Litigation and Reform

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More than 1.6 million lawsuits enforcing federal laws were filed over the past decade, about 97 percent of which were litigated by private parties. The suits spanned the waterfront of federal regulation, covering the policy domains of antitrust, civil rights, consumer protection, environmental law, labor, and securities and exchange. While the United States has relied heavily upon private litigation to enforce policies passed into law by Congress since the rise of the federal regulatory state in the late 1880s, the frequency with which it has done so exploded in the late 1960s. From a rate of 3 per 100,000 population in 1967—a rate that had been roughly stable for a quarter century—it climbed to 13 by 1976, to 21 by 1986, to 29 in 1996, increasing by about 1000% during these three decades.[1] Despite much vitriolic rhetoric, typically focused on tort litigation, empirical scholars of American courts have *not* established a "litigation explosion" across American court systems as a whole during this period. There was, however, an utterly unmistakable explosion of private lawsuits filed to enforce *federal statutes*.

It is perhaps not surprising, then, that by the 1980s regular calls emerged in Washington for "litigation reform" in the federal system, seeking changes in federal law calculated to reduce incentives for lawsuits. By the 1990s, the issue of litigation more frequently came to the surface of policy conflicts between the two major political parties, in such area as civil rights, environmental, consumer protection, and securities and exchange policy, with Republican's predominantly arguing for litigation reform and Democrats predominantly opposing them. Reduction of "frivolous" lawsuits in federal court was an important part of the legislative reforms of the Republican Contract with American leading up to the 1994 mid-term elections. Currently pending before Congress is the Lawsuit Abuse Reduction Act of 2011, introduced by Lamar Smith (R, TX) in the House and Charles Grassley (R, IA) in the Senate, with the goal of

[1] See figure 2, and underlying data.

reducing "frivolous" lawsuits in federal court by increasing sanctions against those who file them. Partisan battles over litigation reform have become a regular part of national politics surrounding federal regulation in the U.S.

This paper argues that grasping contemporary partisan conflicts over "litigation reform" in the federal system requires first understanding the emergence of a critical linkage between litigation and a movement to reform the regulatory state in the late 1960s and early 1970s. At that time, litigation reform—though it was not called that—had the opposite ambition of today's litigation reform. Its goal was to increase lawsuits to compensate for perceived failures in bureaucracy, and to avoid building more bureaucracy. This regulatory reform strategy sustained relatively strong bipartisan support during the decade of the 1970s, a period of profound importance in laying the foundation for the country's current massive reliance upon private lawsuits in federal regulation.

The contemporary variant of litigation reform—with the goal of reducing litigation—first gained significant sway in federal government when the Reagan administration assumed power. It was during the Reagan years that the existence and extent lawsuits in federal regulation became a recurrent locus of national party conflict. However, the Reagan administration's litigation reform proposals were a total failure. The story of their failure teaches two important lessons. First, the successes of the reform movement of the 1970s, embedding extensive private litigation in federal regulation, have proved extremely difficult to retrench, even by determined opponents who wield significant political power. Second, this fact profoundly limits the capacity of presidents to effectuate reductions in regulatory pressures in fields occupied by decentralized armies of private lawyers, guided by market incentives.

This paper traces struggles over litigation reform in federal regulation during roughly the two decades from passage of the Civil Rights Act of 1964 to the end Reagan's first term. This period teaches that current debates over "litigation reform" in federal regulation should be understood largely as struggles over government intervention, much like decisions about whether to fund, staff, and empower bureaucracy. Further, it suggests political and institutional reasons that the Republican program of litigation reform, which continues to the present day, has been largely unsuccessful.

Liberal's waning faith in administrative power in the late 1960s

During the New Deal it had been liberals, of course, that played the role of chief architect of the administrative state-building project, while the principal detractors of the burgeoning American bureaucracy 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, "The 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."[2] By the late 1960s, however, there was mounting disillusionment on the left—among both activist interest groups and legislators within the Democratic party—with the capacities and promise of the American administrative state. As Wilson put it in 1967, "Conservatives once feared that a powerful bureaucracy would work a social revolution. The left now fears that this same bureaucracy is working a conservative reaction."[3]

This metamorphosis toward disillusionment in liberals' view of the administrative state coincided with, and was propelled by, the proliferation starting in the mid to late 1960s in the

[2] James Q. Wilson, "The Bureaucracy Problem," *The Public Interest* 6 (1967): 3-9, 3.
[3] Id. at 3.

number, membership, and activism of liberal "public interest" groups.[4] 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. By referring to them as "public interest" groups I simply mean to indicate, following a long line of scholarship in political science, that they pursued broad social goals, as distinguished from narrow member interests. The political significance of liberal public interest groups is importantly connected to their position within the Democratic party coalition.

The 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 an important and core element of the Democratic party coalition, a position they continue to occupy to the current day.[5] Indeed, David Vogel argues that within the Democratic party coalition, "During the 1970s, the public-interest movement replaced organized labor as the central countervailing force to the power and values of American business."[6] 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

[4] David Vogel, "The 'New' Social Regulation in Historical and Comparative Perspective," in *Regulation in Perspective*, ed. Thomas K. McCraw (Cambridge: Harvard University Press, 1981), 155-85, 164-75; Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Athens: University of Georgia Press, 1988), 55-77.

[5] Martin Shefter, *Political Parties and the State: The American Historical Experience* (Princeton: Princeton University Press, 1994), 86-94; Jules Witcover, *Party of the People: A History of the Democrats* (New York: Random House, 2003), ch. 27; Vogel, "The 'New' Social Regulation in Historical and Comparative Perspective," 164-75; David Vogel, *Fluctuating Fortunes: The Political Power of Business in America* (New York: Basic Books, 1989); Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton: Princeton University Press, 2010), 129-213.

[6] Vogel, *Fluctuating Fortunes*, 293.

of which targets private business.[7] This partisan difference, of course, is not an iron law, but it is a powerful central tendency. An activist state, particularly one prepared to regulate private business, is exactly what the agenda of liberal public interest groups called for, from non-discrimination 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. As between the two major political parties in the U.S., the Democrats were their party.

Reasons for the liberal loss of faith in bureaucracy

Capture and timidity

Why the liberal loss of faith in bureaucracy among public interest groups and their allies among 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 business, treating them as the constituency to be protected. Alongside regulated business's extensive access to and influence upon 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 associated with serious conflict with regulated business. On balance, this added up to an implementation posture hardly likely to secure the transformative goals of the liberal coalition.[8]

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[7] Keith T. Poole and Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting* (New York: Oxford University Press, 1997).

[8] R. Shep Melnick, "Courts and Agencies," in *Policy, Making Law: An Interbranch Perspective*, ed. Mark C. Miller and Jeb Barnes (Washington, DC: Georgetown University Press, 2004), 89-104, 93; Simon Lazarus and Joseph Onek, "The Regulators and the People," *Virginia Law Review* 57 (1971): 1069-1108; Shapiro, *Who Guards the Guardians*, 62-73; Wilson, "The Bureaucracy Problem;" Richard Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88 (1975): 1667-1813, 1684-85, 1713-15.

Democratic Legislators, Republican Presidents, and Party Polarization

As the liberal coalition's growing concern about the limits of bureaucratic regulation was gathering strength in the late 1960s, an important transformation in the alignment of American government profoundly deepened their skepticism toward the administrative state as a regulator. The new dominant governing alignment in the U.S. combined divided government and party polarization, primarily with the Democrats writing laws in Congress, and Republican presidents exercising important influence on the bureaucracy charged with implementing them. In the first sixty-eight years of the twentieth century, one political party had control of both the executive and legislative branches 79 percent of the time. In the subsequent thirty-two years of the twentieth century (from Nixon through Bush II), the parties divided control of those branches 81 percent of the time. In the mid-1960s, the estimated probability of divided government became more likely than not for the first time in the twentieth century, according to Charles Cameron, and it climbed steadily to a likelihood of roughly 80 percent by the close of the century.[9]

The durability of the condition of divided government that emerged in the late 1960s was exacerbated by another factor contributing to legislative-executive antagonism: party polarization. Ideological polarization between the parties starting between the late 1960s and the mid-1970s, depending upon one's measure, eroded the bipartisan center in Congress and fueled party antagonisms. In the late 1960s, with Nixon's first term, legislators not from the president's party began to vote at markedly higher rates—as compared to members of the president's party—against presidential initiatives, a trend that continued to slope upward through the end of the twentieth century.[10] In the mid-1970s, ideological polarization between Democrats and Republicans, as measured by the ideological distance between the parties, began to increase for

[9] Cameron, *Veto Bargaining*, 10-11.
[10] Gary Jacobson, "Partisan Polarization in Presidential Support: The Electoral Connection," *Congress and the Presidency* 30 (2003): 1-36.

the first time in the twentieth century, and the distance between the parties continued to grow through century's end.[11] Thus, during the era of divided government, the political parties were in an increasingly antagonistic posture toward one another.

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

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 acrimonious conflict between the liberal coalition in Congress and the comparatively conservative Republican leadership of the federal bureaucracy. Liberal public interest groups and congressional Democrats attacked the federal bureaucracy under Republican leadership, claiming that 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, including civil rights, environmental, and consumer regulation.[12] The

[11] Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches* (Cambridge: MIT Press, 2006).
[12] R. Shep Melnick, "From Tax and Spend to Mandate and Sue: Liberalism after the Great Society," in *The Great Society and the High Tide of Liberalism*, ed. Sidney Milkis and Jerome M. Mileur (Amherst: University of

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 regulatory reform 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 upon bureaucracy, and its concern about non-enforcement of congressional mandates. The primary set of strategies employed sought more effective control of the bureaucracy by the liberal coalition. For example, it advocated enlarging opportunities for effective participation in the administrative processes—particularly rulemaking—by public interest groups and their allies. It sought to force agency actions though legislative deadlines and group rights to prod agencies into action when they failed to carry out mandatorily prescribed responsibilities. It pursued greater oversight of administrative policymaking through more aggressive congressional oversight, and with more frequent and stringent judicial review of important agency policymaking decisions. These were all strategies of reform through enhanced influence upon and control over the bureaucracy, and they have been widely examined by scholars.[13]

An additional response, which has been less studied and is the primary focus of this paper, was to advocate statutory rules that allowed circumventing the administrative state altogether by undertaking *direct* enforcement of legislative regulatory mandates through private

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Massachusetts Press, 2005), 387-410, 398-99; Farhang, *The Litigation State*, 129-213; Farhang, "Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law," *Law and Social Inquiry* (2011), forthcoming; Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* (Washington, DC: Brookings Institution, 1990), 27; *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 Cong., 2nd sess., 1970.

[13] Melnick, "From Tax and Spend to Mandate and Sue," 399; Lazarus and Onek, "The Regulators and the People"; Vogel, *Fluctuating Fortunes*, ch. 5; Stewart, "The Reformation of American Administrative Law."

lawsuits against the targets of regulation, such as discriminating employers, polluting factories, and deceptive labelers of consumer products.[14] It is important to differentiate clearly 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 upon 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.[15] This paper refers to this constellation of rules as a statute's "private enforcement regime."

Among incentives to encourage private enforcement of regulatory laws, both scholars and activists recognize that statutory fee shifting rules allowing plaintiffs to recover attorney's fees if they prevail are especially important.[16] Under the "American rule" on attorney's fees, which generally controls in the absence of a statutory fee shift, each side pays their own attorney's fees regardless of who wins. In light of the high costs of federal litigation, if there are not very substantial economic damages at stake, winning plaintiffs would often suffer a financial loss under the American rule. By the early 1970s, liberal regulatory reformers were urging Congress, in order to mobilize private enforcement, to include fee shifting provisions with private rights of action in the new social regulatory statutes, across the fields of civil rights, environmental,

[14] Morris P. Fiorina, "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?" *Public Choice* 39 (1982): 33-66; Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*, rev. ed. (Philadelphia: Transaction Publishers, 2002), ch. 10; Farhang, *The Litigation State*.
[15] Sean Farhang, "Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991," *Journal of Empirical Legal Studies* 6 (2009): 1-34; Farhang, *The Litigation State*.
[16] Frances Kahn Zemans, "Fee Shifting and the Implementation of Public Policy," *Law and Contemporary Problems* 47 (1984): 187-210; Farhang, *The Litigation State*; Kagan, *Adversarial Legalism*.

consumer, labor, and public health and safety, among others.[17] Monetary damages enhancements—which allow a plaintiff to recover more than the economic injury suffered, such as double, triple, or punitive damages—can also serve to incentivize enforcement.[18]

To understand direct private enforcement as a strategy of regulatory reform, and to appreciate its effects, it is important to distinguish between a strategy of leveraging high impact law reform litigation, and a strategy of using private lawsuits as a method to achieve ordinary, day-to-day enforcement. High impact law reform litigation can be achieved with a relatively small number of carefully selected cases meant to control the content of substantive regulatory policy, such as interest group challenges to important rulemakings by the Environmental Protection Agency. Private lawsuits as a method to achieve ordinary, day-to-day enforcement, in contrast, will frequently require the mobilization of lawyers on a vastly larger scale, sufficient to represent, for example, employees, consumers, and shareholders across the nation claiming ordinary rights violations. In the mid 1970s, across all policy areas, there were approximately 72 public interest law groups, with a mean number of seven lawyers each.[19] Such public interest groups had the capacity for impact litigation, but not ordinary, day-to-day law enforcement. Private enforcement regimes, however, could accomplish the latter goal if they mobilized the *for-profit* bar.

When structuring implementation regimes to encourage private enforcement, rules rendering claims economically viable to litigate are obviously important in general, but they are especially important for mobilizing the private for-profit bar. While fee awards can contribute

[17] *Hearings on Legal Fees Before the Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee*, 93rd Cong., 1st sess., 1973; Farhang, *The Litigation State*, ch. 5.
[18] Farhang, *The Litigation State*.
[19] Joel F. Handler, Betsy Ginsburg, and Arthur Snow, "The Public Interest Law Industry," in *Public Interest Law: An Economic and Institutional Analysis*, Burton A. Weisbrod, Study Director, in collaboration with Joel F. Handler and Niel K. Komesar (Berkeley: University of California Press, 1978), 42-79, 51.

valuable and much-needed resources to public interest law groups to support their litigation campaigns, such groups typically have multiple other sources of funding—importantly including foundation grants, member dues, and contributions—such that fee awards are a small fraction of total revenue.[20] Thus, such groups can often undertake impact litigation without anticipating fee recovery. In contrast, the for-profit bar generally will not litigate expecting a loss, other than in the rare scenario of *pro bono* work.

By the early 1970s, the liberal coalition sought to use private enforcement regimes, as a reform strategy, to gain opportunities and economic incentives for direct private enforcement. This strategy contemplated a private enforcement infrastructure doing what the administrative state would not. Private enforcement regimes would foster impact litigation by public interest groups, as well as enforcement by the for-profit bar, responding to market incentives. Together, nonprofit and for-profit lawyers would compose a private enforcement infrastructure that would be substantially insulated from interference by ideologically hostile presidents, as well as from bureaucratic capture or timidity. This strategy did not arise from abstract reflection. Rather, it was learned from unexpected developments in the area of civil rights.[21]

The emergence and spread of the litigation solution in the 1970s

The civil rights model

The liberal coalition's embrace of private lawsuits in the new social regulation of the 1970s was importantly shaped by the civil rights movement and its experience with private lawsuits, first as a strategy of law reform, and later as a tool of regulatory implementation and enforcement. For liberal public interest law activists of the 1970s, who shaped the legislation of that period, the civil rights movement had been a massively salient political experience, and for

[20] Id. at 54; Deborah L. Rhode, "Public Interest Law: The Movement at Midlife," *Stanford Law Review* 60 (2008): 2027-2084, 2055.
[21] Farhang, *The Litigation State*, ch. 5.

many it was the occasion for their first acts of political participation. The civil rights movement provided a model for the liberal public interest movement to seize rights *through litigation*.[22]

Moreover, during the legislative outpouring of the new social regulation of the 1970s, civil rights groups were important and influential actors in collaborative umbrella organizations that brought groups together from across the liberal public interest movement. There existed an organizational network though which public interest law groups working in various policy areas pooled information, learning from one another's experiences, and even conducing and disseminating research of interest to the wider public interest law community. The financial sustainability of the private enforcement infrastructure, and the role of fee awards in that calculus, was a matter of extensive attention and discussion within this network in the early to mid 1970s.[23] The story of the civil rights private enforcement infrastructure, discussed below, was thus an influential precedent for the liberal public interest movement in general.

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 1963-64, 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 authority to adjudicate and issue cease-and-desist orders, *with no private lawsuits*. This preference was reflected in the job discrimination bill initially introduced by liberal Democrats with support from civil rights groups. At the time, the Democratic party, while a majority in Congress, was

[22] Michael Schudson, *The Good Citizen: A History of American Civil Life* (Cambridge: Harvard University Press, 1999), chap. 6; Vogel, *Fluctuating Fortunes*, 100, 108; Stephen C. Yeazell, "*Brown*, the Civil Rights Movement, and the Silent Litigation Revolution," *Vanderbilt Law Review* 57 (2004): 1975-2003.
[23] Louise Trubek, "Public Interest Law: Facing the Problem of Maturity," *University of Arkansas at Little Rock Law Review* 33 (2011): 417-33, 418-19; Council for Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America* (Washington D.C.: Council on Public Interest Law, 1976); Burton, *Public Interest Law*.

sharply divided over civil rights, with its southern wing deeply 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.[24]

Wielding the powers of a pivotal voting bloc, conservative Republicans stripped the EEOC of the strong administrative powers initially proposed by civil rights liberals, and provided instead for private lawsuits for enforcement. 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, especially in the hands of the Kennedy/Johnson administrations, which they thought would commandeer a powerful agency and be overzealous enforcers in pursuit of an excessively liberal implementation program. Thus, conservative Republican support for Title VII was conditioned on a legislative deal that traded private lawsuits for public bureaucracy.[25]

Bitterly disappointed by defeat of the proposed New Deal-style job discrimination agency, civil rights groups and civil rights liberals in Congress insisted that the Republican-orchestrated private enforcement compromise contain an attorney fee shifting provision. They

[24] Farhang, *The Litigation State*, ch. 4.
[25] Id.

had seen the Reconstruction civil rights laws, which were centered on private enforcement litigation but lacked fee shifting, go largely unenforced, and they diagnosed the problem as importantly economic. Poor people whose civil rights were violated could not afford the costs of federal litigation. While non-profit groups could engage in strategic impact litigation—a role they had played with great success in the litigation campaign leading to *Brown*—they did not have the capacity to shoulder enforcement of the non-discrimination rights of the entire national workforce. And private for-profit attorneys were rarely willing to take civil rights cases on a contingency basis, without fee recovery, because available economic recoveries were modest and uncertain. Even with fee shifting, civil rights liberals were deeply skeptical that Title VII's private enforcement regime, foisted upon them by Republican, would secure vigorous enforcement by the for-profit bar. Thus, they regarded the substitution of private lawsuits with fee shifting for strong formal administrative powers as an evisceration of Title VII's enforcement regime.[26]

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, then 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 paper for declining liberal faith in administrative power were critical: concerns about administrative capture and timidity, greatly exacerbated by Nixon's influence upon the federal bureaucracy. Even under the Johnson administration, civil rights liberals regarded the federal bureaucracy's enforcement of civil rights as feeble, lacking both in political will and in

[26] Id.

commitment of resources. When Nixon came to power, open conflict and antagonism broke out between civil rights liberals and the administration across civil rights in employment, education, housing, and voting. Perceptions of the federal bureaucracy as lackluster were replaced by perceptions of the federal bureaucracy as purposefully obstructionist, and at times as the enemy.[27]

However, these factors 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 thought was certain to fail. Understanding 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, required one further development: evidence of its effectiveness 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

During the first half of the 1970s, attorney's fee awards contributed resources to existing civil rights groups that prosecuted lawsuits under the new civil rights laws, such as the NAACP Legal Defense Fund and the Lawyers' Committee for Civil Rights Under Law, adding to their enforcement capacity.[28] By 1973, the Lawyers' Committee was devoting half of its staff to its job discrimination litigation unit, which had become nearly self-supporting through attorney's fee awards.[29] By 1975, $550,000 of the LDF's operating budget of $3 million (over 18 percent)

[27] Id.
[28] Armand Derfner, "Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976," *Urban Law* 37 (2005): 653-61, 656; Karen O'Connor and Lee Epstein, "Bridging the Gap between Congress and the Supreme Court: Interest Groups and the Erosion of the American Rule Governing Award of Attorney's Fees," *Western Political Quarterly* 38 (1985): 238-49, 241.
[29] *Hearings on Legal Fees Before the Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee*, 93rd Cong., 1st sess., 1973 (hereinafter *1973 Hearings on Attorney's Fees*) (testimony of Armand Derfner), 1112-13.

came from attorney's fee awards.[30] The availability of fee awards also contributed to the formation of significant new civil rights enforcement groups, with foundation seed money, such as the Native American Rights Fund in 1970 and the Women's Law Fund in 1972, both still in existence today, on the expectation that they would be able to draw continuing operating funds from attorney's fees awards.[31] The Lawyers' Committee formed an Attorney's Fees Project in the early 1970s for the purpose of compiling and disseminating to civil rights litigators information on developing case law governing fee awards, seeking to aid attorneys in recovering fees and to move the law in a direction favorable to fee awards.[32]

Liberal public interest law groups fashioned on the model of these civil rights organizations grew rapidly in the late 1960 and early 1970s. A 1976 study identified 72 such groups in the U.S., spanning the areas of civil rights and civil liberties, environmental, consumer, employment, education, health care, and housing policy. Of the 72 groups identified, only 7 had been founded prior to 1968. When surveyed in 1975, a major share of these groups' work was litigating in the fields of the new social regulation. In the three years from 1972 to 1975, the revenue brought in by these groups in the form of attorney's fee awards from litigation grew by 239 percent. While attorney's fees were, on average, a small fraction of these groups' revenue, for some it was a primary source of funding to sustain litigation programs.[33]

In addition to increasing enforcement resources available to civil rights groups, the private enforcement approach in important parts of the CRA of 1964, and numerous civil rights laws to follow that model in the ensuing decade,[34] had the feedback effect of fostering the

[30] O'Connor and Epstein, "Bridging the Gap," 241.
[31] Robert B. McKay, *Nine for Equality under Law: Civil Rights Litigation. A Report to the Ford Foundation* (New York: Ford Foundation, 1977); O'Connor and Epstein, "Bridging the Gap," 240.
[32] Derfner, "Background and Origin," 656; Armand Defner, correspondence with the author, July 26, 2007.
[33] Handler, Ginsburg, and Snow, "The Public Interest Law Industry"; Vogel, *Fluctuating Fortunes*, 105.
[34] These were the Age Discrimination in Employment Act of 1967, the Fair Housing Act of 1968, the Emergency School Aid Act of 1972, the Rehabilitation Act of 1973, and the Voting Rights Act Amendments of 1975.

growth of a private for-profit bar to litigate civil rights claims. After a slow start in the second half of the 1960s during which time little private Title VII enforcement materialized, in the first half of the 1970s the number of job discrimination lawsuits multiplied tenfold, growing from an annual number of about 400 to 4000, where it roughly plateaued for the balance of the decade.[35] Title VII's fee shifting provision, according to one practitioner in the field, had "led to the development of a highly skilled group of specialist lawyers" to enforce it.[36] A 1977 report of the Ford Foundation on civil rights litigation observed that "[u]ntil at least the mid-1960s the NAACP Legal Defense and Education Fund stood almost alone" as a prosecutor of civil rights suits, but by the mid-1970s "fee-generating private practice has in many areas of the South enabled an indigenous bar, engaged in litigating cases of racial discrimination, to survive."[37] An April 1976 *Washington Post* article titled "Civil Rights Turns to Gold Lode for Southern Lawyers" declared: "The lure of legal fees, paid by the loser, is fertilizing a whole new practice in civil rights disputes. . . . Congress intended it that way in passing laws specifying that legal fees be awarded in such cases."[38]

Civil rights, again, was at the leading edge of a much broader pattern of growth. A 1976 study examined private for-profit firms that devoted at least 25 percent of their practice to "non-commercial" issue areas with the goal of "law reform"—importantly including enforcement of civil rights, environmental, consumer, employment, housing, education, and health care statutes. The study identified 55 such firms in the U.S., and of them only two had been in existence in 1966. In the eight years from 1967 to 1975, the number of such firms increased from 2 to 55 (increasing by a factor of 27.5). The collection of attorney's fees from defendants was an

[35] *Federal Court Cases: Integrated Data Base, 1970-2000*, maintained by ICPSR. The method for arriving at the estimates is explained in Farhang, *The Litigation State*, 271 n. 118.
[36] *1973 Hearings on Attorney's Fees*, 1113.
[37] McKay, *Nine for Equality*, 8, 13.
[38] Bill Crider, "Civil Rights Turns to Gold Lode for Southern Lawyers," *Washington Post*, April 4, 1976, 59.

important source of revenue to these firms.[39] Many more private firms litigated cases under the new social regulatory statues where such work amounted to less than 25 percent of the firms' work.

In 1977, Mary Derfner, an expert on fee shifting, observed that during the first half of the 1970s, fee shifting provisions in recent federal statutes cutting across civil rights in employment, education, and voting; environmental protection and public nuisance regulation; and consumer protection in banking and product safety; had conjured into existence a for-profit bar prepared to prosecute such federal statutory claims on behalf of plaintiffs. Because of congressionally provided fee shifting provisions, she explained, litigating such claims contributed to "a financially viable practice," and consequently "public interest laws firms burgeoned."[40] One public interest lawyer observed in 1975, "public interest lawyers by the 1980s may become what the personal injury lawyer of the 1920s, product liability lawyers of the 1930s, shareholder derivative lawyers of the 1950s, and plaintiff antitrust lawyers of the 1960s have become—lawyers who represented those who could not get counsel and who devise ways to make defendants pay."[41]

Figure 1 reflects the net number of fee shifts and damages enhancements (double, triple, or punitive) added to the body of federal statutory law from 1933 to 2004. The number of these litigation incentives is "net" in that it accounts for exits from federal statutory law due to repeal, expiration by the law's own terms, or being stricken by the Supreme Court. The predicted number rose sharply from the late 1960s to the late 1970s, somewhat plateaued until the mid-1990s, and then declined after the Republican party won Congress in 1995. The solid line in

[39] Handler, Ginsburg, and Snow, "The Public Interest Law Industry."
[40] Derfner, "One Giant Step," 443-45.
[41] Russell F. Settle and Burton A. Weisbrod, "Financing Public Interest Law: An Evaluation of Alternative Financing Arrangements," in *Public Interest Law*, 532-49, 536.

figure 2 represents the cumulative number of plaintiffs' fee shifts and damages enhancements in effect annually (accounting for provisions that exit the body federal statutes), reflecting the structural environment of private enforcement regimes in existence annually. The dashed line in figure 2 is the annual rate, per 100,000 population, of private federal statutory enforcement litigation (it is only possible to distinguish privately from governmentally filed actions beginning in 1942).[42] The strikingly close association between these two variables, and particularly the coincident sharp upward shift in both at the end of the 1960s, reinforces the plausibility of plaintiffs' fee shifts and damages enhancements as measures of the broader phenomena of private enforcement regimes, and of the efficacy of private enforcement regimes in mobilizing private litigants. Figure 2 also illustrates a ratchet effect on statutory litigation in the federal system produced by the combination of enactments over time and their durability through time.

It deserves emphasis (or reemphasis) here that this, overwhelmingly, is not the kind of private statutory litigation that political scientists have paid much attention to. Political scientists have shown a fairly keen interest in litigation filed or orchestrated by interests groups, and also in suits filed against government agencies challenging agency policymaking and seeking a court order enjoining or revising policy decisions of administrators.[43] Such suits are extremely important to U.S. public policy development and they deserve the scholarly attention that they have garnered. However, it is noteworthy that such suits comprise a very small fraction of total litigation brought under federal statutes. In a stratified random sample of 1,100 published federal

[42] The private statutory litigation figures reflect cases classified by the Administrative Office of the United States Courts, in the *Annual Report of the Administrative Office of the United States Courts*, Table C-2, as private / federal question / statutory cases, excluding prisoner petitions and deportation cases.

[43] See, e.g., Jeb Barnes and Mark C. Miller, "Governance as Dialogue," in *Making Policy, Making Law: An Interbranch Perspective*, ed. Mark C. Miller and Jeb Barnes (Washington, DC: Georgetown University Press, 2004); Kagan, *Adversarial Legalism*; Melnick, *Between the Lines*; Michael McCann, "Litigation and Legal Mobilization," in *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (New York: Oxford University Press, 2008), 522-40, 532-35 (summarizing the literature on interest group / law reform litigation).

court of appeals cases between 1960 and 2004, I find that in only 2 percent of the cases were interest groups either a plaintiff or counsel to a plaintiff, and in only 5 percent of the cases did a plaintiff seek a court order to enjoin or revise agency policy decisions.[44] The vast bulk of private litigation enforcing federal statutes (well over 90 percent) is neither a story of impact litigation by interest groups seeking to make policy, nor of suits challenging the policymaking prerogatives of national authorities. Rather, the private enforcement infrastructure is a radically decentralized story of private plaintiffs and their private attorneys pursuing their private interests, albeit with large public consequences.

The Reagan Years

Deregulation and Administrative Power

Ronald Reagan came to power on the wave of a regulatory reform movement. It was, of course, quite different from the one that emerged in the late 1960s and early 1970s—and in some sense a reaction to it. Whereas "fairness," "justice," and "equality" were central themes of the movement behind new social regulation, in the late 1970s and early 1980s the themes were "freedom," "efficiency," "accountability," and "economic growth."[45] The reforms of the new social regulation period were driven by civil rights, environmental, consumer, labor, and other liberal public interest groups. In the late 1970s and early 1980s, it was business, trade

[44] A random sample of 25 cases per year was coded. These small numbers of interest group litigation and challenges to agency policymaking appear in published court of appeals decisions, which surely well exceeds the representation of such cases in trial court filings, given that such cases are more likely to have high policy salience, and therefore more likely to lead to published court of appeals decisions. David S. Law, "Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit," *University of Cincinnati Law Review* 73 (2005) 817-66, 826; Erica Weisgerber, "Unpublished Opinions: A Convenient Means to an Unconstitutional End," *Georgetown Law Journal* 97 (2009): 621-55, 627.

[45] Thomas O. McGarity, "Regulatory Reform in the Reagan Era," *Maryland Law Review* 45 (1986): 253-273, 253-54.

associations, state and local officials, and newly emergent conservative public interest groups that were the primary catalysts behind the movement for reform through deregulation.[46]

Regulatory reform was high on the Reagan administration policy agenda. However, substantial continuing public support for the aspirational goals of the new social regulation, coupled with lack of cooperation from Congress (where Democrats controlled the House), effectively ruled out the possibility of retrenching the new social regulation via legislative amendment.[47] Instead, the administration pursued an alternative strategy of deregulation, within the confines of existing statutory mandates, through a combination of withdrawal and redirection of the machinery of administrative implementation. This strategy involved appointing leadership to the new social regulatory agencies that shared the administration's deregulatory preferences, and that exercised administrative discretion to steer the bureaucracy and regulatory policy in the direction desired by the president. Under Reagan-appointed leadership, the new social regulatory agencies—in such field as civil rights, environmental, consumer, and public health and safety—markedly reduced enforcement activity by numerous objective measures, such as the number of inspections, investigations, citations, civil penalties, administrative enforcement orders, and lawsuits prosecuted. They also embraced less interventionist regulatory standards through rulemaking, rule rescission, and other forms of regulatory policymaking. Further, the administration, acting through the Office of Management and Budget, sharply reduced agency budgets and, correspondingly, personnel. As one OMB briefing characterized it in 1981, "fewer regulators will necessarily result in fewer regulations and less harassment of the regulated."[48]

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[46] McGartiy, "Regulatory Reform in the Reagan Era"; Decker, *Lawyers for Reagan*; O'Conner and Epstein, "Rebalancing the Scales of Justice"; Vogel, *Fluctuating Fortunes*.
[47] Vogel, *Fluctuating Fortunes*, 260-65; Greve, "Why 'defunding the Left' Failed," 101-04.
[48] McGartiy, "Regulatory Reform in the Reagan Era" (quotation on page 262); Vogel, *Fluctuating Fortunes*, 246-51; Robert Litan and William Nordhaus, *Reforming Federal Regulation* (New Haven: Yale University Press, 1983), 119-32; Farhang, *The Litigation State*, ch. 6; Farhang, "Legislative-Executive Conflict and Private Statutory Litigation in the United States."

The forgoing deregulatory strategy by the Reagan administration has been much noted and well documented by scholars. What I wish to stress here is how private lawsuits to enforce federal statutes impeded Reagan's deregulatory program. The proliferation of opportunities and economic incentives for private litigation in the 1970s had been a self-conscious part of the liberal-Democratic coalition's regulatory reform strategy. They had learned from experience, following the Dirksen compromise, of the effectiveness of private civil rights enforcement with fee shifting, and had witnessed the emergence of a for-profit plaintiff's civil rights bar to carry out the enforcement function. Their broad regulatory reform agenda thus incorporated the private enforcement element, which was calculated to ensure a durable source of enforcement, and of advocacy for liberal regulatory positions before courts, in the face of apathetic or under-resourced bureaucracy, overtly hostile agency leadership, or both. The effect of this reform agenda—dramatically escalating private enforcement of federal statutes—had been growing for a decade when Reagan came to power.

Deregulation and the Problem of Private Enforcement Infrastructures

Upon assuming office, Reagan and those he appointed to lead the federal regulatory bureaucracy well understood the importance of the rise of private enforcement litigation in the American regulatory state. They saw it as a critical obstacle to their regulatory reform agenda. Their efforts to control it failed utterly, at least in the short run.

By the mid to late-1970s, conservative activists and leading business associations had developed considerable antipathy toward the new social regulation and its encroachment on business and governmental prerogative. Business began to claim, for example, that job discrimination litigation against employers, environmental litigation against developers, and consumer litigation against product manufacturers, was having a substantial adverse impact upon

business interests. Private rights of action, coupled with fee shifting provisions that forced business and government to pay the attorney's fees of the plaintiffs' lawyers who prosecuted invasive, disruptive, and costly lawsuits against them, were a particular target of criticism. They also believed that liberal public interest groups used litigation and courts to shape the substantive meaning of the new social regulatory statutes to their liking, thereby making regulatory policy which was injurious to the interests of business and government.[49]

In the mid to late 1970s, conservative activists and business associations mobilized and collaborated in forming a number of conservative public interest law groups—including the Pacific Legal Foundation and the National Legal Center for the Public Interest—to pursue an agenda, in part, of limiting the new social regulation.[50] Close associates of Reagan, including high ranking members of his California gubernatorial administration that would follow him to the White House, were instrumental in founding this movement.[51] Indeed, litigation by liberal public interest groups against the Reagan gubernatorial administration, obstructing its pursuit of conservative public policies which Reagan regarded as critical, provoked members of his administration to found the first conservative public interest law group in Sacramento—the Pacific Legal Foundation—which then served as a model for many others.[52] Reagan himself was openly hostile to liberal public interest lawyers, characterizing them in the early to mid 1970s as "a bunch of ideological ambulance chasers doing their own thing at the expense of the poor who

[49] Michael S. Greve, "Why 'defunding the Left' Failed," *Public Interest* 89 (1987): 91–106, 91; Jefferson Decker, *Lawyers for Reagan: The Conservative Litigation Movement and American Government, 1971-87*, Ph.D Dissertation, Columbia University, 2009, 12-149; Karen O'Conner and Lee Epstein, "Rebalancing the Scales of Justice: Assessment of Public Interest Law," *Harvard Journal of Law and Public Policy* 7 (1984): 483-505; Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2009), 60-66.
[50] Id.
[51] Decker, *Lawyers for Reagan*, 3-5; O'Conner and Epstein, "Rebalancing the Scales of Justice," 495; Teles, *The Rise of the Conservative Legal Movement*, 60-61.
[52] Ronald A.Zumbrun, "Life, Liberty, and Property Rights," in *Bringing Justice to the People: The Story of the Freedom-Based Public Interest Law Movement*, ed. Lee Edwards (Washington, DC: Heritage Books, 2004), p.42-43; Decker, *Lawyers for Reagan*, 3-5; Teles, *The Rise of the Conservative Legal Movement*, 62.

actually need help,"[53] and as "working for left-wing special interest groups at the expense of the public." [54] According to Ernest Hueter, long-time president of the National Legal Center for the Public Interest, conservatives and business interests turned to litigation and courts, through the vehicle of public interest law groups, to "fight fire with fire."[55]

Interestingly, there were strong elements within the conservative public interest law movement in the late 1970s and early 1980s which argued that such groups should *not* petition for attorney's fees when they were entitled to do so under statutes, on the theory that groups truly working in the public interest should be funded by voluntary contributions from the public. In fact, these conservative public interest groups, which enjoyed considerable funding from business and conservative foundations, were far less dependent upon collection of legal fees to meet their operating expenses than liberal groups.[56] Moreover, it appears that this anti-fee shifting position would allow the conservative public interest law movement to use courts to combat the new social regulation, while at the same time opposing fee shifting provisions, which disproportionately served liberal groups and incentivized escalating private enforcement activity.[57]

Upon assuming office, the Reagan administration was acutely aware that private enforcement of federal regulatory law had surged powerfully since the late 1960s, and that the private enforcement infrastructure presented an important obstacle to its deregulatory agenda. Reagan had appointed numerous leaders and activists from the emergent conservative public interest law movement to important positions in the federal bureaucracy, ranging across

[53] Greve, "Why 'defunding the Left' Failed," 91; Ronald Ostrow, "Legal Services Agency Battles Reagan Attempt to Cut Off Its Funding," *Los Angeles Times*, April 12, 1981, B1.
[54] Decker, *Lawyers for Reagan*, 74.
[55] O'Conner and Epstein, "Rebalancing the Scales of Justice," 495 n. 74.
[56] Id. at 502-03, 504-05 n. 130.
[57] Decker, *Lawyers for Reagan*, 174-88.

Counselor to the President, the White House Office of Policy Development, the Office of Management and Budget, the Equal Employment Opportunity Commission, and the Departments of Interior, Energy, and Justice.[58] The conservative public interest law movement had been born in opposition to the steep growth in litigation activity undertaken by both the for-profit and nonprofit plaintiffs bar under the new social regulatory statutes. They had watched, from Nixon's assumption of office in 1969 to Regan's in 1981, as the population adjusted rate of private enforcement lawsuits under federal statutes increased by 352 percent.[59]

According to Michael S. Greve, a conservative legal activist and founder of the Center for Individual Rights, Reagan administration leadership saw private rights of action with attorney's fee awards as an obstacle to deregulation. Proposals to curtail fee awards under the new social regulatory statutes—along with a constellation of other efforts to reduce sources of funding for liberal public interest groups—were pursued by conservative activists as part of a strategy to "defund the left."[60] Greve explains:

> When the Reagan Administration took office in 1981, one of the priorities urged upon it was to cut federal funding for liberal and leftist advocacy groups. Well known conservative activists openly advocated a strategy of "defunding the Left." This was necessary, they argued, for the success of the conservative social and deregulatory agenda. The incoming administration shared this assessment. President Reagan … sensed that the liberal public interest movement was a primary obstacle to his campaign promises of "regulatory relief."[61]

Private enforcement litigation was a "primary obstacle" to Reagan's deregulatory agenda because his principle strategy for effectuating the agenda was to demobilize, to a significant measure, the administrative regulatory enforcement apparatus, with little prospect of actually being able to repeal or modify legislative mandates. The deregulatory reform value of

[58] Decker, *Lawyers for Reagan*, 5, 160, 251.
[59] See figure 2.
[60] Michael S. Greve, "Why 'defunding the Left' Failed," *Public Interest* 89 (1987): 91–106.
[61] Greve, "Why 'defunding the Left' Failed," 91.

withdrawing administrative enforcement is weakened if extensive private enforcement continues, and the strategy will be severely undercut if private enforcement actually expands to fill gaps left by withdrawal of administrative machinery. Important members of the Regan bureaucracy were in full agreement with Greve's characterization. Based upon archival research, Jefferson Decker finds that some were deeply concerned that the private rights of action coupled with fee shifting in the new social regulatory statutes were producing "a state-sponsored, private governing apparatus" that was *beyond the control of the elected branches*.[62]

Moreover, advocates of retrenching private enforcement recognized that the proliferation of fee shifting provisions in the 1970s had produced a private enforcement infrastructure not just among liberal public interest groups, but, more significantly, among the for-profit American bar. Greve observes that when the Reagan administration sought to curtail fee awards, "a sizeable portion of attorneys' fees is collected not by public interest groups but by big, for-profit law firms."[63] Michael Horowtiz, Reagan's general counsel of Office of Management and Budget, and a leading administration proponent of retrenching the private enforcement infrastructure, explained in a 1983 memo to the Cabinet Counsel on Legal Policy, when advocating for a proposal to curtail attorney's fee awards (discussed below): "Not only the 'public interest' movement but, *more alarmingly*, the entire legal profession is becoming increasingly dependent on fees generated by an open-ended 'private Attorney General' rule."[64] He also complained that there had emerged private firms for which fee recovery was central to their business model.[65]

Horowitz was surely right, from the standpoint of a deregulatory agenda, that the statutory enforcement activity of the for-profit bar, mobilized by fee awards, was more alarming

[62] Decker, *Lawyers for Reagan*, 181.
[63] Greve, "Why 'defunding the Left' Failed," 103.
[64] Decker, *Lawyers for Reagan*, 181-82.
[65] Id. at 181.

than the activity of the non-profit bar. As noted above, in a large sample of federal court cases decided between 1960 and 2000, in only 2 percent were interest groups either a plaintiff or a plaintiff's counsel, and in 98 percent non-interest group plaintiffs were represented by for-profit counsel. To the extent that the "regulatory relief" sought by Reagan involved, in part, less aggressive and stringent enforcement of existing statutory mandates, and the private enforcement infrastructure posed a problem to presidential control, then the problem was emanating overwhelmingly from the for-profit bar responding to market incentives.

Attacking the Private Enforcement Infrastructure

At the beginning of Reagan's first term, the Office of Management and Budget, with David Stockman as Director and Michael Horowitz as general counsel, drafted a proposed administration bill significantly limiting attorney's fee awards in suits brought against the federal government. Stockman shared Reagan's and Horowitz's antipathy for liberal public interest law groups. At the time the bill was developed, Stockman commented publicly that consumer advocacy organizations had "created this whole facade of consumer protection in order to seize power in our society. I think part of the mission of this administration is to unmask and discredit that false ideology."[66] Those within the administration that drafted and advocated for the proposed bill believed that the extensive fee shifting legislation since the Civil Rights Act of 1964 was a critical part of the incentive structure generating excessive litigation, and the goal of the fee-capping proposal, according to Jefferson Decker, was to "drive a stake through that incentive structure."[67] Titled "The Limitation of Legal Fees Awards Act of 1981," the proposed bill would amend over 100 federal statutes allowing recovery of attorney's fees in successful suits against the federal government, ranging across suits under consumer, civil rights,

[66] "Ambulance Chasers?," *Wall Street Journal*, February 26, 1981, 26.
[67] Decker, *Lawyers for Reagan*, 186.

environmental, public health and safety, and freedom of information statutes, among many others. Under the administration's proposal:

- No fee awards would be allowed for public interest organizations with staff attorneys, legal services organizations receiving federal funds, or for-profit attorneys representing plaintiffs on a *pro bono* basis;
- With respect to private attorneys representing paying clients, fee awards would be capped at the lower of "actual direct costs" or approximately 53 dollars per hour (a sum drastically below what courts had been awarding);
- Where a money judgment was obtained, the fee award would be reduced by 25 percent of the money judgment;
- Fee awards could not be too disproportionate to the actual damages suffered; and
- Fee awards would apply only with respect to issues on which the plaintiff actually prevailed, and which were necessary for resolving the dispute.[68]

While this proposal's restrictions on fee awards were arguably quite extreme as applied to suits against the federal government, the proposal is also noteworthy for its modesty—it did not attempt to restrict fees in suits against states or the private (business) sector. It is clear that some key actors in the Reagan administration behind pushing the private enforcement issue onto the agenda wanted a more expansive retrenchment of the private enforcement infrastructure, including as applied to states and the private sector.[69] If the proposal above had passed into law easily, it likely would have been the thin end of the retrenchment wedge. Advocates of retrenching private enforcement encountered resistance from a number of powerful quarters within the administration and important constituents, and their more ambitious aspirations to retrench private enforcement were defeated. As discussed below, militating in favor moderating the attack on the private enforcement infrastructure were (1) concerns that the administration would be accused of trying to take away popular rights, (2) perceptions that Congress was

[68] Robert Percival and Geoffrey Miller, "The Role of Attorney Fee Shifting in Public Interest Litigation," *Law and Contemporary Problems* 47 (1984): 233-47, 242; Fred Barbash, "… And Uncle Sam Wants to Save on His Legal Fees," *Washington Post*, February 10, 1982, A25; Mary Thornton, "Plaintiffs' Legal Fess Attacked by OMB," *Washington Post*, August 12, 1982, A21.
[69] Greve, "Why 'defunding the Left' Failed"; Decker, *Lawyers for Reagan*, 179-88.

unlikely to pass legislation significantly restricting fee awards in any event, and (3) opposition from some elements of Republicans' business constituency

Reagan Attorney General William French Smith thought that seeking too much on the private enforcement issue would be neither wise nor expedient from the standpoint of practical politics. In the Justice Department's formal position statement on the issue, he observed that striking too severely at attorney's fee awards risked "excessive controversy." In the public relations battle, it would be hard to distinguish an administration attack on attorney's fees from an attack on underling substantive rights, and it is difficult to take away existing rights in the U.S. "Attorney's fee cap proposals," wrote Attorney General Smith, "are thought by public interest litigating organizations to strike at a vital source of their financial support. Accordingly, these groups have characterized fee cap proposals as 'anti-civil rights' or 'anti-environmental' proposals."[70] Opponents of such proposals, administration supporters lamented, would be able to beat them back with "the rhetoric of rights and justice."[71]

Justice Department leadership also seriously doubted that Congress (where Democrats still controlled the House) would actually pass a statute curtailing fee awards. Some conservatives recognized, with disappointment, that support within Congress for civil rights, environmental, and consumer groups was relatively broad, including many moderate Republicans, either because of their sincere preferences or because they feared being cast as opposed to a "good cause." In the face of this political environment in Congress, some in the Reagan administration leadership believed that the risk of being painted anti-civil rights, anti-

[70] Decker, *Lawyers for Reagan*, 184-85.
[71] Greve, "Why 'defunding the Left' Failed," 104.

environmental, and anti-consumer had little chance of yielding the payoff of reducing private enforcement, which would require actually getting a law passed.[72]

Add to this that, in an ironic turn of events, some members of the business community opposed any proposal that would limit their ability to recover attorney's fees against the federal government. With strong Republican and business support, in 1980 Congress had enacted the Equal Access to Justice Act, which provided for attorney's fee awards for small businesses, individuals, and organizations that prevail against the federal government in administrative or judicial proceedings in which they challenge the legitimacy of federal regulatory actions. The law, passed as part of a small business assistance statute, was primarily intended to aid small businesses in challenging excessive and unreasonable regulation by the federal government, including prosecutions of small businesses accused of violating regulatory laws. In the absence of fee shifting, it was argued, small businesses often had limited capacity or incentive to resist the abuse of federal regulatory power.[73]

The House and Senate Reports stated that under the Equal Access to Justice Act "fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority."[74] Arguing in favor of the bill in the Senate, Republican Charles Grassley of Iowa, one of the bill's primary sponsors, explained that "the purpose of the Equal Access to Justice Act is to make Government bureaucrats think long and hard before they start an enforcement action."[75] The act was opposed by the Carter administration and leading liberal

[72] Greve, "Why 'defunding the Left' Failed," 101-02; Decker, *Lawyers for Reagan*, 184.
[73] Susan Gluck Mezey and Susan Olson, "Fee Shifting and Public Policy: The Equal Access to Justice Act," *Judicature* 77 (1993): 13-20; Gregory C. Sisk, "The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct," *Louisiana Law Review* 55 (1994): 217-360, 220-29; Ar Lewe S. Ragozin, "The Waiver of Immunity in the Equal Access to Justice Act; Clarifying Opaque Language," *Washington University Law Review* 61 (1986) 217-244, 219-21.
[74] House Report No. 1418, 96th Cong., 2nd Sess., 1980, 12; Senate Report No. 253, 96th Cong., 1st Sess., 1979, 7.
[75] Sisk, "The Essentials of the Equal Access to Justice Act," 280 n. 396.

public interest law groups, which argued that it would thwart effective government regulation of business, chilling federal prosecutions under environmental, consumer, labor, and civil rights statutes.[76]

The Equal Access to Justice Act was a rare marriage of the litigant incentivizing strategy of the new social regulation, and the emergent deregulatory ethos at the start of the 1980s. What was primarily being incentivized was resistance, through litigation, to overregulation. When the Regan administration moved to retrench private enforcement of regulatory law by attacking fee shifting against the federal government, small business groups made clear that they would not give up their new weapon quietly, and that any effort to take it away would be regarded as "break[ing] faith with the small-business community," as one business association leader put it in an interview with the *Wall Street Journal*.[77] The law was initially enacted as a four year experiment, which expired of its own terms in 1984. By that time, liberal public interest groups had concluded that it served their interests as well, and they joined in a unique alliance with small business to advocate for its reenactment as a permanent law. Some members of the administration marshaled data to show that in fact liberal public interest groups secured attorney's fees under the act far more often than small business, arguing that reenactment should be opposed. Reagan vetoed the bill when passed by Congress in 1984, but in the face of mounting criticism from small business, signed a slightly modified version in 1985.[78]

Even the skeptics within the Reagan administration of retrenching the private enforcement infrastructure underestimated the difficulty of the task, notwithstanding the administration's choice to restrict its opening gambit to a bill addressing only fee recovery

[76] Mezey and Olson, "Fee Shifting and Public Policy," 15.
[77] "Small-Business Groups Protest Reagan's Veto Of Bill for Legal Fees," *Wall Street Journal*, November 12, 1984, 3.
[78] Mezey and Olson, "Fee Shifting and Public Policy," 15; Decker, *Lawyers for Reagan*, 181.

against the federal government. While it is clear that the administration's motivations were primarily deregulatory, it presented the bill as being aimed at conserving federal dollars and mitigating the exploding federal court caseload. [79] Still, the bill provoked fierce opposition, with critics declaring in national media that it would "cut the legs off private enforcement." While liberal public interest groups had been the primary architects of the private enforcement infrastructure, by the time Reagan sought to retrench it, its constituency had broadened to include the for-profit plaintiffs bar and small business. There were, consequently, multiple constituencies with significant ties in Congress that moved to kill retrenchment of the private enforcement infrastructure, and they succeeded handily.[80]

Reagan's initial 1981 proposal failed to find a congressional sponsor even within the president's own party. The administration pursued a modified version of the bill, moderating various aspects of it, while also extending coverage to include suits against states. In 1984, hearings were held on this bill in a Senate subcommittee chaired by Orrin Hatch (R, UT), who championed the bill as a much needed corrective to the proliferation of statutory fee shifting rules in the 1970s, creating "exorbitant windfalls for lawyers," leading to an "explosion of litigation" which had "clogged the courts."[81] Hatch had himself introduced a bill to limit attorney's fees in civil rights cases in 1982.[82] However, despite Hatch's alignment with legal conservatives in the administration that sought to retrench the private enforcement infrastructure, he was unable to muster support in his own committee, where the bill died.

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[79] Percival and Miller, "The Role of Attorney Fee Shifting in Public Interest Litigation," 242 n. 56.
[80] Barbash, "… And Uncle Sam Wants to Save on His Legal Fees"; Percival and Miller, "The Role of Attorney Fee Shifting in Public Interest Litigation," 242 n. 56; Greve, "Why 'defunding the Left' Failed," 100-04.
[81] *Hearings on The Legal Fee Equity Act (S. 2802) Before the Subcommittee on the Constitution of the Senate Judiciary Committee*, 98th Cong., 2nd sess., 1984, 1-3.
[82] *Hearings on Attorney's Fee Awards Before the Subcommittee on the Constitution of the Senate Judiciary Committee*, 97th Cong., 1st sess., 1982.

Autopilot enforcement

The durability of the private enforcement infrastructure had real consequences. A deregulatory administration could not control a critical source of regulatory enforcement. To the contrary, during the period that the Reagan administration was considering strategies to reduce private enforcement of federal statutes, such enforcement activity grew by leaps and bounds. After having been roughly flat during the Carter presidency (it actually declined slightly), during Reagan's first term the rate of private lawsuits enforcing federal statutes *shot up by 63 percent*.[83] The significance of this growth as an obstacle to Reagan's deregulatory strategy is reinforced by considering specific policy areas within the ambit of his deregulatory agenda. The number of private statutory suits grew by 64 percent under labor statutes, 68 percent under civil rights statutes, 82 percent under environmental statutes, and 90 percent under securities and exchange statues.[84]

While the overwhelming majority of the private statutory lawsuits during the Reagan years were prosecuted by for-profit counsel, it bears emphasis that liberal non-profit litigation groups also thrived during the Reagan years. Whereas the revenue of such groups had increased by 23 percent during the Carter presidency, it doubled during Reagan's first three years in office, apparently owing in part to the galvanizing effects of Reagan's deregulatory program on financial contributions by his political opponents.[85] During the Reagan years the targets of federal regulation were more likely than ever to be hauled into court as defendants

[83] See figure 2.
[84] *Annual Report of the Administrative Office of the United States Courts*, table C-2, 1980-1984. For a discussion of how growing private lawsuits ran counter to Reagan's efforts to reduced administrative job discrimination enforcement, see Farhang, *The Litigation State*, ch. 6. For a discussion of how growing private lawsuits ran counter to Reagan's efforts to reduced administrative environmental enforcement, see Michael Greve, "Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program," in *Environmental Politics: Public Costs, Private Rewards*, ed. Michael Greve and Fred Smith, Jr. (New York: Praeger, 1992), and Farhang, "Legislative-Executive Conflict and Private Statutory Litigation."
[85] Greve, "Why 'defunding the Left' Failed," 99.

(overwhelmingly by for-profit plaintiffs counsel), and liberal public interest groups continued their work seeking to shape regulatory policy through litigation.

Conclusion

The litigation reform strategy developed by the liberal coalition in the late 1960s and early 1970s, in the sphere of federal regulation, sought litigation to perform functions that it concluded the administrative state either could not or would not perform. The movement was largely successful, and its success had a profound and enduring influence on American government. Its model of regulatory implementation continued to appeal to legislative coalitions, particularly in an era of Democratic Congresses facing Republican presidents, as the parties drifted further and further apart. There is, of course, great disagreement among analysts of American government and regulation about whether the impact was positive or negative.

The turn to private enforcement regimes, as an alternative to bureaucracy, by those disappointed in the administrative state in the late 1960s and early 1970s, viewed alongside efforts in the early 1980s to retrench private enforcement as part of a broader deregulatory program that included diminishing the position of the federal bureaucracy in the American economy and society, highlights an important point. Private lawsuits are an integral part of the way that the government governs in the U.S., for better or worse. Debates over litigation reform are debates about the proper scope and reach of the state in the economy and society, and about which policy tools, given feasible alternatives, are most desirable and effective for accomplishing regulatory goals.

Many political scientists have observed that the status quo is hard to change in the American separation of powers system. As Terry Moe puts it, in this lawmaking system

"Whatever is formalized will tend to endure."[86] This is probably even more true regarding private enforcement regimes than many other types of formal law. Private enforcement regimes are attached to rights; existing rights are hard to take away in the U.S.; and those who (visibly) seek to reduce incentives to enforce them will likely be accused of attacking fundamental rights. The longer that rights exist, the more deeply rooted will be the interests that form around them. And the number of potential opponents to retrenchment grew as Republicans began not only to acquiesce in the liberal coalition's private enforcement regimes, but also to deploy private enforcement regimes for Republican constituencies—the Equal Access to Justice Act was not an isolated event in this regard.[87]

Some would argue that, in fact, retrenchment of private enforcement has been incrementally accomplished by conservative Supreme Court justices, and by acts of Congress under Republican control from 1995 to 2005.[88] Starting around the mid 1980s, the Rehnquist court issued a series of decisions which, when viewed together, appear clearly calculated to curtail private enforcement. These decisions concern limitations on attorney's fee and damages awards; allowing contractual mandatory arbitration agreements; the qualified immunity defense; and interpretation of rules of civil procedure which arguably restrict access to courts. The legislative contributions to retrenchment in the sphere of federal regulation primarily concerned

[86] Terry M. Moe, "Political Institutions: The Neglected Side of the Story," *Journal of Law, Economics, and Organization* 6 (1990): 213-53, 240.

[87] For example, in the Taft-Hartley Act of 1947 (Public Law No. 80-101) Republicans gave companies a private right of action with economic damages against unions engaged in labor actions proscribed by the act; in the Cuban Liberty and Democratic Solidarity Act of 1996 (Public Law No. 104-114), they gave United States nationals whose property was confiscated by the Cuban government during or following the Cuban revolution a private right of action, with attorney's fees for successful plaintiffs, against "traffickers" in such property; and in the "Partial-Birth Abortion" Ban Act of 2003 (Public Law No. 108-105), they created a private right of action with treble damages, and damages for emotional pain and suffering, for fathers (if married to the woman on whom the procedure is performed), and for "maternal grandparents of the fetus" if the woman is a minor, against a doctor who performs an abortion in violation of the act.

[88] Sarah Staszak, "Institutions, Rulemaking, and the Politics of Judicial Retrenchment," *Studies in American Political Development* 24 (2010): 168-89; Andrew Siegel, "The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence," *Texas Law Review* 84 (2006): 1097-1202.

securities litigation (under the Securities Litigation Reform Act of 1995) and prisoner litigation (under the Prison Litigation Reform Act of 1996). It also bears noting, regarding legislative reform, that from 1995 to 2004 Republicans in Congress, while calling for retrenchment of the private enforcement infrastructure, continued to add more incentives for private lawsuits enforcing federal statutes, though certainly at a lesser rate than Democrats had done for the previous two decades (see figure 1). None of the new social regulatory statutes were amended to reduce opportunities or incentives for private enforcement.

I don't wish to contest the importance of anti-litigation decisions from the Supreme Court, nor of any of the few legislative enactments aimed at reducing private enforcement in federal regulation. However, such decisions and laws, thus far, nibble around the edges of the Litigation State. They are important battles at the margins of the Litigation State. The parties regard them as highly consequential precisely because of the centrality of the Litigation State to American politics and public policy. Viewed from the level of aggregate private enforcement activity (per figure 2), despite the conservative Court's anti-litigation posture beginning in the mid 1980s, and calls for retrenchment of private enforcement from congressional majorities from 1995 to 2005, their day of litigation reform has yet to arrive.

Figure 1

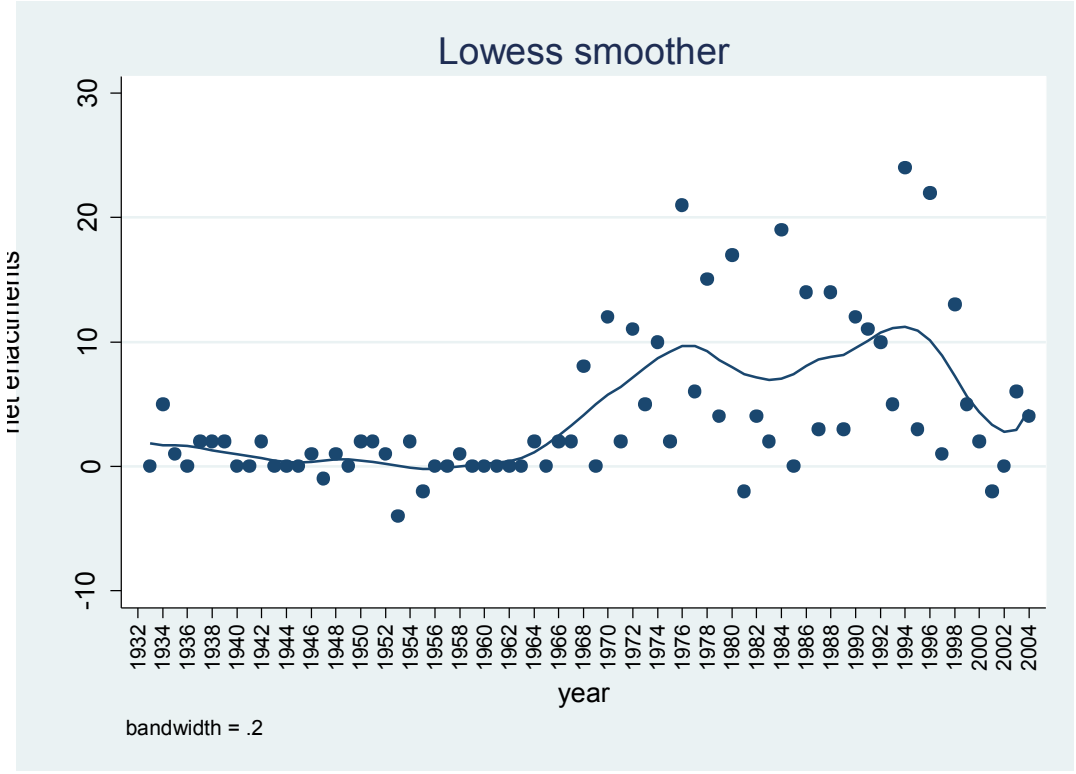

Figure 2