

Winter 2019

Subterranean Politics Blues

R. Shep Melnick

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

R. S. Melnick, *Subterranean Politics Blues*, 54 Tulsa L. Rev. 271 (2019).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol54/iss2/9>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

SUBTERRANEAN POLITICS BLUES

R. Shep Melnick

KAREN ORREN AND STEPHEN SKOWRONEK, *THE POLICY STATE: AN AMERICAN PREDICAMENT* (HARVARD UNIVERSITY PRESS 2017). PP. 272. HARDCOVER \$25.95.

STEPHEN B. BURBANK AND SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (CAMBRIDGE UNIVERSITY PRESS 2017). PP. 292. HARDCOVER \$105.00. PAPERBACK \$34.99.

One of the benefits of studying American politics is that we routinely confront important changes in the real world. A political science professor who lazily recycles decades-old lectures would merit the ridicule he would inevitably receive from his students. For example, for many decades we could repeat the nostrum that our two major political parties are internally heterogeneous “umbrella” parties. No longer. Similarly, during most of the twentieth century, we could explain to students that the real work of Congress is done in committees. Not now. This means there is always something new to examine and explain. In the humanities, those looking for dissertation and book topics must offer new (often wildly implausible) interpretations of a well-known work, or claim to have discovered new works of previously unrecognized importance. All we political scientists need to do, in contrast, is read the newspaper and identify developments that do not fit the conventional academic wisdom.

The challenge, then, is to distinguish those developments that are temporary and ephemeral from those that are more long-lasting and fundamental. Is Trump just a fluke or the harbinger of things to come? Within six years that man in the White House will be gone. Will Trumpism (whatever that is) remain? What features of our political system allowed such an aberrant figure to be nominated and elected?

Two features of American politics during the past half century will definitely not be going away soon, and they affect virtually every aspect of our politics. The first is the relentless growth of government. First in the 1930s and again in the 1960s the federal government took on a wide variety of new responsibilities, in the process lowering what James Q. Wilson has called the “legitimacy barrier.”¹ Once it becomes widely

1. James Q. Wilson, *American Politics: Then & Now*, COMMENTARY (Feb. 1979), <https://www.commentary>

acknowledged that the Constitution imposes few limits on the legitimate authority of the federal government, political conflict takes a very different form:

New programs need not await the advent of a crisis or an extraordinary majority, because no program is any longer ‘new’—it is seen, rather, as an extension, a modification, or an enlargement of something the government is already doing. . . . Since there is virtually nothing the government has not tried to do, there is little it cannot be asked to do.²

Today the federal government even tries to regulate name-calling on school playgrounds,³ to determine whether “competitive cheer and tumbling” is a “sport,”⁴ and to establish the essential rules of golf.⁵

The second feature is the distinctive politics of retrenchment, that is, taking away benefits and privileges previously granted. Starting with Paul Pierson’s seminal 1994 book *Dismantling the Welfare State?* political scientists have helped us understand why frontal assaults on established programs usually fail and what sort of indirect strategies sometimes succeed.⁶ Human being’s innate “loss aversion” leads them to fiercely oppose benefit cuts. Such cuts also tend to attract attention from well-organized constituencies. And the multiple veto points in the American political system offer many opportunities for these groups to register their opposition. The more accessible and transparent the institution, the more difficulties it will face in cutting existing programs.

These two features of contemporary politics are opposite sides of the same coin. Big government imposes highly visible costs, breeds resentment, and therefore produces crusades to “drain the swamp.” Often retrenchment pits small-government conservatives against defenders of the welfare and regulatory state. But since those on the left hope to enact many expensive new programs—far too expensive to be funded merely by taxing the “one percent”—they, too, will need to find ways to trim some existing programs. When one considers the large federal deficit, the aging of our population, and state governments’ huge unfunded pension liability, it is clear that our budget plight is so dire as to make retrenchment in some form inevitable. As Herb Stein famously noted, anything that “can’t go on like this forever” won’t.⁷

The two books under review here are different in many ways. Orren and Skowronek’s *The Policy State* is a work of unusually broad sweep, backed by a wealth of examples and filled with provocative insights.⁸ Only authors who have spent years studying American politics and history could have written it. It is also an unusually dense and at times maddeningly abstract book. After several readings I still have trouble following some of their arguments. On the first page the authors write, “policy has become

magazine.com/articles/american-politics-then-now/.

2. *Id.*

3. Russlynn Ali, Dear Colleague Letter on Bullying, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC (2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

4. R. SHEP MELNICK, THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION 7–9 (2018).

5. *PGA Tour v. Martin*, 532 U.S. 661 (2001).

6. PAUL PIERSON, DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT 108 (1995).

7. Herbert Stein, *My Foreign Debt*, WALL ST. J. 24 (May 10, 1985).

8. See KARREN OREN & STEPHEN SKOWRONEK, THE POLICY STATE: AN AMERICAN PREDICAMENT (2017).

an enigmatic omnipresence.”⁹ Two hundred pages later, the precise meaning of “the policy state” remains somewhat enigmatic to the reader—at least this one.

Burbank and Farhang’s book, in contrast, is tightly focused, clearly written, and convincingly argued.¹⁰ They examine in detail one important part of our “policy state,” namely, post-1980 efforts to curtail the use of private law suits to enforce federal statutory rights. They combine a careful review of congressional, administrative, and judicial activity with quantitative analysis of Supreme Court decisions. They show that while legislative and quasi-administrative efforts to curb such private litigation have largely failed, the Supreme Court’s conservative majority has achieved the same objective through a large number of seemingly technical rulings. This is important because Farhang’s previous work has shown how important private enforcement is for civil rights law and for enforcement of the many strings attached to federal grants.¹¹ Like Sarah Staszak’s *No Day in Court: Access to Justice and the Politics of Rights Retrenchment*,¹² Burbank and Farhang provide a valuable service by bringing the courts into the retrenchment picture.

Despite the obvious differences between these two books, *Rights and Retrenchment* offers a vivid example of the sort of politics *The Policy State* describes in more abstract terms. Burbank and Farhang show that important policy issues are being described in technical terms unintelligible to most voters. Orren and Skowronek help us understand the peculiar nature of the statutory rights that lie at the center of Supreme Court debates. *The Policy State* addresses the underlying causes of partisan polarization, *Rights and Retrenchment* some of its previously unrecognized consequences.

What are the distinctive features of the “policy state” and why do they define the “American predicament”? Orren and Skowronek concede that all governments make policy; from the outset both the federal government and the states have established policies on a wide array of matters.¹³ Yet they also insist that policy “is one way of governing among others, and not the principle way America was governed originally.”¹⁴ The shift from the old regime to the “policy” regime was not simply a matter of quantity. Although the cumulative effect of the growth of government responsibility was clearly significant, even more important was the change in the “ethos” of governing.¹⁵ The contemporary policy state, they repeatedly assert, is characterized by a “problem-solving ethos.”¹⁶ Policy, they emphasize, “is a commitment to a designated goal or course of action, made authoritatively on behalf of a given entity or collectivity, and accompanied by the guidelines for its accomplishment.”¹⁷

The significance of this seemingly anodyne definition only becomes clear when

9. *Id.* at 3.

10. See STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017).

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

12. See SARAH L. STASZAK, *NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT* (2015).

13. OREN & SKOWRONEK, *supra* note 8, at 9.

14. *Id.* at 10.

15. *Id.* at 106.

16. *Id.*

17. *Id.* at 27.

contrasted with the authors' understanding of the non-policy regime. The pre-1900 Anglo-American political system "proceeded for many centuries on the principles of rights, which we identify as the most encompassing counter motive to policy."¹⁸ The authors "juxtapose those two systems—policy, limited but bent on expansion, and rights, socially entrenched but increasingly challenged."¹⁹

The attentive reader will quickly ask, what about the rights revolution of the 1960s? Isn't the story of the growth of the policy state coterminous with the expansion of civil rights, consumer rights, welfare rights, environmental rights, and "rights-talk" in general? Orren and Skowronek's reply constitutes one of the most interesting parts of their book. Although "the United States recognizes more rights today than it did previously . . . the nature of rights has changed."²⁰ Most importantly, these new rights are no longer "trumps," but merely "chips."²¹ Rather than set limits on what government can do, these new rights provide access and bargaining power to those seeking government benefits, services, and protections. This new understanding of rights creates an "opportunity structure" that allows policy entrepreneurs to advance their programs and enhance their power.²²

A good example of what they have in mind is the Education for All Handicapped Children Act of 1975, which created the right of all children with disabilities to receive a "free appropriate public education."²³ In practice this created a process that significantly increased the power of parents and special education experts in devising "individualized educational plans" for one set of pupils—those deemed to have crossed the "disability" threshold.²⁴ Outside of this process the new rights remain wholly undefined.

We can understand the "policy state," Orren and Skowronek maintain, only by contrasting it with the common law state which it displaced.²⁵ The old regime amounted to rule by judges who established a variety of social hierarchies that could not be challenged by mere politicians: the rule of masters over slaves, men over women, and employers over workers.

Placed in this historical context, it becomes clear that the "policy state" is founded on Progressive (with a capital P) principles, a product of the Progressives' attack both on the limits imposed by the Madisonian Constitution and on the common law rights protected by the courts. Progressives were devoted to loosening all constitutional restraints; undermining traditional understandings of individual rights; promoting open-ended, forward-looking innovation; and empowering experts who would make these many new programs "work" (whatever that would mean).

With each branch and level of government engaged in such "collective problem solving," they lost their distinctive constitutional roles.²⁶ If legislators are problem-

18. OREN & SKOWRONEK, *supra* note 8, at 16.

19. *Id.*

20. *Id.* at 17.

21. *Id.* at 41.

22. *Id.* at 17 (emphasis in the original).

23. Education for All Handicapped Children Act of 1975, 89 Stat. 773, 94 Pub. L. 142 (1975).

24. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1414 (2004).

25. OREN & SKOWRONEK, *supra* note 8, at 95.

26. *Id.* at 6.

solvers, they must be prepared to revise laws quickly as new information becomes available—something we know is difficult in any legislative body, to say nothing of our bicameral Congress. If administrators are problem-solvers, they need to have the flexibility to issue provisional guidelines rather than just formal rules, and at times they will need to ignore legal provisions that have become outmoded or have proved to be unwise. Thus our current “government by waivers.” If judges are problem-solvers, they might need to step in when other have failed to act—as the Supreme Court did on global warming.²⁷ And they must rewrite statutes they decide are not working well—as the Court did in the 1970s with Title VII of the Civil Rights Act²⁸ and more recently with the Affordable Care Act.²⁹

One of the driving themes of *The Policy State* is that the Progressive understanding of governing that lies at the heart of the policy state has been a disaster, the main source of the “American predicament.” The policy state is now “trapped by its problem-solving instincts.”³⁰ “A monument to pragmatism, the new American state dispels the myth of pragmatism: that problem solving can proceed with impunity, that the institutions of government are infinitely adaptable.”³¹ The result is the erosion of a government of laws, replaced by a government of ever-changing guidelines; and a government by consent of the governed displaced by the rule of technocrats. Our contemporary policy state is based on a myth, “what John Dewey referred to as ‘like-mindedness,’” that is, the “idea that public problems have rational solutions, that they should be addressed scientifically and with an eye toward fine-tuning down the line.”³² Consensus on what constitutes a problem and a “rational solution” simply does not exist. As a result, the policy state’s legitimacy is always under attack.

Orren and Skowronek provides telling examples of how this problem-solving ethos has placed contradictory demands on all branches of government and required them to institute more and more elaborate “workarounds” to achieve barely tolerable results.³³ In their section on “Makeshift Presidentialism” the authors quote the Progressive historian Henry Jones Ford: “‘The greatness of the presidency,’ he enthused, ‘was the work of the people breaking through the constitutional form.’”³⁴ No doubt this sounded more appealing to Progressives in the age of Teddy Roosevelt and Woodrow Wilson than it does to self-described progressives in the age of Trump. As the founders well understood, popular governments need constitutional limits to counter the ever-present danger of demagoguery.

At times Orren and Skowronek sound like those conservative critics of progressivism we associate with Claremont and Hillsdale. But unlike the “Claremonsters” they do not defend the original Constitution, which they insist was not based on natural rights to “life, liberty, and the pursuit of happiness,” but rather on common law rights that protected unjust social hierarchies.

27. See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

28. See *Griggs v. Duke Power*, 401 U.S. 424 (1971); *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

29. See *King v. Burwell*, 135 S. Ct. 2480 (2015).

30. OREN & SKOWRONEK, *supra* note 8, at 193.

31. *Id.*

32. *Id.* at 175.

33. *Id.* at 91.

34. *Id.* at 124.

One can agree with Orren and Skowronek that the old regime was deeply flawed, especially on the issue of race, without accepting their insistence that the Madisonian Constitution was based on an intractable common law dedicated to the subjugation of African Americans, women, and workers. After all, a key feature of common law is that it evolves to address new problems and evidence—in effect, it envisions pragmatic problem-solving by judges. Wasn't it that eminent progressive, Oliver Wendell Holmes, who told us “The life of the law has not been logic; it has been experience”?³⁵ Moreover, throughout the 19th century there was an on-going struggle between advocates of the common law and “codifiers.” Gradually statutes, often based on “model codes,” supplanted or redirected traditional elements of the common law. That famous canon of statutory interpretation—”statutory provisions in derogation of the common law should be narrowly construed”—was largely a rear-guard action against the “statutification” of the law. At the national level it has been a staple of jurisprudence that there is no federal common law, save for the common law of procedure in diversity cases first recognized in 1842³⁶ and abruptly abandoned in 1938.³⁷

The biggest problem with Orren and Skowronek's insistence that the common law was the heart and soul of the old regime, though, is that the fact that Madison, Jefferson, and the other founders believed in *natural* rights—inalienable rights based not on judicial pronouncements, but on the “laws of nature and of nature's God.” If this is the foundation, then some elements of the common law *must* be overturned, most obviously those establishing the rights of slaveholders. If there was any doubt about this, the issue was resolved by the post-War amendments. The Progressive's attack on the Constitution was not just an attack on an ossified common law in the name of collective problem-solving, but an attack on natural rights in the name of history.³⁸

The despair so apparent in the book's final chapter result from the authors' conclusion that Progressivism has led us to a dead-end and that the Constitution eviscerated by Progressivism was not worth saving.³⁹ Their elevation of the common law over natural rights as the foundation of the Constitution leads them to part company with such thinkers as Lincoln, Martin Luther King, and Frederick Douglas, who saw the principles underlying the Declaration and the Constitution as condemning the practices that they—like Orren and Skowronek—for good reason despised. *The Policy State* does an excellent job identifying many of the pathologies of our current “predicament,” but may exaggerate their intractability. Its authors should take heart from a statement from Franklin Roosevelt they quote in Chapter 4: “Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form.”⁴⁰

At first blush, Burbank and Fahang's book does not lend itself to such speculation about regime principles. They focus on one small but important (and underappreciated)

35. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Pereira & Beltran eds. 2011) (1881).

36. *See* *Swift v. Tyson*, 41 U.S. 1 (1842).

37. *See* *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

38. *See* JAMES CEASER, *NATURE AND HISTORY IN AMERICAN POLITICAL DEVELOPMENT* (2008).

39. OREN & SKOWRONEK, *supra* note 8, at 151–98.

40. *Id.* at 105.

feature of “the policy state,” namely private suits to vindicate statutory rights.⁴¹ Farhang’s important book *The Litigation State* showed how large a role litigation by private parties plays in both interpreting and enforcing Title VII of the Civil Rights Act.⁴² Many law professors have described and bemoaned the Rehnquist and Roberts Courts’ tendency to restrict access to federal courts and limit the available judicial remedies.⁴³ What Farhang and Burbank add are (1) an enlightening comparison of efforts in various forums to reduce litigation; and (2) a convincing quantitative look at Supreme Court decisions

Burbank and Farhang devote one chapter to anti-litigation efforts in Congress, and another to similar efforts in the little-known but influential Advisory Committee on Civil Rules. Both campaigns proved largely ineffective. The legislative effort to scale back the litigation unleashed by new laws and court rulings in the 1960s and 1970s began during the Reagan Administration. Spearheaded by the Reagan Justice Department, this completely failed; indeed, Congress continued to pass legislation creating additional private rights of action. Since Democrats controlled the House during the Reagan years, they could block anything that managed to get through the Republican Senate. Important Republican constituencies—especially small business—feared that anti-litigation legislation would threaten their ability to challenge federal regulators. When Republicans took control of both houses in 1994, they restricted litigation affecting a few industries, but did nothing more sweeping than that. Much the same was true when Republicans controlled both houses under President George W. Bush. Burbank and Farhang offer a conventional but convincing argument for these events: the legislative process is full of veto points; this was a minor issue for Republicans but an extremely important one for interest groups affiliated with the Democratic party; and the Supreme Court took the steam out of legislative efforts by reducing access to the courts without any help from Congress.⁴⁴

Burbank and Farhang’s chapter on the Advisory Committee on Civil Rules introduces an important arena of rulemaking that almost no one other than legal procedure nerds (and Sarah Staszak) has ever paid much attention to. In passing the Rules Enabling Act of 1934, Congress gave the Supreme Court authority to issue general rules regarding procedures used in federal court. To aid them the Court established the Advisory Committee, with members appointed by the Chief Justice. Not surprisingly, the Committee appointed by Chief Justice Warren expanded access to federal courts, most notably in class action suits. Chief Justice Burger—who once described the surge in litigation as the result of “mass neurosis”—made a concerted effort to reverse this trend. Burbank and Farhang provide a fascinating picture of the operation of this obscure quasi-administrative, quasi-judicial, quasi-legislative committee—one that illustrates Orren and Skowronek’s point about the homogenization of the branches of government. (When we are forced to invoke the term “quasi,” we can be sure that constitutional clarity has escaped us.)

Despite Burger’s commitment, his efforts largely came to naught. Why? The

41. BURBANK & FARHANG, *supra* note 10, at 43.

42. *See* FARHANG, *supra* note 11.

43. *See, e.g.*, Judith Resnick, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003).

44. BURBANK & FARHANG, *supra* note 10, at 15.

authors' answer is that the Advisory Committee feared that if it antagonized members of Congress, legislators might claw back the power delegated to the Supreme Court in 1934. Congress did in fact flex its muscle by requiring more transparency in the Committee's deliberations. This, too, made large-scale change more difficult. The less insulated the institution, the more difficult retrenchment becomes.

Burbank and Farhang's chapters on Congress and the Advisory Committee examine the dogs that didn't bark—at most they emitted occasional yips. That is not true of their chapter on the Supreme Court. They describe changes in Court doctrine on procedural matters ranging from the relatively well known (class actions) to the obscure (pleadings and offers of judgment) that make it more difficult for plaintiffs to win cases alleging violations of federal statutory rights. Using a Supreme Court database they constructed for this project, they find a marked decline in the number of pro-private enforcement ruling, especially after 1995.⁴⁵ They also show that the Court's liberals and conservatives often disagree on these issues, despite their seemingly technical nature. In fact, "Justices are now more ideologically divided over private enforcement issues than they are over federal rights issues in general."⁴⁶

Burbank and Farhang's most provocative argument is that the conservative members of the Court have cleverly chipped away at private enforcement through procedural rulings rather than eviscerate statutory rights more directly because these decisions receive less media and public attention.⁴⁷ In a nutshell, the Court's "counterrevolution" has been "subterranean."⁴⁸ Early in the book they write of the conservative legal movement, "Recognizing the political infeasibility of retrenching substantive rights, the movement's strategy was to undermine the infrastructure for enforcing them."⁴⁹ That, they suggest, is exactly what the Supreme Court has been doing for well over two decades. Although they shy away from saying so directly, the authors clearly believe this judicial strategy is undesirable, even sleazy.

While Burbank and Farhang offer convincing support for their central findings, they leave out three important parts of the story. The first is the even more "subterranean" origins of the procedural rulings subject to recent retrenchment. For example, under Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972, Title IV of the Social Security Act (creating Aid to Families with Dependent Children), and other important statutes, federal courts simply asserted, with hardly a word of explanation, that Congress had intended to create a private right of action. Regarding AFDC the Court later said, in effect, "gee, we never examined that question before, but it's too late to turn back now."⁵⁰ On Title IX the Court's argument amounted to "well, we did it for Title VI, and Title IX looks like Title VI"—overlooking the fact that they had never explained why there is a private right of action under Title VI either.⁵¹ When the Court began to restrict such

45. *Id.* at 169.

46. *Id.* at 169.

47. *Id.* at 204.

48. *Id.* at 192.

49. BURBANK & FARHANG, *supra* note 10, at 3.

50. *See* Hagans v. Levine, 415 U.S. 528 (1974); King v. Smith 392 U.S. 309 (1968); R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 67 (1994).

51. Cannon v. Univ. of Chi., 441 U.S. 677, 695 (1979); *see also* MELNICK, *supra* note 4, at 48–53.

“implied” private rights of action, it provided much more extensive explanations, in part because the dissenters forced them to defend themselves.⁵² The readers should compare the extensive debate over private rights of action in *Alexander v. Sandoval* (2001) with the superficial treatment of the same issue in *Lau v. Nichols* (1974).⁵³ Only in the former is there any serious discussion of the best way to enforce the federal law. In her aptly titled book *Below the Radar: How Silence Can Save Civil Rights*, Alison Gash shows how liberal judges have used even more “subterranean” methods for expanding the rights of gay and lesbian couples.⁵⁴ This seems to be a regular feature of our “policy state,” not simply a lamentable strategy employed by conservative judges.

Second, it is often impossible to separate the creation of rights from the procedures designed to enforce them. Many statutory rights cases involve the conditions placed on states that receive federal grants. Do these laws create individual rights enforceable in federal court? The statutes themselves seldom say so. In recent decades the Court has insisted that before an individual plaintiff can file suit under one of these grant-in-aid programs, he or she “must assert the violation of a federal *right*, not merely the violation of a federal *law*.”⁵⁵ They must identify the “particular statutory provision” that “gives rise to a federal right,” and show that the right “is not so ‘vague and amorphous’ that enforcement would strain judicial competence.”⁵⁶ In other words, in many of instances the Court does not allow court-based enforcement for the simple reason that it finds no statutory right. During the 1960s and 1970s, in contrast, federal courts had used private rights of action to convert directives addressed to subnational governments into rights enforceable by private citizens. This often required the creative rewriting of statutes.⁵⁷ In other words, what is usually at stake in these cases is not the appropriate method for *enforcing* well-defined rights, but the underlying *definition* of the rights themselves.

The same is true in most discrimination cases. Take Title VII, a law central to the Burbank and Farhang study. What is the right at stake here? Not the right to a job, but rather the right not to be discriminated against by an employer. How do we know if discrimination has occurred? The most famous and important Title VII case, *Griggs v. Duke Power*,⁵⁸ lays out a series of evidentiary tests, each with a particular burden of proof. A higher burden of proof at the first stage gives more leverage to the employer; a higher burden of proof at the next stage gives more leverage to the employee. In almost all discrimination cases the procedure for enforcement is so intertwined with the definition of the underlying right that it is impossible to distinguish them. To use Orren and

52. *Cannon*, 441 U.S. at 695.

53. See *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Lau v. Nichols*, 414 U.S. 563 (1974).

54. See ALISON L. GASH, *BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS* (2015).

55. See *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (citing *Golden State Transit Corp. v. L.A.*, 493 U.S. 103, 106 (1989)) (emphasis added). I discuss the significance of these cases in *Institutions and Public Law: Comparative Approaches*. See R. Shep Melnick, *Deregulating States: The Political Jurisprudence of the Rehnquist Court*, in *INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES* 83 (Ginsburg & Kagan, eds. 2005).

56. *Blessing*, 520 U.S. at 340–41 (quoting *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 431–32 (1987)).

57. The most dramatic example is AFDC, see R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 65–132 (1994).

58. See 401 U.S. 424 (1971).

Skowronek's terms, these rights are almost always "chips" rather than "trumps."

Third, Burbank and Farhang offer no explanation for *why* conservative judges have sought to curtail litigation. Sometimes it is to stem the oft-cited "flood of litigation" that might result from a contrary ruling. Just as often these conservative judges seek to reduce the power of the federal government—especially federal administrators—to give commands to state and local governments. Sometimes (as the above quotation from Justice O'Connor in *Blessing* suggests) it is because they fear the courts are being drawn into issues about which they know little. Occasionally it is to induce Congress to speak more clearly. Every now and again the liberals on the Court will agree. As Farhang's colleague Robert Kagan has shown, "adversarial legalism" has many drawbacks, few of which are acknowledged in this examination of what is essentially a counterrevolution against "adversarial legalism."⁵⁹

Like all of us, Burbank, Farhang, Orren, and Skowronek are struggling to understand the confusing politics of big government, technocratic governance, political polarization, and (occasional) retrenchment. Taken together, they illustrate the shift from rights-as-trumps to rights-as-chips, the homogenizing consequences of our "problem-solving ethos," the prevalence of "subterranean" governance, and the public discontent that all of this has bred. As we confront the alarming implications and consequences of the 2016 elections, they provide useful—but not reassuring—insights into "the American predicament."

59. See ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).