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Procedural Law, the Supreme Court, and the Erosion of Private Rights Enforcement

Author : Suzette M. Malveaux

Date : January 9, 2020

Stephen B. Burbank & Sean Farhang, [Rights and Retrenchment in the Trump Era](#), 87 *Fordham L. Rev.* 37 (2018).

A slow, insidious creep of procedural law has been systematically eroding the private rights enforcement regime. For years, many of us proceduralists have sounded a clarion call over this unrelenting, incremental attack on private enforcement of substantive rights. [Rights and Retrenchment in the Trump Era](#) by Stephen Burbank and Sean Farhang unpacks this troubling phenomenon and offers us a cogent way for understanding how we got here. Burbank and Farhang do an excellent job of unearthing the history and future prospects of this entrenchment, illuminating through archival research, data, and theory how various institutions have taken a swipe at private enforcement.

The authors explore how Congress, the federal court rulemakers, and the Supreme Court have strategically sought to undermine substantive law, with varied success. Burbank and Farhang ultimately conclude that the Supreme Court is the winner in rights retrenchment—the most successful player in the counterrevolution against federal litigation vis-à-vis the other branches of government—for reasons of competency, opportunity and lack of democratic accountability. In pinpointing the Court as the victor, Burbank and Farhang focus our attention and effort toward resurrecting precious substantive rights in jeopardy. Their work is not only critical to understanding the problem, but represents an important step toward designing prescriptive measures. For those of us invested in protecting the rule of law—whether it be civil rights, environmental protection, consumer safety, or immigration policy—this article is essential reading for understanding the complexity, dynamism, and relentless way in which process (shrouded in neutrality and legalese) can quietly undercut democracy and more fundamentally humanity.

The article grows out of the authors' prior book, [Rights and Retrenchment: The Counterrevolution Against Federal Litigation](#). The new work not only summarizes the salient points of the book, but builds from this solid foundation and offers predictions about what lies ahead in an increasingly partisan and unpredictable political landscape. Unfortunately, Burbank's and Farhang's conclusion is troubling; they "expect that the Court's anti-private-enforcement posture will be sustained, if not deepened, in the foreseeable future." What accounts for this longevity, resilience and growth? The authors offer much food for thought.

They start by explaining how this all started—with the rise of the litigation state in the 1960s. Democrats, disillusioned with the American Administrative state's lack of capacity or interest in social and economic regulation, set out directly to enforce legislative mandates through private lawsuits and statutory rules. With Congress increasingly controlled by a different party than the White House, tension increased between Congress and the President, giving birth to a greater private enforcement regime. The Democratic-controlled Congress enacted statutes establishing private rights of action with fee-shifting provisions and damages enhancements. Burbank and Farhang demonstrate that these litigation incentives worked, tracking a steady rise in the federal private statutory litigation rate from 1933 to 2014.

But the rise of the litigation state would not go unchallenged. The authors describe an orchestrated counterrevolution on the part of Congress, the federal rulemakers, and the Supreme Court to leave untouched the substantive law, but to destabilize the tools used for their enforcement. Each branch had varying success.

Congress failed at its attempt. Retrenchment legislation advocated in the 1980s by John Roberts (yes, that John Roberts, then in the Justice Department) and Antonin Scalia (yes, you guessed it, then a law professor) failed. Republican support for anti-litigation measures was largely unsuccessful, from the Reagan era and beyond, even with

unified control of Congress in the 1990s. Republicans succeeded at enacting the Private Securities Litigation Reform Act (“PSLRA”) and the Prison Litigation Reform Act (“PLRA”) with Democrat Bill Clinton in the White House and the Class Action Reform Act (“CAFA”) with President George W. Bush in the White House. But they were unable to do more because of the “endowment effect”—people’s disdain for advocating for rights removal. While Republican legislators have largely abandoned their rights-retrenchment program, a new wave began in 2014 with unified control of Congress and has continued into the Trump era. However, with deterrents like the endowment effect and the filibuster, Burbank and Farhang doubt the beginning of a revolutionary litigation retrenchment coming from Congress. Their doubt may be even more justified today, given that the Democrats recaptured the House in the 2018 elections since this article was written. In fact, Burbank and Farhang flag an interesting twist—the growth of Republican-led bills to create private rights of action (complete with attorneys’ fees) for those seeking to enforce a traditionally conservative agenda.

The federal rulemakers have not fared much better in the counterrevolution. The authors analyzed original data from 1960 to 2014, seeking to understand the behavior of the Civil Rules Advisory Committee. Few rules proposals have limited private enforcement, but the ones that have been adopted have steadily disfavored plaintiffs. The authors conclude that anti-enforcement efforts by the Committee have not been very successful because of checks and balances (including public transparency and participation by stakeholders) added to the rulemaking process in the 1980s. They do flag one marked exception—the influence of Chief Justice Roberts on the amendment of the discovery rules in 2015. But class action reform efforts have not followed suit. The rulemakers did not take the bait—passing on many controversial proposals aimed at issue certification, ascertainability, and “picking off” plaintiffs. The authors give a shout out to the rulemaking process—its “restraint, thoroughness, and inclusiveness”—and the Advisory Committee members themselves when explaining why this institution has played a more limited counterrevolutionary role.

The Supreme Court has been the most successful at retrenching rights enforcement. Unlike Congress and the federal rulemakers, the Court is immune from politics and largely free from public scrutiny and participation respectively. The Court thus has achieved through interpretation (some would say rewriting) of the Federal Rules what others could not do through legislation or rule amendment. With an increasingly conservative Supreme Court, plaintiffs’ probability of successfully litigating private enforcement issues has declined over the last 40 years, to the point where “by 2014 they were losing in the vast majority of cases.” Burbank and Farhang share some gripping statistics:

By 2014 . . . the pro-private-enforcement side was losing an estimated 86% of the time, with conservative justices voting against private enforcement 90% of the time. Over the same period, the probability of a pro-private-enforcement vote by liberal justices actually increased from 67% to 78%. The distance between liberals and conservatives grew from 30 percentage points in 1970 to 68 percentage points in 2014

The authors contend that ideology has played a greater role in the justices’ votes over time and has created a greater schism among the justices when it comes to private enforcement rules than the substantive law itself.

The article concludes by offering insightful institutional justifications for why the Supreme Court has been most effective in the counterrevolution. First, the Court can more easily take unilateral action by a simple majority vote in controversial cases. Second, as a branch of government not chosen by the electorate, the Court is more immune from political influence. Third, the Court is more free to make policy-oriented decisions safe from a congressional course correction because of party polarization and congressional gridlock. Finally, the Court’s relative obscurity allows it to make retrenchment decisions that fly largely under public radar. These institutional attributes create the perfect storm for effective backlash to the 1960s rise of the litigation state.

Burbank and Farhang end on a sobering note, concluding that given the Court’s current and potential future composition, it will continue to lead the private rights retrenchment movement. *Rights and Retrenchment in the Trump Era* challenges us to think about this state of affairs. Given the ongoing violation of constitutional norms that characterize the Trump Administration, it behooves us to consider the role of all government institutions, particularly the

Court, and to hold them accountable to protect the rule of law.

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