APRIL 2020

CIVIL JUSTICE
RESEARCH INITIATIVE

Rights and Retrenchment: The Counterrevolution in Federal Rulemaking

Published by The Civil Justice Research Initiative, a Project of UC Berkeley & UC Irvine Law Schools

BerkeleyLaw
UNIVERSITY OF CALIFORNIA

UCI Law

Published by The Civil Justice Research Initiative

CIVIL JUSTICE
RESEARCH INITIATIVE

About the Authors

Stephen B. Burbank

David Berger Professor for the Administration of Justice
University of Pennsylvania Carey Law School

Stephen B. Burbank is the author of definitive works on federal court rulemaking, inter-jurisdictional preclusion, litigation sanctions, international civil litigation, litigation retrenchment, and judicial independence and accountability. He is co-editor (with Barry Friedman) of Judicial Independence at the Crossroads: An Interdisciplinary Approach (Sage, 2002). His 1982 article, "The Rules Enabling Act of 1934," reoriented the theory and practice of court rulemaking. Burbank's recent scholarship includes a detailed study of the Class Action Fairness Act of 2005 in historical perspective, an analysis of different approaches to the study of judicial behavior in law and political science, and an empirical study of the retirement decisions of federal judges (with Judge Jay Plager and Gregory Ablavsky). His recently published book (with Sean Farhang), Rights and Retrenchment: The Counterrevolution Against Federal Litigation (Cambridge, 2017) uses original archival research and original data sets to map efforts to scale back private enforcement of federal law across institutional sites. Burbank was appointed by the Speaker of the U.S. House of Representatives to the National Commission on Judicial Discipline and Removal and was a principal author of the Commission's 1993 report.

Sean Farhang

Elizabeth Josselyn Boalt Professor of Law
Berkeley Law

Sean Farhang is Professor of Law, Political Science, and Public Policy. His research interests focus mainly on civil litigation, and the role of litigation and courts in regulatory implementation, with a particular interest in the political and institutional forces that shape it. His first book, The Litigation State: Public Regulation and Private Lawsuits in the U.S. (Princeton University Press, 2010), examines the sources of private litigation in the enforcement of federal law, stressing Congress's role in enacting incentives calculated to mobilize this form of regulatory implementation in the American separation of powers context. The book won the American Political Science Association's Kammerer Award for the best book in the field of U.S. national policy. His second book, Rights and Retrenchment: The Counterrevolution Against Federal Litigation (with Stephen Burbank, Cambridge University Press, 2017), examines the emergence and development of the political and legal movement to restrict opportunities and incentives for private enforcement of federal law through litigation. His work on the institutional and political dimensions of American civil justice has also appeared in numerous social science and law journals.

BerkeleyLaw UNIVERSITY OF CALIFORNIA UCI Law

CIVIL JUSTICE
RESEARCH INITIATIVE

Rights and Retrenchment: The Counterrevolution in Federal Rulemaking

Stephen B. Burbank and Sean Farhang[1]

Table of Contents

[1] This whitepaper presents edited excerpts from Rights and Retrenchment: The Counterrevolution Against Federal Litigation, by Stephen B. Burbank and Sean Farhang (Cambridge University Press 2017).

Abstract

The Federal Rules of Civil Procedure effectively determine access to court and likelihood of success in court for those seeking to enforce federal rights through litigation. This white paper focuses on the Advisory Committee on Civil Rules, which has primary responsibility for drafting the Federal Rules, under Chief Justice Warren Burger and his successors. Our research shows that, beginning in the Burger era, the Committee became dominated by federal judges appointed by Republican Presidents. At the same time, its practitioner members, reduced in number, were increasingly dominated by corporate lawyers. We also show that, although few of the Committee's proposals in the study period were salient to private enforcement, those that were increasingly disfavored it. Overall, our data show that the predicted probability that a proposal would favor plaintiffs went from highly likely at the beginning of the period of study to highly unlikely at the end.

Key Findings

• Following the 1971 reconstitution of the Civil Rules Committee under Chief Justice Burger, judges quickly became a majority, rising from 19% to 69%. Meanwhile, practitioners were demoted from comprising the majority to little over 25%. Academics disappeared for a decade and returned to only around 10%.

• The balance of individual versus corporate/business representation moved during the study period from near parity toward corporate/business representation. Although initially plaintiffs' lawyers were well represented, by the end of the series, corporate defense lawyers consistently held the balance of power.

• Judges appointed by Republican presidents served at a population-adjusted rate about 150% higher than those appointed by Democrats. In terms of absolute numbers, Republican-appointed judges have held a majority of Article III judge seats on the committee in every year but two from 1971 to 2014; on average, they held 70% of the Article III judge seats. As a result, Republican-appointed judges had more than double the estimated probability of serving on the Committee during the period of interest.

• The probability of service as chair for judges appointed by Republican presidents is 18.2 times larger than for Democratic appointees and 7.7. times larger when holding constant the effect of committee service on becoming chair. Eleven of twelve chairs serving from 1971 to 2014 were Republican-appointed, accounting for 41 of 43 years of chair service, or 95% of years of chair service.

• Non-white judges are less likely to serve on the Advisory Committee. In comparison, white judges' probability of serving on the Committee is about 5 times larger. White judges represent 89% of the judge-years and 98% of both committee service-years and appointments or reappointments. The chief justices in the study period never selected a non-white judge as chair.

• After increasing in the early 1960s, the predicted probability that a proposed amendment to the Federal Rules would favor plaintiffs declined from 87% in the mid-1960s to 19% by the end of the study period.

An Introduction to Federal Rule Making

The federal judiciary plays a surprisingly important role in influencing legislative policy outcomes. In order to understand and measure the full extent of the judiciary's power, this white paper explores a realm in which the judiciary was long ceded the first, and essentially the final, word: federal procedural law. The federal judiciary's procedural lawmaking is not confined to creating and interpreting rules while deciding cases in the exercise of judicial power under Article III of the Constitution. What follows is a brief introduction to the rulemaking process, with particular emphasis on the role of the Advisory Committee on Civil Rules, and a brief discussion of some of the changes to Federal Rules of Civil Procedure ("Federal Rules") that have been particularly salient for private enforcement.

The Rulemaking Process and the Role of the Advisory Committee

Under the Rules Enabling Act and its statutory successors, Congress delegated to the Supreme Court the power to promulgate prospective, legislation-like rules of procedure to govern proceedings in the federal trial courts — the Federal Rules. Although the rulemaking power is delegated legislative power, a core limitation under the Rules Enabling Act is that Federal Rules "shall not abridge, enlarge or modify any substantive right."

The system that the Court devised to exercise the power that Congress delegated in the Enabling Act remained essentially the same until 1956. Under this system, an Advisory Committee appointed by the Court prepared draft Federal Rules and amendments, with some (albeit, by modern standards, limited) input from the bench and bar, for consideration by the Court and, if acceptable, reporting to Congress. Once reported, proposed rules went into effect if not vetoed by Congress in legislation signed by the president within a specified period.

The Advisory Committee became a continuing body in 1942. Since there were no prescribed terms, its membership remained remarkably stable thereafter. In 1956, however, the Committee was discharged "with thanks." The Committee's discharge, in turn, prompted concerns about the "void" that resulted (Clark 1969). To address those concerns, the judiciary sought, and in 1958 Congress enacted, legislation revamping the rulemaking process.

The 1958 legislation directed the Judicial Conference of the United States, through which the federal judiciary formulates and supervises the implementation of institutional policy, to "carry on a continuous study of the operation and effect of" the various rules of practice and procedure promulgated under the Enabling Act. The Judicial Conference promptly decided to exercise its statutory duties through a system of advisory committees reporting to a single Standing Committee, which in turn reports to the Conference.

As provided by the Conference's 1958 resolution, the Chief Justice, as Chair of the Conference, appoints the members of all Conference rulemaking committees, thereby preserving them from the "degradation" that was feared if those committees were not closely linked to the Court (Clark 1969: xix). Chief Justice Warren appointed the members of the reconstituted Advisory Committee on Civil Rules in April 1960.

The Original 1938 Federal Rules

The original Federal Rules became effective in 1938, four years after the successful conclusion of a decades-long campaign that culminated in the Rules Enabling Act of 1934. Although ostensibly neutral, the original 1938 Federal Rules were nevertheless perceived as litigation-friendly. In this they reflected the jurisprudential and social commitments of the individuals who were responsible for drafting them. The way that those individuals approached pleading and discovery in the 1938 Federal Rules illustrates this point and made these procedural features critical pillars of the regime they created.

Pleading rules matter for purposes of private enforcement because they regulate the process by which, and the specificity with which, parties must assert their claims and defenses at the outset of litigation. For example, an important way in which the drafters of the 1938 Federal Rules made it easier to sue was through their repudiation of "fact pleading," which required that a plaintiff's complaint state all facts necessary to establish each cause of action. Instead, the drafters of the 1938 Federal Rules opted for "notice pleading," under which a plaintiff is required to state a claim that is legally tenable on any set of facts, and to do so only in sufficient detail to give the defendant fair notice of what that claim is.

This implementation of the view that pleading should play a minor role in litigation, however, required other means to ascertain facts prior to trial. To that end, the architects of the 1938 Federal Rules wrote rules that afforded parties pre-trial authority to demand information from other parties (and non-parties) that was much greater than had been available under prior systems (Sunderland 1939; Burbank 2004b). Essentially, discovery under the 1938 Federal Rules conferred on private litigants and their attorneys the functional equivalent of administrative subpoena power (Carrington 1997; Higginbotham 1997).

The 1960s and the Class Action Amendments

No one familiar with federal court rulemaking would characterize the work of the reconstituted Advisory Committee in the 1960s as merely keeping the Federal Rules up-to-date, which was Chief Justice Warren's stated goal. Starting with a review and reworking of its predecessor's 1955 proposals, on which the Court had taken no action, the Advisory Committee produced substantial packages of proposals leading to amendments that became effective in 1961, 1963, 1966, 1970, and 1971. While sitting for 19% of the study period (1960-2014), the 1960s Advisory Committee produced eighty proposals (at the rule level), comprising 31% of all proposals to amend the Federal Rules that the Committee sent forward over the period of study. Twelve of these proposals implicated private enforcement, comprising 36% of all such proposals that we identified for the study period.

In the 1960s, the Advisory Committee recommended, and the Supreme Court adopted, new provisions governing class actions that made it much easier for individuals to sue collectively. Contrary to Chief Justice Warren's stated expectations, the 1966 class action amendments to Rule 23 constituted "great changes," and many would call them "radical." Prior to the Federal Rules, class actions were permitted in a limited set of circumstances marked out by the practice of courts of equity in England. The class action rule that the Court promulgated in 1938 divided the world of group litigation into three parts, colloquially called true, hybrid, and spurious class actions. The distinctions among them turned on an analysis of the abstract nature of the rights involved that often verged on the metaphysical. For this and other reasons, class actions did not play a major role in federal litigation prior to the 1960s (Kalven and Rosenfield 1941; Yeazell 1987; Hazard, Geded and Sowle 1998; Burbank and Wolff 2010). All this changed after the adoption of the class action amendments of 1966, when the Rule became a key tool of civil rights, environmental and consumer advocates.

The 1960s Advisory Committee's stated agenda in revising Rule 23, however, was largely uncontroversial. They sought to turn federal jurisprudence from abstract inquiries to functional analysis that considered the practical effects of litigation. To that end, in Rule 23(a) the Committee specified four requirements applicable to all litigation if it was to proceed as a class action, colloquially called numerosity, commonality, typicality, and adequacy of representation. They also reformulated the categories appropriate for class action treatment and specified different procedural requirements depending on the category.

The first category (Rule 23(b)(1)), capturing the core of traditional practice, allowed class actions in situations where separate lawsuits might either establish incompatible standards of conduct for the opposing party or necessarily affect the interests of non-party claimants. The second category (Rule 23(b)(2)), conceptually close to the first, allowed class actions where class-wide injunctive or declaratory relief was appropriate. The Advisory Committee's primary purpose in this category was to provide prospective relief to classes of civil rights plaintiffs, helping to give practical meaning to emerging constitutional and statutory rights.

It was the third category (Rule 23(b)(3)) that marked the 1966 amendments to Rule 23 as a break from the past. Here, a court may certify a case as a class action if it finds that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." If the court does so certify, Rule 23 requires notice to the members of the class, together with the opportunity to opt out of the action, avoiding its preclusive (binding) effects.

The Advisory Committee recognized that Rule 23(b)(3) would enable people with small claims for whom individual litigation would be economically irrational (those with "negative value claims") to band together in litigation against a common adversary (Kaplan 1966; Kaplan 1969). In this respect, class actions packaging negative value claims might be said to create litigation; they do not make existing or prospective litigation more efficient or consistent. At the same time, for most people with small claims, notice and an opportunity to opt out are not important, while paying for notice may present insuperable financial obstacles for those representing the class.

The Burger Court and the Beginnings of Retrenchment

For the most part, rulemaking was an ally of private enforcement from 1938, when the Court promulgated the original Federal Rules, through the 1960s. Under the Burger Court and its successors, however, the rules became a focus of those seeking to restrict private enforcement.

Chief Justice Burger appointed a special advisory group on civil litigation in 1971, which suggested consideration of a number of reforms with an anti-plaintiff valence. That same year he appointed a new Advisory Committee on Civil Rules. The advice this committee received was very different from the advice given eleven years earlier by Chief Justice Warren, and it was given to a committee very differently composed. Apart from docket concerns, Burger made no secret of his antipathy toward the "litigation explosion" (Dunham 2001: 36).

Nevertheless, it is striking that, with the Chief Justice and the Standing Committee urging major changes, the reconstituted Advisory Committee forwarded few proposed amendments during the 1970s. Moreover, their recommendations were much less ambitious than proposals advanced in the 1960s, and the only two proposed amendments that were salient to private enforcement favored it.

Specifically, our research found that, although sitting for 17% of the study period (1960-2014), the 1970s Advisory Committee sent forward to the Standing Committee only 5% of the proposals (at the rule level). Moreover, we determined that only two proposed amendments implicated private enforcement, comprising only 7% of all such proposals that we identified for the study period. Neither approached the salience of the 1960s Advisory Committee's work, and both were pro-enforcement.

The 1980s and Controversy Around the Rulemaking Process

The 1980s Advisory Committee was a group chiefly distinguishable from their predecessors in the 1970s by reason of the greater representation of judges appointed by Republican presidents. In the early 1980s, this Committee advanced proposals to amend Rule 11, governing sanctions, and considered proposals to amend Rule 68, governing offers of judgment. Notably, the Special Advisory Group that Burger appointed in 1971 had identified these rules as potentially fruitful sources of litigation retrenchment, that is, as ways to make it more difficult to sue.

The proposed amendments to Rule 11 sought to significantly broaden the scope of permissible sanctions and were prompted by oft-repeated arguments attributing cost and delay in federal litigation to frivolous lawsuits. The proposals were widely regarded as a threat to private enforcement because they would chill the legitimate zeal of plaintiffs' attorneys in representing their clients. The House passed a bill to prevent the proposed amendments from taking effect, but the Senate did not act in time to prevent them from going into effect.

The Committee then turned its attention to offers of judgment (settlement) under Rule 68. Rule 68 provides that a prevailing party who has rejected an offer of judgment more favorable to that party than the judgment ultimately obtained must pay the "costs incurred after the offer was made." The rule seeks to promote settlement through financial incentives keyed to a comparison of a rejected offer and a subsequent judgment. According to the Advisory Committee, a principal reason that it had been ineffective was "that 'costs,' except in rare instances in which they are defined to include attorney's fees…are too small a factor to motivate parties to use the rule."

One of the concerns about the newly amended Rule 11 was that it could be used effectively to reverse the American Rule on fees (each side pays its own). The 1983 proposal to amend Rule 68 again put the American Rule at risk, but it also threatened to undermine one-way statutory fee-shifting provisions that Congress included in legislation in order to stimulate private enforcement, notably those applicable in civil rights actions (Burbank 1989a; Burbank 1989b; Burbank 1986). Facing stiff opposition to these changes, the Advisory Committee ultimately abandoned the effort.

These controversies over Rule 11 and Rule 68 in the early 1980s arrived on the heels of a decade in which Congress for the first time blocked proposed Federal Rules — the proposed Federal Rules of Evidence — and thereafter blocked a number of other proposed amendments. In addition, the rule-specific controversies of the early 1980s came at about the time (1) the Federal Judicial Center published a study, undertaken at the request of Chief Justice Burger, that comprehensively reviewed the arguments for and against changes in the Enabling Act process, and (2) the ABA approved a policy that advocated substantial changes in that process (Burbank 1982; Brown 1981; Burbank 1983: 998 n.2). These controversies led to oversight hearings in the House of Representatives, one each in 1983, 1984 and 1985.

Attention at the latter two hearings increasingly turned to the question whether the rulemakers had acted, or were proposing to act, beyond the limits of the Enabling Act, abridging substantive rights and thereby subverting congressional preferences. As noted above, although the Enabling Act confers broad

power to promulgate rules of "procedure," it also specifies that Federal Rules may not "abridge, enlarge, or modify any substantive right." During the House hearings, some criticized the Court's jurisprudence interpreting the Enabling Act, arguing that it eviscerated the statute's limiting language by equating "substantive rights" with rules of substantive law and establishing as the test of validity whether a rule "really regulates procedure."

Eventually, in 1988 legislation, Congress required rulemaking committees to hold open meetings, preceded by "sufficient notice to enable all interested persons to attend," to keep and make available to the public minutes of such meetings, and to provide an explanatory note with any proposed rule, as well as a report "including any minority or separate views." It also lengthened the minimum period before proposed Federal Rules can become effective after being reported to Congress — from three to seven months.

The 1990s and Changes to the Discovery Rules

In contrast with its record during the two previous decades, the Advisory Committee was very busy in the 1990s. While sitting for 19% of our study period, it sent forward 24% of the total proposals (at the rule level). Eight proposals for amendments predictably implicated private enforcement, comprising 28% of such proposals that we identified for the study period, all of them in the proposals that led to the 1993 and 2000 amendments to the Federal Rules. The decade was a mixed bag of proposals favoring and disfavoring private enforcement, although the Advisory Committee's discovery proposals tilted heavily against private enforcement.

Starting in the 1970s, the Committee had resisted calls to reduce the scope of discovery for more than twenty years. In the late 1990s, however, it proposed amendments to Rule 26 that would shrink the scope of discovery from material relevant to the subject matter of the action, to material relevant to a claim or defense. The Advisory Committee had rejected this change to the scope of discovery when fashioning the proposals that became the 1980 discovery amendments, on the ground that there was insufficient empirical evidence to support it. The 1990s proposed amendments also included a cost-shifting provision that in some circumstances would have required the information-requesting party to bear some or all of the costs of the responding party. Such a rule could have been particularly disadvantageous to parties of modest means, including in particular plaintiffs seeking information in the voluminous records of corporate and government defendants.

The Judicial Conference rejected the Committee's cost-shifting amendment, and the scope amendment passed that body by a vote of thirteen to twelve (Stempel 2001: 619, 621). This was an important reminder that the multi-tiered process that was first put in place to exercise the Judicial Conference's responsibilities under the 1958 legislation, which was subsequently solidified by the 1988 legislation, contributes to the stickiness of the court rulemaking status quo.

Recent Decades and the Politics of Restraint

One reason for the Committee's mixed record in the 1990s — why it did not attempt more and bolder retrenchment — had to do with the very different qualities and priorities of its leadership over the decade. Those qualities and priorities also help to understand why rulemaking in the first decade of the new millennium was restrained.

While sitting for 19% of the study period, the Advisory Committee sent forward 20% of the total proposals (at the rule level). Only two of them were salient from the perspective of private enforcement, and both were inimical to private enforcement. Judging only from the presumed committee preferences suggested by our data, one might have predicted significantly more retrenchment. Judges appointed by Republican presidents accounted for 77% of the service years of Article III members across the decade. Moreover, by

this time unaligned practitioners on the Committee were a thing of the past, and of the ten lawyer members serving during the decade, those representing primarily defendants and primarily corporations/business dominated with 72% of the years of service.

Yet, on a number of occasions the Advisory Committee prevented anti-private enforcement proposals from going forward. Moreover, prominent rulemakers celebrated these examples of restraint as evidence that the Enabling Act process works (Kravitz et al. 2013). From this perspective, restraint reflected the deeper epistemic foundation that results from an open process and greater commitment to empirical study, as well as the rulemakers' commitment to take seriously the Enabling Act's prohibition against abridging, enlarging or modifying substantive rights (Ibid.; Burbank 2004a).

An important question as federal court rulemaking entered the current decade was whether the relative restraint evident in the immediately preceding period would continue. Our interpretation of rulemaking's vacillation between restraint and episodic retrenchment efforts is that there are contending perspectives among rulemakers, even those who support retrenchment. For some influential rulemakers, the important lessons of the 1980s concerned the threat that indefensible proposed reforms, or overreaching the Enabling Act's charter, pose to the perceived legitimacy of the process. Rulemaking's perceived legitimacy serves the judiciary's institutional interest in control of procedure; it helps the judiciary resist legislatively imposed procedure. For others, the key lessons focused attention on what retrenchment could actually be accomplished given the preferences of bodies with veto power, in particular Congress. They recognized that if power is to be exercised effectively, it must be exercised strategically, with attention to potential responses of other institutional actors.

The process leading to and immediately following the 2015 amendments to the discovery rules suggests that, encouraged by Chief Justice Roberts, new leadership on the Civil Rules and Standing Committees took the latter perspective. Whatever doubt there may be about the significance of those amendments, the Chief Justice made his hopes clear. Having prodded the Advisory Committee to action, after the amendments went into effect he added his voice to the effort to ensure that they would not be ignored and to influence their interpretation. Devoting his entire year-end report for 2015 to the amendments, Roberts emphasized their potential importance. Thus, he observed, although "[m]any rules amendments are modest and technical, even persnickety…the 2015 amendments to the Federal Rules of Civil Procedure are different." That is because "[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."

An Empirical Examination of Advisory Committee Membership, Appointments and Output

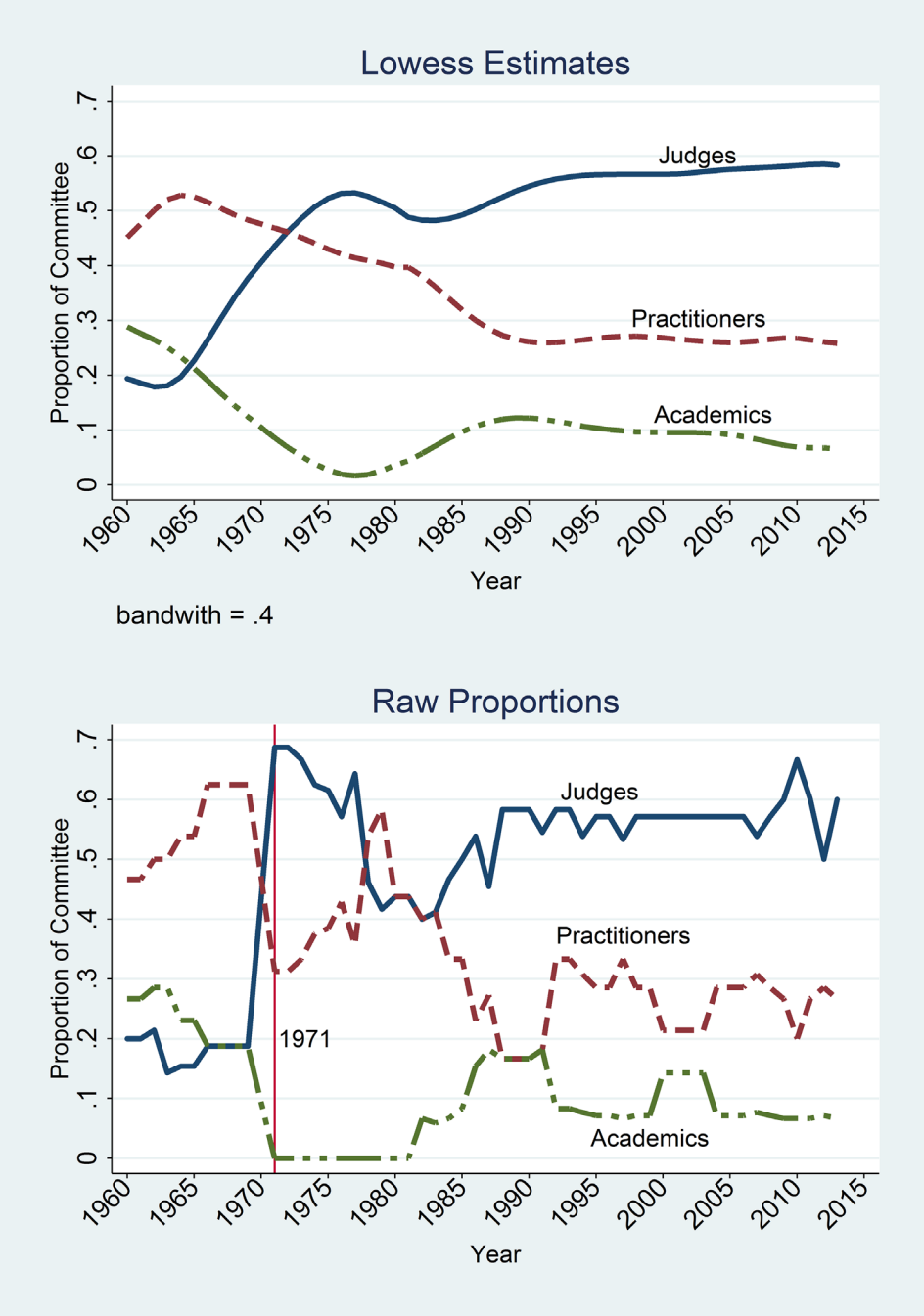
In this section, we seek to better understand the Advisory Committee's actions by presenting data covering the period from 1960 to 2014, with particular attention to changes in the membership of the Advisory Committee, how Chief Justices used their appointment power, and the implications of the Committee's proposed rule changes for private enforcement.

Our research reveals that under Chief Justice Warren Burger and his successors, the Committee became dominated by federal judges appointed by Republican Presidents, and practitioner representation shifted significantly toward corporate defense lawyers. Committee chair appointments were also significantly skewed in favor of judges appointed by Republican presidents, with only one chair having been appointed by a Democrat, representing only 5% of chair service. Meanwhile, committee output slowly transitioned to being highly unlikely to favor plaintiffs by the end of the study period.

Advisory Committee Membership

The original (1935-38) Advisory Committee consisted exclusively of practicing lawyers (nine or 69%) and academics (four or 31%) — with two members having previously held judicial office. To investigate what institutional, ideological and other interests have been empowered to influence the Federal Rules in the modern period, we collected data on committee membership from 1960 through 2014. Each committee member was coded as a judge, practitioner, academic, or ex officio representative of the Federal Government. We then calculated, for each committee-year, the proportion of total membership represented by each category.

Figure 3.1: Proportion of judges, practitioners, and academics on Advisory Committee, 1960–2014



In order to convey a sense of longitudinal trends, the top panel of Figure 3.1 represents regression curves fit to the annual proportion of judges, practitioners, and academics on the Advisory Committee over time. The data reflect that in the early 1960s, practitioners enjoyed the highest level of representation, followed by academics, with judges the least represented. A transformation followed in which, in the 1970s, judges moved from a relatively small minority to a consistent majority on the committee. Just as precipitous as judges' ascent to majority status was the corresponding decline in the share of committee representation garnered by practitioners and academics.

The smoothed regression lines do not reveal sharp disjunctures in the data. For that purpose, looking at plots of raw proportions for each group is illuminating, and the bottom panel of Figure 3.1 presents that information. These are the data used to estimate the smoothed regression lines in the top panel. These data make clear that the 1971 reconstitution of the Rules Committee under Chief Justice Burger was a pivotal event. Judges, who represented about 18% of the Committee for the previous decade, overnight became a majority, with their representation rising from 19% immediately before reconstitution to 69% on the new committee in 1971. Practitioners were demoted from solid majority status in the 1960s, and over the long run their position stabilized at a little over 25% of the committee. Academics disappeared from the Committee for a decade and then rebounded to something on the order of a 10% share of seats. In the last quarter century, judges have constituted a majority of the Committee in every year.

"The data reflect that in the early 1960s, practitioners enjoyed the highest level of representation, followed by academics, with judges the least represented. A transformation followed in which, in the 1970s, judges moved from a relatively small minority to a consistent majority on the Committee."

We also chart practitioner profiles over time along two dimensions: plaintiff versus defendant representation, and individual versus business/corporate representation. In order to assess a practitioner's practice area, we examined multiple sources. We primarily relied on cases in Lexis and Westlaw in which the practitioner appeared as counsel, but we also relied on firm profiles, newspapers, and other historical sources. We acknowledge that these sources have important limits — most significantly, the cases contained in electronic databases may not be representative of each practitioner's client base. Still, we regard the sources, collectively, as informative, albeit not decisive. In general, we classified practitioners as plaintiff or defense lawyers if they represented plaintiffs or defendants in 75% or more of decisions identified, respectively. We classified practitioners who did not represent either plaintiffs or defendants at or above the 75% threshold as representing both client populations. We coded defense practitioners as 0, those representing both sides as 1, and plaintiff practitioners as 2. It is important to note that a practitioner can be designated a plaintiffs' lawyer even when representing predominantly business/corporate clients.

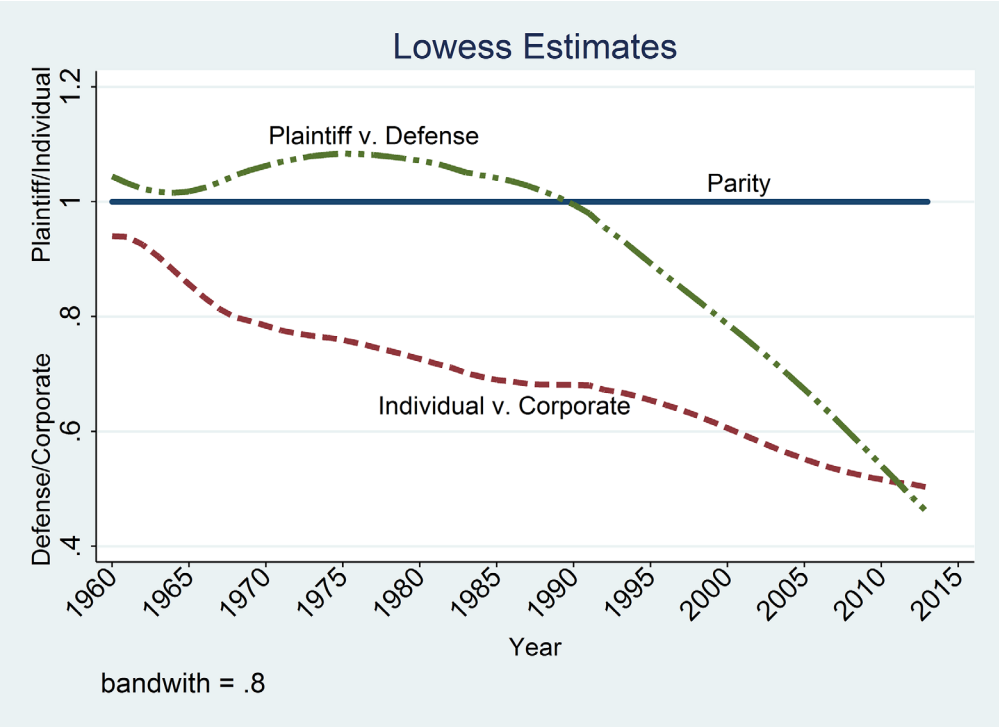
"The 1971 reconstitution of the Rules Committee under Chief Justice Burger was a pivotal event. Judges, who represented about 18% of the Committee for the previous decade, overnight became a majority, with their representation rising from 19% immediately before reconstitution to 69% on the new committee in 1971."

We classified practitioners as individual or business/corporate if they represented individuals or businesses/corporate clients in 75% or more of cases identified, respectively. We include in our conception of individual representation cases in which an attorney represents classes of individuals. We classified practitioners who did not represent either individuals or business/corporate clients at or above the 75% threshold as representing both. We coded practitioners representing business as 0, those representing both as 1, and those representing individuals as 2.

We compiled a dataset in which the unit of analysis is the presence of an individual practitioner on the committee in each year. From 1960 through 2014, 40 practitioners were members in total, serving an average of 6.7 years, comprising 267 practitioner-committee-year observations. To provide a broad sense of longitudinal patterns,

Figure 3.2 presents regression curves with the plaintiff versus defendant scale, and the individual versus corporate/business scale, as dependent variables, and year as the independent variable. The solid horizontal line at the value of 1 represents parity on the plaintiff/individual versus defense/business scales.

Figure 3.2: Practitioner types on the Advisory Committee, 1960–2014

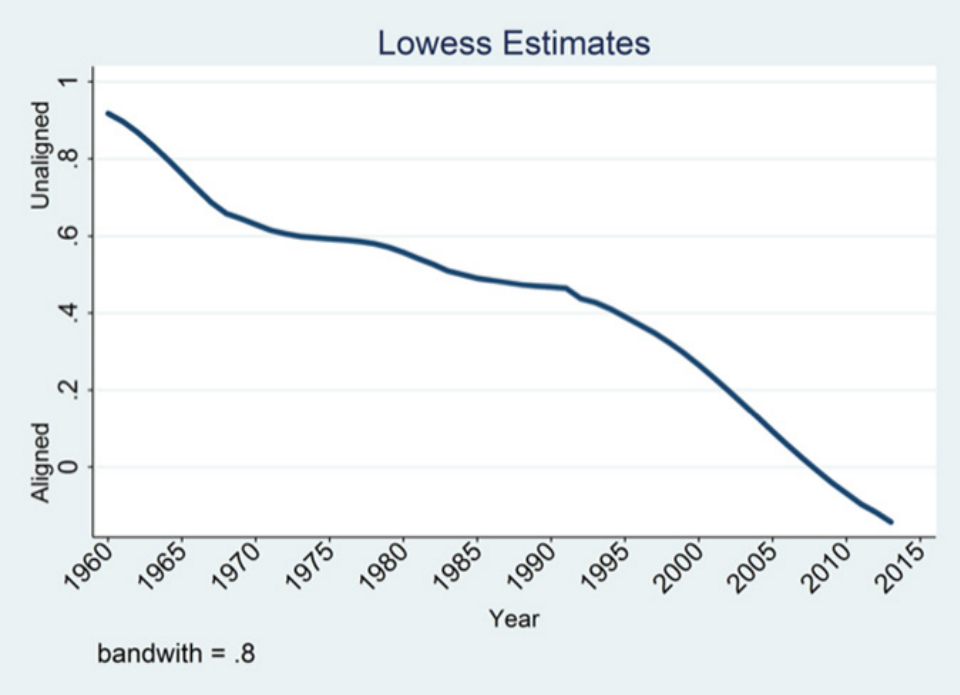


The estimated values in the figure reflect that, on the individual versus corporate/business scale, there was a long-run decline over the full period away from near parity and toward corporate/business representation. The estimated values of the individual versus business scale declined from .94 in 1960 to .50 in 2014, falling by 49%. The balance is on the business/corporate side of the parity line throughout.

On the plaintiff versus defendant scale, the estimated values hovered between 1 and 1.08 from 1960 to 1990, and then they declined rapidly to .46 by 2014, for a net decline of 54%. We note, however, that when the scale was on the plaintiffs' side of parity from 1960 to about 1990, only one plaintiffs' lawyer served who represented primarily individual plaintiffs or classes of them. The slight balance in favor of plaintiffs during this period is driven by practitioners representing a mix of business/corporate and individual plaintiffs. By the end of the series, the predicted values for the plaintiff versus defense scale, and the individual versus business scale, converge. This is because by the end of the series Advisory Committee practitioners are composed primarily of two types: plaintiffs' lawyers representing individuals or classes of them, and corporate defense lawyers, with the latter consistently holding the balance of power.

This trend relates to a facet of the client populations represented by Committee practitioners that bears emphasis. At the start of the series, a substantial majority of practitioners on the Committee could not be classified using our 75% rule into any of the four types: plaintiff, defense, individual, or business. Their client populations were sufficiently heterogeneous to place them in the "both" categories on each of the scales. By the end of the series, such unaligned practitioners, once predominant, become nonexistent. To convey this transformation graphically, we coded practitioners 1 if they could be classified into none of the four classifications, and coded them 0 otherwise. We then estimated a regression curve of the probability of such unaligned practitioners serving in each year, and we present the results in Figure 3.3. The probability declines from a high level of 92% in 1960, to essentially zero in 2014.

Figure 3.3



To some extent these data may reflect the influence of changing professional demographics. For example, 53% of Chicago lawyers' time was devoted to the corporate sector in 1975 (including work for some nonbusiness organizations such as unions and government entities), with 40% devoted to serving individual clients. Twenty years later, the split was 64% to 29% (Heinz et al. 2005). Yet, even assuming Chicago lawyers are representative of those practicing in large cities, a great deal of federal litigation occurs in other locations, where the demographics of practice may be different. In addition, there have been other potentially relevant changes in legal practice, including growth in the number, size, and budgets of public interest law firms (including firms promoting conservative agendas) (Galanter 2011; Galanter 2006; Nielsen and Albiston 2006; Rhode 2008).

Whatever the cause, we regard the composition of practitioners on the Committee along the individual versus corporate, and plaintiff versus defendant, dimensions as material to assessing their likely preferences. Still, given the small number of practitioners serving on the committee, limitations in data available to characterize their practices, and the difficulty of specifying the population of attorneys that are or should be regarded as candidates for appointment, our data cannot support strong inferences about a chief justice's goals in making selections. In this respect, Article III judges provide opportunities for more rigorous investigation of ideological bias in the Chief Justices' appointments to the Advisory Committee.

Appointments

The appointment of Article III judges to, and their service on, the Advisory Committee provide unique opportunities to explore in a systematic way the question whether the Committee is selected so as to give it a particular ideological profile. These appointments are made from a readily identifiable pool of candidates, and we have a plausible measure of potential members' presumed preferences that would be visible to the appointing Chief Justice — the political party of the appointing president. This measure is surely imperfect, but empirical evidence establishes that, in at least some fields of law, it is associated with the voting behavior of federal judges in predictable ways (e.g., Segal and Spaeth 2002; Sunstein et al. 2006; Nash 2015).

Judge-members of the Advisory Committee do not exercise Article III judicial power when they participate in rulemaking under the Enabling Act. Although being judges may affect their behavior as rulemakers, any close observer of this landscape over time will acknowledge that some of the rulemakers who are judges, some of the time, vote according to their ideological preferences. Nor is this surprising, given that, even in deciding cases, "[w]hen a judge or Justice has to make a legislative decision rather than decide the case just by following clear statutory or constitutional text or clearly applicable precedent, ideology may determine the outcome" (Epstein, Landes, and Posner 2013b: 235).

We do not doubt that most of the Advisory Committee's work is unaffected by members' ideological preferences, including in particular the ideological preferences of members who are judges. As our data confirm, few of the Committee's proposals predictably implicate private enforcement, and a great deal of its work does not map to a left-right ideological dimension.

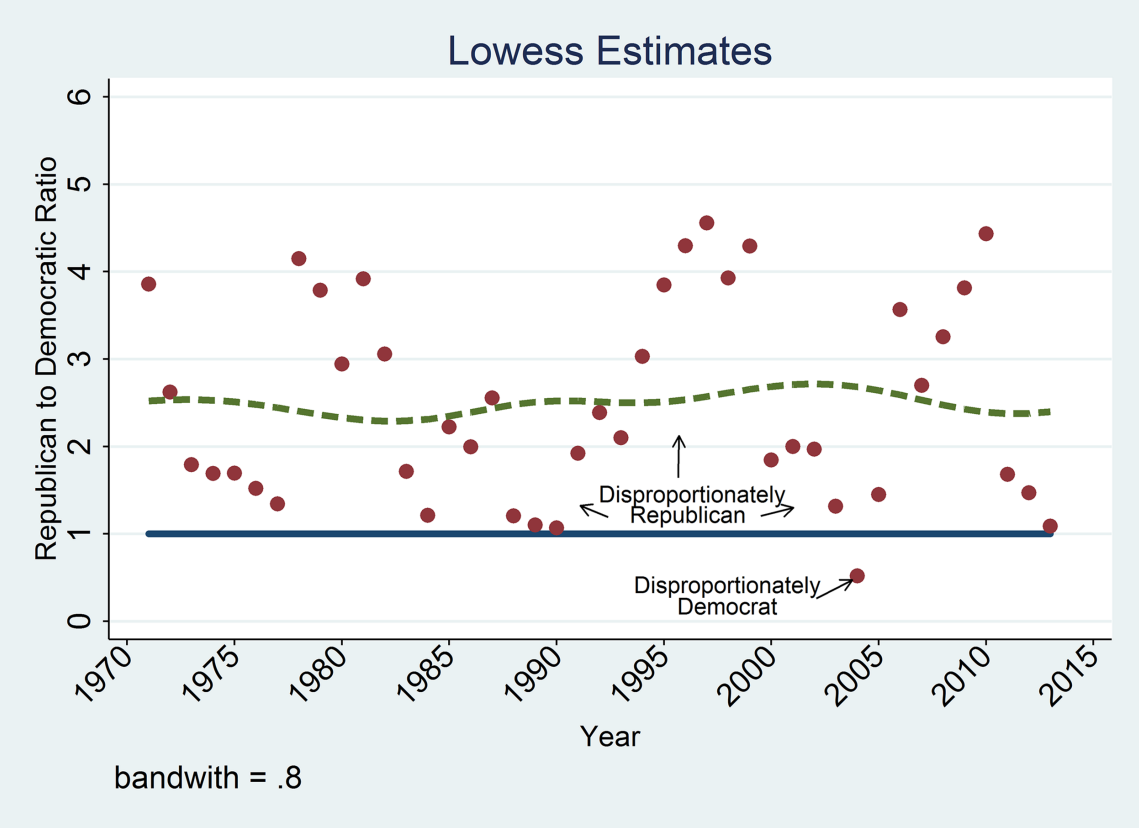
We focus on the period from 1971 through 2014. The data we collected for the 1960s are too sparse for meaningful analysis in statistical models. Only a handful of federal judges served on the committee during the entire decade. The large increase in the number of judges on the Committee beginning in 1971 generated sufficient data for analysis. Moreover, because there was a Republican Chief Justice in every year from 1971 through 2014, to assess presumed ideological effects we need only examine whether there was disproportionate reliance on judges appointed by Republican presidents for appointments to the Committee.

If the party of the appointing president were not associated with judges' service on the Advisory Committee, the balance on the Committee would approximate the balance among judges on the federal bench eligible to be appointed. Pooling judge-years on the federal bench from 1971 through 2014, the Republican to Democratic-appointee split was 55% to 45%. Pooling committee-years of service by Article III judges for the same period, the split was 70% to 30% in favor of Republican appointees. Among 103 appointments or reappointments of Article III judges to the committee, the split was also 70% to 30% in favor of Republican appointees. Of course, these cross-sectional percentages give no sense of how representation on the Committee has changed over time.

We calculated the annual percentage of all sitting judges appointed by Republican presidents who served on the Committee, divided by the same percentage for judges appointed by Democratic presidents. This yields an annual population-adjusted ratio of service. A population-adjusted ratio of one-to-one would occur when appointment to the Committee was not associated with party. A ratio greater than one would occur when Republican appointees constituted a larger fraction of the Committee than they did of eligible judges on the federal bench; and a ratio less than one would occur when Democratic appointees constituted a larger fraction of the Committee than they did of eligible judges on the federal bench. The average value of the annual ratio is 2.5, meaning that judges appointed by Republican presidents served at a population-adjusted rate about 150% higher than those appointed by Democrats.

Figure 3.4 represents a regression curve fit through those data points. The horizontal line at the value of one indicates where the estimates would cluster if the party of the appointing presidents of federal judges on the Committee reflected that of the federal judiciary. The raw data and regression estimates reflect overrepresentation of judges appointed by Republican presidents on the Committee from the time of its reconstitution under Chief Justice Burger in 1971. There is only one year in the entire period (2004) in which the ratio fell below the parity line, indicating overrepresentation on the Committee of judges appointed by Democrats. Moreover, in terms of absolute numbers, Republican-appointed judges have held a majority of Article III judge seats on the committee in every year but two from 1971 to 2014 (they were in parity in 1984, and in the minority in 2004). On average, across the full period, they held 70% of Article III judge seats. Thus, at the bivariate level, controlling for the composition of the federal bench, Republican-appointed judges had more than double the estimated probability of serving on the Committee during the period of interest, and in absolute terms, they were a majority of Article III judges in 41 of 43 years.

Figure 3.4



"Republican-appointed judges have held a majority of Article III judge seats on the Committee in every year but two from 1971 to 2014 ."

We next assess whether this effect is statistically significant in regression models with controls. We constructed the dataset as follows. For each year, each federal District Court and Court of Appeals judge, both active and senior, is included. The judge-year is the unit of analysis. In the model of committee service (Model 1 below), judges serving on the Committee are coded 1 in each year they serve, and those not serving are coded 0. In the models of committee appointments (Models 2 and 3 below), in years in which

appointments were made judges appointed are coded 1, and those not appointed are coded 0. We include independent variables in our models that annually measure the party of the judge's appointing president (Democrat=0, Republican=1), whether the judge had taken senior status (active=0, senior=1), and whether she was a District or Court of Appeals judge (Court of Appeals=0, District=1).

"Appointment by a Democratic president is significantly associated with a lower probability of serving on the Committee."

In addition, empirical research has demonstrated that in some types of cases, even controlling for political party of the appointing president, judges' gender and race can be important variables predicting their policy preferences as measured by voting behavior.
In particular, a number of studies have found that women and racial minority judges vote more liberally on some important civil rights issues (Farhang and Wawro 2004; Cox and Miles 2008). Civil rights litigation has been central in debates over whether there is excessive litigation in federal courts and the implementation of federal law. It has also been an area frequently targeted by retrenchment proposals, emanating very substantially from the Republican party, that are calculated to reduce opportunities and incentives for private enforcement litigation. We thus also incorporate variables measuring each judge's gender (male=0, female=1) and race (white=0, minority=1), which the Chief Justice may regard as associated with their likely preferences over the Federal Rules as they bear on opportunities and incentives for litigation.

Finally, the models include year fixed effects. With year fixed effects the model estimates the effect of party on appointment and service only relative to the pool of judges sitting in the same year. This is necessary to restrict the model to comparing those appointed or serving on the committee in any given year only to those eligible to be appointed or serve in that year. Year fixed effects also addresses the possibility of potential confounding factors, such as the identity of the Chief Justice, the political salience of litigation or federal rulemaking, and changes in the regulatory environment. This approach leverages only variation in the relationship between judges' characteristics and selection to, and service on, the committee within years to estimate the effects of those characteristics. This approach allows us to estimate the effects of party most effectively, because it absorbs and holds constant the influence of any variables that would take the same value for each judge sitting in a given year. In this sense, these estimates of the effects of party are net of the effects of any such variables (Greene 2003: ch. 13).

We first estimate logit models with committee service as the dependent variable. There are 277 years of committee service in the data. Because the probability of service for any judge is extremely low, in order to assess the magnitude of the effects, we focus on the ratio of predicted probabilities between categories of the explanatory dummy variables. That is, we calculate predicted probabilities for the dummy variable at both 0 and 1 and take the ratio of the two predicted probabilities. We report the results in Model 1 of Table 3.1. Appointment by a Democratic president is significantly associated with a lower probability of serving on the Committee. The probability of service for judges appointed by Republican presidents is 2.1 times larger than for Democratic appointees. This is roughly the same magnitude we observed when looking at the raw data.

The race variable is significant and negative, indicating that non-white judges are less likely to serve on the Advisory Committee. By comparison, white judges' probability of serving on the Committee is about 5 times larger. Examining the raw data to assess the plausibility of this very large effect, we observe that although non-white judges account for 11% of the judge-years in the data, they account for only 2% of committee service-years (6 of 277), and 2% of appointments or reappointments (2 of 103). White judges represent 89% of the judge-years and 98% of both committee service-years and appointments or reappointments. Thus, a large race disparity is visible at the descriptive level. Active judges have a probability of service about 3.8 times larger than judges in senior status. Gender

"Non-white judges are less likely to serve on the Advisory Committee. By comparison, white judges' probability of serving on the Committee is about 5 times larger."

Table 3.1: Logit Model of Committee Service and Committee Appointments for Article III Judges, with Year Fixed Effects, 1971-2014

	Model 1 Committee Service	Model 2 Appointment & Reappointment	Model 3 Initial Appointment Only
	Coef.	**Coef.**	**Coef.**
Party (Democrat=1)	-.75** (.34)	-.64** (.29)	-.57* (.31)
Race (Non-white=1)	-1.61** (.72)	-1.36* (.75)	-.98 (.72)
Gender (Female=1)	.30 (.56)	.22 (.42)	.20 (.49)
Senior Status (Senior=1)	-1.34*** (.49)	-2.26*** (.58)	-2.34*** (.74)
District Court (District=1)	-.55* (.33)	-.33 (.30)	-.53* (.31)
Reappointment Candidate	____	8.42*** (.41)	____
(Year fixed effects not displayed)			
N=	42077	42077	32165
Pseudo R^2=	.06	.49	.12

***$p < .01$; **$p < 05$; *$p < .1$

Standard errors in parentheses, clustered on judge

and being a District versus Court of Appeals judge are both insignificant.In Model 2 of Table 3.1, we substitute as the unit of analysis a variable measuring whether the judge was appointed or reappointed in each year. Model 1, focusing on years of service, only describes the association between judge characteristics (party of appointing president, race, etc.) and the probability of being in the state of serving on the Committee in each year. What the model reveals is critical to understanding the actual composition of the Advisory Committee relative to the federal bench. However, we cannot draw direct inferences from this about appointment decisions. With only 103 episodes of appointment or reappointment, we have limited data to model appointment. In Model 2, we add the additional control variable of reappointment candidate, accounting for whether a judge was already serving on the Committee. Initial appointments cannot be treated in the same way as reappointments because being on the Committee makes one vastly more likely to be appointed, and this must be modeled in some fashion. The reappointment candidate variable takes the value of 1 in the year following the conclusion of a term — a year in which a judge can either exit the Committee or transition into the first year of a new term.

In this model, party is again significant. The probability of committee appointment or reappointment of judges appointed to the bench by Republican presidents is about 1.5 times larger than that of Democratic appointees. Race remains significant at the .1 threshold, with whites having a probability of appointment or reappointment 2.2 times larger than non-whites. Active judges have a probability of appointment or reappointment 3.9 times larger than judges in senior status; and the gender and District versus Court of Appeals judge variables remain insignificant.

In Model 3, we restrict the dependent variable to initial appointments. We lack information about reappointments that could be material, such as whether a judge sought and was rejected for reappointment, as opposed to choosing to exit service even though the Chief Justice would have accepted or desired the judge's continued service. This model also avoids aggregating initial appointments and reappointments, which are likely quite different decisions. Restricting the dependent variable in this way drops the number of appointing events to 50. The party of appointing president variable remains significant, with judges appointed to the bench by Republican presidents 1.8 times more likely to be initially appointed to the Committee. Race dips below .1 significance, which is likely due to limited data to estimate an effect in the models of initial appointment decisions. Judges in senior status remain substantially less likely to be appointed; gender remains insignificant, and the District judge variable becomes significant with a negative sign, meaning that District judges are less likely than Court of Appeals judges to be initially appointed to the committee. Finally, we estimate two additional models, but instead of estimating

Table 3.2: Logit Model of Chair Service and Chair Appointments for Article III Judges, with Year Fixed Effects, 1971-2014

	Model 1 Chair Service	Model 2 Initial Appointment
	Coef.	**Coef.**
Party (Democrat=1)	-2.91*** (1.08)	-2.18** (1.07)
Gender (Female=1)	.23 (1.12)	.19 (.87)
Senior Status (Senior=1)	-.40 (.84)	-.97 (.97)
District Court (District =1)	-1.50** (.60)	-.99* (.52)
Committee Member (Member=1)	___	6.20*** (.75)
(Year fixed effects not displayed)		
N=	42077	20177
Pseudo R^2=	.10	.44

***$p < .01$; **$p < 05$; *$p < .1$

Standard errors in parentheses, clustered on judge

the probability of service and appointment as a committee member, we estimate the probability of service and appointment as chair of the committee. The chair is an especially important appointment, having the capacity to influence, if not control, the committee's agenda (Cooper 2014: 592). If chief justices have disproportionately selected Republican-appointed judges for the committee in an effort to influence rulemaking, one would expect the effect to be larger in the selection of the most consequential member of the committee. This is precisely what we find. We report the results in Table 3.2.

In our models of chair service and appointment, the race variable cannot be included because chief justices have never selected a non-white judge as chair, making it impossible to estimate an effect. In Model 1 we estimate a model with a dependent variable that takes the value 1 for each year of chair service and takes the value 0 otherwise. This model estimates the probability of being in the state of service as chair. Party of the appointing president is statistically significant, and the magnitude of the effect is dramatically greater than for committee service. Again focusing on the ratio of predicted probabilities, the probability of service as chair for judges appointed by Republican presidents is 18.2 times larger than for Democratic appointees.

"The probability of service as chair for judges appointed by Republican presidents is 18.2 times larger than for Democratic appointees."

In Model 2, we estimate a model with a dependent variable that takes the value 1 for the year of initial appointment as chair, and 0 otherwise. Unlike our models of committee service, we do not estimate a model that includes reappointments because, based on inquiries to knowledgeable sources, norms regarding the duration of chair service have evolved over time such that we cannot identity with confidence when reappointments occurred. In this model we include an explanatory variable reflecting whether the judge selected as chair had already been serving on the committee. Of the twelve chairs from 1971-2014, eight were members at the time of their appointment, and four were new to the committee. Thus, although service on the committee greatly increases the probability of being selected as chair, the pool from which appointment to chair is made includes the full federal bench and not only existing committee members.

In Model 2, committee membership is statistically significant. Committee members are 331 times more likely to be selected as chair. This, of course, carries with it one pathway of partisan influence. We have established that Republican appointed judges are about twice as likely to be in a state of service on the committee (Table 3.1, Model 1). As a function of this initial partisan disparity, they are twice as likely to be in the state (committee service) that is 331 times more likely to be selected as chair. Further, even with this effect accounted for in the model, the party variable remains statistically significant. Holding constant the massive effect of committee service on selection as chair, the probability of selection as chair for judges appointed by Republican presidents remains 7.7 times larger than for Democratic appointees.

We examined the raw data to confirm these remarkably large magnitudes and observed that 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. Eleven of twelve chairs serving from 1971 to 2014 were Republican-appointed, accounting for 41 of 43 years of chair service, or 95% of years of chair service. Apparently, chief justices regard the chair position as a distinctively important Advisory Committee appointment.

Committee Output

In order to track longitudinal trends in the Advisory Committee's posture toward private enforcement, we constructed a dataset of all proposals to change the Federal Rules in a manner predictably affecting private enforcement that the Committee forwarded to the Standing Committee from 1960 through 2014. We coded those proposals for whether they favored or disfavored private enforcement (were pro-plaintiff or pro-defendant) in predictable ways. In order to identify proposals bearing on private enforcement, at least one of the authors read all of the Advisory Committee's proposed revisions to the Federal Rules from 1960

through 2014, including proposals that were not adopted. At the Rule-level — counting each proposal to amend a specific Rule in a particular year as a discrete unit — there were 262 proposals over this period. We identified 33 of these Rule-level proposals (about 13% of the total) as predictably affecting private enforcement.

We then further broke down the proposals into distinguishable subunits within the Rule-level. This had no effect on the count for the 19 Rule-level proposals that sought only a single change bearing on private enforcement. For the remaining proposals, however, disaggregation seemed appropriate. For example, the 1983 proposal to amend Rule 11 included multiple changes to the Rule. Among them we identified two basic types of change: one enlarging the scope of the Rule's application, and one strengthening sanctions for violations. Thus, we coded the proposal as contributing two units to this measure of proposed changes.

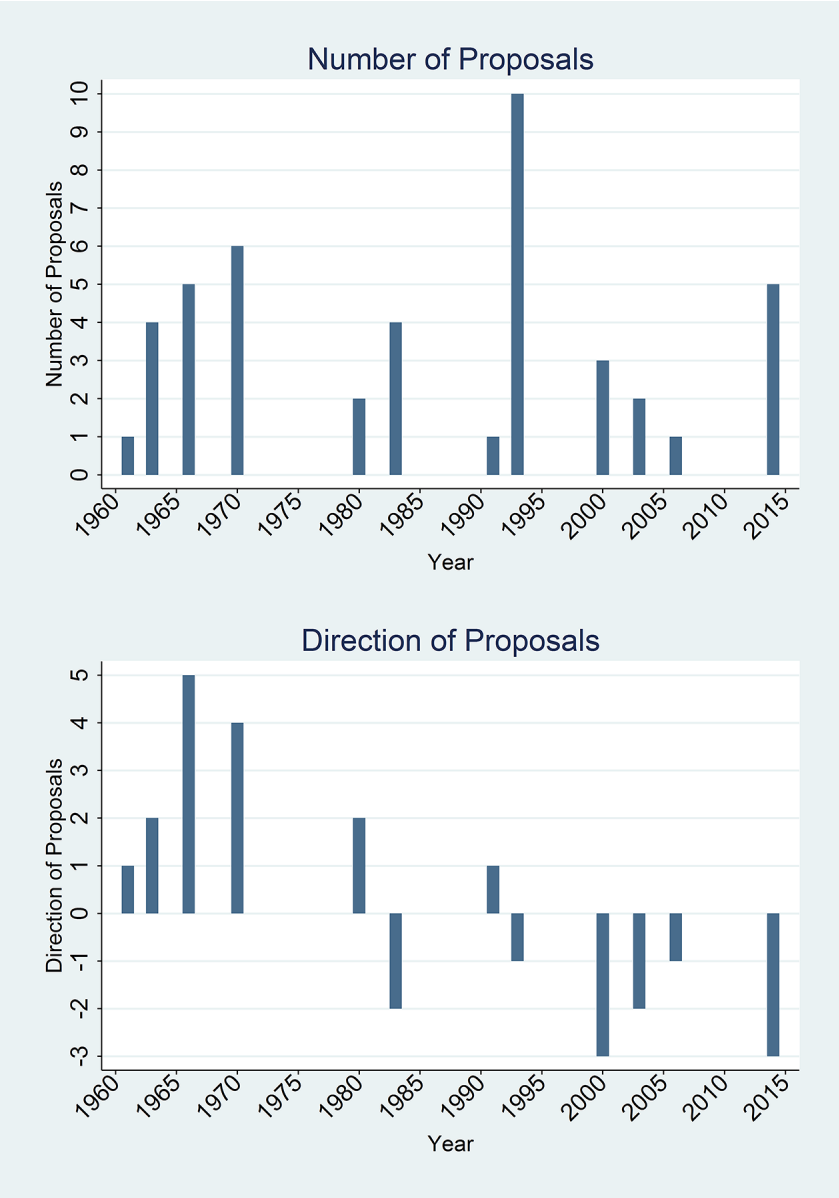
Breaking down the 33 Rule-level proposals into these subunits rendered a total of 44 items. Of these, 41 (93%) passed through the rest of the Enabling Act process and became effective in substantially the language recommended. Three proposals — a 2000 proposal to authorize cost-shifting in Rule 26, and a 1993 proposal to amend Rule 56 (in which we count two items) — were rejected by the Standing Committee or the Judicial Conference.

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

Before discussing our findings, a caveat is in order. Our approach to counting proposals does not distinguish potentially far-reaching proposals from those that appear less consequential. Qualitative analysis and judgment are necessary to assess the relative potential significance of particular proposals. Here our approach is quantitative; we assess change over time in the average direction of proposals on the pro-plaintiff versus pro-defendant dimension. This is a different question than impact, but one that we believe is important to address as we endeavor to understand long-term patterns in the Committee's behavior.

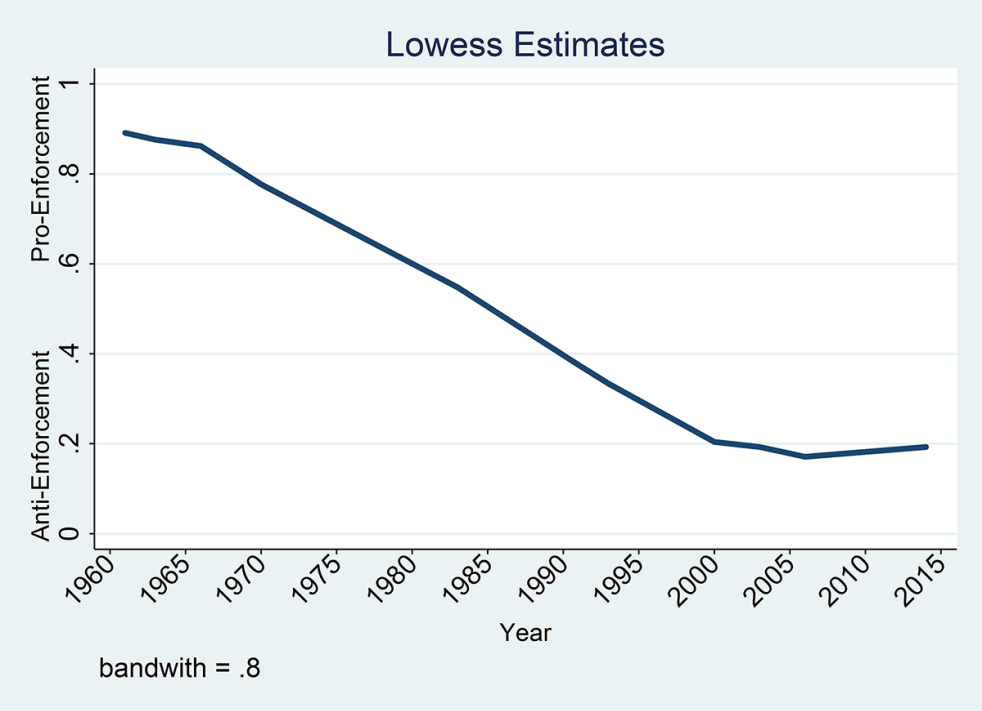
The top panel of Figure 3.5 presents the distribution over time of the 44 proposals affecting private enforcement from 1960 through 2014. The bottom panel of Figure 3.5 presents the net balance, in years in which there were proposals affecting private enforcement, between pro-plaintiff and pro-defendant proposals. Pro-plaintiff proposals are coded 1; pro-defendant proposals are 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 3.5 represent the net result from summing across all values of 1, 0, and -1 in each year. There were no years in which all proposals summed to zero. Thus, all zero values in the figure represent years in which there were no proposals affecting private enforcement. Years in which the bar is greater than zero were those in which the Committee made more proposals favoring plaintiffs than defendants, and the value of the bar represents the margin by which this was so. Years in which the bar is less than zero were those in which the Committee made more proposals favoring defendants than plaintiffs. The period from 1960 to 1971 was one in which the net balance clearly favored plaintiffs. The two decades from 1971 to 1991 saw only three years with proposals affecting private enforcement (leading to the 1980, 1983, 1991 amendments to the Federal Rules), and the net result over that period was roughly an even balance between plaintiff- and defense-favoring proposals. From 1991 through 2014, the net balance favored defendants in every year in which a proposal was made.

Figure 3.5



We next estimate a smoothed regression curve of the probability of a pro-plaintiff proposal over time, conditional on the existence of a proposal affecting private enforcement. For this purpose, proposals favoring defendants were coded 0, and proposals favoring plaintiffs were coded 1. For proposals containing both pro-plaintiff and pro-defendant elements — which occurred only four times in the data — we took the mean value. For example, if we treated three changes on the same subject as constituting a single subunit, where one was pro-defense (0) and two were pro-plaintiff (1) in direction, the value for the unit would be .67. The variable thus ranges between 0 and 1. Figure 3.6 represents the results. After increasing in the early 1960s, the predicted probability that a proposed amendment would favor plaintiffs declined from 87% in the mid-1960s to 19% by the end of the series. Because smoothed regression curves do not allow one to observe key breakpoints in the data, this figure should be interpreted in conjunction with the descriptive representation of the data in Figure 3.5.

Figure 3.6



In order to assess the statistical significance of this negative time trend, we regressed an annual time trend on the dependent variable used to estimate the curve in Figure 3.6. Although we have only 44 observations, the negative time trend is highly statistically significant (p=.000), with a coefficient -.017, indicating that from 1960 through 2014 the passage of each year was, on average, associated with a reduction of about 1.7% in the probability that a proposal would be pro-plaintiff. Overall, the data show that, conditional on the existence of a proposal affecting private enforcement, the predicted probability that it would favor plaintiffs went from highly likely at the beginning of the series to highly unlikely at the end.

Conclusion

Our research illustrates the influence of Chief Justice Burger and his successors on the make-up and output of the Advisory Committee on Federal Rules. The years that followed Burger's appointment as Chief Justice featured a partisan slant in the appointment of judges, and a pro-corporate slant in the appointment of practitioners, that continued under Chief Justices Rehnquist and Roberts. Most of the work of the Advisory Committee is not salient to private enforcement, however, and even members who favor retrenchment are aware both that the process demands reasoned explanations and that overreaching could put at risk the judiciary's control of federal procedure.

"Overall, the data show that, conditional on the existence of a proposal affecting private enforcement, the predicted probability that it would favor plaintiffs went from highly likely at the beginning of the series to highly unlikely at the end."

Bibliography

Brown, Winifred R. Federal Rulemaking: Problems and Possibilities. Washington, DC: Federal Judicial Center, 1981.

Burbank, Stephen B. "The Rules Enabling Act of 1934." University of Pennsylvania Law Review 130 (1982): 1015–1197.

Burbank, Stephen B. "Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions about Power." Hofstra Law Review 11 (1983): 997–1012.

Burbank, Stephen B, "Proposals to Amend Rule 68 – Time to Abandon Ship." University of Michigan Journal of Law Reform 19 (1986): 425–40.

Burbank, Stephen B. "The Transformation of American Civil Procedure: The Example of Rule 11." University of Pennsylvania Law Review 137 (1989a): 1925–67.

Burbank, Stephen B. "Hold the Corks: A Comment on Paul Carrington's 'Substance' And 'Procedure' In the Rules Enabling Act." Duke Law Journal (1989b): 1012–46.

Burbank, Stephen B. "Procedure, Politics and Power: The Role of Congress." Notre Dame Law Review 79 (2004a): 1677–1744.

Burbank, Stephen B. "Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Towards Bethlehem or Gomorrah?" Journal of Empirical Legal Studies 1 (2004b): 591–626.

Burbank, Stephen B. and Sean Farhang (2017) Rights and Retrenchment: The Counterrevolution Against Federal Litigation, Cambridge: Cambridge University Press: 2017.

Burbank, Stephen B. and Tobias Barrington Wolff. "Redeeming the Missed Opportunities of Shady Grove." University of Pennsylvania Law Review 159 (2010): 17–76.

Carrington, Paul D. "Renovating Discovery." Alabama Law Review 49 (1997): 51–78.

Clark, Tom C. "Foreword (1969)." In 4 Federal Practice and Procedure, Edited by Charles Alan Wright, Arthur R. Miller, and Adam N. Steinman, xvii–xx. St. Paul: West Publishing Company, 2015.

Cooper, Edward H. "Revising Civil Rule 56: Judge Mark R. Kravitz and the Rules Enabling Act." Lewis and Clark Law Review 18 (2014): 591–614.

Cox, Adam B. and Thomas J. Miles. "Judging the Voting Rights Act." Columbia Law Review 108 (2008): 1–54.

Dunham, Kenneth F. "The Future of Court-Annexed Dispute Resolution is Mediation." Jones Law Review 5 (2001): 35–49.

Epstein, Lee, William A. Landes, and Richard A. Posner. The Behavior Of Federal Judges: A Theoretical and Empirical Study of Rational Choice. Cambridge: Harvard University Press, 2013b.

Farhang, Sean and Gregory Wawro, "Institutional Dynamics on The U.S. Court of Appeals: Minority Representation under Panel Decision Making." Journal of Law, Economics, and Organization 20 (2004): 299–330.

Galanter, Marc. “More Lawyers than People: The Global Multiplication of Legal Professionals.” In The Paradox Of Professionalism: Lawyers and the Possibility Of Justice, Edited By Scott L. Cummings, 68–89. New York: Cambridge University Press, 2011.

Galanter, Marc. “Planet of the Aps: Reflections on The Scale of Law and Its Users.” Buffalo Law Review 53 (2006): 1369–1418.

Greene, William. Econometric Analysis, 5th Edn. Upper Saddle River: Pearson Publishing, 2003.

Hazard, Geoffery C., John Gedid, and Stephen Solwe “An Historical Analysis of The Binding Effect of Class Suits.” University of Pennsylvania Law Review 146 (1998): 1849–1948.

Heinz, John P., Robert L. Nelson, Rebecca L. Sandefur, and Edward O. Laumann. Urban Lawyers: The New Social Structure of the Bar. Chicago: University of Chicago Press, 2005.

Higginbotham, Patrick E. “Foreword.” Alabama Law Review 49 (1997): 4–6.

Kalven, Harry Jr. and Maurice Rosenfield. “The Contemporary Function of The Class Suit.” University of Chicago Law Review 8 (1941): 684–721.

Kaplan, Benjamin “A Prefatory Note.” Boston College Industrial and Commercial Law Review 10 (1969): 497–500.

Kaplan, Benjamin. “Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I).” Harvard Law Review 81 (1966): 356–416.

Kravitz, Mark R., David F. Levi, Lee H. Rosenthal, and Anthony J. Scirica, “They Were Meant for Each Other: Professor Edward Cooper and the Rules Enabling Act.” University of Michigan Journal of Law Reform 46 (2013): 495–526.

Nash, Jonathan R. “Interparty Judicial Appointments.” Journal of Empirical Legal Studies 12 (2015): 664–85.

Nielsen, Laura Beth and Catherine Albiston. “The Organization of Public Interest Practice: 1975-2004.” North Carolina Law Review 84 (2006): 1591–1622.

Rhode, Deborah L. “Public Interest Law: The Movement at Midlife.” Stanford Law Review 60 (2008): 2027–86.

Segal, Jeffrey A. and Harold J. Spaeth. The Supreme Court and The Attitudinal Model Revisited. New York: Cambridge University Press, 2002.

Stempel, Jeffrey W. “Politics and Sociology in Federal Civil Rulemaking: Errors of Scope.” Alabama Law Review 52 (2001): 529–637.

Sunderland, Edison R. “Discovery before Trial under the New Federal Rules.” Tennessee Law Review 15 (1939): 737–57.

Sunstein, Cass R., David Schkade, Lisa Ellman, and Andres Sawicki. Are Judges Political? An Empirical Analysis of the Federal Judiciary. Washington, DC: Brookings Institution Press, 2006.

Yeazell, Stephen C. From Medieval Group Litigation to the Modern Class Action. New Haven: Yale University Press, 1987.