bureaucratic compliance that does not require the time, effort, and resources of political actors.").

¹⁹⁷ See, e.g., *1983 and 1984 House Hearings*, *supra* note 179, at 33, 38 (statement of Alan Morrison); *id.* at 154-55 (introductory remarks of Hon. Robert W. Kastenmeier); Letter from Stephen B. Burbank to Hon. Robert Kastenmeier (Jan. 13, 1984), *reprinted in id.*, at 204, 213.

¹⁹⁸ See McNollgast, *supra* note 119, at 192.

¹⁹⁹ See *id.* at 198-99. See Generally Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

define them.²⁰⁰ Under the 1980s reforms, the trans-substantive reach of Federal Rules assures monitoring by a broad swath of interest groups. Such monitoring should make it more difficult for the rulemakers to exceed their charter by providing a credible threat of whistleblowing if the rulemakers proceed with proposals deemed to be *ultra vires*, unsupported by evidence, or otherwise seriously objectionable.

Unlike the situation under the APA, the courts are not realistically available to preserve the status quo by policing the Federal Rules' compliance with the terms of the statutory delegation. The inadequacy of the Court's jurisprudence interpreting the Enabling Act's limitations was a source of complaint during the House hearings.²⁰¹ Yet, even though a goal of the Enabling Act process reforms was to lessen legislative monitoring costs, a "second bite at the apple" is available to "organized interests that seek to preserve the status quo" through the provision requiring proposed Federal Rules to lie before Congress before becoming effective.²⁰²

After 1988, as before, it is difficult to muster the forces needed to pass legislation that blocks a Federal Rule promulgated by the Supreme Court. Moreover, securing such legislation may be especially difficult because a vote against a proposed trans-substantive Federal Rule may help some constituents or interests while harming others.²⁰³ It is rather the 1980s process changes, combined with other influences promoting institutional self-restraint, that make bold reforms difficult to achieve.²⁰⁴

Although Holmes famously observed that "[i]gnorance is the best of law reformers,"²⁰⁵ he did not mean that it produces the best law reforms. Traditionally, Federal Rules were more often based on limited anecdotal

²⁰⁰ See *supra* note 180 and accompanying text.

²⁰¹ See, e.g., Aron Letter, *supra* note 172, at 233-34; Letter from Stephen B. Burbank to Hon. Robert Kastenmeier, *supra* note 197, at 208-11. Indeed, as we discuss below, the courts have become the major venue for those who seek to *change* the status quo.

²⁰² McNollgast, *supra* note 119, at 181. "Perhaps, however, describing the phenomenon as one of redundancy is tendentious. In the absence of effective judicial review of court rules, (the potential for) congressional review becomes the only feasible alternative." Burbank, *Role of Congress*, *supra* note 141, at 1725. For the current version of the "report-and-wait" provision, which gives Congress seven months to block a proposed Federal Rule or amendment, see 28 U.S.C. § 2074(a) (2012).

²⁰³ Cf. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 885 (1975) (discussing the problem of congressional actions that "impose costs on all who use the courts, including various politically effective groups and indeed the beneficiaries of whatever legislation the current legislature has enacted").

²⁰⁴ See Burbank, *Role of Congress*, *supra* note 141, at 1736-37.

²⁰⁵ OLIVER WENDELL HOLMES, *THE COMMON LAW* 64 (Mark DeWolfe Howe ed., 1963).

evidence than on systematic empirical data.²⁰⁶ To some extent, no doubt, their epistemic shallowness reflected the time and money necessary for empirical work. But it also well served a commitment not to let facts get in the way of reforms desired by the rulemakers and those who influenced them, and the rulemakers' wish to be perceived as neutral, making choices behind a "veil of ignorance."²⁰⁷ Empirical study is a threat to ignorance and thus to claims of neutrality.

C. *Bad Habits Die Hard: 1989–2000*

The 1993 amendments to Rule 11 demonstrated the power of systematic empirical data to discipline improvident rulemaking, albeit ex post, confirming the existence of an empirical vacuum underlying the version of Rule 11 the rulemakers replaced. Unfortunately, however, they were paired with amendments on required disclosures under Rule 26 that reflected the rulemakers' determination to regain institutional leadership—an impulse that overwhelmed calls to wait for the fruits of experience.²⁰⁸ The fact that the disclosure proposals elicited a vigorous dissent from Supreme Court Justices²⁰⁹ and, as with Rule 11 in 1983, only barely escaped legislative override²¹⁰ should have encouraged a return to empiricism, as recommended in the judiciary's 1995 self-study of rulemaking.²¹¹ But bad habits die hard, particularly when they serve institutional or ideological interests.

²⁰⁶ See Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841 (1993) [hereinafter Burbank, *Ignorance and Procedural Law Reform*]; *supra* text accompanying note 164.

²⁰⁷ Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2079 (1989). *But see* Burbank, *Transformation*, *supra* note 169, at 1940-41 ("A 'veil of ignorance' may be an apt metaphor to describe federal rulemaking to date. It is not, I contend, an appropriate normative posture for the rulemakers of the future.")

²⁰⁸ See Burbank, *Ignorance and Procedural Law Reform*, *supra* note 206, at 845.

²⁰⁹ See AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS: COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. NO. 103-74, at 104 (1993) [hereinafter H.R. DOC. NO. 103-74] (dissenting statement of Scalia, J., joined by Thomas, J. and, as to the disclosure rules, Souter, J.).

²¹⁰ See 140 CONG. REC. S7149 (daily ed. June 20, 1994) (statement of Sen. Heflin) ("Both the House and Senate relevant committees concluded that the bar protests should be honored and that the rules should be changed; however, tangles in our own procedures prevented the more objectionable proposals from being deleted and all of the proposed changes went into effect on December 1, 1993.")

²¹¹ See *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcomm. on Long Range Planning to the Comm. on Rules of Practice, Procedure & Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 699 (1995).

Much of the Advisory Committee's work during the 1990s was devoted to class action reform and to attempts to reach out to and reflect the concerns of the practicing bar. The latter were largely unsuccessful, as proposed amendments on jury size, which were supported by extensive social science research, and voir dire were squelched by the Judicial Conference and Standing Committee respectively,²¹² and the Chair of the Advisory Committee was not reappointed to a second term.²¹³

Under new leadership and with Congress under Republican control, the Advisory Committee relied on persistent calls from the organized bar and business community to "calibrate" discovery by restricting its scope, eliminating the right to subject matter discovery and making it available only upon a showing of good cause.

One might draw the inferences from the Advisory Committee's 2000 note on the scope change that (1) some interest groups count more than others, and (2) those interest groups also count more than empirical evidence, at least if they are persistent.²¹⁴

Methodologically sound empirical data concerning discovery have been remarkably consistent in debunking claims of ubiquitous abuse or excess made by bar organizations and the business community over the last forty

²¹² See Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 243-44 (1997).

²¹³ In the last year of his three-year term, shortly before the Advisory Committee returned to discovery, Judge Higginbotham observed:

Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.

Higginbotham, *supra* note 140, at 4-5.

²¹⁴ See FED. R. CIV. P. 26(b)(1) advisory committee's note to the 2000 amendments; Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 520 (1998) (observing that "it is the persistence of complaints and questions about the merit of broad discovery and its expense that, at bottom, has caused the Committee to take another look"). Those inferences also find support in the breathless memorandum that Robert Campbell, the Chair of the American College of Trial Lawyers' Committee on Federal Civil Procedure, sent to his fellow members in September 1999 to report the "extremely good news" that the Judicial Conference had "approved by a close vote the College proposal (substantially adopted by the Advisory Committee) to amend Rule 26(b)(1) changing the primary scope of discovery from 'subject matter' to 'claims and defenses.'" Memorandum from Robert S. Campbell, Jr., Comm. Chair, to Members, Fed. Civil Procedure Comm., American College of Trial Lawyers 1 (Sept. 16, 1999) (on file with authors).

years.²¹⁵ From the perspective of putative abuse, in other words, the discovery landscape did not appear meaningfully different in the run-up to the 2000 amendments than it had in 1980, when Justice Powell dissented from the promulgation of “tinkering changes.”²¹⁶ Nor, alas, did the claims of those seeking to curtail discovery. An abiding lack of reliable empirical evidence did not cause them to change their tune, a strategy of blinkered persistence that finally paid off (with a different group of rulemakers).

D. Procedure and Litigation Reform: 2001–2013

1. Rulemaking as Democratic Legislation: The Stickiness of the Status Quo

A commitment to reliable empirical data was critical to the abandonment of flawed rulemaking proposals in the decade after 2000, and prominent rulemakers cited that phenomenon as proof that the Enabling Act process works well.²¹⁷

The deeper epistemic foundation that results from an open process and from greater commitment to empirical study also helps to explain why rulemaking largely escaped controversy in that decade. Another important contributing factor was the rulemakers’ commitment to take the Enabling Act’s limitations seriously, whether prompted by the Rule 68 controversies, the Chief Justice’s inaccurate assurance in 1988 that they had always done so,²¹⁸ or scholarly literature demonstrating fundamental errors in the

²¹⁵ See, e.g., EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1103-11 (2012) (discussing the 2009 FJC study); *id.* at. 1111 (“Nearly every effort to quantify litigation costs and to understand discovery practice over the last four decades has reached results similar to the 2009 FJC study.”).

²¹⁶ See *supra* text accompanying note 163.

²¹⁷ See Mark R. Kravitz, David F. Levi, Lee H. Rosenthal & Anthony J. Scirica, *They Were Meant for Each Other: Professor Edward Cooper and The Rules Enabling Act*, 46 U. MICH. J.L. REFORM 495, 515-24 (2013); cf. Richard Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J.L. REFORM 637, 637 (2013) (“[W]hat the Advisory Committee on Civil Rules does not do is, in some ways, as important as what it does.”). The phenomenon is not confined to court rulemaking. See Daniel Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1318-19 (2012) (“One reason litigation politics have become so dysfunctional in recent decades is a lack of empirical data that can inform public debate.”).

²¹⁸ Chief Justice Rehnquist wrote a letter as part of a successful effort to persuade the House not to insist on eliminating the Enabling Act’s supersession clause, pursuant to which valid Federal Rules supersede previously enacted statutes with which they are inconsistent. Inflating the rulemakers’ restraint, the Chief Justice asserted that the rulemakers “have always been keenly aware of the special responsibility they have in the rules process and the duty incumbent upon

Supreme Court's interpretations of those limitations and documenting the effort to change them in the 1988 legislation.²¹⁹ This additional source of self-restraint also influenced the abandonment of rulemaking proposals and furnished additional evidence for those celebrating the Enabling Act process.²²⁰

Opening the process to diverse sources of information, anecdotal and empirical, may have triggered institutional dynamics that were less likely to operate when rulemaking committees were dominated by non-judges and when rulemaking was the product of a "relatively cloistered culture."²²¹ Smart people operating as part of a group may be perfectly willing to make decisions on the basis of their pooled reflections. Particularly if they can claim expertise or are confident about their power, they may also be willing to recommend bold action that they deem normatively desirable without worrying about empirical support and without any rigorous attempt to assess costs and benefits.

However, when those people are judges, and when reason must be exercised on an evidentiary record more complete than "judicial experience and common sense,"²²² they may be reluctant to become involved in controversies in which their decisions can be tarred with a political label. This is especially true when the decisionmakers' monopoly of expertise is in question, in part because the effect of potential policy choices on substantive rights is plain for all to see. The rulemakers are not courts, and rulemaking under the Enabling Act is not an exercise of judicial power

them not to overreach their charter," and he further advised the House leadership that "[t]he advisory committees should undertake to be circumspect in superseding procedural statutes." Letter from Hon. William H. Rehnquist, Chief Justice of the United States, to Rep. Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary (Oct. 19, 1988), *reprinted in* 134 CONG. REC. H10,441 (daily ed. Oct. 19, 1988).

²¹⁹ See, e.g., Burbank, *Rules Enabling Act*, *supra* note 130, at 1023; see also Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1029-36. The latter article discussed the legislative history of the 1988 statutory reforms, which clearly signaled congressional unhappiness with the way in which the Supreme Court had interpreted the Enabling Act's limitations.

We have, then, a situation in which the body responsible for developing amendments to legislation sought through detailed legislative history to guard against the assumption that similar statutory language should be given the same meaning by the courts, while the expectations of the other body in that regard remain unclear.

Id. at 1035.

²²⁰ See Burbank, *Role of Congress*, *supra* note 141, at 1737 (discussing abandonment of proposals "to address in Federal Rules problems stemming from duplicative or overlapping class actions"); Kravitz et al., *supra* note 217, at 519-21 (same).

²²¹ Patrick E. Higginbotham, *Iron Man of the Rules*, 46 U. MICH. J.L. REFORM 627, 628 (2013).

²²² *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

under Article III. It is essentially a legislative activity, not a judicial activity, and federal judges are understandably reluctant to be seen as active participants in a political process. Although Chief Justice Burger did not succeed in extricating the Supreme Court from the Enabling Act process in the 1980s,²²³ Justices have been at pains to distance the Court from responsibility for the content of Federal Rules.²²⁴

Finally (and relatedly), we believe that the influence of these institutional dynamics may depend on the qualities of those who lead the rulemaking committees. In that regard, during most of the period since 2000, perhaps the three most influential rulemakers for these purposes all had close ties to academia, which houses an audience likely to notice and reprove rulemaking proposals that lack empirical foundation, test the limits of the Enabling Act, or disproportionately burden identifiable groups of litigants.²²⁵

Thus, the 1988 reforms assimilated the formal characteristics of the rulemaking process to those of the administrative process, and brought the landscape of rulemaking closer to that of the legislative process more generally. In combination with other influences promoting institutional self-restraint, their effect was to entrench the status quo and to render consequential reform by Federal Rule more difficult than it had been in the era of “undemocratic legislation.”²²⁶

²²³ The controversies of the 1970s and early 1980s were “a threat to the prestige and influence of the Court itself.” Burbank, *Role of Congress*, *supra* note 141, at 1721. For the Court’s initial acquiescence in the elimination of its role in the process and subsequent change of position, compare Letter from Hon. Warren E. Burger, Chief Justice of the United States, to Rep. Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary (May 12, 1983), *reprinted in 1983 and 1984 House Hearings*, *supra* note 179, at 195, with Letter from Hon. Warren E. Burger, Chief Justice of the United States, to Rep. Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary (June 25, 1984), *reprinted in 1983 and 1984 House Hearings*, *supra* note 179, at 195.

²²⁴ See Letter from Hon. William H. Rehnquist, Chief Justice of the United States, to Hon. Thomas S. Foley, Speaker, U.S. House of Representatives (Apr. 22, 1993), *reprinted in H.R. DOC. NO. 103-74*, *supra* note 209, at 1; *see also* Burbank, *Ignorance and Procedural Law Reform*, *supra* note 206, at 842.

²²⁵ See generally BAUM, *supra* note 123. The three individuals are Judge Anthony Scirica, Judge Lee Rosenthal, and former Judge (now Dean) David Levi. New leaders are now in place; the rulemakers are again considering proposed amendments to the discovery rules that are intensely controversial, and it is too soon to tell whether recent restraint will endure or was an interlude in an ongoing struggle for power. For comments on the current proposed amendments—an astonishing number of them, exceeding 2350—and transcripts of the public hearings, see *Proposed Amendments Published for Public Comment*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx> (last visited May 12, 2014).

²²⁶ See generally Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 YALE L.J. 1284 (1978) (book review). Professor Freer recently criticized the rulemakers for hyperactivity, most of which in his opinion is aimed at trivia. He attributed the dearth of substantial rulemaking to a combination of four influences: uncertainty about the Enabling Act’s limitations, “congressional intermeddling,”

As one example, the rulemakers have recurrently flirted with proposals to tighten up the pleading rules in the years after the Supreme Court's resounding 1957 defense of notice pleading in *Conley v. Gibson*.²²⁷ Even after two subsequent Supreme Court decisions that could be viewed as inviting rulemaking on the subject,²²⁸ however, they concluded that the game was not worth the candle, probably because any such proposal would generate significant controversy with inescapable political overtones.²²⁹

As another example, starting in 2006, the rulemakers considered whether they should pursue potentially significant changes to Rule 56 on summary judgment. Conscious of potential Enabling Act objections and assured political controversy,²³⁰ however, they focused on proposals ostensibly designed to improve the process for ruling on summary judgment motions. They abandoned the most prominent of those proposals when testimony and written comments from numerous witnesses, including trial court judges, and empirical data demonstrated that it might not yield the benefits sought and could have a statistically significant adverse effect on plaintiffs in civil rights and employment discrimination litigation.²³¹ Although cited by rulemakers as an example of the Enabling Act process working,²³² the experience contributed to Gregory Joseph's description of the rulemakers as having an "instinct for the capillary."²³³

"politicization of the rulemaking process," and "inconsistent signals from the Supreme Court." Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 450 (2013). We regard this account as historically tone deaf and institutionally naïve. For instance, it ignores the controversies and rulemaking excesses that led to the process reforms of the 1980s, and the Chief Justice's 1988 letter to Congress. The report-and-wait provision in the Enabling Act has always permitted Congress to "look over the [rulemakers'] shoulder," *id.* at 473, and a major goal animating the 1988 reforms was to enable Congress to disengage. In addition, the account's seeming celebration of closed-door rulemaking is both historically inaccurate and, in 2013, puzzling.

²²⁷ 355 U.S. 41 (1957).

²²⁸ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); Freer, *supra* note 226, at 464.

²²⁹ See Burbank, *Transformation*, *supra* note 169, at 1953-54; Marcus, *supra* note 217, at 646; see also Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 117 (2009) [hereinafter Burbank, *Pleading and Dilemmas*] ("[O]nce entrenched . . . [notice pleading] became part of the status quo and thus was highly resistant to change through the lawmaking process that brought it forth . . .").

²³⁰ See, e.g., Memorandum from Steve Burbank to Michael M. Baylson & Lee H. Rosenthal 3 (Jan. 20, 2007) (on file with authors).

²³¹ See Kravitz et al., *supra* note 217, at 521-24; Letter from Stephen B. Burbank to Peter G. McCabe, Sec., Comm. on Rules of Practice & Procedure (Jan. 28, 2009) (on file with authors).

²³² See Kravitz et al., *supra* note 217, at 524 (concluding that the rulemaking episode resulted from "the robust, transparent, and highly effective process under the Rules Enabling Act").

²³³ Gregory P. Joseph, *An Instinct for the Capillary*, LITIG., Summer/Fall 2012, at 9, 9.

Finally, by way of example, the rulemakers studied possible class action reforms for more than a decade, supported by the empirical research of the Federal Judicial Center. The changes they recommended, which went into effect in 1998 and 2003, avoided the core elements of the rule and were far more restrained than class action opponents advocated.²³⁴ One of those changes, however, is of special interest for present purposes because it enabled and highlighted another path to civil litigation reform.

2. The New Undemocratic Legislation: Making Procedural Law the Old-Fashioned Way

a. *The Cases*

A 1998 amendment to Rule 23, which permits courts of appeals in their discretion to entertain immediate appeals from class certification decisions,²³⁵ substantially expanded the opportunities for federal appellate courts, including the Supreme Court, to control the course of class action jurisprudence. And control it they have, to the point that the legal mechanism Congress chose to deal with abuses resulting from *state* courts certifying national classes was to enable most such cases to be brought in or removed to federal courts, where class action opponents had reason to hope that most of them would simply disappear.²³⁶ It was, again, a “procedural” mechanism, this time involving the subject matter jurisdiction of the federal courts. Most of this jurisprudence was first developed by the courts of appeals,²³⁷ but in recent years the Supreme Court has focused on class actions. A majority of the Court has appeared to bless court of appeals decisions that made class certification more difficult by assimilating the governing procedures to trial procedures through the imposition of evidentiary requirements and burdens,²³⁸ thereby further ensuring that in most cases, no matter what the certification decision, there would be no trial.

Although most of the changes in class action jurisprudence thus effected can plausibly be grounded in the interpretation of Rule 23, particularly as

²³⁴ See Kravitz et al., *supra* note 217, at 519-20.

²³⁵ See FED. R. CIV. P. 23(f).

²³⁶ See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.); Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1942-43 (2006).

²³⁷ See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1495-96 (2008).

²³⁸ See, e.g., Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553-54 (2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2008).

amended in 2003,²³⁹ some Justices in the Court's conservative majority have made little effort to conceal their hostility to class actions and the lawyers who bring them.²⁴⁰ It is thus no surprise that the concept of interpretation has been stretched to the breaking point, as it was on the question of commonality under Rule 23(a)(2) in *Wal-Mart Stores, Inc. v. Dukes*.²⁴¹

Examples from the domain of pleading provide the most vivid demonstration of both the power of the Supreme Court to reform litigation through supposed interpretation of Federal Rules, and the importance of historical, institutional, and political perspectives on litigation reform. We have seen that the framers of the 1938 Federal Rules rejected both common law and code pleading, criticizing attempts to identify "facts" as opposed to "conclusions," and preferring discovery to pleading as the means to ascertain what happened.²⁴² The Court embraced this approach in dictum in *Hickman v. Taylor*,²⁴³ and it embraced it squarely in its 1957 *Conley* decision, which can be seen as approval of the Advisory Committee's previous rejection of calls for a return to fact pleading through rulemaking.²⁴⁴ Thereafter, in two cases decided over the ten year period from 1993 to 2002, the Court twice reversed lower court decisions that sought to impose heightened pleading requirements in particular substantive contexts, reasserting the traditional interpretation of the pleading rules and observing that change would have to come from the rulemaking process or from Congress.²⁴⁵

²³⁹ See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 320 (relying on 2003 amendments to Rule 23 for the conclusion that a trial court must "consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class").

²⁴⁰ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting) ("To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.").

²⁴¹ See 131 S. Ct. at 2562, 2565-66 (Ginsburg, J., dissenting); John C. Coffee, Jr. & Alexandra D. Lahav, *The New Class Action Landscape: Trends and Developments in Class Certification and Related Topics* 12-13, 69-70 (Columbia Law Sch. Ctr. for Law & Econ. Studies, Working Paper No. 435, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182035. For a more nuanced reading of *Wal-Mart*, under which it is less vulnerable to criticism on this ground, see Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1035-39 (2013) (arguing that the Court's Rule 23(a)(2) holding was driven in part by Title VII).

²⁴² See *supra* text accompanying notes 136-137.

²⁴³ 329 U.S. 495, 501 (1947).

²⁴⁴ See *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 90 (2009) [hereinafter *Has the Supreme Court Limited Americans' Access to Courts?*](statement of Stephen B. Burbank, David Berger Professor for the Admin. of Justice, Univ. of Pa.).

²⁴⁵ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); see also *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998); *supra* text accompanying note 220.

Yet, as we have also seen, the status quo is difficult to change through legislation and, with respect to important procedural issues since the reforms of the 1980s, the rulemaking process. Indeed, inaction in the face of resurgent calls to move to fact pleading was one of the examples we gave of the stickiness of the status quo in contemporary federal court rulemaking. The Chief Justice not only appoints all members of the rulemaking committees; he meets regularly with the chairs of the key rulemaking committees. It is thus inconceivable that the current Chief Justice was unaware of the Advisory Committee's decision not to pursue pleading reform. More generally, particularly because Chief Justice Roberts participated in the unsuccessful campaign for a broad fee bill as a member of the Reagan Justice Department,²⁴⁶ it is unlikely that he was unaware of the reality that consequential reform, if it were to occur, would have to come from the courts in the guise of interpreting existing Federal Rules.

Nor can the decisions avoid the charge of judicial lawmaking (here, judicial amendment) by the insight that judicial interpretation and judicial lawmaking shade into each other. The Court itself has provided an objective standard for distinguishing the two when a Federal Rule promulgated under the Enabling Act is in question. Thus, in order to protect the Enabling Act process, that statute's limitations on rulemaking, and the power it accords Congress to review and, if necessary to block, prospective procedural policy choices, the Court has foreclosed from treatment as mere interpretation (or reinterpretation) the practice of giving meaning to a Federal Rule that is different from the meaning the Court understood "upon its adoption."²⁴⁷

The Court's recent pleading decisions were certainly bold. Particularly when one considers that an effort to overrule them in a Congress controlled by Democrats failed rather miserably, they demonstrate the importance of institutions and institutional dynamics to litigation reform.²⁴⁸ On the basis of information provided in one case, a one-judge majority of the Supreme Court—whose members are unelected, serve for life, and are insulated from individual if not institutional reprisal—can bring about momentous civil litigation reform that would be impossible to secure from the legislature or its delegated procedural lawmaking bodies.²⁴⁹

²⁴⁶ See *supra* notes 41-42 and accompanying text.

²⁴⁷ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

²⁴⁸ See generally *Has the Supreme Court Limited Americans' Access to Courts?*, *supra* note 244.

²⁴⁹ We agree with Professor Staszak that such decisions are a good example of retrenchment through conversion once "barriers for authoritative change [through amendments to the Federal Rules] rose" Staszak, *supra* note 20, at 188. As previously noted, however, we believe that the

Wal-Mart, *Twombly*, and *Iqbal* are a few recent examples of the Court using its Article III judicial power to achieve results that would have been very difficult or impossible to achieve through the exercise of delegated legislative lawmaking power under the Enabling Act. In addition, in our view, all of the decisions strained any principled distinction between judicial interpretation and judicial amendment. Finally, all of them involved “interpretations” that are inimical to private enforcement, and in most there was a clear divide in the votes of Justices generally thought to be conservative and those generally thought to be liberal.

Having expressed concern in Part III that such accounts of litigation involving private rights of action, standing, attorneys’ fees, and arbitration may not reflect an unbiased (in the statistical sense) view of the Court’s decisions on those issues,²⁵⁰ we acknowledge the possibility of similar concern as to cases involving the interpretation of the Federal Rules of Civil Procedure. We therefore turn here, as we did there, to statistical analysis of comprehensive data.

b. *The Justices’ Votes in Federal Rules Private Enforcement Cases*

We identified all cases from 1970 to 2013 in which the Supreme Court decided an issue that turned on interpretation of a Federal Rule of Civil Procedure, where the result would either widen or narrow opportunities or incentives for private enforcement. The search yielded 50 cases,²⁵¹ containing 51 issues and 445 Justice votes.²⁵² At least one of the authors read each majority, concurring, and dissenting opinion in order to assign codes to

primary source of these obstacles is the stickiness of the *rulemaking* status quo effectuated through the reforms we have traced. *See supra* note 196.

²⁵⁰ *See supra* text accompanying note 92.

²⁵¹ The Federal Rules most frequently interpreted in these cases, in descending order of frequency, were: Rule 23 (class actions) (12 cases), Rule 8 (pleading) (6 cases), Rule 11 (sanctions) (5 cases), Rule 56 (summary judgment) (5 cases), Rule 15(c) (relation back) (3 cases), Rule 50 (judgment as a matter of law) (3 cases), Rule 68 (offers of judgment) (3 cases), Rule 3 (commencement) (2 cases), Rule 23.1 (derivative actions) (2 cases), and Rule 24 (intervention) (2 cases). Rules 4, 16, 19, 37, 54, 59 and 65 were at issue in 1 case each.

²⁵² We excluded from the data set cases that merely cited a Federal Rule, cases in which the decision of an issue did not turn on an interpretation of a Federal Rule, habeas cases, cases not implicating private enforcement, and cases in which the interpretation of a Federal Rule could not fairly be characterized as either pro- or anti-private enforcement. We acknowledge that, as a result, the data on which to base empirical analysis are limited. On the other hand, this is the full universe of cases that actually turn on interpretation of the Federal Rules and that bear directly on private enforcement. Moreover, the trans-substantive nature of the Federal Rules means that such decisions are often considerably more far-reaching than decisions interpreting the private enforcement provisions of individual statutes.

each Justice's position: anti-private enforcement (=0), pro-private enforcement (=1), and missing if the Justice did not take a position on the issue.

Table 6: Percent Pro-Private Enforcement Votes in Federal Rules Cases

Justice	Pro-Private Enforcement Votes (%)	Number of Issues	Conservative	Average Martin-Quinn Score
Powell	27	15	1	.924
Thomas	33	27	1	4.14
Scalia	38	34	1	2.92
Roberts	38	13	1	2.39
Stewart	43	7	1	.478
Rehnquist	44	36	1	2.86
Kennedy	44	34	1	.986
Alito	46	13	1	2.68
Souter	50	20	0	-.814
Burger	50	16	1	1.85
O'Connor	50	30	1	.900
White	56	25	1	-.587
Marshall	61	23	0	-3.16
Ginsburg	64	25	0	-.875
Blackmun	64	25	0	-.184
Stevens	66	41	0	-1.47
Breyer	68	25	0	-.698
Brennan	77	22	0	-2.74
Sotomayor	89	9	0	.241
Kagan	100	7	0	.333

Table 6 lists the raw proportion of pro-private enforcement votes, relative to total votes, for each Justice who voted in more than five cases in our data, along with their conservative versus liberal designation according to the Martin-Quinn median and their Martin-Quinn score.²⁵³ Although the specific ordering changes as compared to our non-Federal Rules private enforcement cases (displayed in Table 4), the distribution from the lowest to highest ratio of pro-private enforcement votes is very similar. Dividing the

²⁵³ See *supra* Section III.B.

Justices into conservatives and liberals in Table 6 demonstrates that it again effectively predicts whether a Justice is above or below the median ratio of pro-private enforcement votes in Federal Rules cases. Only Justice Souter defies expectations. Excluding this one Justice out of twenty, every conservative has a lower pro-private enforcement voting rate in the Federal Rules cases than every liberal.

Figure 7: Case Outcomes and Justice Votes in Federal Rules Private Enforcement Cases

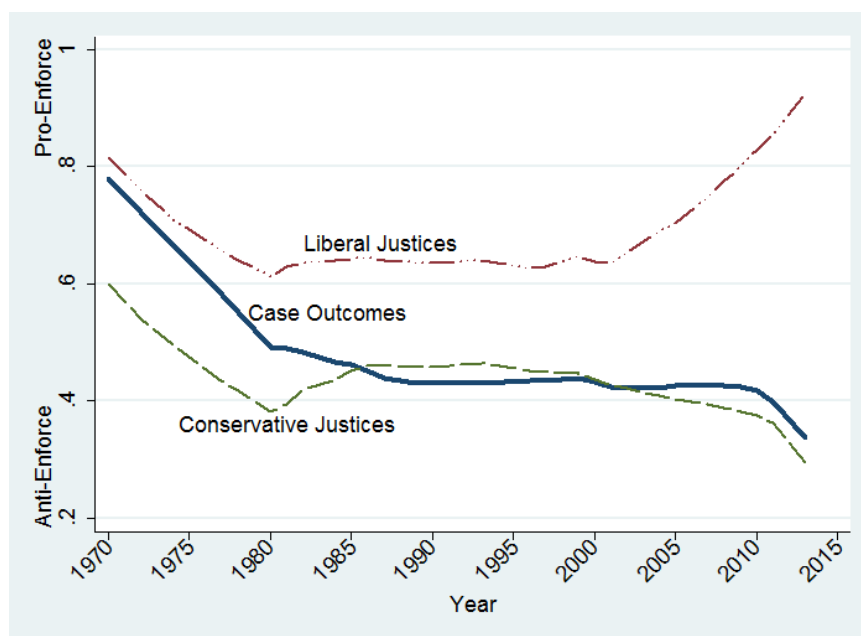
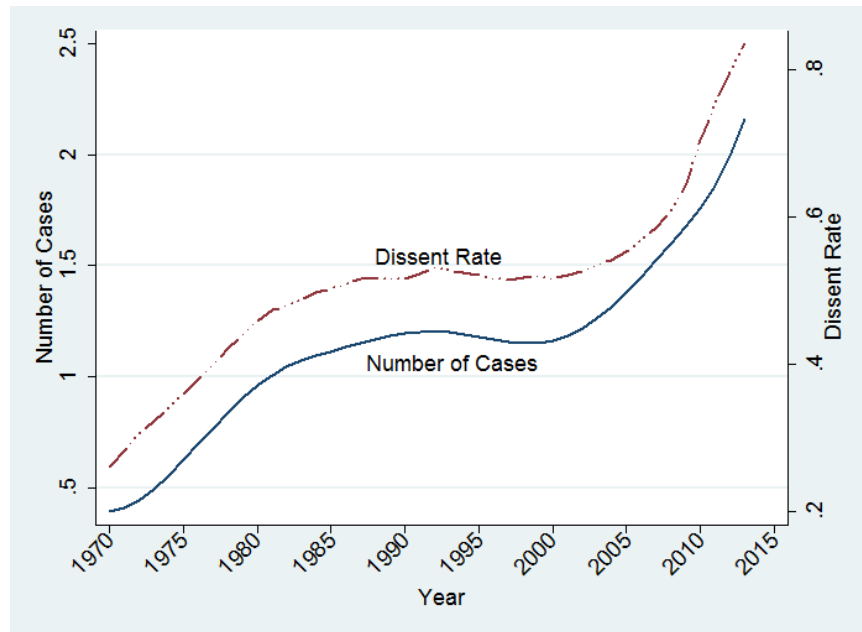


Figure 7 plots a LOWESS curve estimating the probability of an outcome in favor of private enforcement in the Federal Rules cases over time, and the probability of votes in favor of private enforcement separately for conservative and liberal Justices. The figure reflects that the estimated probability of a pro-private enforcement Federal Rules outcome declined from 78% in 1970 to 34% in 2013. This decline occurred first with a 35 percentage point drop in probability from 1970 to the late 1980s; a plateau for roughly two decades; and then an additional 9 percentage point decline in about the past five years. As with the non-Federal Rules private enforcement votes, the decline has been substantially driven by the votes of conservative Justices in the majority, whose estimated probability of a pro-private enforcement vote declined from 60% to 29% over this period.

The estimated probability of a pro-private enforcement vote by liberal Justices declined for the first decade of the series, plateaued from about 1980 to 2000, and then increased significantly after about 2000. On net, liberal pro-private enforcement votes actually increased from 82% to 92% over the full period.

What is perhaps most notable about this graph is that from 1970 to the end of the 1990s, the liberal and conservative probabilities of a pro-private enforcement Federal Rules vote moved in rough parallel, with liberals consistently about 20 percentage points more pro-private enforcement on average. After about 2000, however, the distance between the two groups of Justices widened considerably, ending the series separated by 63 percentage points in the estimated probability of a pro-private enforcement vote. By 2013, as was true of the other private enforcement issues we analyze, outcomes on Federal Rules issues approximately converge with the votes of conservative Justices.²⁵⁴

Figure 8: FRCP Private Enforcement Cases per Term, and Proportion with Dissents



²⁵⁴ As noted in Part III, we acknowledge that there may be variation over time in the frequency of highly salient, large-impact cases.

Figure 8 reflects LOWESS estimates of the number of Federal Rules cases decided each year, and the proportion of them in which there was a dissent. The number of such cases on the Court's docket grew from the early 1970s into the early 1980s, plateaued for two decades, and then spiked over the past ten years. The likelihood of a dissent follows a similar pattern: it grows from the early 1970s to the early 1980s, plateaus for two decades, and then spikes in the last decade, rising from an estimated 52% likelihood of a dissent in 2001 to an 84% likelihood in 2013. Although the percentage of dissents in the other private enforcement cases we analyzed increased during the same period, the growth was by only 4 (as opposed to 32) percentage points.

Thus, our limited Federal Rules cases suggest significant changes over the past decade. The Court has devoted more attention to these issues on its docket; the decisions are more likely to produce dissents, and liberals and conservatives appear to be increasingly polarized in their voting behavior.²⁵⁵ By contrast, with respect to the non-Federal Rules cases we analyzed, both the number of cases and the dissent rate have been relatively flat during this period, and although conservative and liberal Justices have continued to drift further apart in their voting behavior, the growth in polarization is notably less stark.

²⁵⁵ Scholars have made similar findings concerning the Court's business decisions, and a similar phenomenon may explain both of 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 hence to a higher percentage of liberal votes by those Justices in business cases." Epstein et al., *supra* note 90, at 1470. An alternative explanation is that it took time for some of the Court's liberals to realize what was going on. See Burbank, *Pleading and Dilemmas*, *supra* note 229, at 114 (describing failure of Justices Souter and Breyer to realize that *Twombly* could "fundamentally alter the role of litigation in American society" as "understandable but, at least in retrospect, naïve").

Table 7: Logit Model of Justice Votes in Private Enforcement
Federal Rules Cases, with Case Fixed Effects

	Coefficient	Marginal Effect
Ideology (Martin–Quinn)	-.30* (.12)	-.048
Ideology*Post-1994 Dummy	-.80** (.25)	-.128

N= 257
Pseudo R²= .30

***<.001; **<.01; *<.05

Standard errors in parentheses, clustered on Justice

Table 7 reports logit models with case fixed effects. The models are parallel to those presented in Table 5 for non-Federal Rules private enforcement cases.²⁵⁶ The main effect of the ideology variable is significant. Because the interaction is included, this variable reflects the effects of ideology only in the period from 1970 to 1994. The marginal effect for the coefficient is -.048, which means that for each unit increase in a Justice's Martin–Quinn score, there is a corresponding reduction of about 5% in the probability of a pro–private enforcement vote. Moving from the mean ideology score of a liberal Justice to a conservative Justice (as defined in Part III) is associated with a 17% reduction in the probability of a pro–private enforcement vote. It is notable that the magnitude of the effect, although substantively significant, is *only about half* of that observed in the models that pooled our other private enforcement issues. Thus, although there is clearly ideological voting on Federal Rules issues in the period from 1970 to 1994, the cases are characterized by a notably smaller degree of it relative to our other private enforcement cases. Procedure in that period looks different.

In the 1995–2013 period, the net effect of the difference between a liberal and a conservative grew to 62%. Relative to the effect of ideology in the 1970–1994 period (a 17% difference), it grew by 167% in the 1995–2013 period. Thus, the rate of growth in the effect of ideology for Federal Rules cases was much larger than we observed in the other private enforcement

²⁵⁶ For our previous discussion of the details of the model specifications, see *supra* Section III.B.

cases. The effect of ideology in Federal Rules cases went from about half the effect in other private enforcement cases in the 1970–1994 period, to about the same in the 1995–2013 period. Indeed, as we discuss in the Appendix, after 2000 ideology had a materially *larger* effect in the Federal Rules cases. If procedure had once been less ideological, times changed.²⁵⁷

Finally, we again acknowledge the many influences in addition to ideology that may have influenced the Justices' votes in Federal Rules cases.²⁵⁸ As previously discussed, use of case fixed effects analysis requires some division among the Justices, with the result that unanimous decisions, where we would expect the influence of law and rule of law values to be greatest, cannot be included. Another influence that this approach does not permit us to measure is what we have called institutional self-interest. One of the Court's Federal Rules decisions where that influence—in the form of an attempt to mitigate the difficulties and costs of seating larger juries, particularly in rural districts—may have played a major role is *Colgrove v. Battin*, a 1973 civil case in which a five Justice majority upheld a district court rule providing for six-person juries against challenges under the Seventh Amendment, the Rules Enabling Act, and federal law requiring local rules to be consistent with the Federal Rules.²⁵⁹

Yet case fixed effects analysis *does* permit us to measure with confidence the influence of ideology in divided Federal Rules cases implicating private enforcement. The results show just how far we have come from the traditional conception of, and rhetoric about, procedure as technical details or adjective law.

²⁵⁷ As with our other private enforcement cases, we observe similar growth in the effect of ideology by running regressions on subsets of the data for 1970 to 1994, and 1995 to 2013.

²⁵⁸ See *supra* text accompanying notes 113–117.

²⁵⁹ 413 U.S. 149, 160 (1973). We agree with those dissenting Justices who argued that the Court distorted the meaning of Federal Rule 48 in order to find no conflict. See *id.* at 165 (Douglas, J., joined by Powell, J., dissenting); *id.* at 185–86 (Marshall, J., joined by Stewart, J., dissenting). Because, however, we do not believe the result can reasonably be deemed either pro- or anti-private enforcement, we did not include *Colgrove* in our data set. In the 1990s, the institutional interests vindicated in *Colgrove* were joined by the institutional interest against disrupting courthouse construction plans that assumed smaller juries, and the combination sufficed to defeat an Advisory Committee proposal to return to a norm of twelve-person civil juries. See *supra* text accompanying note 212.

CONCLUSION

Viewing the modern history of federal law that affects private enforcement in institutional context enables us to see that, in the long campaign for retrenchment that began in the Reagan administration, consequential reform has proved even more difficult to accomplish by statute than have other proposed changes to the status quo, particularly because the object of reform conferred rights with a substantial base of support in American politics. Recognizing that, as Lewis Powell had written in 1971, the courts were fertile and unploughed territory for such a campaign, those seeking to retrench private enforcement turned to that institution and were well rewarded. Litigation seeking to narrow private rights of action, attorneys' fee awards, and standing, and to expand arbitration, achieved growing rates of voting support from an increasingly conservative Supreme Court, particularly over the past two decades.

An institutional perspective that recognizes interactions and competition for power also enables us to see how the judiciary's control of procedure can be, and has been, central to the campaign to retrench private enforcement, particularly in the last decade. Once a major element of the infrastructure of progressive private enforcement, the Federal Rules of Civil Procedure became for a brief time the lawmaking territory in which a newly assertive institutional judiciary, intent through its leadership to dictate and control the reform agenda, sought to forge instruments of retrenchment. The ensuing controversies quickly animated interest groups and members of Congress protective of the procedural status quo to press successfully for changes in the Enabling Act process and in the rulemakers' fidelity to the limits of the statutory delegation. Those changes—a product of institutional bargaining in the shadow of proposed legislation and of a promise to Congress by the Chief Justice—moved rulemaking closer to the administrative and legislative processes both formally and functionally, rendering bold reforms of the sort we associate with the era of “undemocratic legislation” in rulemaking difficult to achieve.

Rulemaking is not, however, the only way that an ideologically distant or institutionally self-interested judiciary can frustrate congressional preferences concerning private enforcement. Because Federal Rules are trans-substantive, many of them are written at a relatively high level of indeterminacy and leave substantial interpretative discretion to the federal courts. Even when they are not so indeterminate, however, Federal Rules can be reinterpreted, at least by the Supreme Court, which is at no greater risk of override in doing so than it is when construing a statute. To the

extent that such decisions effectively amend the Federal Rules outside the Enabling Act process, they are today's "undemocratic legislation."

Whatever one's view about cases in which judicial interpretation seems indistinguishable from judicial amendment, data from all of the Court's Federal Rules decisions confirm that, in this domain as well, the campaign to retrench private enforcement has had its greatest success in the courts. Indeed, it may be that the success experienced in the Supreme Court affected both the content and the zeal of the legislative campaign for civil litigation reform. Thus, although the issue of litigation reform in general—and procedure as a tool of litigation reform in particular—has been declining in Congress since the mid-1990s, it is now more prominent than ever for the Court.

APPENDIX

A. Models of Support for Litigation Reform Bills in Part II

In our bill data models in Part II, the dependent variables are counts of the number of legislators sponsoring or cosponsoring litigation reform bills. Because the distribution of event counts is discrete, not continuous, and is limited to nonnegative values, it is best modeled assuming that the errors follow a Poisson rather than a normal distribution. A negative binomial count model is appropriate for data with this structure in the presence of overdispersion of the dependent variable, which is the case with the data analyzed here. Overdispersion is present where the variance exceeds the mean, violating an assumption of a standard Poisson model.²⁶⁰

We cluster standard errors on legislator because standard regression models (without clustering) treat each legislator's support for a bill as independent from her support for other bills, but episodes of bill support by the same legislator are not independent from one another. Non-independent observations add less information to regression estimates than independent observations. Clustering standard errors on legislator adjusts standard errors to account for this and thereby avoids standard errors that are too small.²⁶¹

For the models of the ninety-third to ninety-sixth Congresses (Table 1), and the ninety-seventh to the 111th Congresses (Table 2), we ran alternative

²⁶⁰ A. COLIN CAMERON & PRAVIN K. TRIVEDI, REGRESSION ANALYSIS OF COURT DATA 4 (2d ed. 2013).

²⁶¹ See JEFFREY M. WOOLDRIDGE, INTRODUCTORY ECONOMETRICS: A MODERN APPROACH 484-501 (5th ed. 2012).

specifications substituting common space NOMINATE scores for party. These scores are continuous measures of legislator ideology based on a spatial model of roll call voting behavior, and thus they are a granular ideology measure as compared to the dichotomous party variable.²⁶² With this ideology measure substituted for party, we obtained results parallel to those reported in Tables 1 and 2 in terms of statistical significance, direction of effect, and rough magnitude.

In the models of the ninety-third to ninety-sixth Congresses (Table 1), we had in excess of 90% zeros in our dependent variables, suggesting the potential need for zero-inflated models.²⁶³ We replicated the models in Table 1 with zero-inflated negative binomial count models and obtained very similar results: statistical insignificance in the “All Bills” and “Monetary Recovery” models, and a significant negative coefficient of comparable size in the “Procedure” model.²⁶⁴

The coefficients of a count model are not directly interpretable. In order to transform them into interpretable form, an x -unit increase in an independent variable translates into a factor change in the rate of the dependent variable given by $\exp(x\beta)$. For example, for a coefficient .655, the factor change in the expected count for a one-unit change in the associated independent variable is given by exponentiating $((1)(.655))$, which equals 1.93. This means that when the independent variable is increased by one unit, holding other variables constant, the expected count increases by a factor 1.93. This is the equivalent of saying that the expected count increases by 93%. This is how the marginal effects in Tables 1 to 3 were computed.

B. *Models of Justice Votes in Supreme Court Opinions in Parts III and IV*

Because the dependent variable in these models is dichotomous, we use logistic regression, which is designed for dichotomous dependent variables.²⁶⁵ We cluster standard errors on Justice for the same reason that we did so on legislator in the bill support models. We computed marginal effects for these models with Stata’s “margins, dydx(*)” command.

In the models presented in Tables 5 and 7, we included an interaction with a dummy variable that took the value 0 for the period 1970–1994, and 1 for the period 1995–2013. We explained in the text that this dividing line

²⁶² KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* (1997).

²⁶³ CAMERON & TRIVEDI, *supra* note 260, 139–42.

²⁶⁴ These models were run using Stata’s `zinb` command.

²⁶⁵ FRED C. PAMPEL, *LOGISTIC REGRESSION* (2000).

was selected based upon theory and evidence suggesting that the Court had greater insulation from legislative override, and that litigation reform became more salient, in the latter period. Considering the *distance between* liberal and conservative voting on private enforcement issues in Figures 4 and 7 as a measure of politicization of these issues among Justices, the distance appears to have begun to widen noticeably in about 2000, after a period of stability. In alternative specifications, we moved the dividing line for the dummy variable from 1995 to 2000. The main effects of ideology remain significant in both models. The marginal effects associated with moving from a liberal to a conservative Justice for the 1970–1999 period were essentially the same as for the 1970–1994 period (reported in Tables 5 and 7). However, the marginal effects of ideology for the 2000–2013 period were somewhat larger than for 1995–2013 period (reported in Tables 5 and 7). The distance between the mean liberal and conservative Justice is associated with 62 percentage points in the general private enforcement model, and 92 percentage points in the Federal Rules private enforcement model. Thus, when we isolate the most recent period we observe a materially larger ideological effect in the Federal Rules cases as compared to the other private enforcement cases.

We ran the general private enforcement model (replicating the model in Table 4), and Federal Rules private enforcement model (replicating the model in Table 7), substituting Segal–Cover scores for Martin–Quinn scores. Segal–Cover scores are based upon pre-confirmation media coverage of Justices’ nominations, and therefore are based upon information independent of Justices’ voting behavior. Martin–Quinn scores are derived from Justices’ aggregate voting behavior in non-unanimous cases, and thus are susceptible to the concern of circularity in that we are using Justice votes to predict Justice votes. We note in this regard that our 317 private enforcement issues (combining both the models presented in Tables 4 and 7) comprise a very small fraction of the total non-unanimous votes used to estimate the Martin–Quinn scores. Moreover, a key part of what we wish to understand is whether the Court’s private enforcement votes map to the more general left–right axis on the Court that we associate with the substantive policy positions that divide it. Still, Segal–Cover scores provide a useful robustness check.

In Segal–Cover scores higher values are more liberal, but we inverted their direction to render them consistent with the Martin–Quinn scores. The results are presented in Table 1-A. Both the main effect and the interaction are significant in the general private enforcement model (Model 1). For the main effect, which is the influence of ideology on Justices’ votes in the

1970–1994 period, the marginal effect is $-.42$. The distance between the mean Segal–Cover ideology score of Justices designated conservative and liberal is about $.36$. An increase of this magnitude (in the conservative direction) renders a 15% reduction in the probability of a pro–private enforcement vote. Summing the marginal effects of the main effect and the interaction indicates that in the 1995–2013 period, there was a 39% reduction in the probability of a pro–private enforcement vote moving from liberal to conservative. Both the main effect and the interaction are also significant in the Federal Rules private enforcement model (Model 2). In the 1970–1994 period, the marginal effect is $-.25$, rendering a 9% reduction in the probability of a pro–private enforcement vote moving from liberal to conservative. In the 1995–2013 period, there was a 37% reduction.

The overall structure of the results is the same as with the Martin–Quinn scores. There was an ideology effect in both models in the 1970–1994 period, and it increased sharply in the 1995–2013 period. Ideology played a notably smaller role in Federal Rules cases as compared to other private enforcement cases in the 1970–1994 period, but then experienced more growth in the 1995–2013 period, elevating the role of ideology in Federal Rules cases to about the same level as in our other private enforcement cases. The magnitude of the effects with the Segal–Cover scores is less than in models using the Martin–Quinn scores. This is probably explained largely by the fact that, because the Segal–Cover scores are based upon perceptions at the time of appointment but before confirmation, they effectively classify Brennan, Stevens, Blackmun, and Souter as moderate–conservatives.

Table A-1: Logit Model of Justice Votes in Private Enforcement
and Federal Rules Cases, with Case Fixed Effects

	Coefficient	Marginal Effect
Model 1 (Private Enforcement)		
Ideology (Segal–Cover)	-2.49** (.75)	-.42
Ideology*Post-1994 Dummy	-3.98** (1.47)	-.67
N= 1739		
Pseudo R ² = .28		
Model 2 (FRCP)		
Ideology (Segal–Cover)	-1.35* (.69)	-.25
Ideology*Post-1994 Dummy	-4.24** (1.47)	-.77
N= 257		
Pseudo R ² = .22		
**<.01; *<.05		
Standard errors in parentheses, clustered on Justice		