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THE SUBTERRANEAN COUNTERREVOLUTION: THE SUPREME COURT, THE MEDIA, AND LITIGATION RETRENCHMENT

Stephen B. Burbank* and Sean Farhang**

INTRODUCTION

An extensive body of research in political science, law, history, and sociology has established that, beginning with the “rights revolution” of the 1960s and 1970s, the role of lawsuits and courts in the creation and implementation of public policy in the United States has grown dramatically.¹ Central to this revolution was an outpouring of rights-creating legislation from Democratic Congresses, much of which contained attorneys’ fees or multiple damages provisions that were designed to stimulate private enforcement.² The consequences and normative implications of this development are the focus of intense debate, both in scholarly circles³ and public fora.⁴ Yet, although we have numerous accounts of the emergence, development, costs, and

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1. See, e.g., CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 63–65, 69, 205 (1998); SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 214–23 (2010); LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 20–21, 118–19 (1994); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* *passim* (2001).

2. The phenomenon of Congress including private-enforcement regimes—whether attorneys’ fee-shifting provisions or multiple damages provisions (or both)—in statutes enacted to confer new or expand old rights increased substantially in the late 1960s and the 1970s, and it is closely correlated with the enormous increase in federal civil filings that started in the late 1960s. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1548, 1548 fig.1 (2014); see FARHANG, *supra* note 1, at 216–20.

3. See, e.g., ANDREW P. MORRIS ET AL., *REGULATION BY LITIGATION* 160–67 (2009); *REGULATION VERSUS LITIGATION* 38–39 (Daniel P. Kessler ed., 2011); W. Kip Viscusi, *Overview, in REGULATION THROUGH LITIGATION* 1–3 (W. Kip Viscusi ed., 2002).

4. See, e.g., Francis Fukuyama, *The Decay of American Political Institutions*, AM. INTEREST (Dec. 8, 2013), <http://www.the-american-interest.com/articles/2013/12/08/the-decay-of-american-political-institutions/>.

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benefits of rights enforcement through litigation, scholars have largely neglected systematic examination of the counterrevolution that ensued.⁵

This Article is part of a larger project to study that counterrevolution from an institutional perspective. We are interested in the interactions and competition among federal political institutions (including courts) for power and influence in the regulation of access to federal court, and, in particular, access for private enforcement of federal law. In a series of articles emerging from the project, we show how the Executive Branch, Congress, and the Supreme Court (wielding both judicial power under Article III of the Constitution and delegated legislative power under the Rules Enabling Act⁶) fared in efforts to reverse or dull the effects of statutory and other incentives for private enforcement.⁷

As discussed in Part II, an institutional perspective helps explain the outcome we document: the long-term erosion of private enforcement's infrastructure as a result of judicial decisions, despite the counterrevolution's struggles in landscapes of democratic politics. This perspective also highlights normative concerns that arise when changes bearing on the fate of rights enforcement are not the result of public deliberation and democratic politics—indeed, when they may not be noticed by the public at all.⁸

In Part III, we further explore the theoretical underpinnings of our intuitions concerning public awareness of the relevant judicial decisions⁹ and, for the first time, seek to determine whether they have empirical support. To that end, we investigate relationships among the Supreme Court's turn against rights enforcement, public under-

5. *But see* SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT *passim* (2015) (addressing part of this phenomenon, although her concept of retrenchment is quite different from ours).

6. 28 U.S.C. §§ 2072–74 (2012).

7. Burbank & Farhang, *supra* note 2; Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015) [hereinafter Burbank & Farhang, *Rulemaking*]. In another paper, we focus on the implications of our data for the study of litigation retrenchment in civil rights cases. Stephen B. Burbank & Sean Farhang, *Retrenching Civil Rights Litigation: Why the Court Succeeded Where Congress Failed*, in THE RIGHTS REVOLUTION REVISITED (L. Dodd, ed. forthcoming). Finally, we have written a paper on the implications of retrenchment for class actions. Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation* (Univ. of Pa. Law Sch. Pub. Law Research Paper Series, Research Paper No. 15-12, 2015), <http://ssrn.com/abstract=2622201>. We are currently writing a book, tentatively titled *Rights and Retrenchment: The Counterrevolution Against Federal Litigation*, which will be published by Cambridge University Press in 2016.

8. *See infra* notes 14–35 and accompanying text.

9. *See infra* notes 36–70 and accompanying text.

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standing, and public preferences by analyzing an original dataset that comprises news coverage regarding: (1) Supreme Court decisions ruling on substantive rights; and (2) decisions adjudicating opportunities and incentives to enforce those rights, such as standing, damages, fees, and the class action.¹⁰ This empirical evidence supports our hypothesis that the Court's decisions on rights enforcement, because of their lower public visibility, are less constrained by public opinion and, therefore, less tethered to democratic governance.¹¹ We further suggest that the relatively subterranean quality of law affecting private enforcement of rights may help to explain why it has become even more ideologically divisive on the Court than substantive rights themselves.¹² Finally, in Part IV, we explore whether analysis of data concerning the relationship between the Court's private enforcement decisions and public opinion supports the hypothesis that those decisions merely track public opinion (which, if true, would mitigate normative concerns).¹³ We show that it does not do so.

II. THE BACKGROUND

Our work to date elucidates the emergence of the conservative counterrevolution, organized largely within the Republican Party, and charts its failure in the elected branches. The campaign to retrench private enforcement crystallized early in the Reagan administration. Recognizing the political impossibility of repealing the substantive rights that underpinned the growing American regulatory state, the architects of the movement's strategy instead sought to constrict opportunities and incentives for their enforcement.¹⁴ Yet, the distinctive political and electoral challenges of retrenching existing rights with broad public resonance by statutory amendment—a goal that is obvious when the proposed amendments target statutory private enforcement regimes or procedural rules known to have dramatic impact on substantive rights—coupled with the inherent stickiness of the status quo arising from America's fragmented legislative institutions, proved to be more than the movement could surmount in Congress.¹⁵

10. See *infra* notes 71–81 and accompanying text.

11. See *infra* notes 29–35 and accompanying text.

12. See *infra* note 21 and accompanying text.

13. See *infra* text accompanying notes 82–100.

14. Early on, a Reagan administration bill that would have materially reduced attorneys' fees available to prevailing plaintiffs in suits against government under more than 100 statutes, which both John Roberts and Antonin Scalia championed, was unable to gain traction even in the Republican-controlled Senate. Burbank & Farhang, *supra* note 2, at 1552–55, 1565–67.

15. An analysis of all bills introduced in Congress between 1973 and 2010 that sought to amend federal law on five issues predictably affecting private enforcement shows that the 97th

We uncover similar dynamics affecting court rulemaking, which occupies lawmaking space that bridges legislative and judicial authority and was a powerful engine driving private enforcement through the 1960s, most notably in the 1966 amendments to Federal Rule of Civil Procedure 23 (class actions).¹⁶ Under the leadership of the first of a succession of Chief Justices appointed by Republican presidents, rulemaking became the focus of retrenchment efforts starting in 1971.¹⁷ However, once its potential for that purpose became apparent, rights-oriented interest groups and Democratic members of Congress who favored private enforcement quickly responded. Their efforts ultimately led to reforms in the rulemaking process that made the process itself more transparent and more accessible to public participation, assimilating it to the legislative process. In turn, those reforms to the rulemaking process made major retrenchment under its auspices more difficult, even with committees increasingly dominated by judges appointed by Republican presidents and corporate defense attorneys.¹⁸

Although largely a failure in the elected branches and only modestly successful in the domain of court rulemaking, the counterrevolution flourished in the federal courts. Having learned that retrenching rights enforcement by statute was politically and electorally perilous—and unlikely to succeed—the proponents of the counterrevolution pressed federal courts to interpret, or reinterpret, existing federal statutes and court rules to achieve the same purpose. They found a sympathetic audience in courts that were increasingly staffed by judges appointed by Republican presidents. Some of these judges were ideologically sympathetic to the retrenchment project, some were connected to the conservative legal movement that gave birth to the counterrevolution, and some even participated in or promoted the Reagan administration's failed efforts to retrench rights through legislation.¹⁹

Incrementally at first but more boldly in recent years, over the past four decades conservative majorities of the Supreme Court have

Congress (1981–1982) also occasioned the emergence of litigation retrenchment as a Republican issue in Congress. Thus, as long as Democrats controlled at least one chamber of Congress, Republicans' litigation-retrenchment proposals, whether initiated by the Executive or the Legislative Branch, had little chance of success. Indeed, even when Republicans secured control of both chambers, and for a time concurrently held the presidency, their litigation-retrenchment successes were modest and clustered in a few discrete policy areas. *Id.* at 1555–67.

16. See Burbank & Farhang, *Rulemaking*, *supra* note 7, at 1565–66.

17. See *id.* at 1567–68, 1568 fig.2.

18. Burbank & Farhang, *supra* note 2, at 1583–1603; Burbank & Farhang, *Rulemaking*, *supra* note 7, at 1586–87.

19. See Burbank & Farhang, *supra* note 2, at 1554.

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transformed federal law, making it less and less friendly, if not hostile, to the enforcement of rights through lawsuits. This branch of the campaign for retrenchment achieved victories in a long succession of decisions interpreting statutory private enforcement regimes, reshaping standing and private rights of action doctrine, and interpreting the Federal Rules of Civil Procedure.²⁰ Even if such apparently technical and legalistic rulings are unlikely to attract the notice of the American public—a central question we explore below—their importance is plain to members of the Supreme Court.²¹

In our work to date, we offered a tentative institutional account of why conservative judges on a court exercising judicial power usually succeeded when their ideological compatriots in Congress, the White House, and the primary rulemaking committee usually failed.²² First, as contrasted with the institutional fragmentation of the legislative and rulemaking processes, the Court is governed by a more streamlined decisional process and simple voting rules, making it comparatively more capable of unilateral action on controversial issues.²³ Four Justices suffice to put an issue on the Court's agenda, and bare majorities routinely win in decided cases, although they rarely do to enact legislation.

20. *See id.* at 1568–82, 1603–12.

21. This is how we interpret our findings that both nonprocedural private enforcement cases and, even more so, cases calling for interpretation of the Federal Rules of Civil Procedure, have emerged in recent years as axes of ideological conflict among the Justices even more factious than conflicts over substantive rights. *See id.* at 1576, 1612. Marc Galanter recognized the importance of “attention not only to the level of rules, but also to institutional facilities, legal services and organization of parties” more than forty years ago. MARC GALANTER, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, in *WHY THE HAVES COME OUT AHEAD: THE CLASSIC ESSAY AND NEW OBSERVATIONS* 15, 62 (2014).

The thrust of our analysis is that changes at the level of parties are most likely to generate changes at other levels. If rules are the most abundant resource for reformers, parties capable of pursuing long-range strategies are the rarest. The presence of such parties can generate effective demand for high grade legal services—continuous, expert, and oriented to the long run—and pressure for institutional reforms and favorable rules. This suggests that we can roughly surmise the relative strategic priority of various rule-changes. *Rule changes which relate directly to the strategic position of the parties by facilitating organization, increasing the supply of legal services (where these in turn provide a focus for articulating and organizing common interests) and increasing the costs of opponents—for instance authorization of class action suits, award of attorneys [sic] fees and costs, award of provisional remedies—these are the most powerful fulcrum for change.* The intensity of the opposition to class action legislation and autonomous reform-oriented legal services such as California Rural Legal Assistance indicates the “haves” own estimation of the relative strategic impact of the several levels. *Id.* at 63 (emphasis added).

22. *See* Burbank & Farhang, *supra* note 2, at 1580, 1605–06.

23. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 124–34 (2007).

Second, legislators and presidents are democratically accountable through elections. This accountability limits their ability to retrench existing rights that enjoy broad popularity.²⁴ Retrenching rights is electorally dangerous. By reason of the “negativity bias” (or “endowment effect”) phenomenon, people are substantially more likely to mobilize to avoid losing existing rights and interests than they are to secure new ones. For the same reason, voters are more likely to punish politicians who have impaired their interests than reward those who have benefited them, and politicians understand this. Federal judges (when acting as such, rather than serving as rulemakers) are far more insulated from the forces and incentives of democratic politics, which accords the Court greater freedom to act decisively on divisive issues.²⁵

Third, in an era of divided government and party polarization, the Court faced less credible threats of statutory override and correspondingly enjoyed a wider range of policy-making discretion.²⁶ With Republicans controlling at least one chamber of Congress nearly continuously since 1994, the prospect of Congress overriding the decisions of a conservative Court majority has usually been vanishingly small.²⁷ The growth of the influence of ideology on Justices’ votes on private enforcement issues, both procedural and nonprocedural, that we find after 1994 is consistent with the hypothesis that the Court enjoyed and exercised wider policy-making discretion during this period.²⁸

24. E.g., PAUL PIERSON, *DISMANTLING THE WELFARE STATE?: REAGAN, THATCHER AND THE POLITICS OF RETRENCHMENT* 17–19 (1994); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 36–37 (1993).

25. See Graber, *supra* note 24, at 35–38; see also Howard Gillman, *How Political Parties Can Use Courts To Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 *AM. POL. SCI. REV.* 511, 511–12, 517, 521 (2002). When potential legislative coalitions are internally divided in pursuit of a policy agenda, the Court’s electoral insulation and streamlined decisional rules are especially advantageous. See Graber, *supra* note 24, at 35–36, 43, 55. R

26. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 333, 365 (1991) (discussing the failed Civil Rights Act of 1990, which would have overturned nine Supreme Court decisions); see William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 *CAL. L. REV.* 613, 622 (1991) (discussing a proposed amendment to the Civil Rights Act that would have overturned a recent Supreme Court decision). See generally WHITTINGTON, *supra* note 23, at 230–84 (describing the history behind the growth of judicial authority). The same is true of proposed amendments to the Federal Rules of Civil Procedure, which we suggest influenced some rulemakers, who promoted controversial amendments, but not others. Prominent among the latter group are judges concerned about the perceived legitimacy and effectiveness of the “Enabling Act process.” Burbank & Farhang, *supra* note 2, at 1599–1603. R

27. See Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court’s Constitutional Rulings, 1987–2000*, 31 *LEGIS. STUD. Q.* 533, 548 (2006), <http://onlinelibrary.wiley.com/doi/10.3162/036298006X201922/epdf>. R

28. Burbank & Farhang, *supra* note 2, at 1577. R

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Finally—the hypothesis we elaborate and test in this Article—the ostensibly more technical and legalistic qualities of the Court’s decisions on issues affecting private enforcement and the gradual, evolutionary nature of case-by-case decision making, opened a pathway of judicial retrenchment remote from public view as compared to legislative politics or, indeed, Supreme Court decisions on highly salient issues. “[C]onsider that the public does not keep track of everything judges do; it follows only the ‘salient’ cases. The hypothesis is that judges might thus play to public opinion in the visible cases while pursuing their agendas in less visible ones.”²⁹ If, as many scholars believe, the Court’s public standing and legitimacy are important to its institutional power,³⁰ the need for broad public support and concern about negativity bias place some limits on its discretion to scale back highly visible, substantive statutory rights directly. From the standpoint of legitimacy, the strategy of focusing on lower visibility private-enforcement issues is preferable. When the Court is engaged in apparently technical and legalistic decision making, the public perceives it as more objective, neutral, and legitimate.³¹ Indeed, the public is less likely to notice these decisions at all.³²

In other words, the hypothesis is that the federal judiciary, spurred by proponents of the counterrevolution, pursued a slow-moving, long-running process that eroded the enforcement of federal rights but went largely unnoticed by the public.³³ Although significant legislative or rulemaking reform proposals often present stark alternatives that trigger powerful interest group mobilization, the case-by-case, less visible, more evolutionary process of legal change via court deci-

29. Stephen B. Burbank et al., *Introduction, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 6 (Stephen B. Burbank & Barry Friedman eds., 2002).

30. See, e.g., TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 162, 178, 193 (2011); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 3, 367–72 (2009); Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J.L. ECON. & ORG. 379, 379–80, 396 (2004).

31. John M. Scheb, II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928 (2000) (explaining the myth of legality and hypothesizing that it leads to positive evaluations of the Court). *But see* RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 15, 16, 189 (2004) (noting how, in the long-term, politicians believe that this may erode the public image of the Court).

32. Although not focusing specifically on judicial opinions, Staszak characterizes the “rules of the game” affecting access to courts as low-visibility. STASZAK, *supra* note 5, at 4–5.

33. The distinctive institutional power of the Court over procedure, which includes the power to amend the Federal Rules of Civil Procedure under the guise of interpretation, sometimes leads to radical and highly visible retrenchment. Burbank & Farhang, *supra* note 2, at 1604–06 (discussing the Court’s decisions on class actions and pleading).

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sions on seemingly technical and legalistic issues is far less likely to do so.³⁴ It is, therefore, less likely to be obstructed.

If this is accurate, a large transformation in private enforcement resulted from a succession of hundreds of court decisions distributed over decades, most of which did not appear monumental in isolation. Political scientist Paul Pierson suggested that, in contrast with attempting change through legislation at one or a few moments in time, slow-moving and low-visibility historical processes of policy change may be capable of overcoming the obstacles to retrenching rights in a democratic polity. As Pierson puts it, such slow-moving processes of retrenchment may be “invisible at the surface” while producing “long-term erosion . . . like termites working on a foundation.”³⁵

III. WHY PUBLIC OPINION MATTERS

A. *The Theory*

1. *Public Knowledge of Supreme Court Decisions*

There is extensive literature on what the public knows about the Court, how it gathers that knowledge, and how that knowledge translates into support (or lack of support) for the institution. Study after study demonstrates that the public knows little about the Court’s decisions, but levels of awareness differ between the attentive public (who tend to be better educated and more interested in politics and public affairs) and the nonattentive public.³⁶ In addition, numerous studies demonstrate that most members of the public acquire their knowledge about the Court and its decisions from the mass media. Although this is not surprising, it may help to understand a frequent counsel of caution about invoking the public’s ignorance. Research has found that the public’s knowledge of the Court’s decisions varies depending on a number of factors, including the extent and duration of media cover-

34. See Graber, *supra* note 24, at 41, 72–73; see also JEB BARNES & THOMAS F. BURKE, HOW POLICY MAKES POLITICS: ADVERSARIAL LEGALISM AND THE PATCHWORK AMERICAN STATE (forthcoming).

35. Paul Pierson, *The Rise and Reconfiguration of Activist Government*, in THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM 19, 33 (Paul Pierson & Theda Skocpol eds., 2007).

36. See, e.g., Gregory A. Caldeira, *Courts and Public Opinion*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303, 303 (John B. Gates & Charles A. Johnson eds., 1991) (arguing that the Court’s decisions “lack . . . saliency in all but a few situations”); Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOC’Y REV. 357, 363 (1968) (“Even the kinds of Court decisions that are apt to become most widely known are not particularly visible to a majority of the community.”). “People with knowledge about politics and public officials are those most likely to know about the decisions of the Supreme Court.” *Id.* at 364.

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age and the perceived salience of the contested issue. “[Citizens] are much more likely to become aware of controversial issues that produce substantial and continued media coverage, while remaining ignorant of most other decisions. Only those most consistently interested in politics and the Court are likely to know of the full range of its work and decisions.”³⁷ Salience can be defined as perceived relevance to either a person’s personal circumstances (such as race or religion)³⁸ or her circumstances as a member of a geographic community.³⁹

“Legitimacy” is a slippery term in constitutional law scholarship, so much so that Richard Fallon was moved to write an article devoted to unpacking the concept.⁴⁰ It has the same elusive potential in political science, but far more work, both theoretical and empirical, has been done that seeks to bring it to ground. That which Fallon refers to as “sociological legitimacy”⁴¹ is akin to what political scientists call “diffuse support,” that is, support for the institution whether or not one agrees with particular products (decisions).⁴² It is diffuse support, we believe, that the late Judge Richard Arnold was referring to when he stressed, as he often did, the need for the federal courts to have the “continuing consent of the governed”⁴³ if they were to preserve the independence necessary to make unpopular decisions required by law. We know that diffuse support for the Supreme Court was consequent-

37. Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in CONTEMPLATING COURTS 352, 366 (Lee Epstein ed., 1995).

38. Murphy & Tanenhaus, *supra* note 36, at 362 (explaining that the issues most apt to be salient “are clearly the ones that can be viewed in an intensely personal fashion: race, religion, and the security of life and property”).

39. Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89, 97 (2000) (“Most people may not know about most, or even many, of the rulings, but they do hear about those that have some relevance to their community.”); see Martha Humphries Ginn et al., *Vouching for the Court? How High Stakes Affect Knowledge and Support of the Supreme Court*, 36 JUST. SYS. J. 163, 176 (2015) (“extend[ing] Hoekstra by creating a profile of a respondent who was likely to be aware of a single Court decision in a region geographically proximate to the controversy”). “[O]ur results demonstrate that proximate communities seem to be more vested, and thus more aware.” *Id.* It is also relevant to note the possibility that “[a]n unusually controversial court decision appears able to cross the attention threshold of some of those for whom the judicial system is not a matter of everyday concern.” Richard Lehne & John Reynolds, *The Impact of Judicial Activism on Public Opinion*, 22 AM. J. POL. SCI. 896, 901 (1978).

40. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

41. “When legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a *strong* sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.” *Id.* at 1795.

42. DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 273 (1965).

43. *E.g.*, Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 22 (2005) (quoting Judge Arnold); see, *e.g.*, Richard S. Arnold, *Judges and the Public*, LITIG., 1982–1983, at 5, 5.

ial in the failure of President Roosevelt's court-packing plan.⁴⁴ Research suggests that it is linked to legitimizing messages about the courts, such as those highlighting the role of precedent and the rule of law,⁴⁵ and that it is adversely affected by delegitimizing messages, such as those indicating that the Justices consider political factors in their decision making⁴⁶ and those that frame court decisions simply in terms of results (e.g., *Bush v. Gore*⁴⁷ decided the 2000 election).⁴⁸ Federal courts have traditionally been able to draw on a stable deep well of diffuse support when making unpopular decisions.⁴⁹

44. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2611 (2003); see Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 73 (2002).

45. E.g., Vanessa A. Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCHOL. 597, 606–07 (2006); James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 349 (1998); see, e.g., Scheb & Lyons, *supra* note 31, at 928; see also, e.g., James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 553–55 (2003) [hereinafter Gibson et al., *Wounds*] (discussing the framing effect whereby unpopular decisions are cushioned by general views about the Court and the rule of law).

46. See, e.g., Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403 (2015) (reasoning that individuals who view the Court's decisions as evidence of an ideological movement are not concerned about the Court's political rationale). But see James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 213–14 (2011) (arguing that political considerations are not necessarily incompatible with public perceptions of the Court as legitimate).

47. 531 U.S. 98 (2008)

48. See, e.g., Stephen P. Nicholson & Robert M. Howard, *Framing Support for the Supreme Court in the Aftermath of Bush v. Gore*, 65 J. POL. 676, 677–78 (2003).

49. See, e.g., James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162, 162–63, 173 (2015). Notwithstanding predictions to the contrary, substantial, albeit somewhat diminished, diffuse support for the Court persisted following *Bush v. Gore*, 531 U.S. 98 (2008). Herbert M. Kritzer, *The American Public's Assessment of the Rehnquist Court*, 89 JUDICATURE 168, 176 (2005); Manoj Mate & Matthew Wright, *The 2000 Presidential Election Controversy*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 333, 333, 343 (Nathaniel Persily et al. eds., 2008) (finding that diffuse support decreased among Democrats and increased among Republicans following *Bush v. Gore*, but diffuse support in the aggregate remained stable and high). See Christenson & Glick, *supra* note 46, at 415–16, for a recent study suggesting that the aggregate stability of diffuse support masked individual-level changes when those updating their ideological assessment of a highly salient case “largely canceled each other out.” “Consistent with positivity theory, the response to our treatment article shows that people care that courts are different. On the other hand, and consistent with challenges to positivity theory, our panel data show that ideological alignment matters too.” *Id.* at 415. “[F]indings support the idea that individual-level support can be fluid and dynamic even if aggregate support is relatively stable.” Ginn et al., *supra* note 39, at 177.

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Many political scientists distinguish diffuse support from “specific support,” that is, support based on particular products (decisions).⁵⁰ Some political scientists do not believe that it is possible to disaggregate specific and diffuse support.⁵¹ Most believe, however, that the distinction is theoretically valuable, and there appears to have been progress in designing instruments permitting one to make the separation.⁵² Scholars most insistent on the distinction between diffuse and specific support acknowledge that there is a dynamic process at work, whereby repeated decisions eroding specific support might adversely affect diffuse support.⁵³ Moreover, polls regarding confidence in leadership seem to measure a combination of specific and diffuse support.⁵⁴

2. *The Relationship Between Public Opinion and Supreme Court Behavior*

There is also extensive literature on the relationship between public opinion and Supreme Court behavior. The central question in the seemingly endless debate about the so-called “counter-majoritarian difficulty” is whether the Supreme Court is, in fact, unconstrained by democratic politics. For decades, numerous political scientists have

50. See, e.g., EASTON, *supra* note 42, at 273; Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992) (“In principle, diffuse support differs from specific support in its sources, greater durability, and more fundamental basis.”).

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51. See, e.g., Robert H. Durr et al., *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768, 775 (2000).

52. See, e.g., Caldeira & Gibson, *supra* note 50, at 637, 637 n.1 (“We think it [is] possible with careful conceptualization and measurement to keep the two separate.”); James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 356 (2003) (“[M]ost [scholars] recognize a difference at least at the theoretical level.”); Nicholson & Howard, *supra* note 48, at 678 (“agree[ing] with Caldeira and Gibson . . . that such a distinction is theoretically and empirically feasible”).

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53. See, e.g., Gibson et al., *supra* note 45, at 356 (“Over the long-term, the two types of support should be related (and may converge)”); Gibson & Nelson, *supra* note 49, at 164 (“[S]pecific support causes diffuse support.”); Ginn et al., *supra* note 39, at 175 (“Collectively, these findings suggest that there is, in fact, a relationship between specific outputs of the Court and general feelings toward the Court, though undoubtedly a complicated one.”); see also, e.g., Paul J. Gardner, *The Effect of Media Framing on Public Support for the Supreme Court* 16 (Jan. 9, 2015) (“The results suggest that ideological factors are important not only for evaluating individual Supreme Court decisions, but that they also affect support for the Supreme Court overall, at least in the short term.”); Jeffrey J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1121–24 (1997) (discussing how the Court’s institutional legitimacy is affected over time by the public’s reaction to individual decisions).

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54. See, e.g., Gibson et al., *supra* note 45, at 357 (“[C]onfidence measures something akin to ‘presidential popularity,’ rather than enduring institutional loyalty,”); Gibson et al., *Wounds*, *supra* note 45, at 555 (“[C]onfidence is too much affected by short-term forces.”).

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disputed the proposition that the Supreme Court is unaccountable to other government institutions when deciding cases.⁵⁵ Their work, together with more recent work by scholars who take a strategic perspective, suggests that the Court does not often have the last word, even on matters of constitutional interpretation,⁵⁶ and, as a result, it does not stray very far (or for very long) from what the majority wants.⁵⁷ Moreover, as Barry Friedman and Anna Harvey have observed: “there is general agreement among political scientists, and increasing recognition among legal academics, that more often than not the outcomes of Supreme Court decisions are consistent with popular opinion.”⁵⁸

Why this is true remains unclear.⁵⁹ Since writing the article previously quoted, Friedman authored a book claiming, on the basis of qualitative analysis of historical evidence, that the Justices directly respond to public opinion for reasons of institutional legitimacy and effectiveness.⁶⁰ As observed by Epstein and Martin, however, studies deploying statistical analyses of quantitative data that were designed to test the effect of public opinion on the Court yielded mixed re-

55. See, e.g., ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* (2d ed. 1994); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992).

56. See, e.g., Neal Devins, *Is Judicial Policymaking Countermajoritarian?*, in MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 189 (Mark C. Miller & Jeb Barnes eds., 2004); Lee Epstein et al., *Constitutional Interpretation from a Strategic Perspective*, in MAKING POLICY, MAKING LAW, 170, 170–71. A recent study confirms that Congress seeks to override both statutory and constitutional decisions in certain circumstances. Alicia Uribe et al., *The Influence of Congressional Preferences on Legislative Overrides of Supreme Court Decisions*, 48 LAW & SOC. REV. 921, 941 (2014). However, finding that Congress does not act strategically in doing so, the authors suggest that “the Court may, at least when it concerns the ultimate effect of the override legislation, have greater influence on the ultimate location of public policy.” *Id.*

57. “Congress and the Court rarely disagree about whether the status quo should be altered; Congress wishes to override a Court decision preferred by the Court only 2.5% of the time in our data [Supreme Court decisions between 1946 and 1990].” *Id.*

58. Barry Friedman, *History, Politics and Judicial Independence*, in JUDICIAL INTEGRITY 114 (András Sajó ed., 2004). Friedman and Harvey’s study of Supreme Court decisions overruling congressional statutes demonstrates “that the Court is significantly more likely to overturn congressional statutes when it faces an ideologically congenial Congress.” Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 138 (2003). “In other words, the Court does defer to Congress, we believe, but it is more probably the sitting Congress rather than the enacting one. The sitting Congress has ample tools to discipline the Court, should Congress truly believe this is necessary.” *Id.* at 139.

59. See Isaac Unah et al., *U.S. Supreme Court Justices and Public Mood*, 30 J.L. & POL. 293, 297–303 (2015), for a summary of recent research and competing hypotheses concerning the causal mechanism.

60. See FRIEDMAN, *supra* note 30, at 4.

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sults.⁶¹ To be sure, “virtually all the studies demonstrate an *indirect* effect of public opinion via the appointments process[.]” with the public’s “role com[ing] in electing the President and the Senate, who appoint and confirm Justices reflecting the public’s preferences.”⁶² But, previous studies reached different results regarding the “more controversial matter . . . whether the public *directly* influences Court decisions (as Friedman claims).”⁶³ Epstein and Martin departed from those studies by analyzing their data at the case level (rather than on a term-by-term basis). They found “that an association exists between the public’s mood and the Court’s decisions.”⁶⁴ They were unable to affirm Friedman’s causal claim, however, because of concern that their statistical model was underspecified (missed important variables),⁶⁵ and because “the same things that influence public opinion may influence the Justices, who are, after all, members of the public too.”⁶⁶

We are doubtful about assimilating the Justices to the general public for this purpose, particularly at a time when all of them have similar elite educational and professional backgrounds.⁶⁷ Moreover, qualita-

61. Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 263 (2010).

62. *Id.* at 270. Dahl argued that the Court is “inevitably a part of the dominant national alliance.” Dahl, *supra* note 55, at 293. Dahl also stressed that the regularity of appointments of judges has likely led to a congruence of the policy preferences of a Court majority and the policy aims of the dominant political coalition. *Id.* at 284–85. A decrease in turnover, as happened in the decade after Justice Breyer’s appointment, “has important implications if Dahl’s . . . thesis is correct. A Supreme Court with a stable membership may be less responsive to changes in the political environment. This could result in a loss of public support over time, something that might endanger the Court’s ability to perform its constitutional function.” Peverill Squire, *Politics and Personal Factors in Retirement from the United States Supreme Court*, 10 POL. BEHAV. 180, 187 (1988).

63. Epstein & Martin, *supra* note 61, at 270.

64. *Id.* at 280.

65. As evidence of under-specification, Epstein and Martin discuss their finding, after re-estimating their model to interact the *Mood* variable with issues, “that public opinion was not a good predictor of the outcome in Judicial Power cases. Because litigation in this area tends to fly under the public’s radar screen, the (non-)result implies the need to control for the importance of each case” *Id.* In a footnote, however, they quote the authors of another study whose finding of a reduced effect of public opinion on liberalism in salient cases led them to suggest “case salience may actually intensify the operation of [the Justices’ own ideological] preferences[.]” *Id.* at 280 n.54 (first alteration in original) (quoting Michael W. Giles et al., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. POL. 293, 304 (2008)).

66. Epstein & Martin, *supra* note 61, at 281; see Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 471 (1997).

67. LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 66 (2006) (“Because of their pre-Court experiences, Supreme Court justices are likely to orient themselves toward elite groups rather than the general public.”). Baum argues that when values held by elites differ from those of the mass public, “judges’ links with their personal

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tive evidence that the Justices regard public standing and perceived legitimacy as important to the Court's institutional power disposes us to credit accounts that treat this impulse as an important driver of the Court's caution about straying too far from public opinion.⁶⁸ This explains the hypothesis, tentatively advanced as part of our institutional account of the Court's relative success in the counterrevolution, that Court majorities benefit—and know that they benefit—from doing the work of retrenchment on apparently technical and legalistic terrain, where the public tends to regard decisions as more objective and neutral, if it learns of the decisions at all.⁶⁹ As Paul Gardner observed:

Since the Court does not have electoral incentives, it is less interested in generating support for its decisions than it is in avoiding criticism or backlash. Therefore, it seeks to implement its preferred policy without generating negative attention that might decrease its legitimacy or support for its decision. . . .

audiences will draw them toward the views of elites.” *Id.* at 163. Note, however, that Baum dissented from the proposition that public opinion directly affects the Justices' behavior, causing them to act strategically to maintain the Court's institutional effectiveness, except perhaps in unusually controversial cases. *See id.* at 63–66. As a result, and notwithstanding the elite versus mass opinion distinction, he deemed it “more likely that the justices' own preferences change than that the justices respond systematically to changes in mass public opinion.” *Id.* at 70.

Judges are selected precisely for their skills as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly, then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in the east-and west-coast States. . . . Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination . . . a select, patrician, highly unrepresentative panel of nine

Obergefell v. Hodges, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) (footnotes omitted).

68. *See, e.g.*, CLARK, *supra* note 30, at 76, 162; FRIEDMAN, *supra* note 30, at 260. Clark's work persuades us that this is a more likely explanation of court-curbing bills' effects on the Court's decisions than is fear of congressional reprisal. As Professor Segal and colleagues argued, although the great majority of these bills are not credible threats to the Court, they function as signals of public displeasure. Jeffrey A. Segal et al., *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89, 90 (2011) (finding that although the Court does not appear to act strategically so as to avoid override in constitutional cases, “institutional maintenance” concerns appear to prompt strategic behavior when the Court is ideologically distant from Congress). “The variable measuring court-curbing legislation also achieves statistical significance . . . providing further support for a theory of institutional maintenance: the more court-curbing bills that are introduced in Congress, the less likely the Court is to invalidate a federal enactment.” *Id.* at 101.

69. From the perspective of legitimacy, the latter may be more important than the former because the authors of a recent study found that the “effect of information about the Court's alleged political rationale on respondents' legitimacy assessments is not conditioned by a legalistic belief about the Court.” Christenson & Glick, *supra* note 46, at 414.

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. . . The Court can achieve this either through decisions that match public preferences, or by deciding cases at odds with public opinion, but shielding themselves from public backlash by making effective journalistic coverage of those decisions significantly more difficult.

. . . .

. . . When the Supreme Court issues opinions with ambiguous language on technical subjects, a journalist may desire to expose changes in the law that result from the opinion. Given the public demand for lower levels of sophistication in political reporting, however, journalists may not be able to simultaneously command large audience[s] while providing sophisticated reporting. Therefore, the Supreme Court has tools to prevent the news media from reporting its decisions in such a way that the public will be well informed.⁷⁰

B. *The Evidence*

When we argued, without data, that the lower visibility of private enforcement cases enlarged conservative Justices' latitude to pursue the retrenchment project with little public notice, we encountered this objection: How do we know? After all, some private enforcement decisions, such as *Wal-Mart Stores, Inc. v. Dukes*⁷¹ and *Ledbetter v. Goodyear Tire & Rubber Co.*,⁷² elicited controversy and attracted massive public attention. Moreover, reporters covering the Court draw on sources who are highly sophisticated observers of U.S. law, including liberal activists and representatives of public-interest law organizations, many of whom are intensely aware of, and aggrieved by, the Court's private enforcement decisions.⁷³

70. Gardner, *supra* note 53, at 8–9.

The Haves also possess huge advantages of stealth. The media are mostly incurious and inexpert, bored by policy details, and inclined to report debates about policy as clashing partisan assertions with no attempt to sort out which are true and which distortions or lies. The general public is often more interested in policy than the media, but also ignorant of details.

Robert W. Gordon, *Afterword: How the Haves Stay Ahead*, in GALANTER, *supra* note 21, at 119. Cf. Megan Mullin, *Federalism*, in PUBLIC OPINION, *supra* note 49, at 209, 209 (“An additional reason for the public’s inattention to federalism jurisprudence is the abundance and complexity of the decisions themselves. The case history for federalism does not consist of a few discrete, visible decisions. Instead, the Court has acted incrementally through frequent rulings on a broad set of constitutional questions.”).

71. 131 S. Ct. 2541 (2011).

72. 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

73. In discussing the difficulties of using newspaper coverage as a measure of case importance, the authors of a recent study of end-of-term decisions observe that coverage, “being motivated by journalistic concerns, may bear little relation to the legal importance of a case.” Lee Epstein et al., *The Best for Last: The Timing of U.S. Supreme Court Decisions*, 64 DUKE L.J. 991, 998–99 (2015). They give as an example the fact that the *New York Times* gave front page coverage to a

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Finding no data on the question,⁷⁴ we undertook an empirical project to test our intuitions. Beyond that, we sought to provide concrete information about actual magnitudes of differences (if any exist) and how they vary (if they do) for distinct types of coverage—such as aggregate coverage, prominent coverage, or opinion and editorial coverage. We were also interested in longitudinal trends, in particular, whether growing ideological polarization among Justices over private enforcement in recent years, which has attracted increasing attention by scholars, has garnered heightened media attention as well.

We evaluate media coverage of the Supreme Court's decisions on issues affecting the enforcement of rights as contrasted with rights themselves. To do so, we start with a set of Supreme Court cases addressing issues that have been commonly associated with private enforcement. For the period 1960–2013, we identified all Supreme Court decisions requiring Justices to vote on: (1) the existence or scope of either an express or implied private right of action; (2) whether a party has standing to sue under either Article III or prudential analysis; (3) the availability of attorneys' fees to a prevailing plaintiff; (4) whether an arbitration agreement forecloses a plaintiff's access to court to enforce a federal right; (5) the availability or magnitude of damages for a plaintiff who establishes the violation of a federal right; and (6) the interpretation of a Federal Rule of Civil Procedure where the result would either widen or narrow opportunities or incentives for private enforcement.⁷⁵ In total, there were 364 of these cases from 1960 to 2013.

case that has been cited in 2,160 decisions but not to a pleading case (*Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)) that, “[a]lthough less interesting to the average newspaper reader,” has been cited “in nearly 69,000 decisions.” *Id.* at 999. “For a media committed to large readerships and accurate reporting, conveying the nuance of these sorts of decisions may take a back seat to more sensational reporting about divided cases that may actually be less consequential.” Gardner, *supra* note 53, at 18.

74. *But cf.* Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 325 (2012) (“*Wal-Mart v. Dukes* involved a massive sex-discrimination class action against a major nationwide corporation, making it the rare civil procedure case to draw significant scholarly and mainstream media coverage, which largely focused on its potential effect on substantive employment discrimination law.”). “Of course, having civil procedure on the doctrinal agenda will not draw the attention . . . of the popular media or the public; do not expect public calls to impeach Roberts over the scope of Rule 8(a).” *Id.* at 315–16.

75. We included cases in our data only to the extent that they involved suits directly against the objects of legal regulation, and, thus, we excluded judicial review of administrative action. We also excluded cases in which the Court's analysis applied equally to public and private enforcers. With respect to the Federal Rules cases, because we are especially interested in class actions, we included cases in which the decision either turned on an interpretation of Federal Rule of Civil Procedure 23 or an issue explicitly linked to policies underpinning it.

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From these cases, we drew 235 at random. Of these 235 cases, 149 contained a private enforcement issue but did not contain a merits issue. For each of these 149 cases, we used the Spaeth Supreme Court Database⁷⁶ to identify a case decided around the same time that addressed a merits issue comparable in nature to the claim underlying our private enforcement case. An example serves to illustrate. In our private enforcement data, a fee issue arose in a Clean Air Act⁷⁷ case, but the Court only addressed the fee issue and not the Clean Air Act merits issue. We then searched the Spaeth database for a Clean Air Act case decided around the same time that presented only a merits issue or, failing that, a merits issue under another environmental statute. In the Appendix we discuss in detail the protocol for identifying merits companion cases for private enforcement cases lacking merits issues. This procedure led to 149 pairs of cases or 298 cases for analysis in total. We call these Type 1 cases.

An additional sixty-eight cases from our random sample of 235 involved both a private enforcement issue and a merits issue from the underlying claims in the litigation. We call these Type 2 cases. In the remaining eighteen cases, it was not possible for us to segregate a private enforcement issue from the underlying merits issue, and thus these cases did not present an opportunity to assess differences in media coverage across the two kinds of issues.⁷⁸

To evaluate media coverage of our issues, we constructed an issue-level dataset. For our 298 Type 1 cases, each case produced one issue with respect to which we evaluate media coverage. In accordance with the procedure previously mentioned, one-half of the cases presented private enforcement issues but not merits issues, and one-half presented merits issues but not private enforcement issues. The sixty-eight Type 2 cases each presented a merits issue and a private enforcement issue for a total of 136 issues. The total dataset, therefore, contains 434 issues, one-half private enforcement and one-half merits, which arose in 366 cases.

We conducted searches to identify articles covering cases in the data that appeared in the *New York Times*, *Washington Post*, and *Wall Street Journal*. With respect to each case, coders read all articles covering it and collected the following information: (1) the total number

76. *The Supreme Court Database*, <http://supremecourtdatabase.org/analysis.php> (last visited Oct. 10, 2015).

77. Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401–7671q (2012)).

78. These were primarily cases in which the Court addressed the scope of a private right of action.

of articles discussing the issue; (2) the number of articles discussing the issue that were reporting *only* on the case in question, as contrasted with roundup articles covering numerous cases; (3) the number of editorial and opinion pieces covering the issue; and (4) the number of articles discussing the issue that were reporting only on the case in question and that appeared on the front page. In total, there were 1,626 instances of an article discussing one of the issues (private enforcement or merits) in our data.

The distinctions across the four counts are important. Articles giving cursory coverage to many cases are typical among those reporting on the Supreme Court. Although 80% of the issues in our data were covered, only 55% were covered in an article discussing only that case, only 19% were covered in at least one opinion or editorial piece, and only 20% were covered in single-case articles that appeared on the front page. Thus, the count of single-case articles registers more prominent coverage than the count of total articles, and the counts of opinion and editorial pieces and front-page, single-case articles register still more prominent coverage. Opinion and editorial pieces indicate whether the press is presenting issues to the public as matters of particular public interest warranting reflection and debate.

At this stage in the work, we are not attempting to explain why the media covers private enforcement issues differently than merits issues, if in fact it does. If that were our goal, we would incorporate independent variables intended to test explanatory theories or control for other factors into statistical models. But, that is not our goal. Rather, we wish to know the answer to the raw descriptive question: How much media coverage is garnered by the Court's decisions on private enforcement of rights as compared to its decisions on those rights themselves? Although the question *why* variation exists may be interesting, the bivariate relationship best describes the quantum of information being transmitted to the public by the media with respect to the two types of issues.

Table 1 displays the mean counts for the total number of articles, the number of single-case articles, the number of opinion and editorial pieces, and the number of front-page, single-case articles separately for private enforcement and merits issues. The bivariate differences are large, and they increase from total articles, to single-case articles, to opinion and editorial pieces. Moving from private enforcement issues to merits issues is associated with a growth of 157%, 307%, and 400%, respectively. The difference is even greater for front-page, single-case articles (464%).

TABLE 1

Mean Values of Newspaper Coverage of Supreme Court Decisions: Private Enforcement versus Merits Issues			
	Private Enforcement	Merits	Percent Growth
Total Articles	2.1	5.4	157%
Single-Case Articles	.76	3.1	307%
Opinion & Editorials	.16	.80	400%
Front-Page, Single-Case Articles	.11	.62	464%

To test the statistical significance of these effects, we ran negative binomial models on each count with an indicator variable reflecting whether the issue was a private enforcement or merits issue (private enforcement=0, merits=1). We also included an indicator variable capturing whether the issue is from the Type 1 or Type 2 pool (Type 1=0, Type 2=1) and a linear time trend. The results are presented in Table 2. The effects are statistically significant, and the magnitudes are similar to those reflected in Table 1. The marginal effect displayed in the table reflects the change in a predicted count moving from private enforcement issues to merits issues. The growth in the count is 166% for total articles, 278% for single-case articles, 371% for opinion and editorial pieces, and 464% for front-page, single-case articles.

To assess whether these differences are present across newspapers, we replicated the three models in Table 1 but used each newspaper separately as the dependent variable. The private enforcement coefficient was statistically significant in each of the twelve regressions. Table 3 summarizes the main results, displaying the marginal effect associated with moving from private enforcement to merits cases for each coefficient. Although statistical significance is always present, the marginal effects are notably smaller in the *Wall Street Journal* regressions. Examining the data reveals that the smaller effect for the *Wall Street Journal* is driven not by greater coverage of private enforcement issues but by materially less coverage of merits issues. For example, in the single-case category, the *Wall Street Journal* has a mean value of .22 per issue for private enforcement cases as compared to .21 for the *Washington Post* and .33 for the *New York Times*. For merits issues, however, the mean values are .43 for the *Wall Street Journal*, 1.1 for the *Washington Post*, and 1.6 for the *New York Times*.⁷⁹

79. See Matthew Gentzkow & Jesse M. Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, 78 *ECONOMETRICA* 35 (2010), for a study showing that the political slant of newspapers depends on the views of their readers. See also Epstein et al., *supra* note 73, at

TABLE 2

Negative Binomial Model of Newspaper Coverage of Supreme Court Decisions			
	Total Articles		
	Coef.	SE	Marginal Effect
Merits versus Private Enforcement	.98***	.11	166%
Year	-.01*	.005	
Type	-.07	.14	
	Single-Case Articles		
	Coef.	SE	Marginal Effect
Merits versus Private Enforcement	1.33***	.14	278%
Year	-.01	.01	
Type	.35**	.18	
	Opinion & Editorial Pieces		
	Coef.	SE	Marginal Effect
Merits versus Private Enforcement	1.55***	.26	371%
Year	.01	.01	
Type	.33	.27	
	Front-Page, Single-Case Articles		
	Coef.	SE	Marginal Effect
Merits versus Private Enforcement	1.73***	.26	464%
Year	-.01	.01	
Type	.97***	.23	

N=434
Standard errors in parentheses clustered on case
 ****p*<.01; ***p*<.05; **p*<.1

We are also interested in assessing variation in media coverage of private enforcement issues over time. In earlier work, we find a steep, long-run trend toward more anti-private enforcement outcomes. Additionally, we find ideological voting by Justices growing over time with respect to private enforcement issues. Further, since the mid to late 1990s, there has been a sharp increase in polarization between the liberal and conservative wings of the Court, such that the Justices are now more divided over private enforcement issues than they are over federal statutory and constitutional issues in general.⁸⁰ Also, since around 2000, there has been increased scholarly attention to the Court’s anti-private enforcement posture.⁸¹ We are interested in

1010 (“[C]onservative decisions are less likely to receive media coverage.”). Also, “there is a slight downward trend in *New York Times* coverage since the Warren Court.” *Id.* at 1018–19.

80. Burbank & Farhang, *supra* note 2, at 1574–76, 1608, 1616.

81. See, e.g., Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 318–21 (2012); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186–87; Sylvia A. Law, *In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 395–96 (2002); Andrew M. Siegel, *The Court*

TABLE 3

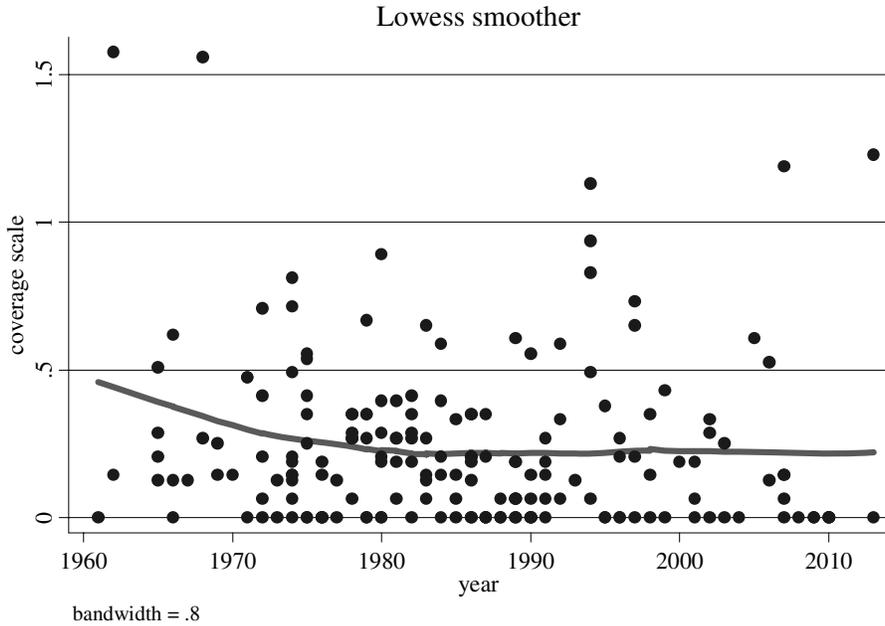
Marginal Effects of Negative Binomial Count Models from Newspaper Coverage of Supreme Court Decisions	
	Total Articles
<i>New York Times</i>	189%***
<i>Washington Post</i>	186%***
<i>Wall Street Journal</i>	92%***
	Single-Case Articles
<i>New York Times</i>	344%***
<i>Washington Post</i>	385%***
<i>Wall Street Journal</i>	97%***
	Opinion & Editorial Pieces
<i>New York Times</i>	381%***
<i>Washington Post</i>	511%***
<i>Wall Street Journal</i>	239%***
	Front-Page, Single-Case Articles
<i>New York Times</i>	362%***
<i>Washington Post</i>	603%***
<i>Wall Street Journal</i>	None of this type of coverage for private enforcement issues
N=434	
Robust standard errors clustered on case	
*** <i>p</i> <.01; ** <i>p</i> <.05; * <i>p</i> <.1	

whether increasing acrimony between Justices on these issues and mounting scholarly attention and criticism have been associated with greater press coverage of private enforcement issues.

To answer that question, we focus on coverage of the private enforcement cases over time. We created a composite media coverage index for each case as the mean value of the standardized counts for total articles, single-case articles, opinion and editorial pieces, and front-page, single-case articles. Figure 1 displays that composite measure and a LOWESS curve fit through it. The estimated values decline significantly from .33 in 1961 to .19 in the early 1980s. Since then, these values continued to decline very gradually to .16 at the end of the series. There is no indication that escalating polarization on the Court over private enforcement issues since the late 1990s, or the growing attention paid to the Court’s private enforcement decisions by scholars during the same period, influenced the quantum of information conveyed to the public by the press.

Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence, 84 TEX. L. REV. 1097, 1119–21 (2006).

FIGURE 1: MEDIA COVERAGE OF PRIVATE ENFORCEMENT ISSUES: 1960–2013



IV. PRIVATE ENFORCEMENT AND PUBLIC OPINION

It may be cause for concern that although the rights-retrenchment campaign largely failed in democratic politics, the Court is eroding the operational meanings of rights with little notice by the public.⁸² Some of the research on public opinion discussed in this Article suggests, however, that these concerns may be misplaced. If empirical scholarship showing that the Court’s decisions track public opinion is correct, regardless of the causal mechanism that produces this effect, then even if one dislikes the direction the Court is taking the law of private enforcement, it is likely not far from what the public wants. As we have noted, our view is that the Court is likely constrained by legitimacy concerns on issues that are salient to the public but that Court majorities have wider latitude to pursue ideological agendas at odds with public preferences in more subterranean fields of law.

The suggestion that normative concerns may be misplaced and our response point to one further empirical question: Are the Court’s pri-

82. Burbank & Farhang, *supra* note 2, at 1580–82. “Since unpopular decisions are generally short-lived, by avoiding public notice entirely, the Court is able to make small yet significant changes in the law, which may be hard to undo by the time the public takes notice.” Gardner, *supra* note 53, at 18.

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vate enforcement decisions just moving in tandem with public preferences? To test whether the Court's private enforcement decisions are merely a reflection of public opinion, we first replicate, with slight modification, a recent model created by Epstein and Martin⁸³ and then apply the model to our private enforcement decisions. Epstein and Martin's case-level analysis of the empirical relationship between public opinion and Supreme Court decisions uses the Spaeth dataset of all Supreme Court opinions. Their dependent variable is the ideological direction of case outcome (conservative=0, liberal=1). Their key independent variable is James Stimson's influential public "mood" variable, which aggregates extensive survey data to map underlying public attitudes on a liberal-conservative continuum with higher values associated with increasing degrees of liberalism; it is measured quarterly.⁸⁴ We lagged the mood variable one quarter because a contemporaneous quarterly mood variable would frequently be based on public opinion measured after a decision was issued. This lagged public mood variable is available through the first quarter of 2012.

The Epstein and Martin model incorporates a set of controls for factors well known to be associated with the direction of case outcomes, including: (1) the ideological position of the Court, which they measure with the median Martin–Quinn score⁸⁵ of Justices sitting in each case (increasing values are associated with increasing conservatism); (2) the ideological direction of the lower court decision being reviewed; (3) the ideological direction of the position of the United States or a federal agency if either was a party in the litigation; and (4) the policy area of the claim asserted in the case.⁸⁶ They also incorporate measures of the President's and Congress's ideological preferences using common space "NOMINATE" scores, controlling for potential effects of the political branches on the Court (increasing values are associated with increasing conservatism).⁸⁷ We include a linear time trend as well. Standard errors are clustered on year.

83. Epstein & Martin, *supra* note 61, at 277.

84. JAMES A. STIMSON, *PUBLIC OPINION IN AMERICA: MOODS, CYCLES, AND SWINGS* 19–37 (2d ed. 1999).

85. Martin–Quinn scores are measures of Justice ideology based on the voting behavior and alignments of Justices in nonunanimous decisions, and they vary for each Justice each year. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 *POL. ANALYSIS* 134, 137, 146 tbl.1 (2002).

86. See Epstein & Martin, *supra* note 61, at 271–75, for a discussion of their model specifications. We measure policy area with fourteen policy area dummy variables based on Spaeth's "issueArea" variable.

87. We measure congressional ideology based on the average of the median NOMINATE scores in the House and Senate. NOMINATE scores are a continuous ideology measure based

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First, we apply the revised model to the Spaeth dataset for the period 1960–2012. Because liberalism is coded in the positive direction for both the public mood variable and the Spaeth case outcome variable, if the two are moving in tandem, the predicted effect is a significant coefficient and a positive sign on the public mood variable. The results, presented in Table 4, Model A, are consistent with Epstein and Martin’s results.⁸⁸ The public mood variable is statistically significant. The substantive effect is modest in size. It requires an increase equivalent to the full range of the variable to produce a 9% increase in the probability of a liberal vote.⁸⁹

Next, we apply the same model to the Court’s private enforcement decisions referred to above, which address: (1) private rights of action; (2) standing; (3) attorneys’ fees; (4) arbitration; (5) damages; and (6) the Federal Rules of Civil Procedure. Cases were included in our dataset only when resolution of the issue would predictably affect private enforcement. In our 364 private enforcement cases from 1960–2013, some cases presented more than one private enforcement issue, and, thus, outcomes were coded at the issue level. We coded each of the 401 issue outcomes as pro-enforcement (=1) if it favored the plaintiff-enforcer and as anti-enforcement (=0) if it favored the defendant. We also separately coded each Justice’s vote on each private enforcement issue.

A question arises about how to characterize the direction of outcomes on the conservative–liberal dimension. The anti- versus pro-enforcement coding does not necessarily correspond to conservative versus liberal because a pro-enforcement decision may occur in a case with an ideologically conservative underlying claim. It turns out that these cases are relatively rare. We applied the Spaeth protocol for coding conservative versus liberal outcomes to the underlying causes of action in our cases.⁹⁰ Under this protocol, only 7% of our private enforcement cases concerned conservative underlying claims. Another 7% could not be assigned an ideological direction. Eighty-six

on roll call votes for legislators and on presidential positions publicly taken on roll calls by presidents. See KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 23–27 (1997), for a discussion of NOMINATE scores.

88. See Epstein & Martin, *supra* note 61, at 277 tbl.3.

89. In an alternative specification (not displayed), we substituted Segal–Cover medians for Martin–Quinn medians as our measure for Court ideology, and the public mood variable remained significant with a comparably sized effect. Segal–Cover scores are measures of Justice ideology based on preconfirmation newspaper editorials on the nominations and thus are independent of the Justices’ voting behavior. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 559 (1989).

90. See generally *Online Code Book*, SUP. CT. DATABASE, <http://wustl.edu/php?var=decision> Direction (last visited Aug. 21, 2015) (describing the protocol in detail).

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percent (344) of our private enforcement issues had liberal underlying claims. Thus, if our data are representative of private enforcement issues in general, the vast majority of private enforcement issues decided by the Supreme Court over the past half-century have been in cases asserting liberal claims. We restrict our empirical analysis to those issues to enable a consistent mapping between the conservative-liberal dimension of public opinion and the actual underlying ideological meaning of the anti- or pro-axis of our private enforcement issues.⁹¹

TABLE 4

Logit Model of Supreme Court Case Outcomes and Justice Votes			
	All Spaeth Cases (Model A)	Private Enf. Cases (Model B)	Private Enf. Votes (Model C)
Public Mood (Lag)	.02** (.01)	-.03 (.03)	-.003 (.02)
Martin–Quinn Median	-.51*** (.08)	-.80** (.32)	-.37*** (.03)
Lower Court Outcome	-1.15*** (.07)	-.86*** (.28)	-.67*** (.19)
U.S. Liberal/Pro-Enforcement	.51*** (.08)	-.32 (.63)	.54 (.49)
U.S. Conservative/Anti-Enforcement	-.44*** (.08)	-.21 (.30)	-.04 (.23)
Congressional Ideology	-.36 (.38)	-2.3* (1.22)	-1.97* (1.03)
Presidential Ideology	-.03 (.09)	-.04 (.30)	-.14 (.21)
Year	-.000 (.003)	-.01 (.01)	.005 (.007)
Policy Area Fixed Effects	✓	✓	✓
N=	6732	344	2973

Standard errors in parentheses clustered on Supreme Court term in Models A and B and on case in Model C

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

In Table 4, Model B replicates Model A, but the dependent variable is switched to measure anti- versus pro-enforcement outcomes in our private enforcement cases (anti=0, pro=1).⁹² The significant correla-

91. Failure to restrict the analysis in this way would be biased toward failing to detect a correlation between public-opinion and private-enforcement outcomes.

92. The policy dummies in this model were civil rights actions alleging some form of discrimination, other civil rights, civil liberties, environmental, labor, antitrust, securities, and other. We also included dummy variables that captured our private-enforcement issues: private rights of action, standing, attorneys’ fees, arbitration, damages, and civil procedure.

tion between public opinion and case outcomes, net of the effects of other variables, disappears. The public mood variable becomes highly insignificant ($p=.76$) with a negative sign—the opposite direction of the prediction if the Court’s private-enforcement decisions were moving in tandem with public opinion.⁹³

In another effort to detect a correlation between public opinion and the development of law governing private enforcement, in Model C, we replicate Model B but substitute Justice votes for case outcomes as the dependent variable. This provided 2,973 justice votes for analysis. In this model we clustered standard errors on case. Although Model B reveals that public mood is not associated with actual case outcomes on private enforcement issues, it may still be correlated with individual-level Justice voting. However, in this model, the public mood variable is again negative and insignificant.⁹⁴

The data simply provide no hint that conservatism in either outcomes or Justice votes in private-enforcement cases is positively correlated with conservatism in public opinion. Whatever explains the significant positive correlation between the ideological direction of public opinion and justice behavior in highly aggregated models, such as Model A, the relationship disappears when we focus on private enforcement decisions. This is consistent with our view that the lower-visibility character of private enforcement issues increases Justices’ perceived policy-making discretion. To be sure, although the models in Table 4 are consistent with that view, they do not demonstrate it to be true.

We note one further result and probe its meaning. In both of the private-enforcement models, the measure of congressional ideology crosses the .1 threshold, with more conservative Congresses associated with more anti-enforcement votes and outcomes. In the context of the normative question raised in this Article, it may be significant that although the Court’s private enforcement decisions have received little public notice and are not associated with public opinion, the results on the congressional ideology variable suggest that the decisions do track Congress’s preferences.

This association’s meaning is not entirely clear. We have demonstrated elsewhere that beginning around 1995, the Court moved notably to the right on private enforcement issues, and we suggested that

93. In an alternative specification (not displayed), we substitute Segal-Cover medians for Martin-Quinn medians, and the public mood variable remains negative and becomes statistically significant ($p=.03$).

94. This remains true in the alternative specification (not displayed) in which we substitute Segal-Cover medians for Martin-Quinn medians.

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this may have been, in part, because nearly continuous Republican control of at least one chamber of Congress provided the Court's conservative wing shelter from legislative override.⁹⁵ To pursue this point, we reran Model C from 1960–1994 and 1995–2012. This vote-level model provides sufficient data to gauge whether the association between congressional ideology and the Court's private enforcement decisions varies across the two periods and to compare the effects with respect to liberal and conservative justices.⁹⁶ What we find is that in the 1960–1994 period, where a large majority of the data lies, the congressional ideology variable is highly insignificant.⁹⁷ In the 1995–2012 period, where a much smaller portion of our data lies, the variable measuring congressional ideology approaches significance.⁹⁸ Moreover, when the post-1994 vote-level model is run separately on the votes of conservative Justices and liberal Justices, the congressional ideology variable is significant only for conservative Justices.⁹⁹ Thus, in the three and a half decades prior to 1995 when the Republicans took control of Congress, there is no evidence that the Court's private enforcement decisions were correlated with congressional preferences. In the 1995–2012 period, only the conservative Justices' votes are significantly correlated with congressional ideology.

V. CONCLUSION

Deploying content analysis of a large body of news articles, we demonstrate that Supreme Court rulings on private enforcement of rights receive dramatically less press coverage than decisions concerning the rights themselves. This is true with respect to the volume of total coverage, more prominent coverage, and whether issues receive editorial or opinion treatment, with increasingly large effects. The media's role in informing the public about the work of the Supreme Court declines precipitously when one moves from rulings on rights to rulings on the enforcement of those rights. This low level of coverage has been unaffected by the conservative majority's increasingly strong push against private enforcement, escalating polarization on the Court over it, and growing criticism of these developments by scholars and commentators.

95. Burbank & Farhang, *supra* note 2, at 1577–79.

96. We use the median of the average Martin–Quinn scores for the years that Justices appear in the data to divide them into the conservative and liberal categories. *Id.* at 1572 tbl.4, 1573.

97. $P=.61$ with 2,080 observations.

98. $P=.102$ with 893 observations.

99. $P=.07$ in the model of conservative votes with 458 observations and $p=.21$ in the model of liberal votes with 391 observations.

From a normative perspective, these results might not cause concern if the Court's private enforcement decisions merely tracked public opinion. We set out to test that proposition. To do this, we constructed models to explore the relationship between our private enforcement data and the most widely used measure of liberalism in public opinion. In these models, we found no evidence of a positive association between the ideological direction of public opinion and the Court's private enforcement decisions. Whatever positive association may exist between the ideological direction of public opinion and the Court's decisions when large swaths of its cases are pooled, it appears to be wholly absent in our low-visibility, private-enforcement cases.¹⁰⁰

100. In this light, a strategy of subterranean retrenchment has special value when, as now, the Court is badly fractured because "the Supreme Court responds more strongly to public opinion when the Court is more polarized than when it is not." Unah et al., *supra* note 59, at 328.

APPENDIX

For each case addressing a private enforcement issue but not a merits issue, we drew a companion case from the Spaeth Supreme Court database that presented only a merits issue. We followed the procedure below to identify these companion cases.

- (1) We first looked for a case under the same statute or constitutional provision that was decided in the same year. If more than one existed, we drew one randomly.
- (2) If one was not present, we looked for a case under the same statute or constitutional provision in the year before or the year after, in random order. If more than one existed, we drew one randomly.
- (3) If one was not present, we looked for one in the same specific policy area in the same year. The most common example of this is when a federal statutory claim was in a policy area, such as environmental, in which there was not a specific statute match, but there was a case under another federal statute in the same policy area. For example, if our case was under the Clean Water Act but our match case was under the Clean Air Act, we would regard that as a specific policy match.
- (4) If one was not present, we looked for a case in the same specific policy area in the year before or the year after, in random order. If more than one existed, we drew one randomly.
- (5) If one was not present, we looked for a case under the same statute or constitutional provision two years before or two years after, in random order. If more than one existed, we drew one randomly.
- (6) If one was not present, we looked for one in the same specific policy area two years before or two years after, in random order. If more than one existed, we drew one randomly.
- (7) In the event that these steps did not yield a match, we drew a case randomly in the same year with the same general policy area defined by the Spaeth “issue” code.

After a Spaeth case was used, it was removed from the pool of data from which we drew subsequent companion cases. Using this procedure, 63% of the cases were matched on the statute or constitutional provision, 26% were matched on the specific policy area, and 11% were matched on the general policy area.

