

FEDERAL COURT RULEMAKING AND LITIGATION REFORM:
AN INSTITUTIONAL APPROACH

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CODING PRACTITIONER PRACTICE TYPES

For every practitioner, coders conducted separate searches in Westlaw and Lexis. We used both databases because we found that they sometimes contained different sets of cases and we did not want our coding to be affected by the decision to rely upon one database. We identified cases in which the practitioner appeared as counsel going back in time from their date of appointment, and stopping when we reached twenty-five cases. If we did not obtain twenty-five, we extended forward through the duration of their service on the committee. In only a handful of instances did this protocol yield fewer than twenty-five cases. Criminal cases were skipped and not counted toward our ceiling of twenty-five.

Practitioners were classified in each case according to whether they represented a corporate/business defendant; corporate/business plaintiff; individual person civil defendant; individual person civil plaintiff; union defendant; union plaintiff; government defendant; government plaintiff; or other type of party. From this information, we calculated whether each practitioner represented 75 percent or more (1) defendants, (2) plaintiffs, (3) corporations/businesses, or (4) individuals. Infrequently, the cases obtained in Lexis and Westlaw would produce different classifications. In these instances, we consolidated the two sets of case, eliminated duplicates, and assigned codes based upon the combined cases.

We also collected information from attorney biographies, firm affiliations, firm profiles, and news coverage of practitioners that discussed their practice, such as obituaries. In no instance did we find that this additional information contradicted the code assigned based upon our review of cases. In rare instances, our search in Lexis and Westlaw yielded no cases or only a few, in which case we relied heavily on these additional historical sources. In nearly all of those cases, the practitioner was a partner in a corporate firm. When we had only that information, we coded the practitioner as corporate/business on the individual versus corporate/business scale, and coded them as having a mixed practice on the plaintiff versus defendant scale.

MODEL OF FEDERAL JUDICIAL APPOINTMENTS TO THE ADVISORY COMMITTEE

Using Federal Judicial Center data, we constructed the dataset analyzed in Table 1 as follows. Initially, for *each year* from 1971 to 2013, each federal district court and court of appeals judge, both active and senior, is included. This produced 42,685 judge-year observations. A committee service variable was created and coded 1 for each year in which a judge served on the Advisory Committee, and coded 0 otherwise. There are a total of 277 years of Committee service by Article III judges in this period. An appointment variable was also created and coded 1 in years that a decision was made by the Chief Justice to appoint or reappoint a judge to the Advisory Committee, and was coded 0 otherwise. There were 103 appointments or reappointments in

this period: fifty initial appointments, thirty-eight reappointments to all or part of a second term, eleven to a third, and four to a fourth. These committee service and appointment variables are dependent variables in our statistical models. Judges are dropped from the data when they are no longer eligible for service on the Committee—we assume that they are not eligible for appointment at a later time after they have terminated service on the Committee.

In addition, empirical research has demonstrated that in some types of cases, even controlling for political party, judges' gender and race can be important variables predicting their policy preferences as measured by voting behavior. In particular, a number of studies have found that women and racial minority judges vote more liberally on some important civil rights issues.¹ Civil rights litigation has been central in debates over whether there is excessive litigation in federal courts and the implementation of federal law.² It has also been an area frequently targeted by litigation reform proposals, emanating very substantially from the Republican party, that are calculated to reduce opportunities and incentives for private enforcement litigation.³ We thus also incorporate variables measuring each judge's gender and race, which may be regarded by the Chief Justice as associated with their likely preferences over the Federal Rules as they bear on opportunities and incentives for litigation.

We include year fixed effects. With year fixed effects the model estimates the effect of party on appointment and service only relative to the pool of judges sitting in the same year. This is necessary to restrict the model to comparing those appointed or serving on the committee in any given year only to those eligible to be appointed or serve in that year. Because this modeling approach leverages only within year variation, and does not use cross-year variation, it also controls for all year-level variables that might affect appointment choices. For example, to the extent that changes over time in litigation rates, political conflict over the Federal Rules, or transitions in the identity of the Chief Justice, might bear on appointments to the committee, year-fixed effects control for them. Whatever the effects of these and other year-level variables, the results we report are net of them.

Finally, in Model 3, with only fifty appointing events, we examine an alternative specification using a Firth model, which is designed for "rare events" logit. The results were essentially the same.⁴

THE UNIT OF ANALYSIS IN PROPOSED AMENDMENTS BY THE ADVISORY COMMITTEE

We examined two approaches to counting Advisory Committee proposals, as alternatives to the one discussed in Part II.C,⁵ in order to confirm that the results we observe are not an artifact of the counting strategy used. In the first, we simply use the Rule level count, avoiding the need to make judgments necessary to disaggregate a Rule level proposal into smaller subunits. There were twenty-nine proposals salient to private enforcement at the Rule level from 1960 to 2011. In the second, we took a more granular approach than the one presented in Part II.C. We counted every discrete proposed change to a Rule, but, unlike the approach taken in Part II.C, we did not aggregate them into subject matter categories.

¹ Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 302 (2004); see also Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 37 (2008).

² See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 3–5 (2010).

³ This claim is based on a dataset that we compiled of litigation reform proposals introduced in Congress, which is discussed in Burbank & Farhang, *supra* note 1. Although we do not discuss policy areas in that article, approximately 25 percent of the proposals contained in the bill data discussed there concerned civil rights policy.

⁴ See David Firth, *Bias Reduction of Maximum Likelihood Estimates*, 80 BIOMETRIKA 27 (1993). We ran the model using the "firthlogit" command in Stata.

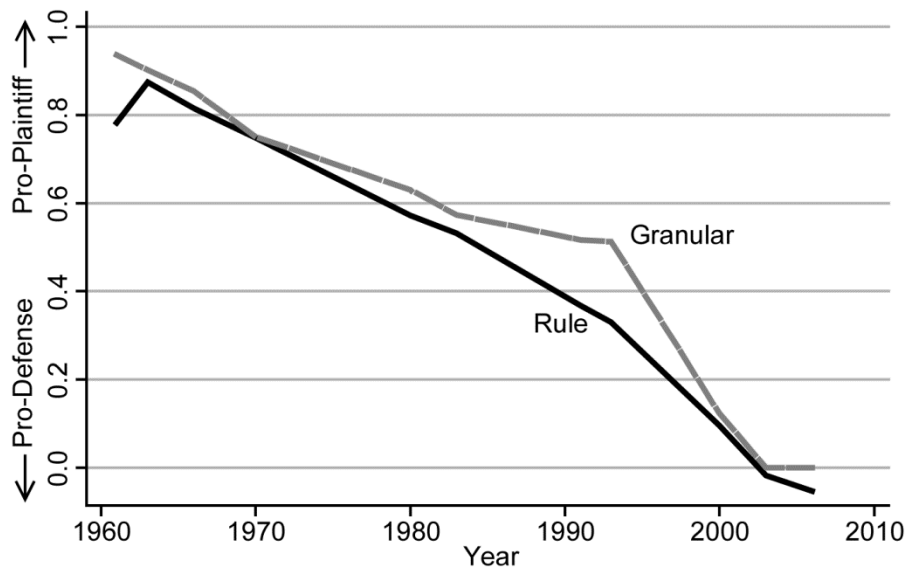
⁵ See main article, note 58 and accompanying text.

For example, the 1983 proposal to amend Rule 11 (1) expanded coverage to include not just pleadings but also any motion or paper; (2) added parties to attorneys as making certain certifications by signing a paper; and (3) strengthened the substance of the certification from the “good ground” standard to something more demanding; (4) introduced mandatory sanctions; and (5) identified costs and fees as potential sanctions. At the Rule-level, this contributes one unit to the count. In the approach taken in Part II.C, we counted this as contributing two units to the count of proposed changes: one widening the scope of the Rule’s application (items 1 to 3); and one strengthening sanctions (items 4 and 5). In the more granular approach, we count five proposed changes—one for each enumerated item. This approach to counting rendered a total of sixty-four proposed changes over the twenty-nine Rule-level proposals from 1960 to 2011.

We estimated LOWESS models of the probability of pro-plaintiff proposals over time using both of these alternative dependent variables. Figure A-1 displays the results. The Rule level results look nearly identical to those presented in Figure 8. The estimates generated by the Rule level dependent variable are correlated with those presented in Figure 7 at .99. The count at the more granular level follows the same long-run trajectory of decline, with the only difference that it is pulled out toward higher values in the early 1990s. This difference arises primarily from amendments to Rule 4 in 1993, where we counted seven pro-plaintiff changes (at the granular level) easing service of process and enlarging jurisdiction. The estimates generated by the more granular dependent variable are correlated with those presented in Figure 7 at .98.

Finally, we regressed on the alternative dependent variables on an annual time trend. As with the intermediate-level dependent variable discussed in Part II.C, the results reveal that the negative time trend in the probability of pro-plaintiff proposals is statistically significant at better than $p < .01$ in both models. The coefficient on the year variable was $-.019$ in the Rule level model, and $-.015$ in the more granular model. Overall, then, we conclude that the long and steep decline in the probability of pro-plaintiff proposals, conditional on the existence of a proposal affecting private enforcement, is a durable and robust feature of the data. It is not an artifact of any particular approach to constructing the unit of analysis.

FIGURE A1⁶: PROBABILITY OF PRO-PLAINTIFF ADVISORY COMMITTEE PROPOSALS



⁶ Cite as 15 NEV. L.J. 1559, app. fig.A1.