RIGHTS AND RETRENCHMENT

The Counterrevolution against Federal Litigation

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Retrenching Rights in Institutional Context: Constraints and Opportunities

More than 40 years ago, in his iconic article, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," Marc Galanter emphasized the importance of "attention not only to the level of rules, but also to institutional facilities, legal services and organization of parties" (Galanter 1975: 150).

> If rules are the most abundant resource for reformers, parties capable of pursuing long-range strategies are the rarest. The presence of such parties can generate effective demand for high-grade legal services – continuous, expert, and oriented to the long run – and pressure for institutional reforms and favorable rules. This suggests that we can roughly surmise the relative strategic priority of various rule-changes. *Rule changes which relate directly to the strategic position of the parties by facilitating organization, increasing the supply of legal services (where these in turn provide a focus for articulating and organizing common interests) and increasing the* costs *of opponents – for instance authorization of class action suits, award of attorney's fees and costs, award of provisional remedies – these are the most powerful fulcrum for change.* The intensity of the opposition to class action legislation . . . indicates the "haves'" own estimation of the relative strategic impact of the several levels.
>
> (Ibid.: 150–1) (emphasis added)

As we demonstrate later in this chapter, such insights animated a movement that successfully lobbied for provisions designed to stimulate private enforcement of federal statutes regulating a broad swath of American economic and social activity. Indeed, many of those statutes rely primarily on private enforcement, thereby promoting dramatic growth in the role of lawsuits and courts in the creation and implementation of public policy in the United States, a phenomenon that has stimulated an extensive body of research in political science, law, history, and sociology (Friedman L. 1994; Melnick 1994; Epp 1998; Kagan 2001; Farhang 2010). In the past decade, more than 1.25 million private federal lawsuits were filed to

enforce federal statutes, spanning the waterfront of federal regulation.[1] Although Congress has relied on private litigation for this purpose since the rise of the federal regulatory state in the late 1880s, the frequency with which it did so increased dramatically starting in the late 1960s. The rate of private lawsuits to enforce federal statutes increased from about 3 per 100,000 members of the population in 1967 – a rate that had been stable for a quarter-century – to 13 by 1976, 21 by 1986, and 29 by 1996 (Farhang 2010: 15). There was an unmistakable "litigation explosion" of private suits to enforce federal rights during this period.

The consequences and normative implications of the "Litigation State" are the focus of intense current debate, both in scholarly circles (Viscusi 2002; Morriss, Yandle, and Dorchak 2008; Kessler 2011) and in more public fora (Burke 2002).[2] Although existing literature provides a rich picture of the emergence, development, benefits, and costs of the Litigation State, scholars have largely neglected the counterrevolution that ensued. That is our focus in this book.

Recent work has begun to investigate how conservative, anti-regulatory forces responded to these developments in American state regulation. They did not stand still. From this perspective, as Sarah Staszak puts it, scholars who study rights need to pay "attention to a broader historical timeline that incorporates what has come next" and to recognize "that there are always multiple, competing agendas in our complex institutional universe . . . [where] the institutional devices that have transformed the American state may also be the tools for its constriction, or at least for a chipping away at the edges of the rights revolution" (Staszak 2013: 243). In fact, in recent years an increasing number of scholars have examined various aspects of the agenda to diminish or disable the infrastructure for the private enforcement of federal rights (Stempel 2001; Chemerinsky 2003; Karlan 2003; Siegel 2006; Staszak 2015). But a great deal of the story remains untold.

To this emerging literature we add distinctive theoretical perspectives, fresh historical accounts, and substantial new evidence. We use qualitative historical evidence to identify the origins of the counterrevolution. We collect extensive data that allow us (1) to measure the counterrevolution's trajectory over decades in multiple lawmaking sites where retrenchment

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

[2] *See* Francis Fukuyama, Decay of American Political Institutions, *The American Interest*, available at www.the-american-interest.com/articles/2013/12/08/the-decay-of-american-political-institutions/

has been attempted, (2) to evaluate systematically how successful it has been in changing law in those different lawmaking sites,[3] and (3) to test key aspects of our argument. We leverage original perspectives founded in institutional theory to explain the striking variation we document in the counterrevolution's achievements across lawmaking sites.

We argue that, in the wake of an outpouring of rights-creating legislation from Democratic Congresses in the 1960s and 1970s, much of which contained provisions designed to stimulate private enforcement, the conservative legal movement within the Republican Party – and more specifically, within the first Reagan administration – devised a response. Recognizing the political infeasibility of retrenching substantive rights, the movement's strategy was to undermine the infrastructure for enforcing them. We show that the project was undertaken in earnest but largely failed in the elected branches, where efforts to diminish opportunities and incentives for private enforcement by amending federal statutory law were substantially frustrated. We also show how, although a number of Chief Justices appointed by Republican presidents hoped to bring about major retrenchment through amendments to the Federal Rules of Civil Procedure, success proved elusive and episodic.

We then document the sharply contrasting success of the counterrevolution in the unelected federal judiciary, where decades of decisions have achieved legal change congenial to many of the counterrevolution's goals. Incrementally at first but more boldly in recent years, over the past four decades, the Supreme Court has transformed federal law from friendly to unfriendly, if not hostile, toward enforcement of rights through private lawsuits. Although the Court's anti-enforcement work has ranged broadly across fields of federal regulatory policy, it has especially focused on civil rights.

In seeking to understand why conservative judges on a court exercising judicial power succeeded where their ideological compatriots in Congress, the White House, and the body primarily responsible for making procedural law for federal courts largely failed, we suggest the importance of institutional differences that are revealed by the cross-institutional theoretical approach that we describe later in this chapter. Moreover, highlighting one such difference, we show that the counterrevolution's legal campaign in the courts – with victories achieved in rulings centered on procedural and other seemingly technical issues – has been little noticed

[3] In Chapter 6, we discuss the challenges of assessing the effects that the counterrevolution has had through the legal changes to which it has contributed.

by the American public and thus poses little threat to the perceived legitimacy of the Supreme Court. Ultimately, we raise normative questions about the desirability of this outcome from the perspective of democratic governance.

The remainder of this chapter is divided into two parts. In the first part, we discuss the ideological, partisan, and interest group forces behind the dramatic growth in private litigation enforcing federal law that began in the late 1960s. In this part of the chapter we cover terrain that, while useful as historical background, is indispensable to an adequate understanding of what animated the counterrevolution's emergence and tactics, failures and successes, and its relationship to ongoing conflicts over regulatory governance in the United States. One must understand where the Litigation State came from – the interests that created it, how they did so, and for what purposes – in order to appreciate the dynamics that ensued when proponents of the counterrevolution sought to dismantle it. One must understand the pervasive role of private enforcement in, and its importance to, the implementation of federal regulatory policy in order to appreciate what is at stake in those efforts.

In the second part of this chapter, we articulate our overarching argument, the key pillars of which we support with qualitative and quantitative evidence in Chapters 2–5.

Emergence of the Litigation State

Liberals' Waning Faith in Administrative Power

During the New Deal liberals were the chief architects of the administrative state-building project, while its principal detractors were business interests and their allies in the Republican Party. Within the sphere of regulation, liberals' state-building vision and ambition was one of regulation through expert, centralized, federal bureaucracy. According to James Q. Wilson, "[t]he New Deal bureaucrats" piloting a centralized federal bureaucracy "were expected by liberals to be free to chart a radically new program and to be competent to direct its implementation" (Wilson 1967: 3). By the late 1960s, however, there was mounting disillusionment on the left with the capacities and promise of the American administrative state. As Wilson put it, "[c]onservatives once feared that a powerful bureaucracy would work a social revolution. The left now fears that this same bureaucracy is working a conservative reaction" (ibid.).

The slide toward liberal disillusionment with the administrative state coincided with, and was propelled by, the proliferation in the number,

membership, and activism of liberal public interest groups starting in the mid-to-late 1960s (Vogel 1981: 155–83; Shapiro 1988: 55–77). A primary focus of these groups was on regulation, mainly of business, in such fields as environmental and consumer protection, civil and worker rights, public health and safety, and other elements of the new social regulation of the period. The political significance of liberal public interest groups to the growth of private litigation to implement public policy is connected to their position within the Democratic Party coalition.

Democratic-Liberal Public Interest Coalition

After about 1968, owing both to liberal public interest groups' increasingly assertive role in American politics and to reforms within the Democratic Party organization, such groups emerged as a core element of the Democratic Party coalition, a position they continue to occupy to the current day (Vogel 1981: 164–75, 1989; Shefter 1994: 86–94; Witcover 2003: ch. 27; Farhang 2010: 129–213). David Vogel shows that within the Democratic Party coalition, "[d]uring the 1970s, the public interest movement replaced organized labor as the central countervailing force to the power and values of American business" (Vogel 1989: 293). The affinity between the Democratic Party and liberal public interest groups is hardly surprising. In the 20th century, a bedrock axis distinguishing the Democratic and Republican parties is Democrats' greater support for an interventionist state in the sphere of social and economic regulation, much of which targets private business (Poole and Rosenthal 1997). An activist state, particularly one prepared to regulate private business, is exactly what the agenda of liberal public interest groups called for, from nondiscrimination on the bases of race, gender, age, and disability to workplace and product safety, to cleaner air and water, to truth-in-lending and transparent product labeling.

Democratic Legislators, Republican Presidents, and Party Polarization

What explains the loss of faith in bureaucracy among liberal public interest groups and their allies in the Democratic Party? A number of charges were leveled. Because regulatory agencies interacted with regulated industries on an ongoing basis, agencies had been "captured" by business – regulators had come to identify with regulated businesses, treating them as the constituency to be protected. Apart from regulated business's extensive access

to and influence on bureaucracy, liberal public interest groups believed that they were, by comparison, excluded, disregarded, and ignored by administrative policymakers. Moreover, bureaucrats were by nature timid and establishment-oriented, wishing to avoid controversy and steer clear of the political and economic costs of serious conflict with regulated business. On balance, it was alleged, this added up to an implementation posture hardly likely to secure the transformative goals of the liberal coalition (Wilson 1967; Lazarus and Onek 1971; Stewart 1975: 1684–5, 1713–15; Shapiro 1988: 62–73; Melnick 2004: 93).

As the liberal coalition's growing concerns about the limits of bureaucratic regulation were gathering strength in the late 1960s, an important transformation in the alignment of American government deepened their skepticism toward the administrative state as a regulator. The new dominant governing alignment in the United States combined divided government and party polarization, usually with the Democrats writing laws in Congress and Republican presidents exercising important influence on the bureaucracy charged with implementing them. In the first 68 years of the 20th century, the parties divided control of the legislative and executive branches 21% of the time, and in the subsequent 32 years (from Nixon through Bush II), the figure was 81%. The durability of the condition of divided government that emerged in the late 1960s was exacerbated by another factor contributing to legislative–executive antagonism. Starting around the early 1970s, the growth of ideological polarization between the parties, which increased through century's end, eroded the bipartisan center in Congress and fueled the antagonisms inherent in divided government (Jacobson 2003; McCarty, Poole, and Rosenthal 2006).

Add to this that during the years of divided government between Nixon taking office and the end of the 20th century, Democrats controlled one or both chambers of Congress while a Republican occupied the presidency 77% of the time. Congress – the legislation-writing branch of government – was predominantly controlled by the Democratic Party, with its greater propensity to undertake social and economic regulation, and with liberal public interest groups occupying an important position within the party coalition. This legislative coalition usually faced an executive branch in the hands of a Republican president, the leader of a political party more likely to resist social and economic regulation, and with American business occupying a key position within the party coalition.

This new alignment in American government was unlikely to make anyone happy. Not surprisingly, periods of Democratic Congresses facing Republican presidents were characterized by virtually continuous conflict

between the liberal coalition in Congress and the comparatively conservative Republican leadership of the federal bureaucracy. Liberal public interest groups and congressional Democrats regularly attacked the federal bureaucracy under Republican leadership, claiming that it was willfully failing to effectuate Congress's legislative will. They charged that the executive branch adopted weak, pro-business regulatory standards; devoted insufficient resources to regulatory implementation; generally assumed a posture of feeble enforcement, and at times one of abject non-enforcement. Such charges ranged across many policy domains (Aberbach 1990: 27; Melnick 2005: 398–9; Farhang 2010: 129–313, 2012).[4] The convergence of divided government, party polarization, and Democratic legislatures facing Republican presidents sent the liberal legislative coalition in search of new strategies of regulation.

Private Lawsuits as a Statutory Implementation Strategy

The liberal coalition pursued a number of reform strategies to address the problems underpinning its disillusionment with the administrative state, its growing anxiety about presidential ideological influence on bureaucracy, and its concern about non-enforcement of congressional mandates. One set of strategies sought more effective control of the bureaucracy by the liberal coalition. It advocated enlarging opportunities for effective participation in administrative processes – particularly rulemaking – by public interest groups and their allies. It sought to force agency action through legislative deadlines and other means when agencies failed to carry out mandated responsibilities. It pressed for more aggressive congressional oversight and more frequent and stringent judicial review of important agency decisions. These were all strategies of reform through enhanced influence on and control over the bureaucracy, and they have been widely examined by scholars (Lazarus and Onek 1971; Stewart 1975; Vogel 1989; Melnick 2005).

An additional response, which has been less studied but is central to this book, was to advocate statutory rules that circumvented the administrative state altogether by fostering direct enforcement of legislative mandates through private lawsuits against the targets of regulation, such as discriminating employers, polluting factories, and deceptive labelers

[4] *See also Hearings on Class Action and Other Consumer Procedures before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce*, 91st Congress, 2nd Session (1970).

of consumer products (Melnick 1994; Kagan 2001; Burke 2002; Farhang 2010). It is important to differentiate between judicial review of agency action (one of the strategies discussed in the last paragraph) and direct private enforcement lawsuits. Rather than seeking to shape and constrain the behavior of bureaucracy, the direct enforcement strategy instead privatizes the enforcement function. When Congress elects to rely on private litigation by including a private right of action in a statute, it faces a series of additional choices of statutory design – such as who has standing to sue, how to allocate responsibility for attorney's fees, and the nature and magnitude of damages that will be available to winning plaintiffs – that together can have profound consequences for how much or little private enforcement litigation will actually be mobilized (Farhang 2010; Burbank, Farhang, and Kritzer 2013). We refer to this constellation of rules as a statute's "private enforcement regime."

Among the incentives that are available to encourage private enforcement of regulatory laws, especially important are statutory fee-shifting rules that authorize plaintiffs to recover attorney's fees if they prevail (Zemans 1984; Melnick 1994; Kagan 2001). Under the "American Rule" on attorney's fees, which generally controls in the absence of a statutory fee-shift, each side pays its own attorney's fees, win or lose. In light of the high costs of federal litigation, even prevailing plaintiffs might suffer a financial loss as a result of the American Rule, resulting in a disincentive for enforcement. More realistically, unless they were wealthy or could secure representation by a public interest organization, many would not be able to find counsel willing to take their case.

By the early 1970s, in order to mobilize private enforcement, liberal regulatory reformers were urging Congress to include private rights of action and fee-shifting provisions in new statutes across the entire domain of social regulation (Farhang 2010: ch. 5).[5] Monetary damages enhancements that allow a plaintiff to recover more than compensation for injury suffered – such as double, triple, or punitive damages – were also used to stimulate enforcement (21–31). This strategy was designed to facilitate impact litigation by law reform organizations, and, critically, to cultivate a for-profit bar to achieve day-to-day enforcement of ordinary claims – a function beyond the capacity of small non-profit groups. The strategy did

[5] *See also Hearings on Legal Fees before the Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee*, 93rd Congress, 1st Session (1973) (hereinafter *1973 Hearings on Attorney's Fees*).

not arise from abstract reflection. Rather, it was revealed by unexpected developments in the area of civil rights.

Civil Rights Model

Civil rights groups' embrace of private lawsuits for implementation has ironic origins in the job discrimination title of the foundational Civil Rights Act of 1964. When that law was proposed and debated in 1963–4, liberal civil rights advocates wanted a job discrimination enforcement regime centered on New Deal-style administrative adjudicatory powers modeled on the National Labor Relations Board, with Equal Employment Opportunity Commission (EEOC) authority to adjudicate and issue cease-and-desist orders. The proposal did not provide for private lawsuits. This preference was reflected in the job discrimination bill that liberal Democrats initially introduced with support from civil rights groups. At the time, the Democratic Party, while a majority in Congress, was sharply divided over civil rights, with its Southern wing committed to killing any job discrimination (or other civil rights) bill. In light of these insurmountable intraparty divisions, passage of the CRA of 1964 depended on conservative anti-regulation Republicans joining non-Southern Democrats in support of the bill (Rodriguez and Weingast 2003; Chen 2009: ch. 5; Farhang 2010: ch. 4).

Wielding the powers of a pivotal voting bloc, conservative Republicans stripped the EEOC of the strong administrative powers in the bill initially proposed by civil rights liberals, and they provided instead for enforcement by private lawsuits. Generally opposed to bureaucratic regulation of business, conservative Republicans also feared that they would not be able to control an NLRB-style civil rights agency in the hands of their ideological adversaries in the executive branch, long dominated by Democrats, and which passed from the Kennedy to the Johnson administrations while the bill proceeded through the legislative process. At the same time, in a political environment marked by intense public demand for significant civil rights legislation, some meaningful enforcement provisions were necessary in order for the Republican proposal to be taken seriously. To conservative Republicans and their business constituents, private litigation was preferable to public bureaucracy. Thus, conservative Republican support for Title VII was conditioned on a legislative deal that traded private for public enforcement. As part of the deal, liberals insisted that, if private enforcement was the best they could do, a fee-shift must be included, and thus Republicans incorporated one into their amendments to Title VII.

Civil rights groups regarded the substitution of private lawsuits – even with fee-shifting – for strong administrative powers as a bitterly disappointing evisceration of Title VII's enforcement regime (Farhang 2010: ch. 4).

If civil rights liberals and private enforcement regimes were a forced marriage, they soon fell in love and became inseparable. Civil rights groups mobilized in the early 1970s to spread legislative fee-shifting across the field of civil rights, first to school desegregation cases in the School Aid Act of 1971, to voting rights in the Voting Rights Act Amendments of 1975, and then to all other civil rights laws that allowed private enforcement but lacked fee-shifting in the Civil Rights Attorney's Fees Awards Act of 1976. Why? The two causes discussed earlier in this chapter for declining liberal faith in administrative power were critical: concerns about administrative capture and timidity, greatly exacerbated by Nixon's influence on the federal bureaucracy. Even under the Johnson administration, civil rights liberals regarded the federal bureaucracy's enforcement of civil rights as feeble, lacking in both political will and commitment of resources. When Nixon came to power, open conflict and antagonism broke out between civil rights liberals and the administration across the landscape of civil rights. Perceptions of the federal bureaucracy as lackluster were replaced by perceptions of the federal bureaucracy as purposefully obstructionist, and at times as the enemy (Farhang 2010: ch. 5).

These developments explain civil rights groups' turn away from bureaucracy, not their embrace of private lawsuits with fee-shifting, an enforcement alternative that, when adopted in 1964, they regarded with profound disappointment. Civil rights groups' embrace of private enforcement regimes, and the widespread adoption of private enforcement regimes as a reform strategy by the liberal coalition that shaped the new social regulation, was propelled by several other developments. First, the federal courts during this period took an expansive, pro-plaintiff orientation toward the CRA of 1964, making the judiciary a more hospitable enforcement venue for plaintiffs than anyone expected (Melnick 2014). Second – and more central to our study – private rights of action with fee-shifting proved unexpectedly potent in cultivating a private enforcement infrastructure in the American bar. In this regard, the early 1970s was a critical period of policy learning.

Growth of the Private Enforcement Infrastructure

In the early 1970s, attorney's fee awards contributed resources to existing non-profit public interest groups that prosecuted lawsuits under the new civil rights laws, such as the NAACP Legal Defense Fund and the

Lawyers' Committee for Civil Rights Under Law, adding to their enforcement capacity (O'Connor and Epstein 1984: 241; Derfner 2005: 656).[6] The availability of fee awards also contributed to the formation of significant new civil rights enforcement groups, with foundation seed money, on the expectation that they would be able to draw continuing operating funds from attorney's fees awards (McKay 1977; O'Connor and Epstein 1984: 240). The number of liberal public interest law groups fashioned on the model of these civil rights organizations grew rapidly in the late 1960s and 1970s. Although only seven such groups were in existence prior to 1968, by 1975 the number had grown to 72, spanning the areas of civil rights and civil liberties, environmental, consumer, employment, education, health care, and housing policy (Handler, Ginsberg, and Snow 1978; Vogel 1989: 105). These groups litigated in the fields of the new social regulation, and fee awards contributed revenue to their litigation campaigns.

In addition to increasing enforcement resources available to non-profit civil rights groups, the private enforcement approach in parts of the CRA of 1964 and numerous civil rights laws that followed that model in the ensuing decade fostered the growth of a private for-profit bar to litigate civil rights claims. In the first half of the 1970s, the number of job discrimination lawsuits multiplied 10-fold, growing from an annual total of about 400 to 4,000.[7] Title VII's fee-shifting provision, according to one practitioner in the field, had "led to the development of a highly skilled group of specialist lawyers" to enforce it.[8] This was true of civil rights more broadly. A 1975 *Washington Post* article reported that "[t]he lure of legal fees, paid by the loser, is fertilizing a whole new practice in civil rights disputes,"[9] and a 1977 Ford Foundation report observed that by the mid-1970s "fee-generating private practice has in many areas of the South enabled an indigenous bar, engaged in litigating cases of racial discrimination, to survive" (McKay 1977: 8, 13).

This story of a private for-profit plaintiffs' bar enforcing federal law extended beyond civil rights to the new social regulatory statutes in general. A 1976 study examined private for-profit firms – as contrasted with non-profit public interest organizations – that devoted at least 25% of their practice to "non-commercial" issue areas with the goal of "law reform,"

[6] *See 1973 Hearings on Attorney's Fees* (testimony of Armand Derfner).

[7] *Federal Court Cases: Integrated Data Base, 1970–2000*, maintained by ICPSR. The method for arriving at the estimates is explained in Farhang 2010: 271 n. 118.

[8] *1973 Hearings on Attorney's Fees*, at 1113.

[9] Bill Crider, "Civil Rights Turns to Gold Lode for Southern Lawyers," *Washington Post*, April 4, 1976, 59.

including enforcement of civil rights, environmental, consumer, employment, housing, education, and health-care statutes. Two such firms existed in 1966, and the number grew to 55 by 1975 (Handler, Ginsberg, and Snow 1978). The collection of attorney's fees from defendants was an important source of revenue to these firms. In 1977, an advocate of fee-shifting as a strategy of private regulatory enforcement observed that the enactment of such provisions across many policy fields since the Civil Rights Act of 1964 had conjured into existence a for-profit bar prepared to prosecute federal statutory claims on behalf of plaintiffs. Fee-shifting statutes, she explained, made litigating such claims "a financially viable practice," and consequently "public interest laws firms burgeoned" (Derfner 1977).

As civil rights leaders pursued the spread of fee-shifting and observed the remarkable mushrooming of a for-profit civil rights bar in the first half of the 1970s, they were simultaneously active and important participants in collaborative umbrella organizations that brought together groups from across the liberal public interest movement. In these networks, public interest law groups spanning the full range of the new social regulation pooled information, learning from one another's experiences. The question of how to finance public interest law, and the role of fee awards in that calculus, was a matter of extensive attention and discussion within this network in the early-to-mid 1970s (Council for Public Interest Law 1976; Weisbrod 1978; Trubek 2011: 418–19).

The Council for Public Interest Law was formed in the spring of 1974. Succeeded by the Alliance for Justice, the Council was an association of activists in the public interest law movement, including leaders of nonprofit public interest organizations spanning civil rights, environmental, consumer, education, public health, good government, and poverty law. Its initial purpose was to develop and disseminate a strategic plan for financing public interest legal representation – a vision for harnessing economic support for the spread and growth of public interest law, with a central focus being the enforcement of rights under the new social regulatory statutes (Trubek 2011). The Council's book-length report, *Balancing the Scales of Justice: Financing Public Interest Law in America* (1976), articulated a coalition-wide, self-conscious, coordinated decision of the leaders of the liberal public interest law movement to embrace the strategy of privatizing the enforcement of regulatory policy.

As expressed in *Balancing the Scales of Justice*, the strategy was to "bring into the marketplace" cases that otherwise would not be prosecuted, making such cases "economically attractive to regular commercial lawyers" in the "commercial legal marketplace." "[T]he passage of legislation

authorizing court awards of attorneys' fees," the report argued, "may make it possible for some matters that would now be considered public interest cases eventually to be handled on a contingent commercial basis." The report regarded what it called "private public interest law firms," then beginning to develop under recent fee-shifting legislation, as a model to build on and as "a significant area for growth." Such firms could be "economically viable" in the for-profit arena, could be sustained by fee awards under statutes, and could function as the backbone of the enforcement infrastructure for the new social regulation. In order to "institutionalize" this for-profit private enforcement infrastructure, the liberal public interest movement's reform strategy would need to focus on securing statutory fee-shifting provisions from Congress. The report provided a model fee-shifting statute to be pursued legislatively. *Balancing the Scales of Justice* repeatedly emphasized that this reform strategy was modeled on what had been learned from the success of the civil rights movement in general and experience under Title VII in particular (9–10, 20–1, 37–8, 54, 89–90, 113–14, 134–46, 313–20).

The long-term success of the movement we have been describing is reflected in Figures 1.1 and 1.2. Figure 1.1 displays the total number

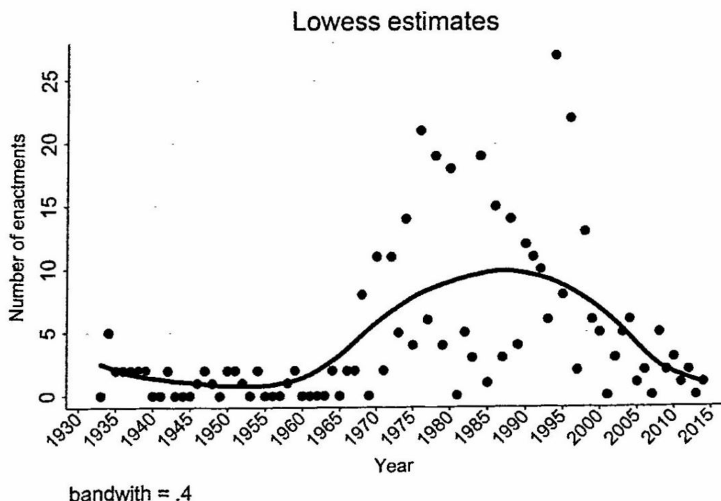

Figure 1.1 Number of federal statutory plaintiff's fee-shifting and damages enhancement provisions enacted, 1933–2014

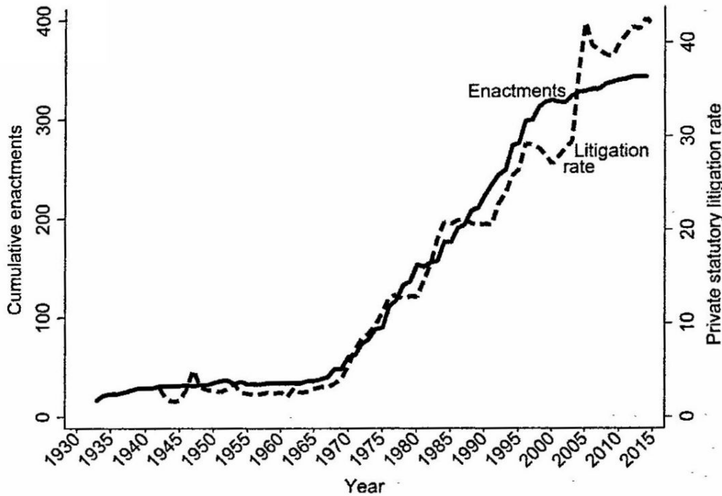

Figure 1.2 Cumulative federal statutory plaintiff's fee-shifting and damages enhancement provisions, and federal private statutory litigation rate, 1933–2014

of plaintiff's fee-shifts and/or damages enhancements (double, triple, or punitive) attached to private rights of action that were enacted by Congress from 1933 to 2014, with a regression curve fit through the data points. The predicted number rose sharply from the late 1960s to the late 1970s, somewhat plateaued until the mid-1990s, and then declined after the Republican Party took control of Congress in 1995. In Figure 1.2, the solid line represents the *cumulative* number of plaintiff's fee-shifts and damages enhancements attached to private rights of action in effect annually, reflecting the structural environment of private enforcement regimes in existence annually. This cumulative count is "net" in that it accounts for exits from federal statutory law due to the underlying law being repealed, expiring, or being declared unconstitutional. The dashed line in Figure 1.2 is the annual rate per 100,000 members of the population of private federal statutory enforcement litigation (it is only possible to distinguish private from government actions beginning in 1942). The strikingly close association between these two variables, and particularly the coincident sharp upward shift in both at the end of the 1960s, reinforces the plausibility of plaintiff's fee-shifts and damages enhancements as measures of the broader phenomenon of private enforcement regimes, and of the efficacy

of private enforcement regimes in mobilizing private litigants. It deserves emphasis that about 98% of these suits were prosecuted by for-profit counsel, and only 2% by interest groups.[10]

Even during periods of significant Republican legislative power, while calls for retrenchment were emanating from some quarters of the Republican Party, there was net growth in the private enforcement infrastructure. Republican instigation of the private enforcement regime in Title VII was not anomalous. Indeed, while Republicans controlled the Senate and the presidency from 1981 to 1986, Congress passed and the president signed, per Congress, an average of 12 new private rights of action with fee-shifts and/or monetary damages enhancements. That number was down materially from the Carter years, when 21 per Congress were passed, but it contributed to the continuing growth of opportunities and incentives for private lawsuits enforcing federal law. This basic pattern persisted from 1987 to 2004: Democratic Congresses from 1987 to 1994 passed 20 per Congress, and, although proclaiming an anti-litigation reform agenda, Republican Congresses passed 11 per Congress from 1995 to 2004. In the last decade, as Congress has alternated between Democratic control, Republican control, and divided control, enactments have declined to significantly lower levels, averaging only about three per Congress, with modest partisan variation. It is important to stress that our data do not allow us to assess the extent to which declining levels of enactment of private enforcement regimes are associated with declining levels of regulation by Congress as opposed to declining reliance on private enforcement when Congress does regulate.

We can conclude that under Republican Congresses after 1994, the rate of growth slowed, but material expansion of the private enforcement infrastructure continued. Some examples of Republican Congresses (or chambers) finding private enforcement regimes to be a useful regulatory strategy to serve their constituents are:

- In the Taft–Hartley Act of 1947, a Republican-controlled Congress gave companies a private right of action with economic damages against unions engaged in labor actions proscribed by the Act.[11]
- In the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, a Republican-controlled Congress gave United States nationals whose property was confiscated by the Cuban government during or following

[10] For a discussion of the data underlying the figures and this paragraph, *see* Farhang (2010: chs. 1 and 3).

[11] Public Law No. 80-101.

the Cuban revolution, a private right of action, with attorney's fees for successful plaintiffs, against "traffickers" in such property.[12]

- In the "Partial-Birth Abortion" Ban Act of 2003, a Republican-controlled Congress created a private right of action with treble damages, and damages for emotional pain and suffering, for fathers (*if* married to the woman on whom the procedure is performed), and for "maternal grandparents of the fetus" if the woman is a minor, against a doctor who performs an abortion in violation of the Act.[13]
- In the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, a Republican-controlled House (and a Democrat-controlled Senate) created a private right of action, with attorney's fees, for injuries resulting from certain protest activity at the funerals of veterans.[14]

Counterrevolution

Although the movement that propelled the growth of the Litigation State was successful, as time went on, it was contested, and ultimately it gave rise to a countermovement that is the subject of this book. The counterrevolution's strategy was to leave substantive rights in place while retrenching the infrastructure for their private enforcement. We divide our investigation of the counterrevolution according to its three main institutional strategies: (1) amend existing federal statutes to reduce opportunities and incentives for private enforcement; (2) amend existing or fashion new Federal Rules of Civil Procedure to do the same; and (3) use litigation to elicit federal court interpretations of private enforcement regimes and Federal Rules that demobilize private enforcers. The counterrevolution's legislative strategy was largely a disappointment, and its efforts to change Federal Rules achieved only modest and sporadic success. In notable contrast, its campaign in the courts – we focus on the Supreme Court – has proved, by far, the most successful for the project of retrenching private enforcement legal infrastructure. We argue in the balance of this chapter that institutional theory provides important insights that help to explain the variation we observe across institutional sites in the success of the campaign to retrench private enforcement. In laying out our institutional argument, we preview the main evidence we rely on in this book – a great deal of which

[12] Public Law No. 104-114.
[13] Public Law No. 108-105.
[14] Public Law No. 112-154.

consists of original data and the fruits of archival research – as well as the main empirical results and inferences we draw from the evidence.

Legislative Project

In Chapter 2, we trace the emergence, growth, and substantial failure of a movement in the elected branches to constrict opportunities and incentives for the enforcement of federal rights. We show that the growth of litigation as a central instrument to implement social and economic regulation beginning in the mid-to-late 1960s soon met opposition emanating primarily from the emergent conservative legal movement and the Republican Party. The campaign crystallized in the first Reagan administration, and the strategy it fashioned was to curtail, through legislation, the incentive structure that encouraged the private bar to enforce the rights embodied in the outpouring of rights-creating statutes beginning with the Civil Rights Act of 1964.

Recognizing the political impossibility of actually repealing the substantive rights that underpinned the growing postwar American regulatory state, the strategy was to constrict private enforcement regimes, such as by limiting standing, money damages, and attorney's fee awards for successful plaintiffs. Drawing on original archival research, we show that this legislative strategy included advocacy within the first Reagan administration for a major bill, "The Limitation of Legal Fees Awards Act of 1981," that would have amended over 100 federal statutes to sharply reduce attorney's fee awards to successful plaintiffs under federal statutes. The strategy also included consideration of proposals to amend the Civil Rights Act of 1871 (Section 1983) – among the most wide-ranging and consequential American civil rights laws – by materially restricting opportunities and incentives to enforce it, including by limiting both attorney's fees and damages. We use the archival records of these episodes to uncover the motives and strategy of the counterrevolution's founders and to elucidate the difficulties they encountered.

To investigate retrenchment activity in Congress, we constructed an original dataset of 500 bills that were introduced over the four decades from 1973 to 2014 and that specifically attempted to retrench opportunities and incentives for the enforcement of federal rights. Our congressional bill data allow us to trace over 40 years the emergence, growth, and decline of an attempted legislative counterrevolution; to identify its key advocates; to test hypotheses about the role of ideology and party; and to measure success or failure in effecting legal change. With these data, we

show that the movement to retrench rights enforcement initiated in the first Reagan administration quickly spread to congressional Republicans, among whom the introduction of such bills grew steeply beginning in the early 1980s. The movement thereby transformed statutory private enforcement regimes from a relatively non-partisan issue prior to the first Reagan administration into the source of partisan cleavage that we know today. The bill activity peaked in the mid-1990s when Republicans won control of Congress.

Ultimately in Chapter 2, we document the substantial failure of this Republican legislative project in the elected branches and the reasons for that failure. The Reagan administration abandoned private enforcement retrenchment through legislation, having concluded that it was broadly perceived as "anti-rights," threatening unacceptably high political and electoral costs to the administration, and thwarting any realistic prospects of success in the legislative process, apparently even within the Republican Party. Congressional Republican proposals, we show, largely failed as well, even after Republicans achieved unified control of Congress in the mid-1990s. Although some notable retrenchment bills did become law beginning in 1995, they were few in number, usually required years to enact, clustered in a few discrete policy areas, and did not seriously challenge the Litigation State as conservative activists had set out to do. By the present day, we find that retrenchment of private enforcement has largely disappeared from the legislative agenda.

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

Rulemaking

The counterrevolution also pursued retrenchment through court rulemaking. The Supreme Court wields power, delegated to it by Congress, to create and revise the Federal Rules of Civil Procedure (Federal Rules). Court rulemaking occupies intermediate lawmaking space that bridges legislative and judicial power (Burbank 2004a). The Federal Rules govern federal civil litigation, prescribing, for instance, criteria for whether multiple persons with similar claims can proceed in a class action, and what potential evidence parties are able to discover from one another during

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

To exercise these powers, the federal judiciary and Congress have together created an administrative process within the judiciary. In this system, the Advisory Committee on Civil Rules has primary responsibility for drafting the Federal Rules. All members of the Advisory Committee – who are judges, practitioners, and academics – are appointed by the Chief Justice.

In Chapter 3, we first chronicle rulemaking's role in stimulating private enforcement, and we then identify its role in the counterrevolution. Court rulemaking had been a powerful engine driving private enforcement through the 1960s, but it became the focus of retrenchment efforts starting in 1971, under the leadership of Chief Justice Warren Burger, the first of a succession of Chief Justices appointed by Republican presidents who have held that position up to the present. He had hopes for bold retrenchment, which reflected both institutional (docket) concerns and, increasingly as time went by, his own views about litigation as a "mass neurosis" in the United States (Burger 1985: 5).

To investigate how Chief Justices have exercised their appointment power with respect to the Advisory Committee, and to gauge likely Advisory Committee preferences, we compiled original data sets, spanning 1960 to 2014, in which we identified every person who served on the committee. We recorded rulemakers' key characteristics salient to our study, including occupation, party of the appointing president for federal judges, and type of practice for practitioners (e.g., corporate versus individual representation). To investigate the Advisory Committee's output over the same 55-year period, we also collected every amendment to the Federal Rules proposed by the Advisory Committee, evaluated each, and identified those salient to private enforcement and whether they were pro or anti-plaintiff in the direction of their likely effects.

With these original data, we show that under Burger and his successors, the Advisory Committee on Civil Rules came to be dominated by federal judges appointed by Republican presidents and, among its practitioner members, by corporate lawyers. We also demonstrate, however, that few of the Advisory Committee's proposals in the long period we study were pertinent to private enforcement, and that among those that were, ambitious retrenchment efforts have been less frequent than one might have predicted based on salient characteristics of committee members. We show in addition, however, that the proposals affecting private enforcement,

although modest in number and usually in ambition, increasingly disfavored it over time. We conclude that notwithstanding the preferences of Republican-appointed Chief Justices, reflected in their committee appointment choices and in other historical evidence, court rulemaking has been a site of only episodic and modest retrenchment.

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

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

Supreme Court

In Chapter 4, we show that those wishing to retrench private enforcement of social and economic regulation also waged a campaign in the courts. Their goal was the same: to constrict opportunities and incentives for the enforcement of federal rights, again focusing on such issues as standing,

damages, fee awards, and class actions. They learned that retrenching rights enforcement by changing statutory law was politically and electorally perilous and unlikely to succeed, and that an increasingly public and participatory rulemaking process would yield only modest and episodic retrenchment.

They thus pressed federal courts to interpret, or reinterpret, existing federal statues and procedural rules to achieve the same purposes. The federal courts were increasingly staffed by judges appointed by Republican presidents, some of whom had participated in the Reagan administration's failed efforts to retrench rights through legislation. These judges were ideologically sympathetic to the retrenchment project, and, in some cases, they were connected to the conservative legal movement that had given birth to that project. In addition, some of the same Reagan administration officials who were disappointed by failed efforts to retrench private enforcement through legislation, and who advocated a turn to the federal courts as an alternative pathway of retrenchment, also participated in the administration's selection of candidates to fill federal judgeships.

In demonstrating the Supreme Court's dramatic turn against private enforcement, we rely on both quantitative and qualitative evidence. We have created an original dataset of 366 decisions in which the Supreme Court ruled on the same types of issues we examined in our congressional bill data: standing, private rights of action, damages, fees, and arbitration. It also contains decisions on Federal Rules of Civil Procedure issues affecting private enforcement. This dataset allows us to elucidate the changing role of justices' ideology in the adjudication of these issues; to draw out a comparison between the Court's treatment of rules governing enforcement of rights and its treatment of the rights themselves; and to document a striking and uniquely large shift toward constricting opportunities and incentives to enforce rights through lawsuits. In addition, we present qualitative evidence focusing on important procedural issues targeted for retrenchment in Congress and/or through rulemaking before coming to the Court. Such qualitative evidence allows us to observe outcomes in more concrete detail when retrenchment was attempted on the same issue across multiple institutional sites.

In marked contrast to its substantial failure in Congress and modest success in the domain of rulemaking, the counterrevolution against private enforcement of federal rights achieved growing rates of support, especially over the past several decades, from an increasingly conservative Supreme Court. We find empirically that, in cases with at least one dissent, plaintiffs' probability of success when litigating private enforcement

issues before the Supreme Court has been in decline for over 40 years, and that by 2014 they were losing about 90% of the time, an outcome driven by the votes of conservative justices. Moreover, we demonstrate that the effect of ideology on justices' votes in private enforcement cases has grown significantly larger over time, especially since about the mid-1990s, during which time the Court's private enforcement docket has come to focus increasingly on business regulation cases. We show that this clear shift in the 1990s toward increasingly ideological conflict on the Court over private enforcement issues in business cases was associated with a roughly contemporaneous, and very large, mobilization of the Chamber of Commerce and conservative law reform organizations on the issue of private enforcement as measured by their amicus filings. With respect to the policy focus of the Court's private enforcement cases, we also observe that it focused disproportionately on civil rights cases relative to their share of the federal civil docket.

This escalation in ideological divisiveness on the Court over private enforcement issues has been particularly striking in Federal Rules cases. Although ideology played a fairly modest role in the justices' votes in Federal Rules cases for many years, there has been a sea change over the past 15 to 20 years toward those cases becoming a distinctively ideological part of the Supreme Court's docket. Remarkably, on the current Supreme Court, justices are more ideologically polarized over apparently technical rules of private enforcement than they are over the actual substantive rights in statutes, and when conflicts arise over these rules, the conservative wing prevails in the vast majority of cases.

The same project of retrenchment that largely failed in other lawmaking domains achieved substantial success through the courts. To explain why, we emphasize distinctive institutional properties of the judiciary. First, the Court is governed by a streamlined decisional process and simple voting rules, making it capable of unilateral action on controversial issues (Whittington 2007: 124–34). Second, life-tenured federal judges are largely insulated from the forces and incentives of democratic politics, again affording the Court considerable freedom to act decisively on divisive issues (Graber 1993; Gillman 2002). Third, in eras of divided government and party polarization, the Court faces less credible threats of statutory override and correspondingly enjoys more policymaking discretion (Eskridge 1991a, b; Whittington 2007: ch. 5; Hasen 2012). Fourth, the law governing or driving private enforcement, perceived by most observers as legalistic and technical, provides the Court a pathway to retrenchment that is remote from public view, and this subterranean quality is

reinforced by the slow-moving, evolutionary nature of case-by-case policy change (Graber 1993; Barnes and Burke 2015). We elaborate this institutional argument in comparative context in this book's conclusion.

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

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

In this book's concluding chapter (Chapter 6), we elaborate the institutional account that helps to explain the outcome we document: the long-term erosion of the infrastructure of enforcing rights through lawsuits, despite the substantial failure of the counterrevolutions policy project in democratic politics and in the intermediate lawmaking space of court rulemaking. After elaborating our institutional account, we engage the difficulties of measuring the "success" or "failure" of the counterrevolution

when attention turns from changing law governing or influencing private enforcement to changing the quantum and quality of private enforcement. We then take up normative concerns that arise when potentially crucial decisions bearing on the fate of broadly popular rights, most of which are conferred by statute, are not the result of public deliberation and democratic politics – indeed, when they are little noticed by the public at all. We also address a number of concrete steps that might be taken to address other normative concerns that our qualitative and quantitative data unearth.