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A New (Republican) Litigation State?

Stephen B. Burbank

Sean Farhang

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Stephen B. Burbank & Sean Farhang*

It is a commonplace in American politics that Democrats are far more likely than Republicans to favor access to courts to enforce individual rights with lawsuits. In this Article we show that conventional wisdom, long true, no longer reflects party agendas in Congress. We report the results of an empirical examination of bills containing private rights of action with proplaintiff fee-shifting provisions that were introduced in Congress from 1989 through 2018. The last eight years of our data document escalating Republican Party support for proposals to create individual rights enforceable by private lawsuits, mobilized with attorney's fee awards. By 2015–18, there was rough parity in levels of support for such bills by Democratic and Republican members of Congress.

This transformation was driven substantially by growing Republican support for private enforcement in bills that were anti-abortion, immigrant, and taxes, and pro-gun and religion. We demonstrate that this surge in Republican support for private lawsuits to implement rights was led by the conservative wing of the Republican party, fueled in part by an apparent belief during the Obama years that the President could not be relied upon to implement their anti-abortion, immigrant, and taxes, and pro-gun and religion agenda. We conclude that the contemporary Republican party's position on civil lawsuits has become bifurcated, reflecting the distinctive preferences of core elements of their coalition. They are the party far more likely to oppose private enforcement when deployed to enforce business regulation, while embracing it when deployed in the service of rights for their social conservative base.

* Burbank is David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School, and Farhang is Elizabeth Josselyn Boalt Professor of Law, and Professor of Political Science and Public Policy at the University of California, Berkeley. Mordechai Josefovits, Penn Law Class of 2020, provided excellent research assistance.

INTRODUCTION

Conventional wisdom in American politics and law is that, as between the two political parties, it is Democrats who support polices that facilitate "access to courts" by individuals. This conventional wisdom links the plaintiffs' bar to the Democratic Party and business opponents of civil legal liability to the Republican Party. Professor Yeazell has described "divergent attitudes toward civil litigation in the United States" as follows:

> Some view civil litigation as the vindicator of rights, a way of speaking truth to power, and a guarantor of democratic values and freedoms. Others see civil litigation as a deadweight loss, a stick in the wheels of commerce, and a source of national shame.
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> In recent decades these two views have become attached to the major political parties: Republicans deploring litigation, Democrats defending it.[1]

Although the connections of the plaintiffs' personal injury bar to the Democratic Party have received the most extensive attention,[2] scholars have

1. Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1754 (2013).

2. *See, e.g.*, Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 438–39 (2015) ("Trial lawyers provide a significant portion of the funds relied on by Democratic candidates in both state and federal elections. Trial lawyers, in turn, rely on jury awards to generate the income they channel to Democratic candidates."); Damian Stutz, Note, *Non-Economic-Damage Award Caps in Wisconsin: Why* Ferdon *Was (Almost) Right and the Law Is Wrong*, 2009 WIS. L. REV. 105, 106–07 (2009) ("This attempt to reform the tort system on a national level is almost perfectly split along political party lines, with trial lawyers lobbying Democrats to oppose reforms, and insurance companies and doctors encouraging Republicans to argue the opposite."); Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1418, 1423 (2001) (observing that in Ohio Supreme Court elections, "Democratic candidates were supported by trial lawyers and . . . Republicans by business interests," and that trial lawyers had "develop[ed] long-term working relationships with . . . the Democratic Party"); Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. COLL. L. 849, 866 (2001) ("Since

pointed to the apparent influence of plaintiffs' lawyers on Democrats more broadly, fostering litigation across such policy areas as civil rights, consumer protection, the environment, securities, health care, and financial products regulation;[3] shaping rules of civil procedure, such as those governing class actions and summary judgment, so as to strengthen plaintiffs' position in litigation;[4] and discouraging alternative dispute resolution mechanisms that would divert disputes away from litigation.[5] In an analysis of the parties' respective positions on federal securities regulation, Professor Romano observed that "Republicans' general support for and Democrats' opposition to litigation reform that restricted liability . . . paralleled the perspective of key party constituencies, the business community for Republicans and the plaintiffs' bar for the Democrats."[6] We refer to these characterizations by Yeazell and Romano as the "party alignment hypothesis."

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at least the early 1990s, Alabama . . . has seen constant hot contests between Democratic candidates supported by plaintiffs' trial lawyers and Republican candidates supported by business interests."); *id.* at 881 ("For awhile, Texas Supreme Court elections were a battleground between liberal Democrats supported largely by plaintiffs' trial lawyers and Republicans and conservative Democrats supported by business interests.").

3. *See, e.g.*, Dave Ebersole, Note, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 123, 146 (2011); Randolph I. Gordon & Brook Assefa, *A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate over America's Health Care*, 4 SEATTLE J. FOR SOC. JUST. 693, 700 (2006) ("[T]he success of the plaintiffs' bar in cases advancing individual interests against corporate and governmental power and the resultant alignment of the plaintiffs' bar with the Democratic Party, led inexorably to political attacks upon trial lawyers representing plaintiffs."); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005); Stephen C. Yeazell, Brown*, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 2002–03 (2004) ("As a group, plaintiffs' lawyers currently ally themselves politically with the Democratic Party. And currently, the Republican Party has, as an important tenet, the proposition that much, if not all, civil litigation—and certainly all brought by the malevolent group known as 'the trial lawyers'—is a social ill and drag on the economy."); Robin Jones, Comment, *Searching for Solutions to the Problems Caused by the "Elephantine Mass" of Asbestos Litigation*, 14 TUL. ENV'T L.J. 549, 549–50 (2001).

4. *See* Jeffrey W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes*, 83 WASH. U. L.Q. 1127 (2005); Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455 (1997).

5. *See* Mark E. Steiner, *Senior Discount: Arbitration of Nursing Home Disputes*, 21 J. CONSUMER & COM. L. 2 (2017); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 661 (1999) ("Justices whose election campaigns are funded by plaintiffs' lawyers oppose arbitration, whereas justices whose campaigns are funded by business favor arbitration."); *id.* at 662 ("The entire body of arbitration law seems to be shaped by the campaign finance battle between plaintiffs' lawyers and business."); *id.* at 684 ("Justices whose campaigns are funded by plaintiffs' lawyers are all Democrats and oppose arbitration, while justices whose campaigns are funded by business are nearly all Republicans and favor arbitration."). Professor Yeazell reminds us, however, that, "for a brief moment," President Carter bemoaned the amount of litigation and favored ADR. *See* Yeazell, *supra* note 1, at 1774–75. "Nothing happened, and no subsequent Democrat has taken up that banner." *Id.*

6. Romano, *supra* note 3, at 1561; *see also* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 16 (2015) ("[T]he two major political parties in the United States have aligned themselves with the rival camps—Democrats with the plaintiff's bar; Republicans with the business community—and each is heavily financed by its chosen ally.").

In this Article we show that conventional wisdom does not accurately reflect contemporary reality. We report the results of an empirical examination of a random sample of bills containing private rights of action and attorney's fee provisions that were introduced in Congress from 1989 through 2018. We show that, as applied to private enforcement of federal law, the conventional wisdom captured by the quotations from Professors Yeazell and Romano was reasonably accurate for over about the first two decades of our data. Democratic support for statutory provisions facilitating access to court substantially exceeded Republican support.

However, over the last eight years of our data, we document escalating Republican Party support for private lawsuits to implement rights. This transformation was driven substantially by growing Republican support for private enforcement in bills that were anti-abortion, immigrant, and taxes, and pro-gun and religion. By the end of our data, Republicans were as likely as Democrats to sponsor or cosponsor statutory provisions intended to stimulate private lawsuits. We also show that this surge in Republican support for private lawsuits to implement rights was led by the conservative wing of the Republican Party, fueled in part by an apparent belief during the Obama years that the President could not be relied upon to implement their anti-abortion, immigrant, and taxes, and pro-gun and religion agenda.

In Part I we provide an account of recent scholarship on private enforcement that renders implausible any strong version of the party alignment hypothesis, and we discuss the origins of this project. Before turning to the presentation and analysis of our data, we seek to frame this project more clearly in two ways. In Part II we specify why and how the phenomena that we interrogate are different from other litigation phenomena involving Republican constituencies or interests that are the subjects of recent scholarship, the focus of which is impact litigation by interest groups seeking constitutional change. We then discuss in Part III, as context for our empirical contributions, work illuminating how constituencies or interests associated with the Republican Party perceived the normative legitimacy and practical utility of litigation and courts as sites to pursue their agendas, and the specific institutional choices they made to leverage them.

I. PRIVATE ENFORCEMENT IN CONTEXT

It is a legislative choice to rely on a private right of action in statutory implementation. When Congress does choose to rely on private enforcement, it faces a series of additional statutory design choices that together have profound consequences for access to court. These choices include allocation of responsibilities for attorney's fees, who has standing to sue, what remedies will be available, and whether a judge or jury will make factual determinations and assess

damages, among many others. We refer to this system of rules as a statute's *private enforcement regime*.[7]

Among the incentives that are available to encourage private enforcement of regulatory laws, especially important are statutory fee-shifting rules that authorize plaintiffs to recover attorney's fees if they prevail. In light of the high costs of federal litigation, even prevailing plaintiffs might suffer a financial loss if they had to pay their own attorney's fees, resulting in a disincentive for enforcement. More realistically, unless these plaintiffs were wealthy or could secure representation by a public interest organization, many would not be able to find counsel willing to take their case. By the early to mid-1970s, the liberal public interest law movement and congressional Democrats sought to leverage fee shifting across many policy domains to cultivate a for-profit bar to achieve day-to-day enforcement of new statutory rights—a function beyond the capacity of small nonprofit groups.[8]

Congress's choice of whether and how much to rely on private enforcement of statutory mandates must be understood in institutional context. The primary alternative is to empower and fund administrative authorities to perform that function.[9] Conflict between Congress and the President over control of the bureaucracy is a perennial feature of the American state, and this creates incentives for Congress, seeking an alternative or supplement to bureaucracy, to provide for enforcement via private litigation. This incentive to create private enforcement regimes increases with the degree to which Congress distrusts the President to use the bureaucracy to carry out statutory mandates.[10] Private enforcement is thus a form of insurance against the President's failure to use the bureaucracy to carry out Congress's will.

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7. *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 19–59 (2010).

8. *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 10–14 (2017); FARHANG, *supra* note 7, at 60–93.

9. *See* Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 53 (1982) ("If the legislature writes a clear law containing the regulatory decision and charges the courts with enforcement, the demand for lawyers' services is thereby increased. . . . [H]owever, if the legislature writes a vague law and empowers an agency to interpret and enforce it, the demand for legislative ombudsman services is thereby increased."); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1036 (2006); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363 (2010); Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529, 1535–36 (2018).

10. *See* FARHANG, *supra* note 7, at 34–37; R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 48–49 (2001); THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 14–15, 173 (2002); 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 387 (Sidney M. Milkis & Jerome M. Mileur eds., 2005).

This reason to choose private enforcement became much more significant to American public policy beginning in the late 1960s, when divided party control of the legislative and executive branches became the norm and relations between Congress and the President became more antagonistic.[11] The institutional antagonism arising from divided government was exacerbated by growing ideological polarization between the parties.[12] Both quantitative and qualitative empirical scholarship have demonstrated that these political-institutional conditions were critically important in causing greater congressional reliance on private litigation to enforce federal statutes beginning in the late 1960s.[13]

In the years of divided government from Nixon's assumption of office in 1969 through the end of Bush II's presidency in 2008, the chief configuration was Democratic Congresses facing Republican Presidents. Thus, in years of divided government, Congress was predominantly controlled by the Democratic Party, with its stronger propensity to undertake social and economic regulation,[14] and with liberal public interest groups occupying an important position within the party coalition.[15] This legislative coalition largely faced an executive branch in the hands of Republican Presidents, the leaders of a political party more likely to oppose social and economic regulation, with business groups occupying an important position within the party coalition.[16] The bulk of private enforcement regimes in federal law—spanning civil rights, environmental, consumer, and financial regulation law, among many other areas—were enacted by Democratic Congresses under this configuration of divided government.[17]

Although concerns about executive subversion of congressional mandates are predictable in a period of divided government when Democrats control Congress and seek more aggressive regulation, Republicans too have contributed to private enforcement regimes. Indeed, one of the most consequential private enforcement regimes in our history, that which included the proplaintiff attorney's fee-shifting

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11. *See* FARHANG, *supra* note 7, at 60–93.

12. *See generally* Gary C. Jacobson, *Partisan Polarization in Presidential Support: The Electoral Connection*, 30 CONG. & PRESIDENCY 1 (2003); NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2006).

13. *See* FARHANG, *supra* note 7; Sean Farhang, *Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law*, 37 LAW & SOC. INQUIRY 657 (2012) [hereinafter *Legislative-Executive Conflict and Private Statutory Litigation*]; Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821 (2008) [hereinafter *Public Regulation and Private Lawsuits*].

14. *See* KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997).

15. *See* MARTIN SHEFTER, POLITICAL PARTIES AND THE STATE: THE AMERICAN HISTORICAL EXPERIENCE 86–94 (1994); David Vogel, *The "New" Social Regulation in Historical and Comparative Perspective*, *in* REGULATION IN PERSPECTIVE 155, 155–85 (Thomas K. McCraw ed., 1981); DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 93–112 (1989) [hereinafter FLUCTUATING FORTUNES].

16. *See* FLUCTATING FORTUNES, *supra* note 15, at 108.

17. *See* Sean Farhang, *Regulation, Litigation, and Reform*, *in* THE POLITICS OF MAJOR POLICY REFORM IN POSTWAR AMERICA 48 (Jeffrey A. Jenkins & Sidney M. Milkis eds., 2014).

provision in Title VII of the Civil Rights Act of 1964, was insisted on by Republicans whose votes were needed to break the cycle of filibusters by Southern Democrats that had long prevented passage of civil rights legislation.[18] Among their motivations for embracing private enforcement was to divest the executive branch, long in Democratic hands, of enforcement powers that they feared would be used too aggressively.[19] And it was Republicans who proposed, and overwhelmingly voted for, the Civil Rights Act of 1991, which added compensatory and punitive damages and the right to a jury trial to Title VII. They did so in the face of electoral pressures after President Bush I vetoed an earlier version introduced by Democrats.[20]

For Republican members of Congress who support—or who are resigned to—regulatory legislation,[21] reliance on private enforcement may also be attractive because it obviates the need to create another, or augment an existing, central administrative bureaucracy, which would consume tax revenue. Private enforcement is a decentralized and partially privatized enforcement strategy. Its operational costs, other than costs imposed by the additional workload of courts,[22] are not borne by taxpayers.[23] Indeed, Democrats too have found these considerations influential in selecting an enforcement strategy.[24]

Drawing on this work in *Rights and Retrenchment: The Counterrevolution against Federal Litigation*, we observed that "[e]ven during periods of significant Republican legislative power," while calls to repeal (retrench) existing private enforcement regimes "were emanating from some quarters of the Republican Party, there was net growth in the private enforcement infrastructure."[25] Moreover, we noted,

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18. *See* FARHANG, *supra* note 7, at 94–128.

19. *See id.* at 107–08.

20. *See id.* at 187–89.

21. "For much of its growth phase, legal liberalism was not a partisan project, drawing support as it did from elite actors in both parties. By the early 1970s, however, the party system was changing . . . ." STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 56 (2008).

22. "[T]hese costs are not easily traceable by voters to legislators' support for a piece of regulatory legislation with a private enforcement regime. Thus, with private enforcement regimes, legislators can provide for policy implementation at lesser cost than with administrative implementation, and can minimize blame for what costs are born by government." Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 663 (2013).

23. *See* FARHANG, *supra* note 7, at 71–72, 81. "In a conceptually tidy universe, the view that celebrates litigation might see it as the market alternative to centralized control and government regulation. In that universe, litigation enthusiasts would align themselves with the Republican Party and celebrate its decentralizing and privatizing virtues." Yeazell, *supra* note 1, at 1773. For a recent elaboration of this view, see BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 29–47 (2019).

24. *See* Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 246 (1991) (describing the switch from administrative to private enforcement during 1960 hearings on the bill, evidently at the behest of the legislation's initial sponsor, Senator Paul Douglas, a liberal Democrat, who "hope[d] that reliance on private enforcement would keep the bill simple and avoid spawning another federal bureaucracy"); FARHANG, *supra* note 7, at 154–55.

25. BURBANK & FARHANG, *supra* note 8, at 15; *see also* Farhang, *supra* note 17.

Republican support for private enforcement has not been confined to bills seeking to advance the interests of constituencies or policies traditionally associated with the Democratic Party, or even bipartisan constituencies. We provided a few examples of legislation containing private enforcement regimes that Republican Congresses enacted as "a useful regulatory strategy to serve their constituents," such as management seeking to battle unions, and anti-abortion activists seeking to control abortion providers.[26]

The goal of this Article is to seek greater empirical and normative understanding of Republican support for private enforcement. The project was conceived when we were compiling updated congressional bill data for an article on the prospects of Republican legislative retrenchment of access to court in the Trump era. We not only found recent growth in Republican bills aiming to limit access to court for traditional Democratic constituencies.[27] We also observed what appeared to be a substantial increase in newly proposed private enforcement regimes in bills introduced by Republicans that were aimed to benefit their base constituents. This raised in our minds the question whether

> [p]erhaps ironically, a signature of Trump era litigation reform may be an escalation of efforts to dismantle the Litigation State of civil rights, environmental regulation, and consumer protection, and replace it with a new Litigation State in the service of an anti-abortion, anti-immigrant, anti-union, and pro-gun agenda.[28]

Although our accounts of Republican legislative retrenchment efforts were based on systematic data,[29] our observations about Republican support for private enforcement in Congress were not similarly grounded. We have sought to fill that gap by compiling data on (1) congressional bills from 1989 through 2018 that included a statutory private right of action and a proplaintiff fee-shifting provision, (2) the members of Congress who sponsored or cosponsored those bills, and (3) a number of potentially salient aspects of the bills. Apart from testing the accuracy of our impressions of recent Republican bill activity, we also use the data to explore reasons for the transformation in Republicans' attitudes toward private enforcement of federal law.

The fact that some Republican legislators have long supported private enforcement is proof against any strong version of the party alignment hypothesis

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26. BURBANK & FARHANG, *supra* note 8, at 16; *see also Legislative-Executive Conflict and Private Statutory Litigation*, *supra* note 13 (chronicling Republican enactment of a private right of action for management to sue unions in the Taft-Hartley Act).

27. Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 FORDHAM L. REV. 37, 45 (2018). The data compiled for our book ended in 2014. In preparing the article, we compiled additional data for the three years 2015–17.

28. *Id.* at 47.

29. "To investigate retrenchment activity in Congress, we constructed an original dataset of 500 bills that were introduced over the four decades from 1973 to 2014 and that specifically attempted to retrench opportunities and incentives for the enforcement of federal rights." BURBANK & FARHANG, *supra* note 8, at 17.

that posits a clear dichotomy between Democratic legislators as proponents, and Republican legislators as opponents, of private enforcement. A more capacious view of preferences is needed in order to account for Republican support of private enforcement, such as in Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991.[30] Likewise, understanding the recent apparent upsurge in Republican support for private enforcement may require a more nuanced view of preferences, one that is attentive to temporal trends such as shifting ideological alignments within the Republican Party and changing partisan control of the presidency.

II. THE ROLES OF LITIGATION

In this Part we discuss existing scholarship demonstrating how interest groups associated with the Republican coalition in American politics have leveraged courts to advance their agendas, and we highlight how our focus is on a much more recently growing, and quite different, phenomenon. Whereas the work we discuss below focuses on litigation by interest groups seeking constitutional change through judicial interpretation, our focus is on legislative efforts to mobilize the private bar to enforce statutory rights created for the Republican base.

Constituencies long associated with the Republican Party, including prominently business corporations, have always sought to use litigation to advance their interests. Edward Purcell's magisterial history of federal diversity of citizenship litigation[31] demonstrates how, as defendants, business corporations sought to manipulate the rules governing access to federal court in order to inflict expense and delay on their opponents and, prior to *Erie Railroad Co. v. Tompkins*,[32] to take advantage of the business-friendly general federal common law jurisprudence of the federal courts. A necessary condition for that activity, sketched by Purcell and more fully developed in Adam Winkler's recent history of the development of corporate civil rights,[33] was an approach to citizenship for jurisdictional purposes that promoted access to federal court by corporations.

> Since corporations were not themselves viewed as citizens [in the early nineteenth century], courts employed the technique of looking to the citizenship of their shareholders instead. In a move that heralded, if it did not reflect, the increasingly important role that corporations played in an increasingly interstate economy, the Supreme Court, in a confusing but heroic bit of fiction-making, blundered to the solution that corporations would be accorded the benefits of citizenship for diversity purposes

30. *See supra* text accompanying notes 18–20.

31. EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958 (1992).

32. 304 U.S. 64 (1938).

33. ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018).

> through an irrebuttable presumption that their shareholders were citizens of the incorporating state.[34]

Scholars before Winkler had argued that the Court's decisions about the citizenship of corporations for jurisdictional purposes may have played a role in the subsequent recognition of corporations as "persons" under the Fourteenth Amendment.[35] But for Winkler, the technique of looking beneath the corporation to its shareholders—treating a corporation as an association of persons[36]—was central in the development of corporate constitutional rights in general, culminating in *Citizens United v. FEC*.[37] Moreover, Winkler chronicled nineteenth-century corporate litigation campaigns in pursuit of constitutional protections that, as he pointed out, will seem familiar to modern civil rights litigators on both the left and the right:

> To fight [a California law prohibiting railroads, but not individuals, from deducting mortgages when valuing their land for tax purposes], the Southern Pacific and Central Pacific undertook a litigation campaign that could have served as a template for future civil rights movements. First, the railroads engaged in civil disobedience. They simply refused to pay the taxes and launched a public relations campaign in the newspapers against the law. The counties, which were responsible for collecting the tax, were forced to go to court seeking redress. The courts, however, were exactly where the railroads wanted the controversy to be decided. Judges, especially the ones in federal court, were not likely to share the anticorporate populism of California voters.
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> The railroad corporations were constitutional first movers who employed innovative tactics to secure new rights. They envisioned the lawsuits as a form of strategic litigation, or what their lawyers called "test cases," to determine whether corporations had the same rights as ordinary people to equal protection and due process under the Fourteenth Amendment. The railroads did not want merely to lower tax bills in California. They wanted to establish broad new protections against burdensome regulations of all sorts. Their remarkable series of cases—more than sixty in all—would become "landmarks in American

34. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1464–65 (2008) (footnotes omitted).

35. *See, e.g.*, Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1642–43 (1988).

36. For a favorable review of Winkler's book, which nonetheless argues that calling the phenomenon he identifies "piercing the corporate veil" is misleading, even metaphorically, see Joshua C. Macey, *What Corporate Veil?*, 117 MICH. L. REV. 1195, 1197–98 (2019) (book review).

37. 558 U.S. 310 (2010; *see* WINKLER, *supra* note 33, at 364 ("Corporate personhood—the idea that a corporation is an entity with rights and obligations separate and distinct from the rights and obligations of its members—is entirely missing from the court's opinion. . . . Instead, like many of the earlier corporate rights cases, the *Citizens United* decision obscured the corporate entity and emphasized the rights of others, like shareholders and listeners.").

> constitutional history," . . . and "an important turning point in our social and economic development."[38]
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> Even when the [Supreme Court] ruled against corporations, however, the companies could often count their lawsuits as small victories. Their never-ending string of Fourteenth Amendment lawsuits delayed for years the implementation of countless laws that, like California's railroad tax, threatened to reduce their profits. Corporate lawsuits also imposed huge costs on government. California's counties spent untold hours and money fighting off the Southern Pacific's groundbreaking series of test cases, which dragged on for years. . . . Regardless of the losses, corporations kept litigating case after case.[39]

These and other historical accounts remind us that corporations have long used litigation to argue for conservative, probusiness interpretations of the Constitution, statutes, and common law that are designed to thwart regulation.[40] Adversarial legalism—the phenomenon identified by Robert Kagan that includes a heavy dose of private lawsuits to implement public policy[41]—is not a child of the 1960s. Moreover, not all such litigation behavior was defensive. Although Kagan argued that "[t]he adversarial legalism that has pervaded the United States in the last few decades is both more extensive and more intense than that of the nineteenth-century and the first half of the twentieth,"[42] he also observed that "[i]n the late nineteenth century and the first third of the twentieth, business interests often resorted to adversarial legalism, urging the courts to strike down pro-labor statutes and to issue injunctions against striking workers."[43] In addition, "[l]itigation was the tool of those who opposed the administrative regulations of the Progressive Era and the New Deal."[44]

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38. WINKLER, *supra* note 33, at 119–20 (quoting HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY", AND AMERICAN CONSTITUTIONALISM 31 (1968)).

39. *Id.* at 158–59. Winkler discussed a study of the Supreme Court's Fourteenth Amendment cases from 1868 to 1912, which found that, of 604 total cases, 312 involved corporations, while 28 involved African Americans. *See id.* at 157–58 (discussing CHARLES WALLACE COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES: A STUDY OF THE OPERATION OF THE RESTRAINT CLAUSES OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1912)). He noted that "[t]o be sure, corporations lost plenty of cases—a fact too often ignored in histories of the *Lochner* era." *Id.* at 156.

40. *Cf.* FITZPATRICK, *supra* note 23, at 27 ("[F]or most of our history, conservatives preferred legal enforcement by private lawyers because they thought private enforcers of the law were better than public enforcers.").

41. *See* KAGAN, *supra* note 10, at 3.

42. Robert A. Kagan, *American Courts and the Policy Dialogue: The Role of Adversarial Legalism*, *in* MAKING POLICY, MAKING LAW 13, 26 (Mark C. Miller & Jeb Barnes eds., 2004).

43. *Id.* at 25; *see also* PURCELL, *supra* note 31, at 206–09 (describing use of federal equity in insurance litigation); *id.* at 222–24 (describing railroads' use of state court injunctions against Federal Employers' Liability Act litigation).

44. Yeazell, *supra* note 1, at 1778.

Turning to the modern period, and to ideologically motivated advocacy organizations, Thomas Keck has argued that "[i]n polarized America, advocates on both the left and the right engage in litigation more or less constantly to achieve their ends."[45] Analyzing two decades of litigation regarding abortion, affirmative action, gay rights, and gun rights, Keck posited three scenarios in which policy advocates on both sides have used litigation: "to preserve the policy status quo by enjoining new and unwanted policies, to disrupt the policy status quo by dismantling existing policies, and to enable democratic politics by clearing the channels of political change."[46]

Keck's book powerfully makes the case that, in the litigation landscape he surveyed, the activity of "left liberal social movements" and of "conservative movements" should be regarded as "examples of the same phenomenon."[47] The landscape he surveyed is essentially that of constitutional litigation, and it is dominated by "organized rights advocates." Although Keck also discussed "a variety of overlapping and intersecting lawsuits filed by private litigants and attorneys," he referred to such suits as "wildcat litigation," noting that they "have regularly complicated the efforts of movement attorneys to lead the courts down a preferred path."[48]

We are interested in a litigation phenomenon that is different in important respects from those chronicled by Winkler and Keck.[49] Whereas both of them focused on litigation aimed at changing *constitutional* meaning, our interest is primarily in litigation designed to enforce *statutory* rights. In addition, although the "constitutional first movers" central to their accounts are corporations and other organizations that (usually) have or can raise sufficient resources to fund their litigation activity, we focus on litigants who (usually) lack such resources.[50] Finally,

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45. THOMAS M. KECK, JUDICIAL POLITICS IN POLARIZED TIMES 4 (2014).

46. *Id.* at 20. In this "world of constant litigation by friend and foe, any decision not to litigate would amount to an act of unilateral disarmament, leaving the field to their ideological opponents." *Id.* at 15; *see also* Richard S. Price & Thomas M. Keck, *Movement Litigation and Unilateral Disarmament: Abortion and the Right to Die*, 40 LAW & SOC. INQUIRY 880 (2015).

47. KECK, *supra* note 45, at 11.

48. *Id.* at 10–11. Keck defined "wildcat litigation" as "social reform litigation that is initiated by private litigants and attorneys rather than movement litigators." *Id.* at 36–37. As examples, he discussed gay rights and gun rights cases brought by individuals in which movement lawyers became involved when they "eventually realized that if they were unable to make the lawsuits go away, their best option was to join in and help it succeed." *Id.* at 87; *see id.* at 36–37.

49. There are, of course, also differences between the litigation chronicled by Winkler and that chronicled by Keck. For our purposes, the most salient may repose in the issues underlying the cases. Winkler's cases involved regulatory issues primarily affecting business, while Keck's focus was cases primarily affecting individuals.

50. In discussing empirical evidence demonstrating "the plausibility of plaintiff's fee-shifts and damages enhancements as measures of the broader phenomenon of private enforcement regimes, and of the efficacy of private enforcement regimes in mobilizing private litigants," we emphasized "that about 98% of these suits were prosecuted by for-profit counsel, and only 2% by interest groups." BURBANK & FARHANG, *supra* note 8, at 14–15.

whereas courts are at the center of these previous accounts, our institutional interest lies in political parties in Congress.

Our earlier work shows how and why the strategy of engineering private rights of action into federal statutes, and of using fee-shifting (and multiple damages) provisions to mobilize lawyers for people and causes that did not have the money to pay them, emerged among liberals in the late 1960s and early 1970s.[51] This project studies attempts to use the same strategy by Republican legislators in the service of very different regulatory goals—those favored by their conservative constituents. As accounts of constitutional litigation make clear, conservative advocates came to understand that simply playing defense was not a winning strategy, and they modeled their litigation efforts seeking affirmative constitutional rights on successful liberal litigation campaigns.[52] This project studies a much more recent and less recognized development: Republican legislative efforts to mobilize lawyers, with private rights of action and fee shifting, on behalf of clients in pursuit of conservative regulatory goals—to normalize "wildcat litigation" devoted to that agenda.

III. LESSONS FROM EXPERIENCE

In this Part we identify aspects of the modern history of litigation involving constituencies or interests associated with the Republican Party that shed light on their perceptions of the normative legitimacy and practical utility of litigation and courts as avenues to pursue their policy agendas, and the moves they made (and declined to make) to leverage them. This context will inform the interpretation of our data in Part IV.

Steven Teles's 2008 book, *The Rise of the Conservative Legal Movement*,[53] is perhaps the most comprehensive contribution to our understanding of modern conservative litigation. Together with Jefferson Decker's more recent book, *The Other Rights Revolution*,[54] it provides a rich account of conservative public interest law firms—how they got started, who their patrons were, why the first wave of them failed, and why the second wave succeeded. Teles did not have much to say about Congress or about statutory private enforcement regimes and the role they play in stimulating private enforcement of federal rights. Decker's research, however, unearthed that some leaders in the conservative legal movement were cognizant of, and opposed to, fee shifting. One of those leaders was Michael Horowitz. Decker explains:

> Horowitz saw fee-shifting [in suits against government] as an excessive drag on government budgets, at a time when he and others in the

51. *See id.* at 4–13.

52. *See infra* text accompanying notes 59–63.

53. TELES, *supra* note 21.

54. JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT (2016).

> administration were trying to pare public spending to make room for tax cuts. . . .
>
> Horowitz also objected to fee-shifting as a matter of principle. The United States, he argued, was on the verge of creating a state-sponsored private governing apparatus that was subject to neither the discipline of electoral politics nor the exigencies of the market.[55]

Fee recovery by conservative litigation groups "was [also] eschewed by many . . . conservative legal foundations" and "legal conservatives who opposed fee-shifting as an institution."[56] At the time, conservative legal organizations were financed primarily by business.[57]

This opposition to fee shifting was arguably of a piece with the conservative legal movement's distrust of courts as policymakers. In both Teles's and Decker's accounts, embracing a more proactive and affirmative litigation strategy was critical to the second wave of conservative legal organizations' pivot toward success.

> While conservatives successfully used resistance to the courts to attract converts to their cause, they quickly discovered that disentrenching legal liberalism was an altogether more difficult matter. . . . Conservatives slowly recognized that they needed to develop their own apparatus for legal change, one that could challenge liberal legalism in the courts, in classrooms, and in legal culture.[58]

Convinced that the movement needed "specialization [and] more hardball litigation rather than amicus briefs,"[59] the founders of the second wave of conservative public interest firms eschewed the first wave's dependence on the financial support of business, whose interests were not reliably aligned with their ideological goals.[60] In concentrating on foundation and individual financial support, they sought the freedom to advance through litigation positions that were consistent with their principles even if contrary to business preferences. Moreover, they understood that a successful offensive strategy in pursuit of those goals would require (1) the articulation of counterrights reflecting ideas and principles that would

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55. *Id.* at 142. Michael Horowitz was General Counsel of the Office of Management and Budget, who in the late 1970s had written an influential report for the Scaife Foundation that is discussed below. *See infra* note 60; *see also* BURBANK & FARHANG, *supra* note 8, at 29, 32–33.

56. DECKER, *supra* note 54, at 171–72; *see id.* at 139–40.

57. *See* TELES, *supra* note 21, at 58–89.

58. *Id.* at 57; *see id.* at 221 (observing that leaders of second wave "had learned that conservative interests could only be protected by actively using courts to establish new or invigorate old rights, rather than simply standing in the way of the activism of the Left"); *id.* at 226.

59. *Id.* at 67 (quoting Michael Greve, "a founder of the second-generation Center for Individual Rights"); *see id.* at 225 (discussing importance of becoming "'repeat players' in specific areas of law").

60. *See id.* at 79 ("In fact, . . . business could be the conservative movement's most determined foe."); *id.* at 221 (explaining that leaders of the second wave "established distance from business"); *id.* at 228. Both Decker and Teles discussed the importance to the development of the conservative legal movement of a 1978 report to the Scaife Foundation by Michael Horowitz, who criticized conservatives "for allying themselves too closely with the business community and allowing their funding sources to bias their litigation strategies." DECKER, *supra* note 54, at 120; *see* TELES, *supra* note 21, at 68–70.

be counterweights to the prevailing liberal ethos,[61] and (2) the development of a conservative network capable of rivaling the Liberal Legal Network (LLN) that had proved durable even after the precipitous decline in Democratic power that started with the election of Richard Nixon.[62] Finally, they also understood that such an offensive strategy would require rejection of the principle of "judicial restraint," which was the rallying cry of conservatives' defensive campaign.[63] As put by Decker,

> By teaching their fellow conservatives to stop worrying and love legal activism, the public interest right normalized strategic litigation campaigns and showed how mucking up bad, unpopular, or excessively egalitarian social policies could further the cause of American conservatism, even when it undermined law, order, or the regularity of rules.[64]

Although Teles identified priorities and strategies that made the second wave of conservative public interest law firms successful, he also discussed characteristics that limited the scope of that success. Two in particular are of interest to this project. First, in seeking alternative, nonbusiness sources of financial support, conservatives relied primarily on funding by foundations and individuals, and on the pro bono services of lawyers. Second—and perhaps in part because of dependence on practitioners willing to contribute their services pro bono—the conservative legal movement concentrated on impact litigation, neglecting the creation of an infrastructure comparable to that created by liberals for the fructification of the rights secured through ordinary litigation.

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61. *See* TELES, *supra* note 21, at 87 (summarizing CLINT BOLICK, UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY (1991)); DECKER, *supra* note 54, at 104 ("By defending counter-rights, conservatives showed how rights-conscious legal activism might be a double-edged sword, capable of skewering the vested interests of liberal constituencies and demonstrating the hypocrisy and internal contradictions of the legal left."); *id.* at 109.

62. "By the time that the Democrats' electoral dominance began to crumble in 1968, many of the pieces of the LLN were already well developed. This previous organizational development and network-building laid the groundwork for the final, and in policy terms, most powerful, piece of the LLN: public interest law firms." TELES, *supra* note 21, at 46. Teles does not appear to have recognized that most of the litigation was brought by for-profit lawyers, not public interest law firms. *See supra* note 50.

63. *See* TELES, *supra* note 21, at 80 (noting that planning documents for a proposed conservative public interest law firm were "striking in their scant emphasis on 'judicial restraint,' which was still dominant in conservative jurisprudence, and their insistence that courts should energetically protect a libertarian understanding of constitutional liberties"); *id.* at 83 (observing that the 1985 proposal "embraced a proactive stance for conservative litigators and an assertive role for federal courts," which, although "bitter medicine for a movement raised on 'judicial restraint' and 'strict construction,'" was "necessary if conservatives were to cease the futile exercise of playing defense in the federal courts"); *id.* at 248, 275.

64. DECKER, *supra* note 54, at 9; *see* Logan E. Sawyer, III, *Why the Right Embraced Rights*, 40 HARV. J.L. & PUB. POL'Y 729 (2017) (reviewing JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT (2016)); *id.* at 733 ("Conservatives in the 1970s and 80s, Decker argues, believed in the effective use of government authority when exercised by democratically elected branches, but were dubious about judicial policy-making. . . . Things are different today. Conservative lawyers, politicians, activists, and voters have made 'rights talk' and an associated suspicion of government authority core ten[e]ts of contemporary conservatism. Decker's most striking claim is that this transition was led by lawyers.").

> Despite all their other strengths, conservatives continue to have little of this sort of infrastructure, and as a result conservative law firms only have the manpower to take cases likely to set a significant precedent. The need to correct this "disparity between these two philosophical sides in the number of lawyers who follow up on victories made by the public interest groups with whom they agree" was the most important motivation for the [Federalist] Society's expansion of its involvement in pro bono law. [65]
>
> . . . .
>
> Any legal movement needs to have an informal division of labor, with a substantial pool of lawyers willing to engage in fairly routine but often labor-intensive trial work that applies existing precedents. The conservative public interest law field, by contrast, is top-heavy, with a reasonable number of lawyers willing to volunteer for "A Team" work but few willing to participate at the lower ranks. This vice may be inseparable from the virtues of the more libertarian (as opposed to religious) side of conservatism . . . . Christian conservatives, by contrast . . . seem to have been more successful in drawing a wide base of lawyers to bring non-precedent-setting cases.
>
> . . . The dearth of conservative and libertarian lawyers willing to engage in pro bono activity means that most conservative activism flows through [conservative public interest firms], rather than bubbling up from below. . . . This lack of unplanned, entrepreneurial litigation reduces the opportunity for unorthodox legal strategies or trial and error, and so conservatives are betting on the effectiveness of legal strategies at the top of the legal food chain.[66]

Teles's suggestion about "a wide base of lawyers to bring non-precedent setting cases" that is available to Christian conservatives may refer to the network of small firms described by Hans Hacker in his 2005 book, *The Culture of Conservative Christian Litigation*.[67] The business model of such firms, however, appears to depend not on court-awarded attorney's fees but on direct mail solicitation and contributions by related organizations and wealthy patrons, together

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65. TELES, *supra* note 21, at 156; *see id.* at 155–56 (discussing the Federalist Society's mid-1990s creation of a "pro bono clearinghouse to connect conservative and libertarian lawyers with ideologically sympathetic pro bono opportunities").

66. *Id.* at 254–55. "'Lawyers on the right, they always want to be involved in the biggest, baddest, most precedent-setting case around. They don't want to bring the follow-on cases. On the other hand, the Left has organized itself to bring the follow-on cases.'" *Id.* at 259 (citation omitted); *see also* ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 156 (2008) ("All but three of the [interviewed] lawyers who engaged in litigation pursued primarily impact work rather than individual service."); *id.* at 154 (noting that sixty-five of the seventy-two lawyers whom the author interviewed engaged in litigation "at least occasionally"). For an interesting review essay that traces the influence of the work of Charles Epp on these books by Teles and Southworth, see generally Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement*, 36 LAW & SOC. INQUIRY 516, 518 (2011). *See also* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 26–71 (1998).

67. HANS J. HACKER, THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION 29 (2005).

with volunteer attorneys.[68] Moreover, although some of the firms Hacker described placed emphasis on service to "ordinary Christians,"[69] the attitude toward "non-precedent-setting cases" of the leader of one of them differed. According to Hacker, Jay Sekulow of The American Center for Law and Justice

> state[d] that he could continue to litigate free expression and equal access claims if he chose, but he d[id] not. "We don't do much of that anymore because in the area of equal access, the school cases, Bible clubs, we've won that," he stated when explaining the shift in litigation and other emphases. "I don't like spending a lot of money on something we've won three times before. I don't feel like wasting our resources that way. When we get cases like that we try to get them resolved."[70]

In sum, as of Teles's writing, the focus of the conservative legal movement remained impact litigation rather than the kind of routine enforcement that fee shifting can provide and that motivated liberal advocacy for it.

IV. EMPIRICAL DISCUSSION

A. Data

Our measure of preferences to mobilize private enforcement is the extent to which members sponsor or cosponsor bills with a private right of action together with a provision allowing prevailing plaintiffs or parties to recover attorney's fees.[71]

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68. *See id.* at 31–33, 64–65, 108–12, 140–41; *see also* STEVEN P. BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS 27–45 (2002). Brown observes that the organizations he described seek attorney's fees when available but that "[m]ore commonly, they solicit funds from supporters . . . through . . . direct mail techniques." *Id.* at 122.

69. HACKER, *supra* note 67, at 156.

70. *Id.* at 28; *see also* BROWN, *supra* note 68, at 49–50 (noting a number of groups' case-selection emphasis on setting precedent but distinguishing one group as "not requir[ing] that a case have precedent-setting potential"); *cf.* Kevin R. den Dulk, *Purpose-Driven Lawyers: Evangelical Cause Lawyering and the Culture War*, *in* THE CULTURAL LIVES OF CAUSE LAWYERS 56, 78 (Austin Sarat & Stuart Scheingold eds., 2008) ("Even when the populist appeal of cultural conflict appeared to wane, evangelical attorneys managed to refashion their place in the war. The emergence of the warrior-hero heightened the importance of elite lawyering while diminishing the need for mass-based mobilization.").

71. In addition to provisions for an award of fees to a winning plaintiff, provisions for attorney's fees to a "prevailing party" or to "any party" were also included. Although, read literally, these provisions could allow for fees to a defendant; courts have with few exceptions adopted a "dual" (and asymmetric) interpretation of such provisions under which fees are generally awarded to prevailing plaintiffs as a matter of course, but are only awarded to prevailing defendants in the rare cases in which it is established that the plaintiff's action was brought in bad faith, was clearly frivolous, or was brought for purposes of harassment. *See* 1 ALBA CONTE, ATTORNEY FEE AWARDS 667–701 (3d ed. 2004); Kerry D. Florio, Comment, *Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. ENV'T AFFS. L. REV. 707, 722–32 (2000); E. RICHARD LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 85–97 (1981). Courts have grounded this dual standard in congressional intent. Given that Congress legislates against this longstanding interpretive background, it is appropriate to include such fee-shifting provisions, which asymmetrically benefit plaintiffs, in the analysis.

We include only rights of action for de novo suits against the targets of regulation.[72] Of course, only a tiny fraction of bills are ever enacted. But our purpose is not to measure change in law. It is to measure legislator and party preferences and agendas. For this purpose, bills are well suited and extensively employed by scholars of legislatures. As Professor Schiller explained in her widely cited study of how members of Congress shape legislative agendas:

> [A legislator's] choice of bills is a strong indicator of which issues he or she wants to be associated with and the reputation he or she wants to acquire among colleagues. . . . Senators must be careful and deliberate in their choice of bills; bill sponsorship is no different in that regard than any other legislative tool. Since senators are free to introduce any number and types of bills they choose, their use of bill sponsorship should reflect their best assessment of the effectiveness of bills to accomplish their goals.[73]

Using the Library of Congress bill database, we identified a random sample of one half of the bills with private rights of action and fee shifting that were introduced during the three decades from 1989 through 2018.[74] There are 857 bills in our sample. The bills had an average of twenty-four cosponsors, yielding a total of 21,146 instances of legislators sponsoring or cosponsoring a bill with a private enforcement regime. Ninety-five percent of the members of Congress who served from 1989 to 2018 supported at least one bill in our data, and those who did so ranged between supporting one and 115 bills. Table 1 reflects the distribution of policy areas covered by the bills (for policy areas comprising 1% or more of the data). The largest five policy areas are civil rights and liberties, labor and employment, information privacy, health care, and consumer.

Using this collection of bills, we constructed the following dataset. Separately for each legislator who served in Congress from 1989 to 2018, we calculated the total number of episodes of sponsorship or cosponsorship per Congress. That is, the unit of analysis is a Congress-legislator count of the total number of times that each legislator in each Congress sponsored or cosponsored one of our bills. We focus on counts that include both sponsorship and cosponsorship because we are

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72. We do not include rights to seek judicial review of agency action or rights to enforce agency orders. Such rights are intended to control or facilitate (respectively) administrative authority. Our focus, in contrast, is direct private enforcement against the targets of regulation.

73. Wendy J. Schiller, *Senators as Political Entrepreneurs: Using Bill Sponsorship to Shape Legislative Agendas*, 39 AM. J. POL. SCI. 186, 187 (1995); *see also, e.g.*, Gerald Gamm & Thad Kousser, *Broad Bills or Particularistic Policy? Historical Patterns in American State Legislatures*, 104 AM. POL. SCI. REV. 151, 154 (2010) (studying locally focused bills, authors stated that "even the mere act of introducing . . . [a bill] sends a clear and transparent signal to voters and the local political establishment that a legislator is looking after their needs"); Michael S. Rocca & Gabriel R. Sanchez, *The Effect of Race and Ethnicity on Bill Sponsorship and Cosponsorship in Congress*, 36 AM. POL. RSCH. 130, 132 (2008) ("[S]ponsoring legislation—even bills that do not pass—shapes the legislative agenda. It is quite clear that the sponsorship stage of the legislative process has important policy implications.")

74. The search functionality of the database makes the collection of such bills much more onerous before 1989, and the goals of this Article can be achieved with a three-decade dataset.

interested in the comparative degree of legislative support for private enforcement across the Democratic and Republican Parties. To neglect cosponsors would be to treat a bill that a legislator introduces only for herself as equivalent to one that scores of other members of Congress wish to support.

Table 1: Policy distribution of bills

Policy area	**Percent of cases**
Civil Rights & Liberties	16%
Nondiscrimination (6%)	
Abortion and Contraception (5%)	
Policing (3%)	
Free Speech and Religion (2%)	
Labor and Employment	15%
Information Privacy	11%
Health Care	8%
Consumer	7%
Environmental & Energy	5%
Guns	4%
Intellectual Property	4%
Antitrust	3%
Good Government	3%
Property Rights	3%
Public Health & Safety	3%
Banking	2%
Communications	2%
Education	2%
Immigration	2%
Pornography & Sexual Exploitation	2%
Veterans	1%
Voting	1%
Other	6%

B. Partisan Variation in Legislator Support for Private Enforcement

Figure 1 reflects regression estimates of total legislator support over time for private enforcement regimes. The curve is generated with per-Congress counts of sponsorship and cosponsorship summed across all legislators. The horizontal axis designates the first year of each Congress in which bills were introduced. Total support for private enforcement shows a decline in roughly the decade leading up to the 111th Congress (2009–10), after which there was a reversal to a growth trend through the end of the series.

Figure 1: Total support for private enforcement

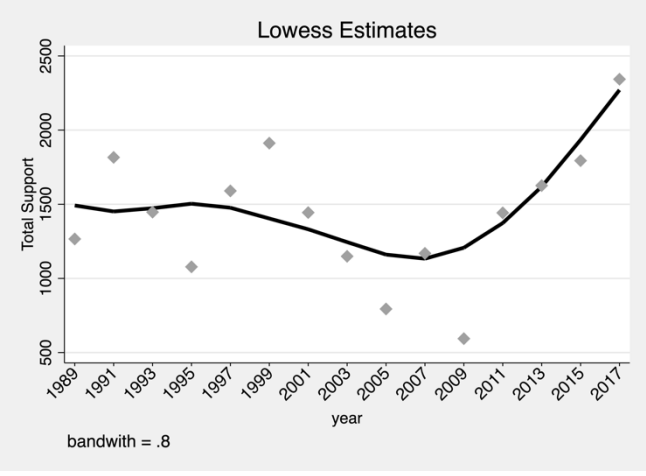
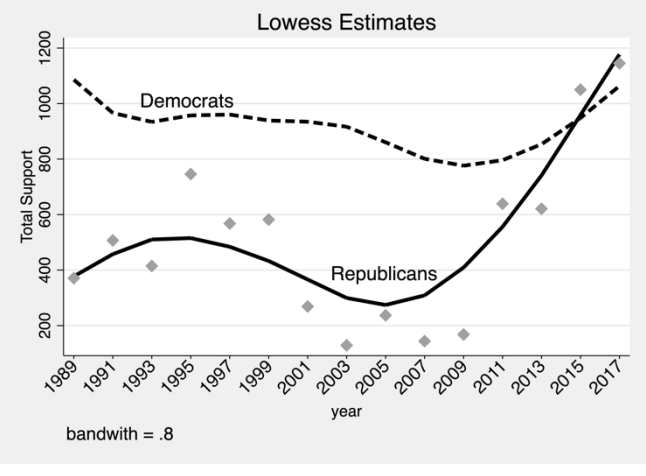


Figure 2 depicts support for private enforcement separately for Democrats and Republicans. About the first two-thirds of the series appears consistent with conventional wisdom. Over the past eight years, however, we observe a transformation that contradicts conventional wisdom. After a decade (2001–10) in which Republican support was fairly stable at an average of 23% of the size of Democratic support in our sample, it grew to an average of 72% in the 112th and 113th Congresses (2011–14), and then reached approximate parity with Democratic support in the 113th and 114th Congresses (2015–18). Growth in Republican support for private enforcement has driven party convergence on the issue.

The pattern of growth in congressional Republicans' turn to private enforcement lawsuits from the 112th through the 115th Congresses (2011–18) does not correspond to the conservative legal movement's turn to impact litigation.

Figure 2: Democratic versus Republican total support for private enforcement



Professors Teles and Southworth identify some of the most important impact litigation victories of that movement as occurring from the mid-1990s to the mid-2000s.[75] During this period, congressional Republicans' use of private enforcement actually declined materially. The Republican surge in legislative private enforcement proposals occurred much later.

C. Policy Substance Underlying Growth in Republican Support for Private Enforcement

We examined the bills in our data that Republican members of Congress supported over the past eight years. In that window, there are five policy areas that comprise more than 5% of Republicans' total support. These were private enforcement bills that were anti-abortion, immigrant, and taxes, and pro-gun and religion. These are policy agenda items of obvious salience to the Republican base. We offer a few illustrative examples of each type of bill in order to convey a concrete picture of the policy agenda for which Republicans have turned increasingly to private enforcement.

Abortion

- The Born-Alive Abortion Survivors Protection Act of 2017 required that when "[a]ny infant [is] born alive after an abortion," health care practitioners must exercise the same degree of care as provided to any other at that gestational age, and "ensure that the child born alive is immediately transported and admitted to a hospital." The bill provided a private right of action to the woman on whom the abortion was performed for money damages for all injuries, including for psychological pain and suffering, statutory damages equal to three times the cost of the abortion, punitive damages, and attorney's fees.[76]
- The Dismemberment Abortion Ban Act of 2016 provided a private right of action against doctors, with the same remedies and attorney's fees, to parents of minor children on whom the doctor performed a "dismemberment abortion."[77]

Guns

- The Firearm Due Process Protection Act of 2016 proposed to amend the Brady Handgun Violence Prevention Act to provide that the Attorney General must make a final disposition within sixty days of a request by any person seeking to obtain a firearm to correct a record in the federal background check system. For violation of this rule, the Act provides an aggrieved person a private right of action to obtain a declaratory judgment on their "eligibility . . . to receive and possess a firearm," and an expedited hearing within thirty days in which the United States "shall bear

75. *See* TELES, *supra* note 21, at 220; SOUTHWORTH, *supra* note 66, at 37.
76. Born-Alive Abortion Survivors Protection Act, H.R. 4712, 115th Cong. §§ 2(2), 3(a) (2017).
77. Dismemberment Abortion Ban Act of 2016, S. 3306, 114th Cong. (2016).

the burden of proving by clear and convincing evidence that the individual is ineligible to . . . possess a firearm." If the government does not "prove the ineligibility," the court shall award attorney's fees to the plaintiff.[78]

- The Concealed Carry Reciprocity Act of 2015 provided that, notwithstanding any contrary state law, under certain conditions a person who is not prohibited from possessing a firearm under federal law, and who possesses a valid concealed carry permit in one state, has a right to carry a concealed handgun in any other concealed carry state. It creates a private right of action against states for violating such right, with prevailing plaintiffs entitled to "damages and such other relief as the court deems appropriate, including a reasonable attorney's fee."[79]
- Republicans also introduced bills to protect the right to possess and carry knives, overriding contrary state law, and providing a private right of action against states that interfere with federal knife-possession rights, with attorney's fees for prevailing plaintiffs (including those prevailing in settlements).[80]

Immigrants

- The Build the Wall, Enforce the Law Act of 2018 created a private right of action by any individual, or spouse, parent, or child of that individual (if deceased), who is the victim of a murder, rape, or any felony, for which an alien has been convicted. The Act designated as defendants a state (or political subdivision) if it released the alien from custody as a consequence of declining to honor an Immigration and Customs Enforcement detainer, and provided for attorney's fees (as well as expert fees) for prevailing plaintiffs.[81]
- In 2014, Republicans introduced a bill which provided that "[a]n alien who is not lawfully present in the United States shall not be eligible for any postsecondary education benefit unless every citizen and national of the United States is eligible to receive such a benefit (in no less an amount, duration, and scope)," and included a private right of action against state education officials for economic damages, with an award of attorney's fees, for prevailing plaintiffs.[82]

78. Firearm Due Process Protection Act, H.R. 4980, 114th Cong. (2016).

79. Concealed Carry Reciprocity Act of 2015, H.R. 986, 114th Cong. (2015).

80. *See, e.g.*, Knife Owners' Protection Act of 2018, S. 3264, 115th Cong. (2018).

81. Build the Wall, Enforce the Law Act of 2018, H.R. 7059, 115th Cong. (2018).

82. A bill to prohibit aliens who are not lawfully present in the United States from being eligible for postsecondary education benefits that are not available to all citizens and nationals of the United States, S. 1990, 113th Cong. (2014).

Religion

- The Child Welfare Provider Inclusion Act of 2017 prohibited the federal government, or state programs receiving federal funds, from "discriminating" or taking an adverse action against a child welfare service provider that declines to provide, facilitate, or refer for a child welfare service that conflicts with the provider's "sincerely held religious beliefs or moral convictions," such as an adoption or foster care agency declining to facilitate placement of a child with a same-sex couple. The bill provided to an aggrieved child welfare service provider a private right of action and authorized injunctive relief, compensatory damages, and attorney's fees.[83]
- The First Amendment Defense Act of 2015 barred the federal government from discriminating against persons for acting in accordance with a religious belief or moral conviction that marriage is the union of one man and one woman, or that sexual relations are properly reserved to such a marriage. The bill defined "discriminatory action" as any adverse tax treatment (including disallowing deduction of a charitable contribution), adverse treatment with respect to any federal grant, benefit, employment, license, or other opportunity. The bill provided to an aggrieved person a private right of action and allowed injunctive relief, compensatory damages, and attorney's fees to prevailing plaintiffs.[84]

Taxes

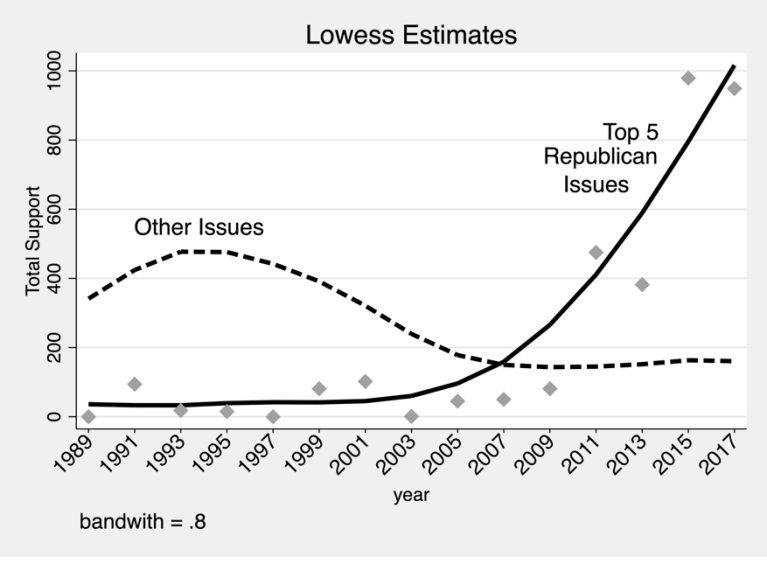
- The Fair Tax Act of 2017 provided that persons in tax disputes with the IRS may recover reasonable attorney's fees, as well as accountancy and other professional fees incurred in the dispute, unless the sales tax administering authority or the Secretary established that its position was substantially justified.[85]

83. Child Welfare Provider Inclusion Act of 2017, H.R. 1881, 115th Cong. (2017).

84. First Amendment Defense Act, S. 1598, 114th Cong. (2015).

85. Fair Tax Act of 2017, S. 18, 115th Cong. § 201 (2017). The fee shift applies to petitions for redetermination of deficiencies in the Tax Court. "The Tax Court has as its purpose the redetermination of deficiencies, through a trial on the merits, following a taxpayer petition. It exercises *de novo* review." Mary Ferrari, *"Was Blind, but Now I See" (Or What's Behind the Notice of Deficiency and Why Won't the Tax Court Look?)*, 55 ALB. L. REV. 407, 446 (1991).

Figure 3: Republican total support for private enforcement in top five issues versus other issues



From the 101st to the 111th Congresses (1989–2010), this set of Republican base issues (the top five) constituted 12% of total Republican support for private enforcement. From the 112th to the 115th Congresses (2011–18), they grew dramatically to 81% of total Republican support. Figure 3 compares (1) Republican support for private enforcement in this set of Republican base issues, with (2) Republican support in all remaining policy domains. The figure makes clear that these Republican base issues account for the growth in Republican support for private enforcement.

By way of comparison, the top five policy areas of Republican support for private enforcement prior to the 101st to the 111th Congress (1989–2010) were bills protecting private property against takings and other government regulation, information privacy, gun owner's rights, health care, and good government. Bills directed at protection of private property against government[86] and gun owner's rights[87] are Republican base issues and show that private rights of action and fee shifting to enforce a conservative rights agenda long predated the recent surge. However, the remaining three of the top five areas (data privacy, health care, and good government) do not have distinctive salience to the Republican base.[88] Thus,

86. *See, e.g.*, Private Property Protection Act of 1995, H.R. 925, 104th Cong. (1995); Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. (2005).

87. *See, e.g.*, Second Amendment Reaffirmation Act of 1995, H.R. 2470, 104th Cong. (1995); Citizens' Self-Defense Act of 2003, H.R. 2789, 108th Cong. (2003).

88. We reach this conclusion after review of the Republican-sponsored bills in each of these areas. Representative bills in health care are the Medicaid Home and Community Quality Services Act of 1989, S. 384, 101st Cong. (1989) (providing a cause of action for severely disabled persons against a

the 112th to the 115th Congresses (2011–18) were characterized by growth not only in the volume of Republican reliance on private enforcement, but also in their increasing focus on Republican base issues when deploying private enforcement.

D. Causes of Growth in Republican Support for Private Enforcement

The data thus document an unmistakable transformation. Over the course of about the past eight years—since the 112th Congress, seated after the midterm election following Obama's first term—there was sharp growth in Republican support for private enforcement. This growth was mainly driven by proposals to leverage private enforcement in the service of the Republican base issues highlighted above. Why did this happen? We explore two possible causes, both suggested by the timing and substance of the transformation.

Republicans' enhanced support of private enforcement corresponded to an era of rapidly escalating conservatism in the Republican Party, contributing to the party's distrust of the Obama administration—the alternative source of enforcement for their agenda. Regarding the rightward movement in the Republican Party, NOMINATE scores—the most widely used ideology scores for members of Congress[89]—are illustrative. From 1997 to 2006, the median Republican NOMINATE score increased (grew more conservative) by .016. From 2007 to 2016, it increased by .082. Thus, in the latter decade the Republican movement in the conservative direction was *more than five times larger* than in the previous decade.

We did not come to the data with an expectation that conservatism within the Republican Party would be associated with support for private enforcement.

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state agency that fails to protect their right to medical assistance under Medicaid); the Bipartisan Consensus Managed Care Improvement Act of 1999, H.R. 2723, 106th Cong. (1999) (providing a cause of action against health care plans for failure to provide medical benefits determined to be due by external review board); and the Bipartisan Patients' Bill of Rights Act of 2001, S. 889, 107th Cong. (2001) (providing a cause of action to participant or beneficiary against insurance providers for failure to make payments determined to be due by an external review entity). In the area of good government, the Republican bill introductions focused heavily on the same proposal to create a cause of action for government employees retaliated against by employers for aiding a federal investigation or prosecution of election fraud or other political corruption. *See* Anti-Corruption Act of 1989, H.R. 2083, 101st Cong. (1989); Comprehensive Campaign Finance Reform Act of 1993, S. 7, 103d Cong. (1993); Anti-Corruption Act of 1995, S. 1378, 104th Cong. (1995). Representative bills in information privacy are the Affordable Health Care Now Act of 1994, S. 2396, 103d Cong. (1994) (providing a cause of action against a health information trustee or government employee for unlawful disclosure of health information); Security and Freedom Through Encryption (SAFE) Act, H.R. 695, 105th Cong. (1997) (providing a cause of action against law enforcement for unlawfully obtaining or disseminating decryption information); Protecting Consumer Phone Records Act, S. 2389, 109th Cong. (2006) (providing a cause of action for unlawful acquisition or sale of "customer proprietary network information").

89. The NOMINATE procedure is based on a spatial theory of voting and creates estimates of the ideological positions of legislators on an interval scale based on their pattern of roll call voting behavior. *See* POOLE & ROSENTHAL, *supra* note 14. In this Article, we use Common-Space Constant DW-NOMINATE scores, which are comparable across chambers and over time. *See* Adam Boche, Jeffrey B. Lewis, Aaron Rudkin & Luke Sonnet, *The New Voteview.com: Preserving and Continuing Keith Poole's Infrastructure for Scholars, Students and Observers of Congress*, 176 PUB. CHOICE 17, 23–24 (2018).

However, the Republican base issue content that we observe to be associated with escalating Republican Party support for private enforcement in Congress, and the fact that this escalation followed a marked rightward shift in the party, leads us to test the hypothesis that conservatism within the party is associated with higher levels of support for private enforcement.

We note that this is the opposite of what conventional wisdom would predict. As discussed earlier, the conventional wisdom in American politics and law is that Democrats are the party more likely to support private enforcement, and Republicans are the party more likely to oppose it. Figure 2 largely bears out this expectation for the first two decades of the period we study. It is a short step from this conventional wisdom to the hypothesis that movement in a conservative direction is associated with *less* support for private enforcement, and therefore that more conservative Republicans will be *less* likely to support private enforcement. This is also the story suggested by the notion, implicated in Parts II and III, that conservatism is associated with opposition to the use of courts to make public policy (a notion that we acknowledge is easy to doubt).

A second and related pattern visible in the data suggests a second hypothesis for testing. Relative to the last two Congresses of Bush I (1989–92), average levels of Republican support for private enforcement grew in the Clinton years, then declined in the Bush II years, and then surged in the Obama years. In the first Congress of the Trump administration, Republican private enforcement proposals did not decline in accord with this pattern. Thus, at a descriptive level, Republican legislators' support for private enforcement appears to grow, on average, when they face Democratic Presidents. This pattern is consistent with theoretical and empirical scholarship, discussed in Part I, showing that under divided government Congress has greater incentives to enact private enforcement regimes. The primary alternative to private enforcement is to delegate implementation authority to bureaucracy. Therefore, when Congress distrusts the President to use bureaucratic power to implement its mandates, as under divided government, it has heightened incentives to mobilize private enforcement as an alternative or supplement to bureaucracy.[90]

This theory and the evidence supporting it focus on *enacted statutes*. Its goal is to explain how conflict between the majority party in Congress and the President drives the actual growth of private enforcement in American law. In contrast, here we seek to explain changes in the role of private enforcement on the Republican Party agenda, measured by bill support. Still, the institutional logic underlying the scholarship on divided government has implications for bill introductions. Republican members of Congress who support bills that they believe a Democratic President will not enforce, whether they are in the minority (unified government) or in the majority (divided government), still may regard private enforcement as a useful tool.

90. *See supra* notes 9–12 and accompanying text.

This incentive would be most salient when the substantive rights in question would likely be opposed by the President. Under unified Democratic government, just as under divided government when Republicans controlled Congress, members in the Republican minority surely recognized that President Obama was not likely to champion enforcement of Republican base issues such as abortion, immigrants, guns, taxes, and religion that constituted the lion's share of their proposals relying on private enforcement during his presidency. We thus test the hypothesis that increasing distance between Republican members and the President is associated with increased levels of support for private enforcement.

It bears emphasis that the two putative developments just discussed—increasing conservatism of the Republican Party and increasing distrust of Democratic Presidents by Republican members of Congress—are linked. The Republicans' swing to the right over approximately the past decade simultaneously increased conservatism within the party and (on average) Republican members' distance from Democratic Presidents.

In order to evaluate the effects of Republican members' ideology and distance from the President on their support for private enforcement, we use regression models (discussed in the Appendix). The dependent variable again is, for each legislator in each Congress, a count of the total number of instances of sponsorship or cosponsorship, per Congress, for bills with a private right of action coupled with a plaintiffs' fee-shifting provision. We first examine models only of Republican members (dropping all Democrats from the dataset). We have two key independent variables. One is the Republican member's ideology, measured with NOMINATE score, in which movement in the positive direction is movement in the conservative direction. A positive and statistically significant coefficient on this variable will indicate that more conservative Republicans are more likely to support private enforcement; a significant negative coefficient will indicate that more liberal Republicans are more likely to do so; and a statistically insignificant coefficient will indicate that variation in ideology within the Republican Party is not significantly associated with such support.

The second key independent variable is the Republican member's distance from the President. Poole and Rosenthal also construct presidential ideology scores in the NOMINATE space. Whereas legislator NOMINATE scores are based on their roll call voting behavior, public positions taken by the President on roll call votes are used to map each President into the NOMINATE space. As our presidential distance measure, we use the distance on the NOMINATE scale between each Republican member and the President.

We employ Congress fixed effects to account for potential confounding factors. Congress fixed effects account for any variables that change across Congresses that would take the same value for each member in that Congress, such as the extent of regulatory legislation proposed in each Congress (providing an opportunity to utilize private enforcement), budgetary constraints on funding bureaucracy that may fuel use of private enforcement, the lobbying priorities of

groups and interests that may favor or disfavor private enforcement, and all political-institutional variables that are fixed within years, such as divided government, seat shares held by each party, and divided party control of the two chambers of Congress. The Congress fixed effects approach leverages only variation in the relationship between legislators' party and their support for bills *within* that Congress. This approach allows us to estimate the effects of party most effectively because it controls for the influence of any variables that change across Congresses that would take the same value for each member in the same Congress.

We also include a dichotomous variable measuring which chamber the bill was introduced in, with Senate=0 and House=1. Finally, the model does not include the last Congress (115th) because no NOMINATE scores have yet been created for President Trump.

The top panel of Table A-1 (Appendix) reports results for the full period of the 101st to the 114th Congresses (1989–2016). The ideology variable is insignificant. Over the full period, support for private enforcement does not vary within the Republican Party along ideological lines. The presidential distance variable is statistically and substantively significant, with the predicted positive sign indicating that members more distant from the President are more likely to support private enforcement. To put the magnitude in perspective, moving from the last Congress under Bush II to the first Congress under Obama, the average distance from a Republican member of Congress to the President is associated with a 35% increase in Republican legislators' predicted count of support for private enforcement. The chamber variable is also significant, showing that Republican members of the House have predicted counts of support for private enforcement that are 44% higher than Republican members of the Senate.

Our descriptive examination of the data leads us to consider the possibility that the politics surrounding private enforcement in the Republican Party in Congress changed over time. We thus rerun the model over about the second half of the data, covering the Bush II and Obama administrations, from the 107th to the 114th Congresses (2001–16).[91] The results are reported in the bottom panel of Table A-1. In this sixteen-year period, the ideology variable becomes significant with a positive sign. Contrary to conventional wisdom that increasing conservatism is associated with less support for private enforcement, among Republican members increasing conservatism is associated with *higher* levels of support. An increase from a very liberal Republican (5th percentile on the NOMINATE scale among Republicans) to a very conservative one (95th percentile) is associated with a 30% increase in support for private enforcement. An increase from a moderately liberal

91. It is not possible to run the model only during the Obama administration when Republican support for private enforcement was surging. If the model does not span multiple presidential administrations, collinearity prevents the inclusion of both legislator ideology and the presidential distance variables.

Republican (25th percentile) to a moderately conservative one (75th percentile) is associated with a 13% increase in support for private enforcement.

Presidential distance remains significant, and its magnitude grows larger during the 2001–16 period. Again, moving from the last Congress under Bush II to the first Congress under Obama, the average increase in distance from a Republican member of Congress to the President was associated with a 53% growth in support for private enforcement. The chamber variable remains significant, showing that Republican members of the House have predicted counts of support that are 116% higher than Republican members of the Senate.

We reiterate that both the presidential distance variable and the ideology variable are associated with higher levels of support for private enforcement by more conservative Republicans. This is because increasing degrees of conservatism among Republican members are associated with increasing degrees of distance from Democratic Presidents. Thus, the model identifies two pathways through which more conservative members have led the growing presence of private enforcement on the Republican legislative agenda. One pathway is that, even controlling for presidential distance, more conservative Republicans have disproportionately supported private enforcement. The other is that, even controlling for legislator ideology, Republicans more distant from Democratic Presidents, who are more conservative Republicans, have disproportionately supported private enforcement.[92] Through these two pathways, the Republican Party's swing to the right, in conjunction with a two-term Democratic President whom they deeply distrusted as an enforcer of the Republican base policy agenda, materially contributed to the dramatic growth of Republican support for private enforcement and to convergence in levels of support for private enforcement by the two parties, over about the past decade.

Although our purpose here is to explain shifts in Republican preferences for private enforcement, we briefly report the same models presented in Table A-1 but run only on Democratic members (see Table A-2 in the Appendix). Presidential distance is significant in both models. Moving from the last Congress under Clinton to the first under Bush II, the average increase in distance from a Democratic member of Congress to the President was associated with a 30% growth in support for private enforcement, and the effect size increases to 67% in 2001–16. The chamber variable is significant in the full period, showing that Democratic members of the House have predicted counts that are 26% higher than Democratic members of the Senate, and it becomes insignificant in 2001–16.

92. This interpretation is confirmed by estimating the same model while dropping the presidential distance variable. In that model, the ideology coefficient grows much larger, with the move from a very conservative Republican (95th percentile) to a very liberal one (5th percentile) associated with an 84% increase in Republican members' support for private enforcement, and a move from a moderately conservative Republican (75th percentile) to a moderately liberal one (25th percentile) associated with a 37% increase in Republican members' support for private enforcement.

Ideology has a much larger association with Democratic support for private enforcement as compared to Republicans, and it is significant both for the full period and when we examine only the 107th to the 114th Congresses (2001–16). In the full period, an increase from a very conservative Democrat (5th percentile) to a very liberal one (95th percentile) is associated with a 470% increase in support for private enforcement. An increase from a moderately conservative Democrat (25th percentile) to a moderately liberal one (75th percentile) is associated with a 182% increase in support for private enforcement. The much larger effect size for ideology among Democrats as compared to Republicans indicates that there is much more variation within the Democratic party, associated with member ideology, in support for private enforcement. The association moves in the opposite direction from Republicans, with more liberal Democrats much more likely to support private enforcement.

Viewing both parties together, then, the wings of the parties (more liberal Democrats and more conservative Republicans) are most likely to support private enforcement. One interpretation of the separate Republican and Democratic models, with significant effects in opposite directions, is that the ideological wings of the party are more likely to pursue enactment of rights for their base, providing both more occasions to rely on private enforcement than moderates in their parties. That is, support for private enforcement is in part a function of having an individual rights agenda.

CONCLUSION

Conventional wisdom about civil litigation as a source of party cleavage does not accurately reflect contemporary reality. The party alignment hypothesis, construed as a claim about the parties' central tendencies rather than an iron law, was a fair characterization over about the first two decades of our data (1989–2010), when Democrats were substantially more likely than Republicans to support private enforcement. In more recent years, however, we found escalating Republican support for bills seeking to leverage private lawsuits to enforce rights that were primarily anti-abortion, immigrant, and tax, and pro-gun and religion. By the end of our data in 2018, Republicans were about as likely as Democrats to sponsor or cosponsor statutory private enforcement regimes. This transformation was led by the conservative wing of the party, spurred in part by apparent distrust of the Obama administration as an enforcer of their rights agenda.

One lesson to be learned from the partisan convergence on private enforcement, and the role of rights agendas and separation of powers conflicts in contributing to it, is that both parties' posture toward private enforcement is instrumental. Private enforcement is one institutional strategy for implementing rights. Our evidence suggests that political parties do not have positions on private enforcement and access to justice as a matter of general principle, independent of the rights being implemented. They have positions on private enforcement when it

is or may be deployed in the service of specific agendas—when it accrues to the advantage of some groups and the disadvantage of others.

In Yeazell's characterization in the opening paragraphs of this Article (which aptly represents conventional wisdom), Republicans regard civil actions as a "deadweight loss" and a "source of national shame," leading them to "deplor[e]" it.[93] The transformation we have documented shows that their views are far more instrumental than this narrative implies. When they mounted a campaign to create statutory rights for base constituents that were anti-abortion, immigrant, and tax, and pro-gun and religion, mostly under a President they distrusted, Republicans (especially more conservative ones) turned to private enforcement. In this, they followed a model laid down by Democrats and liberal interest groups decades earlier when they disproportionately faced Republican Presidents.

At the same time, the Republican Party's position on private enforcement is more complex than Democrats', and this is owing to the distinctive preferences of key elements of their coalition: business on the one hand, and social conservatives on the other. The surge in Republican support for access to courts has been clearly focused on social conservatives. Republicans' top five areas of bill proposals from the 112th to the 115th Congresses (2011–18), comprising 81% of their total support for private enforcement, disproportionately served the social conservative wing of the coalition. With the exception of health care workers that provide abortions, none targeted businesses as defendants.

Both Yeazell's and Romano's characterizations of litigation as a source of partisan cleavage focused on business' role in the Republican Party, and business's antagonism toward private enforcement regimes under which they disproportionately are defendants. This account, we believe, remains accurate. In the domain of business regulation, Republicans have remained dramatically more likely to oppose private enforcement than Democrats even as they began to ramp up private enforcement of proposed new rights for the Republican social conservative base.[94] The party's agenda is not to disable the Litigation State, but to redirect it.

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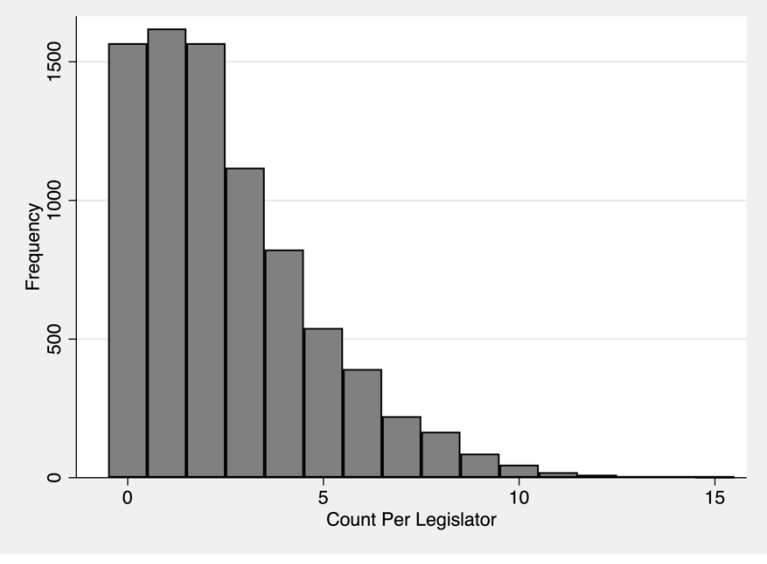
93. Yeazell, *supra* note 1, at 1754.

94. In recent work we assembled data on bill introductions in Congress that sought to limit existing rights of plaintiffs to attorney's fees and damages and to change certain procedural rules so as to limit lawsuits. *See* BURBANK & FARHANG, *supra* note 8, at 34–36. The procedural rules were the Federal Rules of Civil Procedure governing class actions (FED. R. CIV. P. 23), sanctions (FED. R. CIV. P. 11), and offers of judgment (FED. R. CIV. P. 68). In our book we analyzed proposed changes to fee shifting and damages only if they targeted federal rights, whereas for purposes of this Footnote, we examine all proposed changes to federal or state law since both reflect the Republican party's agenda on private enforcement against business. This data ends in 2014. We examined it for the first three Congresses of the Obama administration (2009–14) and found that there were seventy-five such bills introduced, together comprising 887 acts of sponsorship or cosponsorship of proposals to limit private enforcement on one of the dimensions we measured. Seventy-five percent of these acts of sponsorship or cosponsorship were for bills that sought to limit causes of action against business. Republican members of Congress represented 95% of the support for these bills seeking to limit business exposure to lawsuits.

APPENDIX

In our statistical models, the dependent variables are counts, for each legislator in each Congress, of the number of times they sponsored or cosponsored bills in our sample. A frequency distribution of the counts is presented in Figure A-1. Because the distribution of event counts is discrete, not continuous, and is limited to nonnegative values, it is best modeled assuming that the errors follow a Poisson rather than a normal distribution.

Figure A-1: Frequency distribution of legislator counts of sponsorship or cosponsorship per Congress



Data with this distribution is generally modeled with a Poisson or a Negative Binomial count model. The standard Poisson model assumes that the variance equals the mean. If this assumption is violated because the variance exceeds the mean, overdispersion is present, and the Negative Binomial is the more appropriate model. We relied on the likelihood ratio test of the overdispersion parameter alpha to judge which model to use.[95] In the Republican-only model (Table A-1), alpha is not significantly different from zero, and thus we employ the Poisson model. However, in the Democrat-only model (Table A-2), alpha is significantly different from zero, and thus we employ the Negative Binomial model. With respect to all models, we obtain substantively equivalent results with Poisson and Negative Binomial.

95. The leading treatment of count models is A. COLIN CAMERON & PRAVIN K. TRIVEDI, REGRESSION ANALYSIS OF COUNT DATA (2d ed. 2013).

We cluster standard errors on legislator because regression models without clustering would treat each legislator's support for a bill as independent from her support for other bills, but episodes of bill support by the same legislator are not independent from one another. Nonindependent observations add less information to regression estimates than independent observations. Clustering standard errors on legislator adjusts standard errors to account for this and thereby avoids standard errors that are too small.[96]

The coefficients of a count model are not directly interpretable. In order to transform them into interpretable form, an *x*-unit increase in an independent variable translates into a factor change in the rate of the dependent variable given by $exp(x\beta)$. Using the chamber variable in the model in Table A-1 covering the full period, for a coefficient .362 the factor change in the expected count for a one-unit change in the associated independent variable is given by exponentiating ((1)(.362)), which equals 1.44. This means that when the independent variable is increased by one unit, holding other variables constant, the expected number of enactments increases by a factor of 1.44. This is the equivalent of saying that the expected number of enactments increases by 44%. This is how all marginal effects were computed.

The marginal effects column in the tables indicates the change in the predicted count associated with an increase of one unit in the associated independent variable. The meaning of "one unit," however, varies materially across independent variables, and thus the marginal effects listed are not meaningfully comparable across independent variables. The NOMINATE scale is continuous and spans -1 to 1, and the presidential distance variable ranges from 0 to 1.38, and thus the substantive meaning of the marginal effect associated with a one unit change on those variables is not clear. In the text, we translate the marginal effects into meaningful quantities by identifying the size of the effect associated with specific concrete changes, such as the difference in the average distance from a Republican member to the President for the last Bush II Congress and the first Obama Congress.

In the Democrat-only models (in Table A-2), we reversed the direction of the nominate scale because positive rates of change can be expressed more intuitively than negative ones, and doing so allows for clearer comparison to the positive rates of change associated with increasing conservatism in the Republican-only model.

96. *See* JEFFREY M. WOOLDRIDGE, INTRODUCTORY ECONOMETRICS: A MODERN APPROACH 484–511 (5th ed. 2013).

Table A-1: Poisson model of Republican legislator support for private enforcement provisions with Congress fixed effects

101st to 114th Congresses (1989–2016)

	Coefficient	Marginal effect
Ideology (increasing in conservatism)	.15 (.16)	
Presidential Distance	.51*** (.12)	66%
Chamber (Senate=0, House=1)	.36*** (.05)	44%
(Congress fixed effects not displayed)		
N=3,741 Adj. Dev. R^2 =.31		

107th to 114th Congresses (2001–2016)

	Coefficient	Marginal effect
Ideology (increasing in conservatism)	.48** (.21)	61%
Presidential Distance	.69*** (.20)	100%
Chamber (Senate=0, House=1)	.77*** (.07)	116%
(Congress fixed effects not displayed)		
N=2,218 Adj. Dev. R^2 =.42		

Standard errors in parentheses, clustered on legislator
***<.01; **<.05

Table A-2: Negative binomial model of Democratic legislator support for private enforcement provisions with Congress fixed effects, 1989–2018

101st to 114th Congresses (1989–2016)

	Coefficient	Marginal effect
Ideology (increasing in liberalism)	2.42*** (.14)	1026%
Presidential Distance	.28** (.12)	32%
Chamber (Senate=0, House=1)	.23*** (.05)	26%
(Congress fixed effects not displayed)		
N=3,876 Adj. Dev. R^2 = .35		

107th to 114th Congresses (2001–2016)

	Coefficient	Marginal effect
Ideology (increasing in liberalism)	2.86*** (.22)	1648%
Presidential Distance	.54** (.25)	72%
Chamber (Senate=0, House=1)	.07 (.06)	
(Congress fixed effects not displayed)		
N=2,137 Adj. Dev. R^2 = .39		

Standard errors in parentheses, clustered on legislator
***<.01; **<.05