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Who Is Responsible for the Stealth Assault on Civil Rights?

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No Day in Court: Access to Justice and the Politics of Judicial Retrenchment. By *Sarah Staszak*. Oxford and New York: Oxford University Press. 2015. Pp. x, 222. $29.95.

Introduction

On March 31, 2015, the Supreme Court decided *Armstrong v. Exceptional Child Center, Inc.*[1] In *Armstrong*, the Court barred Medicaid providers from obtaining injunctive relief against states that have set reimbursement rates too low to comply with the Medicaid Act's requirement that rates be "sufficient to enlist enough providers."[2] The decision set off an immediate flurry of commentary among lawyers and academics. In a blog post on the afternoon of the ruling, for example, leading health law scholar Timothy Jost described the Court's ruling as "a momentous decision."[3]

Yet the *New York Times* did not publish an article about the Court's decision in *Armstrong*. Its only Supreme Court coverage in the next day's paper was a summary, on page three of the business section, of an oral argument the Court heard in a patent case.[4]

Why the absence of coverage? It was not for lack of drama and division on the Court. The *Armstrong* Court divided 5 to 4, and the lineup was unusual: Justice Kennedy, often the swing vote, joined Justice Sotomayor's dissent, along with Justices Ginsburg and Kagan. If Justice Breyer had stuck with his three other more liberal colleagues, the Medicaid providers would have prevailed. But Justice Breyer defected from his usual allies, and joined the Court's four most conservative Justices in Justice Scalia's majority opinion—though Justice Breyer issued his own concurrence explaining that he would not go quite as far as those four on one of the issues before the Court.

Nor was it for lack of real-world importance. Medicaid accounts for a quarter of the average state's budget and a significant fraction of every state's

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1. 135 S. Ct. 1378 (2015).

2. 42 U.S.C. § 1396a(a)(30)(A) (2012); *see Armstrong*, 135 S. Ct. at 1387.

3. Timothy Jost, *Supreme Court Turns Back Payment Suit by Medicaid Providers*, Health Aff. Blog (Mar. 31, 2015), http://healthaffairs.org/blog/2015/03/31/supreme-court-turns-back-payment-suit-by-medicaid-providers/ [http://perma.cc/UY3E-JH5B].

4. Adam Liptak, *Justices Reconsider 1964 Ruling on a Patent*, N.Y. Times, Apr. 1, 2015, at B3.

economy.[5] In a report issued the same day as the *Armstrong* decision, the Kaiser Family Foundation found that, "[a]s of January 2015, 70.0 million people were enrolled in Medicaid or CHIP [the related Children's Health Insurance Program]."[6] Whether those 70 million Americans will receive the health care they need—and to which the law entitles them—depends crucially on whether states set reimbursement rates that are sufficient to attract enough providers to serve them. And the opportunity for providers to go to court to force states to comply with the sufficient-rates requirement is important to ensuring that states do in fact comply with that requirement. Although Justice Breyer suggested in his concurrence that the Department of Health and Human Services could adequately enforce that requirement (by cutting off Medicaid funds to, and perhaps suing, offending states),[7] administrative remedies are not a realistic option in most cases. The department has limited resources (and uncertain authority) to bring enforcement actions.[8] And, like all funding agencies, the department is loath to use the one tool that it unquestionably possesses—the power to cut off federal funds—because doing so is likely to harm Medicaid beneficiaries even more than the state's failure to comply with the sufficient-rates requirement.[9]

Armstrong offered plenty of Supreme Court intrigue, not to mention enormous real-world impact. So why did the Court's opinion draw such little attention beyond a narrow circle of experts? *Armstrong* drew such little attention, I would argue, because it was a decision that focused on remedies. At least as a formal matter, the Court did not deny that the Medicaid Act gave states an obligation to ensure that their rates were sufficient to attract enough providers. It simply decided that provider-initiated lawsuits were not the proper means of enforcing that obligation.[10] Remedies decisions are yawners, seemingly of interest only to lawyers and other specialists.

As *Armstrong* shows, however, this perception is misguided. Decisions about the scope of available remedies can be exceptionally important in determining whether the rights and obligations created by the law are actually meaningful to those they purport to protect and regulate. That is hardly a

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5. *See* Nat'l Ass'n of State Budget Officers, The Fiscal Survey of States: Fall 2014, at 1 (2014), https://www.nasbo.org/sites/default/files/NASBO%20Fall%202014%20Fiscal%20Survey%20of%20States.pdf [http://perma.cc/F27Y-4JYH].

6. Samantha Artiga et al., *Recent Trends in Medicaid and CHIP Enrollment as of January 2015: Early Findings from the CMS Performance Indicator Project*, Kaiser Comm'n on Medicaid & the Uninsured 1 (2015), http://files.kff.org/attachment/issue-brief-recent-trends-in-medicaid-and-chip-enrollment-as-of-january-2015-early-findings-from-the-cms-performance-indicator-project [http://perma.cc/Z6WY-DSK4].

7. *See Armstrong*, 135 S. Ct. at 1389 (Breyer, J., concurring in part and concurring in the judgment).

8. *See* Brief for Former HHS Officials as Amici Curiae in Support of Respondents at 16-18, *Armstrong*, 135 S. Ct. 1378 (No. 14-15).

9. *See* Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 Yale L.J. 248, 285-86 (2014).

10. *See Armstrong*, 135 S. Ct. at 1384.

new point. It is key to Holmes's "bad man" theory of law, of course.[11] But although every practicing lawyer intuitively knows that a legal right or obligation is worth nothing more than the remedy for its violation, journalists and the general public too rarely focus on the important remedial questions addressed by courts.

That is a shame. As Sarah Staszak[12] shows in her book, *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment*, the Supreme Court has repeatedly closed off avenues for enforcing civil rights in recent years. But rather than attend to these incredibly consequential *remedial* decisions, journalists—and even many scholars—have generally focused on the Court's *substantive* decisions regarding the scope of civil and constitutional rights. A number of those substantive decisions—notably including cases involving gay rights,[13] capital punishment,[14] and prison conditions[15]—have reached politically liberal results, even in the Rehnquist and Roberts Courts. But to look at those decisions and conclude that this is a moderate Supreme Court is to miss the more fundamental point that, whatever the scope of the substantive rights it is willing to recognize, the Court's remedial decisions have made it more difficult to vindicate those rights. As Staszak puts it, if we focus on those substantive decisions "we miss the more 'subterranean' realm where so much of the politics of retrenchment takes place, and where actual changes have had a demonstrable effect on access to the courts" (pp. 17-18).

Staszak's book focuses resolutely on the under-the-radar procedural rulings that in fact determine whether civil rights are meaningful. It offers a welcome corrective to accounts that look to the higher-profile rulings that define the scope of substantive rights. Although some other commentators have examined aspects of the Supreme Court's attack on civil-rights remedies,[16] Staszak offers the most comprehensive analysis available of this phenomenon by examining a range of seemingly disparate doctrinal contexts in which the Court has contributed to it.

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11. *See* Oliver Wendell Holmes, *The Path of the Law*, *in* Collected Legal Papers 167, 170-71 (1920).

12. Assistant Professor of Political Science, City College of New York; Robert Wood Johnson Foundation Scholar in Health Policy Research, Harvard University; Postdoctoral Fellow, Politics Department, Princeton University; Brookings Institution Research Fellow in Governance Studies.

13. *See* United States v. Windsor, 133 S. Ct. 2675 (2013) (holding that section 3 of the Defense of Marriage Act is unconstitutional); Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a Texas statute making it illegal for persons of the same sex to engage in sexual conduct); Romer v. Evans, 517 U.S. 620 (1996) (striking down a Colorado constitutional amendment disallowing government protections to gays and lesbians).

14. *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding that the juvenile death penalty is unconstitutional); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the execution of individuals with intellectual disabilities is unconstitutional).

15. *See* Brown v. Plata, 563 U.S. 493 (2011) (upholding a court order requiring California to reduce its prison population due to overcrowding).

16. *See, e.g.*, Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183 (arguing that the Supreme Court has stripped private individuals of the ability to enforce civil-rights laws); David Rudovsky, *Running in Place: The Paradox of Expanding Rights*

In addition to its comprehensiveness, Staszak's book deserves great credit for the subtlety and complexity of its analysis. It is tempting to view the line of decisions that constrict remedies as simply the work of conservative judges who do not like civil-rights enforcement. But, as Staszak highlights, conservative judges have not been the only ones who have written or joined opinions placing procedural obstacles in the way of civil rights and other litigation. Liberal judges have done so as well.[17] And lawyers and others with a stake in the judicial process, many of whom carry a liberal reputation, have also supported many of the developments that have limited court remedies for civil-rights violations.[18] As Staszak puts it, "[t]he groups and political cleavages that pursue retrenchment have multifaceted interests that transcend partisan lines and change over time" (p. 35). This is an incredibly important point that prior work in the field has elided. Without accounting for that point, one cannot fully understand the politics of narrowing civil-rights remedies.

At times, however, Staszak bends over backward in her effort to find political complexity. Although she is surely right that the story of judicial retrenchment on civil-rights remedies is one of shifting alliances and positions over time, the dominant trend over the past two decades or so has been one of conservative judges succeeding in limiting litigation.[19] Sometimes, they followed a path that liberals and progressives had cleared decades earlier, when the ideological stakes were different. Other times, they have been joined by liberals for whom removing restrictions on vigorous government action trumps rights protection—and who, at least in the context of restraints on law-enforcement conduct, simply are not as liberal as they could be. Staszak's argument thus does not, ultimately, undermine the claim that today's judicial retrenchment is a fundamentally conservative project. It does, however, highlight the complexities of judicial politics.

In this Review, I elaborate on those points. Part I describes the Supreme Court's stealth assault on civil rights. Drawing from but going beyond the examples in Staszak's book, I show that the Court has made it much more

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and Restricted Remedies, 2005 U. ILL. L. REV. 1199 (contending that the Supreme Court's rulings have created a system in which only egregious violations of rights are subject to remedial action); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006) (arguing that the current Supreme Court has been hostile to litigation). For discussions that postdate Staszak's book, see Lynda G. Dodd, *The Rights Revolution in the Age of Obama and Ferguson: Policing, the Rule of Law, and the Elusive Quest for Accountability*, 13 PERSPECTIVES ON POL. 657 (2015); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219 (2015).

17. *See, e.g.*, pp. 152-53 (discussing Justice Stevens's majority opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as a mechanism of judicial retrenchment).

18. *See, e.g.*, pp. 60-62 (noting that the ABA and many in the Democratic Party embraced alternative dispute resolution in the 1970s).

19. Staszak, of course, recognizes this point. *See* pp. 220-21. She describes her project as seeking "to complement the partisan dimension of retrenchment, not to deny it." P. 221.

difficult to vindicate civil rights even in cases in which it has not narrowed the substance of those rights. Part II assesses responsibility for this assault. I argue that it is largely a conservative phenomenon, though Staszak is right that liberals and progressives have given that phenomenon a substantial assist.

I. The Stealth Assault on Civil Rights

The "subterranean realm" of decisions that have hamstrung civil-rights litigation has a number of interrelated components. Taken together, those components erect powerful barriers against judicial redress for plaintiffs—even those whose civil rights have in fact been violated. Staszak discusses a number of these barriers, particularly through the Court's interpretations of the Federal Rules of Civil Procedure and its restrictions of the remedies available to plaintiffs who overcome those procedural hurdles and prove a violation of their rights. In this Part, I discuss those procedural and remedial obstacles. I begin, however, with a barrier that Staszak does not extensively address—the Court's limitations on the circumstances in which plaintiffs have standing to sue in injunctive cases.

A. *Restrictive Standing Doctrine*

Thanks to the Burger Court's decisions in *Allen v. Wright*[20] and *City of Los Angeles v. Lyons*,[21] it is extremely difficult to have standing to get in the courthouse door and seek an injunction in many categories of civil-rights violations. *Lyons*, in particular, set up a major impediment to injunctive cases challenging practices of unconstitutional policing. To have standing to seek an injunction, *Lyons* held, it is not enough to show that the defendant violated the plaintiff's constitutional rights in the past, nor is it enough to show that the defendant will violate the constitutional rights of someone like the plaintiff in the future.[22] Rather, the plaintiff must show that *he personally* faces a "realistic[ ] threat[ ]" of experiencing the same constitutional violation in the future.[23] And Rehnquist Court cases such as *Lujan v. Defenders of Wildlife* make clear that the Court regards this standing rule as a constitutional one that Congress cannot displace by granting a right of action to an individual plaintiff.[24]

B. *Restrictive Interpretation of the Federal Rules of Civil Procedure*

As Staszak shows, even those plaintiffs who have standing face significant hurdles as the result of the Court's interpretations of the Federal Rules

20. 468 U.S. 737 (1984).

21. 461 U.S. 95 (1983).

22. *Lyons*, 461 U.S. at 105-09.

23. *Id.* at 109.

24. 504 U.S. 555, 559-62 (1992).

of Civil Procedure (pp. 111-17). In *Bell Atlantic Corp. v. Twombly*[25] and *Ashcroft v. Iqbal*,[26] for example, the Supreme Court made it much harder—at least as a formal matter—to plead a violation of law in federal court. *Twombly* and *Iqbal* created a regime of "plausibility pleading,"[27] in which the plaintiff, before any discovery, must plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[28] It is not enough, the Court explained, for the complaint to show "the mere possibility of misconduct."[29] In *Twombly*, the Court applied this standard to reject a claim that the defendants' parallel behavior plausibly suggested a conspiracy in violation of the antitrust laws.[30] As *Iqbal* later explained, the *Twombly* Court "[a]cknowledg[ed] that parallel conduct was consistent with an unlawful agreement," but nevertheless concluded "that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior."[31] Where the case law had previously said that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,"[32] *Iqbal* said that judges should assess the plausibility of a plaintiff's factual allegations based on "judicial experience and common sense."[33]

These procedural rules pose a particular barrier to civil-rights plaintiffs, who often must prove intentional discrimination. Many judges believe intentional discrimination is extremely infrequent,[34] so they are unlikely to find allegations of discriminatory intent to be plausible, based on their "experience and common sense," without particular allegations of highly probative direct or circumstantial evidence. And because intent rests in the mind of the defendant, it will often be especially difficult for plaintiffs to have such highly probative evidence before discovery. Although there remains a dispute regarding *Twombly* and *Iqbal*'s effects on plaintiffs, the plausibility pleading regime is unquestionably harder for plaintiffs to satisfy than the notice pleading regime that it formally replaced (a regime that, to be sure, may have been honored in the breach for many years).[35]

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25. 550 U.S. 544 (2007).

26. 556 U.S. 662 (2009).

27. *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431 (2008).

28. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

29. *Id.* at 679.

30. *Twombly*, 550 U.S. at 566-70.

31. *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 550 U.S. at 567).

32. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

33. *Iqbal*, 556 U.S. at 679.

34. For a discussion of the recent jurisprudence that seems to rest on the premise that intentional discrimination is a rare and deviant act, see Samuel R. Bagenstos, *Formalism and Employer Liability Under Title VII*, 2014 U. Chi. Legal F. 145, 163.

35. For a recent empirical review that concludes that *Twombly* and *Iqbal* "had palpably negative effects on plaintiffs," see Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 Cornell L. Rev. 193, 193 (2014).

Even if plaintiffs can overcome the pleading hurdle, they face a much more difficult burden in overcoming summary judgment than they did in the heyday of civil-rights litigation (pp. 104-05). Claims of discriminatory intent were once considered to be peculiarly for the judge or jury to decide after a full trial.[36] But since the Supreme Court's mid-1980s *Celotex* trilogy,[37] courts have routinely granted summary judgment against plaintiffs in intentional discrimination cases.[38] Summary judgment is now the place where civil-rights claims go to die—though some fear that *Twombly* and *Iqbal* will push that place earlier to the motion-to-dismiss stage.[39]

The rules matter beyond pleading and summary-judgment standards. Many civil-rights claims involve individuals who experienced injuries that are small in monetary terms but were experienced in common with a large number of individuals.[40] Because of the small cash stakes, lawyers find these cases insufficiently profitable to bring them individually.[41] But, if the claims of all similar individuals are aggregated together in a class action, it becomes cost effective for an attorney to pursue them.[42] In a series of cases in recent years, the Supreme Court has substantially tightened the standards for pursuing class actions.[43] In the most notable case, *Wal-Mart Stores, Inc. v. Dukes*,[44] the Court applied a stringent standard of commonality that makes it extremely difficult to pursue a class action alleging systemic intentional discrimination.[45] Because cases challenging discrimination in pay or promotion often involve low individual stakes, *Wal-Mart* has posed an especial obstacle to vindicating the rights of those who have experienced those forms of discrimination.

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36. *See, e.g.*, John V. Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation*, 4 LAB. LAW. 747, 756-59 (1988).

37. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

38. *See* Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671, 673 (2012–2013) (citing Federal Judicial Center data showing that "summary judgment was granted, in whole or in part, in employment discrimination cases approximately seventy-seven percent of the time, in tort cases approximately sixty-one percent of the time, and in contract cases approximately fifty-nine percent of the time"); *see also* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 127 (2009) ("Over the period of 1979–2006 in federal court, the plaintiff win rate for jobs cases [basically, employment discrimination cases] (15%) was much lower than that for non-jobs cases (51%).").

39. *See, e.g.*, Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15 (2010).

40. *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 142-43 (2011).

41. *See id.*

42. *See id.*

43. *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

44. 131 S. Ct. 2541 (2011).

45. *See* pp. 114-15. For an instructive discussion, see Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395 (2011).

C. *Constricting Remedies*

Many of the restrictions imposed by the Court in recent years, Staszak notes, relate not to the rules of procedure but to the remedies available to those who have been injured by a violation of law (pp. 186-207). A steady line of cases over the past four decades—and particularly over the past decade and a half—has narrowed the rights of private parties to challenge statutory violations in court, whether for damages or injunctive relief.[46] *Armstrong v. Exceptional Child Center, Inc.*,[47] with which I opened this piece, is but the most recent example. And even when plaintiffs have a right of action, the Court has applied doctrines of sovereign and official immunity, and other limitations on governmental liability, to limit the availability of damages against governments that violate the law.[48] And it has imposed major limitations on the attorneys' fees available to prevailing plaintiffs in civil-rights cases.[49] By limiting attorneys' fees—and by limiting the damages remedies out of which plaintiffs' attorneys can recover contingent fees—the Court has substantially shrunk the number of cases in which it is economically rational for a lawyer to take on representation of an individual whose civil rights have been violated.[50]

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46. *See* Gonzaga Univ. v. Doe, 536 U.S. 273 (2002); Alexander v. Sandoval, 532 U.S. 275 (2001).

47. 135 S. Ct. 1378 (2015); *see also supra* notes 1–10 and accompanying text.

48. *See, e.g.*, City of S.F. v. Sheehan, 135 S. Ct. 1765 (2015) (holding that officers who used potentially deadly force to bring a woman with mental illness into custody had qualified immunity); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) (applying a broad doctrine of qualified individual immunity to bar a damages action for police use of excessive force); Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012) (holding that sovereign immunity bars damages action against a state for a violation of the self-care provision of the Family and Medical Leave Act (FMLA)); Connick v. Thompson, 131 S. Ct. 1350 (2011) (applying a stringent standard of municipal liability to bar recovery for the prosecutor's failure to disclose exculpatory evidence); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (finding that sovereign immunity bars damages action against a state for employment discrimination in violation of the Americans with Disabilities Act (ADA)); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (finding that sovereign immunity bars damages action against a state under Age Discrimination in Employment Act). Of course, not all of the Court's cases have gone against plaintiffs, particularly in the sovereign-immunity area. *See* United States v. Georgia, 546 U.S. 151 (2006) (holding that sovereign immunity does not bar damages action against a state for violation of the ADA that also violates the Fourteenth Amendment); Tennessee v. Lane, 541 U.S. 509 (2004) (holding that sovereign immunity does not bar damages action against a state for violation of the ADA involving denial of access to courts); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (holding that sovereign immunity does not bar damages action against a state for violation of the family-care provision of the FMLA).

49. *See* Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542 (2010) (severely limiting enhancements to the lodestar attorneys' fee); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001) (rejecting the catalyst theory of attorneys' fee recovery).

50. *See* Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 Nw. U. L. Rev. 1459, 1462 (2007).

The Court has reached similar results by an aggressive expansion of its enforcement of predispute arbitration agreements. The Court began this expansion twenty-five years ago, in *Gilmer v. Interstate/Johnson Lane Corp.*,[51] when it held that an arbitration agreement, entered into as a condition for receiving a securities license, could waive the right to a judicial forum in which to assert a violation of the federal employment discrimination laws.[52] Ten years later, in *Circuit City Stores, Inc. v. Adams*,[53] the Court narrowly read the Federal Arbitration Act's (FAA) exclusion of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" to be limited to transportation workers,[54] notwithstanding substantial textual and historical evidence that Congress sought to exempt *all* employment disputes from the FAA's deference to arbitration. And the Court even went so far, in *14 Penn Plaza LLC v. Pyett*,[55] as to hold that a collective-bargaining agreement between an employer and a union could require arbitration of asserted violations of federal civil rights[56]—and thus waive each worker's *individual* right to a judicial forum to adjudicate her claim.

These cases, all decided by closely divided Courts that tracked the usual conservative–liberal split, gave employers the power to channel even core employment discrimination disputes into arbitration simply by requiring their workers to agree to arbitration as a condition of employment. Given the substantial repeat-player advantage that businesses enjoy in arbitrations against individuals, this development makes it much harder for individual workers to enforce their substantive federal rights—even as the provisions granting those rights remain on the books, unchanged.[57]

Perhaps more significant, in its recent decisions in *AT&T Mobility LLC v. Concepcion*[58] and *American Express Co. v. Italian Colors Restaurant*,[59] the Court held that arbitration agreements that ban class actions must be enforced—even in cases in which state law would make those class-action bans unenforceable,[60] and even when the possible recovery on any individual claim is less than the cost of bringing that claim in arbitration.[61] These cases

51. 500 U.S. 20 (1991).

52. *Gilmer*, 500 U.S. at 26.

53. 532 U.S. 105 (2001).

54. *Adams*, 532 U.S. at 109 (citing 9 U.S.C. § 1 (2012)).

55. 556 U.S. 247 (2009).

56. *Pyett*, 556 U.S. at 274.

57. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997); Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 805, 829-33 (2009). Arbitration, of course, has its defenders, but that controversy is outside the scope of this Review. For a more in-depth account, see Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 267-68 (2013).

58. 131 S. Ct. 1740 (2011).

59. 133 S. Ct. 2304 (2013).

60. *Concepcion*, 131 S. Ct. at 1747.

61. *Italian Colors Restaurant*, 133 S. Ct. at 2309.

have made it much more difficult for employees and consumers to vindicate their rights.[62] While the *Wal-Mart* line of cases has made it harder to certify employment discrimination class actions in federal court, these recent arbitration decisions allow employers to avoid class actions entirely, simply by requiring, as a condition of hire, that employees sign an agreement that any disputes will be resolved by individual arbitration.

Some of these arbitration-agreement cases have received a fair measure of press. But, overall, they have flown under the radar. While the big cases involving the definition of rights get the headlines, the steady line of decisions imposing procedural and remedial limitations makes it extremely difficult to vindicate those rights. The low public salience of these remedial decisions gives courts "a high degree of discretion" in choosing what remedies to provide: "because the political spotlight focuses on the Court's treatment of rights, this enables it to limit remedies without calling much attention to its activities" (pp. 208-09).

D. *The Consequences*

The consequences of the doctrinal developments I have discussed in this Part are extremely significant. After incidents of excessive use of force by police in Ferguson, New York City, and Baltimore led to widespread protests and civil unrest, one might be tempted to ask why civil-rights litigation had not been effective in incentivizing police departments to comply with their constitutional obligations. These procedural and remedial restrictions provide much of the answer. Because of the Supreme Court's rules of qualified immunity, sovereign immunity, and municipal liability, the victim of an unconstitutional use of force will often be unable to recover damages from the officer who applied the force or the governmental entity that employed that officer. Because of the Court's rules of standing, it is extremely difficult to obtain injunctive relief to force a municipality to comply with its constitutional obligations in the future. Private individuals—even those whose rights have been violated—are thus generally not in a position to use litigation as a tool to induce constitutional policing.[63] And the Department of Justice, which can file its own civil cases against police departments, lacks the resources to investigate—much less sue—all of the departments in which a pattern or practice of police misconduct exists. Police departments therefore have very little practical legal incentive to set up structures to ensure respect for constitutional rights. The stealth assault on civil rights does not get the headlines, but it has headline-generating consequences.

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62. *See, e.g.*, *Concepcion*, 131 S. Ct. at 1740; 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

63. *See* Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 UCLA L. Rev. 306, 325–28 (2015).

II. Who Is Responsible?

It would be easy to blame these developments on conservative Justices with an agenda to undermine civil-rights laws. But, as Staszak shows, matters are not so simple. Many of the strategies for limiting access to the courts were pioneered by political liberals and progressives. In the nineteenth and early twentieth centuries, labor unions and Progressive Movement activists were key to securing judicial acceptance of and deference toward arbitration, and that deference would not have become so broad without the active support of liberal labor lawyers in the 1950s and 1960s.[64] It was Progressives, New Dealers, and their judicial allies—notably Justices Brandeis and Frankfurter—who pushed restrictive doctrines of standing in the first half of the twentieth century. And it was liberals in the 1960s and later who pushed changes in the Federal Rules of Civil Procedure—such as expansion of Rule 23, which governs class actions—with avowedly substantive ends (p. 91). All of these actions formed key background precedents for the Court's recent procedural and remedial restrictions on civil-rights litigation.

More significant, as Staszak also shows, even in the present day many liberal Justices have signed on to the key decisions that have severely restricted civil-rights litigation. In *Armstrong*, Justice Breyer provided the crucial fifth vote to limit federal court access.[65] (Justice Kennedy defected from the conservatives to join the other more liberal Justices in dissent.)[66] Justice Breyer (with Justice Souter, when he was on the Court) has often been wary of expansive private rights of action.[67] Justice Ginsburg, since her time on the District of Columbia Circuit, has been a hawk on standing issues. Particularly striking given current controversies over police misconduct, *all* of the Justices have joined with the Court's decisions expanding individual officers' immunities from damages liability for violating constitutional rights (pp. 188-89).[68]

To be sure, the liberal Justices do often dissent from decisions that impose procedural and remedial restrictions on civil-rights litigation. But it is exceedingly rare for the liberal Justices to join a decision that narrowly interprets *substantive* civil rights. When the question involves the procedures and remedies that are necessary to vindicate those rights in the world, however, such liberal crossovers are commonplace.

Does this mean that liberals have no basis to complain about the Court's restrictions on civil-rights litigation? Not at all. Anyone who cares about

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64. *See* pp. 52-58.

65. *See* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1388 (2015) (Breyer, J., concurring in part and concurring in the judgment).

66. *See id.* at 1390 (Sotomayor, J., dissenting) (opinion joined by Kennedy, Ginsburg, & Kagan, JJ.).

67. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 291 (2002) (Breyer, J., concurring in the judgment).

68. For recent examples of unanimous decisions granting immunity to individual officers, see *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022–24 (2014) and *Pearson v. Callahan*, 555 U.S. 223, 243–45 (2009).

whether civil rights are meaningful in the real world should complain, and complain loudly, about those decisions. But the story Staszak lays out suggests problems with some common arguments against the Court's recent jurisprudence. The long and bipartisan pedigree of efforts to restrict civil-rights litigation shows that recent decisions are not a betrayal of longstanding, entrenched, transsubstantive principles. To the contrary, those decisions merely represent another round in a long-running fight, in which litigation serves different interests at different times—and in which dominant factions have always used rules governing access to courts to achieve their preferred substantive ends. The latest restrictions on civil-rights litigation should be attacked on their merits, for their effects on the ability to make substantive rights real, not as contravening somehow transcendent and prepolitical procedural principles.

And critics of the Court should focus not just on the conservative Justices but also, crucially, on the more liberal ones. The procedural and remedial cases highlight the degree to which today's liberal Justices value the removal of restraints on vigorous government action over the vindication of individual rights. They also highlight the extent to which the liberals on the Court, who grew up politically in a period when liberals were at pains to show that they were tough on crime, have passed up opportunities to impose checks on the power of law enforcement in practice.

In this Part, I elaborate on these points. Section A discusses the contingent and ever-changing politics of court access. Section B examines how the recent stealth assault on civil rights exposes divisions among today's judicial liberals.

A. *The Ever-Changing Political Valence of Access to Courts*

As Staszak argues, there is nothing new about efforts to close the courthouse doors to certain classes of litigants or litigation. Throughout the twentieth century, activists frequently employed techniques to foreclose litigation, and they did so precisely because they feared that judges would rule against *substantive* positions they favored. In many cases, those efforts to close the courthouse doors came from the liberal or progressive side of the political spectrum. As Staszak contends, the longstanding history of progressive uses of denial of access to the courts made it easier for conservatives to adapt similar techniques to their own ends (pp. 216-19).

At some level, most lawyers learned in law school about the contingent political valence of broader access to the courts. Before the New Deal "switch in time," the courts—particularly the Supreme Court—formed a major obstacle to Progressive Era legislation and economic regulation. In challenging judicial decisions that invalidated regulations such as minimum-wage, maximum-hours, and child-labor laws, progressives developed an ideology of judicial restraint, which held that courts had a relatively limited role in displacing the judgments of democratically elected legislators. When President Franklin Roosevelt's appointments gave adherents to this ideology a majority on the Supreme Court, they quickly translated it into substantive

constitutional law doctrines, involving the Commerce and Due Process Clauses among others, that gave legislators ample leeway to regulate the economy. But the New Deal consensus broke down when the Justices began addressing civil-rights and civil-liberties issues during and after World War II. In the Warren Court, progressive and liberal Justices forged a new consensus, which gave legislators great leeway to regulate the economy, but which looked extremely skeptically on restrictions on protected civil rights or liberties. By the end of the Warren Court—and even more so after *Roe v. Wade*[69]—it was conservatives who were advocating the old ideology of judicial restraint, and liberals who were seeking to justify judicial displacement of legislative decisions.

That much is well understood. But what the casual observer may have missed is that, from the beginning, adherents to both camps understood that the battles over judicial restraint and judicial intervention would be fought both in the arena of substantive constitutional law and in the arena of procedural rules governing access to the courts. *Ex parte Young*[70]—the case on which the plaintiffs in *Armstrong* relied in seeking to enforce the Medicaid Act[71]—was a typical *Lochner*-era due process challenge to railroad rate regulation.[72] Justice Peckham—the same Justice who wrote *Lochner*[73]—wrote the opinion. The *Young* opinion reflects an evident understanding that the due process rights against economic regulation that the Court recognized at the time would be meaningless without an injunctive remedy that enabled them to be effectively enforced.[74] Justice Harlan, who dissented in *Lochner*,[75] also dissented in *Young*.[76] Justice Brandeis, the great progressive Justice, famously enumerated seven different procedural off-ramps courts should take before considering whether a statute is constitutional.[77] Today, many of these off-ramps would be understood as reflecting a restrictive vision of standing to sue. Brandeis's protégé Justice Frankfurter, whom Roosevelt appointed to the Court, made a career on and off the bench out of advocating for limits on judicial power—both as a matter of substantive constitutional law and as a matter of procedures and remedies.[78]

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69. 410 U.S. 113 (1973).

70. 209 U.S. 123 (1908).

71. *Armstrong*, 135 S. Ct. at 1384.

72. *See* Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1318 (2001) (describing *Young* as presenting "a typical constitutional claim of the *Lochner* era." (footnote omitted)).

73. Lochner v. New York, 198 U.S. 45 (1905).

74. *See* Louise Weinberg, *Of Sovereignty and Union: The Legends of* Alden, 76 NOTRE DAME L. REV. 1113, 1130 (2001) ("*Young* must have been intended to furnish the remedial counterpart of *Lochner*.").

75. *Lochner*, 198 U.S. at 76 (Harlan, J., dissenting).

76. *Ex parte Young*, 209 U.S. 123, 168 (1908) (Harlan, J., dissenting).

77. Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

78. For a nice discussion of the connection between Justice Frankfurter's substantive and procedural views on the limited role of courts, see Evan Tsen Lee, *Federal Jurisdiction According to Professor Frankfurter*, 53 ST. LOUIS U. L.J. 779 (2009).

It is only when the rights revolution of the 1960s and 1970s came into full force that liberal Justices began to expand access to courts. Thus, in 1961 the Court decided *Monroe v. Pape*, which interpreted 42 U.S.C. § 1983—a provision of the Ku Klux Act of 1871—as authorizing suits against public officials who, in misusing legal authority, violated constitutional rights.[79] Just as the fundamental-rights cases of the same period highlighted the emerging divide among New Deal Justices over the role of judicial restraint in substantive constitutional law,[80] *Monroe* highlighted a similar divide in the context of remedies. Justice Douglas's opinion for the Court breathed new life into § 1983, a statute that had been largely dormant for nearly a century, while Justice Frankfurter's dissent argued for avoiding judicial intervention when a constitutional violation by a state official was not authorized by state law.[81] Similar divides emerged over justiciability doctrines.[82] By the end of the Warren Court, though, the liberal Justices were more or less consistently supporting broad access to judicial remedies.

As Staszak shows, the judicial embrace of arbitration also had a liberal pedigree. In the nineteenth century, arbitration spread as a way to resolve small-scale commercial disputes without the burdens of litigation (pp. 45-47). To the extent that the rise of arbitration at that point prompted a political struggle, that struggle involved a fight for authority between judges and the business community (pp. 46-47). With the industrial revolution, arbitration expanded to cover labor disputes in the railroad industry (pp. 47-48). Here, it was the moderate railroad unions and their allies who sought arbitration, "as a way of making owners accountable by, at the very least, bringing them to the bargaining table," and by providing an alternative to the "radical[ism]" of "socialists and activist unions on the left" (p. 48).

As Staszak describes, the decades surrounding the turn of the twentieth century saw a struggle between Progressive Era legislators who sought to employ arbitration-type processes to implement their regulations and *Lochner*-era judges who resisted nonjudicial encroachment on their territory (pp. 48-50). Not surprisingly, given the conservative bent of the judiciary at the time, much pressure to expand arbitration came from the left of center, though centrist business interests also continued to support this development as a way of reducing the costs of commercial disputes (p. 50). And, indeed, it was "business interests and the organized bar" (p. 52) that provided crucial support for the enactment of the Federal Arbitration Act of

79. 365 U.S. 167, 187 (1961).

80. *Compare, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (holding, in the majority opinion by Justice Douglas, that a state poll tax is unconstitutional under the Equal Protection Clause), *with id.* at 675 (Black, J., dissenting) (accusing the majority of "using the old 'natural-law-due-process formula' to justify striking down state laws as violations of the Equal Protection Clause" (footnote omitted) (quoting Adamson v. California, 332 U.S. 46, 90 (1947) (Black, J., dissenting))).

81. *See Monroe*, 365 U.S. at 202-59 (Frankfurter, J., dissenting).

82. *Compare, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (finding a constitutional challenge to legislative malapportionment justiciable), *with id.* at 266-330 (Frankfurter, J., dissenting) (arguing that such a challenge is not justiciable).

1925—a statute that required federal courts to defer to arbitral resolution of commercial disputes (pp. 52-54).

In keeping with their anticourt views, labor unions increasingly favored arbitration of their disputes with employers during the middle third of the twentieth century. And the liberal Warren Court embraced broad powers for labor arbitrators in its 1963 *Steelworkers* Trilogy.[83] But this was the high point of left-of-center support for arbitration. Civil-rights matters began to displace labor law as the central arena for progressive lawyers (p. 57). And those lawyers saw courts—which were now much more liberal than those of the *Lochner* era—as far more likely to vindicate individual rights than arbitral proceedings were (p. 57). Moreover, lawyers influenced by the Ralph Nader model of public-interest law saw courts as a unique and crucial venue to provide a voice to interests that had been shut out of the bargaining process through which the other branches of government made policy (pp. 62-63). By the 1970s, some liberals still supported expanding arbitration in certain contexts (notably medical malpractice and small-scale disputes) to lower the costs for plaintiffs seeking access to justice, but many liberals remained committed to the courts as the champions of rights (pp. 58-67).

Does this history mean that the recent narrowing of access to courts is dictated by precedent? Emphatically not. If anything, the history shows that the procedural and remedial rules governing court access have long been the subject of controversy—controversy that has frequently been based on different views of the *substantive* rights litigants are attempting to enforce. Does it mean that the recent narrowing of access to courts is the *fault* of liberal Justices? No—though, as Staszak argues, liberals certainly blazed the trail by taking similar steps in the past that made it easier for conservatives to constrict court access today.

What the history of progressive efforts to narrow court access *does* mean, however, is that today's progressives are wrong to argue that today's conservatives are betraying transcendent procedural or remedial principles. We have *always* fought about what rights should have what remedies in what circumstances. And we have done so precisely because we have recognized the effects of particular procedures and remedies on *substantive* interests in making particular rights real without imposing undue costs on other interests. Although it requires a more candidly political argument, *that* is the playing field on which today's fights should be waged as well.

B. *What Kind of Liberal?*

Much of the stealth assault on civil rights, then, involves today's conservatives running plays from a playbook written by progressives decades earlier. Today's liberals can hardly be blamed for that development. But they

83. *See* Katherine V.W. Stone, *The* Steelworkers' Trilogy*: The Evolution of Labor Arbitration*, *in* Labor Law Stories 149 (Laura J. Cooper & Catherine L. Fisk eds., 2005). To pick a nit: Staszak gets the date of the trilogy wrong (the cases were decided in 1960, not 1962 as she says), as well as its common name (the "*Steelworkers* Trilogy," not the "Steel Trilogy" as she says). P. 55.

can certainly be faulted for those parts of the assault on civil rights with which they have cooperated. And those parts are quite significant, in legal and practical terms.

Perhaps the most significant is the doctrine of qualified immunity. Although *Monroe* held that public officials who violate the Constitution are subject to individual liability under § 1983,[84] the Court later held that individual officials are immune from damages actions unless their actions were objectively legally unreasonable in light of "clearly established" law at the time they acted.[85] This doctrine did not come from the text of § 1983, nor from any particular evidence of congressional intent in passing the statute. Rather, as the Court forthrightly acknowledged, it reflected the Justices' own effort to "balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.' "[86] Because the Court found depositions and discovery to be "peculiarly disruptive of effective government,"[87] it crafted a procedural scaffold to ensure that qualified-immunity claims are resolved before extensive discovery, and that officials have an immediate right to appeal the denial of immunity.[88]

Qualified immunity presents a particular barrier to the success of Fourth Amendment excessive-force claims. Under the Court's cases, whether a police officer's use of force is unconstitutionally excessive depends on its "objective reasonableness" based on "the totality of the circumstances," an analysis that " 'requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.' "[89] It is exceedingly difficult to overcome qualified immunity in a case governed by such a totality-of-the-circumstances standard, because "a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it."[90] But unless the plaintiff can overcome qualified immunity, there will likely be no effective redress or sanction for a use of excessive force. Victims of excessive force will only rarely be able to show a sufficient likelihood of being targeted in the future to have standing

84. *Monroe*, 365 U.S. at 187.

85. *E.g.*, Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014).

86. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (citation omitted) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)). Although *Harlow* was a case brought against a federal official under the implied *Bivens* cause of action, *see* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Court subsequently applied the same qualified-immunity test to cases brought under § 1983. Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984) ("[O]ur cases have recognized that the same qualified immunity rules apply in suits against state officers under § 1983 and in suits against federal officers under [*Bivens*].").

87. *Harlow*, 457 U.S. at 817.

88. Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985).

89. *Plumhoff*, 134 S. Ct. at 2020 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).

90. *Id.* at 2023.

to seek an injunction. Nor does excessive force typically result in evidence that can be suppressed in a later prosecution (even if we accept that suppression is ever a useful sanction for Fourth Amendment violations).

With the current political attention to unreasonable police uses of force, one might expect the liberal Justices to have fought the Court's expansive understanding of qualified immunity. But that has not happened. The Supreme Court typically decides qualified immunity by overwhelming—often unanimous—votes.[91] Even in the recent *Sheehan* case—decided in 2015, while the Black Lives Matter movement was active and prominent—every Justice to express a view on the question held that the police officer defendants were entitled to qualified immunity for shooting a woman with mental illness whom they were attempting to bring into custody.[92] Justice Breyer recused himself,[93] because his brother had served as the trial judge[94] (who granted summary judgment to the officers)[95] in the case; and Justice Kagan joined Justice Scalia's opinion urging that the writ of certiorari be dismissed as improvidently granted due to defendant San Francisco's change in its argument between the certiorari and the merits stages of the case.[96] But Justices Ginsburg and Sotomayor fully joined Justice Alito's decision granting the officers immunity.[97]

Although the Court is not always unanimous on these issues, it is fair to say that qualified immunity has been as much a liberal as a conservative project on the Supreme Court. To a lesser extent, the same can be said for the Court's undertaking to restrict private rights of action to enforce federal law.[98]

What is going on here? Why are liberal Justices so supportive of doctrines that make it difficult for civil-rights plaintiffs to obtain redress for violations of federal law? Staszak notes that liberals have at times argued for rules keeping certain types of cases—cases that they deemed less important—out of federal court, to preserve adjudicative resources for more significant matters (pp. 215-16). But that dynamic hardly fits the qualified-immunity and private-right-of-action doctrines. Police misconduct cases and the large, systemic cases in which the Court has denied private rights of

91. *See, e.g.*, Carroll v. Carman, 135 S. Ct. 348, 352 (2014) (per curiam) (unanimously finding qualified immunity and summarily reversing the lower court); Lane v. Franks, 134 S. Ct. 2369, 2381 (2014) (unanimously finding qualified immunity); *Plumhoff*, 134 S. Ct. at 2024 (unanimously finding qualified immunity); Wood v. Moss, 134 S. Ct. 2056, 2070 (2014) (unanimously finding qualified immunity). You get the point.

92. City of S.F. v. Sheehan, 135 S. Ct. 1765, 1774–78 (2015).

93. *See id.* at 1778.

94. John Elwood, *Relist Watch*, SCOTUSblog (Dec. 4, 2014, 2:05 PM), http://www.scotusblog.com/2014/12/relist-watch-49/ [http://perma.cc/XC7B-7RNY].

95. Sheehan v. City of S.F., No. C 09–03889 CRB, 2011 WL 1748419, at *1 (N.D. Cal. May 6, 2011).

96. *See Sheehan*, 135 S. Ct. at 1778–80 (Scalia, J., concurring in part and dissenting in part).

97. *See id.* at 1769 (majority opinion).

98. *See supra* text accompanying notes 65-67.

action are undeniably significant matters from the perspective of judicial liberals.

I would argue, instead, that these cases are revealing of the *type* of liberal that Presidents Clinton and Obama appointed to the Supreme Court. Liberals have long disagreed among themselves regarding the relative importance of, on the one hand, promoting vigorous government action, and, on the other, protecting disempowered individuals and communities against the harms that government can cause them. We might attach the label of "New Deal Liberal" to those who tilt in favor of vigorous government, and we might attach the label of "Rights Revolution Liberal" to those who tilt in favor of protecting vulnerable individuals and groups.

The qualified-immunity cases (and to a lesser extent the private-right-of-action cases) represent the triumph of New Deal Liberalism over Rights Revolution Liberalism. The Court's principal articulated justification for the qualified-immunity doctrine was that individual liability—and the attendant litigation—will undermine effective government unless it is carefully confined.[99] And when liberal Justices have joined decisions restricting private rights of action, they have expressly invoked the need to protect administrative discretion and policymaking against interference by litigants and judges—a classic Frankfurterian move.[100]

The liberals on today's Court pursue a mix of New Deal and Rights Revolution Liberalism, but when push comes to shove—as it does in these cases—they tend to side with the former over the latter. To a large extent, that may be a legacy of the liberal politics in which they grew up. Justices Ginsburg and Breyer were appointed to the Court by President Clinton, who appointed then-Judge Sotomayor to the Second Circuit, and for whom now-Justice Kagan served on the White House staff. President Clinton came from a centrist faction of the Democratic Party—a faction that called itself the

99. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("Social costs [of litigation against public officials] include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" (second alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

100. *See, e.g.*, Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1389 (2015) (Breyer, J., concurring in part and concurring in the judgment) ("To find in the law a basis for courts to engage in such direct rate-setting could set a precedent for allowing other similar actions, potentially resulting in rates set by federal judges (of whom there are several hundred) outside the ordinary channel of federal judicial review of agency decisionmaking. The consequence, I fear, would be increased litigation, inconsistent results, and disorderly administration of highly complex federal programs that demand public consultation, administrative guidance and coherence for their success."); Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in the judgment) ("Under these circumstances, Congress may well have wanted to make the agency remedy that it provided exclusive—both to achieve the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking and to avoid the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action for damages.").

"New Democrats." One piece of the New Democrat message was an advocacy for communitarian ideas of civic responsibility over atomistic ideas of individual rights to be free from government.[101] That message reflected a political understanding that rights-based liberalism had hamstrung the government and harmed liberals politically. In pursuing the New Deal Liberal agenda in the qualified-immunity and private-right-of-action cases, the liberal Justices on the current Court are to a large extent implementing the New Democrat politics that led to their appointments.

But the political ground may have shifted underneath the liberal Justices. A major part of New Democrat ideology was toughness on crime—a reaction to conservatives successfully using the intertwined issues of race and crime to draw white middle-class voters to the Republican Party in the period since 1968.[102] It is hardly surprising that Justices marinated in that ideology would take positions, as they have in the qualified-immunity cases, that avoid fettering law enforcement. But in our post-Ferguson world, with a resurgent libertarian wing of the Republican Party removing some of the pressure on liberals, and increased concern from the left, center, and right about law enforcement abuse, that position seems increasingly out of step.[103] In particular, the Court's remedial jurisprudence, which makes it very difficult to obtain *any* redress when police officers violate acknowledged constitutional rights, should draw increasing criticism—and the liberal as well as conservative Justices who have contributed to it each deserve their share of the blame.

Conclusion

Staszak's book does a great service in demonstrating the extent of the stealth assault on civil-rights litigation. As Staszak shows, procedural and remedial decisions fly under the public's radar, but they have exceptionally important consequences. Indeed, one can draw a clear line between judicial decisions on such obscure topics as standing and qualified immunity and the persistent acts of police misconduct that have aroused great public concern in recent months. Any effort to ensure that civil-rights protections make a concrete difference in people's lives must attend to the procedural and remedial issues Staszak discusses.

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101. For a classic statement of this view, see generally William Galston & Elaine Ciulla Kamarck, *The Politics of Evasion: Democrats and the Presidency*, Progressive Pol'y Inst. (1989), http://www.progressivepolicy.org/wp-content/uploads/2013/03/Politics_of_Evasion.pdf [http://perma.cc/BY7N-T2YK].

102. *See id.* at 19.

103. *See* David Dagan & Steven Teles, Prison Break: Why Conservatives Turned Against Mass Incarceration (forthcoming 2016); David Dagan & Steven M. Teles, *Locked In? Conservative Reform and the Future of Mass Incarceration*, Annals Am. Acad. Pol. & Soc. Sci., Jan. 2014, at 266.