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### Federal Court Rulemaking and Litigation Reform: An Institutional Approach

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# FEDERAL COURT RULEMAKING AND LITIGATION REFORM: AN INSTITUTIONAL APPROACH

Stephen B. Burbank & Sean Farhang\*

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## INTRODUCTION

This article is part of a larger project that explores the interactions and competition among federal political institutions, including courts, for power

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and influence in the regulation of access to court, in particular private enforcement of federal law (collectively, “private enforcement”). The first article to emerge from the project, *Litigation Reform: An Institutional Approach*,<sup>1</sup> shows how the Executive, Congress and the Supreme Court fared in efforts to reverse or dull the effects of statutory and other incentives for the private enforcement of federal law.<sup>2</sup>

We demonstrate that retrenchment became primarily a Republican issue during the first term of the Reagan administration, but that the administration failed in its effort to secure enactment of legislation that would have amended more than 100 statutes to reduce the availability of attorney’s fees in suits against the government.<sup>3</sup> More generally, through statistical analysis of an original data set of congressional bills implicating private enforcement,<sup>4</sup> we show that retrenchment bills have rarely been enacted, and that success, such as in the Private Securities Litigation Reform Act of 1995<sup>5</sup> and the Class Action Fairness Act of 2005,<sup>6</sup> has been very difficult to achieve and has clustered in a few discrete policy areas. We discuss institutional dynamics that likely account for this record of legislative failure, focusing on those contributing to “the stickiness of the status quo,” particularly when the proposal is to take away rather than confer rights.<sup>7</sup>

In contrast to this limited legislative success in retrenching private enforcement, we show that, in the period 1970 through 2013, Supreme Court justices have increasingly forged majorities for anti-private-enforcement decisions and that the justices’ votes on those issues have been increasingly influenced by ideology, leading to a wide gap between the Court’s liberals and conservatives.<sup>8</sup> The Court’s ability to negate or dull statutory private-enforcement incentives derives in part from its power to interpret the statutes providing them, and

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<sup>1</sup> Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014).

<sup>2</sup> The phenomenon of Congress including private enforcement regimes, whether attorney’s fee-shifting provisions or multiple damages provisions, in statutes enacted to confer new or expand old rights, increased substantially in the late 1960s and the 1970s, and it is closely correlated with the enormous increase in federal civil filings that started in the late 1960s. *See id.* at 1548 fig.1.

<sup>3</sup> *See id.* at 1553–55, 1565–67.

<sup>4</sup> For the period 1973 (when the Library of Congress bill database starts) to 2010, 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.

*Id.* at 1555.

<sup>5</sup> Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

<sup>6</sup> 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.).

<sup>7</sup> *See* Burbank & Farhang, *supra* note 1, at 1564–67.

<sup>8</sup> *See id.* at 1574 fig.4, 1608 fig.7.

our findings are similarly based in part on statistical analysis of an original data set of Supreme Court decisions on salient issues, most of which involved statutory interpretation.<sup>9</sup> These findings confirm, refine, and extend ideas in the qualitative accounts of a number of scholars,<sup>10</sup> and we identify institutional differences between the Court and Congress that may account for the Court's greater success in the retrenchment effort.<sup>11</sup>

Recognizing, however, that the federal courts' power to influence litigation reform is not limited to statutory interpretation, we also compiled an original data set for the same period of every Supreme Court case in which the decision of an issue "turned on interpretation of a Federal Rule of Civil Procedure, where the result would either widen or narrow opportunities or incentives for private enforcement."<sup>12</sup> Statistical analysis yielded findings that the gap between the Court's liberals and conservatives has become even wider in Federal Rules cases than in other private enforcement cases, and that by 2013 the Federal Rules decisions were even more influenced by ideology.<sup>13</sup> These findings are likely to surprise those who still believe that procedure is "adjective law," subsidiary in importance to substantive law. They are, however, consistent with the institutional insight that the leadership which Congress long ceded to the federal judiciary in fashioning procedural law should afford courts greater latitude to frustrate or subvert congressional preferences through interpreting that law than it has when interpreting statutory private-enforcement regimes. Moreover, "[b]ecause 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."<sup>14</sup>

The federal judiciary's control over procedure is not limited to interpreting the governing rules. Since 1934, the judiciary has been accorded primary responsibility for fashioning them—in the Federal Rules of Civil Procedure.<sup>15</sup> Although *Litigation Reform* devotes substantial attention to court rulemaking as one of the ways in which retrenchment of opportunities or incentives for private enforcement can be pursued,<sup>16</sup> the treatment is incomplete in at least two re-

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<sup>9</sup> *Id.* at 1570–71 ("For the period from 1970 to 2013, 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 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." (footnote omitted)).

<sup>10</sup> *See id.* at 1568–70.

<sup>11</sup> *See id.* at 1580–82.

<sup>12</sup> *Id.* at 1606.

<sup>13</sup> *See id.* at 1611.

<sup>14</sup> *Id.* at 1613. *Cf. id.* at 1582 ("When the Court is engaged in apparently procedural and legalistic decisionmaking, the public perceives it as more objective, neutral, and legitimate.").

<sup>15</sup> *See* Pub. L. No. 73-415, 48 Stat. 1064.

<sup>16</sup> *See* Burbank & Farhang, *supra* note 1, at 1583–603.

spects. First, none of the institutional analysis of rulemaking in *Litigation Reform* is informed by systematically collected data concerning the rulemaking enterprise. Second, as is also true of the Supreme Court data sets underlying *Litigation Reform*, that article includes little information about the rulemaking enterprise during the period immediately before 1971, information that should be useful both for comparison and for creating a more comprehensive longitudinal picture.<sup>17</sup>

The purpose of this article is to advance understanding of the role that federal court rulemaking has played in litigation reform by beginning to fill those gaps. For that purpose, we created original data sets that include (1) information about every member of the Advisory Committee on Civil Rules who served from 1960 to 2013, and (2) every proposal for amending the Federal Rules that the Advisory Committee approved for consideration by the Standing Committee during the same period, and that had implications for private enforcement. We first sketch developments from the advent of the modern rulemaking system in 1958 and the reconstitution of the Civil Rules Advisory Committee in 1960 until October 1970, when the terms of all members of the committee expired. We then revisit the period covered in *Litigation Reform*, seeking whatever additional light the new data cast on the institutional account offered there.

These new data help us to augment and refine the qualitative account of federal court rulemaking in *Litigation Reform*, while that account in turn puts the data in perspective. Thus, although our proposal data might lead one to conclude that Chief Justice Burger was successful in turning the tide of Federal Rules that favored private enforcement, we show that he had bold ambitions for retrenchment, which were largely frustrated. Indeed, the attempts to use court rulemaking for retrenchment that he encouraged caused a backlash, leading to changes in the Enabling Act Process (and the Enabling Act itself) that had the effect, and for some the purpose, of impeding retrenchment by Federal Rule.

Burger's inability to control even an Advisory Committee dominated by judges may have led him to rely more heavily on the appointment of judges and practitioners whose known or presumed preferences concerning litigation were congenial, initiating a trend that has continued. Still, the stickiness of the rulemaking status quo has continued to make bold retrenchment difficult to achieve, even for those who are ideologically disposed to it, once more setting in relief the ability of a conservative majority of the Supreme Court to make potentially radical inroads on private enforcement by "interpreting" the Federal Rules.

We are honored to present this work at a symposium recognizing the scholarly achievements and exemplary career of a dear friend, Professor Ste-

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<sup>17</sup> *See id.* at 1585–86. We have now broadened the Supreme Court data sets to include the 1960s, and we intend to analyze and discuss those data, both discretely and comparatively, in future work. As previously noted, the Library of Congress bill database begins in 1973.

phen Subrin. Steve's work has been pivotal in changing the narrative of civil procedure. He has taught us that any attempt to understand procedural reform without attention to the legal and political philosophies of its supporters and opponents, and without setting it in broader social context, is doomed.<sup>18</sup> Long before Professor Edward Purcell undressed Henry Hart and his followers, Steve Subrin's work had demonstrated that "[w]ithout constant reference to changing social dynamics and consequences, students of procedure can scarcely know what they are talking about."<sup>19</sup>

### I. FEDERAL CIVIL RULEMAKING IS REBORN: 1958–1971

The system devised to exercise the power that Congress delegated to the Supreme Court in the Rules Enabling Act of 1934<sup>20</sup> remained essentially the same from its inception in 1935 until 1956. An advisory committee appointed by the Court prepared draft Federal Rules and amendments, with some (albeit by modern standards limited) input from the bench and bar, for consideration by the Court and, if acceptable, reporting to Congress.<sup>21</sup> Although the future of the original Advisory Committee was in doubt once the Federal Rules became effective in 1938, it was constituted as a continuing body in 1942.<sup>22</sup> Since there were no prescribed terms, its membership remained remarkably stable thereafter. Indeed, it may be, as one of us has heard, that a reason for the Committee's peremptory discharge "with thanks" in 1956<sup>23</sup> was the perception that it consisted primarily of old men.<sup>24</sup>

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<sup>18</sup> See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1185 & n.732 (1982). The critically important contributions by Subrin that were anticipated there started with his canonical article on the role of equity in the Federal Rules. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

<sup>19</sup> EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 257 (2000).

<sup>20</sup> See Pub. L. No. 73-415, 48 Stat. 1064.

<sup>21</sup> For the order appointing the original Advisory Committee, see Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935). Note that the statutory arrangements governing the Enabling Act's "report and wait" system changed in 1950. See Pub. L. No. 81-510 174, 64 Stat. 158; Burbank, *supra* note 18, at 1075–77 n.268. They changed again in 1988. See *infra* note 98 and accompanying text.

<sup>22</sup> See Continuation of Advisory Committee, 314 U.S. 720 (1942).

<sup>23</sup> See Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

<sup>24</sup> Cf. A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING: A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 168 F.R.D. 679, 685 (1995) [hereinafter SELF-STUDY] ("Other observers had misgivings about the tenure and influence of the members of the Advisory Committee, who served until resignation or death."). In its 1955 report to the Supreme Court, the Advisory Committee noted that its Chair (since 1935), former Attorney General William D. Mitchell, "died before the Report could be physically completed," and that another member since 1935, Professor Edson Sunderland, "has been prevented by illness from participating in later discussions and for that reason does not join in this Report." COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF PROPOSED AMENDMENTS TO THE RULES OF

The temptation to infer that the Committee's relative (by modern standards) inactivity over almost fifteen years<sup>25</sup> was another reason for its discharge should be resisted; at the time of the Committee's discharge, a substantial package of proposed amendments was before the Court,<sup>26</sup> on which it took no action.<sup>27</sup> Subsequent events suggest, rather, that the Court sought a system that would keep the Federal Rules up-to-date and provide an effective check on improvident rulemaking within the institutional judiciary, relieving the Court of most of that burden (and of the reputation of being a rubber stamp).<sup>28</sup>

The new system was developed in response to concerns expressed by the American Bar Association ("ABA"), the Judicial Conference, and others about the "void" resulting from the Advisory Committee's discharge.<sup>29</sup> Legislation that Congress enacted at the judiciary's behest in 1958 directed the Judicial Conference to "carry on a continuous study of the operation and effect of" the various rules of practice and procedure promulgated under the Enabling Act, and to recommend to the Court "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."<sup>30</sup> The Judicial Conference promptly accepted recommendations to exercise its statutory duties through a system of advisory committees reporting to a single Standing Committee, which in turn reported to the Conference.<sup>31</sup>

As envisioned by the "Queen Mary Compromise,"<sup>32</sup> and as provided by the Conference's action in 1958,<sup>33</sup> the Chief Justice, as Chair of the Conference, appoints the members of all Conference rulemaking committees, thereby preserving them from the "degradation" that was feared if those committees were

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CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 4 (1955) [hereinafter REPORT OF PROPOSED AMENDMENTS].

<sup>25</sup> See REPORT OF PROPOSED AMENDMENTS, *supra* note 24, at 1–2, 4–5 (discussing all proposed amendments since 1938).

<sup>26</sup> See *id.* at 1–2, 4. Indeed, Professor Moore argued that "the proposed revision is too extensive." *Id.* at 6 (Separate Statement of James Wm. Moore).

<sup>27</sup> See Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 JUDICATURE 250, 252 (1963).

<sup>28</sup> See SELF-STUDY, *supra* note 24, at 685–86; *infra* notes 41–44 and accompanying text.

<sup>29</sup> See SELF-STUDY, *supra* note 24, at 685–86; CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE xix (2002) ("The Bar became disturbed over the situation and it was suggested to the Court that it appoint new committees."). The new system was the product of discussions involving Chief Justice Warren, Justice Clark, and Chief Judge Parker while in transit on the Queen Mary to the annual meetings of the American Bar Association, which were held in London in 1957. See *id.*

<sup>30</sup> Pub. L. No. 85-513, 72 Stat. 356.

<sup>31</sup> See REPORT OF THE PROCEEDINGS OF THE REGULAR ANNUAL MEETING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6–7 (Sept. 17–19, 1958) [hereinafter 1958 PROCEEDINGS], available at <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1958-09.pdf>.

<sup>32</sup> SELF-STUDY, *supra* note 24, at 686; see also *supra* note 29.

<sup>33</sup> See 1958 PROCEEDINGS, *supra* note 31, at 6.

not closely linked to the Court.<sup>34</sup> Chief Justice Warren appointed the members of the reconstituted Advisory Committee on Civil Rules in April 1960. Whereas the original (1935–38) Advisory Committee consisted exclusively of practicing lawyers (nine or 69 percent) and academics (four or 31 percent)<sup>35</sup>—with two members having previously held judicial office<sup>36</sup>—the fifteen-member committee appointed by Chief Justice Warren comprised seven practitioners (47 percent), four academics (27 percent),<sup>37</sup> three judges (20 percent), and one ex officio government official (7 percent).

According to one of the recommendations approved by the Conference in 1958, members were to be appointed “for terms of four years, the first appointments to be for staggered terms of two and four years, the members to be eligible for reappointment for one additional term only, and the members to consist of broadly representative judges, lawyers and law teachers.”<sup>38</sup> The judiciary’s gloss on this provision explained that it would “have the effect of bringing new ideas to the Committees and keeping pace with developments in the law.”<sup>39</sup> However, a review of tenure over the succeeding decade does not suggest a coherent or consistent reappointment policy, let alone a system promoting substantial turnover. Indeed, eight of the fifteen original members were still serving on the committee in 1969–70.<sup>40</sup>

In remarks to the reconstituted Advisory Committee at its first meeting in 1960, Chief Justice Warren acknowledged the Court’s concern “about the vacuum that we have had in this field for some years,”<sup>41</sup> and confided that “the re-

<sup>34</sup> See WRIGHT & MILLER, *supra* note 29.

<sup>35</sup> Here, as throughout this article, we do not count committee Reporters, who are always academics, as members of the committee.

<sup>36</sup> See Subrin, *supra* note 18, at 971–72.

<sup>37</sup> We infer that Charles T. McCormick, who was appointed to the reconstituted committee in 1960 but does not appear on the 1961 roster, was replaced by Charles Alan Wright, who appears on that roster (but not in the list of 1960 appointees) and served only the length of McCormick’s original four-year term. Both were professors at the University of Texas Law School, and McCormick died in 1963.

<sup>38</sup> 1958 PROCEEDINGS, *supra* note 31, at 6–7.

<sup>39</sup> REPORT OF THE PROCEEDINGS OF A SPECIAL SESSION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 49 (March 10–11, 1960). Note that this gloss erroneously stated that members were “entitled” to reappointment and erroneously implied that terms of “2 and 4 year[s]” continued after the initial appointments. See *id.* At the committee’s first meeting, lots were drawn to determine which members were to have four-year terms and which two-year terms. See MINUTES OF THE DECEMBER 1960 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 6 (1960) [hereinafter DECEMBER 1960 MINUTES], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV12-1960-min.pdf>.

<sup>40</sup> They were Dean Acheson (the Chair), George C. Doub, John P. Frank, Arthur J. Freund, Charles W. Joiner, David W. Louisell, Roszel C. Thomsen, and Charles E. Wyzanski, Jr. In addition, Benjamin Kaplan, the Reporter in 1960 (and thus not counted), was also a member in 1969–70.

<sup>41</sup> DECEMBER 1960 MINUTES, *supra* note 39, at 2. These minutes contain hand-written edits, all in the same handwriting. Since they include changes to the Chief Justice’s transcribed remarks, we assume that they were the work of Mr. Acheson. The quotations in the text reflect the edits.



sponsibility of keeping these rules up to date—and the fact that we were not doing it—weighed very heavily on us.”<sup>42</sup> Convinced that under the new system “all the legal profession can have the satisfaction of knowing that [the Federal Rules] are current,” Warren added that the Court did not “expect great changes to be made in the rules.”<sup>43</sup> “On the contrary,” he continued, “we feel that in the main our rules work very well. We don’t advocate any radical changes, or even any considerable departure from . . . the Civil Rules as they exist.”<sup>44</sup>

Few if any observers of federal court rulemaking would characterize the work of the reconstituted Advisory Committee from 1960 through 1971 as merely keeping the Federal Rules up-to-date. Starting with the 1955 proposals of its predecessor,<sup>45</sup> the Advisory Committee produced substantial packages of amendments that became effective in 1961, 1963, 1966, 1970, and 1971. Indeed, during that period the Advisory Committee produced 32 percent of all proposals to amend the Federal Rules that it sent forward over the five decades covered by our data.<sup>46</sup>

The 1966 amendments to Rule 23 (Class Actions) alone constituted “great changes,” and many would similarly characterize the 1970 discovery amendments, which included substantial revisions to Rules 26 (General Provisions), 30 (Depositions), 33 (Interrogatories), 34 (Document Production), 36 (Requests for Admissions), and 37 (Sanctions). The tenor of both sets of amendments was decidedly in favor of private enforcement. Indeed, based on the analysis of systematic data presented below, we find that “[t]he period from 1960 to 1971 was one in which the net balance clearly favored plaintiffs,”<sup>47</sup> and hence private enforcement.

Looking at the demography of the Committee over the course of the period, we see that there were never less than seven, and that during the final four years of the period there were ten, practitioners (mean = 55.1 percent), while there were never more than three (nor less than two) judges (mean = 18.15 percent). There were never less than three academics, and there were four during the first four years of the reconstituted committee (mean = 23.16 percent). Because the tenure of Committee members exceeded expectations expressed in 1960, only four judges were members over the decade, two appointed by Democrats (Roosevelt and Kennedy), and two by Republicans (both Eisenhower). Similarly, only twelve practitioners served on the Committee during the dec-

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<sup>42</sup> *Id.* at 3.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> *Id.*

<sup>45</sup> *See id.* at 7.

<sup>46</sup> We have treated the years 1960 through 1971 as a discrete period in order to reflect the fact that the proposals sent forward during that period emanated from a committee appointed by Chief Justice Warren, which remained substantially intact throughout, and which was replaced by a committee appointed by Chief Justice Burger in 1971. Although the terms of all members of the Advisory Committee ended in October 1970, they were responsible for the proposals that became the 1971 amendments to the Federal Rules.

<sup>47</sup> *Infra* text accompanying notes 60-61; *see also infra* Figures 7-8.

ade. To the extent that we can tell from available sources, eleven (92 percent) were in mixed practices, and one (8 percent) was in a primarily plaintiff-side practice. One member (8 percent) during this period primarily represented individuals, and two (17 percent) primarily represented corporations/businesses. The great majority (nine or 75 percent) represented both individuals and corporations/businesses.

## II. THE DATA

In the previous section we presented, without detailed statistical analysis, certain data for the purpose of enriching discussion of the reconstituted Advisory Committee and its work over the period ending in 1971. As a supplement to that discussion and a bridge to the remainder of the article, which considers the period covered in *Litigation Reform*, we present here analyses of data for the entire period spanning 1960 to 2013.

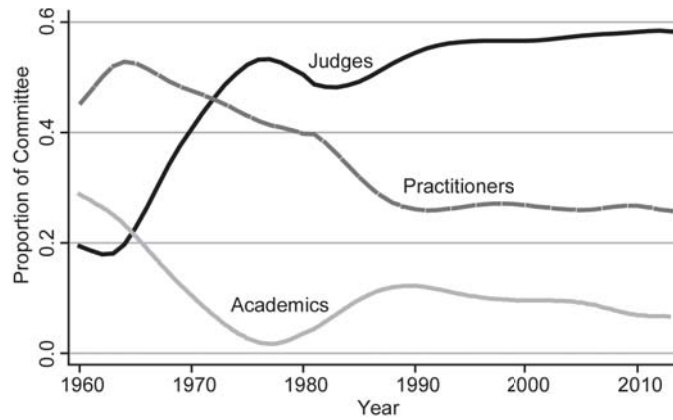
### A. *Balance of Power on the Advisory Committee, 1960–2013*

To investigate what institutional, ideological, and other interests have been empowered to influence the Federal Rules, we collected data on committee membership from 1960 to 2013. Each committee member was coded as a judge, practitioner, academic, or ex officio representative of the federal government. We then calculated, for each committee year, the proportion of total membership represented by each category. Because we are primarily interested in the Chief Justice's choices, we do not examine federal government representation on the Committee, which is beyond the Chief's control (it averaged 6 percent over the full period).

Figure 1 represents locally-weighted least squares ("LOWESS") curves fit to the annual proportion of judges, practitioners, and academics on the Advisory Committee over time. The data reflect that in the early 1960s, practitioners enjoyed the highest level of representation, followed by academics, with judges the least represented. A transformation followed in which, by the 1970s, judges moved from a relatively small minority to a consistent majority on the Committee. Just as precipitous as judges' ascent to majority status was the corresponding decline in the share of Committee representation garnered by practitioners and academics.

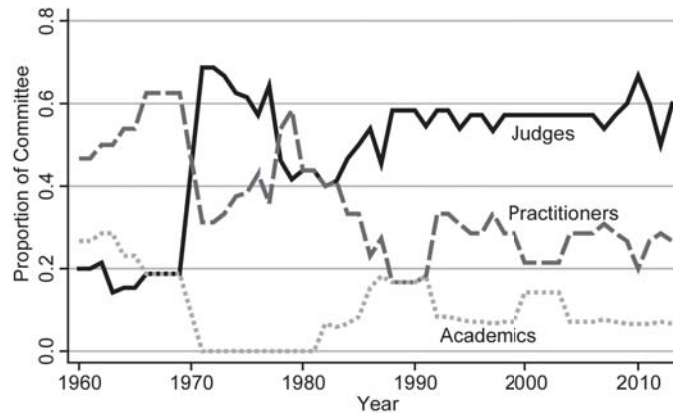
The smoothed regression lines do not reveal sharp disjunctures in the data. For that purpose, looking at plots of raw proportions for each group is illuminating, and that information is presented in Figure 2. These are the data used to estimate the smoothed regression lines in Figure 1. Figure 2 makes clear that

FIGURE 1: LOWESS PLOT OF PROPORTION OF JUDGES, PRACTITIONERS, AND ACADEMICS



the 1971 reconstitution of the Rules Committee under Chief Justice Burger, which we discuss below, was a pivotal event. Judges, who represented about 18 percent of the Committee for the previous decade, overnight became a majority, with their representation rising from 19 percent immediately prior to reconstitution to 69 percent on the new committee in 1971. Practitioners were demoted from solid majority status in the 1960s, and over the long run their position stabilized at a little over 25 percent of the Committee. Academics disappeared from the committee entirely for a decade and then rebounded to something on the order of a 10 percent share of seats. In the last quarter century, judges have constituted a majority of the Committee in every year.

FIGURE 2: PROPORTION OF JUDGES, PRACTITIONERS, AND ACADEMICS ON THE COMMITTEE



We also chart practitioner profiles over time along two dimensions: plaintiff versus defendant representation, and individual versus business/corporate representation. In order to assess a practitioner's practice area, we examined multiple sources. We primarily relied on cases in which the practitioner ap-

peared as counsel, but we also relied on firm profiles, newspapers, and other historical sources. With respect to the plaintiff versus defendant classification, we classified practitioners as plaintiff or defense lawyers if they represented plaintiffs or defendants in 75 percent or more of decisions identified, respectively. Practitioners who did not represent either plaintiffs or defendants at or beyond the 75 percent threshold were classified as representing both client populations. We coded defense practitioners as 0, those representing both sides as 1, and plaintiff practitioners as 2, creating a scale ranging from 0 to 2. It is important to note that a practitioner can be designated a plaintiffs' lawyer even when representing predominantly business/corporate clients.

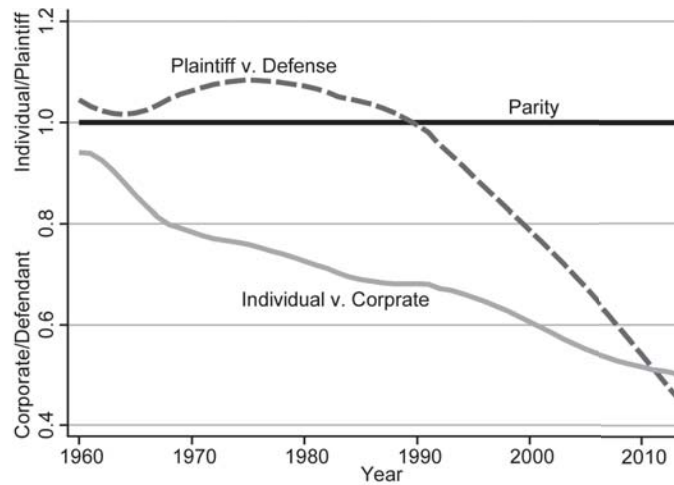
With respect to the individual versus business/corporate classification, we classified practitioners as individual or business if they represented individuals or businesses in 75 percent or more of decisions identified, respectively. We include in our conceptualization of individual representation cases in which an attorney represents *classes* of individuals. Practitioners who did not represent either individuals or businesses at or over our 75 percent threshold were classified as representing both. We coded practitioners representing businesses as 0, those representing both as 1, and those representing individuals as 2, again creating a scale ranging from 0 to 2.

We compiled a dataset in which the unit of analysis is the presence of an individual practitioner on the committee in each year. From 1960 to 2013, forty practitioners were members in total, serving an average of 6.7 years, comprising 267 practitioner-committee year observations. To provide a broad sense of longitudinal patterns, we estimated LOWESS curves with the plaintiff versus defendant scale, and the individual versus corporate/business scale, as dependent variables, and year as the independent variable. The results are presented in Figure 3. The solid horizontal line at the value of 1 represents parity on the plaintiff/individual versus defense/business scales. If, for example, in a particular committee year there were two plaintiff practitioners, one representing both sides, and two defense practitioners, the mean practitioner value for the year would be 1 on the plaintiff versus defense scale. Values above the parity line represent a balance in favor of plaintiffs/individuals, and values below it represent a balance in favor of defense/business.

The estimated values in the figure reflect that, on the individual versus corporate/business scale, there was a long run decline over the full period away from near parity and toward corporate/business representation. The estimated values of the individual versus business scale declined from 0.94 in 1960 to 0.50 in 2013, falling by 49 percent. The balance is on the business/corporate side of the parity line throughout.

On the plaintiff versus defendant scale, the estimated values are slightly on the plaintiffs' side of party until the start of the 1990s, when there is a substantial shift toward defense practitioners, which continues up to the present time. The estimated values on the plaintiff versus defendant scale hovered between 1 and 1.08 from 1960 to 1990, and then declined rapidly to 0.46 by 2013, for a

FIGURE 3: PRACTITIONER TYPES ON ADVISORY COMMITTEE



net decline of 54 percent. We note, however, that during the period that the scale was on the plaintiffs' side of parity—from 1960 to about 1990—only one plaintiffs' lawyer served who represented primarily *individual* plaintiffs or classes of them. The slight balance in favor of plaintiffs during this period is driven by practitioners representing a mixture of business/corporate and individual plaintiffs. By the end of the series, the predicted values for the plaintiff versus defense scale, and the individual versus business scale, converge. This is because by the end of the series Committee practitioners are composed overwhelmingly of two types: plaintiffs' lawyers representing individuals or classes of them, and corporate defense lawyers, with the latter consistently holding the balance of power.

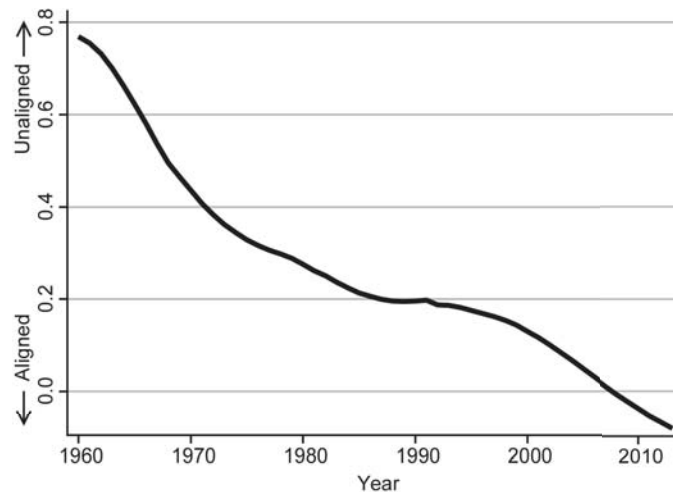
This relates to a facet of Committee practitioner client populations that bears emphasis. At the start of the series, a substantial majority of practitioners on the Committee could not be classified, using our 75 percent rule, into any of the four types: plaintiff, defense, individual, or business. Their client populations were sufficiently heterogeneous to place them in the “both” categories with respect to each of the scales. By the end of the series, such unaligned practitioners, once predominant, become nonexistent. To convey this transformation graphically, we coded practitioners 1 if they could be classified into *none* of the four classifications, and coded them 0 otherwise. We then estimated a LOWESS model of the probability of such unaligned practitioners serving in each year, and the results are presented in Figure 4. The probability declines from a high level of 92 percent in 1960, to essentially zero in 2013.

We suspect that our data reflect changing professional demographics to some extent, a matter that we intend to investigate further.<sup>48</sup> Yet, Chief Justices

<sup>48</sup> See JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005).

have made choices in appointing practitioners that cannot be described as yielding “broadly representative” groups, particularly if one recalls that every lawsuit involves at least one plaintiff and one defendant. Whatever the cause, we regard the composition of practitioners on the committee along the individual versus corporate, and plaintiff versus defendant dimensions, as material to assessing the likely preferences of practitioners on the committee.

FIGURE 4: ALIGNED VERSUS UNALIGNED PRACTICES ON ADVISORY COMMITTEE



### B. *The Politics of Appointing Federal Judges to the Committee*

The appointment and service of Article III federal judges on the Advisory Committee provides a unique opportunity to explore in a systematic way the question whether the Committee is selected so as to give it a particular ideological profile. These appointments are made from a readily identifiable pool of candidates, and we have a plausible measure of potential members’ presumed preferences that would be visible to the appointing Chief Justice—the political party of the appointing president. This measure is surely imperfect, but mountains of evidence establish that it is associated with the voting behavior of Supreme Court justices in predictable ways.<sup>49</sup> Of course, judge-members of the

<sup>49</sup> See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). Although we used another measure of ideological preferences in our analysis of the case data in *Litigation Reform*, see Burbank & Farhang, *supra* note 1, at 1571, 1607 (discussing Martin-Quinn scores), when we regress party of the appointing president on the direction of justices’ votes in a logit model with case fixed effects and standard errors clustered on justice, the party variable is statistically significant ( $p=.007$ ), with Republican-appointed justices having a 29 percent lower probability of voting in the pro-private enforcement direction. For a study of the Chief Justice’s appointments to all Judicial Conference committees in the period 1986–2012, see Dawn M. Chutkan, *The Chief Justice as Executive: Judicial Conference Committee Appointments*, 2 J.L. & CTS. 301 (2014). The author finds that the “[o]dds of being selected to any committee increase by about 73% for Republi-

Advisory Committee are not Supreme Court justices,<sup>50</sup> but neither do they exercise Article III judicial power when they participate in rulemaking under the Enabling Act. Although being judges may affect their behavior as rulemakers exercising delegated legislative power,<sup>51</sup> any close observer of this landscape over time will acknowledge that some of the rulemakers who are judges vote their ideological preferences at least some of the time.<sup>52</sup>

We focus on the period from 1971 to 2013. Although we collected data for the 1960s, those data are too sparse for meaningful analysis in statistical models. As we have noted, in the 1960s Chief Justice Warren appointed only four federal judges to the Advisory Committee, and of the four, two were appointed by Republican, and two by Democratic, presidents. Further, of the twenty-seven years of committee service by these four federal judges in the 1960s, thirteen were by Democratic appointees and fourteen by Republican appointees. As a result of the large increase in the number of judges on the committee beginning in 1971, there were sufficient data for analysis. Finally, because there was a Republican Chief Justice in every year from 1971 to 2013, to assess presumed ideological effects we need only examine whether there was disproportionate reliance on judges appointed by Republican presidents for appointments to the Committee.

If the party of the appointing president were not associated with judges' service on the Advisory Committee, the balance on the Committee would approximate the balance among judges on the federal bench eligible to be appointed. Pooling *judge-years* on the federal bench from 1971 to 2013, the Republican to Democratic-appointee split was 55 to 45 percent. Pooling *committee-years* of service by Article III judges for the same period, the split was 73 to 27 percent in favor of Republican appointees. Among 103 *appointments or reappointments* of Article III judges to the committee, the split was 72 percent to 28 percent in favor of Republican appointees. Of course, these cross-sectional figures give no sense of how representation on the Committee has changed over time.

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can judges, and the odds of a selection to a Law Committee [of which the Civil Rules Advisory Committee is one of nine in the author's disaggregation] more than double." *Id.* at 313. The paper has some other findings that parallel those presented here, but because it aggregates data from appointments across nine committees, no inferences about the Advisory Committee from its findings are possible. We learned of Professor Chutkow's paper after first presenting this paper at the conference celebrating Steve Subrin on April 11–12, 2014, and we thank her for sharing it with us.

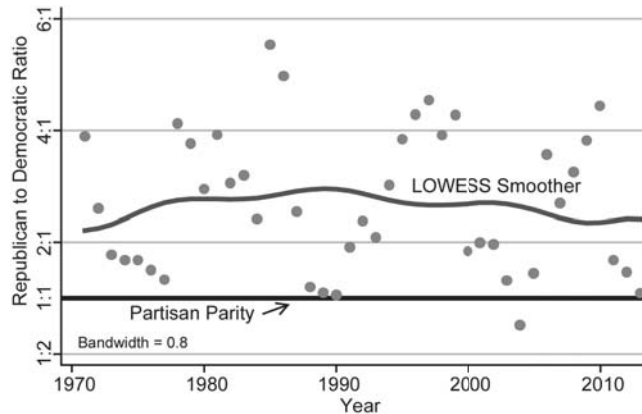
<sup>50</sup> Cf. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 237 (2013) (“[T]he ratio of Republican to Democratic conservative votes is seen to increase as cases move up the judicial ladder, consistent with ideology playing an increasing role at each level because the constraints on judicial discretion lessen as one moves up.”).

<sup>51</sup> See Burbank & Farhang, *supra* note 1, at 1600–01.

<sup>52</sup> Cf. EPSTEIN ET AL., *supra* note 50, at 235 (“When a judge or Justice has to make a legislative decision rather than decide the case just by following clear statutory or constitutional text or clearly applicable precedent, ideology may determine the outcome.”).

We calculated the percentage of all sitting judges appointed by Republican presidents who served on the committee, divided by the same percentage for judges appointed by Democratic presidents. This yields a population-adjusted ratio of service. A population-adjusted ratio of one-to-one would occur when appointment to the Committee was not associated with party; a ratio greater than one would occur when Republican appointees constituted a larger fraction of the Committee than they did of eligible judges on the federal bench; and a ratio less than one would occur when Democratic appointees constituted a larger fraction of the Committee than they did of eligible judges on the federal bench. Constructing this ratio from the pooled 1971 to 2013 data shows that 0.18 percent of judges appointed by Democratic presidents served on the committee, while 0.47 percent of judges appointed by Republicans served. Although the percentages themselves are minuscule, what is important is the relationship between them. The Republican to Democratic ratio is 2.61 to 1, meaning that judges appointed by Republican presidents served at a population-adjusted rate 161 percent higher than those appointed by Democrats.

FIGURE 5. JUDGE MEMBERS APPOINTED BY REPUBLICAN AND DEMOCRATIC PRESIDENTS



To assess change over time, we constructed this ratio in each year from 1971 through 2013. Figure 5 represents a LOWESS curve fit through those data points.<sup>53</sup> The horizontal line at the value of one indicates where the estimates would cluster if the presumed ideological composition of federal judges on the committee reflected that of the federal judiciary. The LOWESS estimates reflect overrepresentation of judges appointed by Republican presidents on the

<sup>53</sup> In the years 1994 to 1997, there were six Article III judges appointed by Republican presidents on the committee and none appointed by Democratic presidents. There was one state court judge appointed by a Democratic governor during these years (Christine Durham of Utah). It is impossible to compute a rate for these years since one cannot divide by zero. In order to avoid discarding data for these years, we treated the committee as if there were one Democratic and six Republican appointees. Figure 5, therefore, modestly understates the size of the Republican slant of Article III judges serving on the committee in the region of the figure affected by these years.



Committee from the time of its reconstitution under Chief Justice Burger in 1971. The estimated ratio ranges between 2.2 and 3 for the full period. Thus, simple bivariate estimates indicate that, controlling for the composition of the federal bench, Republican-appointed judges had more than double the estimated probability of serving on the Committee during the period of interest.

We next assess whether this effect is statistically significant in regression models with controls. The dataset was constructed as follows. For each year from 1971 to 2013, each federal district court and court of appeals judge, both active and senior, is included. This produced 42,685 judge-year observations. In the model of Committee service (Model 1 below), judges serving on the Committee are coded 1 in each year they serve, and those not serving are coded 0. In the models of Committee appointments (Models 2 and 3 below), in years in which appointments were made, judges appointed are coded 1 and those not appointed are coded 0. We include independent variables in our models that annually measure the party of the judge's appointing president (Democrat=0, Republican=1), whether the judge had taken senior status (active=0, senior=1), and whether she was a district or court of appeals judge (court of appeals=0; district=1). We also code each judge's race (white=0; minority=1) and gender (male=0; female=1). Finally, the models include year-fixed effects, which control for all year-level variables, such as the identity of the Chief Justice, and the political salience of litigation or federal rulemaking. Further details of measurement and model specifications are in the Appendix.<sup>54</sup>

We first estimate logit models with committee service as the dependent variable, with standard errors clustered on judge. There are 277 years of committee service in the data. The results are reported in Model 1 of Table 1. Being appointed by a Democratic president is significantly associated with a lower probability of serving on the Committee.<sup>55</sup> The probability of service for judges appointed by Republican presidents is 2.3 times larger, or 130 percent higher, than for Democratic appointees. This is roughly the same magnitude we observed when looking at the raw data.

The race variable is significant and negative, indicating that non-white judges are less likely to serve on the Advisory Committee. By comparison, white judges' probability of serving on the committee is about 5.1 times larger. Examining the raw data to assess the plausibility of this very large effect, we observe that although non-white judges account for 11 percent of the judge-years in the data, they account for only 2 percent of committee service-years (6 of 277), and 2 percent of appointments or reappointments (2 of 103).<sup>56</sup> White

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<sup>54</sup> The Appendix to this article is available at <http://scholars.law.unlv.edu/nlj/vol15/iss3/19/>.

<sup>55</sup> Because the probability of service for any judge is extremely low, in order to assess the magnitude of the effects, we focus on the ratio of predicted probabilities between categories of the explanatory dummy variables. That is, we calculate predicted probabilities for the dummy variable at both 0 and 1, and take the ratio of the two predicted probabilities.

<sup>56</sup> The two non-white judges are Jose Cabranes, who served one committee term from 2004–06, and Oliver Solomon, who began service on the committee in 2011.

judges are 89 percent of the judge-years, and 98 percent of both committee service-years and appointments or reappointments. Thus, a large race disparity is visible at the descriptive level. Active judges have a probability of service about 3.7 times larger than judges in senior status. Gender and being a district versus court of appeals judge are both insignificant.

In Model 2 in Table 1, we substitute as the unit of analysis a variable measuring whether the judge was appointed or reappointed in each year. Model 1, focusing on years of service, only describes the association between judge characteristics (party of appointing president, race, etc.) and the probability of being in the state of serving on the committee in each year. What the model reveals is critical to understanding the actual composition of the Advisory Committee relative to the federal bench. However, direct inferences cannot be drawn from this about appointment decisions. With only 103 episodes of appointment or reappointment, we have limited data to model appointment. In Model 2, we add the additional control variable of reappointment candidate, accounting for whether a judge was already serving on the Committee.<sup>57</sup>

TABLE 1: LOGIT MODEL OF COMMITTEE SERVICE AND APPOINTMENT FOR ARTICLE III JUDGES WITH YEAR FIXED EFFECTS, 1971–2013

	Model 1 Committee Service	Model 2 Appointment & Reappointment	Model 3 Initial Appointment Only
	Coef.	Coef.	Coef.
<i>Party</i> (Democrat=1)	-0.83 (.34) **	-0.72 (.30) **	-0.65 (.32) **
<i>Race</i> (Non-white=1)	-1.60 (.72) **	-1.37 (.73) *	-0.99 (.71)
<i>Gender</i> (Female=1)	0.32 (.56)	0.21 (.42)	0.16 (.48)
<i>Senior status</i>	-1.34 (.49) ***	-2.29 (.58) ***	-2.37 (.74) ***
<i>District court</i>	-0.54 (.33)	-0.32 (.31)	-0.52 (.31) *
<i>Reappointment Candidate</i>	—	8.43 (.41) ***	—
N=	42077	42077	32165
Adj. R <sup>2</sup> =	.06	.49	.12

Standard errors in parentheses, clustered on judge.  
\*\*\* p < .01; \*\* p < .05; \* p < .1

<sup>57</sup> Initial appointments cannot be treated in the same way as reappointments because being on the committee makes one vastly more likely to be appointed again, and this must be modeled in some fashion. The reappointment candidate variable takes the value of 1 in the year following the conclusion of a term—a year in which a judge can either exit the committee or transition into the first year of a new term.

In this model, party is again significant. The probability of committee appointment or reappointment of judges appointed to the bench by Republican presidents is about 1.5 times larger than that of Democratic appointees. Race is significant at the  $p < .1$  threshold, with whites having a probability of appointment or reappointment 2.08 times greater than non-whites. Active judges have a probability of appointment or reappointment 3.75 times larger than judges in senior status, and the gender and district versus court of appeals judge variables remain insignificant.

Finally, in Model 3, we restrict the dependent variable to initial appointments. We lack information about reappointments that could be material, such as whether judges sought and were rejected for reappointment, versus choosing to exit service even if their continuation would have been accepted or was desired by the Chief Justice. This model also avoids aggregating initial appointments and reappointments, which are likely quite different decisions. Restricting the dependent variable in this way drops the number of appointing events to fifty. The party of appointing president variable remains significant, and the magnitude increases relative to Model 2, with judges appointed to the bench by Republican presidents twice as likely to be initially appointed to the Committee. Race dips below  $p < .1$  significance. We believe that the decline in significance of the race variable from significant in Model 1, to marginally significant in Model 2, to insignificant in Model 3, is a function of limited data to estimate an effect in the models of appointment decisions. Judges in senior status remain substantially less likely to be appointed; gender remains insignificant, and the district judge variable marginally crosses the  $p < .1$  threshold with a negative sign.

### C. *The Committee's Output*

In order to track longitudinal trends in the Advisory Committee's posture toward private enforcement, we constructed a dataset of all proposals to change the Federal Rules in a manner affecting private enforcement that the Committee forwarded to the Standing Committee from 1960 to 2011. We coded those proposals for whether they favored or disfavored private enforcement (were plaintiff or pro-defendant) in predictable ways. In order to identify proposals bearing on private enforcement, at least one of the authors read all of the Advisory Committee's proposed revisions to the Federal Rules from 1960 to 2011, including proposals that were not adopted. At the Rule level—counting each proposal to amend a specific Rule in a particular year as a discrete unit—there were 248 proposals over this period.<sup>58</sup> We identified twenty-nine of these Rule

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<sup>58</sup> The 2007 style amendments, and the package of 1987 gender-neutrality amendments, are omitted for purposes of the count, as are multiple iterations of substantially similar amendments to the same Rule. Conforming amendments, technical amendments, new Rules proposals, and amendments by way of abrogation are included in the count.

level proposals (about 12 percent of the total) as predictably affecting private enforcement.

We further broke down the proposals into distinguishable subunits within the Rule level. This had no effect on the count for the sixteen Rule level proposals that sought only a single change bearing on private enforcement. For the remaining proposals, however, disaggregation seemed appropriate. For example, the 1983 proposal to amend Rule 11 suggested multiple changes to the Rule. Among them we identified two basic types of change: one enlarging the scope of the Rule's application, and one strengthening sanctions for violations. Thus, we coded the proposal as contributing two units to this measure of proposed changes.<sup>59</sup> Breaking down the twenty-nine Rule level proposals into these subunits rendered a total of thirty-nine items. Of these, thirty-nine (92 percent) passed through the rest of the Enabling Act Process and became effective in substantially the language recommended. Three proposals—a 2000 proposal to authorize cost-shifting in Rule 26, and a 1993 proposal to amend Rule 56 (in which we count two items)—were rejected by the Standing Committee or the Judicial Conference.

In the Appendix<sup>60</sup> we show that the basic patterns described below with respect to these data hold if one performs the analysis at the Rule level, or if one breaks the proposals down into even more granular units than we do in our main analysis. Thus, although reasonable people can disagree about the appropriate way to construct the unit of analysis, the same temporal patterns emerge from three alternative plausible strategies. Our results are not an artifact of our method of counting proposals.

Before discussing our findings, a caveat is in order. Our approach to counting proposals does not distinguish far-reaching proposals from less consequential ones. Qualitative analysis and judgment are necessary to assess the relative impact and significance of particular proposals, and that is on our agenda for the larger project of which this article is a part. Although we offer a provisional view on that question as to rulemaking in the 1980s, assessment of the contribution that rulemaking has made to the retrenchment project over the entire period of study will require careful exploration of the significance of changes that the Advisory Committee has fashioned. Here, we assess quantitatively change over time in the average direction of proposals on the pro-plaintiff versus pro-defendant dimension. This is a different question than impact, but one that we believe is important to address as we endeavor to understand long-term patterns in the Committee's behavior.

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<sup>59</sup> With respect to scope, the 1983 proposal (1) expanded coverage to include not just pleadings but also any motion or paper, (2) added parties to attorneys as making certain certifications by signing a paper, and (3) strengthened the substance of the certification from the "good ground" standard to something more demanding. With respect to sanctions, the proposal (1) introduced mandatory sanctions, and (2) identified costs and fees as potential sanctions.

<sup>60</sup> Available at <http://scholars.law.unlv.edu/nlj/vol15/iss3/19/>.

Figure 6 presents the distribution over time of the thirty-nine proposals affecting private enforcement from 1960 to 2011. Figure 7 presents the *net* balance, in years in which there were proposals affecting private enforcement, between pro-plaintiff and pro-defendant proposals. Pro-plaintiff proposals are coded 1, and pro-defendant proposals are coded -1. The bars in Figure 7 represent the net result from summing across all values of 1 and -1 in each year. There were no years in which all proposals summed to zero. Thus, all zero values in the figure represent years in which there were no proposals affecting private enforcement. Years in which the bar is greater than zero were ones in which the Committee made more proposals favoring plaintiffs than defendants, and the value of the bar represents the margin by which this was so. Years in which the bar is less than zero were ones in which the Committee made more

FIGURE 6: NUMBER OF ADVISORY COMMITTEE PROPOSALS AFFECTING PRIVATE ENFORCEMENT

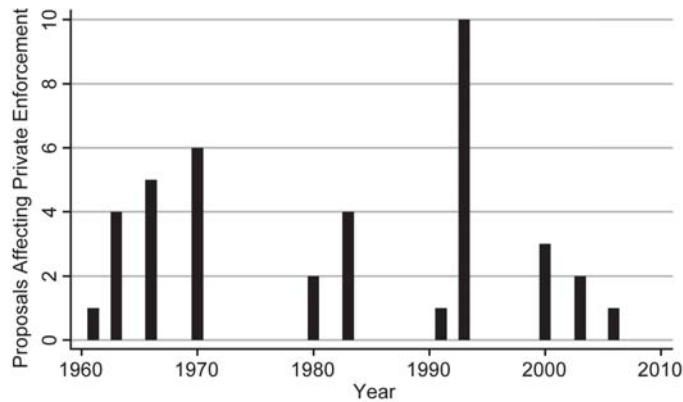
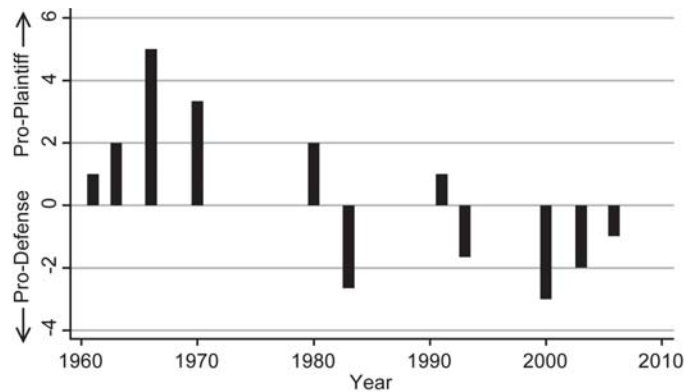


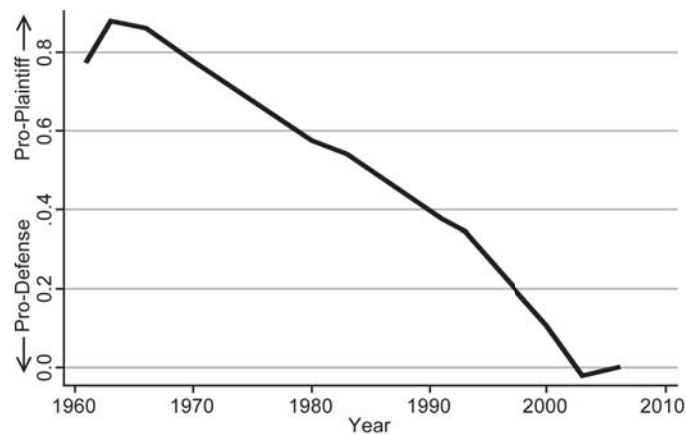
FIGURE 7: BALANCE BETWEEN PRO-PLAINTIFF AND PRO-DEFENSE PROPOSALS



proposals favoring defendants than plaintiffs. The period from 1960 to 1971 was one in which the net balance clearly favored plaintiffs. The two decades from 1971 to 1991 saw only three years with proposals affecting private enforcement (leading to the 1980, 1983, and 1991 amendments to the Federal Rules), and the net result over that period was an even balance between plaintiff- and defense-favoring proposals. From 1991 through 2011, the net balance favored defendants in every year in which a proposal was made.

We next estimate a LOWESS curve of the probability of a pro-plaintiff proposal over time, conditional on the existence of a proposal affecting private enforcement.<sup>61</sup> For this purpose, proposals favoring defendants were coded 0 and proposals favoring plaintiffs were coded 1. For proposals containing both pro-plaintiff and pro-defendant elements—which occurred only three times in the data—we took the mean value.<sup>62</sup> The variable thus ranges between 0 and 1. Figure 8 represents the results.<sup>63</sup> After increasing in the early 1960s, the predicted probability that a proposed amendment would favor plaintiffs declined from 88 percent in 1963 to zero by the end of the series. Because LOWESS smoothing regression does not allow one to observe key breakpoints in the data, this figure should be interpreted in conjunction with the descriptive representation of the data in Figure 7.

FIGURE 8: PROBABILITY OF PRO-PLAINTIFF ADVISORY COMMITTEE PROPOSALS



In order to assess the statistical significance of this negative time trend, we regressed an annual time trend on the dependent variable used to estimate the curve in Figure 8. Although we have only thirty-nine observations, the negative time trend is highly statistically significant ( $p=.000$ ), with a coefficient  $-.02$ , in-

<sup>61</sup> The LOWESS curve was estimated at 80 percent bandwidth.

<sup>62</sup> For example, if we treated three changes on the same subject as constituting a single sub-unit, where one was pro-defense (0) and two were pro-plaintiff (1) in direction, the value for the unit would be  $.67$ .

<sup>63</sup> The LOWESS curve was estimated at 80 percent bandwidth.

dicating that from 1960 to 2011 the passage of each year was, on average, associated with a reduction of 2 percent in the probability that a proposal would be pro-plaintiff. Overall, the data show that, conditional on the existence of a proposal affecting private enforcement, the predicted probability that it would favor plaintiffs went from highly likely at the beginning of the series to zero at the end.

### III. STARTING OVER: RETRENCHMENT AND RULEMAKING REFORM, 1971–1991

#### A. 1971–1981: A Decade of Frustration

In an October 1970 report, the Standing Committee observed that the “initial examination of the civil rules, begun more than ten years ago by the Advisory Committee on Civil Rules has now been completed and the terms of service of the members of that committee expired on October 1, 1970.”<sup>64</sup> Recommending that “the Chief Justice be requested to appoint a new Advisory Committee on Civil Rules when he deems it appropriate,”<sup>65</sup> the report continued:

The standing committee recognizes that there is presently a crisis in the administration of justice in the federal courts caused, at least in part, by the inordinate delays resulting from the constantly increasing case loads. The committee believes that the time has come when we must consider all serious proposals for modernizing the procedure and improving the efficiency of the courts, without impairing the just determination of litigation, no matter how drastic or fundamental the proposals may be. We accordingly recommend that a small ad hoc committee . . . be appointed by the Chief Justice to consider and report to the Conference a list of those proposals which they think might be helpful in this regard and which they believe merit serious discussion and detailed study by an advisory committee and its reporter.<sup>66</sup>

Chief Justice Burger wasted little time in implementing these recommendations. He appointed a special advisory group on civil litigation,<sup>67</sup> and in 1971

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<sup>64</sup> COMM. ON RULES OF PRACTICE AND PROCEDURE, SUPPLEMENTAL REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 4 (Oct. 19, 1970), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST10-1970-1.pdf>.

<sup>65</sup> *Id.* at 5.

<sup>66</sup> *Id.* at 5–6.

<sup>67</sup> See SPECIAL ADVISORY GRP. ON FED. CIVIL LITIG., SUGGESTIONS FOR IMPROVING THE PROCESSES OF CIVIL LITIGATION IN THE FEDERAL COURTS TO THE CHIEF JUSTICE OF THE UNITED STATES: A TENTATIVE REPORT (1971) [hereinafter SPECIAL ADVISORY GROUP SUGGESTIONS] (on file with authors). From the perspective of 2015, before the end of which we are likely to see the abrogation of Rule 84 and Official Forms, it is interesting that the Special Committee’s suggestions regarding pleadings and motions were animated by the question “whether they can be further streamlined,” and that it proposed as a possible first step “expand[ing] the Official Forms that accompany the Federal Rules and even requir[ing] that they be used.” *Id.* at 13–14. Less likely to elicit cognitive dissonance is its suggestion that there be “a serious attempt to vitalize and extend some of the procedural devices that have been developed for achieving an accelerated judgment or a determination of litigation prior to trial but that have not been widely used in the past.” *Id.* at 14; see also *id.* at 2 (rec-

he appointed a new Advisory Committee on Civil Rules. Burger “attended briefly and addressed the Committee”<sup>68</sup> at its first meeting in September 1971. According to the minutes:

He noted certain expressions of dissatisfaction with a number of specific procedural devices and suggestions for improvement. But he emphasized the need, not simply for the betterment of existing procedures, but for major changes in the way in which litigation is being handled. He advised the Committee that it was unique in that it could make recommendations in any area of civil litigation where it considered change desirable.<sup>69</sup>

This was very different advice from that given eleven years earlier by Chief Justice Warren,<sup>70</sup> and it was given to a committee very differently composed. Notwithstanding Judicial Conference policy calling for “members to consist of broadly representative judges, lawyers and law teachers,”<sup>71</sup> of the new committee’s sixteen members, eleven (69 percent) were judges, and five (31 percent) were practitioners; there were no academic members.<sup>72</sup>

In *Litigation Reform*, we suggest that 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” Chief Justice Burger’s “chang[ing] the balance of power on the key committees”<sup>73</sup> strongly in favor of members

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ommending that courts “make more effective use of the pretrial disposition procedures presently available, such as summary judgment”). One of the devices mentioned by the Special Committee, which came to play an important role in the controversies of the next decade was “the offer of judgment (Rule 68).” *See infra* text accompanying notes 92–94. The Special Committee also observed that “Rule 11 . . . should be more frequently invoked,” SPECIAL ADVISORY GROUP SUGGESTIONS, *supra*, at 1, foreshadowing the 1983 amendments to that rule, which were at the center of controversy during the next decade. *See infra* text accompanying note 91. The Advisory Committee considered this report at its first meeting and committed to the Reporter for further study “the suggestions contained in the report for improving the pleading structure and accelerating judgment.” ADVISORY COMM. ON CIVIL RULES, MINUTES OF THE SEPTEMBER 21, 1971 MEETING 3 [hereinafter 1971 MINUTES], *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV09-1971-min.pdf>.

<sup>68</sup> 1971 MINUTES, *supra* note 67, at 1.

<sup>69</sup> *Id.*

<sup>70</sup> *See supra* text accompanying notes 41–44.

<sup>71</sup> 1958 PROCEEDINGS, *supra* note 31, at 7.

<sup>72</sup> The members of the reconstituted Advisory Committee were appointed for four-year terms that ended October 1, 1975. Our evidence suggests that term length changed at that time to three years, which has remained the norm to the present. *See SELF-STUDY, supra* note 24, at 688. There is no right to reappointment, but reappointment for one additional term has also been the norm. Finally, Chief Justices have occasionally appointed members to additional terms after an initial reappointment, and occasionally have done so for terms of less than three years.

<sup>73</sup> Burbank & Farhang, *supra* note 1, at 1587. We note there that “judges . . . are presumably more likely than lawyers or academics to protect institutional interests, as well as more susceptible to direction from on high.” *Id.* at 1588. Further reflection in light of the composition and work of the Advisory Committee in the 1971–81 period and more recently suggests that



who were judges. We also observe that “Burger made no secret of his antipathy toward the ‘litigation explosion’ of the 1970s, a phrase that some credit him with coining,”<sup>74</sup> and that “[a]lthough 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.’”<sup>75</sup>

It is striking that, with the Chief Justice and the Standing Committee urging major changes, and with judges constituting a majority of the Advisory Committee—which remained true until 1978–79<sup>76</sup>—the Committee accomplished little in the 1970s. The Advisory Committee sent forward to the Standing Committee only fourteen proposals for amendments (at the Rule level), four that resulted in the 1972 amendments and ten that resulted in the 1980 amendments. This represented but 6 percent of the proposals sent forward during the entire period of study. Moreover, we determined that only two proposals for amendments were salient to the issue of private enforcement, and both of those proposals were pro-enforcement.

Resisting the temptation to attribute this record, so different from that of the 1960s Committee, to the lack of academic members, we think it likely that the Chief Justice’s bold ambitions became harder to achieve in light of the controversies engendered by the proposed Federal Rules of Evidence, which the Court had promulgated under the Enabling Act’s delegation of civil rulemaking authority in late 1972.<sup>77</sup> Then, too, Chief Justice Burger may have overestimated his ability to control or influence the Advisory Committee.

At its first meeting, in September 1971, the Advisory Committee “requested the reporter to undertake a study of the desirability of effecting changes in” Rule 23 (Class Actions) and Rule 16 (Pre-Trial Procedure).<sup>78</sup> We deem it likely that the Chief Justice stimulated interest in Rule 23—that it was one of the “specific procedural devices” about which “[h]e noted certain expressions of dissatisfaction.”<sup>79</sup> It was not, in any event, one of the subjects that received attention from the Special Advisory Group he had appointed, the report of which

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“susceptib[ility] to direction from on high” may depend to some extent on whether the judge in question shares the ideological and other preferences bearing on procedural lawmaking of those seeking to exercise such direction.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1588 n.157.

<sup>76</sup> *See supra* Figure 2.

<sup>77</sup> From Burger’s perspective, the timing could not have been worse. The Federal Rules of Evidence controversy prompted calls for changes in the Enabling Act process. *See* Burbank, *supra* note 18, at 1020–21. Moreover, Congress now had evidence of the potential costs of the delegation, which may have seemed similar to those that caused it to implement reforms making administrative agencies more responsive and responsible. *See* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1710–11, 1728 (2004).

<sup>78</sup> 1971 MINUTES, *supra* note 67, at 2.

<sup>79</sup> *Id.* at 1.

the Advisory Committee considered at that first meeting,<sup>80</sup> perhaps because Rule 23 had been extensively revised only a few years before.

Thereafter, it appears that the Advisory Committee did little else for six years besides “study” Rule 23,<sup>81</sup> during which period the Enabling Act difficulties implicated in consequential class action reform should have become apparent by reason of the controversy surrounding the proposed Federal Rules of Evidence. Such difficulties became hard to miss when, starting in the spring of 1977, the Advisory Committee was briefed on legislative proposals to amend Rule 23 by Justice Department officials.<sup>82</sup> No such legislation was enacted, but the experience caused class action reform to disappear from the Advisory Committee’s agenda for more than a decade.<sup>83</sup>

Not easily thwarted, however, in 1976 Chief Justice Burger stimulated and presided at the Pound Conference, which, as Professors Subrin and Main recently observed, was a showcase for those seeking retrenchment. Prominent critics took aim at notice pleading and discovery—the cornerstones of modern, litigation-friendly federal procedure—as well as at the recently amended class action rule.<sup>84</sup> We do not know whether there was any connection between the ascendancy of practitioners to a majority position on the Advisory Committee

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<sup>80</sup> See *supra* text accompanying note 66.

<sup>81</sup> There is a big gap in the public record of Advisory Committee minutes during this period. As a result, with respect to the period between September 1971 and May 1977, our assessment is based on the reports of the Standing Committee to the Judicial Conference. See, e.g., COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 6 (Sept. 1973), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-1973.pdf>.

<sup>82</sup> See ADVISORY COMM. ON CIVIL RULES, MINUTES OF THE MAY 23, 1977 MEETING 1–3 [hereinafter MAY 1977 MINUTES], available at <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-may-1977>; ADVISORY COMM. ON CIVIL RULES, MINUTES OF THE DECEMBER 12–13, 1977 MEETING 2–13, 22 [hereinafter DECEMBER 1977 MINUTES], available at <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-december-1977>. In introducing its legislative proposal, the Justice Department noted “serious questions as to whether such revision is appropriately within the scope of the rule-making authority granted by the Rules Enabling Act.” 124 CONG. REC. 27,860 (1978). See Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 58–59 (2010) (discussing Justice Department proposal).

<sup>83</sup> At its January 1978 meeting, the Advisory Committee decided not to circulate any proposed Rule 23 amendments for comment, with Judge Hufstедler observing that “[i]f an explanation is needed they could point out that the Committee has worked on recommendations but circulation is awaiting action by Congress or the Department of Justice.” ADVISORY COMM. ON CIVIL RULES, MINUTES OF THE JANUARY 12, 1978 MEETING 16–17, available at <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-january-1978>. For the subsequent history of Advisory Committee attention to Rule 23, see *infra* note 121; see also *infra* text accompanying notes 123–25.

<sup>84</sup> See Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1864 (2014) (summarizing criticisms of Simon Rifkind, Robert Bork, and Francis Kirkham); see also Burbank & Farhang, *supra* note 1, at 1588 (noting characterization of “the Burger-organized Pound Conference in 1976 as the most important event in the counteroffensive against notice pleading and broad discovery”).

during the last two years of the decade and the prominent role that the Bar played in the Pound Conference. In that regard, following the Pound Conference, even though the Advisory Committee established a subcommittee on abuse of discovery,<sup>85</sup> the ABA was permitted to set the discovery reform agenda through a Special Committee for the Study of Discovery Abuse of its Section of Litigation.<sup>86</sup>

Contrary to the ABA Special Committee's recommendation and its own initial inclination, however, the Advisory Committee decided not to propose changing the scope of discovery (by eliminating subject matter discovery). The Committee's Chair observed that "we are not satisfied on the present record, including such empirical studies as have been made, that changes suggested so far would be of any substantial benefit."<sup>87</sup> The Advisory Committee also rejected the ABA proposal "to amend Rule 33(a) by limiting the number of questions that could be asked by written interrogatories to a party to thirty (30) unless the court permitted a larger number."<sup>88</sup>

In 1980 Justice Powell, joined by two colleagues, dissented from the promulgation of the proposed discovery amendments that emerged from this process, deriding them as "tinkering changes" that would "delay for years the adoption of genuinely effective reforms."<sup>89</sup> In this, Justice Powell, who had been President of the ABA, was echoing the reasoning of the ABA Special Committee, which had urged the Advisory Committee not to transmit its proposals, "[m]indful that the rules which are ultimately adopted will likely govern discovery proceedings for the next decade."<sup>90</sup> Even if Chief Justice Burger's role in the process prevented him from joining Justice Powell's dissenting statement, he cannot have been pleased.

Considering the failure of the Advisory Committee appointed by the Chief Justice in 1971 to satisfy his retrenchment ambitions in light of our data

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<sup>85</sup> See MAY 1977 MINUTES, *supra* note 82, at 19–20.

<sup>86</sup> The Preliminary Draft of Proposed Amendments that the Advisory Committee circulated for comment in March 1978 "was in major part the response of the Advisory Committee to a study of the discovery rules that had been undertaken by [the ABA Special Committee]." Memorandum from Judge Walter R. Mansfield, Chair of the Advisory Comm. on Civil Rules, to Judge Roszel C. Thomsen, Chair of the Standing Comm. 2 (June 14, 1979) [hereinafter 1979 Memorandum], available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-june-1979>. The former Chair of the ABA's Section of Litigation had briefed the Advisory Committee about the "background for the Report of the Special Committee for the study of Discovery Abuse" at its December 1977 meeting. DECEMBER 1977 MINUTES, *supra* note 82, at 13. The Advisory Committee considered relying on the ABA's notice and comment process for its package of proposed amendments but decided instead to review the ABA's proposals and make any changes deemed appropriate before soliciting public comment. *See id.* at 15–17.

<sup>87</sup> 1979 Memorandum, *supra* note 86, at 8.

<sup>88</sup> *Id.* at 9–10.

<sup>89</sup> Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Powell, J., dissenting).

<sup>90</sup> 1979 Memorandum, *supra* note 86, at 8 (quoting ABA Special Committee's Comments on Revised Proposed Amendments to the Federal Rules of Civil Procedure).

prompts three additional observations. The first is that for most of the decade judge members who had been appointed by Democratic presidents, although in the minority, had substantial representation (four members for four years and three for the following three years). A substantial imbalance arose (through attrition) only in the last two years. The second is that a practitioner primarily representing plaintiffs was a member from 1974, with two members having such a practice serving from 1978 until 1980, while no member represented primarily defendants during the entire decade. As a result, even though the number of members who primarily represented corporations/businesses increased to five (50 percent) over the decade, to the extent that members' presumed ideological preferences and professional backgrounds influenced their views on retrenchment issues, the Advisory Committee in this period was not ideally composed to respond favorably to calls for major litigation reform from organized bar groups or to pressure from the Chief Justice.

*B. 1981–1991: Watch What You Wish For*

Litigation reform as a strategy of retrenchment in federal law, as a salient issue championed by the Republican party, and as an issue cleavage between the parties emerged in both the White House and Congress in the early years of the first Reagan Administration.<sup>91</sup> At about the same time, the Advisory Committee assumed a more anti-litigation posture. Although few would call the 1983 amendments to the Federal Rules, in Justice Powell's words, "genuinely effective reforms," they certainly were not long delayed. Moreover, primarily because of their emphasis on sanctions, particularly in the amendments to Rule 11, they were intensely controversial and only barely escaped legislative override.<sup>92</sup> In *Litigation Reform*, we note that controversy and discuss at length other controversies around the same time arising from proposals to amend Rule 68 (Offers of Judgment) that were published for comment, for which Chief Justice Burger pressed even in the face of vigorous opposition. Critics correctly perceived the Rule 11 and the Rule 68 proposals as threats to the American Rule on attorney fee-shifting and the Rule 68 proposals as threats to statutory private enforcement regimes, notably in civil rights cases. In other words, both augured potentially significant retrenchment.<sup>93</sup>

Criticisms following the Federal Rules of Evidence imbroglio and concern about the Rule 68 proposals prompted Representative Robert Kastenmeier, the chair of the subcommittee of the House Judiciary Committee with jurisdiction

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<sup>91</sup> See Burbank & Farhang, *supra* note 1, at 1551–62.

<sup>92</sup> See *id.* at 1589.

<sup>93</sup> See *id.* at 1589–90; Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425 (1986). The Advisory Committee did not finally approve and send forward either the 1983 or the 1984 proposal to amend Rule 68, with the result that neither is in our data.

over the federal judiciary, to initiate three hearings in the period 1983–85.<sup>94</sup> As the House Hearings came to focus on the Rule 68 proposals, testimony became increasingly inflected with both ideological and partisan arguments. Indeed, some proponents of court rulemaking reform hoped to insulate the Federal Rules against change, making retrenchment more difficult through procedural requirements that facilitated monitoring and whistleblowing (with Congress rather than the Court being the backstop).<sup>95</sup>

As a result of the House Hearings and the threat of legislation, as well as the earlier criticisms,<sup>96</sup> the judiciary institutionalized steps previously used but sparingly (e.g., public hearings) and adopted and published rulemaking procedures.<sup>97</sup> Legislation enacted in 1988<sup>98</sup> imposed some additional requirements, notably a requirement of open meetings, and it lengthened the minimum period during which proposed Federal Rules must lie before Congress from three to seven months.<sup>99</sup> Similar to 1970s process changes imposed on administrative agencies,<sup>100</sup> the court rulemaking reforms of the 1980s had the effect, and for some the purpose, of making it harder to change the status quo.<sup>101</sup>

Viewing these events in the light of our data, we see that the Advisory Committee sent forward thirty-nine proposals (at the Rule level) during this decade, which comprised 16 percent of the total for the entire period of study. Again, very few of those proposals (10 percent at the Rule level) were salient to

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<sup>94</sup> See *Rules Enabling Act: Hearings Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the House Comm. on the Judiciary*, 98th Cong. 191 (1983 & 1984) [hereinafter *1983 and 1984 House Hearings*]; *Rules Enabling Act of 1985: Hearing Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the House Comm. on the Judiciary*, 99th Cong. 118, 144 (1985).

<sup>95</sup> See Burbank & Farhang, *supra* note 1, at 1595–96; McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 192 (1999) (arguing for a similar motivation behind Democrats' change of position on the Administrative Procedure Act of 1946).

<sup>96</sup> The earlier criticisms had led Chief Justice Burger to request a 1981 Federal Judicial Center report exploring possible reforms. See WINIFRED R. BROWN, *FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES* (1981); Burbank, *supra* note 18, at 1020–21.

<sup>97</sup> See *PROCEDURES FOR THE CONDUCT OF BUSINESS OF THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE* (1983), available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-1983>.

<sup>98</sup> *Judicial Improvements and Access to Justice Act*, Pub. L. No. 100-702, 102 Stat. 4642 (1988), codified at 28 U.S.C. § 2073 (2012). The bill that, with a few changes in the Senate, was enacted in 1988, took essentially final form in 1985. See *infra* note 106. We note that Republicans held the Senate from 1985 to 1987, while Democrats controlled both Houses starting in 1987.

<sup>99</sup> See Burbank & Farhang, *supra* note 1, at 1594 (discussing the statutory requirements).

<sup>100</sup> See Burbank, *supra* note 77, at 1711.

<sup>101</sup> See *supra* text accompanying note 94; see also Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 257–58 (1987) (arguing that notice and comment requirements, together with a requirement of written justification based on evidence, can empower groups to oppose administrative action and heighten the evidentiary burden of administrators desiring to act).

private enforcement—three of them part of the package that became the 1983 amendments to the Federal Rules, and one of them part of the package that became the 1991 amendments. Of these, at the Rule level, two sets of proposals (amending Rule 4 and Rule 15) predictably would favor private enforcement, while two sets of proposals (amending Rule 11 and Rule 26) predictably would disfavor private enforcement. At the subunit level we use for statistical purposes, the decade yielded a small net disfavoring private enforcement. We note again, however, that qualitative assessment of these data might well yield a different conclusion, one in which the impact of the 1983 amendments to Rules 11 and 26 swamped the contrary tendencies of the Rule 4 (1983) and Rule 15 (1991) amendments. This, indeed, is our provisional judgment.

Although judges and practitioners were in parity for the first four years of the decade, in 1984–85 judges again assumed the majority; the gap widened over the ensuing years, with the result that only two practitioners served on the Committee in any year from 1988 through 1991. Perhaps of greater interest, the substantial imbalance between judges appointed by Republican and Democratic presidents that arose in 1978–79 continued through most of the 1980s. Nine of the practitioner members who served during the decade represented both plaintiffs and defendants, with one member primarily representing plaintiffs. Fewer members (three) primarily represented corporations/businesses than during the previous decade, but no member primarily represented individuals. After more than a decade in the wilderness, academics regained membership on the committee in 1982–83. Yet, they held but a single seat for the first four of the eight remaining years of the decade, and two seats thereafter—a far cry from their role during 1960s and from the role suggested by Judicial Conference policy.

This was a group, in other words, chiefly distinguishable from their predecessors in the 1970s by reason of the greater representation of judges whose presumed ideological preferences made them more likely to favor retrenchment and thus to take their lead from a Chief Justice who was not shy about telling them what he wanted. They were, moreover, operating in a political environment in which litigation reform as a strategy of retrenchment had emerged as a salient issue championed by the Republican party in the White House and Congress.<sup>102</sup> The attempt to use the Federal Rules as the vehicle of retrenchment backfired, however, leading to major changes in the Enabling Act process—with the Advisory Committee laboring in the shadow of impending legislation for most of the decade.

#### IV. PROCESS, POLITICS, OR PEOPLE?: 1991–2011

##### A. *A Mixed Bag: 1991–2001*

The changes in the Enabling Act Process in the 1980s did not extend to the composition of the Advisory Committee. Perceived imbalances in the member-

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<sup>102</sup> See Burbank & Farhang, *supra* note 1, at 1551–62.

ship of the rulemaking committees were central to some of the critiques in the 1970s, and they were a prominent source of criticism at the House hearings. Judge Edward Gignoux, Chair of the Standing Committee, maintained in 1983 that the relevant committees were “broadly representative,” as required by the 1958 Judicial Conference policy.<sup>103</sup> Alan Morrison of Public Citizen Litigation Group specifically disagreed, observing that the “committees are particularly heavily weighted in favor of judges, with a smattering of law professors,” and that “[p]ractitioners are predominantly from large firms, principally people who represent defendants.”<sup>104</sup>

These individuals were talking past one another, with the judiciary’s representative choosing to equate “broadly representative judges, lawyers, and law teachers” in Judicial Conference policy with “balanced cross section” in a House bill.<sup>105</sup> Indeed, a requirement that “[e]ach such committee shall consist of a balanced cross section of bench and bar, and trial and appellate judges” was part of the House bill that passed in 1985 and 1988.<sup>106</sup> The provision was not part of the 1988 legislation, however, which substituted the language in the Senate bill: “Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.”<sup>107</sup> A few years later, Senator Heflin, who shepherded the 1988 legislation in the Senate, apparently had cause to regret this aspect. He introduced a bill to require “a majority of members of the practicing bar” on rulemaking committees.<sup>108</sup> The Chief Justice had already taken the hint, doubling the number of practitioners from two to four in 1992–93, still very much a minority but enough to avoid legislation.<sup>109</sup>

In contrast with its record during the two previous decades, the Advisory Committee was very busy in this period, sending forward sixty-three proposals for amendment (at the Rule level), or 25 percent of the total for the entire period of study. It remained true, however, that only a relatively small percentage

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<sup>103</sup> 1983 and 1984 House Hearings, *supra* note 94, at 11 (statement of Judge Edward Gignoux, Chair, Standing Comm. on Rules of Practice & Procedure).

<sup>104</sup> *Id.* at 29 (statement of Alan Morrison, Director, Pub. Citizen Litig. Grp.).

<sup>105</sup> *See id.* at 98 (statement of Judge Edward Gignoux, Chair, Standing Comm. on Rules of Practice & Procedure).

<sup>106</sup> *See* Rules Enabling Act of 1985, H.R. 3550, 99th Cong. § 2(a) (1985); Court Reform and Access to Justice Act of 1988, H.R. 4807, 100th Cong. § 2 (1988).

<sup>107</sup> Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988), codified at 28 U.S.C. § 2073(a)(2) (2012). Representative Kastenmeier, perhaps wishfully, described the deletion of “a balanced cross section” as “a technical amendment relating to the composition of the advisory committees.” 134 CONG. REC. 31,872 (1988). Unlike the 1958 Judicial Conference policy, there is no mention of academics.

<sup>108</sup> S. 2212, 103d Cong., 140 CONG. REC. 13,524 (1994); 140 CONG. REC. S7149 (1994).

<sup>109</sup> *See* Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 516 (1996); Burbank, *supra* note 77, at 1714 n.168. Democrats controlled both houses of Congress and the presidency starting in 1993. Our data show that this increase did not come at the expense of judge members, the number of whom increased from six to seven in 1992–93. And, although Advisory Committee appointments are not a zero sum proposition, academic members declined from two in 1990–91 and 1991–92 to one for the rest of the decade.

(14 percent) of proposals (at the rule level) were salient to private enforcement, all of them in the proposals that led to the 1993 and 2000 amendments to the Federal Rules. From that perspective the decade was a mixed bag, although in the area that dominated rulemaking activity—discovery—the Advisory Committee’s proposals tilted heavily against private enforcement.<sup>110</sup>

As we discuss in *Litigation Reform*, the 1993 amendments to the Federal Rules were Janus-like, both embracing (Rule 11 Sanctions) and rejecting (Rule 26 Mandatory Disclosures) the call for court rules based on competently documented experience, a call that was supported by the judiciary’s 1995 self-study of rulemaking.<sup>111</sup> One of the reasons for the Advisory Committee’s refusal to wait for data on mandatory disclosures was the desire to reclaim procedural lawmaking leadership following the Civil Justice Reform Act of 1990, an institutional impulse that can overwhelm good judgment, and that, in 1993 as in 1983, brought proposed amendments to the verge of legislative override.

Moreover, in sharp contrast with the Advisory Committee’s care when considering amendments to Rule 23, which reflected broad outreach, attention to data, and sensitivity to the limitations imposed by the Rules Enabling Act, in the latter part of the decade the Committee again eschewed caution in proposing amendments to Rule 26. The committee had resisted calls to reduce the scope of discovery for more than twenty years, and there was no more competent empirical support for change in 2000 than there had been in 1980. However, leadership of the Committee had passed from Judge Patrick Higginbotham to Judge Paul Niemeyer in 1996. In explaining the change in the Committee’s position, Judge Niemeyer invoked persistent pressure for litigation retrenchment from elite elements of the bar and a report from President Bush’s Council on Competitiveness issued back in 1991.

The Council, chaired by Vice President Quayle, advocated a variety of anti-litigation proposals, including damages caps, a loser pays rule, and a moratorium on federal statutory one-way fee-shifting provisions.<sup>112</sup> The Vice President explained that the Council’s proposals were “geared toward reducing excessive and unnecessary litigation and decreasing the costs and time associated with resolving disputes.”<sup>113</sup> More specifically, the Council’s charge concerned reducing costs imposed on *business* by government regulation.<sup>114</sup> A number of the Council’s litigation reform proposals were subsequently incorpo-

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<sup>110</sup> The 1993 amendments to Rule 4, which liberalized service of process in numerous respects, are primarily responsible for the spike in pro-private enforcement items we see when we map pertinent proposals at the most granular level.

<sup>111</sup> See SELF-STUDY, *supra* note 24, at 699–700.

<sup>112</sup> See Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039 & n.1 (1993); Susan M. Olson, *How Much Access to Justice From State “Equal Access to Justice Acts”?*, 71 CHI.-KENT L. REV. 547, 551 (1995); Greg Pogarsky & Linda Babcock, *Damage Caps, Motivated Anchoring, and Bargaining Impasse*, 30 J. LEGAL STUD. 143, 144 & n.3 (2001).

<sup>113</sup> Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 561 (1992).

<sup>114</sup> See Krent, *supra* note 112.



rated into the Republicans' 1994 Contract with America.<sup>115</sup> In a remarkable display of candor, Judge Niemeyer acknowledged both the lack of empirical evidence for the position being urged on the Advisory Committee and the influence of the Council's advocacy. He explained:

Indeed, in August 1991, the President's Council on Competitiveness issued a report claiming that "[o]ver 80 percent of the time and cost of a typical lawsuit involves pre-trial examination of facts through discovery." While I am not aware of any empirical data to support this claim, the fact that the claim was made and is often repeated by others, many of whom are users of the discovery rules, raises a question of whether the system pays too high a price for the policy of full disclosure in civil litigation.<sup>116</sup>

For those seeking retrenchment, the timing was right. The political climate favored retrenchment, and, given the post-1994 locus of partisan control of Congress, there was no risk of congressional override.<sup>117</sup> Even so, the Judicial Conference rejected one of the Committee's proposed discovery amendments, and the scope amendment passed that body by a vote of thirteen to twelve.<sup>118</sup> This was an important reminder that the multi-tiered, hierarchical process which the judiciary put in place to exercise the Conference's responsibilities under the 1958 legislation is itself somewhat sticky, which may explain why Congress chose to require it in 1988.<sup>119</sup> But the Committee likely needed no such reminder, since the Conference had rejected a proposed amendment within the preceding five years.<sup>120</sup>

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<sup>115</sup> Everett L. Hixson, III, *All Losers Should Pay in Tennessee: How to Amend T.C.A. Section 20-12-119 to Deter Meritless Claims*, 44 U. MEM. L. REV. 183, 189 n.16 (2013).

<sup>116</sup> Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 518 (1998) (footnote omitted); see also *id.* at 520 ("[I]t 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."). Thus, the Committee appears to have exploited an "availability cascade" relentlessly promoted by "availability entrepreneurs." See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 687 (1999) (discussing availability entrepreneurs' focus on large punitive damages awards in order to win support for tort reform); see also Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 2 (forthcoming 2015).

<sup>117</sup> For a detailed account of the 2000 amendments, many aspects of which are confirmed by our systematic longitudinal data, see Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001). As we suggest more generally concerning the 1990s, Professor Stempel observes that "[t]he Committee seems to have been operating under both a preference for scientific inquiry and the gravitational pull of the venerable myth of discovery abuse." *Id.* at 555; see also *id.* at 613-14 ("What has changed, of course, are the pressure points of political power, particularly the Advisory Committee's receptiveness to certain arguments preferred by certain groups. Although the Committee and other Rulemakers continue to strive for nonpartisan fairness, the composition of the Rulemakers has become distinctly more conservative in both ideology and social background.").

<sup>118</sup> See *id.* at 619, 623.

<sup>119</sup> See *supra* text accompanying note 31; see also Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988), codified at 28 U.S.C. § 2073 (2012).

<sup>120</sup> See *infra* text accompanying note 121.

The multi-tiered process established by the Judicial Conference may help to explain why pressure for retrenchment did not accomplish more in the 1990s, as might have been expected given only the Advisory Committee demographics revealed by our data. The balance of power on the Committee between judges appointed by Republican versus Democratic presidents, which was three to two during the 1987–90 period, tilted yet more sharply in favor of Republican appointees starting in 1991–92. Indeed, the only two judges associated with Democratic appointment authorities for four years (1994–95 through 1997–98) were state court judges, and there was only one of them in any year. In addition, for most of the decade (eight of ten years) there was no practitioner member who primarily represented plaintiffs, although only one member primarily represented defendants. Finally, although members with mixed practices accounted for a plurality of service years (49 percent) across the decade, members with practices primarily representing corporations/businesses had much higher representation than those primarily representing individuals (46 vs. 5 percent of service years).

Another likely reason for this mixed record and for limited retrenchment in the 1990s has to do with the qualities and priorities of the leadership of the committee. For three years under Judge Patrick Higginbotham, the Committee concentrated on outreach to the bar and the academy as a means of healing wounds that had emerged in the 1980s, educating the Committee, and seeking consensus on reform.<sup>121</sup> The most visible product of those efforts, a proposed amendment to restore a norm of twelve-person civil juries, which the Advisory Committee and Standing Committee approved, fell victim in the Judicial Conference to perceived institutional interests (new courtroom construction planned on the assumption of smaller juries) and to the habit of preferring anecdotal experience to social science evidence (members' views that six-person juries worked well).<sup>122</sup> After Judge Higginbotham's measured approach to rulemak-

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<sup>121</sup> Judge Higginbotham described the Advisory Committee's renewed consideration of Rule 23 to the Standing Committee as follows:

Judge Higginbotham explained that after he had become chairman, the advisory committee returned to Rule 23 and decided that it needed to reach out widely and learn as much as it could about class actions. This required not just seeking reactions to a particular proposal for amending the rule, but also a broad effort to deal with basic concepts and to explore the practical operation of all aspects of class actions.

Judge Higginbotham pointed out that the advisory committee had invited prominent class action lawyers to attend its meetings and discuss class action issues. It had also convened symposia and meetings on class actions with practitioners and scholars at university settings in Philadelphia, Dallas, New York, and Tuscaloosa. Many people had participated in these gatherings, and they had been encouraged to speak freely and share their differing viewpoints. Judge Higginbotham stated that the lawyers and academics had been generous with their time, and he thanked them for their contributions to the work of the advisory committee.

COMM. ON RULES OF PRACTICE AND PROCEDURE, MINUTES OF MEETING ON JUNE 19–20, 1996, at 20, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-1996-min.pdf>.

<sup>122</sup> See Burbank, *supra* note 77, at 1705, 1715 n.169.

The tendency of legally-trained minds to prefer thinking to counting is legendary. So is the lawyer's preference for learning by watching for the vivid case rather than tabulating the mine-

ing, he was not invited by the Chief Justice to serve a second term. Instead, the Chief Justice replaced him with Judge Niemeyer, who had different priorities and preferences, and who delivered the “extremely good news” that the Judicial Conference had approved the proposed discovery scope amendment that went into effect in 2000 to a representative of the bar interest group that had spent “[t]housands of hours” lobbying for it.<sup>123</sup>

The care and inclusiveness of the process by which the Advisory Committee considered class action reform in the 1990s was due in substantial measure to the exquisite political judgment of Judge Higginbotham and Judge Anthony Scirica (first as a member of that committee and then as Chair of the Standing Committee). Ironically, however, the best measure of that judgment may be the fact that Rule 23 amendments, which seemed modest at the time, at least by comparison with proposals that champions of class action retrenchment were pressing, have facilitated major change in class action jurisprudence through court decisions. The most obvious example is the 1998 amendment permitting discretionary interlocutory appellate review of class certification decisions.<sup>124</sup> Less obvious are 2003 amendments that, wearing his Article III hat, Judge Scirica has been able to leverage in influential decisions that have made class certification more difficult by recasting the certification process in the image of trial.<sup>125</sup>

#### B. *Rulemaking’s Restraint, 2001–11: Calm Before the Storm?*

Rulemaking in the first decade of the new millennium was marked by relative restraint. Although the Advisory Committee sent forward fifty-two proposals (21 percent of the total for the entire period of our study), only two of them (4 percent) were salient from the perspective of private enforcement. Both of these proposals were, however, inimical to private enforcement. On a num-

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run cases. The problem is not that watching this case or that is useless. A dramatic case or anecdote may be more informative and more memorable than a tubful of printouts. But the rub is that good anecdotes do not care if they are not representative; they can be badly misleading if generalized.

Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2211 (1989).

<sup>123</sup> Memorandum from Robert S. Campbell, Jr. to Members, Fed. Civil Procedure Comm., Am. Coll. of Trial Lawyers 1, 3 (Sept. 16, 1999) (recounting conversations with Judge Paul Niemeyer, Chair of the Advisory Committee, among others) (on file with authors). Mr. Campbell also noted that credit was due to a member of the American College, Francis Fox, who sat on the Advisory Committee when it was considering the proposal. *See id.* at 3 (“Fran Fox played a major role as a member of the Advisory Committee, itself, in advocating the proposed amendment to Rule 26(b)(1).”).

<sup>124</sup> *See* Burbank & Farhang, *supra* note 1, at 1603 (discussing Rule 23(f)). Because this proposal did not at the time have an obvious directionality from the perspective of private enforcement, it is not included in our data.

<sup>125</sup> *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008) (relying on 2003 amendments to Rule 23 for conclusion that 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”); Burbank & Farhang, *supra* note 1, at 1604.

ber of occasions, the Advisory Committee, with careful attention to the Rules Enabling Act's limitations and to data, prevented improvident proposals from going forward. Moreover, prominent rulemakers celebrated these examples of restraint as evidence that the Enabling Act Process works.<sup>126</sup>

It is not easy to explain the relative restraint of the committee over the last decade of our study relative to the 1990s, let alone to determine whether it represents an interlude or a durable shift to a new rulemaking posture. In considering that question, the 2010 Conference on Civil Litigation organized by the Advisory Committee (the "Duke Conference"), which came toward the end of the decade, may be salient.<sup>127</sup> On the one hand, notwithstanding the evident hope of some who attended the event that it would function like the 1976 Pound Conference as a catalyst of further retrenchment,<sup>128</sup> in their report to the Chief Justice the Advisory Committee and the Standing Committee provided no encouragement on the issue that, for forty years, has been the brass ring for those seeking litigation retrenchment—the scope of discovery.<sup>129</sup> On the other hand, adopting recommendations of a sub-committee that purportedly sought to translate the knowledge and insights generated for and at the Duke Conference into Federal Rules amendments, in 2013 the Advisory Committee, under new leadership—with the approval of the Standing Committee, also under new leadership—published for comment, proposals to amend the discovery rules that in significant respects contradicted the summary previously provided to the Chief Justice and that are decidedly anti-private enforcement.<sup>130</sup> Apart from,

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<sup>126</sup> See Burbank & Farhang, *supra* note 1, at 1599–1600. A major project during this period—the restyling of all of the Civil Rules—not only occupied a great deal of the Advisory Committee's attention. It did so by forcing them to think small. See Stephen B. Burbank, *Thinking, Big and Small*, 46 U. MICH. J.L. REFORM 527, 533–36 (2013).

<sup>127</sup> For a description of the Duke Conference and access to the papers and reports that it generated or collected, see *2010 Civil Litigation Conference*, U.S. COURTS <http://www.uscourts.gov/RulesAndPolicies/rules/archives/projects-rules-committees/2010-civil-litigation-conference.aspx> (last visited June 15, 2015).

<sup>128</sup> See *supra* note 84 and accompanying text.

<sup>129</sup> The report found:

The extent of the actual change effected by [the 2000 scope] amendment continues to be debated. *But there was no demand at the Conference for a change to the rule language; there is no clear case for present reform.* There is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not accomplished what was intended. *Again, however, there was no suggestion that this rule language should be changed.*

REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 8 (emphasis added), available at <http://www.uscourts.gov/file/reporttothechiefjusticepdf>.

<sup>130</sup> See PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 264 (2013) (proposing change to the scope of discovery, in part by making proportionality part of the basic scope definition), available at <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>. Even if we extended our database of proposals to 2013, these proposals would not be included, because they were not forwarded to the Standing Committee until 2014. Note, however, that the committee did send forward three proposals (at the rule level) in 2013, which are not included in our analyses. None of them, however, was salient from the perspective of private enforcement. Finally, although the Advisory Committee revised its discovery proposals be-

and even prior to, new leadership on both committees, it appears that the impulse for restraint was overwhelmed by a call to action from the Chief Justice.<sup>131</sup>

#### CONCLUSION

In *Litigation Reform*, we identify a number of institutional differences that may help to understand why, as the data analyzed there demonstrate, since 1970 the Supreme Court— increasingly conservative and influenced by ideology—has been more effective than Congress in reducing opportunities and incentives for private enforcement. Among them is the fact that,

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. It is therefore less likely to be obstructed. A large transformation in private enforcement resulted from a succession of individual Court decisions, none of which may have appeared monumental in isolation.<sup>132</sup>

The institutional contrasts we draw in *Litigation Reform* were prompted by cases in which the Supreme Court was usually interpreting federal statutes. When “interpreting” Federal Rules, on the other hand, in recent years the Court has demonstrated a penchant for major retrenchment, again reflecting the increasing influence of ideology and the increasing separation of conservative and liberal justices that our data confirm. In that regard, those decisions may also reflect the relative lack of visibility of Supreme Court decisions on seemingly technical and legalistic issues<sup>133</sup> as well as the fact that, particularly in the domain of Federal Rules, congressional override of anti-litigation decisions by the Supreme Court, even when Congress is controlled by Democrats, is not a serious threat in the current political environment. Indeed, we describe some of the Court’s decisions as today’s “undemocratic legislation.”<sup>134</sup>

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fore transmitting them to the Standing Committee, the inconsistency noted in the text remained. For the revised proposals, which have been approved by the Standing Committee, the Judicial Conference, and the Supreme Court, see *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, US COURTS (2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf> (last visited June 15, 2015). Unless blocked by legislation, they will become effective on December 1, 2015.

<sup>131</sup> When asked about the inconsistency between the report of the Duke Conference and the tenor of subsequent deliberations and proposals concerning the scope of discovery, a current member of the Advisory Committee informed one of the authors that the Chief Justice had “encouraged” the Chair of the Advisory Committee to make use in rulemaking of the information acquired for and at the Conference.

<sup>132</sup> Burbank & Farhang, *supra* note 1, at 1581 (footnotes omitted).

<sup>133</sup> See Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Reform*, 65 DEPAUL L. REV. \_\_\_\_ (forthcoming 2015), available at <http://ssrn.com/abstract=2598753>.

<sup>134</sup> See Burbank & Farhang, *supra* note 1, at 1603.

As was true of the original 1938 Federal Rules, the amendments in the period ending in 1971 largely favored private enforcement, and some of them were far-reaching. Using rulemaking to achieve far-reaching retrenchment of private enforcement has proved more difficult, particularly since the changes to the Enabling Act Process (and the Enabling Act itself) in the 1980s. Moreover, the bold rulemaking reforms of 1983 and 1993 were very nearly blocked by Congress. Since that time it has seemed that the important lessons for some rulemakers had to do with the epistemic deficits or overreaching of proposed reforms, while for others the lessons focused attention on the locus of partisan control in Congress. The former group may have learned from the Court's strategy of incrementalism—death by a thousand cuts—in litigation reform involving the interpretation of federal statutes. For the latter group, it may not be enough that, as analysis of our data shows, the predicted probability of a proposal favoring plaintiffs went from highly likely in the 1960s to zero in 2011. For they may regret, if not the loss of leadership in procedural lawmaking, then the loss of leadership in retrenchment, which some rulemaking critics have seen signaled in the Court's recent use of decisions effectively to amend the Federal Rules.<sup>135</sup>

The fact that more than 2,300 comments were submitted on the preliminary draft of the 2013 proposed amendments<sup>136</sup> shows that, notwithstanding repeated characterization of the proposals as “modest” or “measured” by some rulemakers and interest groups, they in fact have “trigger[ed] powerful interest group mobilization” on both sides. Perhaps that is because opponents fear, and proponents expect, “a large transformation in [discovery] result[ing] from a succession of individual [Federal Rules amendments].” Alternatively, some individuals on both sides may regard the characterizations as naïve or disingenuous: sheep's clothing for a wolf.

It remains to be seen whether the last decade in our study was a mere interlude in an ongoing struggle for power. A rulemaking committee appointed by a Republican Chief Justice that is dominated by judges appointed by Republican presidents<sup>137</sup> and lawyers who defend corporations/businesses may again give reason to believe, as a committee less unrepresentative from this perspective

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<sup>135</sup> See Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 450, 464 (2013). Cf. Gregory P. Joseph, *An Instinct for the Capillary*, 38 LITIGATION, Fall 2012, 9, 10 (describing the advisory committee's approach to summary judgment reform). Recall our suggestion that “the desire to reclaim procedural lawmaking leadership” is “an institutional impulse that can overwhelm good judgment.” See *supra* text accompanying note 111.

<sup>136</sup> See *Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS <http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002> (last visited June 16, 2015) (showing 2,356 comments received on the proposed amendments).

<sup>137</sup> We note that the number of judges appointed by Democratic presidents on the Advisory Committee, while still in the minority, increased to two in 2011 and to three in 2013. We do not consider the composition of the Standing Committee in this article, but as our attention to the leaders of the rulemaking enterprise suggests, that committee, and particularly its Chair, can have strong influence on the work of the Advisory Committee.

did in 2000, that it should be understood, to a material degree, as a political institution carrying out a partisan project; that some interest groups, therefore, count more than others; and that those interest groups also count more than empirical evidence, at least if they are persistent.<sup>138</sup> If so, because the rulemakers are alert to the capacity or lack of capacity of Congress to check improvident Federal Rules,<sup>139</sup> we should have the answer to another question.

That question is whether the rulemaking reforms of the 1980s are adequate for the future. Our data suggest that anyone considering additional reforms should look first at the appointment process.<sup>140</sup>

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<sup>138</sup> See Kuran & Sunstein, *supra* note 116 (suggesting the influence of “availability entrepreneurs” on 2000 discovery amendments).

<sup>139</sup> See *supra* text accompanying note 113.

<sup>140</sup> See Stempel, *supra* note 117, at 637 (arguing that if Chief Justice does not appoint “more balanced committees . . . serious consideration should be given to reducing the power of the Chief Justice in rulemaking”). For an interesting analysis of the Chief Justice’s appointment power, see James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 NW. U. L. REV. 1125 (2013).

If Article III judges and others can both serve in an office, such as membership on the civil rules advisory committee or the directorship of the AO, then the argument for regarding the appointment as a mere designation seems harder to sustain. If the office entails the exercise of law- or policymaking power, then the argument for regarding it as the sort of inferior office that the Court itself must oversee becomes harder to resist.

*Id.* at 1179. Professor Pfander also notes that “[w]hatever the validity of the attitudinal model in this (or other) contexts, the specter of a politicized appointment process will linger as long as the Chief makes the appointments himself.” *Id.* at 1135.