RIGHTS AND RETRENCHMENT

This groundbreaking book contributes to an emerging literature that examines responses to the rights revolution that unfolded in the United States during the 1960s and 1970s. Using original archival evidence and data, Stephen Burbank and Sean Farhang identify the origins of the counterrevolution against private enforcement of federal law in the first Reagan Administration and then (1) measure the counterrevolution's trajectory in the elected branches, court rulemaking, and the Supreme Court, (2) evaluate its success in those different lawmaking sites, and (3) test key elements of their argument. Finally, the authors leverage an institutional perspective to explain a striking variation in their results: although the counterrevolution largely failed in more democratic lawmaking sites, in a long series of cases little noticed by the public, an increasingly conservative and ideologically polarized Supreme Court has transformed federal law, making it less friendly, if not hostile, to the enforcement of rights through lawsuits.

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RIGHTS AND RETRENCHMENT

The Counterrevolution against Federal Litigation

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PREFACE AND ACKNOWLEDGMENTS

The genesis of this project lay in our shared recognition that Farhang's book, *The Litigation State* (2010), while chronicling the revolution that started in the late 1960s as a result of congressional choices to stimulate private enforcement of federal rights through statutory attorney's fees and damages provisions, only lightly touched its aftermath. Focused elsewhere, *The Litigation State* did not explore retrenchment of private enforcement by any of the lawmaking institutions of the federal government. Thus it also did not consider the possibility that the judiciary enjoys a privileged position to use procedure for the purposes of retrenchment.

In this book, we report the results of a multi-year project that we designed to map the aftermath of the revolution in private enforcement that is the focus of *The Litigation State*. In thinking about the definition and scope of our project, we decided early on that we would not study either efforts to reduce federal judicial power through court-curbing (e.g., jurisdiction stripping) bills or cases involving judicial review of administrative action (or inaction). Although court-curbing has been described in terms of retrenchment (of judicial power) (Staszak 2015), it can be designed either to promote or retard private enforcement of federal rights. Similarly, although decisions on administrative agency power may affect the enforcement of federal law, they bear no necessary connection to private enforcement.

Instead, we sought to identify issues that are widely acknowledged as critical to the infrastructure of private enforcement of federal rights. Among the cases raising such issues that we decided to study, those involving private rights of action, damages and attorney's fees involve only federal claims. Standing cases are potentially broader, but very few cases triggering Article III or prudential standing issues arise under state law,[1] and the doctrine applies to all cases in federal court – that is, the doctrine

[1] Of the standing issues in the dataset we created, which we discuss in Chapter 4, only 2 of 112 (1.8%) involved state law claims.

is transsubstantive. Cases interpreting Federal Rules of Civil Procedure that predictably affect private enforcement (e.g., Rule 23, the class action rule) often involve state law claims, but, again, the resulting interpretations apply equally to federal claims. Finally, we restricted the arbitration cases we studied to those in which the claimant sought to litigate federal claims, a choice that reflected not only our definition of scope but also awareness that different legal standards apply as between federal and state claims when the question is whether an arbitration agreement can be disregarded consistently with the Federal Arbitration Act (FAA).

Thus circumscribing our study's domain, we were conversant with a large literature concerning attacks on lawyers and litigation, and we knew that other authors had chosen different parts of the litigation landscape, and different statutes, cases, or Federal Rules, to illustrate their claims about those attacks. We were also aware that little of the anti-litigation literature was grounded in systematically collected data, with the result that readers could not determine whether the picture of litigation painted by an author was representative. We believed that a systematic approach combining both qualitative and quantitative analysis – a multi-method research strategy – was overdue.

Although inclined to restrict this project to the phenomenon chronicled in *The Litigation State*, and thus to study only legal issues pertinent to the private enforcement of federal rights, we considered expanding it to include matters deemed salient by other scholars, both at the beginning of the work and in response to comments or suggestions made by those reading drafts of the articles that we prepared as the foundation of this book. As a result, early on we seriously considered extending our horizons, and our data collection, to include all or part of the landscape of tort reform. Moreover, we considered gathering data on such issues as preemption of state law and state sovereign immunity.

Our decisions not to expand the project in these directions were driven by a number of related concerns. First, there is a limit to the amount of data that can be gathered and analyzed within a reasonable time and at reasonable expense. Second, whether the question was covering tort reform, sovereign immunity, or preemption, we were concerned, at a macro level, about loss of focus, and at a micro level about consistency in the meaning of the data that we aggregated.

We were fortified at the macro level by our archival research, which, as we discuss in Chapter 2, strongly suggests that the counterrevolution gained traction in the first Reagan administration as an ideological

campaign against private litigation as a tool of federal policymaking.[2] The choice to restrict the project was also supported by our empirical finding that retrenchment of private enforcement preceded tort reform on the federal legislative agenda during the Reagan years, thereafter merging with the broader national campaign to shield business from the effects of pro-litigation incentives, substantive and procedural, that often flies under the banner of tort reform.

At the micro level, if the goal is to determine whether a bill, rule proposal, or court decision favors or disfavors private enforcement of federal rights, it is essential not to include issues that are not salient for that project, such as preemption (of which FAA cases involving state law claims are a subset), and prudent not to include issues that are predictably overlaid with the baggage of federalism, such as sovereign immunity. We acknowledge, of course, that Supreme Court decisions concerning issues like preemption and sovereign immunity may be driven in part by the justices' preferences concerning litigation, but we are not persuaded either that such views are fungible with attitudes about private enforcement of federal rights or that it would be sensible to aggregate them into the same analysis.

Portions of this book have appeared in articles and a book chapter that have been published during the course of the larger project (Burbank and Farhang 2014, 2015, 2016a, 2016b). We have updated most previously reported data through 2014 and provide empirical analyses not reported in earlier work. We have also supplemented qualitative material with the fruits of additional archival research, notably in the papers of the first Reagan administration (Chapter 2) and the records of the Advisory Committee on Civil Rules (Chapter 3). The major benefit of proceeding in this manner, however, has been the opportunities it has afforded us to consider the suggestions of numerous colleagues who read and commented on drafts. Their comments have enabled us to refine, and hopefully improve, our account of what are, after all, complex phenomena unfolding over a long period of time. To that end, we have presented drafts of parts of this project, and received helpful comments, at workshops, conferences, and symposia held at the University of Pennsylvania Law School, University of California, Berkeley, School of Law, Northeastern Law School,

[2] This research also fortified our decision not to include bills or cases whose provisions or holdings were equally applicable to public enforcement of federal law. For the reasons we discuss concerning Rule 23, however, no such decision-rule applies to the Federal Rules of Civil Procedure.

University of California, Hastings College of Law, Stanford Law School, DePaul University College of Law, Boston University Law School, and Hebrew University, Jerusalem.

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In his capacity as Reporter of the first Advisory Committee on Civil Rules, Dean Charles Clark wrote to his colleagues that "listing is always dangerous because of possible omissions" (Burbank 2002: 1044). We are mindful of the magnitude of that risk when seeking to acknowledge the many colleagues who have sought to improve our work over the course of four years, and we ask the indulgence of any who do not appear in this list because of the frailties of our memories or our record-keeping.

We have received invaluable research assistance from numerous students at the University of Pennsylvania Law School and the University of California, Berkeley, including Rishita Apsani, Jessa DeGroote, Joshua Fordin, Noah Kolbi-Molinas, Omar Madhany, Gregory Manas, Mark Mixon, Sonny Pannu, Emily Reineberg, Aadika Singh, and Alex Ussia. Finally, we are grateful to Ed Greenlee and his colleagues at the Biddle Library of the University of Pennsylvania Law School, particularly Ben Meltzer, who have been unfailingly helpful in responding to our requests for assistance, large and small, over the entire period of this project.

[3] Individuals whose names are starred read and provided comments on the entire manuscript. To them we owe a special debt of gratitude.

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