1

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