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## Rights and Retrenchment in the Trump Era

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# RIGHTS AND RETRENCHMENT IN THE TRUMP ERA

*Stephen B. Burbank\* & Sean Farhang\*\**

## INTRODUCTION

Our aim in this Article is to leverage the archival research, data, and theoretical perspectives presented in our book, *Rights and Retrenchment: The Counterrevolution against Federal Litigation*,<sup>1</sup> to illuminate the prospects for retrenchment in the current political landscape. In the book, we documented how an outpouring of rights-creating legislation from Democratic Congresses in the 1960s and 1970s, much of which contained provisions designed to stimulate private enforcement, prompted the conservative legal movement within the Republican Party to devise a response. Recognizing the political infeasibility of retrenching substantive rights, the movement's strategy was to weaken the infrastructure for enforcing them. Although largely a failure in the elected branches and only modestly successful in the domain of court rulemaking, the project flourished in the federal courts.

In both the book and this Article, we focus exclusively on law that bears on opportunities and incentives for private enforcement of federal rights. Our decision to limit the project in that way was based on considerations that are both practical and theoretical.<sup>2</sup> It was fortified by evidence from our archival research that the counterrevolution started in the first Reagan administration as an ideological campaign against private litigation as a tool of federal policymaking and by our empirical data showing that the effort to retrench private enforcement of federal law preceded tort reform on both the administration's and the legislative agenda during the Reagan years.<sup>3</sup>

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\*\* Professor of Law and Associate Professor of Political Science and Public Policy at the University of California, Berkeley. We appreciate the helpful comments of Ed Purcell. This Article was prepared for the *Fordham Law Review* Symposium entitled *Civil Litigation Reform in the Trump Era: Threats and Opportunities* held at Fordham University School of Law on February 23, 2018.

1. *See generally* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

2. *See id.* at xvii–xix.

3. Although the law we study is often made in the context of the enforcement of federal rights (e.g., attorney's fees, damages, and private rights of action), many of the legal rules of interest to us, notably those contained in the Federal Rules of Civil Procedure, are

We follow the scheme of the book by separately considering the prospects for federal litigation retrenchment in three lawmaking sites: Congress, federal court rulemaking under the Rules Enabling Act,<sup>4</sup> and the Supreme Court. Although pertinent data on current retrenchment initiatives are limited, our historical data and comparative institutional perspectives should afford a basis for informed prediction. Of course, little in the Trump era has thus far been predictable.

As in the book, we start with a brief discussion of the revolution that preceded—and elicited—the retrenchment efforts that we chronicle. That revolution created the Litigation State.<sup>5</sup> Understanding the interests that created it, how they did so, and for what purposes is essential to uncovering the dynamics that led the proponents of the counterrevolution to seek to dismantle it.

### I. THE RISE OF THE LITIGATION STATE

In the twentieth century, a bedrock axis distinguishing the Democratic and Republican Parties was the Democrats' greater support for an interventionist state in the sphere of social and economic regulation, much of which targeted private business.<sup>6</sup> By the late 1960s, there was mounting disillusionment on the left with the capacities and promise of the American administrative state, which was propelled by growth in the number, membership, and activism of liberal public interest groups. An activist state, particularly one prepared to regulate private business, was 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.

The liberal coalition pursued a number of reform strategies to address the problems underpinning its disillusionment with the administrative state, its anxiety about presidential ideological influence on the federal bureaucracy, and its concern about nonenforcement of congressional mandates. One set of strategies 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. Private enforcement is a form of insurance against the president's failure to use the bureaucracy to carry out Congress's will.

These reasons to choose private enforcement became much more significant to American public policy starting in the late 1960s, when divided party control of the legislative and executive branches became the norm and relations between Congress and the president became more antagonistic. Growing ideological polarization between the parties exacerbated the

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transsubstantive—as are many legislative proposals to change them—so that our analysis and conclusions are likely to have broader purchase.

4. 28 U.S.C. §§ 2072–75 (2012).

5. See generally SEAN FARHANG, *THE LITIGATION STATE* (2010).

6. For an in-depth discussion of the emergence of the Litigation State, see BURBANK & FARHANG, *supra* note 1, at 4–16.

institutional friction arising from divided government. If antagonism between Congress and the president encourages resort to private enforcement, this will be especially consequential when the more regulation-prone Democratic Party controls Congress (and is writing regulatory mandates) and the less regulation-prone Republican Party controls the presidency (and is appointing the leadership of agencies tasked with implementing them). The bulk of the foundation for the Litigation State was laid under this configuration of divided government.

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 how little private enforcement litigation will actually be mobilized. We refer to this constellation of rules as a statute’s “private enforcement regime.”<sup>7</sup>

In Title VII of the Civil Rights Act of 1964, Congress decided to make the prohibition against job discrimination enforceable in court by including an express private right of action and a pro-plaintiff attorney’s fee-shifting provision.<sup>8</sup> Experience under Title VII demonstrated that private enforcement can be effective, as the federal judiciary proved a more hospitable enforcement venue than anyone expected. Moreover, private rights of action with fee shifting proved unexpectedly potent in cultivating a private enforcement infrastructure in the American bar. As a result, civil rights groups mobilized to spread legislative fee shifting across the entire field of civil rights, and the liberal coalition embraced private enforcement as a reform strategy for numerous other regulatory statutes.

From 2006 through 2015, more than 1.25 million private federal lawsuits were filed to enforce federal statutes, spanning the waterfront of federal regulation.<sup>9</sup> The rate of three lawsuits per 100,000 population in 1967, which had been stable for a quarter century, increased by about 1000 percent over the following three decades (thirteen by 1976, twenty-one by 1986, and twenty-nine by 1996).<sup>10</sup> This phenomenon was closely associated with self-conscious statutory design choices by members of Congress seeking to mobilize private enforcers.

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7. See Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 671–79 (2013).

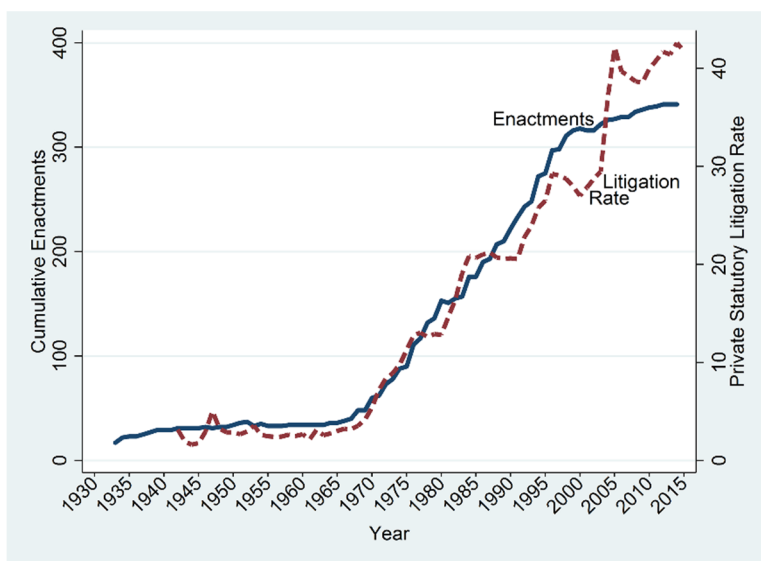
8. See generally FARHANG, *supra* note 5, at 94–128. In amending Title VII in 1991, Congress sought to ensure active use of the private right of action by supplementing attorney’s fee awards with, in certain cases, compensatory and punitive damages and the right to trial by jury. See generally *id.* at 172–213.

9. For a breakdown by year of federal civil case filings, see generally C-3, U.S. CTS., [www.uscourts.gov/data-table-numbers/c-3](http://www.uscourts.gov/data-table-numbers/c-3) [<https://perma.cc/PM29-Z6NT>] (last visited Aug. 24, 2018). In order to determine the number of federal statutory actions, we sum the number of cases in each year classified in the table as “actions under federal question” that are “private cases” arising under “federal question” jurisdiction.

10. See FARHANG, *supra* note 5, at 15.

The solid line in Figure 1 reflects the cumulative number of fee-shifting provisions and damages enhancements (double, triple, or punitive) attached to private rights of action existing in federal statutory law in each year from 1933 to 2014. The dashed line is the annual rate, per 100,000 population, of private federal statutory enforcement litigation.<sup>11</sup> The strikingly close association between these two variables, and particularly the coincident sharp upward shift in both at the end of the 1960s, reinforces the significance of legislatively designed private enforcement regimes in mobilizing private litigants and creating the Litigation State.<sup>12</sup>

*Figure 1: Cumulative Federal Statutory Plaintiffs' Fee-Shifting and Damages-Enhancement Provisions, and Federal Private Statutory Litigation Rate, 1933–2014*



## II. THE COUNTERREVOLUTION: PAST AND FUTURE

Although the movement that catalyzed the growth of the Litigation State was successful, it gave rise to a counterrevolution. The counterrevolution's strategy has been 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) to amend existing or enact new federal statutes to reduce opportunities and incentives for private enforcement; (2) to amend existing or fashion new Federal Rules of Civil Procedure to do the same; and (3) to use litigation to

11. It is only possible to distinguish private- from public-enforcement actions beginning in 1942.

12. For a discussion of the data underlying Figure 1, see FARHANG, *supra* note 5, at 3–18, 60–84.

elicit federal court interpretations of private enforcement regimes, Federal Rules, and other legal rules that demobilize private enforcers.

*A. The Elected Branches*

1. The Past

In Chapter 2 of our book,<sup>13</sup> we traced the emergence, growth, and substantial failure of a movement in the elected branches to constrict opportunities and incentives for the private enforcement of federal rights. We showed that the growth of litigation as an instrument to implement social and economic regulation soon met opposition emanating primarily from the emerging conservative legal movement and the Republican Party. With little prospect of repealing legislative mandates in the new social regulatory statutes, the Reagan administration's principal strategy for implementing its deregulatory agenda was to demobilize the administrative regulatory enforcement apparatus. However, the deregulatory value of weakening administrative enforcement would be diminished if extensive private enforcement continued. The first Reagan administration thus initiated proposals to curtail economic incentives for private enforcement (particularly fee awards) under federal regulatory statutes. It also sought to retrench private enforcement through legislation.

John Roberts, then in the Justice Department, initiated ambitious proposals to alter civil rights enforcement through amendments to section 1983, which were not pursued. He was also an active participant in deliberations over the administration's broad-ranging bill to reduce attorney's fees available under more than one hundred statutes in suits against government. Notwithstanding differences of opinion within the administration about the political wisdom of pursuing the bill, Roberts joined those advocating for it. In explaining why, he stated, "This legislation will, of course, be opposed by the self-styled public interest bar, but the abuses that have arisen in the award of attorney's fees against the government clearly demand remedial action."<sup>14</sup> Antonin Scalia endorsed the fee bill as well. Writing as a University of Chicago law professor and editor of the American Enterprise Institute's magazine, *Regulation* (just months before his appointment to the D.C. Circuit), Scalia argued that recent D.C. Circuit pro-fee-award decisions were a "bad dream" in need of the administration's legislative remedy and that the bill would surely be opposed by the "private attorney general industry."<sup>15</sup> Although their advocacy of retrenchment legislation in the 1980s failed, Roberts and Scalia were to become among the most anti-private-enforcement

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13. See BURBANK & FARHANG, *supra* note 1, at 25–64.

14. See *id.* at 33–34.

15. *The Private Attorney General Industry: Doing Well by Doing Good*, REGULATION, May/June 1982, at 5, 5–7; see also BURBANK & FARHANG, *supra* note 1, at 34.

justices to serve on the Supreme Court in a period spanning more than fifty years.<sup>16</sup>

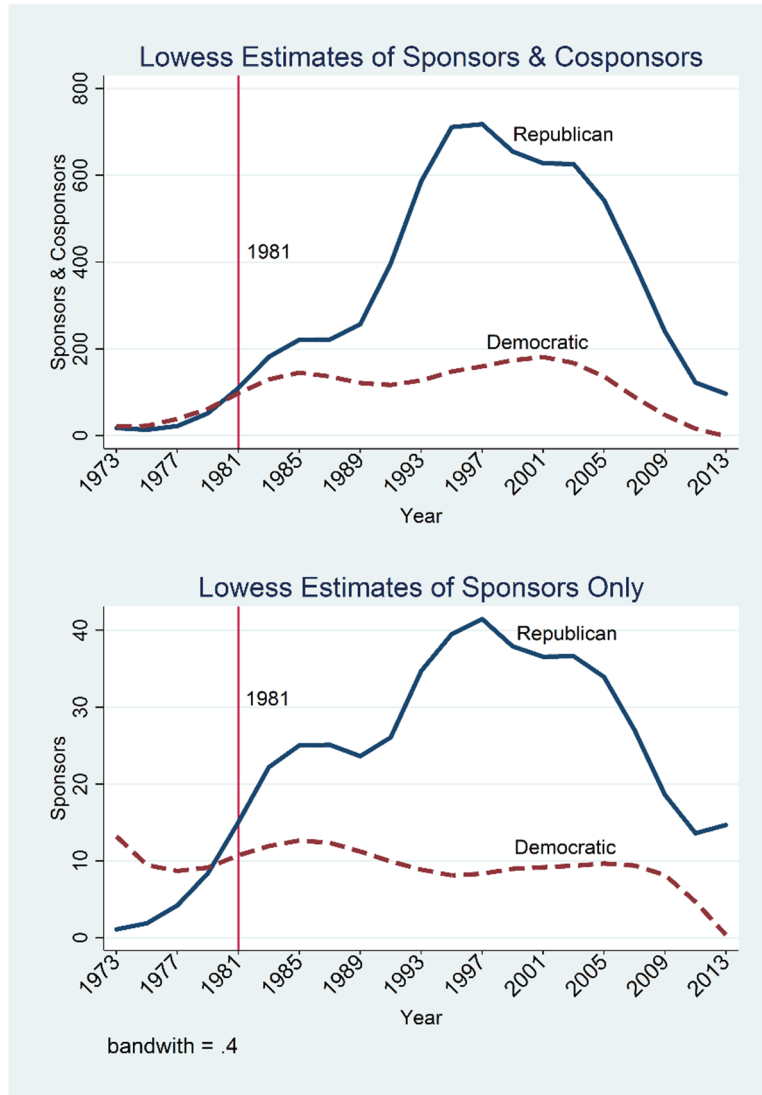
Congressional Republicans followed suit, introducing a sharply escalating series of bills that sought to amend existing federal statutes to limit fees and damages and, later, to amend federal procedural law by statute so as to constrict private enforcement. In order to map the legislative movement for private enforcement retrenchment and its partisan configuration in Congress, we identified all bills that sought to amend federal law so as to (1) reduce the availability of attorney's fees to plaintiffs or increase plaintiffs' liability for defendants' fees; (2) reduce the monetary damages that plaintiffs can recover; (3) reduce opportunities and incentives for class actions; (4) strengthen the operation of sanctions against counsel; and (5) strengthen the operation of offer-of-judgment rules. Our search captured 500 bills from 1973 (when the Library of Congress bill database starts) through 2014.

Figure 2 reflects, separately for Democratic and Republican legislators, smoothed estimates of the number of episodes per Congress of legislators sponsoring or cosponsoring one of our litigation reform items. The Ninety-Seventh Congress (1981–82) is the first in which Republican support for anti-litigation measures in our dataset exceeds Democratic support. From rough parity when Reagan took office, there emerged a partisan gap that grew to its highest levels in the 103rd to 106th Congresses (1993–98), hitting its apex in the 105th Congress (1995–96), with Republicans supporting anti-litigation proposals at a level about 580 percent above Democrats. As the level of Republican proposals declined after the 105th Congress, so did the gap between the parties.

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16. In cases in our dataset with at least one dissent, Justice Scalia had the lowest percentage (11 percent) of pro-private-enforcement votes and Chief Justice Roberts the next lowest (12 percent). BURBANK & FARHANG, *supra* note 1, at 151 tbl.4.4.

Figure 2: Republican and Democratic Support for Private Enforcement Retrenchment, 1973–2014



Ultimately, we documented 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 after concluding that it was widely perceived as “anti-rights” and threatened unacceptably high political and electoral costs to the administration, thwarting any realistic prospects of success in the legislative process. Congressional Republican proposals, we show, largely failed as well, even after Republicans achieved unified control of Congress in the mid-1990s. Only 11 of the 500 bills in our data were enacted. Three Republican



successes are well known: the Private Securities Litigation Reform Act of 1995 (PSLRA),<sup>17</sup> the Prison Litigation Reform Act of 1996,<sup>18</sup> and the Class Action Fairness Act of 2005 (CAFA).<sup>19</sup> We do not question the significance of these laws. Indeed, we believe that CAFA may be more significant to the retrenchment of private enforcement of federal law than is generally recognized.<sup>20</sup> That said, two of the three laws are narrowly focused. In addition, both of the class action statutes required many years to enact and encountered vetoes and filibusters along the way, and, in the view of one of the most prominent scholars in the area, the PSLRA did not change much.<sup>21</sup>

The eight other Republican bills that passed were of no significance to the broader policy project of litigation reform. In sum, Republican litigation-reform successes across the issues in our database, over the three decades from the emergence of the issue on the Republican agenda in 1981 until 2014, nibbled around the edges of the Litigation State. They did not directly challenge it.

To understand the substantial failure of the legislative project, we identified institutional factors that make retrenchment of rights by statute difficult. An institutionally fragmented American separation-of-powers system empowers many actors to block legislation, which makes legislative change difficult on contentious issues and leads to the stickiness of the status quo. This is especially true when the legal change sought involves divesting groups of existing rights, and even more so when those rights enjoy a broad base of support. The phenomenon of “negativity bias” (or an “endowment effect”)<sup>22</sup> means that people are substantially more likely to mobilize to avoid losses of existing rights and interests, as compared to securing new ones. It also leads voters to be more likely to punish politicians who have impaired their interests than to reward politicians who have benefited them, making retrenchment electorally hazardous. Politicians well understand this dynamic.

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17. 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.).

18. Prison Litigation Reform Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

19. 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.).

20. CAFA significantly increased the number of state law class actions governed by a transsubstantive and ever-more-conservative federal class action jurisprudence. In pushing so hard for and against this legislation, members of Congress signaled their awareness that the heart of the campaign against private enforcement reposed where its architects in the Reagan administration came to believe that it should be: in the federal courts. See BURBANK & FARHANG, *supra* note 1, at 141 (“The counterrevolution had been put in the hands of those best equipped institutionally to achieve its goals.”).

21. JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 125–26 (2015) (“[N]ot that much has actually changed.”).

22. See BURBANK & FARHANG, *supra* note 1, at 51.

## 2. The Future

As the top panel of Figure 2 reflects, Republican support for legislative retrenchment was at its highest levels in the 103rd to 109th Congresses (1993–2006) and peaked in the 104th Congress (1995–96). Subsequently, the estimated volume of Republican support for litigation retrenchment proposals in Congress declined through 2014, when the data for our book ended. By the close of the period we studied, Republican support for litigation retrenchment had declined to levels comparable to the end of the 1970s and the beginning of the 1980s.

In 2017, the House passed the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017,<sup>23</sup> a bill that aggressively limits class actions. It also passed the perennially introduced Lawsuit Abuse Reduction Act of 2017,<sup>24</sup> a bill designed to strengthen Rule 11 sanctions. These legislative developments raise the question whether we are witnessing a Trump era revival of Republican legislative retrenchment efforts in Congress—a Trump-led reversal of the long-run decline in the party’s legislative retrenchment program.

To assess this, we extended our bill data forward to cover 2015 through 2017. We find that there has, in fact, been a recent reversal in the decline, although the size of the shift is not large when viewed in historical perspective, and it does not quite correspond to the Trump presidency. According to our bill data indicators, the rebound in Republican support for legislative retrenchment began in the 114th Congress (2014–16) and has continued into the current Congress. The magnitude of the effect is notable but not extremely large. The level of litigation-retrenchment bill activity by Republicans is higher than we observed in the last three Congresses (2009–14) and is comparable to the 110th Congress (2007–08). Although that is a far cry from the high levels of Republican litigation retrenchment activity in Congress in the 1993–2006 period, we would certainly regard it as a material elevation of litigation retrenchment on the Republican legislative agenda if it were sustained or continued in a new upward trajectory.

Although we cannot identify the cause of this reversal with confidence, we do offer a hypothesis. With the exception of 2001 to 2002, the Republicans held unified control of Congress from 1995 to 2006. They never held unified control of Congress from the 110th to 113th Congresses (2007–13), when their level of support for litigation-retrenchment bills declined to its lowest levels since the issue emerged as a source of partisan cleavage and a Republican agenda item in the early 1980s. The recent revival of the issue on the Republican agenda corresponds to their capture of unified control in 2014 for the first time since 2006. This may be because they are newly optimistic about their capacity to actually enact contested legislation.

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23. H.R. 985, 115th Cong. (2017); *see* 163 CONG. REC. H1974–2000 (daily ed. Mar. 9, 2017).

24. H.R. 720, 115th Cong. (2017); *see* 163 CONG. REC. H2025–41 (daily ed. Mar. 10, 2017).

How one conceives of the relationship between the Trump era and the resurgence of litigation retrenchment on the Republican legislative agenda depends on what one means by the “Trump era.” The resurgence (if it proves to be that) emerged in the 114th Congress—commencing two years before Trump took office. In that sense, the President deserves neither credit nor blame (depending on one’s perspective). Alternatively, one may view the consolidation of legislative power in a Congress under unified Republican control—a victory delivered by voters under a Democratic president—as signaling the broader realignment that led to the Trump presidency. From that perspective, it is plausible to regard the Republican rebound in attention to litigation retrenchment, after a period of relative indifference, as being of a piece with the Trump era.

Are we on the verge of significant change via litigation retrenchment in the Trump era? We very much doubt that. Unified Republican control of Congress and the presidency certainly are auspicious developments for any Republican legislative project. But as we demonstrated in our book, divesting groups of existing rights is especially challenging within the veto-point-ridden American legislative process and, for this reason, Republican legislative efforts at litigation retrenchment have rarely succeeded with substantively significant legislation.<sup>25</sup> Indeed, we doubt that any litigation-retrenchment bill as potentially consequential as the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, currently pending before the Senate, has ever been enacted in the forty-five-year period we have studied. Even under unified Republican government, the legislative process includes the filibuster in the Senate. The distinctively potent group mobilization associated with efforts to withdraw existing rights guarantees that assertive litigation retrenchment, such as the two bills mentioned above, will be made sufficiently politically salient to stimulate Democratic use of the filibuster. In fact, a much weaker version of the class action bill passed the House in the 114th Congress and died in the Senate,<sup>26</sup> as did the Lawsuit Abuse Reduction Act.<sup>27</sup> This scenario has been recurrent. As in so many policy domains, controversial legislation is far more likely to pass the House than the Senate.

One success in the current Congress illustrates how important the filibuster is in blocking Republican efforts at litigation retrenchment by legislation, and how its elimination might change the landscape. Congress passed, and President Trump signed, legislation to rescind the Obama-era Consumer Financial Protection Bureau rule that would have prohibited providers of certain consumer financial products from using arbitration agreements to prevent consumers from pursuing class actions.<sup>28</sup> After the bill passed the House, the Senate tied 50-50, with two Republicans (John Kennedy of

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25. See BURBANK & FARHANG, *supra* note 1, at 50–58, 217–26; *supra* notes 17–19 and accompanying text.

26. See H.R. 1927, 114th Cong. (2016); 162 CONG. REC. H200–10 (daily ed. Jan. 8, 2016).

27. See H.R. 758, 114th Cong. (2015); 161 CONG. REC. H6112–21 (daily ed. Sept. 17, 2015).

28. Pub. L. No. 115-74, 131 Stat. 1243 (2017).

Louisiana and Lindsey Graham of South Carolina) declining to vote in favor of rescission. Vice President Mike Pence broke the tie in favor of passage.<sup>29</sup> Under the Congressional Review Act, recently finalized federal regulations may be rescinded by a simple majority vote in both chambers.<sup>30</sup> With the filibuster operative, the legislation would have stood no chance of passage. The episode provides a glimpse into an alternative institutional universe.

We make one final observation about Republican legislative preferences on litigation in the Trump era (loosely defined). When updating the data for the 114th and 115th Congresses, we observed a remarkably high level of Republican-proposed and cosponsored bills relying on private rights of action with attorney fee shifting to enforce Republican regulatory preferences and serve Republican constituencies. These bills included, for example, use of private rights of action with fee recovery to enforce anti-abortion policy against doctors,<sup>31</sup> enforce rights to possess and transport firearms against local and state authorities seeking to prohibit such conduct,<sup>32</sup> obtain damages from “alien” immigrants for injuries they cause,<sup>33</sup> and obtain multiple damages from unions for injuries caused by a labor slowdown.<sup>34</sup>

Although Republican advocacy for private enforcement regimes to serve their constituencies is not new, we believe that there has been significant escalation in such proposals in recent years (a development that is the subject of an ongoing project we are working on). Perhaps ironically, a signature of Trump era litigation reform may be an escalation of efforts to dismantle the Litigation State of civil rights, environmental regulation, and consumer protection, and replace it with a new Litigation State in the service of an anti-abortion, anti-immigrant, anti-union, and pro-gun agenda. It is too early to tell whether the Republican Party will have the political capacity to translate this agenda, reflected in its proposed bills, into statutory law.

## B. Rulemaking

### 1. The Past

In Chapter 3 of our book, we used qualitative and quantitative evidence to identify the role of federal court rulemaking in the counterrevolution against private enforcement of federal law.<sup>35</sup> We compiled original data, which span 1960 to 2014, in which we identified every person who served on the Civil Rules Advisory Committee. We recorded rulemakers’ key characteristics salient to our study, including party of the appointing president for federal judges and type of practice for practitioners (corporate versus individual

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29. See 163 CONG. REC. S6738–60 (daily ed. Oct. 24, 2017).

30. See 5 U.S.C §§ 801–08 (2012).

31. Prenatal Non-Discrimination Act of 2018, S. 2326, 115th Cong. (2018).

32. Sportsmen’s Heritage and Recreational Enhancement Act, H.R. 3668, 115th Cong. (2018).

33. Securing America’s Future Act of 2018, H.R. 4760, 115th Cong. (2018).

34. Preventing Labor Union Slowdowns Act of 2017, S. 702, 115th Cong. (2017).

35. See BURBANK & FARHANG, *supra* note 1, at 65–129.

representation and defendant versus plaintiff representation). We showed that under Chief Justice Warren Burger and his successors, all of whom were appointed by Republican presidents, the Advisory Committee came to be dominated by federal judges appointed by Republican presidents and, among its practitioner members, by corporate lawyers (and, toward the end of the study period, by corporate defense lawyers).

The ideological slant of federal judge appointments to the Committee, on average, has been fairly stable from Burger through Roberts. In statistical models with controls (including year-fixed effects to account for the pool of Article III judges eligible to be appointed and other potentially confounding year-level variables), we found that Republican-appointed federal judges have had about double the probability of service on the Committee. We also presented models demonstrating still-larger party effects in service and appointment as chair of the Committee.<sup>36</sup>

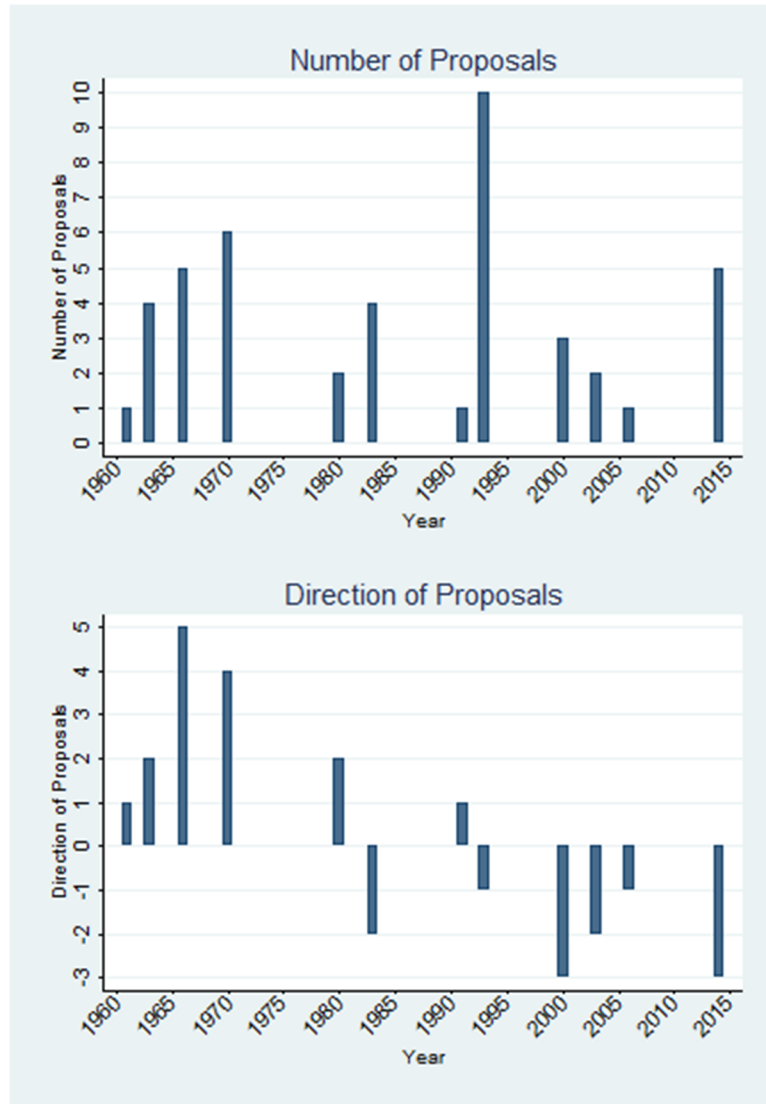
To investigate the Advisory Committee's output over the period 1960 to 2014, we collected every proposed amendment to the Federal Rules sent forward by the Advisory Committee (there were 262 proposals at the rule level), evaluated each, and identified those salient to private enforcement and whether they were pro- or anti-plaintiff (or neither) in the direction of their likely effects. The top panel of Figure 3 presents the distribution over time of the forty-four proposals affecting private enforcement from 1960 through 2014.<sup>37</sup> The bottom panel of Figure 3 presents the net balance, in years in which there were proposals affecting private enforcement, between pro-plaintiff and pro-defendant proposals. Pro-plaintiff proposals were coded 1; pro-defendant proposals were coded -1, and a single proposal that was evenly divided between pro-plaintiff and pro-defendant elements was coded 0. The bars in the bottom panel of Figure 3 represent the sum of all values of 1, 0, and -1 in each year.

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36. *See id.* at 89–91. In terms of the raw data, “the percentage of Republican-appointed judges on the federal bench serving as chair is 17 times larger than the percentage of Democratic-appointed judges so serving.” *Id.* at 91.

37. This number includes multiple proposals when it was possible to identify discrete groups within rules. There were thirty-three proposals affecting private enforcement at the rule level.

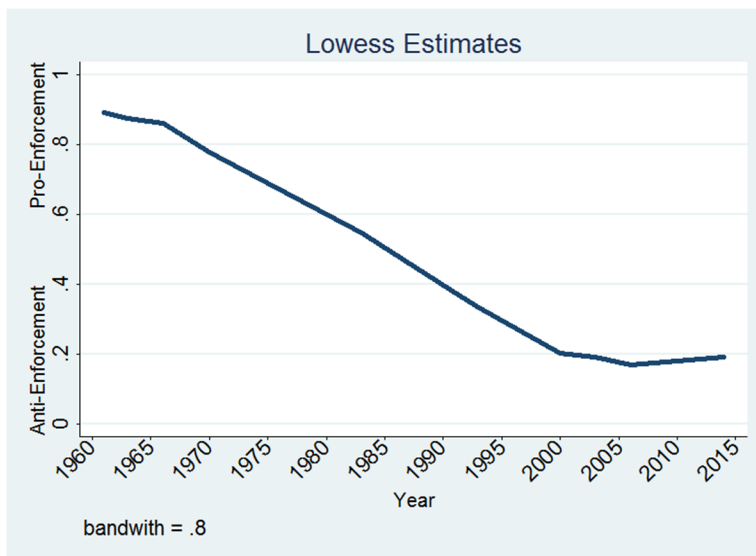
Figure 3: *Number and Direction of Advisory Committee Proposals Affecting Private Enforcement, 1960–2014*



In no year did the values sum to 0, and thus in every year in Figure 3 with no bar, there were no proposals forwarded to the Standing Committee affecting private enforcement that could be characterized as predictably favoring plaintiffs or defendants. The Figure reflects that, by the end of the period, proposals affecting private enforcement were infrequent, with none occurring between 2006 and 2014, but when they did occur, as in 2014, they were anti-plaintiff. Post-1980, there has been only one year (1991) with proposals affecting private enforcement that netted a pro-plaintiff direction, and, even then, just marginally so.

Figure 4 reflects the probability of a pro-plaintiff proposal over time, which is conditioned on the existence of a proposal affecting private enforcement. After increasing in the early 1960s, the predicted probability that a proposed amendment would favor plaintiffs declined from 87 percent in the mid-1960s to 19 percent by the end of the series.

*Figure 4: Probability of Pro-Plaintiff  
Advisory Committee Proposal, 1960–2014*



We are confident that most of the Advisory Committee's work is unaffected by members' ideological preferences. Our data confirmed that, as we suspected, few of the Committee's proposals predictably implicate private enforcement. However, we believe that, at least since the counterrevolution became a partisan project in the elected branches, the rulemaking proposals most likely to elicit ideological behavior have been precisely those that would affect private enforcement. Yet, based on qualitative evaluation of those proposals, ambitious retrenchment efforts have been less frequent than one might have predicted based on salient characteristics of Committee members. Although Chief Justice Burger was successful in stanching the flow of Federal Rules in the 1960s that favored private enforcement, his hopes for bold retrenchment through rulemaking were largely frustrated. In the period we studied, court rulemaking was a site of only episodic and modest retrenchment.

To explain this limited success, we placed particular emphasis on institutional reforms to the rulemaking process in the 1980s. In the early 1980s, influential rights-oriented interest groups and Democratic members of Congress came to believe that the Advisory Committee was embracing the goals of the counterrevolution, and the Committee's anti-enforcement work product (e.g., the 1983 amendments to Rule 11) elicited a backlash. The

resulting changes in the rulemaking process, including some imposed through legislation enacted by a Democratic Congress in 1988,<sup>38</sup> required public meetings, widened opportunities for interest group participation, increased the Committee's burden of justification to support rule changes, and enhanced opportunities for Congress to veto rule changes.

Drawing on institutional scholarship about congressional oversight of bureaucracy, we argued 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 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. The reforms 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 concluded that the reforms did, in fact, contribute to the stickiness of the rulemaking status quo, making bold retrenchment since the 1980s difficult to achieve even for those who were ideologically disposed to it.

The evidence also suggested to us that, even within a designedly sticky process, the Chief Justice and the leaders of the rulemaking committees can exercise important influence on the ambition or restraint of proposed reforms. Thus, on several occasions in the first decade of the new millennium, the Advisory Committee, with careful attention to the Rules Enabling Act's limitations and to data, prevented improvident proposals from going forward.<sup>39</sup> Moreover, prominent rulemakers celebrated these examples of restraint as evidence that the Rules Enabling Act process works.<sup>40</sup>

Consider also the 2010 Conference on Civil Litigation organized by the Advisory Committee (the "Duke Conference").<sup>41</sup> On the one hand, notwithstanding the evident hope of some who attended the event that it would function as a catalyst of major retrenchment, in their report to the Chief Justice, the chairs of the Advisory Committee and the Standing Committee provided no encouragement on the issue that, for forty years, was the brass ring for the rulemaking counterrevolution: the scope of discovery.<sup>42</sup>

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

39. See Mark R. Kravitz et al., *They Were Meant for Each Other: Professor Edward Cooper and the Rules Enabling Act*, 46 U. MICH. J.L. REFORM 495, 515–19 (2013).

40. See *id.* at 515–24; cf. Richard L. Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J.L. REFORM 637, 637 (2013) (“[W]hat the Advisory Committee on Civil Rules does not do is, in some ways, as important as what it does.”).

41. See *2010 Civil Litigation Conference*, U.S. CTS., <http://www.uscourts.gov/RulesAndPolicies/rules/archives/projects-rules-committees/2010-civil-litigation-conference.aspx> [<https://perma.cc/68AQ-ZWSM>] (last visited Aug. 24, 2018).

42. See JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010



On the other hand, in 2013 the Advisory Committee, under new leadership and with the approval of the Standing Committee, which was 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 were decidedly anti-private enforcement.<sup>43</sup> Apart from, 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>44</sup> who, it should be recalled, was one of the architects of the counterrevolution when serving in the first Reagan administration. Indeed, once the amendments (which included a number of potentially significant changes to the 2013 proposals) became effective, he devoted his entire 2015 year-end report to the amendments and emphasized that “[t]hey mark significant change, for both lawyers and judges, in the future conduct of civil trials,” with the result that, although they “may not look like a big deal at first glance . . . they are.”<sup>45</sup>

It remains to be seen whether Chief Justice Roberts’s characterizations of the 2015 discovery amendments are (1) spin designed to influence lower court judges to adopt interpretations not supported by the text, drafting history, or Advisory Committee Note;<sup>46</sup> or (2) vindication of those who regarded proponents’ claims that the amendments were “modest” as a smokescreen: sheep’s clothing for a wolf.<sup>47</sup>

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CONFERENCE ON CIVIL LITIGATION 8 (2010), [http://www.uscourts.gov/sites/default/files/report\\_to\\_the\\_chief\\_justice.pdf](http://www.uscourts.gov/sites/default/files/report_to_the_chief_justice.pdf) [<https://perma.cc/KBR6-6FYW>].

43. *See generally* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 264–66 (2013), [http://www.uscourts.gov/sites/default/files/fr\\_import/ST2013-06.pdf](http://www.uscourts.gov/sites/default/files/fr_import/ST2013-06.pdf) [<https://perma.cc/9LVD-RU6N>].

44. BURBANK & FARHANG, *supra* note 1, at 123. As we noted in our book:

In 2014 one of the authors asked a member of the Advisory Committee about the inconsistency between the report of the Duke Conference . . . and the tenor of subsequent deliberations and proposals concerning the scope of discovery. The member responded that the Chief Justice had reacted to the report by strongly encouraging the Chair of the Advisory Committee to make use in rulemaking of the information acquired for and at the Conference.

*Id.*

45. 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2015), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [<https://perma.cc/27QU-QCDJ>].

46. *See generally* Adam N. Steinman, *The End of an Era?: Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1 (2016).

47. *See, e.g.*, Stephen B. Burbank, Comment Letter on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure 3–4 (Feb. 10, 2014), <https://www.regulations.gov/document?D=USC-RULES-CV-2013-0002-0729> [<https://perma.cc/393W-UD6G>]. Again, the Advisory Committee made a number of potentially significant changes to the 2013 proposals, which eliminated some proposals that had elicited strong objections, and revised the Advisory Committee Note. Professor Steinman’s view of the final product, and therefore of the nature of the Chief Justice’s characterizations, rests substantially on a prediction about the effect of those changes. *See generally* Steinman, *supra* note 46.

## 2. The Future

From 2014 to 2017, the Chief Justice added four Article III judges, one practitioner, and one academic to the Advisory Committee.<sup>48</sup> As of October 2017, the Committee comprised six Article III judges, one magistrate judge, one state court judge, four practitioners, and one academic.<sup>49</sup> Four of the six Article III judges, including the Chair, were appointed to the bench by Republican presidents,<sup>50</sup> and both the magistrate judge and the state court judge had received appointments by Republican administrations, federal or state.<sup>51</sup> The four practitioners appear to be more evenly divided along the dimensions we charted in the book, although only one of them routinely represents individual plaintiffs and, as has become the norm, that representation is in complex aggregate litigation.<sup>52</sup> Thus, to the extent that ideology plays a role in the work of the Advisory Committee—which seems to us most likely when a rule is salient to private enforcement—and to the extent that the party of the appointing president (or other appointing authority) is a reliable basis for predicting the direction of votes on rule proposals that trigger ideological behavior, we might expect to see some anti-private-enforcement proposals.<sup>53</sup>

Looking at the Committee's work product since 2014, of the eight proposals (at the rule level), the great majority, if not all, were either not salient to private enforcement or not directional (i.e., either clearly pro-plaintiff or pro-defendant).<sup>54</sup> Yet, this finding is not surprising. In the entire

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48. Two individuals appointed in 2014, one magistrate judge and one practitioner, were not included in the data we used for our book because, attending their first meeting in October 2014, they did not participate in decisions that led to any of the proposals that we studied.

49. See ADVISORY COMM. ON CIVIL RULES, AGENDA OF NOVEMBER 7, 2017, at 9–11 (2017), [http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook\\_0.pdf](http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf) [<https://perma.cc/88HT-YGBT>]. We include in this count only individuals appointed by the Chief Justice and thus do not include the representative of the Department of Justice. The Reporter and Associate Reporter, who are academics, are also not included.

50. The Article III judges (and their appointing presidents) are: Hon. John D. Bates (G. W. Bush), Hon. Robert Michael Dow, Jr. (G. W. Bush), Hon. Joan N. Ericksen (G. W. Bush), Hon. Sara Lioi (G. W. Bush), Hon. Scott M. Matheson, Jr. (Obama), and Hon. Brian Morris (Obama). See *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges> [<https://perma.cc/73BM-8VT5>] (last visited Aug. 24, 2018).

51. For the background of the magistrate judge, Hon. Craig B. Shaffer, see *Craig Shaffer*, BALLOTPEdia, [https://ballotpedia.org/Craig\\_Shaffer](https://ballotpedia.org/Craig_Shaffer) [<https://perma.cc/9QQX-2KYT>] (last visited Aug. 24, 2018). For the background of the state court judge, Hon. David F. Nahmias, see *Justice David E. Nahmias*, SUP. CT. GA., <https://www.gasupreme.us/court-information/biographies/justice-david-e-nahmias/> [<https://perma.cc/WLB6-GVKZ>] (last visited Aug. 24, 2018).

52. The four practitioners are John M. Barkett, Esq., Parker C. Folse, Esq., Virginia A. Seitz, Esq., and Ariana J. Tadler, Esq. See ADVISORY COMM. ON CIVIL RULES, *supra* note 49, at 13.

53. As has been true for most of the last twenty-five years, an ideologically driven retrenchment proposal of the Advisory Committee that ripened into a proposed amendment promulgated by the Supreme Court during the Trump era would not be at risk of override through legislation.

54. The proposals in question were: in 2015, proposals to amend Rules 4(m), 6(d), and 82; in 2016, a proposal to amend Rule 4(m); and in 2017, proposals to amend Rules 5, 23, 62,

1960–2014 period, only 33 of 262 proposals at the rule level would predictably affect private enforcement. The many years in Figure 3 where there is no bar above or below the line reflect years when there were no such proposals.<sup>55</sup>

There is, however, something about the Committee’s recent work product that may cause surprise to some observers, particularly those who saw in the 2015 discovery amendments the opening wedge in a more ambitious campaign to retrench through rulemaking. Arguably, the only salient proposal at the rule level is the currently pending collection of proposed amendments to Rule 23.<sup>56</sup>

Given that the potential significance of proposals to amend the class action rule dwarfs the potential significance of all other proposals from 2015 to 2017 combined, it is striking that none of them has sufficiently clear implications for private enforcement to warrant directional coding according to our standards.<sup>57</sup>

There are numerous possible explanations for this finding. One possible explanation is that this Rule 23 experience is evidence that Advisory Committee members not only try to be but are immune both to the ideological currents that propel positions of individuals and interest groups on both sides of a proposed Federal Rule change that would affect private enforcement and to the predisposing effects of their own ideology.<sup>58</sup> If intended to describe the work of the Advisory Committee in general, past and present, that explanation is not supported by our data.<sup>59</sup> Moreover, even if Chief Justice

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and 65.1. All rule proposals going forward from the Advisory Committee to the Standing Committee can be found in various minutes and reports. *See generally Records and Archives of the Rules Committees*, U.S. CTS., <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees> [<https://perma.cc/6ZGV-8YY4>] (last visited Aug. 24, 2018).

55. We characterize proposals as not affecting private enforcement when they seek to amend (or add) rules that (1) are not salient to private enforcement, or (2) are salient to private enforcement but would not themselves predictably affect it.

56. STANDING COMM. ON RULES OF PRACTICE & PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 274–93 (2017), [http://www.uscourts.gov/sites/default/files/2017-09-jcus-report\\_0.pdf](http://www.uscourts.gov/sites/default/files/2017-09-jcus-report_0.pdf) [<https://perma.cc/8HXL-M5VA>]. The proposals were approved by the Judicial Conference, adopted by the Supreme Court, and transmitted to Congress on April 26, 2018. *See Pending Rules and Forms Amendments*, U.S. CTS., <http://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments> [<https://perma.cc/B898-9MRN>] (last visited Aug. 24, 2018).

57. For an interesting account of the 2017 Rule 23 proposals, which are on track to become effective December 1, 2018, see generally Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. REV. 903 (2018). “In sum, revolutionary change to class action practice is not currently emerging from the rules process.” *Id.* at 942.

58. *See id.* at 915–16 (“[T]he debates during the current rulemaking effort significantly reflect competing conceptions of this [compensation versus deterrence] divide, and one could say that there is again a studied effort by the rulemakers to avoid embracing the strongest position on either side.”). *But see* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838, 886–87 (2009) (discussing “cognitive illiberalism,” which involves the ability to see the influence of cultural predispositions on others but not on oneself, often leading to a “dismissive and even contemptuous posture toward . . . opponents’ beliefs”).

59. *See supra* Figure 4.

Roberts was spinning the 2015 discovery amendments, the salience and directionality of a number of the Committee's discovery proposals, even as revised, make us doubt the explanation's persuasiveness, standing alone,<sup>60</sup> for the Rule 23 proposals, which started to take shape during the same period.

In fact, we think that comparing rulemaking as to discovery and class actions in historical and institutional perspective is illuminating for this purpose. Doing so suggests that, although controversy has attended rulemaking retrenchment attempts in both areas since 1970, interinstitutional dynamics have played out in very different ways.

The transsubstantive effort to retrench discovery was for decades essentially confined to the rulemaking domain,<sup>61</sup> where it has not generally been thought to pose problems under the Enabling Act. Such influence as the other lawmaking sites may have had seems to have come from the judiciary, and it was more likely to serve as prod than brake. That is how we interpret Chief Justice Roberts's involvement in the 2015 discovery amendments, both in jump-starting the effort and in promoting the resulting amendments after they became effective. In addition, it seems possible that both the Chief Justice and some members of the Advisory Committee may have been influenced by the Court's decisions in *Bell Atlantic Corp. v. Twombly*<sup>62</sup> and *Ashcroft v. Iqbal*,<sup>63</sup> which were predicated in part on the perceived inability of federal judges, under the existing rules, to exercise needed control of discovery.<sup>64</sup>

Class action retrenchment looks different in historical and institutional perspectives. The Advisory Committee that Chief Justice Burger reconstituted in 1971 was a disappointment to him in part because, although it gave priority to Rule 23 (probably at his initiative), it spent six years studying possible amendments, with no proposal seeing the light of day. One reason for the Committee's glacial progress was growing awareness of controversy engendered by early experience under the 1966 amendments and questions about their validity under the Rules Enabling Act, both of which

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60. At the level we use for statistical purposes, three of the amendments salient to private enforcement were anti-private enforcement, while one was pro-private enforcement. The tilt against private enforcement is even more pronounced at the most granular level we use for comparison.

61. We ran searches in the congressional bill database seeking to identify litigation retrenchment proposals targeting discovery. We found that discovery-retrenchment proposals were overwhelmingly focused on discrete policy domains, such as stays of discovery while a motion to dismiss is pending (as in the PSLRA) and discovery in intellectual property litigation. Interestingly, the only arguably transsubstantive discovery-retrenchment proposals we found were linked to class action retrenchment, in the form of proposals limiting discovery pending disposition of a motion for class certification. Although our investigation of this issue was not exhaustive, it supports the firm conclusion that discovery has been far less likely than class actions to be the target of transsubstantive litigation-retrenchment proposals in Congress. We did observe a fair number of bills reflecting transsubstantive concerns about protective orders, but such bills seek to make the fruits of discovery more widely available, not to retrench discovery.

62. 550 U.S. 544 (2007).

63. 556 U.S. 662 (2009).

64. See *Twombly*, 550 U.S. at 558–60; see also *Iqbal*, 556 U.S. at 684–86.

were crystallized by the Carter administration's legislative proposal to repeal and replace Rule 23(b)(3). In the wake of that initiative, the Advisory Committee abandoned the effort for more than a decade.<sup>65</sup>

By the time the Advisory Committee returned to class actions in the early 1990s, the rulemaking-process changes of the 1980s were in place. As a result, attempts to consequentially amend Rule 23 were sure to promote intense and motivated interest group participation, with the capacity to imperil the perceived legitimacy of the Rules Enabling Act process. The fact that Congress was embroiled in aspects of class action retrenchment during essentially the entire period that the Advisory Committee was at work—in the prolonged lawmaking efforts that finally yielded the PSLRA and CAFA—can only have highlighted the institutional stakes, dampening the zeal for ambitious retrenchment even of members otherwise favoring it.<sup>66</sup>

The difference in the levels of congressional interest in these two domains suggests, as does the difference in sensitivity to rulemaking about them under the Rules Enabling Act,<sup>67</sup> that Congress and interest groups like the Chamber of Commerce care more about legislative retrenchment of class actions than of discovery. If so, one reason may be that legislatively restricting class actions has greater potential to affect disfavored types of litigation than does legislatively restricting discovery. Another reason may be that, in most types of litigation, class actions have asymmetrically negative effects on business when compared to discovery, the utility of which in business-to-business litigation is a constant deterrent to unrestrained retrenchist zeal.

Congress appeared to lose interest in class action retrenchment a decade or so ago, and the recent resurgence of interest that we discuss in Part II.A.2 manifested a few years after the Advisory Committee again took up possible amendments to Rule 23, leading to the pending proposals. In our book, we suggested that the decline in legislative activity may have reflected, as CAFA strongly suggests, awareness among proponents of retrenchment in Congress that the federal courts were likely to be more effective in that enterprise.<sup>68</sup> Our data, which tracked only decisions of the Supreme Court, support that proposition.<sup>69</sup> Moreover, our qualitative work yielded the conclusion that, as with pleading, so also with class actions: the conservative majority of the

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65. See BURBANK & FARHANG, *supra* note 1, at 97–101.

66. In our book, we suggested that the prolonged legislative effort necessary to enact the PSLRA, which required numerous compromises and produced statutory language and legislative history that constrained the Supreme Court's retrenchment efforts, may help to explain why a number of the Court's pro-private-enforcement class action decisions of recent years have involved securities class actions. See *id.* at 139–40.

67. The limitations on rulemaking under the Rules Enabling Act are limitations on delegated legislative power that seek to protect the lawmaking prerogatives of Congress. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106–08 (1982).

68. See BURBANK & FARHANG, *supra* note 1, at 140–41; see also *supra* note 20 and accompanying text.

69. See, e.g., BURBANK & FARHANG, *supra* note 1, at 178 (discussing trends in Federal Rules cases). “In the past 15 years, plaintiffs are losing, and business defendants are winning, a huge majority of Federal Rules private enforcement cases, and this field is the locus of increasingly intense conflict among the justices.” *Id.*

Court effectively sought to amend the Federal Rules of Civil Procedure under the guise of interpretation.<sup>70</sup> We see again that lawmaking in one site may reduce lawmaking ambition or flexibility in another.

Here, the impulse to restraint in the Advisory Committee may have reflected concern that the Court had staked out class action retrenchment for itself. Even if so, it may also have reflected the belief among members of both institutions that, if the envelope was to be pushed, better that it be pushed by the Court in decisions less likely to attract wide public notice, with little risk to that institution's perceived legitimacy,<sup>71</sup> than by the rulemakers, whose remit includes protecting the lawmaking mechanism that affords the judiciary its greatest power to craft the rules governing federal practice and procedure.<sup>72</sup> Either consideration (or both of them) might explain why the rulemakers chose to put on hold some matters urged upon them, such as issue classes, settlement class certification, ascertainability, and "pick-off" issues.<sup>73</sup> All four matters are likely to tap into ideological views about the class action, and most are closely connected to doctrinal issues that the Court has considered in its recent class action jurisprudence.

Finally, by way of comparison of class action and discovery retrenchment, something akin to path dependency may also help to explain the differences in the rulemakers' ambition that are suggested by our data. Once the rulemaking changes of the 1980s were in place, the fraught and institutionally complex project of class action retrenchment called out for leadership that was politically astute. Those changes, institutional sensitivity, and the epistemically shallow foundation of the 1966 amendments called out for broad consultation and policy grounded, within reason, in empirical evidence. Those commitments yielded but one amendment in the 1990s,<sup>74</sup> a package of process-oriented amendments in 2003, and self-conscious restraint throughout. The same commitments characterized the process by which the current proposed Rule 23 amendments were fashioned. It is a testament to the restraint, thoroughness, and inclusiveness of the process

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70. *See id.* at 141–42. *See generally* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

71. *See* BURBANK & FARHANG, *supra* note 1, at 192–216, 220–26.

72. *See id.* at 121.

73. *See* Comm. on Rules of Practice & Procedure, *Minutes* 11–12 (Jan. 7, 2016), [http://www.uscourts.gov/sites/default/files/st01-2016-min\\_0.pdf](http://www.uscourts.gov/sites/default/files/st01-2016-min_0.pdf) [https://perma.cc/5LB3-HS9R]. Professor Marcus discusses the Advisory Committee's decisions not to pursue these issues, as well as cy pres and "no injury" classes, in his recent article. *See* Marcus, *supra* note 57, at 923–33. "[I]n general they . . . illustrate the ongoing challenge of emphatic embrace of either the pure compensation or the pure deterrence rationale." *Id.* at 923.

74. As we have noted, although this provision (Rule 23(f)), which permits discretionary appeals from class certification decisions, is facially neutral, it "enabled and highlighted another path to retrenchment of private enforcement by substantially expanding the opportunities for conservative federal appellate courts, including the Supreme Court, to control the course of class action jurisprudence." Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1515 (2017).

followed that the published proposals elicited fewer than ninety written comments.<sup>75</sup>

Operating in the less fraught and institutionally complex environment of discovery retrenchment in the late 1990s, with different leadership in charge of the project, the rulemakers evidently believed that they had greater freedom from, for example, any commitment to heed reliable empirical evidence.<sup>76</sup> Prodded to renewed action by the Chief Justice ten years later, following the Duke Conference, still enjoying greater perceived freedom to pursue ambitious retrenchment through the Rules Enabling Act process, and reassured that such proposals would survive any veto attempt in Congress, the rulemakers chose a course that was bound to provoke intense controversy. Their published proposals elicited 2356 written comments.<sup>77</sup> As we previously suggested, it remains to be seen how much of the controversy will be dissipated by the changes made in the proposals finally submitted. This will depend upon whether federal courts administering discovery share the view that the resulting amendments are modest changes posing little threat to plaintiffs' access to information necessary to effective prosecution of their claims, or if they believe the Chief Justice's contrary claim that "[t]hey mark significant change" and are "a big deal."<sup>78</sup>

### C. THE SUPREME COURT

#### 1. *The Past*

In Chapter 4 of our book,<sup>79</sup> we showed that those wishing to retrench private enforcement of social and economic regulation also waged a campaign in the courts. The goal was the same: to constrict opportunities and incentives for the enforcement of federal rights, with a focus on such issues as standing, damages, fee awards, and class actions. They learned that retrenching rights enforcement by changing statutory law was politically and electorally perilous and unlikely to succeed and that an increasingly public and participatory rulemaking process would yield only modest and episodic retrenchment. They thus pressed federal courts to interpret, or reinterpret, existing federal statutes and procedural rules to achieve the same purposes.

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75. *Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS.GOV, <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=USC-RULES-CV-2016-0004> [<https://perma.cc/LJ3Z-B7LL>] (last visited Aug. 24, 2018). There were ninety-one comments on all of the proposals published for comment, the great majority about the proposed amendments to Rule 23. *See id.*

76. *See* BURBANK & FARHANG, *supra* note 1, at 114–15 (noting the Advisory Committee Chair's explanation that renewed effort was due to "persistent pressure for litigation retrenchment from elite elements of the bar and a report from President Bush's Council on Competitiveness issued in 1991," which contained a claim about the cost of discovery that lacked empirical support).

77. *Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=USC-RULES-CV-2013-0002> [<https://perma.cc/D9L5-AFAF>] (last visited Aug. 24, 2018).

78. 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *supra* note 45, at 5.

79. *See* BURBANK & FARHANG, *supra* note 1, at 130–91.

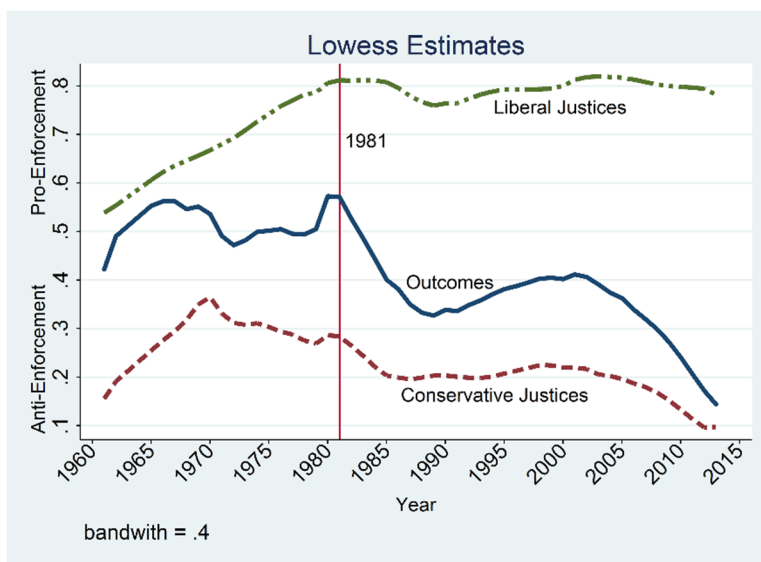
The federal courts were increasingly staffed by judges appointed by Republican presidents, some of whom had participated in the Reagan administration's failed efforts to retrench rights through legislation.

In marked contrast to its substantial failure in Congress and modest success in the domain of rulemaking, the counterrevolution against private enforcement of federal rights achieved growing rates of support, especially over the past several decades, from an increasingly conservative Supreme Court. For the period from 1960 to 2014, we identified all Supreme Court decisions requiring justices to vote on (1) the existence or scope of a private right of action, either express or implied; (2) whether a party has standing to sue under either Article III or prudential analysis; (3) the availability of attorney's fees to a prevailing plaintiff; (4) the availability of damages to a prevailing plaintiff; (5) whether an arbitration agreement forecloses access to court to enforce a federal right; and (6) an interpretation of a Federal Rule of Civil Procedure that bore on opportunities or incentives for private enforcement. This rendered a dataset of 369 cases, with 406 discrete private enforcement issues and 3507 individually coded justice votes on private enforcement issues.

We found that, in cases with at least one dissent, plaintiffs' probability of success when litigating private enforcement issues in the Supreme Court was in decline for over 40 years and that by 2014 they were losing in the vast majority of cases. Figure 5 plots a regression line estimating the probability of an outcome in favor of private enforcement and the separate probabilities of conservative and liberal justices' votes in favor of private enforcement in cases with at least one dissent. By 2014, when the issue in question elicited any disagreement at all, the pro-private-enforcement side was losing an estimated 86 percent of the time, with conservative justices voting against private enforcement 90 percent of the time. Over the same period, the probability of a pro-private-enforcement vote by liberal justices actually increased from 67 percent to 78 percent. The distance between liberals and conservatives grew from 30 percentage points in 1970 to 68 percentage points in 2014, and the growing polarization between the justices on private enforcement issues was driven primarily by the increasingly anti-private-enforcement votes of the conservative justices.



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



Moreover, we demonstrated that the effect of ideology on justices' votes in private-enforcement cases grew significantly larger over time, especially starting in the mid-1990s. During that time, the Court's private-enforcement docket came to focus increasingly on business regulation cases, and it was associated with increasing advocacy against private enforcement by the Chamber of Commerce and conservative law reform organizations. Remarkably, at the end of the series, justices were more ideologically polarized over apparently technical rules of private enforcement than they were over the actual substantive rights in statutes.

In the concluding chapter of our book, we argued that institutional theory provides important insights that help to explain the variation we observed across institutional sites in the success of the campaign to retrench private enforcement. We identified four distinguishing institutional characteristics that have the greatest explanatory value in assessing the reasons for the Supreme Court's relative success.<sup>80</sup> First, as contrasted with the institutional fragmentation of the legislative and rulemaking processes, the Court is governed by a more streamlined decisional process and simple voting rules, which make it comparatively more capable of unilateral action by simple majority vote on controversial issues. Indeed, we suggested that the growing polarization between conservative and liberal justices over private enforcement issues, which is particularly striking in the Court's Federal Rules decisions, may reflect a narrow but determined conservative majority

80. *See id.* at 220–26.

pressing its advantage in pursuit of the counterrevolution's goals and the liberal justices' response.

Second, legislators and presidents are democratically accountable through elections. This accountability limits their ability to retrench existing rights that enjoy broad popularity. As our archival research demonstrated, prominent among the influences that doomed the Reagan administration's legislative initiatives was the fear, abetted by extensive press coverage of its fee-capping bill, that the public would regard the bills as further evidence that the administration was hostile to civil rights and punish the bills' elected sponsors in the 1984 elections.

Members of the Advisory Committee on Civil Rules are not elected. Yet, rulemaking under the Rules Enabling Act involves the exercise of delegated legislative power. Widespread public perception that the members of the Advisory Committee, including in particular its Article III judge members, were engaged in ordinary politics could bring the process into disrepute, which would put at risk the major source of the federal judiciary's power to craft rules of procedure.

Federal judges (when acting as such, rather than serving as rulemakers) are far more insulated from the forces and incentives of democratic politics than elected officials or rulemakers, which gives the Court greater freedom to act decisively on divisive issues. To be sure, the Court is not immune to public opinion. Its power in the long run—its independence—depends on the continued existence of a well of diffuse support, the depth of which could be adversely affected by a series of unpopular decisions, including, in particular, decisions perceived to deprive people of rights enjoying broad support. The strategy of retrenching private enforcement of rights, rather than the rights themselves, enables justices who share the goals of the counterrevolution to avoid eroding diffuse support for the Court, even when the decisions in question do not track public opinion, because the public is unlikely to be aware of them.

Third, in an era of divided government and party polarization, the Court has faced less credible threats of statutory override and correspondingly has enjoyed a wider range of policy-making discretion. With Republicans controlling at least one chamber of Congress nearly continuously since 1995, the prospect of Congress overriding the decisions of a conservative majority of the Court has usually been vanishingly small. The growth of the influence of ideology on justices' votes on private enforcement issues after 1994 is consistent with the hypothesis that the Court has exercised wider policy-making discretion during this period, with the conservative majority pushing the law of private enforcement more assertively in the anti-enforcement direction, which elicited increased opposition from the liberal minority.

Finally, the Court's success was fostered by the lower visibility of its retrenchment efforts as compared to those of Congress or the Advisory Committee. The story of retrenchment of private enforcement by court decision is one of substantial change effected in large part by many comparatively small acts of lawmaking over decades, few of which garnered

much public or press attention. Moreover, when courts elect a strategy of incremental and evolutionary change, their opinions will typically frame each step using a style of legal justification that encourages popular “belief that judicial decisions are based on autonomous legal principles” and “that cases are decided by application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning,”<sup>81</sup> with outcomes framed in “legalistic” terms dictated by such sources as detailed legal text, legislative history, and precedent.<sup>82</sup>

## 2. The Future

We anticipate that the Court will continue as the institutional leader in the project to retrench private enforcement in the near future for two reasons. First, we see little reason to anticipate a change in preferences in the Court’s membership. One seat has turned over since 2014, and a second has been vacated, with the appointment of a new justice now in process. The first departing member—Justice Scalia—had the most anti-private-enforcement voting record among all justices to serve in the past half century in cases with at least one dissenting vote. Given that numerous important decisions affecting private enforcement in recent years have been decided 5 to 4 in the anti-enforcement direction, Scalia’s replacement by a materially less anti-enforcement justice could be consequential.

Justice Gorsuch voted in only two cases presenting an issue in our Supreme Court opinion data through 2017,<sup>83</sup> and we do not have data on his voting record on these issues on the Court of Appeals for the Tenth Circuit. Thus, we lack a meaningful individual-level empirical basis to evaluate Gorsuch’s preferences on private-enforcement issues. At the same time, in our book we showed that on the contemporary Court there are strong patterns of justices voting on private-enforcement issues in coalitions associated with the political party of their appointing president.<sup>84</sup> Indeed, we showed that in the current era such partisan ideological voting was more common on private-enforcement issues than on merits issues.<sup>85</sup> We also showed that

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81. John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928, 929 (2000).

82. *See id.*

83. In *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017), Justice Gorsuch was part of a unanimous Court holding that intervenors of right must have Article III standing to pursue relief different from that sought by a party with standing. In *California Public Employees’ Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), Justice Gorsuch voted with Justices Kennedy, Roberts, Thomas, and Alito in a decision holding that the *American Pipe* class action tolling doctrine does not apply to the statute of repose in section 13 of the Securities Act of 1933, a holding we classify as anti-private enforcement. Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented. *Id.* at 2056–58. For detailed analysis of *American Pipe* and of the Court’s *CalPERS* decision, see Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PA. L. REV. (forthcoming 2018).

84. *See* BURBANK & FARHANG, *supra* note 1, at 150–52. For similar results regarding the Court’s Federal Rules cases, *see id.* at 169–80.

85. *See id.* at 158–60.

ideological conservatism among justices is strongly associated with anti-private-enforcement preferences.<sup>86</sup> Thus, we expect that Justice Gorsuch will vote with the conservative wing of the Court on private-enforcement issues and that the Court's strongly anti-enforcement posture will continue.

A second reason that we see little basis to expect change is institutional. We argued in our book that Republican control of at least one chamber of Congress almost continuously since 1995 increased the conservative wing's latitude to effectuate litigation retrenchment, making the probability of statutory override of anti-private-enforcement decisions "vanishingly small."<sup>87</sup> It is even smaller under a unified Republican Congress and with Trump controlling the presidential veto.

We reviewed cases addressing the issues in our Supreme Court data, enumerated above, in the 2015–17 period. In these last few years, plaintiffs have done much better than the estimated probability of a pro-enforcement outcome at the end of the data represented in Figure 5. However, the Figure reflects smoothed predicted probabilities (long-run averages), and, based only on the last few years, it is impossible to predict whether the trajectory of those long-run averages will change. We doubt that it will. In that regard, it is noteworthy that only three of the cases we identified in the 2015–17 period were decided before Justice Scalia's death and that in all of them Justice Kennedy joined the Court's liberals to create pro-private-enforcement majorities.<sup>88</sup> Moreover, Justice Gorsuch did not participate in ten of the other twelve of these cases, a fact that is potentially significant both when interpreting the results in those cases and when considering case selection during the long period when the Court had only eight members.

The second departing member—Justice Kennedy—announced his retirement while this Article was in production. Kennedy's retirement may portend a further shift on the Court in the anti-enforcement direction, although probably not a big one. As we just noted, Kennedy sometimes joined the Court's four liberal justices to forge bare majorities in the pro-enforcement direction. This, however, has been the exception and not the rule, which is evident when one views aggregate-level voting behavior.

On the Court as it existed prior to Scalia's death, Kennedy was the median justice on private enforcement issues with at least one dissenting vote, but he was still solidly on the conservative side. In the Supreme Court data analyzed in our book, Kennedy voted against private enforcement 76 percent of the time. The four justices to his right on private enforcement issues (Scalia, Roberts, Thomas, and Alito), on average, voted against private enforcement 87 percent of the time.<sup>89</sup> The four justices to his left (Ginsburg, Breyer, Sotomayor, and Kagan), on average, voted against private enforcement

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86. *See id.* at 152.

87. *See id.* at 222.

88. Two of the cases involved standing in redistricting cases, and the third involved mootness. *See generally* *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015); *Ala. Black Legislative Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

89. *See* BURBANK & FARHANG, *supra* note 1, at 151, tbl. 4.4.

19 percent of the time. Although Kennedy was the median on private enforcement, he was far from centrist.<sup>90</sup>

As of this writing, Kennedy has not been replaced. If he is replaced by a justice who is in the vicinity of the conservative justices identified above on private enforcement—which we cannot predict but which seems probable—it will likely contribute, at the margin, to the Court’s further movement in an anti-private-enforcement direction. Thus, we expect that the Court’s anti-private-enforcement posture will be sustained, if not deepened, in the foreseeable future.

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90. The averages given for the four justices to Kennedy’s right, and the four to his left, are each simply the average of their voting percentages given in Table 4.4. *See id.* Each justice’s voting percentage is based on all votes on our private enforcement issues from the time of appointment through the end of 2014.