

## ARTICLES

### PRIVATE ENFORCEMENT

by

Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer\*

*Our aim in this Article is to advance understanding of private enforcement of statutory and administrative law in the United States and to raise questions that will be useful to those who are concerned with regulatory design in other countries. To that end, we briefly discuss aspects of American culture, history, and political institutions that reasonably can be thought to have contributed to the growth and subsequent development of private enforcement. We also set forth key elements of the general legal landscape in which decisions about private enforcement are made, aspects of which should be central to the choice of an enforcement strategy and, in the case of private enforcement, are critical to the efficacy of a private enforcement regime. We then turn to the business of institutional architecture, describing the considerations—both in favor of and against private enforcement—that should affect the choice of an enforcement strategy. We lay out choices to be made about elements of a private enforcement regime, attending to the general legal landscape in which the regime would operate, particularly court access, as well as how incentives for enforcement interact with the market for legal services, which has important implications for private enforcement activity. We situate these legislative choices about private enforcement in the context of institutions that shape them. Finally, we seek to*

---

\* Burbank is the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School. Farhang is Associate Professor of Political Science and Public Policy at the University of California, Berkeley. Kritzer holds the Marvin J. Sonosky Chair of Law and Public Policy at the University of Minnesota Law School. The authors would like to thank Joshua Koppel, Penn Law Class of 2012, for excellent research assistance. Stephen Meili and Prentiss Cox provided comments and helpful suggestions regarding the section on consumer protection; Joshua Wright generously made available data on consumer protection laws collected by the Searle Center. This Article is a revised version of part of a longer comparative paper that was prepared for the XIVth World Congress of the International Association of Procedural Law.

*demonstrate how general considerations play out by examining private enforcement in two policy areas: legislation proscribing discrimination in employment, and laws protecting consumers from unfair and deceptive practices.*

I.	INTRODUCTION.....	638
II.	GENERAL HISTORICAL, CULTURAL, AND POLITICAL INFLUENCES ON PRIVATE ENFORCEMENT.....	643
III.	THE GENERAL LEGAL LANDSCAPE .....	648
	A. <i>Costs and Funding</i> .....	648
	1. <i>Court Costs</i> .....	648
	2. <i>Party Costs</i> .....	650
	3. <i>Funding</i> .....	653
	B. <i>Procedure</i> .....	656
	C. <i>The Lawmaking Powers of the Judiciary</i> .....	659
IV.	CHOOSING AN ENFORCEMENT REGIME .....	661
	A. <i>The Potential Advantages of Private Enforcement</i> .....	662
	B. <i>The Potential Disadvantages of Private Enforcement</i> .....	667
	C. <i>Structuring a Private Enforcement Regime</i> .....	671
	1. <i>Structuring Formal Access Rules</i> .....	672
	2. <i>The Provision of Incentives for Enforcement</i> .....	675
	D. <i>The Influence of Political Institutions on the Choice of Private Enforcement</i> .....	679
V.	EXAMPLES OF ENFORCEMENT REGIMES .....	684
	A. <i>Why the Sectoral Approach?</i> .....	684
	B. <i>Employment Discrimination</i> .....	688
	1. <i>The Statutory Framework</i> .....	688
	2. <i>Legislative Motivations for Creating the Title VII Framework</i> .....	691
	3. <i>Empirical Research on Private Enforcement of Job Discrimination Statutes</i> .....	695
	C. <i>Protecting Consumers from Unfair or Deceptive Acts and Practices</i> .....	703
	1. <i>Legal Structure</i> .....	703
	2. <i>Empirical Research on Private Enforcement Regarding Consumer Problems</i> .....	707
VI.	CONCLUSION .....	712
VII.	APPENDIX: <i>State Law Provisions Regarding Unfair and Deceptive Acts and Practices</i> .....	719

## I. INTRODUCTION

Our aim in this Article is to advance understanding of private enforcement of statutory and administrative law. Long part of American legal culture, private enforcement has in recent years attracted considerable interest and provoked considerable controversy abroad. For example, it appears that an impetus for the attention that some countries have recently given to representative litigation has been EU directives

requiring that member states provide “adequate and effective means” to protect consumers.<sup>1</sup> For that reason, we also seek to raise questions that will be useful to those who are concerned with regulatory design in other legal systems.<sup>2</sup>

There have been deep differences between the civil law and common law worlds about the feasibility and utility of attempting to define the attributes and proper roles of public or private actors in the legal system.<sup>3</sup> For those who believe that “wrongs to individuals are properly within the domain of private liability, wrongs to the general public are properly brought only by public officials. . . . the phrase ‘private attorney general’ is not just an oxymoron; it is virtually a logical impossibility.”<sup>4</sup> Among those not troubled by such matters of first principle, including most Americans, the term nevertheless may have quite different connotations. Thus, one scholar objected to its use to describe plaintiffs in so-called citizen-suit litigation under federal environmental laws.<sup>5</sup> Yet, at least under some of those laws the tenuousness of allegations of individualized injury would seem to make the term least problematic because “[g]reater deterrence was no longer a collateral benefit but became the primary benefit.”<sup>6</sup>

Although we acknowledge some inevitable definitional issues, in this Article we focus on situations in which government responds to a perception of unremedied systemic problems by creating or modifying a

---

<sup>1</sup> See CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS: A NEW FRAMEWORK FOR COLLECTIVE REDRESS IN EUROPE* 103 (2008). See also Till Schreiber, *Private Antitrust Litigation in the European Union*, 44 INT’L LAW. 1157, 1158 (2010) (describing EU Commission activity “clearly indicat[ing] that the legal and economic landscape of actions for damages resulting from the violation of E.U. antitrust law is currently changing to the benefit of victims of antitrust infringements”).

<sup>2</sup> We use the phrase “private enforcement” for both enforcement initiated by private parties but taken over by public officials as well as enforcement initiated and prosecuted by private parties. We use the phrase “private enforcement regime” to refer to the system of rules that a legislature includes in its statutory design after deciding to include a private right of action. These rules may address such diverse subjects as “who has standing to sue, which parties will bear the costs of litigation, what damages will be available to winning plaintiffs, whether a judge or jury will make factual determinations and assess damages, and rules of liability, evidence, and proof that together can have profound consequences for how much or little private enforcement litigation will actually be mobilized.” SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 3–4 (2010).

<sup>3</sup> See John Henry Merryman, *The Public Law–Private Law Distinction in European and American Law*, 17 J. PUB. L. 3, 3–4 (1968).

<sup>4</sup> Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 940 (1985).

<sup>5</sup> See Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. KAN. L. REV. 383, 409, 421 (2001).

<sup>6</sup> Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 198 (2000).

regulatory regime and relying in whole or in part on private actors as enforcers. We are not concerned about alternative regulatory choices that a government sincere about seeking to solve unremedied systemic problems might have made,<sup>7</sup> whether by manipulating incentives in order to shape decentralized individual decisions, as through the tax system, or by deploying a form of command-and-control regulation that did not include privately-initiated proceedings.

We consider the typical origins of and processes characterizing private enforcement regimes,<sup>8</sup> as well as aspects of the broader social, political, and legal landscapes that might be thought to influence those origins and processes. Believing that “abstract speculation on the functioning or desirability of [private enforcement] will get us nowhere,”<sup>9</sup> we explore the social and political character of private enforcement, along with the doctrine that underlies it, disciplining normative analysis with the fruits of social science.

The desire to avoid “abstract speculation” is one reason we take a sectoral approach, choosing two areas to study from a much longer list of legal domains in which private enforcement plays a role. In addition,

the desirability of authorizing private actions involves difficult policy judgments and is likely to depend on a number of context-specific factors [with the result that] [m]aking such determinations therefore requires familiarity with the nature of the particular policy problem, the substantive goals of the regulatory scheme, and the likely interaction of private lawsuits with other elements of the government’s enforcement strategy.<sup>10</sup>

This helps to explain our view, discussed further below, that class action (or other representative litigation) mechanisms should not be designed

---

<sup>7</sup> Continued reliance on the market (ignoring market failure) or intentional creation of an impotent private enforcement regime would not be a viable option for a government “sincere about seeking to solve” such problems. Compare the history of federal employment discrimination legislation. Republican members of the Senate favored private enforcement of the Civil Rights Act of 1964 precisely because they believed that it would be less robust than administrative enforcement. See FARHANG, *supra* note 2, at 94–128.

<sup>8</sup> See Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 36 (1982).

<sup>9</sup> Boyer & Meidinger, *supra* note 4, at 964.

<sup>10</sup> Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 106 (2005). Moreover, in order to assess private enforcement, “it is necessary to understand the social dynamics that surround a particular field of regulation, as well as the ways in which the entry of private enforcers is likely to alter those relationships.” Boyer & Meidinger, *supra* note 4, at 889. See also J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1176 (2012) (“Rigorous analysis of the role private enforcement mechanisms play in a given regulatory regime has been obscured both in doctrine and in scholarship by the tendency to formulate acontextual, abstract metrics for the evaluation of such mechanisms. . .”).

or deployed *for that purpose* on a general (trans-substantive) basis, an approach that necessarily neglects the different regulatory policies and goals of different bodies of substantive law.<sup>11</sup> Although we concentrate on federal law, state law plays the dominant role in one of the two sectors we have chosen to study in detail.

When private actors are given access to courts for enforcement, we think it important not to conceive of or describe the phenomenon as “judicial enforcement,”<sup>12</sup> or “judicial intervention.”<sup>13</sup> Like exclusive focus on formal legal rules, such a frame can obscure the locus of initiation—clients and lawyers—and the impact of incentives on the prospects for initiation. As a result, it may be more difficult to discern what aspects of regulatory design affect the efficacy and durability of the policy sought to be implemented.<sup>14</sup> Our interest in private enforcement is not confined to courts, however; it extends to administrative agencies and other tribunals. Many kinds of actions that are brought in civil courts in the United States are also brought in separate tribunals abroad.<sup>15</sup>

Finally, although a government sincere about seeking to solve unremedied systemic problems would not intentionally create an impotent private enforcement regime, the experience of countries that have introduced class action litigation without attending to the incentive structure that drives litigation—creating “beautiful cars without engines”<sup>16</sup>—suggests that impotence need not be purposeful.<sup>17</sup> It also

---

<sup>11</sup> See Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 74–75 (2010); Glover, *supra* note 10, at 1186.

<sup>12</sup> Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 922 (1978); Fiorina, *supra* note 8, at 43.

<sup>13</sup> Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 LAW & SOC. INQUIRY 855, 891 (2006). *But cf.* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 784 (2011) (discussing incentives and ability of judiciary to thwart private enforcement). *See infra* text accompanying note 247 (same).

<sup>14</sup> See Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. EMPIRICAL LEGAL STUD. 1, 1 (2009). This is not to deny that the locus of enforcement in courts rather than, for instance, administrative agencies may in some jurisdictions implicate a “fundamental debate about the role of the courts in policy making in a representative democracy.” Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 26 (2009). Thus, as to class actions—Professor Hensler’s concern—one might feel differently depending on whether decisions concerning representative litigation were made on a sector-by-sector basis by the legislature or on a general (trans-substantive) basis by court rule.

<sup>15</sup> See, e.g., Richard Moorhead, *An American Future? Contingency Fees, Claims Explosions and Evidence from Employment Tribunals*, 73 MOD. L. REV. 752, 752–54 (2010).

<sup>16</sup> Filippo Valguarnera, *Legal Tradition as an Obstacle: Europe’s Difficult Journey to Class Action*, 10 GLOBAL JURIST (ADVANCES) 1, 42 (2010). Consider in that regard an assessment of the EU Commission’s 2008 White Paper on Damages Actions for Breach of the European Commission Antitrust Rules: “If European courts chase the

confirms that an evaluation of private enforcement, whether in theory or practice, will be useless unless it comprehends the general and specific legal institutions and rules that constitute a private enforcement regime and that, in combination with other social, economic, and cultural influences, determine whether a government sincere about seeking to solve unremedied systemic problems can be successful.

We start with a brief discussion of aspects of American culture, American history, and American political institutions that may have contributed to the growth and subsequent development of private enforcement. We then turn to the general legal landscape in which decisions about private enforcement play out, aspects of which should be central to the choice of an enforcement strategy and, in the case of private enforcement, are critical to the efficacy of a private enforcement regime. Careful attention must be paid to rules on the allocation of costs and fees. Even seemingly technical rules on pleading or discovery may impede access or effective enforcement.<sup>18</sup>

We then turn to the business of institutional architecture: designing an enforcement regime. Once a government that is sincere about seeking to solve an unremedied systemic problem has decided to do so through command-and-control regulation, what are the advantages and disadvantages of public and private enforcement that might affect choices between them (including the choice of a hybrid strategy)? On the assumption that government has selected private enforcement (or a

---

harm downstream to the ultimately injured party, they will find themselves with thousands or even millions of parties to compensate in the ordinary antitrust case. Not only will those parties be widely dispersed with many small injuries, they will also be denied the two features of the U.S. system—generous claim aggregation and treble damages—that provide the best opportunity for a suit to be brought and monies recovered. Further, if the purchasers sue, they will face sharp limitations on discovery. Discovery stinginess is particularly problematic in a system that gives standing to downstream purchasers who are remote from the defendant.” Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 701–02 (2010). See also Reza Rajabiun, *Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States*, 8 J. COMPETITION L. & ECON. 187, 202 (2012) (“The early history of the U.S. antitrust system and the more recent experience in the European Union illustrate that formal rights of standing do not always translate into an effective litigation regime.”).

<sup>17</sup> See Hensler, *supra* note 14, at 22–25.

<sup>18</sup> See Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 120 (2009). Realists cringed when the Supreme Court treated the federal class action rule as just another joinder provision—like a rule that permits two passengers injured in the same automobile accident to bring one lawsuit against the driver—whose effect on substantive rights is “incidental.” See Burbank & Wolff, *supra* note 11, at 65. The case in question, *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), usefully reminds us, however, what a wild card the modern class action (dating to 1966) has been in the history of private enforcement. It also raises related questions about the wisdom of a general (trans-substantive) class action rule and the proper institution to decide whether the class action should serve as an enabler of private enforcement.

hybrid strategy), we take up choices to be made about elements of a private enforcement regime. This part of creating an effective enforcement strategy is considerably more complex than may first appear, requiring careful attention to the general legal landscape in which the regime would operate, including existing formal rules concerning court access, and to the market for legal services. Questions of institutional structure loom over both the choice of an enforcement strategy and structuring a private enforcement regime. There is robust quantitative and qualitative evidence that the structure of American government and, in particular, the dynamics of a separation-of-powers system have strongly influenced resort to private enforcement regimes in connection with federal regulatory legislation.<sup>19</sup>

In the penultimate part of this Article, we examine how general considerations play out—how they change shape and salience—because of the dynamics of particular legal contexts. For that purpose we have chosen two quite different examples of regulatory response to the perception of unremedied systemic problems. First, we take up modern legislation proscribing discrimination in employment. Here we have the benefit of extensive quantitative and qualitative social science research to help discipline normative thinking. Second, we examine modern regulatory responses to the problem of consumer protection against unfair and deceptive practices. Whereas federal law has played an important role in regulating employment discrimination—even if not as important as generally assumed<sup>20</sup>—state law unquestionably has been the dominant vehicle of private enforcement, if not the dominant regulatory force, in the consumer protection field. This makes our job more difficult. Yet, the growing importance of a quasi-federalist structure in Europe through the EU may make the effort worthwhile for those contemplating private enforcement in that rapidly evolving landscape.

## II. GENERAL HISTORICAL, CULTURAL, AND POLITICAL INFLUENCES ON PRIVATE ENFORCEMENT

For most of its history, by reason of the circumstances of its founding, the United States has depended far more on state and local laws and institutions than it has on federal laws and institutions for solutions to systemic problems unremedied by judge-made common law rules applied in actions between private parties. States have historically

---

<sup>19</sup> See THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 13–14 (2002); FARHANG, *supra* note 2, at 31–34. In addition to discussing how these elements of structure have influenced design choices in the United States, in the Conclusion we raise questions about the implications of other government structures for private enforcement.

<sup>20</sup> See Gary Blasi & Joseph W. Doherty, *California Employment Discrimination Law and its Enforcement: The Fair Employment and Housing Act at 50*, CENTER FOR LAW & PUBLIC POLICY 62 (2010), available at <http://ssrn.com/paper=1596906>.

had primary or exclusive responsibility for the maintenance of order, the protection of public welfare, and the provision of government services. Moreover, although disagreements about the need for and permissible extent of national governmental institutions have existed since the founding, the federal Constitution reflects a preference for both limited government and decentralized government with regard to internal affairs.

There have been at least four periods in U.S. history when federal laws and institutions made notable encroachments on a landscape previously either free of legal regulation by statutory or administrative law or dominated by state institutions: (1) during and immediately after the Civil War in the 1860s, (2) during the Progressive Era that bridged the nineteenth and twentieth centuries, (3) during the Great Depression in the 1930s, and (4) during and following the Civil Rights and “Great Society” period in the 1960s. Despite enormous increases in federal regulation since the 1960s, the states of the United States continue to guard their prerogatives, even if inconsistently,<sup>21</sup> and it remains true that most law governing citizen-to-citizen relationships is state law and much of that is judge-made common law.

Each of these periods saw increases in both the amount of federal statutory and administrative law and in the federal government’s reliance on private enforcement. For cases brought by private plaintiffs, various federal statutes contained either (1) a fee-shifting provision or (2) authority to award multiple or punitive damages, or both. There were three such statutes from 1887 through 1899, eight from 1900 through 1929, seven from 1930 through 1939, four from 1940 through 1949, six from 1950 through 1959, ten from 1960 (1964) through 1969, and sixty from 1970 through 1979.<sup>22</sup> In some cases, a single statute might contain multiple private enforcement regimes.<sup>23</sup> For some of this period, increasing resort to private enforcement regimes may have reflected, in part, the slow growth of federal administrative capacity.

---

<sup>21</sup> Those whose parents or grandparents were helped by Social Security or nursed back to health courtesy of Medicare manifest the same sort of inconsistency when protesting health care reform as do their elected representatives. “They want and expect guaranteed health care and financial aid when disability, disaster, or unemployment strikes their families. But getting those things from an institutionally fragmented, tax-averse, ‘anti-statist’ political system, as in the United States, presents a problem.” ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 15 (2001). The same “antistatist sentiments” underlie the tendency of many Americans to explain “business practices that are driven by public policy as driven by market forces. . . . [a tendency] to underestimate the importance of policy in part because the federal government appears to be weak.” Erin Kelly & Frank Dobbin, *Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies*, 105 *AM. J. SOC.* 455, 457 (1999).

<sup>22</sup> See generally FARHANG, *supra* note 2, at 64–66.

<sup>23</sup> For example, the Civil Rights Act of 1964 has separate and distinct enforcement provisions for the public accommodations title and the employment title, both of which include private enforcement. See Pub. L. No. 88-352, 78 Stat. 241.



Although federal administration is not as much a development of the twentieth century as has often been portrayed,<sup>24</sup>

the absence of an autonomous federal bureaucracy in nineteenth-century U.S. democracy allowed patronage-wielding political parties to colonize administrative arrangements in [this country], thereby determining that voters would be wooed with nonprogrammatic appeals, especially with patronage and other “distributive” allocations of publicly controlled resources.<sup>25</sup>

As late as 1941, prominent scholars noted that “an administrative body does not normally act to remedy wrongs which have occurred. . . . [and that this] power of administrative bodies, to act affirmatively after the injury, is still in the tentative stage. . . .”<sup>26</sup> These scholars also pointed out that “there are, of course, many fields in which administrative bodies have not made an appearance”<sup>27</sup> and that “to impose upon public agencies the task of asserting civil sanctions on behalf of injured groups will require a substantial increase in size, personnel and expenditures.”<sup>28</sup> They were skeptical about the prospects of that happening because, “[d]espite the great improvements in federal agencies in recent years, it is still true that there is no tradition of public service and little development of a true civil servant attitude in America.”<sup>29</sup>

Government institutions are a reflection of the preferences of those who fashion them. In this country certain attitudes have been quite tenacious over time. These attitudes include self-reliance, belief in the virtues of free market capitalism, impatience with the status quo, and distrust of government. Distrust of government and bureaucratic authority, manifested in part by antagonism towards taxes, is an important part of the phenomenon of “adversarial legalism” that Robert Kagan believes helps explain the prominent role that privately-initiated litigation plays in American enforcement of statutory and administrative law.<sup>30</sup> He argues that “[o]rganizational, adversarial legalism typically is associated with and is embedded in decisionmaking institutions in which authority is fragmented and in which hierarchical control is relatively weak.”<sup>31</sup> Privately-initiated litigation satisfies the impulse in favor of decentralized regulation, and even though the federal and state governments substantially subsidize civil courts, the system is likely

---

<sup>24</sup> See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *YALE L.J.* 1362, 1365–66 (2010).

<sup>25</sup> Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, in *BRINGING THE STATE BACK IN* 3, 24 (Peter B. Evans et al. eds., 1985).

<sup>26</sup> Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 *U. CHI. L. REV.* 684, 687 (1941).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 720.

<sup>29</sup> *Id.* at 720–21.

<sup>30</sup> KAGAN, *supra* note 21, at 15–16.

<sup>31</sup> *Id.* at 9 (emphasis omitted).

cheaper for the state, and hence for the taxpayers (at least those looking only at their tax bills) than exclusive reliance on centralized (state-initiated) enforcement would be.

Cultural explanations, often emphasizing a litigious populace, an imperial judiciary, and an entrepreneurial bar, dominate discussions of the role of litigation in American society. Kagan is correct, however, that “adversarial legalism in the United States does not arise from a deep-rooted American propensity to bring lawsuits.”<sup>32</sup> Notwithstanding a decades-long organized campaign by American business to demonize lawyers and litigation, there is robust empirical evidence supporting Kagan’s observation that “[m]any, perhaps most, Americans are reluctant to sue . . . .”<sup>33</sup> Moreover, subsequent work in political science, discussed below, both confirms and extends his alternative explanation, namely that “American adversarial legalism arises from political traditions and legal arrangements that provide incentives to resort to adversarial legal weapons,”<sup>34</sup> making clear the centrality of purposefully designed private enforcement regimes to the increase of adversarial legalism. This work demonstrates that cultural explanations of private enforcement drastically oversimplify and that institutional considerations have been consequential.

In recently published work, Sean Farhang uses both statistical analysis of systematically collected data and qualitative empirical work focusing on federal civil rights legislation to show that the choice of private enforcement as opposed (or in addition) to administrative enforcement by the federal government tends to reflect concern in the dominant party in Congress about subversion of legislative preferences if enforcement were committed to an administrative agency under the control of an ideologically distant executive.<sup>35</sup> In a complex system of separated but interdependent governmental powers, it is as difficult to repeal as to enact legislation. Where, therefore, the status quo is “sticky,” the choice of private over administrative enforcement may afford

---

<sup>32</sup> *Id.* at 34.

<sup>33</sup> *Id.* Although Kagan’s 2001 book emphasized the problematic aspects of adversarial legalism, he has also acknowledged its strengths, “I also indicate that if adversarial legalism were by some miracle to be drastically eliminated in the United States, without also instituting major changes in other aspects of American law and public administration, then injustice almost surely would grow. Adversarial legalism fills a void in American governance. In a structurally fragmented, deadlock-prone, and often underfunded governmental system, adversarial legalism provides an essential way of elaborating and enforcing important norms of due process, equal treatment, and protection from harm. The United States lacks the highly professional, hierarchically supervised national bureaucracies, social welfare systems, and corporatist arrangements that characterize western European governments.” Robert A. Kagan, *On Surveying the Whole Legal Forest*, 28 LAW & SOC. INQUIRY 833, 859 (2003) (emphasis omitted).

<sup>34</sup> KAGAN, *supra* note 21, at 34.

<sup>35</sup> See FARHANG, *supra* note 2, at 76–78.

protection to congressional policy long after the governing majority has been replaced by legislators with different preferences. Moreover, because private enforcement regimes create incentives for lawyers and litigants—again, “judicial enforcement” is a misnomer—they also provide some protection against subversion by an ideologically distant judiciary (in a system in which judges are politically appointed). Thus, as Farhang predicted, federal statutory private enforcement regimes are associated with periods of divided government, and the great majority of them endure through periods of control by the party that was in the minority when they were enacted.<sup>36</sup>

Although cultural explanations of adversarial legalism oversimplify, there is certainly a historic willingness of Americans, self-reliant and insistent on their rights, to take their grievances to court. Until the Progressive Era, however, there was virtually no federal statutory or administrative law available to solve unremedied systemic problems through private enforcement, and although the New Deal added to that store considerably, a variety of legal barriers hindered access to court. As we discuss below, the Federal Rules of Civil Procedure eliminated or lowered a number of those barriers. Litigation of consequence requires lawyers and thus financing, however, and those who can afford to litigate may not be the people most intent on righting the wrongs of society.

The vast increase in private enforcement actions under federal law that started in the late 1960s reflected in large part the congruence of three developments: (1) the enactment of many new federal statutes specifically authorizing (or interpreted to authorize) private rights of action, (2) the proliferation of means to finance private enforcement litigation, including Legal Services programs funded by the government, the growth of privately funded nonprofit advocacy organizations subvented through favorable tax treatment, particularly in the civil rights and environmental fields,<sup>37</sup> damages provisions sufficient to attract lawyers relying on contingency fee agreements, statutory attorneys’ fee-shifting provisions favorable to prevailing plaintiffs, and the modern class action (which, as we discuss below, dramatically enlarged the scope for contingent financing), and (3) changes in the legal profession, attracted by these new opportunities to do well, sometimes by doing good, and freed of some of the most seriously anti-competitive aspects of self-regulation (i.e., a ban on advertising).<sup>38</sup> Much of the impetus for these developments came from the political dominance of the Democratic Party during the 1960s.

A great deal has changed since these developments promoted private enforcement in the United States. In a recent article about the demand for and supply of legal services, Gillian Hadfield observes that,

---

<sup>36</sup> See *id.* at 166.

<sup>37</sup> See Belton, *supra* note 12, at 922–31; Thompson, *supra* note 6, at 216–17.

<sup>38</sup> See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 353, 384 (1977).

the vast majority of the legal problems faced by (particularly poor) Americans fall outside of the “rule of law,” with high proportions of people—many more than in the U.K., for example—simply accepting a result determined not by law but by the play of markets, power, organizations, wealth, politics, and other dynamics in our complex society.<sup>39</sup>

To the extent that Hadfield’s findings apply to private enforcement, it may be important to consider how, notwithstanding the “stickiness of the status quo,” those with the power to determine the efficacy of private enforcement regimes in action may subvert the policy preferences of the enacting Congress. As we shall discuss, two related means are underfunding of the courts and judicial actions, often under cover of resource constraints, that compromise steps previously taken to afford effective access to court.

### III. THE GENERAL LEGAL LANDSCAPE

A society’s general legal landscape is relevant to the choice of an enforcement strategy and may be critical to the efficacy of a private enforcement regime. Rules about costs and funding for litigation, the procedures provided for the initiation and conduct of litigation, and the lawmaking powers of the judiciary—all should be considered by those responsible for regulatory policy. If the decision is made to pursue a private enforcement or a hybrid strategy, careful attention should be given to the question whether achievement of the regulatory goal requires changes in the generally applicable arrangements.

#### A. *Costs and Funding*

##### 1. *Court Costs*

Civil court systems are funded primarily by the political units of which they are a part, federal and state. Although filing fees are imposed, they tend to be small. In the federal courts, for example, the filing fee at the trial court (first instance) level is \$350, and the filing fee for a first

---

<sup>39</sup> Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 143 (2010) (footnote omitted). She goes on to note, “But is there a deeper threat to the structure of a democratic society—especially one that purports to organize its relationships on the basis of law and legality—suggested by the finding that Americans are far more likely than those in the U.K. and Slovakia to ‘do nothing’ in response to the legally cognizable difficulties they face? That they are far less likely to seek out others in their community capable of helping them to align their experiences with those contemplated by the laws and procedures that stack up in the voluminous legal materials of regulation, case law, statutes, and constitutions? Is there a paradox lurking here that in the system of adversarial legalism that Robert Kagan describes as distinctive of the ‘American way of law’ (to be contrasted with the greater reliance on bureaucratic means of policy making and implementation found in Europe) that law is in practice less a salient part of everyday life in the U.S. than elsewhere?” *Id.*

appeal is \$450.<sup>40</sup> Those who cannot afford to pay the filing fees may be entitled to relief under provisions for *in forma pauperis* filings.<sup>41</sup> Different fee arrangements govern specialized courts, such as the bankruptcy courts in the federal system.<sup>42</sup>

Determining whether public funding of courts is adequate for their needs is an extremely challenging enterprise. Although some scholars have voiced skepticism that the federal courts are underfunded,<sup>43</sup> reliance for that purpose on docket statistics can be misleading.<sup>44</sup> First, caseloads vary across federal courts at both the trial and appellate levels, and they also vary over time. Over the last few decades in some parts of the country, docket pressures, particularly those caused by criminal (often drug) cases,<sup>45</sup> and more recently immigration cases,<sup>46</sup> have made it impossible for civil litigants to obtain a reasonably prompt trial date. Owen Fiss has argued that in such situations the settlement of civil cases may resemble plea bargaining in criminal cases and reflect not mutual accord but capitulation to economic necessity.<sup>47</sup>

Second, docket pressures have encouraged federal courts to adopt measures that, although they may be celebrated on efficiency grounds, may not give due weight in that calculus to the quality of justice. There is reason to worry that the trends toward aggressive case management and use of procedural filtering devices such as summary judgment and dismissals on the pleadings have exacted a toll on democratic values.<sup>48</sup> It is unrealistic to believe that the enforcement slack created by procedural belt-tightening measures that screen out meritorious and non-meritorious cases alike will be taken up by better-funded public enforcement.

Third, there is also reason to worry that, by creating an elaborate system of pre-trial procedure that has been fashioned to address the perceived problems of complex, high stakes, cases, and by insisting that the same rules govern all civil cases in federal court, the responsible

---

<sup>40</sup> UNITED STATES COURTS: FORMS & FEES, <http://www.uscourts.gov/FormsAndFees/Fees.aspx> (2011).

<sup>41</sup> 28 U.S.C. § 1915 (2006).

<sup>42</sup> See UNITED STATES COURTS: FORMS & FEES, *supra* note 40.

<sup>43</sup> See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 500–01 (2004).

<sup>44</sup> See Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571, 585–86 (2004).

<sup>45</sup> Constitutional and statutory requirements providing for speedy trials may force courts to give criminal cases precedence over civil cases.

<sup>46</sup> See, e.g., Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281–82 (2010).

<sup>47</sup> See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

<sup>48</sup> See Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 399–401 (2011); see also HAZEL GENN, JUDGING CIVIL JUSTICE 174 (2010).

lawmakers have made the federal courts unattractive to business and inaccessible to the middle class—a very effective way to control the civil docket.<sup>49</sup>

Whatever one's judgment about the adequacy of public funding of the federal courts, the instances in recent decades when state court systems have experienced funding emergencies are too numerous to permit doubt that, viewed as a whole, the country's commitment to adequate funding of courts may reasonably be questioned.<sup>50</sup>

## 2. Party Costs

As is well known, but for historical reasons that remain somewhat obscure,<sup>51</sup> it has long been the law in virtually every American court

---

<sup>49</sup> The extent to which corporations favor arbitration over (federal) litigation for the resolution of inter-corporate disputes is less clear than often asserted. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 335–36 (2007). It is clear, however, that many corporations have sought to channel disputes with consumers into arbitration and to foreclose access to elements of the private enforcement regimes, such as attorney fee shifting and representative (class) proceedings, that would be available to them in civil courts. Government reliance on, and enforcement under the Federal Arbitration Act of, private ordering to create alternative dispute resolution processes to litigation, although characteristic of some of the general aspects of American society discussed above, recalls Genn's reference to a "powerful meeting of minds [that] has developed between an emerging profession of private dispute resolvers and judicial opinion formers which perfectly suits the financial realities of a cash-strapped justice system struggling to process a growing number of criminal defendants." GENN, *supra* note 48, at 25. Moreover, it may look less benign when considered in light of recent developments in public enforcement in England and Wales and elsewhere in Europe. See HODGES, *supra* note 1, at 103. This suggests again that distrust of bureaucratic authority may blight the prospects of public enforcement as an alternative. It also suggests that institutional architecture, tradition, and the interests of a self-regulating legal profession may blight the prospects of non-administrative tribunals.

<sup>50</sup> See ABA COALITION FOR JUSTICE, *Funding the Justice System: How Are the Courts Funded?* 4 (2009), available at <http://apps.americanbar.org/abastore/productpage/3460003PDF>; Elizabeth G. Thornburg, *Saving Civil Justice*: JUDGING CIVIL JUSTICE, 85 TUL. L. REV. 247, 259 (2010) (reviewing HAZEL GENN, JUDGING CIVIL JUSTICE (2010)). Recently published comparative data, although incomplete and in some respects incommensurable, are pertinent to the question of adequate funding. In the study of legal resources referred to above, Gillian Hadfield compiled data for the United States and a selection of European countries that included both established and emerging market democracies. She found that "U.S. public expenditure *per capita* on courts, judges, prosecutors, and legal aid is the highest among this set of both advanced and transitioning European countries." Hadfield, *supra* note 39, at 149. She also found, however, that "U.S. public expenditure per case . . . is significantly lower than in other advanced democracies, when accounting for the apparently vastly higher numbers of cases [than] in those countries . . . and comparable [to] or higher than that spent in emerging market democracies that are still seeking to build the rule of law in their countries." *Id.*

<sup>51</sup> See generally John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

system—Alaska is the exception<sup>52</sup>—that each party is responsible for that party’s attorneys’ fees—win or lose. In other words, the default rule<sup>53</sup> for attorneys’ fees is different from the rule that governs other party costs; there is no presumptive shifting of (all or part of) the winner’s attorneys’ fees to the loser. This so-called “American Rule” has been the subject of sustained theoretical study and very limited empirical study, usually with the goal of seeking to adjudicate claims for superiority as between the American Rule and the so-called “English Rule,” under which the loser pays all or part of the winner’s attorneys’ fees and that, as has often been remarked, would more accurately be called the “Most-of-the-World Rule.”<sup>54</sup>

The (law and) economics literature in this area, typically devoted to the creation of highly stylized, necessarily parsimonious models, is ambiguous on the comparative question.<sup>55</sup> That said, since we seek to identify what wise public policymakers would consider when choosing a regulatory strategy and building a private enforcement regime, there may be value in noting some of the conclusions of a recent review and assessment of the theoretical and empirical literature:

[T]he current state of economic knowledge does not enable us reliably to predict whether a move to fuller indemnification [i.e., in the direction of the English Rule] would raise or lower the total costs of litigation, let alone whether it would better align those costs with any social benefits they might generate.

....

Fee shifting does appear to increase legal expenditures per case, in some cases significantly. It also encourages parties with poorly

---

<sup>52</sup> See ALASKA STAT. § 09.60.010 (2012). In addition, Texas by statute has fee shifting for a range of private law matters, including contracts, certain kinds of property loss, claims for payment for services or labor, etc. See TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2005).

<sup>53</sup> Courts will generally honor an otherwise valid contract that calls for fee shifting in the event of a dispute that leads to litigation, making it appropriate to refer to the American Rule as a “default rule.” See John J. Donohue, III, *The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees*, 54 LAW & CONTEMP. PROBS. 195, 196, 201 (1991). In a recent study of 2,350 material contracts contained in Form 8-K “current report” filings with the Securities and Exchange Commission, Theodore Eisenberg and Geoffrey Miller found “a substantial tendency to opt out of the American Rule and into some variant of the English Rule” but that “the American Rule also retains considerable popularity,” with the result that, in their view, “neither system for compensating attorneys enjoys an overwhelming efficiency advantage.” Theodore Eisenberg & Geoffrey P. Miller, *The English vs. the American Rule on Attorneys Fees: An Empirical Study of Attorney Fee Clauses in Publicly-Held Companies’ Contracts* 37–38 (N.Y.U. Law Sch. Law & Econ. Research Paper Series, Working Paper No. 10-52, 2010), available at <http://ssrn.com/paper=1706054>.

<sup>54</sup> See Herbert M. Kritzer, *The English Rule*, 78 A.B.A.J. 54, 55 (Nov. 1992).

<sup>55</sup> See Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1947–48 (2002).

grounded legal claims to settle or to avoid litigating them in the first place, and has a similar effect on litigants who are averse to risk, regardless of the merits of their cases. . . . It is unclear whether fee shifting increases the likelihood of settlement, whether it decreases total expenditures on litigation or total payouts by defendants, or whether on balance it improves incentives for primary behavior. It is even unclear whether fee shifting makes it easier for parties with small meritorious claims to obtain compensation, in light of the increased costs per case that it induces.

. . . .

Rules that encourage parties to raise relatively innovative claims and defenses help to break down precedent, while rules that penalize risk-taking and novel arguments help to preserve traditional formal categories. Given the pervasive influence of ostensibly procedural rules on substantive outcomes, it may not be possible to separate the policy of fee shifting from deeper questions of what the law should be.<sup>56</sup>

The American Rule is subject to a number of exceptions, both judge-made and statutory. In the former category is the rule that courts carved out in order to ensure that those who created a common fund could be reimbursed from that fund.<sup>57</sup> With the advent of the modern class action under Federal Rule of Civil Procedure 23, as amended in 1966, the scope for application of this exception vastly expanded and so did the influence of the class action on private enforcement.

The Supreme Court put a stop to additional court-created exceptions in *Alyeska Pipeline Service Co. v. Wilderness Society*.<sup>58</sup> *Alyeska* quickly elicited legislation prescribing fee shifting for federal civil rights cases, only some of which had previously been governed by statutory fee-shifting provisions.<sup>59</sup> *Alyeska* also may have contributed to the growing legislative resort to such provisions thereafter (once it was clear that Congress alone could authorize additional exceptions). Finally, both the 1976 statute responding to *Alyeska* and its legislative history of congressional policy choices made it difficult for the judiciary to expand attorney fee shifting by court rule.<sup>60</sup>

---

<sup>56</sup> Avery Weiner Katz & Chris William Sanchirico, *Fee Shifting*, in *PROCEDURAL LAW & ECONOMICS* 271, 272, 302–03 (Chris William Sanchirico, ed. 2012) (8 *ENCYCLOPEDIA OF LAW AND ECONOMICS*, 2d ed.).

<sup>57</sup> Here the departure consists not in the losing defendant(s) paying the winning plaintiff's attorneys' fees, but rather in shifting some of the responsibility for those fees from the named class representative(s) to the absent members of the class—all to come out of, thus reducing, the amount recovered from the defendant(s).

<sup>58</sup> 421 U.S. 240, 247 (1975).

<sup>59</sup> See 42 U.S.C. § 1988 (2006).

<sup>60</sup> Katz and Sanchirico observe that, although the effect of fee shifting on settlement has been the issue on which the economic literature has focused “more



### 3. *Funding*

Attorneys' fees are a matter of contract between lawyer and client, subject to minimal control by courts in order to prevent abuse by lawyers of their roles as officers of the court and fiduciaries for their clients, and to greater control in circumstances that prevent a normal principal-agent relationship, whether as a result of a client's age, mental condition, or status as an absent member of a certified class. Indeed, there is some evidence that nineteenth century efforts to regulate attorneys' fees through price ceilings were important in the adoption of the American Rule.<sup>61</sup>

Although publicly-funded legal aid once provided support for some civil litigation by those without financial means, there is not now a functioning federal civil legal aid system worthy of the name, and federal legal aid is prohibited for class actions.<sup>62</sup> Non-profit groups played an important role in private enforcement of statutory and administrative law in the 1960s and 1970s, particularly in the civil rights and environmental fields,<sup>63</sup> and their success spurred the creation and private funding of groups with radically different legal and political agendas.<sup>64</sup> With the proliferation of interest groups who seek influence through litigation, competition for support from private funds has increased as has competition for talented lawyers willing to make personal financial sacrifices.

In the absence of public legal aid or a private interest group champion, the poor and those of modest means who wish to initiate civil litigation require other forms of assistance in order to gain access to the market for legal services. Since the turn of the twentieth century, clients and lawyers have been free to contract for a no-win, no-fee representation with some specific exceptions (criminal cases and most divorce matters). Such arrangements are most common in, but not restricted to, tort litigation and they most commonly call for the lawyer to receive one-third of any monetary judgment.<sup>65</sup> It is also typical of such arrangements that the lawyer will pay the costs of litigation, subject to full or partial reimbursement in the event of success.

---

than any other. . . . at best the effects are ambiguous." Katz & Sanchirico, *supra* note 56, at 281–82.

<sup>61</sup> See Leubsdorf, *supra* note 51, at 13.

<sup>62</sup> 45 C.F.R. § 1617.3 (2012) ("Recipients are prohibited from initiating or participating in any class action."); see Hadfield, *supra* note 39, at 140.

<sup>63</sup> See Belton, *supra* note 12, at 922–23; Thompson, *supra* note 6, at 185–87.

<sup>64</sup> See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 10–13 (2008); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 60–61 (2008).

<sup>65</sup> See HERBERT M. KRITZER, *RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES* 9, 38–39 (2004).

The opportunity to earn a contingent fee is unlikely to attract lawyers unless there is a reasonable prospect for a substantial monetary recovery—with “substantial” being defined with reference to the likely costs of the litigation, the amount of time the matter will require, and the nature of a particular lawyer’s practice.<sup>66</sup> As the cost of litigation has increased, two phenomena may have enhanced the importance of litigation-funding mechanisms that permit clients and their attorneys to look elsewhere than the clients’ personal assets to fund legal representation. First, some of what was affordable litigation for fee-paying clients 40 or 50 years ago may no longer be, at least in federal court, with the result that those at risk of being denied access to the market for legal services are not just the poor and those of modest means but a larger segment of the middle class. Second, and relatedly, the universe of claims that a rational actor would not bring as an individual because the cost of prosecuting them would consume too great a percentage of any possible recovery—including so-called “negative value” claims<sup>67</sup>—may have increased apace.

Focusing on the common fund exception to the American Rule helps to understand what it is about the modern American class action that renders it both such a powerful tool of enforcement and such a strong draw to those whose interest is less in a common benefit than it is in a common fund. A foundational assumption of the Federal Rules of Civil Procedure is that they are trans-substantive and thus apply to all civil actions in federal court.<sup>68</sup> The 1966 amendments to Rule 23 did not just create new types of class actions; particularly through the addition of Rule 23(b)(3) for cases seeking predominantly monetary relief, they greatly expanded the field in which the common fund exception to the American Rule could operate. Promulgated by the Supreme Court under a statute delegating federal legislative power and specifying that valid rules supersede previously enacted statutes with which they are in conflict, Rule 23 immediately overlaid pre-1966 private enforcement regimes and became part of the general landscape in which subsequent regimes were constructed.

---

<sup>66</sup> Empirical research supports economic theory in debunking the linked contentions that the United States suffers from a surfeit of frivolous litigation and that the contingent fee is a cause of the problem. Lawyers who practice on a contingent fee basis are no more interested in throwing their money away than other rational maximizers. Many practices dependent on such arrangements—for instance, practices that stress high volume, modest stakes over low volume, high stakes cases and individual over representative actions—are characterized by a portfolio of cases with different probabilities of success, the great majority of which present little risk of no recovery through judgment or settlement, although there may be substantial uncertainty regarding the amount that will be recovered or the investment of the lawyer’s time that will be required. *See id.* at 11, 13, 17.

<sup>67</sup> *In re Monumental Life Ins. Co.*, 365 F. 3d 408, 411 n.1 (5th Cir. 2004).

<sup>68</sup> *See Burbank*, *supra* note 18, at 109–10.

When considering class actions under Federal Rule of Civil Procedure 23(b)(3), and on the assumption that no fee-shifting statute applies, one should distinguish among: (1) truly large claims where individual representation on a fee-paying or contingency-fee basis would be perfectly plausible; (2) claims where the recovery, viewed in isolation, might very well be substantial but the costs of litigation would be such a large percentage of that recovery as to prevent individual representation on a fee-paying or contingency-fee basis, including negative-value claims; and (3) truly small claims, where the recovery would be a small fraction of the costs of litigation and as a result no one but a wealthy person on a mission would think of bringing them individually because no lawyer would handle such cases on anything but a fee-paying basis (unless the lawyer were on a mission related to some larger political or legal agenda).

The predominant rationale for representative treatment in the first category relates to litigation efficiency and consistency. That rationale is not available for the second and third categories, since by definition the availability of the class action permits litigation that would not otherwise take place (unless it could be maintained through some form of non-class aggregation). Rather, in the second category, class treatment might be justified for the purpose of compensation, or for the dual purposes of compensation and deterrence, with aggregate treatment lowering the unit cost of litigation sufficiently to make the effort worthwhile. In the third category, however, compensation joins litigation efficiency and consistency on the fiction shelf, and only deterrence would seem to justify priming the heavy artillery of a class suit.<sup>69</sup>

From the perspective of private enforcement, and in the context of American political and legal institutions, the use of class actions for “truly small claims” is troublesome only to the extent that it advances an enforcement goal that is not part of the applicable regulatory policy or that, either alone or in combination with other modes of enforcement, it results in a level of enforcement that is substantially different from that contemplated by those responsible for regulatory policy. In the case of federal class actions, the primary sources of potential disconnect from federal or state regulatory policy result from the fact that the Supreme Court has very narrowly interpreted the prohibition against supervisory court rules that “abridge, enlarge or modify any substantive right,”<sup>70</sup> and that the Federal Rules apply trans-substantively.<sup>71</sup>

---

<sup>69</sup> See Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 107 (2006).

<sup>70</sup> 28 U.S.C. § 2072(b) (2006).

<sup>71</sup> Readers may have noticed our failure to discuss either insurance for legal expenses or alternative litigation funding (ALF), so called because the contingent fee and liability insurance covering defense costs are themselves mechanisms of third-party funding. See Steven Garber, *Alternative Litigation Financing in the United States*:

### B. Procedure

The 1938 Federal Rules of Civil Procedure provided a system that could attract a great deal of private litigation, including litigation enforcing statutory and administrative law. In the years following 1938, a number of Supreme Court decisions, including *Hickman v. Taylor*<sup>72</sup> and *Conley v. Gibson*,<sup>73</sup> embraced the concepts of notice pleading and broad discovery. Eventually, however, notice pleading, broad discovery (unleashed further by amendments to the Federal Rules in 1970), and a restrictive view of summary judgment assumed a different complexion in light of statutory incentives to litigate (e.g., a host of new federal statutes with pro-plaintiff fee-shifting provisions), the modern class action, and a bar responsive to such incentives and assisted by decisions striking down anti-competitive regulations like the traditional ban on advertising.<sup>74</sup>

As the volume of federal litigation increased, and as the federal judiciary became more conservative,<sup>75</sup> the rulemakers responded by turning to one approach after another—from managerial judging, to sanctions, to summary judgment.<sup>76</sup> Although different in many respects, these approaches share the quest for greater definition of claims and defenses and the ability it affords courts to make rational judgments as to

---

*Issues, Knowns, and Unknowns* 1 (RAND, Occasional Paper, 2010), available at [http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2010/RAND\\_OP306.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf); see also Maya Steinitz, *Whose Claim is this Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275–76 (2011). From the perspective of access to court for private enforcement, insurance is not an important consideration for plaintiffs because of the combination of contingency fees and the American Rule; liability insurance that covers both indemnity and legal expenses is obviously important for defendants. Moreover, it is our impression that the incidence and coverage of pre-paid legal service plans is not consequential for these purposes. The same is true (at least for the present) of ALF. ALF has only recently made an appearance on the U.S. legal scene; it confronts significant barriers erected by the self-regulating legal profession. See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 979–82 (2000); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011). In addition, to the extent that ALF is focused on investing in cases with the potential for substantial recoveries, it seeks entry into a market in which both the contingency fee and class actions are well-established. That may help to explain why a recent study found three segments of ALF business, two of which involved loans, one to (usually) personal-injury plaintiffs and one to plaintiffs' law firms, and one of which involved investment in commercial (inter-corporate) lawsuits. In their loan activities, ALF providers can be viewed as substituting for banks in a time of tight credit, charging (high) interest rather than taking a percentage of any recovery. See Garber, *supra*.

<sup>72</sup> 329 U.S. 495 (1947).

<sup>73</sup> 355 U.S. 41 (1957).

<sup>74</sup> See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 620 (2004).

<sup>75</sup> See *id.* at 625.

<sup>76</sup> *Id.* at 624.

whether a case should be permitted to proceed.<sup>77</sup> As discussed above, however, they make more difficult efforts to determine whether existing resources were inadequate to accommodate increasing caseloads. Assessing the cost of modern federal litigation as a basis for procedural reform is no easier, at least when the supposed cause of disproportionate cost is discovery.

Increasingly over the last 30 years, probably the greatest source of complaint voiced by critics of litigation has been the cost of federal civil litigation, with the primary culprit said to be the cost of discovery, particularly document discovery (most is born by the party from whom discovery is sought and cannot be shifted *ex post* from the winner to the loser). At the same time, however, thoughtful scholars and judges have pointed out the potential costs of cutting back on discovery.<sup>78</sup>

The rulemakers have responded to complaints about discovery with round after round of amendments designed to streamline the discovery process.<sup>79</sup> Most recently, they fashioned amendments to address a phenomenon that even skeptical empiricists understand may have changed the landscape and the conclusions about costs and benefits that one should draw from it: discovery of electronic documents, or e-discovery. Yet, we do not know what the impact of e-discovery has been, because anecdotes about discovery continue to dominate methodologically sound

---

<sup>77</sup> See *id.*; Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1930–31 (1989).

<sup>78</sup> “We should keep clearly in mind that discovery is the American alternative to the administrative state. . . . Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.” Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997). Judge Patrick Higginbotham, former Chair of the Advisory Committee on Civil Rules, also emphasized the relationship of discovery to the ability to enforce congressional statutes: “Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.” Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997).

<sup>79</sup> They introduced (but then restricted the ambit of) required disclosures (i.e., without waiting for a discovery demand), see FED. R. CIV. P. 26(a) (as amended in 1993 and 2000), presumptive limits on the number of interrogatories, see FED. R. CIV. P. 33(a) (as amended in 1993), and depositions, see FED. R. CIV. P. 30(a)(2) (as amended in 1993) and the length of depositions, see FED. R. CIV. P. 30(d)(2) (as amended in 2000), and even purported to reduce the universe of discoverable material (in the absence of a court order) from that which is relevant to the subject matter of the action to that which is relevant to a claim or defense. See FED. R. CIV. P. 26(b)(1) (as amended in 2000).

research—a phenomenon characteristic of discourse about all of American civil litigation.<sup>80</sup>

When evaluating criticisms of American litigation, it is important to understand that, as Robert Gordon recently put it, “[c]areful studies demonstrate that the ‘litigation explosion’ and ‘liability crisis’ are largely myths and that most lawyers’ efforts go into representing businesses, not individuals; unfortunately, those studies have had no restraining effect on this epidemic of lawyers’ open expression of disdain for law.”<sup>81</sup> With respect to discovery in particular, empirical research conducted over 40 years has not demonstrated that it is a problem—disproportionately expensive—in more than a small slice of litigation.<sup>82</sup> Instead, study after study has found that discovery is a problem in precisely the types of cases that one would expect—high stakes, complex cases.<sup>83</sup> An October 2009 Federal Judicial Center survey of attorneys in recently closed federal civil cases again failed to support the story of ubiquitous abuse or skyrocketing cost.<sup>84</sup>

Notwithstanding the failure of empirical study to verify the oft-told tale of pervasive discovery abuse and pervasively crushing discovery expense, the Supreme Court invoked both, together with the supposed inability of federal judges to manage discovery, as reasons to change federal procedural law—but not the aspects of that law that govern discovery. Rather, in order that defendants in massive antitrust class actions might be spared putatively impositional discovery,<sup>85</sup> the Supreme Court made it more difficult for the plaintiffs in such cases to survive a motion to dismiss. They did so chiefly by resuscitating the distinctions between “facts” and “conclusions” that the drafters of the Federal Rules had rejected and by transforming the motion to dismiss for failure to state a claim upon which relief can be granted from a vehicle for testing the plaintiff’s legal theory into a means to weed out complaints that, shorn of conclusions, do not set forth sufficient facts to make the plaintiff’s claim plausible.<sup>86</sup> Thereafter, in another case where the Court

---

<sup>80</sup> For a refreshing exception, see EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009).

<sup>81</sup> Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1199 (2009).

<sup>82</sup> See, e.g., Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1440–42 (1994).

<sup>83</sup> See, e.g., *id.* at 1437.

<sup>84</sup> See LEE & WILLGING, *supra* note 80, at 40 (finding that median estimates of discovery costs related to total litigation costs were lower than the median responses to the question of what the proper ratio was between the costs of discovery and litigation costs).

<sup>85</sup> See Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 646 (1989).

<sup>86</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007); Burbank, *supra* note 18, at 113.

was concerned about the costs of discovery—but there, the costs of diverting the time and attention of high government officials—the Court made clear what should have been obvious, namely that the new pleading regime applies to all federal civil cases.<sup>87</sup>

Notice pleading and broad discovery were created under the auspices of the Supreme Court acting pursuant to congressional delegation. Once firmly entrenched, they became part of the background against which Congress legislated, part of the foundation of congressional private enforcement regimes. They also became part of the status quo and thus were highly resistant to change through the lawmaking process that brought them forth—the Enabling Act<sup>88</sup> process. From this perspective, desiring to effect change, the Court was equally hobbled by the inertial power of the status quo and the limitations created by foundational assumptions and operating principles associated with the Enabling Act process. The Court effectively amended the Federal Rules on pleading through judicial decision because the Justices knew that, even if amendments through the prescribed process could survive congressional review, they would embroil the process and the Court in political controversy.

It is no surprise that the anecdotes one hears from the defenders of the Court's recent pleading decisions have to do only with the costs of litigation, not its benefits, or that there is no mention of the money that would be required to replace private litigation as a means of securing compensation and enforcing important social norms. Imagine the reaction of the Chamber of Commerce if the proposal were to give the Equal Employment Opportunity Commission adequate resources, raised through increased taxes, to enforce federal anti-discrimination law.

### C. *The Lawmaking Powers of the Judiciary*

There are four aspects of federal judicial power that appear to us particularly salient from the perspective of private enforcement of statutory and administrative law. First, unlike state courts, federal courts have very limited power to make substantive law. Second, like most state judiciaries, the federal judiciary has very substantial power to make procedural law, both in the context of deciding cases and prospectively through court rules. Third, the federal courts have some ability to regulate access to court through interpretations of the constitutional requirements (in Article III) that have been used to limit who has standing to sue. Fourth, having the power to interpret federal statutes, the federal courts can use that power either to infer or to refuse to infer private rights of action. We take up each of these points briefly below.

---

<sup>87</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009); Burbank, *supra* note 18, at 114–15.

<sup>88</sup> Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 et seq.).

Federal courts do not have common lawmaking powers remotely approximating those of state courts. As a result, when, for instance, existing tort law is thought to provide inadequate protection, and it is also thought that federal law is needed to solve the unremedied systemic problem, the law in question will almost always be federal statutory or administrative law.<sup>89</sup> Interstate pollution was once one of the rare exceptions to this proposition, but after Congress acted, the federal courts receded (as lawmaker), noting that “when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.”<sup>90</sup>

Subject to the Constitution, Congress holds ultimate lawmaking power concerning procedure in the federal courts.<sup>91</sup> As discussed above, however, since 1934 the Supreme Court has had the power to promulgate procedural law for all civil actions through court rules that are subject to congressional review before they become effective;<sup>92</sup> the rules so promulgated are general (trans-substantive), and the Court has read statutory limitations on its rulemaking power very narrowly. The federal courts also have the power to fashion procedural law in their decisions so long as such procedural common law is consistent with federal statutes and Federal Rules. With respect to rulemaking, the result has been that Federal Rules, notably Rule 23, can take on a life of their own—act as a wild card—for purposes of private enforcement, divorced from the statutes and administrative regulations that are the authorized sources of regulatory policy.<sup>93</sup> With respect to procedural common law, the Court’s recent pleading decisions suggest how the judiciary may be able to sap private enforcement regimes through change to the background rules under the guise of interpretation, evading

---

<sup>89</sup> See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 317–19 (1981).

<sup>90</sup> *Id.* at 314; see *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (Clean Air Act and EPA actions it authorizes displace federal common law of nuisance).

<sup>91</sup> See Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1679–89 (2004).

<sup>92</sup> See 28 U.S.C. § 2074 (2006).

<sup>93</sup> For advocacy of generic (trans-substantive) and criticism of sectoral class action reform in England, see Rachael Mulheron, *Recent Milestones in Class Actions Reform in England: A Critique and a Proposal*, 127 LAW Q. REV. 288 (2011). “Hence, to summarise, the preference for generic, rather than sectoral, class actions reform was based upon four factors: the existence of evidence of widespread ‘gaps’ in redressing multiple grievances across a variety of sectors; the caveat that a generic action should sit alongside sectoral-specific regimes, as and where appropriate; a majority of those interested parties who provided views to the [Civil Justice Council of England and Wales] preferred the generic approach; and a generic approach would sit comfortably with existing English procedural regimes, and would accord with leading opt-out regimes elsewhere.” *Id.* at 296.



congressional review before the judiciary's policy choices become effective.<sup>94</sup>

Congress has very substantial power to recruit private citizens to enforce statutory and administrative law, but that power is limited by Article III of the United States Constitution. Having liberally construed Article III standing requirements during the 1960s and into the 1970s, a more conservative Supreme Court pulled back, thereby reducing the universe of eligible enforcers.<sup>95</sup> Similarly, having liberally interpreted federal statutes and administrative regulations to imply private rights of action for a number of years, the Court changed course and made private enforcement more difficult in the absence of clear evidence of congressional intent.<sup>96</sup>

#### IV. CHOOSING AN ENFORCEMENT REGIME

In this Part we consider the choice of private enforcement from the standpoint of a legislature sincerely seeking to secure enforcement of its regulatory commands. In the domain of command and control regulation, the choice of private enforcement must be understood in relation to potential sources of public enforcement, either in the form of public prosecutions in court or through some administrative process. Public and private enforcement can be treated as substitutes for one another, or can be used in a complementary fashion. Although public and private enforcement are sometimes used independently of one another, they are also commonly used in combination, with some powers being delegated to administrative actors, while others are left to private litigants and courts within the same statute. In hybrid regimes, either public or private enforcement can be given the dominant role, with the other playing a more ancillary one. The two forms can be given important and distinctly separate roles in a regulatory scheme, such as by authorizing administrators to promulgate rules and allowing private parties to enforce them; or they can be given substantially overlapping roles, such as in an election of remedies arrangement where claimants can either proceed in court or submit their claim to an administrative tribunal. The range of possible combinations of public and private enforcement, and of administrative and legal process, is substantial and complex, and we do not attempt a comprehensive mapping here.

The choice between public and private enforcement does not correspond in any straightforward way to the choice between strong and weak enforcement. Public, private, and hybrid regimes can each range from weak to strong. A private enforcement regime with limited opportunities and incentives can produce far weaker enforcement than

---

<sup>94</sup> See Burbank, *supra* note 18.

<sup>95</sup> See Boyer & Meidinger, *supra* note 4, at 936; Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 10 (1982).

<sup>96</sup> See, e.g., *Touche Ross & Co. v. Redington*, 442 U.S. 560, 573–75 (1979).

an agency with strong formal powers, ample resources, and leadership dedicated to vigorous enforcement. Conversely, a robust private enforcement regime can produce stronger enforcement than an agency with modest powers, insufficient resources, or a leadership disinclined toward vigorous implementation. We will discuss differences between weak and strong private enforcement regimes later in this part.<sup>97</sup>

A. *The Potential Advantages of Private Enforcement*

In assessing the potential advantages and disadvantages of private enforcement regimes, we draw on the substantial literature debating their wisdom, which is always, explicitly or implicitly, evaluating them in relation to public enforcement. This literature is largely characterized by advocacy either for or against private enforcement. Aside from advocacy, we believe that the arguments on each side highlight dimensions of private enforcement that are useful to weigh when considering whether to deploy this enforcement strategy. As discussed in Part I, we also believe that many of the arguments are context-dependent, with their relative importance likely to vary across specific policy domains and political, legal, and institutional environments.

On the positive side of the ledger, relative to administrative implementation, private enforcement regimes can: (1) multiply resources devoted to prosecuting enforcement actions; (2) shift the costs of regulation off of governmental budgets and onto the private sector; (3) take advantage of private information to detect violations; (4) encourage legal and policy innovation; (5) emit a clear and consistent signal that violations will be prosecuted, providing insurance against the risk that a system of administrative implementation will be subverted; (6) limit the need for direct and visible intervention by the bureaucracy in the economy and society; and (7) facilitate participatory and democratic governance.<sup>98</sup>

Private enforcement regimes multiply prosecutorial resources. Regulation scholars have often observed that budgetary limitations are a core and recurring constraint on the administrative state's enforcement capacity.<sup>99</sup> Allowing and encouraging private litigation can bring vastly more resources to bear on enforcement, potentially mobilizing private

---

<sup>97</sup> See *infra* Part IV.A–C.

<sup>98</sup> In reviewing this literature we draw partly upon an excellent review by Stephenson, *supra* note 10.

<sup>99</sup> See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1410 (2000); Rajabiun, *supra* note 16, at 214 n.110 (“[I]n his testimony to Congress in 1951, Assistant Attorney General H. Graham Morrison argued that, in the absence of private suits, public enforcers would require four times as much funding.”); Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT’L REV. L. & ECON. 191 (1992); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 221 (1992).

litigants and plaintiffs' attorneys in numbers that dwarf agency capacity.<sup>100</sup> Moreover, private enforcement litigation can actually enhance the efficient use of scarce bureaucratic resources by allowing administrators to focus enforcement efforts on violations that do not provide adequate incentives for private enforcement, while resting assured that those that do will be prosecuted by private litigants.<sup>101</sup>

Scarcity of government revenue also highlights the comparative political feasibility of enacting private enforcement regimes as compared to bureaucratic state-building. A number of scholars have argued that lack of adequate tax revenue, or the political costs of raising it, encourages Congress to achieve public policy goals through private legal process because it shifts the costs of regulation away from the state and on to private parties.<sup>102</sup> Scarcity of public funds places obvious limits on administrative implementation. As distinguished from funding an executive agency to carry out enforcement activities, private enforcement regimes are, from Congress's standpoint, more or less self-funding. Although increasing rates of litigation will cause some increase in the costs of maintaining the federal judiciary, these costs are not easily traceable by voters to legislators' support for a piece of regulatory legislation with a private enforcement regime. Thus, with private enforcement regimes, legislators can provide for policy implementation at lesser cost than with administrative implementation, and can minimize blame for what costs are born by the government.<sup>103</sup>

Private enforcement regimes have comparative informational advantages for detecting violations. Potential litigant-enforcers—who are directly affected by violations, whose proximity to violations gives them inside information, and whose connections to the relevant industry may give them expertise to judge violations—collectively have knowledge about violations that far exceeds what the administrative state could

---

<sup>100</sup> See John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 218 (1983); Gilles, *supra* note 99, at 1387; Kent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws*, 34 OSGOODE HALL L.J. 461, 479–81 (1996); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1214 (1982).

<sup>101</sup> See Coffee, *supra* note 100, at 224–25; Steven D. Shermer, *The Efficiency of Private Participation in Regulating and Enforcing the Federal Pollution Control Laws: A Model for Citizen Involvement*, 14 J. ENVTL. L. & LITIG. 461, 468–69 (1999); Thompson, *supra* note 6, at 200.

<sup>102</sup> See FARHANG, *supra* note 2, at 129–71; KAGAN, *supra* note 21, at 15–16; R. Shep Melnick, *From Tax and Spend to Mandate and Sue: Liberalism after the Great Society*, in THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM 387, 399–400 (Sidney M. Milkis & Jerome M. Mileur eds., 2005); Karen O'Connor & Lee Epstein, *Bridging the Gap Between Congress and the Supreme Court: Interest Groups and the Erosion of the American Rule Governing Awards of Attorneys' Fees*, 38 W. POL. Q. 238 (1985).

<sup>103</sup> An insincere legislature that wished for political reasons to appear to be serious about enforcement might regard the ability to constrain court capacity through funding allocations as a less obvious means of subverting enforcement than comparable underfunding of a public enforcement regime.

achieve through monitoring, even under the most optimistic budget scenarios.<sup>104</sup> As one scholar put it, “the massive governmental expenditures required to detect and investigate misconduct are no match for the millions of ‘eyes on the ground’ that bear witness to . . . violations.”<sup>105</sup>

Private enforcement regimes encourage legal innovation. Private litigants stand in sharp contrast with a centralized and hierarchical bureaucracy, which frequently engenders what Richard Stewart and Cass Sunstein characterize as comparative “diseconomies of scale, given multiple layers of decision and review and the temptation to adopt overly rigid norms in order to reduce administrative costs.”<sup>106</sup> As compared with conservative tendencies that bureaucracy fosters, private litigants and attorneys are more likely to press for innovations in legal theories and strategies that could expand the parameters of liability and the methods for establishing it, innovations that may be adopted by public enforcers.<sup>107</sup> Freedom from bureaucratic constraint also allows private litigants to mobilize and reallocate their enforcement resources more flexibly and expeditiously than bureaucrats.<sup>108</sup>

The decentralized nature of private enforcement litigation, as contrasted with centralized bureaucracy, can also encourage policy innovation for reasons similar to those associated with federalist governing arrangements.<sup>109</sup> As distinguished from the imposition of a policy solution at the top of a centralized and hierarchical bureaucracy, litigation of an issue among many parties and interests, and across many judicial jurisdictions, can lead to experimentation with a multiplicity of policy responses to a problem, and successful policy solutions will gain traction and spread.<sup>110</sup>

Private enforcement regimes with adequate incentives for enforcement will produce durable and consistent enforcement pressure, avoiding influences that may lead an agency to stray from legislators’ enforcement preferences. In contrast, regulators may choose to under-enforce for a number of reasons. Given that intense preferences for under-enforcement exist in the regulated population, while preferences

---

<sup>104</sup> Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 5, 8 (2002); Gilles, *supra* note 99, at 1387; Roach & Trebilcock, *supra* note 100, at 480–81; Shermer, *supra* note 101, at 472.

<sup>105</sup> Gilles, *supra* note 99, at 1413.

<sup>106</sup> Stewart & Sunstein, *supra* note 100, at 1298; *see also* Boyer & Meidinger, *supra* note 4, at 913.

<sup>107</sup> *See* Harry First, *Antitrust Enforcement in Japan*, 64 ANTITRUST L.J. 137, 179–80 (1995); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1403–04, 1426 (1998); Thompson, *supra* note 6, at 206–07.

<sup>108</sup> Coffee, *supra* note 100, at 226.

<sup>109</sup> *See* Christopher B. Busch et al., *Taming Adversarial Legalism: The Port of Oakland’s Dredging Saga Revisited*, 2 N.Y.U. J. LEGIS. & PUB. POL’Y 179, 208–11 (1999).

<sup>110</sup> *See id.* at 209–10.

for enforcement are far more diffuse, the regulated population has incentives and opportunities to use lobbying, campaign contributions, and other means to seek to influence or capture an agency so as to discourage enforcement.<sup>111</sup> Regulators themselves may have preferences for under-enforcement for many reasons, including ideological preferences, career goals, to protect or enhance budget allocations, to avoid political controversy, or simple laziness.<sup>112</sup> Finally, administrators may face pressure to under-enforce from executives or legislatures who may be motivated by ideological preferences, electoral imperatives in general, or the desire to protect specific constituents in particular.<sup>113</sup> Although this literature has focused on private enforcement regimes created because of concern about under-enforcement by administrators, legislators may believe that private enforcement regimes likewise can guard against *over*-enforcement by the bureaucracy.<sup>114</sup>

Private enforcement can counterbalance uncertainty about agency enforcement in two ways. Most obviously and importantly, it can operate as a simple substitute for or adjunct to public enforcement. Further, it can bring attention to violations going unaddressed by public agencies charged with enforcement responsibilities and thereby shame or prod them into action.<sup>115</sup> Given the tendency of the sources of under-enforcement identified above to vacillate over time, private litigation performs what one regulation scholar called a “failsafe function,” by “ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers . . . and that the legal system emits clear and consistent signals to those who might be tempted to offend.”<sup>116</sup>

Private enforcement regimes may provide a compromise alternative to bureaucratic state-building in political environments in which anti-bureaucracy sentiments are salient and influential.<sup>117</sup> Private litigation,

---

<sup>111</sup> See Sanford C. Gordon & Catherine Hafer, *Flexing Muscle: Corporate Political Expenditures as Signals to the Bureaucracy*, 99 AM. POL. SCI. REV. 245, 245 (2005); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1039-40 (1997); Stewart & Sunstein, *supra* note 100, at 1294.

<sup>112</sup> See J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1454-55 (2003); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 247 (1987); Roach & Trebilcock, *supra* note 100, at 482.

<sup>113</sup> See BURKE, *supra* note 19, at 14; DeShazo & Freeman, *supra* note 112, at 1454; Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329, 329, 338 (1982).

<sup>114</sup> See FARHANG, *supra* note 2, at 94-128.

<sup>115</sup> See Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 56 (1989); Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 350 (1990); Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 133-37 (2002).

<sup>116</sup> Coffee, *supra* note 100, at 227.

<sup>117</sup> See BURKE, *supra* note 19, at 13-14, 172-73; Tom Ginsburg & Robert A. Kagan, *Introduction: Institutional Approaches to Courts as Political Actors*, in INSTITUTIONS AND

with its air of private dispute resolution, is less visible and more ambiguous as a form of state intervention. Therefore, it may be preferred to bureaucratic state-building by legislators with antistatist preferences, a significant strand of the American political tradition, particularly as applied to the central state in the United States' federalist system. Indeed, private enforcement regimes may be embraced by such legislators as a way of thwarting the growth of bureaucracy.<sup>118</sup> Legislators and the public tend to regard private enforcement regimes, as Kagan puts it, as "nonstatist mechanisms" of policy implementation.<sup>119</sup> As compared to constructing and financing bureaucratic regulatory enforcement machinery and endowing it with coercive powers, for example, to investigate, prosecute, adjudicate, and issue cease-and-desist orders, an enforcement regime that is founded instead on allowing aggrieved persons to prosecute their own complaints in court may be likely to attract broader support. If there are pivotal lawmakers prepared to obstruct enactment of regulatory policy that entails bureaucratic state-building, utilizing private enforcement regimes may facilitate overcoming such obstructions.

Finally, private enforcement regimes contribute to participatory and democratic self-government.<sup>120</sup> Meaningful access to opportunities to defend and advance rights through litigation can amount to a form of active and direct citizen participation in the enterprise of self-government, constituting a valuable and important facet of democratic life. This form of participation may incorporate interests into the governing process that would be rendered impotent by simple majoritarianism. Although majoritarian institutions are often thought emblematic of democracy, such institutions do not exhaust forms of democratic governance. As Feeley and Rubin put it, "perhaps a democracy must respect the rights of individuals or be governed by organic law or provide opportunities for expression and participation or establish conditions for rational discourse," and courts may be distinctively suited to contributing these elements to a broader democratic regime.<sup>121</sup>

---

PUBLIC LAW: COMPARATIVE APPROACHES 1, 8 (Tom Ginsburg & Robert A. Kagan, eds., 2005); KAGAN, *supra* note 21, at 15–16, 50–51, 193–94.

<sup>118</sup> See FARHANG, *supra* note 2, at 94–128.

<sup>119</sup> KAGAN, *supra* note 21, at 15–16.

<sup>120</sup> See MALCOM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 330–35 (1998); Busch et al., *supra* note 109, at 211; Susan E. Lawrence, *Justice, Democracy, Litigation, and Political Participation*, 72 SOC. SCI. Q. 464, 472 (1991); Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690, 695 (1983).

<sup>121</sup> FEELEY & RUBIN, *supra* note 120, at 333 (footnotes omitted).

B. *The Potential Disadvantages of Private Enforcement*

The foregoing account of private enforcement regimes as an effective form of policy intervention is heatedly contested. A contending line of arguments not only doubts whether private litigation can advance statutory policy goals, but, in its strongest form, suspects that private litigation may actually *discourage* compliance efforts. This perspective is characterized by the following core arguments: private enforcement regimes (1) empower judges, who lack policy expertise, to make policy; (2) tend to produce inconsistent and contradictory doctrine from courts; (3) weaken the administrative state's capacity to articulate a coherent regulatory scheme by preempting administrative rulemaking; (4) usurp prosecutorial discretion; (5) discourage cooperation with regulators and voluntary compliance; (6) weaken oversight of policy implementation by the legislative and executive branches; and (7) lack democratic legitimacy and accountability.

A primary justification for delegation of policy implementation authority to bureaucracy is to leverage the expertise—informational resources, analytical competence, etc.—of policymakers within an administrative body.<sup>122</sup> Critics of private enforcement emphasize that most judges are generalists by training, lacking the specialized training necessary to deal with complex policy problems.<sup>123</sup> In the course of judging they deal with a multitude of policy areas one after another, developing a depth of knowledge in none. This makes judges, on balance, far less informed and expert than administrators at policymaking.<sup>124</sup>

Private enforcement regimes produce fragmented and incoherent policy. As compared to a more centralized, unified, and integrated administrative scheme, orchestrated by an administrator at the top of a hierarchical agency with powers of national scope, when a large role is given to private litigation in implementation, resulting policy will tend to be confused, inconsistent, and even straightforwardly contradictory. This is so for reasons having to do with the party-driven nature of litigation and the decentralized structure of the judiciary. When courts make

---

<sup>122</sup> See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 29 (1999); JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* 33 (2002); Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 62 (1995).

<sup>123</sup> See, e.g., Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 851–54 (2012).

<sup>124</sup> See Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 1–2 (1986); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 861–62 (2001); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1251 (1989); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 140 (2000).

policy in response to private litigation, judges are only able to rule on issues presented to them by private litigants. These private litigants select and frame issues, thus setting the judicial policy agenda, in the course of pursuing highly particularized interests. These interests, and the associated policy positions being advocated, inevitably will be divergent across private plaintiffs and private attorneys, and they may not correspond with, and in fact may be in competition with, the public interest.<sup>125</sup> In response to issues presented in this fashion to a decentralized court system, non-expert judges make piecemeal policy, one case at a time, often without adequate consideration or understanding of the larger regulatory scheme. Given the inevitable heterogeneity of policy preferences among judges, the multitude of judges authoring regulatory policy often work at cross-purposes, seeking to advance conflicting and even contradictory regulatory agendas. This renders regulatory policy, according to critic Richard Pierce, via “judicial opinions [that] are massively inconsistent and incoherent.”<sup>126</sup>

Private enforcement regimes weaken bureaucratic lawmaking in hybrid regimes that, in addition to providing for private enforcement, also empower administrators to articulate substantive law or to prosecute enforcement actions. Inevitably, private litigation will force courts to delineate the meaning of broadly worded regulatory statutes on important issues before administrators have the opportunity to address them, narrowing the scope of administrators’ opportunity to do so through rulemaking.<sup>127</sup> Private enforcement also diminishes the effectiveness of the traditional administrative strategy of regulating complex and uncertain policy areas by promulgating broad rules, which may in some instances be infeasible to comply with, and relying on prosecutorial discretion to temper the effects of the rule.<sup>128</sup> With wide opportunities for private enforcement litigation, prosecutorial discretion ceases to operate as a safety valve and this regulatory strategy is undermined.<sup>129</sup> Private enforcement further subverts an administrator’s ability to mount litigation campaigns strategically calculated to advance certain policy goals, such as by selecting cases best suited to facilitate a desired change in the law, forum shopping, and tactically ordering presentation of issues to appellate courts so as to gradually build

---

<sup>125</sup> See Bucy, *supra* note 104, at 66–67; Cross, *supra* note 115, at 68–69; Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission’s Authority*, 107 HARV. L. REV. 961, 969–71 (1994).

<sup>126</sup> Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 8–9 (1996); see generally Cross, *supra* note 115, at 69; Stewart & Sunstein, *supra* note 100, at 1292–93.

<sup>127</sup> See Jeannette L. Austin, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220, 223 (1987); Pierce, *supra* note 126, at 2; Stewart & Sunstein, *supra* note 100, at 1292.

<sup>128</sup> See, e.g., Pierce, *supra* note 126, at 8.

<sup>129</sup> See Bucy, *supra* note 104, at 64; Cross, *supra* note 115, at 69; Kalven & Rosenfield, *supra* note 26.



precedent toward a desired outcome. With individual private lawyers representing the interests of individual private clients, an administrator's capacity to orchestrate such strategic litigation campaigns is severely curtailed. To the extent that private litigants make precedent at cross-purposes with an administrator's goals, it will frequently be binding on her. Thus, while courts are producing inconsistent and contradictory regulatory policy, the administrative state's capacity to send its own clear and audible signals about what the law requires is simultaneously weakened.<sup>130</sup>

Private enforcement regimes subvert cooperation and voluntary compliance. Given how adversarial the litigation process is, wide scope for private enforcement litigation will erode and disrupt efforts at cooperation, coordination, and negotiation between regulators and those they regulate. Regulation scholars who voice this concern urge that a significant measure of voluntary compliance is vital to obtaining enforcement objectives, given the limited resources available to administrators and courts to coerce compliance.<sup>131</sup> If cooperatively negotiated informal bargains with regulators, aimed at enhancing compliance, will not protect organizations from private suits on the same issues, then the prospect of facing private suits will make voluntary agreements far harder to achieve.<sup>132</sup> The contentiousness of implementation through private litigation is further exacerbated by the fact that—as compared to administrative enforcement—private litigants will be more likely to file non-meritorious suits that are brought for strategic or extortionate purposes against innocent defendants in the hope that they will find it cheaper to settle than to litigate.<sup>133</sup> This further erodes a cooperative environment conducive to fostering trust and voluntary compliance.

The legislative and executive branches have less continuing control over policy when private enforcement is relied on for implementation, as contrasted with administrative implementation. After a statute is enacted, private enforcement activity and associated judicial interpretation of statutes are far harder for legislatures and executives to control and influence than post-enactment implementation by bureaucrats. Most significant among forms of continuing legislative control over bureaucracy, even if future legislatures lack the political capacity or will to pass a new law, they can exercise some leverage over agency

---

<sup>130</sup> See Bucy, *supra* note 104, at 66–67; Cross, *supra* note 115, at 69.

<sup>131</sup> See, e.g., Austin, *supra* note 127, at 223; Cross, *supra* note 115, at 67; John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 J.LAW & POL'Y 385, 394 (1984).

<sup>132</sup> See Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 409 (1988); Stewart & Sunstein, *supra* note 100, at 1292–93; Zinn, *supra* note 115, at 84.

<sup>133</sup> See Grundfest, *supra* note 125, at 970–71; Robert A. Kagan, *Adversarial Legalism: Tamed or Still Wild?*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 217, 227 (1999); Stephenson, *supra* note 10, at 116.

implementation of statutes through such tools as investigation, oversight hearings, earmarking funds, formal reporting requirements, refusing to confirm appointees, and, of course, by threatening to reduce or actually reducing an agency's budget.<sup>134</sup> Executives also possess considerable capacity to influence agency behavior, particularly through appointment (and removal) of agency leadership.<sup>135</sup> In contrast, if an enacting legislature delegates to private enforcers and institutionally independent courts, there is little if anything that the legislature or the executive can do to exert supervisory oversight powers, other than passing a new law. Passing a new law is far more difficult to accomplish, and even when feasible, has much higher opportunity costs, than traditional tools of bureaucratic oversight.<sup>136</sup> Greater capacity for continuing control of bureaucracy by the elected branches has led some to regard agencies as a far more democratically legitimate, accountable, and responsive delegatee than private litigants and courts.<sup>137</sup>

Critics of private enforcement litigation complain that it can be deeply undemocratic, unsuited to a political community committed to representative democracy, electoral accountability, and legislative supremacy.<sup>138</sup> Private enforcement regimes give plaintiffs, their lawyers, and judges excessive power, fostering "judicial imperialism" by "activist" judges who interpret statutes, in response to the claims of greedy plaintiffs and their irresponsible lawyers, in ways that would never succeed in a politically accountable institution. Plaintiffs, their lawyers,

---

<sup>134</sup> See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 130 (1990); WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1129–73 (3d ed. 2001); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1295–96 (1999).

<sup>135</sup> See Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 197 (1982); Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 J. INST'L & THEORET. ECON. 171, 176 (1994).

<sup>136</sup> See CHARLES R. SHIPAN, *DESIGNING JUDICIAL REVIEW: INTEREST GROUPS, CONGRESS, AND COMMUNICATIONS POLICY* 10 (1997); Cross, *supra* note 134, at 1303–05; Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and Political Control of Agencies*, 75 VA. L. REV. 431, 444–45 (1989); Charles R. Shipan, *Interest Groups, Judicial Review, and the Origins of Broadcast Regulation*, 49 ADMIN. L. REV. 549, 555–56 (1997).

<sup>137</sup> See Cross, *supra* note 134, at 1290–1306; McCubbins et al., *supra* note 136 at 444–45; Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978–79, 999, 1002 (1992); Pierce, *supra* note 124, at 1251; Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990).

<sup>138</sup> See PATRICK M. GARRY, *A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA* 6–8 (1997); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 300–01 (1991); JEREMY RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* 247–49 (1989); ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 6–9 (2003); Nathan Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INT. 104, 105, 119–20 (1975).

and judges are not electorally accountable, and they will stray from the democratic will precisely because they cannot be disciplined by it.<sup>139</sup>

In concluding this discussion of the potential disadvantages of private enforcement, we stress that critics of private enforcement regard private litigation as importantly different from litigation prosecuted by the administrative state. While administrators do not have personal economic stakes in litigation and can pursue public goals, privately prosecuted litigation is guided by private (often economic) interests that may be in conflict with the public interest. While administrators can use litigation to pursue a desired regulatory regime, private litigation is fragmented and uncoordinated. Private litigants will bring strategic and extortionate suits that public administrators would never bring. To the extent that administrators' use of litigation departs from these expectations, it can be disciplined and reined in by the democratic process, whereas private litigation, by comparison, is largely unfettered. A lawsuit is not a lawsuit. It matters who is prosecuting it. When it comes to lawsuits, public and private prosecution should not be confused or conflated.

### C. *Structuring a Private Enforcement Regime*

If legislators elect to rely on private enforcement litigation for statutory implementation, they face a host of additional choices of statutory design concerning such matters as who will have access to the role of private enforcer, rules of claim aggregation, who will bear litigation costs and attorneys' fees, and what remedies will be available. The cumulative effects of such choices can have profound consequences for how much or how little private enforcement is actually mobilized. In discussing these rules below we view them from the standpoint of a legislature making choices about the nature and extent of private enforcement desired, highlighting the economic calculus involved in litigation. We by no means intend to deny or diminish non-economic influences on the choice to litigate by potential plaintiffs and attorneys.<sup>140</sup> However, from the perspective of statutory design, we believe that the economic value of claims is an element influencing the choice to litigate that, unlike other factors, can be readily and substantially influenced by statutory drafters.

---

<sup>139</sup> Of course, many state judges are elected in the U.S., but the democratic critique of private enforcement regimes, as far as we are aware, does not take up this wrinkle.

<sup>140</sup> For example, scholars have suggested that the choice to sue may also be influenced by utility derived from telling one's side of the story in a conflict, utility derived from litigation as a form of political participation, or disutility resulting from feelings of embarrassment or victimization. See KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 98–103 (1988); Lawrence, *supra* note 120, at 467; Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 *ANN. REV. L. & SOC. SCI.* 171, 172–73 (2005).

The economic motive to litigate is, moreover, a distinctively important one in the sense of being a threshold condition in the majority of cases. This is because, whatever other motives may also be at play, very few plaintiffs will be willing or able to proceed with litigation under an expectation of suffering financial loss.<sup>141</sup> This is not to claim that plaintiffs are motivated by greed, but rather that an expectation of a positive, rather than a negative, economic outcome will typically be a precondition to the choice to sue, even if there are other political or psychological reasons for proceeding. As one scholar studying litigation from a social psychological perspective put it in reference to the effect of monetary damages on the choice to litigate, “even a boundedly rational psychological model will assume that expectations play a central role in choice.”<sup>142</sup> Further, the decision to sue will not be made by the plaintiff alone, but will typically also require the agreement of a lawyer. In legal systems in which plaintiffs’ lawyers are regularly dependent on proceeds from the successful prosecution of a case for some or all of their compensation, unless a plaintiff is willing and able to carry the large burden of litigation costs on her own, before filing suit her attorney will have to assess whether investment of limited resources in a case is warranted based on an evaluation of its risks and potential returns.<sup>143</sup>

### 1. Structuring Formal Access Rules

The initial choice that legislators face is whether to allow private enforcement at all. Given the creation of a substantive legal rule—for example, prohibitions against job discrimination, or against deceptive consumer practices—the legislature must decide whether private lawsuits should be permitted, and if so, who should be permitted to seek remedies via private lawsuits.<sup>144</sup> In considering the latter question, the legislature must decide whether the universe of private enforcers should be limited to persons injured by violations of statutory provisions or administrative regulations, and if so, whether and how to define the nature of the injury that will suffice to entitle a person to serve as a private enforcer. We noted in Part III that Article III of the U.S. Constitution, as interpreted by the Supreme Court, sets limits on the

---

<sup>141</sup> See HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* 28–34 (1990). But see Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 172 (1984).

<sup>142</sup> Robert J. MacCoun, *Media Reporting of Jury Verdicts: Is the Tail (of the Distribution) Wagging the Dog?*, 55 DEPAUL L. REV. 539, 539 (2006).

<sup>143</sup> See KRITZER, *supra* note 65, at 11; Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1426 (1992); Earl Johnson, Jr., *Lawyers’ Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC’Y REV. 567, 567–68 (1981); Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 748–49 (2002).

<sup>144</sup> As we discuss in Part III, although the Supreme Court once quite liberally found implied rights of action in federal statutes, since the late 1970s it has refused to do so absent a sufficiently clear indication of legislative intent to confer rights of private enforcement.

power of Congress to confer standing. We have also noted, however, that although those limits have been interpreted more strictly in recent decades, they still leave substantial room for private enforcement, perhaps best illustrated by the so-called citizen-suit provisions of federal environmental statutes.<sup>145</sup> As we discuss in Part V with respect to job discrimination, the U.S. Congress elected to make private enforcement central, allowing suits by any “person claiming to be aggrieved.” With respect to most types of deceptive consumer practices, in contrast, it elected not to allow private lawsuits at all, instead vesting all enforcement authority with an administrative agency (with states free to establish their own enforcement regimes, most of which do authorize private enforcement).<sup>146</sup>

When the legislature structures a private enforcement regime, in addition to creating a private right of action and identifying the set of persons with standing, it should also consider whether plaintiffs will be permitted to proceed on a representative basis.<sup>147</sup> That is not the situation in most of the United States, however. In the U.S., class actions have proven significant sources of private enforcement across numerous important spheres of statutory regulation, including anti-trust, securities, environmental, consumer, and civil rights litigation.<sup>148</sup> As discussed in Part III, class actions are authorized on a general (trans-substantive) basis for litigation in the federal courts by Federal Rule of Civil Procedure 23, as amended in 1966, and most states modeled their class action statutes or rules on the federal rule.<sup>149</sup> That is why we have referred to the class action as a “wild card” in the context of private enforcement in the

---

<sup>145</sup> See Thompson, *supra* note 6, at 185. Qui tam (“whistleblower”) statutes that seek to protect the interests of the United States through private enforcement present a special challenge for purposes of Article III because the private plaintiff (“relator”) typically cannot allege personal injury. The Supreme Court solved this problem by treating the relator as a statutory assignee of the rights of the United States with representational standing to assert the injury in fact suffered by the assignor. See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771–73 (2000).

<sup>146</sup> Between the poles of broad standing for any aggrieved private party and no private right of action at all, there are many opportunities for a legislature to specify with particularity the pool of potential enforcers. For example, if a legislature sought to mobilize private enforcers against those who fraudulently label commodities, it could confer standing on one, all, or some combination of the following potential plaintiffs: the defrauding party’s (1) competitors, (2) customers, (3) competitors of customers, (4) any subsequent purchaser of a commodity in the stream of commerce, and (5) trade associations. In 1970 amendments to the National Gold and Silver Stamping Act of 1906, which previously lacked a private right of action, Congress elected to expressly confer standing on all five groups for the express purpose of increasing private enforcement. See H.R. REP. NO. 91-928, at 1–2 (1970).

<sup>147</sup> We do not address other, non-representative, forms of aggregation that may also enable private enforcement.

<sup>148</sup> JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 758 (4th ed. 2005).

<sup>149</sup> Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1500 (2008).

United States.<sup>150</sup> Since 1966, whenever Congress has fashioned a private enforcement regime, it should have considered the potential impact of class action litigation on the attainment of its regulatory goals. In particular, it should have considered whether (1) given the enforcement incentives provided by the common fund doctrine that we have described—authorizing payment of attorneys' fees and expenses out of the fund created by the class litigation—other such incentives were necessary or appropriate, and (2) additional private enforcement incentives aside, class litigation might yield inefficient over-enforcement.

Congress has not consistently done so, but it is deemed to legislate against the background of the Federal Rules.<sup>151</sup> As a result, there have been some obvious instances of potential over-enforcement, notably under the Truth-in-Lending Act,<sup>152</sup> prompting some federal courts to balk at the idea of certifying a class to collect statutory damages and Congress to amend the statute in order to cap the potential recovery in class suits.<sup>153</sup> Attempts by states to achieve similar protection against inefficient over-enforcement of state law or otherwise to pursue a different vision of the class action than that captured in federal law have recently suffered dual setbacks, first with the enactment of the Class Action Fairness Act of 2005,<sup>154</sup> which sweeps most consequential class litigation on matters of state law into federal court,<sup>155</sup> and more recently by a Supreme Court decision that appears to prevent federal courts from honoring state law limitations on class actions.<sup>156</sup>

As we discussed in Part III, the policies that can reasonably be said to support representative litigation vary depending on claim type. In the scenario in which statutory violations produce a large number of small injuries, compensation may not be a plausible goal, but the absence of representative litigation can render the violator, as a practical matter, immune from suit by private parties. Class actions thus can deter unlawful conduct of would-be violators by eliminating a structural economic impediment to private enforcement.<sup>157</sup> At the same time as it

---

<sup>150</sup> Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT'L L. 663, 666 (2012).

<sup>151</sup> See *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979).

<sup>152</sup> Pub. L. No. 90-321, 82 Stat. 146 (1968).

<sup>153</sup> See, e.g., *McCoy v. Salem Mortg. Co.*, 74 F.R.D. 8 (E.D. Mich. 1976); *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972); *Rodriguez v. Family Publ'n Serv., Inc.*, 57 F.R.D. 189 (C.D. Cal. 1972); Edward J. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO L.J. 233, 237, 305–06 (1991).

<sup>154</sup> Pub. L. No. 109-2, 119 Stat. 4.

<sup>155</sup> See Burbank, *supra* note 149, at 1447.

<sup>156</sup> *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010); see also Burbank & Wolff, *supra* note 11.

<sup>157</sup> See STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 963 (5th ed. 2000); Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1049–51 (1990).

reduces the per claim cost of counsel, the class device can also elevate the quality of representation by markedly increasing the stakes (and potential rewards) of a case by aggregating damages, thereby justifying greater investment of lawyer time and resources into effective private enforcement.<sup>158</sup>

The haphazard way in which legislatures, federal and state, have structured private enforcement regimes against the background of general (trans-substantive) class action provisions is of greatest concern with respect to negative value claims and within that category the subset of truly small claims.<sup>159</sup> As to the latter, because compensation is usually not a plausible objective (depending on how small the claims are), whether or not class litigation should be permitted for the purpose of deterrence should depend, first, on the animating goals of the substantive law, and second on the desired level of enforcement, both of which the Supreme Court has chosen to ignore.<sup>160</sup> Indeed, because Congress has been relatively uninvolved in federal class action policy, it may not consistently consider the potential of representative litigation to skew regulatory objectives when structuring a private enforcement regime.<sup>161</sup>

## 2. *The Provision of Incentives for Enforcement*

Effectively mobilizing private enforcement requires provision of adequate incentives. Simply allowing private enforcement, without attending to incentives, may result in under-enforcement in substantive areas of law in which those injured lack the resources to serve as private enforcers even if they have a substantial claim, or in which the costs of prosecuting claims exceeds their value. As we have discussed, the class action device can provide at least a partial answer to this problem with respect to some kinds of regulatory issues, but a great many violations of statutory law and administrative regulations are too individualized for class treatment under American law. Similarly, in situations where a claim under a statute or administrative regulation can yield a substantial

---

<sup>158</sup> See Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 U.C. DAVIS L. REV. 791, 797–98, 802–03 (1997); David L Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 927–28 (1998).

<sup>159</sup> See Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 94–99 (2010).

<sup>160</sup> See Burbank & Wolff, *supra* note 11, at 20.

<sup>161</sup> However, it has done so in some instances. Congress has limited remedies available in class actions under a number of statutes, including the Real Estate Settlement Procedures Act, Expedited Fund Availability Act, Homeowners Protection Act, Truth in Lending Act, Equal Credit Opportunity Act, Fair Debt Collection Practices Act, Electronic Fund Transfer Act, and Migrant and Seasonal Worker Protection Act. Brief for Respondent at App. A, *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (No. 08-1008), 2009 WL 2777648, at \*1A. That appendix also lists many representative examples of state statutes limiting remedies available in class actions, and another appendix lists representative state statutes that prohibit the use of class actions for particular types of claims.

individual recovery, the acceptability of percentage-based fees in the United States, which we discussed in Part III, may obviate the need to provide additional incentives. But many such claims hold no prospect of a recovery adequate to attract a lawyer practicing on a percentage-fee basis. The two primary types of statutory rules that can be used to incentivize private enforcement are those allocating responsibility for costs and attorneys' fees and those governing available remedies.

We focus here on allocation of responsibility for attorneys' fees, although the same logic applies to other litigation costs. In Part III we discussed the "American Rule," pursuant to which each party pays its own attorneys' fees and the "English Rule," pursuant to which the loser pays most of the winner's attorneys' fees. As compared to the two-way fee shifting of the English Rule, it is also possible to provide one-way fee shifting in favor of plaintiffs or in favor of defendants. One-way fee shifting in favor of plaintiffs has grown considerably in statutory regulation since the late 1960s, including in the areas of civil rights and consumer law.<sup>162</sup> One-way fee shifting in favor of defendants is extremely rare in practice.<sup>163</sup> The Supreme Court has referred to plaintiffs' fee shifts as "congressional utilization of the private-attorney-general concept," while noting that "under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation."<sup>164</sup>

We quoted excerpts from a review of the current state of theoretical and empirical knowledge about fee shifting in Part III, noting that, with rare exceptions, the effects and hence the comparative advantages and disadvantages of the American Rule and the English Rule are unclear.<sup>165</sup> The problem, according to Avery Katz, is that "[l]egal costs influence all aspects of the litigation process, from the decision to file suit to the choice between settlement and trial to the question whether to take precautions against a dispute in the first place," which can affect the

---

<sup>162</sup> See FARHANG, *supra* note 2, at 94–128. Although the language of some of these provisions in federal legislation provides for fee awards to the "prevailing party," literally reflecting the English Rule, based upon their assessment of legislative intent, courts have read most such provisions as effectively creating one-way fee shifting for plaintiffs, allowing prevailing plaintiffs to recover fees as a matter of course, and allowing prevailing defendants to recover fees only upon a showing that the plaintiff's claim was frivolous or brought in bad faith. *Id.* at 82. The federal Copyright Act is a rare exception. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 519 (1994). For Texas departures from the American Rule, see *supra* note 52.

<sup>163</sup> Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 141 & n.8 (1984).

<sup>164</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975).

<sup>165</sup> See *supra* text accompanying note 56.



number of underlying opportunities for litigation.<sup>166</sup> Changing the rules governing legal fees thus “remedies some externalities while failing to address and even exacerbating others.”<sup>167</sup>

Scholars disagree about the comparative merits of the American and English Rules. However, from the standpoint of the incentives facing plaintiffs and their attorneys, it is clear that, as compared to either rule, no matter who wins under a one-way plaintiff’s shift, expected costs of suit will be equal or less, causing the expected value of the case to be equal or greater.<sup>168</sup> Thus, among the alternative arrangements for allocating responsibility for paying attorneys’ fees, the one-way plaintiff’s shift creates the greatest incentives for private enforcement.<sup>169</sup>

Available remedies for legal violations can also provide important incentives for enforcement, and this is clearest with respect to economic remedies, although non-economic remedies can provide important incentives as well. Available economic remedies for statutory violations are, to an important extent, the function of a statute’s express provisions. Legislators have wide latitude to determine whether statutory cases, if won by plaintiffs, will be worth no money, a little money, or a lot of money. They can enact express statutory provisions that confer monetary damages greater than a plaintiff’s actual damages, such as double, triple, or punitive damages. Double or triple damages operate as multiples of the actual monetary damages suffered by the plaintiff, and punitive damages can be awarded separately in an amount that need not be tied to actual monetary harm at all, and can far exceed it.<sup>170</sup> Legislators can also provide “statutory damages,” which are a specific sum awarded either in lieu of or in addition to actual damages, an approach typically taken to

---

<sup>166</sup> Avery Wiener Katz, *Indemnity of Legal Fees*, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS: THE ECONOMICS OF CRIME AND LITIGATION 63, 64 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

<sup>167</sup> *Id.* at 65.

<sup>168</sup> Under the American Rule the plaintiff knows that expected liability for attorneys’ fees will be her own expected fees whether she wins or loses. Under the English Rule (or at least the indemnity version which provides full reimbursement) the plaintiff knows that expected fees will be zero if she wins, since the defendant will have to pay her fees, and will be her own expected fees, plus the defendant’s expected fees, if she loses. Under a one-way plaintiff’s shift, the plaintiff knows that her expected fees will be her own expected fees if she loses, and will be zero if she wins. Thus, if the plaintiff loses, she is in the same position as if she loses under the American Rule (she pays her own fees), and better off than under the English Rule. If the plaintiff wins, she is in the same position as if she won under the English Rule (the defendant pays her fees), and better off than under the American Rule.

<sup>169</sup> See Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 60–61 (1982); Frances Kahn Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 LAW & CONTEMP. PROBS. 187, 190 (1984).

<sup>170</sup> See G. Robert Blakey, *Of Characterization and Other Matters: Thoughts about Multiple Damages*, 60 LAW & CONTEMP. PROBS. 97, 110–11, 123 (1997); Galanter & Luban, *supra* note 143, at 1426.

incentivize private enforcement where actual damages are small or difficult to establish, and one used most often by Congress in the context of consumer protection and intellectual property regulation.<sup>171</sup> Courts have recognized that damages enhancements “are justified as a ‘bounty’ that encourages private lawsuits seeking to assert legal rights.”<sup>172</sup> Like plaintiffs’ fee shifts, using damages enhancements as a “bounty” operates to “reward individuals who serve as ‘private attorneys general’ in bringing wrongdoers to account,”<sup>173</sup> and provides an “incentive to litigate” that is “designed to fill prosecutorial gaps.”<sup>174</sup>

We note that Congress has sometimes incentivized private enforcement by using damages enhancements in conjunction with fee shifting. In some policy contexts, fee shifting alone will not be sufficient to generate private enforcement of meritorious claims.<sup>175</sup> This is so because of delay lawyers experience in receiving payment of fees, uncertainty of case outcome (both in terms of success and amount of recovery), and, sometimes, difficulty in recovering fees by winning plaintiffs.<sup>176</sup> Since litigation regularly entails both delay and uncertainty of outcome, attorneys discount anticipated fee awards accordingly. A for-profit sector attorney weighing only economic considerations will not represent plaintiffs on the expectation of a fee award if she also has the opportunity to be paid at a comparable rate, in a timely fashion, and not contingent on prevailing. Further, courts have at times interpreted prevailing plaintiff fee shifts—on such issues as what attorney work is covered, what constitutes “prevailing,” appropriate hourly rates, and the

---

<sup>171</sup> See Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 103–04, 110–11 (2009); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 61 (2005). In combination with class actions, statutory damages can create massive liability, inefficiently high levels of private enforcement pressure, and over-deterrence. See Burbank & Wolff, *supra* note 11, at 65 n.200; Scheuerman, *supra*, at 111. However, a recent Ninth Circuit decision rejected the “enormity” of damages in a class action under a consumer protection statute with a statutory damages provision as a reason to deny class certification. *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 710–11 (9th Cir. 2010). The court maintained that, while there was no evidence of congressional intent in the case at hand, under the Supreme Court’s decision in *Califano*, see *supra* text accompanying note 151, Congress is deemed to legislate against the background of the Federal Rules (including Rule 23) absent clear expression to the contrary. *Id.* at 716.

<sup>172</sup> *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting); see also *United States v. Snepp*, 595 F.2d 926, 937 (4th Cir. 1979); *TVT Records v. Island Def Jam Music Grp.*, 279 F. Supp. 2d 413, 423 (S.D.N.Y. 2003).

<sup>173</sup> *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986); see also *Perrone v. Gen. Motors Accep. Corp.*, 232 F.3d 433, 440 (5th Cir. 2000).

<sup>174</sup> *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985).

<sup>175</sup> See FARHANG, *supra* note 2, at 190–91; Thompson, *supra* note 6, at 216.

<sup>176</sup> See FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT 50 (1989); see generally FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 25, 104–05 (1990).

relevance of the proportionality of the fee to the outcome achieved—in ways that produce awards below market rates.<sup>177</sup> Deploying damages enhancements in conjunction with fee shifting can allow contingency arrangements to counteract the discounting of fees that results from delay and uncertainty of outcome regarding both the case and, if successful, the fee award.

In our discussion of structuring private enforcement regimes, we have focused on formal access to private enforcement and direct economic incentives for it. Of course, many other aspects of a regulatory statute, and of the legal system in which it is implemented, can affect the probability that a plaintiff will succeed in litigation, which has straightforward influence on the expected value of claims. For example, a plaintiff's probability of successful litigation—and therefore the extent of private enforcement—can be powerfully influenced by rules governing liability,<sup>178</sup> evidence,<sup>179</sup> burdens and standards of proof,<sup>180</sup> and, as discussed in Part III, pleading<sup>181</sup> and discovery.<sup>182</sup> Thus, the operation of private enforcement regimes hinges on the interplay of a complex array of rules at the levels of both the individual statute and the civil justice system, and we have just highlighted what we take to be the most important ones.

#### *D. The Influence of Political Institutions on the Choice of Private Enforcement*

As noted in Part II, in recent years, scholars studying the role of litigation in American policy implementation have argued that American separation-of-powers structures create incentives for Congress to rely on private enforcement litigation for policy implementation. This literature argues that in the American institutional environment Congress has incentives to rely on private enforcement regimes to carry out its will in the face of potential resistance by (1) Presidents, (2) future legislative majorities, and (3) bureaucrats whose interests or preferences are not aligned with the goals of the enacting Congress. This institutional environment also frequently gives rise to the need for broad supermajoritarian coalitions to pass a law, and privatization of enforcement costs in a regulatory law is one strategy to achieve this goal.

---

<sup>177</sup> See FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 176, at 25, 104–05; Ray Terry, *Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearean Tragedy*, 5 LAB. LAW. 63, 66–67 (1989).

<sup>178</sup> See Lewis A. Kornhauser & Richard L. Revesz, *Multidefendant Settlements: The Impact of Joint and Several Liability*, 23 J. LEGAL STUD. 41, 42 (1994).

<sup>179</sup> See FARHANG, *supra* note 2, at 27–28.

<sup>180</sup> See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 431–33 (4th ed. 2004).

<sup>181</sup> See Burbank, *supra* note 18.

<sup>182</sup> See Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 435–36 (1994).

Before elaborating on these institutional explanations, we briefly return to more widespread cultural explanations for “litigiousness” in the U.S., also noted in Part II, intending to highlight how they contrast with—although they are not necessarily in conflict with—the institutional factors. One dimension of the cultural argument is about Americans in general, and a second dimension is about a transformation in American political culture since the late 1960s. The argument about Americans in general is tied to the perspective of “American exceptionalism”—which holds that American political culture differs fundamentally from other developed nations.<sup>183</sup> One strand of this view maintains that in the U.S. individualist and antistatist orientations give rise to “a society profoundly rooted in law,” with a “potent orientation toward individual rights,” fostering “the American eagerness for legal settlements to disputes . . . [and] excessive litigiousness.”<sup>184</sup> Against this general backdrop, scholars have argued that a cultural transformation occurred beginning around the late 1960s that resulted in a greater propensity among Americans to assert legal rights.<sup>185</sup> This account is marked, alternately, by tropes of degeneration and tropes of triumph.

The degenerative story of transformation is one of cultural decline from a rights-respecting people to a rights-abusing one. According to this view, Americans became afflicted with a “national disease” that prevented them from “tolerat[ing] more than five minutes of frustration without submitting to the temptation to sue.”<sup>186</sup> During this period, Americans’ traditional (and healthy) respect for individualism, with long roots in the American political tradition, transmuted into the hyper-individualism of rabid “rights talk,” legalism, and litigiousness.<sup>187</sup> As we note in Part II, however, “Notwithstanding a decades-long organized campaign by American business to demonize lawyers and litigation, there is robust empirical evidence supporting Kagan’s observation that ‘[m]any, perhaps most Americans are reluctant to sue.’”<sup>188</sup> Further, serious empirical scholars have not been able to confirm a “litigation explosion” across American court systems as a whole during this period, though, as discussed below, there was a sharp increase in the rate of private enforcement of federal statutes in the late 1960s.<sup>189</sup>

---

<sup>183</sup> E.g., SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 17–18 (1996).

<sup>184</sup> *Id.* at 270; see also Anthony King, *Ideas, Institutions and the Policies of Governments: A Comparative Analysis: Part III*, 3 *BRIT. J. POL. SCI.* 409, 418 (1973).

<sup>185</sup> See, e.g., ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 299–305 (1998).

<sup>186</sup> Jerold S. Auerbach, *A Plague of Lawyers*, *HARPER’S*, Oct. 1976, at 37, 42; see also Bayless Manning, *Hyperlexis: Our National Disease*, 71 *NW. U. L. REV.* 767, 767 (1977).

<sup>187</sup> See GARRY, *supra* note 138, at 7–8; MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* x–xi (1991).

<sup>188</sup> *Supra* text accompanying note 33 (quoting KAGAN, *supra* note 21, at 34).

<sup>189</sup> See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31

The triumphal story of transformation—rather than disease—apprehends the emergence of an assertive polity advocating an expansive understanding of individual rights and demanding that powerful institutions respect them. Shaped by both the civil rights movement—beginning with race, but expanding well beyond it—and a Supreme Court that elaborated expansive understandings of rights, the American people developed a heightened state of “rights consciousness,” and increasingly turned to courts to vindicate them.<sup>190</sup>

In contrast with these cultural explanations for the extent of litigation in American policy implementation, more recent institutional scholarship emphasizes the importance of separation-of-powers structures. A core and perennial feature of American separation of power structures—conflict between Congress and the President over control of the administrative state—encourages Congress’s purposeful and extensive reliance on private enforcement regimes to implement its policy enactments. Recognizing that command-and-control regulation entails a choice between bureaucracy and litigation, or some combination of the two, scholars making this argument build, theoretically, on scholarship seeking to understand the conditions that motivate Congress to limit and curtail administrative power. In a series of noted articles, Terry Moe argues that when delegating to agencies, American legislators make choices about agency structure, procedure, and power meant to insulate their preferences from other governmental actors who threaten, or might threaten in the future, to subvert them, most importantly the President, who possesses a variety of means to influence agency behavior.<sup>191</sup> Empirical research has demonstrated that, in fact, under conditions of divided party government (different parties controlling Congress and the presidency) legislators enact more detailed laws, thus limiting agency discretion in implementation, and place more structural constraints on the exercise of bureaucratic implementation authority.<sup>192</sup>

This institutional logic—for delegating less authority to the bureaucracy and structurally constraining its exercise of the powers delegated—can also motivate Congress to enact private enforcement

---

UCLA L. REV. 4, 69 (1983); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 37 (1986).

<sup>190</sup> See MICHAEL SCHUDSON, *THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE* 291 (1998); see generally FONER, *supra* note 185, at 299–305.

<sup>191</sup> See Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267, 277–79 (John E. Chubb & Paul E. Peterson eds., 1989) [hereinafter Moe, *Bureaucratic Structure*]; Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213 (1990) [hereinafter Moe, *Political Institutions*]; Moe & Caldwell, *supra* note 135, at 176.

<sup>192</sup> See EPSTEIN & O’HALLORAN, *supra* note 122, at 131; HUBER & SHIPAN, *supra* note 122, at 37.

regimes.<sup>193</sup> To the degree that an enacting Congress is concerned about whether the President will enforce statutes according to legislative goals, due to the distinct imperatives of his office, or due to his own ideological preferences, Congress has reason to enact incentives for private enforcers to do so. Adequately incentivized, private lawsuits can operate as an enforcement mechanism with an autopilot character, substantially beyond executive control.

Consistent with this theory, Congress has been more likely to enact incentives for private enforcement when the opposing political party controls the executive branch.<sup>194</sup> This fact is important in explaining the steep increase in private lawsuits in the implementation of federal statutes since the late 1960s. Between President Nixon assuming office in 1969 and the end of the twentieth century, the U.S. experienced divided government 81% of the time, as contrasted with 21% in the period between 1901 and 1968.<sup>195</sup> At the same time, the ideological distance between the two dominant political parties steadily increased.<sup>196</sup> The surge in both divided government and party polarization during this period led to growing legislative-executive conflict; Congress turned increasingly to private litigants to enforce its regulatory policies, and the rate of private federal statutory lawsuits exploded by about 800% between President Nixon assuming office and the end of the twentieth century.<sup>197</sup>

From the standpoint of an enacting Congress, other threats to bureaucratic enforcement of statutes arise from future Congresses with potentially different preferences (legislative coalition drift), and from bureaucrats themselves (bureaucratic drift). Future congressional coalitions may exercise bureaucratic oversight powers—via oversight hearings, investigations, and budget control—to subvert bureaucratic enforcement of the enacting Congress's policy goals.<sup>198</sup> The alternative of private enforcement regimes provides a form of autopilot enforcement, via market incentives, that will be substantially insulated from interference by future legislative majorities.<sup>199</sup> This strategy of insulation assumes, of course, that such future legislative majorities will not simply pass a new law to achieve their goals.

---

<sup>193</sup> See BURKE, *supra* note 19, at 14–16; Melnick, *supra* note 102, at 400; Ginsburg & Kagan, *supra* note 117, at 6–7.

<sup>194</sup> See FARHANG, *supra* note 2, at 216.

<sup>195</sup> *Id.* at 222.

<sup>196</sup> See NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 1 (2006); Gary C. Jacobson, *Partisan Polarization in Presidential Support: The Electoral Connection*, 30 CONG. & PRESIDENCY 1, 1–2 (2003).

<sup>197</sup> See FARHANG, *supra* note 2, at 66, 221–23.

<sup>198</sup> See ESKRIDGE, *supra* note 134, at 1129–73; Moe, *Bureaucratic Structure*, *supra* note 191, at 277–79; Moe, *Political Institutions*, *supra* note 191, at 223; Moe & Caldwell, *supra* note 135, at 176.

<sup>199</sup> See BURKE, *supra* note 19, at 173–74; KAGAN, *supra* note 21, at 49; FARHANG, *supra* note 2, at 79–81, 166, 225, 233.

The strategy is made effective by the stickiness of the status quo that is characteristic of the American lawmaking system, which arises from the multitude of actors that the system empowers to kill legislation—Presidents, courts, two legislative chambers, an elaborate committee system within each chamber that disproportionately empowers committee members and chairs, and the filibuster in the Senate.<sup>200</sup> In a lawmaking system with so many gatekeepers, as Moe states, “Whatever is formalized will tend to endure.”<sup>201</sup> Under this constraint, private enforcement regimes are considerably more insulated from future legislative coalitions than bureaucratic enforcement regimes. Empirical research shows that, in fact, when the majority party in Congress faces an impending loss of seats in the next election, it is more likely to enact private enforcement regimes.<sup>202</sup>

The threat of bureaucratic drift arises from the prospect that bureaucrats may pursue their own interests at the expense of the enacting Congress’s preferences, leading to bureaucratic shirking of delegated work, capture of the bureaucracy by the regulated population, careerism, and bureaucrats’ pursuit of their own policy preferences rather than those of the elected officials who empowered them.<sup>203</sup> The stickiness of the status quo exacerbates this problem because it creates significant latitude for bureaucrats to move policy (cause it to drift) away from the preferences of the elected branches, before all necessary players in the lawmaking process will have the incentive and ability to coordinate their actions in a legislative reversal.<sup>204</sup> In contrast, the autopilot character of private enforcement, sufficiently incentivized, insulates the enforcement function from the problem of bureaucratic drift.<sup>205</sup> As discussed in Part V.B, concerns about bureaucratic drift have contributed to reliance on private enforcement in civil rights regulation in the U.S.

The many veto points that characterize America’s fragmented lawmaking institutions encourage enactment of private enforcement regimes for an additional reason. Research focusing on institutional fragmentation in the American lawmaking process has emphasized the ways in which the multitude of veto points truncate, limit, and curtail

---

<sup>200</sup> See DAVID W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK: POLITICS AND POLICY FROM JIMMY CARTER TO GEORGE W. BUSH 20* (2d ed. 2006); Sven H. Steinmo, *American Exceptionalism Reconsidered: Culture or Institutions?*, in *THE DYNAMICS OF AMERICAN POLITICS: APPROACHES AND INTERPRETATIONS* 106, 127 (Lawrence C. Dodd & Calvin Jillson eds., 1994); R. Kent Weaver & Bert A. Rockman, *Assessing the Effects of Institutions*, in *DO INSTITUTIONS MATTER?: GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD* 1, 3 (R. Kent Weaver & Bert A. Rockman eds., 1993).

<sup>201</sup> Moe, *Political Institutions*, *supra* note 191, at 240.

<sup>202</sup> See FARHANG, *supra* note 2, at 76–81.

<sup>203</sup> See McCubbins et al., *supra* note 112, at 246–47.

<sup>204</sup> See Cross, *supra* note 134, at 1303–04; McCubbins et al., *supra* note 112, at 246–47.

<sup>205</sup> See BURKE, *supra* note 19, at 173–74; KAGAN, *supra* note 21, at 49; FARHANG, *supra* note 2, at 225.

ambitious policy initiatives.<sup>206</sup> Summarizing this literature, Sven Steinmo concludes that an American lawmaking system “replete with veto points . . . gives huge power to interests wishing to stop, alter, or modify governmental action,” and consequently by the time controversial or ambitious policy initiatives “wheedle their way through the labyrinth and past so many veto points,” they often will have been scaled back to satisfy multiple gatekeepers.<sup>207</sup>

This institutional environment has consequences for legislative choices concerning the mobilization of public versus private power in pursuit of legislative goals, and for the expenditure of public money. A number of studies of the American welfare state have argued persuasively that, as compared to direct governmental expenditures on publicly funded welfare state programs, laws privatizing the delivery of social benefits—such as through tax incentives for private employment-based benefit plans—are more likely to attract the broad cross-party support necessary to clear the labyrinth of veto points in the lawmaking process.<sup>208</sup> One reason for this is that raising tax revenue for new spending is frequently, and certainly increasingly, controversial. Like the legislative creation of incentives for the private provision of benefits to achieve welfare state goals, the legislative creation of incentives for private litigation to achieve regulatory state goals, by reducing or eliminating the need to raise tax revenue, can facilitate the broad coalition-building necessary to enact a new regulatory law.<sup>209</sup>

## V. EXAMPLES OF ENFORCEMENT REGIMES

### A. *Why the Sectoral Approach?*

As we discussed in Part I, the desire to avoid “abstract speculation” and the need to make our account of private enforcement manageable are important reasons why, early on, we decided to take a sectoral approach, choosing a few areas to study from a much longer list (which itself is not exhaustive) of legal domains in which private enforcement plays a role. Equally important, however, is our conviction, also discussed in Part I, that

---

<sup>206</sup> See, e.g., Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 *STUD. AM. POL. DEV.* 1, 1 (2005); VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* (1993); ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* (1998).

<sup>207</sup> Steinmo, *supra* note 200, at 126.

<sup>208</sup> See JACOB S. HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* 43–44 (2002); CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* 9–10 (1997).

<sup>209</sup> See BURKE, *supra* note 19, at 15–16; FARHANG, *supra* note 2, at 154–55; Melnick, *supra* note 102, at 399–400.



regulatory design has to be tailored to the particular social and legal contexts in which unremedied systemic problems arise.

Private enforcement of government-initiated or sanctioned policy potentially covers a virtually limitless array of policy areas, from areas such as anti-discrimination law (employment, housing, education, access to public facilities, etc.) through banking regulation, consumer protection, environmental protection, labor relations, occupational safety, and public health. We have identified almost 400 distinct enforcement regimes specified in federal legislation between 1947 and 2002.<sup>210</sup> Table 1 summarizes information on the nature of those enforcement regimes. As the table shows, 24% of the enforcement regimes include private enforcement mechanisms, although only about one-tenth of those rely exclusively on private enforcement.<sup>211</sup>

As suggested by Table 1, many areas of regulation could involve private enforcement in one way or another. The specifics of regulation and regulatory enforcement (the enforcement regime) vary from area to area. There is no reasonable way to provide a comprehensive overview of the specifics of regulation in all, or even many, of the areas in which private enforcement is used. Consequently, we have chosen to focus on two specific areas: employment discrimination and consumer protection vis-à-vis unfair or deceptive acts and practices (UDAP). In the former, federal law provides a primary role for private enforcement while in the latter, private enforcement is largely through state law, at least with regard to general UDAP statutes.<sup>212</sup> Our selection of these two areas was somewhat arbitrary, although our hope was that we would find useful bodies of empirical research to inform our discussion. Although this hope was fulfilled to a significant degree for employment discrimination (at least for enforcement under federal statutes), we were disappointed by the limited empirical research we found regarding UDAP statutes. As we will discuss, although there is a healthy empirical literature on the experience of consumer problems and the actions taken with regard to those problems, there is little research focused specifically on UDAP enforcement (or that even allows one to separate out UDAP issues from ordinary consumer problems with malfunctioning or unsatisfactory products). Although a substantial number of the problems consumers experience might be due to deceptive or unfair practices by sellers, most of the research is framed simply in terms of consumer dissatisfaction with products or services, and what consumers do to redress those dissatisfactions.

---

<sup>210</sup> Sean Farhang identified these enforcement regimes in 333 laws passed by Congress between 1947 and 2002 that David Mayhew has labeled as “important” legislation. DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, 52–73 (2d ed. 2005).

<sup>211</sup> See *infra* Table 1.

<sup>212</sup> There are many specialized statutes at the federal level dealing with areas such as banking, credit, and debt collection, that do provide for private enforcement, but our decision was to focus on enforcement of the general UDAP statutes rather than the specialized statutes.

TABLE 1. Federal Regulatory Enforcement Regimes; 1947–2002										
	Private Suits (PS)	PS with Fee Shifts*	PS with Damages Enhance*	PS with Fee Shift and Enhance*	Govt Suits	Admin Sanctions	Pure Private Suits	Pure Govt Enfor. (suits or admin)	Hybrid (priv & pub)	Number of Regimes
All Regimes	24	73	33	26	65	68	3	76	21	623
<u>SOCIAL v. ECON</u>										N=623
Economic Regulation	20	61	50	36	63	71	4	80	16	142
Social Regulation	27	76	29	24	65	67	3	73	23	467
<u>BY POLICY AREA</u>										N=609**
Labor	41				60	75	5	59	36	92
Communications	39				86	54	4	61	36	28
Civil Rights	34				70	52	0	66	35	58
Environmental	34				68	78	4	66	30	50
Consumer Protection	30				76	67	3	70	27	33
Banking	28				60	81	7	72	21	43
Energy	18				82	65	0	82	18	17
Transportation	19				38	69	6	81	13	16
Public Health & Safety	17				60	79	0	83	17	42
Elections	9				68	55	0	91	9	22
National Security	8				100	62	0	92	8	13
Food and Drug	0				54	89	0	100	0	37
Aviation	0				83	78	0	100	0	12
Securities/Commodities	0				54	71	0	100	0	35
Other	22				61	56	6	78	17	125
										N=623
* The denominator for these percentages is the number of regimes with private civil actions, not total regimes.										
**14 observations could not be characterized as social or economic regulation.										

*Notes to Table 1*

Laws coded are from the Mayhew “important legislation,” which totaled 333 laws from 1947–2002. These laws are deemed by Mayhew to be the most significant pieces of legislation in the postwar period according to criteria discussed in *Divided We Govern* (Mayhew, *supra* note 210). Of the 333 laws, 189 were found to have regulatory provisions (defined broadly to mean mandatory commands/prohibitions). These 189 laws contained 795 enforcement regimes—distinct sets of regulatory commands within the law governed by distinct enforcement provisions. The unit of analysis in the table is the enforcement regime. Excluded

from the 795 regimes are 172 observations for which administrative rulemaking was the only implementation provided, or for which the law did not provide any enforcement for the prohibitions. This yielded 623 regimes with enforcement provisions, which is the data reflected in the table.

Below are the definitions of the column headings:

*Private Suits*: Percentage of regimes that provide for private civil suits, including ones that also provide for government enforcement.

*Fee Shifts*: The percentage of *Private Suits* with fee-shifting provisions, including awards to prevailing plaintiff, prevailing party, or any party.

*Damages Enhancements*: The percentage of *Private Suits* with damages enhancements, defined as double, triple, statutory, punitive, or exemplary damages.

*Fee Shifts AND Damages Enhancements*: The percentage of *Private Suits* with fee shifts AND damages enhancements.

NOTE: The above four percentages are not provided in the table broken down by specific policy areas because the number of observations with private rights of action at the level of individual policy areas is insufficient for the proportions with fees and damages to be meaningful.

*Government Suits*: Percentage of regimes in which the Attorney General or an administrative agency may bring a lawsuit (whether for civil or criminal penalties).

*Administrative Sanctions*: Percentage of regimes with administrative sanctions, including civil penalties, inspections, recalls, license revocation, citations, seizure, cease and desist, injunctions, and equitable relief. A large majority, but not all, of these contained express authorizations for administrative hearings.

*Pure Private Enforcement*: Percentage of regimes with *Private Suits* but NO government enforcement (no *Government Suits* or *Administrative Sanctions*).

*Pure Government Enforcement*: Percentage of regimes with *Government Suits* and/or *Administrative Sanctions*, but NO *Private Suits*.

*Hybrid*: Percentage of regimes with *Private Suits*, alongside *Government Suits* and/or *Administrative Sanctions*.

In the section of the table broken down by social and economic regulation, the two types are defined as follows: Social regulation typically cuts across different industries and sectors, and is generally aimed at problems of externalities and public goods, the promotion of public health and safety, consumer protection, environmental protection, equal opportunity, and quality of life. Economic regulation typically targets the regulation of markets and industries, working to promote market stability, efficiency, and competition. Excluded from this table were 14 observations that could not be classified as either social or economic regulation (they mainly addressed national security).

## B. *Employment Discrimination*

### 1. *The Statutory Framework*

The foundational decisions about implementation of federal job discrimination laws were made in the landmark Civil Rights Act (CRA) of 1964. CRA's Title VII bars job discrimination based on race, gender, national origin, or religion, and relies on a hybrid enforcement framework including both private and public enforcement, and both administrative and judicial process.<sup>213</sup> It is, however, primarily dependent on private lawsuits for enforcement. We first lay out the current rules governing Title VII enforcement, and in a subsequent section we discuss what motivated legislators to construct this statutory enforcement framework, as well as how the framework has evolved over time.

A person wishing to pursue a job discrimination claim under Title VII must first file a charge with the Equal Employment Opportunity Commission (EEOC).<sup>214</sup> The EEOC provides notice to the accused employer and conducts a preliminary investigation to ascertain whether there is "reasonable cause" to believe the statute has been violated. If it reaches a finding that no reasonable cause exists, the agency notifies the parties and issues the complainant a "right to sue" letter, and he or she is free to bring a civil action in federal court.<sup>215</sup> If the agency does find reasonable cause to believe that the statute was violated, it attempts to facilitate a voluntary settlement of the dispute through an informal process of conciliation.<sup>216</sup> *The EEOC lacks the authority to issue enforceable orders based on its findings.* If the agency is unsuccessful in bringing about a settlement, it is authorized to act as

---

<sup>213</sup> Pub. L. No. 88-352, tit. VII, 78 Stat. 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000e-17) (2006).

<sup>214</sup> 42 U.S.C. § 2000e-5 (2006).

<sup>215</sup> *Filing a Lawsuit*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/lawsuit.cfm>.

<sup>216</sup> 42 U.S.C. § 2000e-5 (2006).

prosecutor in a federal civil action on behalf of the employee, or, in the alternative, the agency will issue the complaining party a right to sue letter. If the claimant elects to file a private suit in federal court, proceedings are “de novo,” and available remedies under the current version of Title VII include injunctive relief, back pay, compensatory and punitive damages, and attorneys’ fees, and plaintiffs seeking compensatory or punitive damages are entitled to trial by jury.<sup>217</sup>

A number of other federal statutes provide additional protections against and remedies for job discrimination. The Rehabilitation Act of 1973, prohibiting employment discrimination based on disability by the federal government and federal contractors, and the Americans with Disabilities Act of 1990, prohibiting employment discrimination based on disability in the private sector and by states, simply incorporated Title VII’s enforcement and remedial provisions by reference.<sup>218</sup> Such claims are thus governed by the enforcement framework set forth above. The Equal Pay Act of 1963 (barring pay discrimination against women) and the Age Discrimination in Employment Act of 1967 (barring job discrimination against persons age 40 or older) also follow a largely private enforcement model, with a similar administrative process as described above.<sup>219</sup> Two federal civil rights laws passed during the Reconstruction period also provide some protections from job discrimination. The Civil Rights Act of 1866<sup>220</sup> guaranteed newly freed slaves the right that “is enjoyed by white citizens” to make and enforce contracts, which was interpreted by courts beginning around 1970 to prohibit race (and only race) discrimination in private employment.<sup>221</sup> The Civil Rights Act of 1871, providing a cause of action against state actors for the violation of any federal rights, encompasses within its vast scope suits by state employees against state governments for violation of constitutional rights, including discrimination in the terms and conditions of employment in violation of the equal protection clause.<sup>222</sup> With respect to enforcement of these statutory provisions, the Civil Rights Act of 1871 contains an express private right of action, while the Supreme Court

---

<sup>217</sup> *Remedies for Employment Discrimination*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/employees/remedies.cfm>.

<sup>218</sup> Rehabilitation Act, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. § 794(a) (2006)); Americans with Disabilities Act, Pub. L. No. 101-336, § 107, 104 Stat. 327, 336 (1990).

<sup>219</sup> Equal Pay Act, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206(d) (2006)); Age Discrimination in Employment Act, Pub. L. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634 (2006)).

<sup>220</sup> Ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2006)).

<sup>221</sup> *See Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970); *Waters v. Wis. Steel Works of Int’l Harvester Co.*, 427 F.2d 476, 483 (7th Cir. 1970).

<sup>222</sup> Ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2006)); *see Monell v. Dep’t of Soc. Serv.*, 436 U.S. 658, 690–92 (1978).

implied a private right of action under the Civil Rights Act of 1866.<sup>223</sup> Neither statute authorizes the federal government to prosecute enforcement actions in court, nor has either statute been amended to provide for administrative evaluation of claims. These Reconstruction civil rights laws can provide a number of significant benefits in addition to those conferred by the other federal employment discrimination statutes, including more extensive economic damages, longer statutes of limitations, and coverage of a broader range of employment relationships.<sup>224</sup>

The federal statutes governing job discrimination are overlaid by a set of state statutes of varying substantive reach and heterogeneous enforcement provisions. Every U.S. state but Alabama has statutory prohibitions against job discrimination on the grounds regulated by Title VII (race, national origin, gender, and religion).<sup>225</sup> Some important differences between state and federal law arise where state statutes go beyond federal statutes and provide additional protections and remedies.<sup>226</sup>

There are also significant differences in enforcement provisions. Of 28 states with fair employment practice laws in 1964 (i.e., pre-existing Title VII), 21 used the administrative cease-and-desist model, 4 used only criminal and no civil sanctions, and 3 lacked enforcement provisions and were strictly voluntary.<sup>227</sup> None contained a private right of action.<sup>228</sup> As state job discrimination statutes spread across the nation after 1964, they continued to rely heavily on administrative authority, but they shifted toward a hybrid approach in which private lawsuits would also play a significant role, and this shift included amending many pre-1964 state statutes to add private rights of action.<sup>229</sup> All state laws provide that an agency or department will handle complaints of discrimination.<sup>230</sup> Most states have fair

---

<sup>223</sup> Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459–60 (1975).

<sup>224</sup> See HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, CIVIL RIGHTS LAW AND PRACTICE 11–19 (2d ed. 2004).

<sup>225</sup> See ELT, *50-State Survey of Discrimination Laws*, <http://www.elt.com/resources/integrity-suite/discrimination-laws/>.

<sup>226</sup> See JOHN F. BUCKLEY & RONALD M. GREEN, 1998 STATE BY STATE GUIDE TO HUMAN RESOURCES LAW (1998); GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 244–47 (3d ed. 2010).

<sup>227</sup> See EQUAL EMP'T OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 5–6 (1968) [hereinafter EEOC]; BUREAU OF NAT'L AFFAIRS, STATE FAIR EMPLOYMENT LAWS AND THEIR ADMINISTRATION: TEXTS, FEDERAL STATE COOPERATION, PROHIBITED ACTS 4 (1964).

<sup>228</sup> FARHANG, *supra* note 2, at 85.

<sup>229</sup> Sean Farhang, *Private Lawsuits, General Deterrence, and State Capacity: Evidence from Job Discrimination Litigation* 2–3 (U.C. Berkeley, Goldman School of Public Policy Working Paper No. GSPPI0-009, 2010) (on file with author).

<sup>230</sup> See GENERAL ACCOUNTING OFFICE, OFFICE OF THE GENERAL COUNSEL, SEXUAL-ORIENTATION-BASED EMPLOYMENT DISCRIMINATION: STATES' EXPERIENCE WITH STATUTORY PROHIBITIONS 6 (1997), <http://www.gao.gov/assets/90/87121.pdf>.

employment practice commissions with far greater administrative power than the EEOC, typically including the authority to adjudicate claims, issue cease-and-desist orders, and provide a broad range of remedies, including injunctive relief, monetary damages, and attorneys' fees.<sup>231</sup> A large majority of states have incorporated private enforcement into their job discrimination statutes.<sup>232</sup>

## 2. *Legislative Motivations for Creating the Title VII Framework*

Recent scholarship has investigated the motivation behind Congress's massive reliance on private litigation, with very modest administrative powers, in the implementation of federal job discrimination laws, starting with Title VII of the CRA of 1964, and escalating in the CRA of 1991 when Title VII was last importantly amended.<sup>233</sup> We draw on this work for the summary account provided below. Consistent with the discussion of separation-of-powers institutions in Part IV.D, the evidence shows that ideological and institutional conflict between Congress and the President has repeatedly—over time, in many different areas of civil rights, and across multiple configurations of party control of Congress and the presidency—been a central cause of Congress's self-conscious mobilization of private lawsuits at the expense of administrative power.<sup>234</sup> It also shows that the combination of fear of bureaucratic drift and concern about the public expense of administrative implementation has encouraged reliance on private enforcement.

In 1964, liberal civil rights advocates wanted a job discrimination enforcement regime centered on strong administrative adjudicatory powers, modeled on the National Labor Relations Board, with no private lawsuits. This preference was reflected in the job discrimination bill initially introduced by liberal Democrats.<sup>235</sup> At the time, the Democratic party, which held a majority in both chambers, was sharply divided over civil rights, with its southern wing deeply committed to killing any job discrimination (or other civil rights) bill. In light of these insurmountable intraparty divisions, passage of the

---

<sup>231</sup> See BUCKLEY & GREEN, *supra* note 226, at 4–138; RUTHERGLEN, *supra* note 226, at 246.

<sup>232</sup> See Andrea Catania, *State Employment Discrimination Remedies and Pending Jurisdiction Under Title VII: Access to Federal Courts*, 32 AM. U. L. REV. 777, 819–32 (1983); Deborah Thompson Eisenberg, *Opening the Doors to the Local Courthouse: Maryland's New Private Right of Action for Employment Discrimination*, 9 U. MD. L.J. RACE RELIGION GENDER & CLASS 7, 7–8 (2009); GENERAL ACCOUNTING OFFICE, *supra* note 230, at 6–7.

<sup>233</sup> See FARHANG, *supra* note 2, at 94–128.

<sup>234</sup> *Id.* at 78.

<sup>235</sup> A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age, H.R. 405, 88th Cong. (1963). See *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, III. *Procedure Under Title VII*, 84 HARV. L. REV. 1195, 1196 n.7, 1250–75 (1971).

CRA of 1964 depended on conservative Republicans joining non-southern Democrats in support of the bill.<sup>236</sup>

Wielding the powers of a pivotal voting bloc, conservative Republicans stripped the EEOC of the strong administrative powers initially proposed by advocates of the job discrimination title, and provided instead for private lawsuits with economic incentives for enforcement, including attorney fee awards for prevailing plaintiffs.<sup>237</sup> Generally opposed to bureaucratic regulation of business, Republicans also feared that they would not be able to control an NLRB-style civil rights agency in the hands of their ideological adversaries in the executive branch.<sup>238</sup> However, in a political environment marked by intense public demand for significant civil rights legislation, some meaningful enforcement provisions were necessary, and to conservative Republicans private litigation was preferable to public bureaucracy, especially in the hands of the Kennedy and Johnson administrations, which they thought would be overzealous enforcers and would pursue an excessively liberal implementation program. Thus, conservative Republican support for Title VII was conditioned on a legislative deal that traded private lawsuits for public bureaucracy.<sup>239</sup> Plaintiffs' economic recoveries would be limited to back pay and attorneys' fees, and cases would be tried to judges rather than juries.

This choice, grounded in fear among pivotal legislators that the President would commandeer a powerful agency to pursue his own policy agenda, had long-run transformative effects on the enforcement preferences of civil rights advocates. They had initially been sanguine about agency implementation and dubious about the effectiveness of private enforcement of Title VII, even with attorney fee awards for prevailing plaintiffs. Their skepticism about private enforcement was based in considerable measure on the long-recognized gross under-enforcement of Reconstruction era civil rights laws, which relied exclusively on private enforcement (although they did not allow for recovery of attorneys' fees). However, developments regarding enforcement in the decade following passage of the CRA of 1964 did not match civil rights advocates' expectations. In the late 1960s, they observed a severely underfunded agency lacking the basic material resources necessary to carry out its mission. They also witnessed a bureaucratic enforcement apparatus apparently not committed to using its administrative capacity, however limited, for aggressive enforcement.<sup>240</sup> Even aside from resource issues, the federal

---

<sup>236</sup> See FARHANG, *supra* note 2, at 94.

<sup>237</sup> *Id.* at 95.

<sup>238</sup> *Id.* at 101.

<sup>239</sup> *Id.* at 118.

<sup>240</sup> See David L. Rose, *Twenty-Five Years Later: Where do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1133-39 (1989).



bureaucracy appeared to them lethargic, establishment-oriented, politically timid, and vulnerable to capture. The situation grew markedly worse when President Nixon assumed office in 1969. The executive branch became more conservative, and civil rights liberals began to attack it openly, claiming that it was *willfully* sabotaging civil rights enforcement by the federal bureaucracy.

Alongside this waning faith in the administrative state, civil rights liberals observed levels of private enforcement that far exceeded their expectations, as well as courts inclined toward broadly pro-plaintiff interpretations of Title VII. The 1964 CRA's attorney fee provisions had the effect of contributing funds to civil rights groups that prosecuted lawsuits, bolstering their litigation programs and enforcement capacity. Critically, it also brought into being a private, for-profit bar to litigate civil rights claims in general, and job discrimination claims in particular. Civil rights groups came to view the private civil rights bar as a valuable enforcement infrastructure to be cultivated and leveraged through fee-shifting rules.

These developments drove an inversion of civil rights groups' assessment of the relative merits of private litigation versus public enforcement, strengthening the former and weakening the latter. They mobilized to extend the fee-shifting provisions of Title VII across the entire field of civil rights as a way to bolster enforcement and obviate dependence on the (then Nixon-Ford) federal bureaucracy, which they regarded as not just feeble, but hostile. They secured from allies in a Democratically-controlled Congress the extension of statutory fee shifting to school desegregation cases in 1972,<sup>241</sup> to voting rights cases in 1975,<sup>242</sup> and then to all other civil rights laws still lacking a fee shift in the omnibus Civil Rights Attorney's Fees Awards Act of 1976.<sup>243</sup> The latter law added fee-shifting provisions to the Civil Rights Acts of 1866 and 1871, both of which, as discussed above, have been construed to provide causes of action for job discrimination.<sup>244</sup> In the early 1970s interest group advocacy to extend the private enforcement model of Title VII (introduced by conservative Republicans) went beyond civil rights to embrace environmental, consumer protection, and "public interest" regulation in general.

Thus, over roughly a decade following the passage of the 1964 CRA, fee shifting was expanded and became an entrenched part of job discrimination and other civil rights laws. The resulting privatization of implementation costs contributed significantly to the broad support these laws attracted from legislators in both political parties. By the early 1970s budget deficits emerged as a politically

---

<sup>241</sup> Emergency School Aid Act, Pub. L. No. 92-318 § 718, 86 Stat. 354, 369 (1972).

<sup>242</sup> Voting Rights Act of 1975, Pub. L. No 94-73 § 402, 89 Stat. 400, 404 (1975).

<sup>243</sup> Pub. L. No 94-559 § 2, 90 Stat. 2641 (1976).

<sup>244</sup> See *supra* text accompanying notes 221–22.

salient issue, strengthening the hand of conservatives wanting to oppose new governmental interventions that would entail spending on bureaucracy, and increasing incentives for all legislators to privatize the costs of regulatory enforcement by relying on private enforcement regimes.<sup>245</sup> In debates over civil rights implementation in the early to mid 1970s, the budgetary efficiency of private rights of action coupled with fee shifting emerged as a key justification on which Democrats and Republicans could agree. This efficiency justification dovetailed naturally with an anti-bureaucracy theme: fee shifting does not add to the federal budget, *and* it does not grow the federal bureaucracy, legislators in both parties argued in unison.

A major moment of development in Title VII's enforcement regime occurred with the CRA of 1991,<sup>246</sup> when Congress built on Title VII's private enforcement framework by adding compensatory and punitive damages, and the right to trial by jury, thereby substantially increasing the volume of private enforcement. The CRA of 1991 was ultimately the result of growing ideological polarization between the President and Congress on civil rights policy (among many other policy issues). The legislative choice was encouraged by policy conflict in the sphere of civil rights throughout the 1980s between a predominantly Democratic Congress and the Reagan administration, including an acrimonious struggle over control of the EEOC in particular and the civil rights bureaucracy in general. It was fueled, correspondingly, by ideological conflict between Congress and a federal judiciary that grew, with the appointment of many judges by President Reagan, increasingly to reflect the administration's position on civil rights.

In the summer of 1989, a newly ascendant conservative Supreme Court majority rendered a series of decisions curtailing Title VII's private enforcement regime that would clearly have the effect of reducing private enforcement.<sup>247</sup> Civil rights groups and their allies in Congress responded decisively by enacting the CRA of 1991, not only overriding most of the offending court decisions, but also adding new monetary damages and jury trial provisions with the express goal of increasing private enforcement. Explicitly pointing to subversion of government enforcement by EEOC leadership and the President, and the failure of congressional oversight to remedy the situation, civil rights advocates elected to mobilize private litigants and their attorneys, using economic incentives, to do what the administrative state would not.<sup>248</sup>

---

<sup>245</sup> See Melnick, *supra* note 102, at 399–400.

<sup>246</sup> Civil Rights Act of 1991, Pub. L. No. 102-166 § 102, 105 Stat. 1071, 1072–73 (codified at 42 U.S.C. § 1981(a)).

<sup>247</sup> See, e.g., *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

<sup>248</sup> See Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896 (1993).

Thus, the claim that legislative-executive competition for control of the bureaucracy within the American separation-of-powers system causes Congress to rely on private litigation for statutory enforcement, as an alternative or adjunct to public enforcement, is strongly borne out by the story of federal job discrimination legislation (and civil rights legislation more broadly). The evidence further suggests that concerns about bureaucratic drift—resulting from such factors as bureaucratic laziness, timidity, or capture—also contributed to the choice to rely on private enforcement. At times budgetary concerns also encouraged private enforcement as an alternative to raising revenue to underwrite administrative capacity. Finally, the events leading to passage of the CRA of 1991 powerfully illustrate the way in which growing ideological polarization between the political parties (and therefore between Congress and the President during periods of divided government) has contributed to the remarkable growth in private enforcement litigation since the late 1960s, noted in Part IV.C. That polarization cannot be better encapsulated than by President Reagan's battle with congressional Democrats over civil rights policy in the 1980s. As discussed below, the resulting CRA of 1991 helped to catapult job discrimination suits to their current position among the most common types of litigation in federal court.

### *3. Empirical Research on Private Enforcement of Job Discrimination Statutes*

In this subsection we discuss what is known about job discrimination litigation from empirical research focusing on (1) the extent of job discrimination litigation, (2) whether job discrimination litigation is an effective regulatory tool, and (3) whether it is an effective vehicle to provide relief to victims of discrimination.

Private actions enforcing federal civil rights in employment statutes are one of the largest categories of suit reflected in statistics compiled by the Administrative Office of the U.S. Courts. In the decade from 2001 to 2010, there were an average of 17,253 such suits per year, 98% of which were privately prosecuted, with 2% prosecuted by the EEOC or the Department of Justice.<sup>249</sup> There are no data available on the volume of litigation under state employment discrimination laws that permit a nationwide assessment of how much private enforcement exists at the state level. However, one very recent and quite extensive study of the implementation of job discrimination statutes in California does permit such an assessment.<sup>250</sup> It is possible to estimate, extrapolating from data in the study, that roughly 42,800 private job discrimination suits were filed in California state courts in

---

<sup>249</sup> *Judicial Business of the U.S. Courts, 2001–2010*, UNITED STATES COURTS, [http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics\\_Archive.aspx](http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics_Archive.aspx).

<sup>250</sup> See Blasi & Doherty, *supra* note 20, at 50.

the 11 years from 1997 to 2007.<sup>251</sup> Data compiled by the Administrative Office of the United States Courts indicates that during the same period there were 12,128 job discrimination suits filed in California's four federal district courts.<sup>252</sup> Thus, during this period about 78% of job discrimination suits in California were filed in state courts.<sup>253</sup> A work sharing agreement between the EEOC and the California agency that handles job discrimination claims, whereby a charge can be cross-filed with both agencies while only one processes the claim, makes it difficult to generalize from California about the balance between federal and state job discrimination lawsuits.

This suggests that, in at least some parts of the country, state courts are an important locus of private enforcement of job discrimination laws. However, we think that it would be a mistake to generalize from the case of California, for it is likely among the states where the federal-state balance on private enforcement of job discrimination laws is most skewed toward state court litigation. California is among the states with much more extensive job discrimination prohibitions than exist under federal law—including discrimination based on association, marital status, and sexual orientation—and its job discrimination laws reach employers that have too few employees to trigger coverage by federal statutes.<sup>254</sup> Further, it is widely believed in the U.S. that plaintiffs' lawyers tend to regard state courts as more ideologically hospitable to their claims than federal courts, and given California's liberal political environment, this is likely to be more true in California than in most other states. Finally, it must be remembered that some states' laws provide no private right of action at all.

---

<sup>251</sup> Our rounded estimate is based upon the following. Under California law, it is necessary to file a complaint with the state administrative agency prior to filing a lawsuit, but claimants are free to request a right to sue letter immediately upon filing. There were 212,144 administrative charges of discrimination filed with the state agency in California in the 12 years from 1997 to 2008. Blasi & Doherty, *supra* note 20, at 26. In order to match the period for which we have data on federal job discrimination filings in California, discussed later in this paragraph of the text, we subtract the mean value of one year's filings during this period (17,679) to estimate that 194,465 charges were filed from 1997 to 2007. Based upon sampling, Blasi and Doherty estimate that at least 22% of these charges were followed by a private lawsuit in state court. *Id.* at 11. Thus, our rough estimate is that for the period 1997 to 2007, 22% of 194,465 charges led to 42,782 state court job discrimination suits filed by private plaintiffs.

<sup>252</sup> *Federal Court Cases: Integrated Data Base*, maintained by the Inter-University Consortium for Political and Social Research, <http://www.icpsr.umich.edu/icpsrweb/landing.jsp>.

<sup>253</sup> *Id.*

<sup>254</sup> See Marjorie Gelb & JoAnne Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy For Employment Discrimination*, 34 HASTINGS L.J. 1055, 1055–56 (1983).

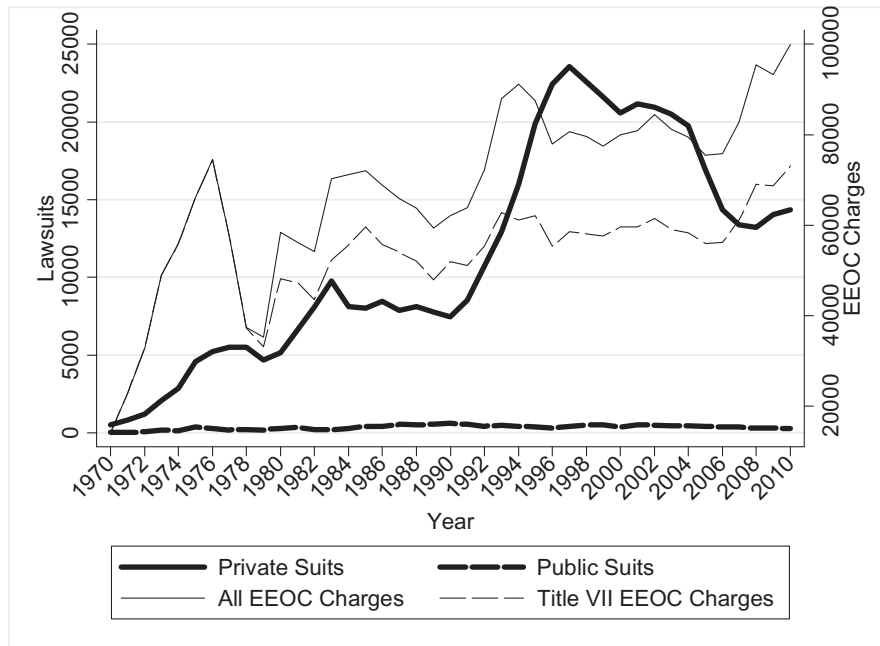
Figure 1 plots (1) the annual number of administrative charges filed with the EEOC under all statutes that it administers, (2) administrative charges filed under Title VII, (3) privately prosecuted job discrimination lawsuits in federal court, and (4) such lawsuits prosecuted by the EEOC or the Department of Justice.<sup>255</sup> Note that the scales for lawsuits and administrative charges are different, with the number of suits reflected on the left y-axis, and the number of EEOC charges reflected on the right y-axis. Prior to 1978, Title VII was the only statute administered by the EEOC. In 1978, as noted above, Congress shifted administration of the Age Discrimination in Employment Act from the Department of Labor to the EEOC, and thus prior to 1978 the plots of Title VII charges and of all EEOC charges are coextensive. After 1978 the plot of all charges begins to exceed the plot of Title VII charges as age claims flowed into the EEOC's administrative system. The Americans with Disabilities Act's job discrimination provisions became effective in July 1992, and thus after 1992 the plot of all EEOC charges begins to exceed the plot of Title VII charges by a wider margin as disability claims flowed into the EEOC's administrative system.

The statutory bases for the lawsuits in the figure include all the statutes mentioned in the last paragraph, and also suits brought under the Civil Rights Acts of 1866 and 1871, which have no EEOC filing requirement. The number of job discrimination suits mainly sloped upward from 1970 to 1983, with a plateau in the middle of that period; gradually declined from 1983 to 1991; shot up sharply from 1991 to 1997; and has declined since then, possibly plateauing in the last few years. Regarding the post-1991 rise, as we discuss below, the CRA of 1991's addition of new damages and jury trials to Title VII is clearly part of the cause. The 1992 effective date for the Americans with Disability Act's employment provisions also contributed, bringing a new type of claim into the legal system. The post-1997 decline is notable, but we hazard no explanation for it here; it is susceptible to many theoretically plausible accounts among which we cannot adjudicate.

---

<sup>255</sup> Data for the EEOC charge figures for 1970 to 2002 were provided to us by the EEOC's Office of Research, Information and Planning, and for 2003 to 2010 they were obtained from the EEOC's website. *Title VII of the Civil Rights Act of 1964 Charges*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm>. Data on job discrimination lawsuits for the years 1970 to 2000 were drawn from the *Federal Court Cases: Integrated Data Base*, *supra* note 252, and for the years 2001–2010 they were drawn from *Judicial Business of the U.S. Courts*, 2001–2010, produced by the Administrative Office of the U.S. Courts.

FIGURE 1: Trends in Job Discrimination Litigation



Several studies have evaluated the effects of the CRA of 1991's amendments to Title VII—which added compensatory and punitive damages, and jury trials—on private enforcement activity. Farhang examined the influence of the CRA of 1991 on the volume of private Title VII charges filed with the EEOC from 1980 to 2002.<sup>256</sup> As previously discussed, such administrative filings are a legal precondition to filing an action in federal court, although they do not reveal whether a court action was subsequently filed:

A substantial proportion of federal employment discrimination claims are settled after an EEOC charge is filed because of the threat of litigation, but without formal litigation being instituted.<sup>257</sup> Indeed, it is well-recognized that potential liability 'in the shadow of the law,' without formal legal action, profoundly shapes whether and how cases settle without litigation.<sup>258</sup>

<sup>256</sup> See Farhang, *supra* note 14, at 16–18.

<sup>257</sup> *Id.* at 16. No data exist that would allow an estimate of the percentage of EEOC charges that are dropped by claimants after the administrative proceeding in the absence of any redress offered by the respondent rather than as part of a settlement.

<sup>258</sup> *Id.*; see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L. J.* 950, 950–53 (1979).

Because EEOC filings reflect the fulfillment of a formal legal precondition to litigation, they capture both cases that ultimately enter litigation and those that settle after the threat of litigation is invoked. The study reports that passage of the CRA of 1991 brought about a statistically and substantively significant increase in Title VII charges filed in all four protected categories (gender, race, national origin, and religion). In aggregate, it increased total Title VII complaints by 58%.<sup>259</sup> Farhang and Spencer evaluate the impact of the CRA of 1991 on the probability that Title VII plaintiffs are represented by counsel in litigation.<sup>260</sup> Analyzing cases filed in the Northern and Eastern Districts of California between 1980 and 2000, they find that the CRA of 1991 substantially increased the probability that Title VII plaintiffs would be represented by counsel. Consistent with the framework we set out in Part IV.C, together these studies show that provisions in private enforcement regimes affecting the value of claims can significantly influence both the volume of private enforcement activity, and the ability of claimants to obtain counsel.

There is also a body of work investigating the effects of job discrimination litigation on the organizations sued, primarily with an eye to assessing whether litigation is an effective regulatory tool (we discussed the theoretical debate surrounding this issue in Parts IV.A and B). There is substantial literature in organizational sociology evaluating the ways in which organizations have responded to civil rights laws prohibiting employment discrimination. It has produced considerable evidence that passage of Title VII of the CRA of 1964, and subsequent job discrimination laws modeled on it, caused the development and diffusion of formal rules, policies, and positions that were ostensibly calculated to reshape personnel decision-making in organizations to improve compliance with equal employment opportunity laws, or at least the appearance of it.<sup>261</sup> Such policies include, for example: efforts aimed at increasing objectivity in evaluating employee performance, setting pay, and awarding promotions; policies providing for formal internal review of complaints of employment discrimination, among other grievances; programs for training managers and staff about compliance with civil rights laws; and policies formally establishing responsibility for improving opportunities for women and racial minorities in the workplace. This literature acknowledges and grapples with the question of whether such formalized employment

---

<sup>259</sup> Farhang, *supra* note 14, at 26–27.

<sup>260</sup> See Sean Farhang & Douglas Spencer, Univ. of Cal., Berkeley, Economic Recovery Rules and Attorney Representation in Job Discrimination Litigation, Presentation at American Law & Econ. Assoc. (May 19, 2012), available at <http://www.dougspencer.org/workingpapers/FarhangSpencer-ALEA.pdf>.

<sup>261</sup> See, e.g., Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1537 (1992); Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 590, 595 (2006); John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 AM. SOC. REV. 794, 798–99 (1996).

policies actually improve employment opportunities for protected groups, or are just symbolic gestures calculated to make employers appear fair and provide them a defense in the event of litigation.

In characterizing the body of research on the regulatory efficacy of job discrimination lawsuits, it is useful to distinguish between specific deterrence and general deterrence effects of enforcement activity. Specific deterrence refers to the effects on the future conduct of the target of enforcement, while general deterrence refers to the effects of aggregate levels of enforcement activity on the future conduct of members of the regulated population, whether or not they have actually been the target of enforcement.

Studies of the specific deterrence effects of job discrimination litigation have not distinguished private actions from those prosecuted by government officials, nor have they distinguished federal from state court lawsuits. Rather, their primary research design has been to compare organizations that had been subject to any job discrimination lawsuit with those not previously subject to suit, in order to assess whether being sued caused organizations to adopt policies calculated to improve compliance with job discrimination laws, or whether they actually increased the proportion of women and racial minorities in managerial positions subsequent to suit. The earliest such studies evaluated whether organizations that had been sued were more likely to have policies ostensibly aimed at compliance with job discrimination laws than organizations that had not been sued. The studies found no specific deterrence effects.<sup>262</sup> However, as Edelman points out, comparisons *across* organizations subject to suit and those not subject to suit are problematic because, although those subject to suit may be prodded into undertaking compliance efforts, the worst violators may be more likely to be sued, making it difficult to disentangle the countervailing effects.<sup>263</sup>

More recent studies of specific deterrence have avoided this problem by deploying research designs and methods that evaluate the effects of job discrimination suits *within* organizations over time, and they have also used the actual proportion of women and racial minorities in managerial positions, rather than the adoption of formal compliance policies, as their dependent variable.<sup>264</sup> These studies do find specific deterrence effects. Examining a large sample of private organizations spanning many industries, Dobbin and Kalev find that organizations that have been targets of job discrimination lawsuits subsequently increased the proportion of

---

<sup>262</sup> See, e.g., Edelman, *supra* note 261, at 1563–64; Allison M. Konrad & Frank Linnehan, *Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?*, 38 ACAD. MGMT. J. 787, 807 (1995).

<sup>263</sup> See Edelman, *supra* note 261, at 1550.

<sup>264</sup> E.g., Kalev & Dobbin, *supra* note 13, at 857; Sheryl Skaggs, *Producing Change or Bagging Opportunity? The Effects of Discrimination Litigation on Women in Supermarket Management*, 113 AM. J. SOC. 1148, 1160–61 (2008).



women and racial minorities in management.<sup>265</sup> In a study focusing on the supermarket industry, Skaggs finds that corporations targeted by sex discrimination lawsuits subsequently increased representation of women in managerial positions in stores operated by the corporation.<sup>266</sup>

Other studies have investigated the general deterrence effects of job discrimination lawsuits. In the earliest study of this sort that we found, Leonard analyzed changes in employment demographics between 1966 and 1978, and found that the number of class action Title VII suits (aggregating public and private prosecutions) within a state and against a defendant in a particular industry was significantly associated with employment market gains for African Americans within that state and industry.<sup>267</sup> Leonard's findings point to the general deterrence effects of class action cases, but they do not speak to the effects of (vastly more prevalent) individual suits, or to the issue of the efficacy of private litigation as distinct from prosecutions by governmental actors.

Two recent studies attempt to investigate the issue of general deterrence and job discrimination litigation with attention to geographic variation, and both find general deterrence effects. Charles Epp, studying a large sample of local governmental employers, finds that litigation "support structures" in the local community—measured as the size of the bar in the locality specializing in suits against government—were significantly and positively associated with state governmental employers' propensity to adopt serious measures directed at compliance with prohibitions against workplace sexual harassment.<sup>268</sup> The U.S. Supreme Court has recognized workplace sexual harassment as a form of gender discrimination that violates Title VII,<sup>269</sup> and it is a substantial source of Title VII claims. The compliance measures that Epp analyzed included policies requiring the investment of resources, such as grievance procedures, employee training, and oversight by legal staff.<sup>270</sup> It seems reasonable to assume that lawyers specializing in suits against the government will be composed entirely, or almost entirely, of private sector lawyers. This finding held in an empirical model that controlled for whether an employer had actually been sued.<sup>271</sup> Although Epp does not include in his model a direct measure of aggregate litigation activity in the relevant geographic area, his measure of lawyer specialization in the relevant

---

<sup>265</sup> Kalev & Dobbin, *supra* note 13, at 883.

<sup>266</sup> Skaggs, *supra* note 264, at 1174.

<sup>267</sup> See Jonathan S. Leonard, *Antidiscrimination or Reverse Discrimination: The Impact of Changing Demographics, Title VII, and Affirmative Action on Productivity*, 19 J. HUM. RESOURCES 145, 150–51 (1984).

<sup>268</sup> See CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 193 (2009).

<sup>269</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

<sup>270</sup> EPP, *supra* note 268, at 181.

<sup>271</sup> *Id.* at 239–40.

practice area interestingly captures the potential for litigation to be mobilized against violators.

Farhang analyzes a sample of primarily private organizations and assesses explanations for their adoption of employment policies that are both ostensibly designed to increase employment opportunities for women and racial minorities, and that also have been demonstrated, in another study, to actually increase the proportion of women and racial minorities in managerial positions.<sup>272</sup> The policies are affirmative action plans with concrete goals and timetables, the creation of at least one full-time position responsible for equal employment opportunity compliance within the organization; and the establishment of committees and task forces with responsibility for improving opportunities for women and racial minorities within the organization.<sup>273</sup> The study parses privately prosecuted from governmentally prosecuted federal lawsuits, and tests the general deterrence hypothesis by evaluating the influence of rates of private federal job discrimination litigation at the level of the federal judicial district.<sup>274</sup> It finds, controlling for whether an organization has actually been sued, that higher rates of policy adoption by organizations are associated with higher rates of private federal job discrimination litigation in the districts in which they have offices.<sup>275</sup> Together, the Leonard, Epp, and Farhang studies arrive at similar conclusions using a variety of different research designs and measurement strategies. All three studies find general deterrence effects associated with higher levels of private enforcement.

Finally, two empirical studies have attempted to assess how well job discrimination plaintiffs fare in the litigation process. Both examined federal job discrimination litigation, and both reached the conclusion that job discrimination plaintiffs fare badly.<sup>276</sup> Clermont and Schwab's strategy of evaluation is to compare job discrimination suits to the rest of the civil docket in aggregate.<sup>277</sup> They find that job discrimination suits, as compared to the mean rates for all other civil cases aggregated together, are less likely to settle early, to win on summary judgment, to win at trial, or to win on appeal.<sup>278</sup>

---

<sup>272</sup> See Farhang, *supra* note 229, at 2–3, 12–13, 29; Kalev et al., *supra* note 261, at 590.

<sup>273</sup> Kalev et al., *supra* note 261, at 590.

<sup>274</sup> There are 94 federal districts.

<sup>275</sup> See Farhang, *supra* note 229, at 26–27.

<sup>276</sup> See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004); Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 176, 188 (2010).

<sup>277</sup> See Clermont & Schwab, *supra* note 276, at 429–30.

<sup>278</sup> *Id.* at 440–41. It bears noting here that all civil litigation other than job discrimination is quite a broad category (which includes contracts disputes, securities, antitrust, banking, consumer, labor, and environmental litigation, among many other

Nielsen, Nelson, and Lancaster analyze a large nationwide sample of Title VII cases filed in federal district courts between 1988 and 2003, and they provide a detailed portrait of litigation outcomes.<sup>279</sup> They report that:

- 19% of cases are dismissed;
- of cases that continue (81% of overall filings), 50% are settled prior to the filing of a summary judgment motion;
- of cases that reach summary judgment (31% of overall filings), plaintiffs lose 57% of the time;
- of cases that survive summary judgment (14% of overall filings), 57% settle prior to trial; and
- of cases that continue to trial (6% of overall filings), plaintiffs prevail 33% of the time.<sup>280</sup>

The study authors sought to identify settlement amounts, but they were able to do so in only 75 of 945 cases in their sample that had settled; the median settlement amount for those 75 cases was \$30,000.<sup>281</sup> We note that the mean settlement value reported is based on only 8% of the settled cases in the sample, and it seems quite possible that there is selection bias at play in whatever process led to disclosure of the settlement figures for that 8%.<sup>282</sup>

### C. *Protecting Consumers from Unfair or Deceptive Acts and Practices*

#### 1. *Legal Structure*

Dissatisfied consumers may be able to seek redress on a number of grounds. These include common law express and implied warranties, common law fraud, and actions under statutes specifically designed to protect consumers from unfair or deceptive acts and practices (including deceptive advertising), either broadly or targeted to specific types of products or services. Our focus here is on the enforcement of general unfair and deceptive acts or practices statutes (UDAP).

The “granddaddy” of these statutes is the Federal Trade Commission (FTC) Act, originally passed in 1914, which declared unlawful “unfair or deceptive acts or practices in or affecting commerce.”<sup>283</sup> The FTC Act created procedures to be followed by the Commission along with penalties

---

types). It is not entirely clear why lower rates of success on the dimensions they measure in the area of job discrimination amount to a “sad story,” as they put it.

<sup>279</sup> See Nielsen et al., *supra* note 276, at 176.

<sup>280</sup> *Id.* at 184–87.

<sup>281</sup> *Id.* at 187.

<sup>282</sup> For example, if larger settlements are more likely to be governed by confidentiality stipulations—because employers don’t want publicity of large payouts to encourage litigation against them, or to signal guilt of the charges of discrimination—then the \$30,000 figure could be downward-biased to a significant extent.

<sup>283</sup> Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5, 37 Stat. 717 (codified as amended at 15 U.S.C. §§ 41–58 (2006)).

the Commission could impose if it found persons, partnerships, or corporations in violation of the Act. Importantly, although the Commission could act on the receipt of complaints of possible violation of the FTC Act, that statute did not, and still does not, generally authorize private rights of action; that is, beyond complaining to the Commission, there is no provision for private enforcement under the FTC Act. There are other, more targeted federal statutes that do authorize private rights of action; a good example is the Fair Debt Collections Practices Act which specifically authorizes private action and provides for actual damages plus up to \$1,000 additional damages (for an individual bringing an action<sup>284</sup>) and reasonable attorneys' fees and expenses.<sup>285</sup>

Because of the limited nature of the enforcement procedures authorized by the FTC Act and the inclination of the FTC to focus on issues with broad, national import, the general enforcement of measures to protect consumers from unfair and deceptive acts or practices not dealt with in a federal statute targeted to a particular set of products or services is left primarily to state law. This is illustrated by the widely reported filing of a lawsuit against McDonald's by a mother in California and the Center for Science in the Public Interest in December 2010;<sup>286</sup> the suit alleged that McDonald's practice of including toys in its "Happy Meals" constituted a deceptive practice intended to circumvent parental control and teach children unhealthy eating habits.<sup>287</sup> The action was filed in California state court under several California statutes including California's False

---

<sup>284</sup> 15 U.S.C. § 1692 (2006). In class actions, the statutory penalty can be up to the lesser of \$500,000 or 1% of the net worth of the debt collector. 15 U.S.C. § 1692k(a)(2)(B) (2006).

<sup>285</sup> Other federal statutes authorizing private rights of action include the Truth in Lending Act (15 U.S.C. §§ 1601–1616 (2006)), Consumer Leasing Act (15 U.S.C. § 1667 (2006)), Fair Credit Reporting Act (15 U.S.C. § 1681 (2006)), Equal Credit Opportunity Act (15 U.S.C. § 1691 (2006)), Real Estate Settlement Procedures Act (12 U.S.C. §§ 2601–2617 (2006)), Homeowner's Protection Act (12 U.S.C. §§ 4901–4910 (2006)), and the Truth in Savings Act (12 U.S.C. §§ 4301–4313 (2006)). Many of these statutes also include public enforcement provisions, often delegating that authority to the FTC.

<sup>286</sup> The filing of the suit was reported on several national broadcast outlets including National Public Radio, April Fulton, *Consumer Group Sues McDonald's Over Happy Meal Toys*, NPR (Dec. 15, 2010), <http://www.npr.org/blogs/health/2010/12/15/132078519/consumer-group-sues-mcdonalds-over-happy-meal-toys>, as well as in newspapers both in the U.S. and in other countries. For example *The Guardian's* Sunday partner, *The Observer*, covered the case. Dominic Rushe, *McDonald's Sued for Tempting Californian Mum's Daughter with Happy Meals Toys* (Dec. 18, 2010), THE OBSERVER, <http://www.guardian.co.uk/business/2010/dec/19/mcdonalds-happy-meals-sued-california>; the *Financial Times* also ran a story on the case, Greg Farrell, *McDonald's Sued over Happy Meals* (Dec. 15, 2010), FINANCIAL TIMES, <http://www.ft.com/cms/s/0/36c6170a-0875-11e0-80d9-00144feabdc0.html#axzz2Loky5gER>.

<sup>287</sup> Farrell, *supra* note 286; Rushe, *supra* note 286.

Advertising Law, all of which, unlike federal statutes, authorize private rights of action.<sup>288</sup>

All of the 50 states have some form of general statute dealing with UDAP issues, often referred to as “little FTC Acts.”<sup>289</sup> These acts vary from state to state, with regard both to scope and to enforcement provisions.<sup>290</sup> A 2009 report prepared for the National Consumer Law Center (NCLC) describes these variations and provides a chart summarizing some of the key differences among the states which we include as an Appendix.<sup>291</sup> As of July 1, 2009, all states provided for some measure of private enforcement, although several states limit when private enforcement may be undertaken (e.g., only when certain vulnerable groups are affected, or only when there is some evidence of “public” impact).<sup>292</sup> The NCLC report makes clear that the nature of the enforcement regime varies from state to state. All states (except for Iowa, where there was no private enforcement at the time the report was prepared<sup>293</sup>) allow consumers to recover compensatory damages.<sup>294</sup> Many states provide for multiple or punitive damages and/or statutory damages (i.e., set amounts unrelated to actual damages),<sup>295</sup> and

---

<sup>288</sup> Amended Class Action Complaint for Violations of the Unfair Competition Law, The Consumers Legal Remedies Act and Declaratory and Injunctive Relief at 1, *Parham v. McDonald’s Corp.*, No. CGC-10-506178 (Cal. Super. Ct. 2012), 2011 WL 162213; see CAL. BUS. & PROF. CODE § 17204 (West 2008); CAL. CIV. CODE §§ 1750–1780 (West 2009).

<sup>289</sup> See Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 169–73 (2011) (describing the development of state consumer protection laws and their variation); Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, 5 (2009) NATIONAL CONSUMER LAW CENTER, [http://www.nclc.org/images/pdf/car\\_sales/UDAP\\_Report\\_Feb09.pdf](http://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf).

<sup>290</sup> See Butler & Wright, *supra* note 289, at 169–73.

<sup>291</sup> Carter, *supra* note 289, at 7–10. For a more detailed analysis of the individual state statutes, see *Consumer Protection in the States, Appendix B: State-by-State Summaries of State UDAP Statutes*, NAT’L CONSUMER LAW CTR. (2009), <http://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf>. For an earlier effort to compile comparative information on the strength of enforcement regimes under state deceptive trade practices legislation, see Anthony Paul Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427 (1984).

<sup>292</sup> Iowa was the last state to provide for private rights of action, with that state’s law (IOWA CODE § 714H (2012)) taking effect on July 1, 2009. 2009 Iowa Acts ch. 167, H.F. 712, §§ 1-8.

<sup>293</sup> The Iowa statute referenced in the previous footnote provides for an award of attorneys’ fees to a prevailing consumer and, if the finder of fact “finds by a preponderance of clear, convincing, and satisfactory evidence that a prohibited practice or act in violation of this chapter constitutes willful and wanton disregard for the rights or safety of another, in addition to an award of actual damages, statutory damages up to three times the amount of actual damages.” IOWA CODE § 714H.5(4) (2012).

<sup>294</sup> Carter, *supra* note 289, at 7–10.

<sup>295</sup> For a description and analysis employing this data set, see JOSHUA D. WRIGHT, SEARLE CIVIL JUSTICE INSTITUTE, *STATE CONSUMER PROTECTION ACTS: AN EMPIRICAL*

many also provide for attorneys' fees for consumers who prevail in their claims.<sup>296</sup> Many states specifically allow class actions under their statutes,<sup>297</sup> and many allow consumers to seek compensation or damages without having to prove that they have in some way relied on the deceptive information the seller provided. Because of the state-by-state variation, it is difficult to make meaningful generalizations about UDAP private enforcement regimes beyond the point that they vary.

Based on the information from the NCLC report (shown in our Appendix), we can say something about variation in the strength of enforcement regimes by focusing on the strength of the remedies for consumers in each state (shown in the bottom panel of our Appendix). We have counted the number of "strong" remedies in each state, counting "mixed or undecided" elements as .5, producing a score that ranges from 0 to 7. Figure 2 shows the distribution of these scores, with one dot representing each state. What is evident is that using the National Consumer Law Center's ratings, most states have relatively strong private enforcement regimes. We also looked to see if the variation among the states correlated with some key political indicators. We found modest correlations with a measure of citizen liberalism (0.20) and with a measure of states' tendency to adopt innovative policies (0.38).<sup>298</sup>

---

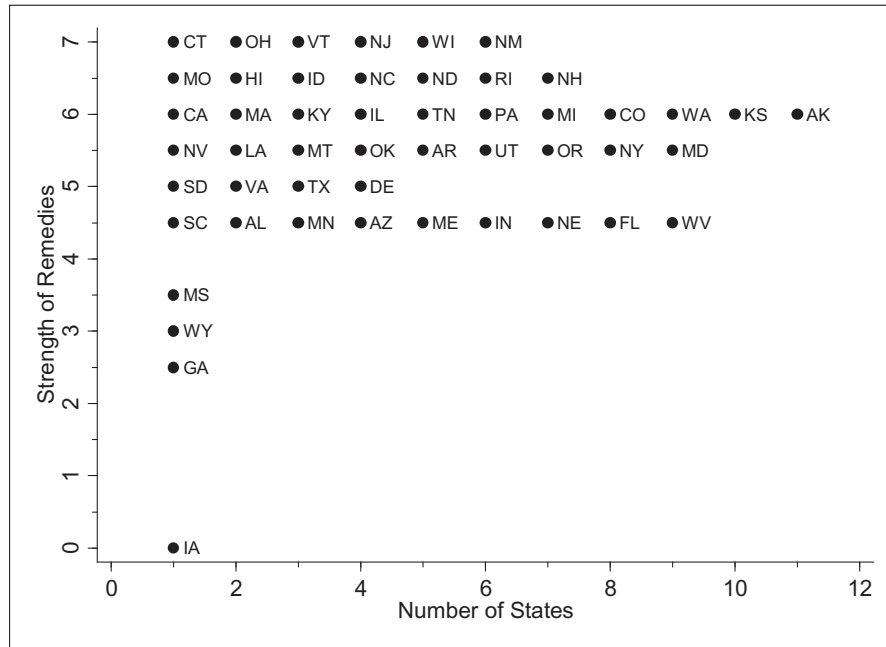
INVESTIGATION OF PRIVATE LITIGATION: PRELIMINARY REPORT (2009)  
<http://ssrn.com/paper=1708175>.

<sup>296</sup> About half the states allow a prevailing defendant to recover its attorneys' fees, but for 22 states this is restricted to cases in which the plaintiff's claim is determined to be frivolous or malicious; 5 states allow two-way fee shifting in consumer cases without limiting shifts to the defendants to cases where the plaintiff had in some sense behaved badly (this information is from the Searle Center data set, supplemented by the authors). Alaska, which is the only American state with a general fee-shifting system, allows for recovery of a fraction of a prevailing party's fees; where the plaintiff's claim is determined to be frivolous or the plaintiff brought the action to "obtain a competitive business advantage," the court can award "full reasonable attorney fees at the prevailing reasonable rate." ALASKA STAT. § 45.50.537(c) (2012). Regarding Alaska's fee-shifting system, see Susanne Di Pietro & Teresa W. Carns, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 ALASKA L. REV. 33 (1996) (describing the history and application of fee shifting in Alaska).

<sup>297</sup> Presumably class actions would be permitted in other states under general procedural rules providing for class actions unless a statute specifically provided otherwise.

<sup>298</sup> The citizen liberalism measure is from William D. Berry et al., *Measuring Citizen and Government Ideology in the American States, 1960-93*, 42 AM. J. POL. SCI. 327, 327-31 (1998); the measure of innovation is from Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880, 882-83 (1969). One might object that a rating created by the National Consumer Law Center reflects a "pro-consumer bias." Yet, scores we created have a substantial correlation (.477) with an index created by researchers at the Searle Center on Law, Regulation, and Economic Growth at the Northwestern University School of Law (an organization that appears to be more on the pro-business side) that measures aspects of state consumer protection laws that reflect both "benefits" and "restrictions" from the viewpoint of plaintiffs in consumer actions. See WRIGHT, *supra* note 295. The Searle Center measure, which coded state consumer protection laws in effect in 2004,

FIGURE 2: Private Enforcement Strength of State UDAP Laws



Given the variation among the states, one would think that they presented a natural laboratory for assessing the impact of enforcement regimes with varying characteristics. Unfortunately, to our knowledge there is no such research. The core problem is measuring the impact of the enforcement regimes because states do not collect in any kind of comparable fashion information on enforcement activities, either in the form of complaints to consumer protection agencies or lawsuits brought under UDAP statutes.<sup>299</sup>

## 2. *Empirical Research on Private Enforcement Regarding Consumer Problems*<sup>300</sup>

The empirical literature on consumer protection issues does not single out unfair and deceptive practices for specific attention. Rather, that research focuses generally on consumer problems and dissatisfaction. There is some

---

correlated 0.30 with the measure of citizen liberalism and 0.28 with state orientation toward policy innovation.

<sup>299</sup> For a discussion of an earlier effort to collect such information, and the problems of using the information that was obtained to make systematic comparisons among the states, see Dunbar, *supra* note 291, at 438.

<sup>300</sup> This section borrows generously from a recent review of empirical research related to consumer protection. See Stephen Meili, *Consumer Protection*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 176 (Peter Cane & Herbert M. Kritzer eds., 2010).

scattered research related to specific problems that could be labeled unfair or deceptive practices, such as disputes with securities dealers<sup>301</sup> or arising from used-car purchases.<sup>302</sup>

The largest body of empirical research dealing with enforcement of consumer protection laws focuses on the actions taken by consumers themselves in response to problems with products and services. Little of this research deals directly with the role of UDAP statutes; it deals instead with what consumers do when they are dissatisfied. The broad category of research is typically described as dealing with "consumer complaining," and involves work both by scholars interested specifically in consumer behavior<sup>303</sup> and by scholars approaching the question from more of a law-in-action perspective.<sup>304</sup> Meili summarizes the findings of research on consumer complaining:

[One study found] the most consistent factor in determining the likelihood of consumer complaints is problem context; [the] research revealed a descending order of complaint probability, beginning with non-professional services (the most likely source of complaints), followed by products and, lastly, professional services (the least likely source of complaints among [these] three categories). Other factors identified in various studies include the socio-economic status of the consumer, the significance and cost of the purchase (complaints are likelier with respect to more expensive products and those perceived by the consumer as more significant), the frequency with which the item is purchased (i.e., complaints are more likely to be lodged over a less regularly purchased item such as an automobile, rather than a consistently purchased household item like a cleaning product), the longevity of the problem (complaints are more likely the longer a problem lingers), the simplicity (or perceived simplicity) of the complaint process (the simpler the process, the more likely the consumer is to utilize it), and whether the product was purchased on credit or with cash (credit users are more likely to lodge complaints).<sup>305</sup>

---

<sup>301</sup> See, e.g., Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349 (2008).

<sup>302</sup> See, e.g., Kenneth McNeil et al., *Market Discrimination Against the Poor and the Impact of Consumer Disclosure Laws: The Used Car Industry*, 13 LAW & SOC'Y REV. 695 (1978-79).

<sup>303</sup> See, e.g., Ralph L. Day, *Modeling Choices Among Alternative Responses to Dissatisfaction*, 11 ADVANCES CONSUMER RES. 496 (1984); Joseph Barry Mason & Samuel H. Himes, Jr., *An Exploratory Behavioral and Socio-Economic Profile of Consumer Action About Dissatisfaction with Selected Household Appliances*, 7 J. CONSUMER AFF. 121 (1973).

<sup>304</sup> See, e.g., ARTHUR BEST, *WHEN CONSUMERS COMPLAIN* (1981); Jack Ladinsky & Charles Susmilch, *Major Findings of the Milwaukee Consumer Dispute Survey*, in CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES 145 (Larry Ray & Deborah Smolover eds., 1983); Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701 (1977).

<sup>305</sup> Meili, *supra* note 300, at 179-80 (citations omitted).



Meili goes on to note:

[T]he extensive empirical research on complaining behavior has revealed that third-party dispute mechanisms are more likely to be utilized by consumers who are wealthier, white, better educated, better informed, younger, more inclined to view complaining in a favorable light, not fearful of antagonizing sellers or other providers of goods and services, more politically active, and more experienced in the particular purchasing category . . . And . . . such mechanisms tend to . . . favor this very group of consumers, i.e., consumers who fit into one or more of these categories are more likely to prevail after complaining.<sup>306</sup>

Although there is nothing specific here about actions in response to unfair or deceptive practices, there is no reason to suspect that patterns for those types of consumer problems would differ substantially.

A second general area of empirical research on consumer problems deals with the dispute resolution mechanisms consumers employ when a complaint to a seller or service provider fails to produce a satisfactory resolution. Almost all of that research deals with administrative or private dispute resolution mechanisms;<sup>307</sup> little of the empirical research deals with consumer problems, UDAP or otherwise, that reach the stage of a lawsuit.

A related point is the growth of contractually-mandated arbitration in many of the service agreements (and some purchase contracts) that consumers sign.<sup>308</sup> Under the Federal Arbitration Act, contractual agreements to take disputes to arbitration can trump rights of action in state UDAP laws.<sup>309</sup> Whether that is true for any specific issue depends on whether the claim falls within the scope of the contract's arbitration clause, a question of law that tends to be decided on a case-by-case basis, and that has produced decisions cutting in both directions.<sup>310</sup> Although there is a body of empirical research on consumer arbitration,<sup>311</sup> none of that research focuses specifically on issues that would be covered under UDAP laws.

---

<sup>306</sup> *Id.* Meili also notes that there has been research on consumer complaining in numerous countries including Australia, Canada, and the United Kingdom. *Id.* at 181.

<sup>307</sup> *See id.* at 183.

<sup>308</sup> *See id.* at 194.

<sup>309</sup> For example, the Supreme Court has ruled that the FAA preempts state law holding arbitration clauses that proscribe class arbitration unenforceable. *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

<sup>310</sup> *See* F. PAUL BLAND, JR. ET AL., *CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS* 218 (6th ed. 2011).

<sup>311</sup> For a brief review of some recent studies of consumer arbitration, *see* Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, 15 *DISP. RESOL. MAG.* 30 (Fall 2008). The most recent study, which involved very detailed coding of about 300 American Arbitration Association consumer cases (about three quarters of which were brought by consumers) did not describe the kinds of issues (although it did report the types of businesses involved). *See* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 *OHIO ST. J. ON DISP. RESOL.* 843, 845–46 (2010).

One important issue regarding private enforcement in any area is whether the enforcement regime produces an appropriate level of enforcement, as opposed to either under- or over-enforcement. In a recent article, Butler and Johnston argue that current state UDAP laws produce over-enforcement, which has negative consequences for consumer welfare.<sup>312</sup> These negative consequences, the authors argue, include higher prices (due to costly precautions merchants take to avoid liability) and decreased information available to consumers (because merchants and manufacturers will limit their advertising to insure they do not make claims that might be deemed deceptive and hence subject them to liability under UDAP laws).<sup>313</sup> In work that seeks to join theory with anecdotes, Butler and Johnston point to some fairly notorious examples of what many would view as abusive uses of UDAP laws, including the case of a government lawyer who sued a neighborhood dry cleaner for \$54 million under the District of Columbia consumer protection law after the cleaner lost a pair of pants.<sup>314</sup> Although there appears to have been an increase in reported decisions dealing with state consumer protection laws in both state and federal courts during the 2000s, it is well known that statistics based on reported cases are unreliable indicators of patterns of litigation.<sup>315</sup> Moreover, the report on which the authors rely finds that there is substantial variation from state to state,<sup>316</sup> with almost half the states showing either no increase or a decline in reported cases between 2000 and 2007.<sup>317</sup>

Another article reports a study that sought to systematically assess whether state consumer protection statutes extended protection beyond what was provided for in the FTC Act.<sup>318</sup> In this study Butler and Wright focused on the substance of what was covered by the state acts rather than the enforcement regimes created by the acts. Butler and Wright recruited a panel of experts that they describe as representing a range of political perspectives; they describe their panel as a “shadow Federal Trade Commission” because several had experience at or with the FTC.<sup>319</sup> The members of this shadow FTC reviewed one-page case scenarios of representative cases that would constitute potential violations of at least some state consumer statutes.<sup>320</sup> The panel members reviewed 110 case scenarios (10 of which were based on actual FTC enforcement actions) and then indicated (1) whether the

---

<sup>312</sup> See Butler & Johnston, *supra* note 159, at 35–52.

<sup>313</sup> *Id.* at 47–51.

<sup>314</sup> *Id.* at 6.

<sup>315</sup> This point is acknowledged by the author of the report upon which Butler and Johnston draw. See WRIGHT, *supra* note 295, at 16–17. A further problem in assessing the meaning of a trend showing increased reporting of cases involving a particular issue is that there may be a more general growth in cases being reported by Lexis (the source used in the study).

<sup>316</sup> See *id.* at 21–24.

<sup>317</sup> *Id.* at 24.

<sup>318</sup> See Butler & Wright, *supra* note 289, at 178.

<sup>319</sup> *Id.* at 178–79.

<sup>320</sup> *Id.* at 178.

practice was “unfair or deceptive according to FTC standards,” and (2) “whether he or she believed the FTC would initiate an enforcement action.”<sup>321</sup> The results showed that of the 100 scenarios based on state cases, the shadow FTC members found that 42 involved possible illegal conduct under the FTC Act; they also found that all 10 of the actual FTC scenarios constituted violations.<sup>322</sup> Interestingly, the shadow FTC members thought that only 16 of the 42 state cases would have led to possible FTC action.<sup>323</sup>

From Butler and Wright’s perspective, the fact that state consumer protection actions often sanction activities that would not be deemed illegal under the Federal Trade Commission Act is indicative of over-enforcement at the state level.<sup>324</sup> Of course, one could just as easily argue that the provisions of the FTC Act provide for inadequate enforcement. Moreover, the fact that less than 40% of the possible illegal activities under the FTC Act would lead to “possible FTC enforcement” suggests why the FTC Act itself, which does not provide for private rights of action, is probably an insufficient vehicle for enforcement of laws against unfair and deceptive trade practices.

A final issue for empirical research related to private enforcement of UDAP laws in the United States is the role of consumer class actions. Although consumer cases is an area where the small claims class action has obvious potential as a mechanism of private enforcement,<sup>325</sup> there is relatively little empirical research on consumer class actions. Early studies focused on a variety of areas other than consumer cases.<sup>326</sup> Many consumer class actions deal with UDAP issues, and hence it would be a fruitful area for empirical research. Still, although some general studies of class actions include consumer class actions,<sup>327</sup> the literature on consumer cases is thin. This is surprising given that consumer cases can involve some of the most controversial class-action issues, such as the use of coupon settlements—where the members of the class receive relatively trivial amounts or forms of compensation (typically in the form of coupons for discounts on future purchases) while lawyers representing the class receive substantial fees. In

---

<sup>321</sup> *Id.* at 180.

<sup>322</sup> *Id.* at 183–87.

<sup>323</sup> *See id.* at 185–86.

<sup>324</sup> *See id.* at 188.

<sup>325</sup> A RAND Corporation study found that consumer cases constitute about a quarter to a third of federal class actions. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 8 (2001). A more recent study of federal class action settlements found that only 12–13% were consumer cases, plus another 6% dealing with debt collection. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEG. STUD. 811, 818 (2010).

<sup>326</sup> *See, e.g.*, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1990–1991); Benjamin S. DuVal, Jr., *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II)*, 1976 AM. BAR FOUND. RES. J. 1273 (1976); Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26 LAW & SOC’Y REV. 237 (1992); Charles W. Wolfram, *The Antibiotics Class Actions*, 1976 AM. BAR FOUND. RES. J. 251 (1976).

<sup>327</sup> *See* HENSLER ET AL., *supra* note 325.

fact, a recent study of federal class action settlements found that 30% of consumer (excluding debt collection) cases involved “in-kind” relief including vouchers, coupons, gift cards, warranty extensions, merchandise, services, and extended insurance policies, the highest of any of the categories examined.<sup>328</sup> Most of these appear to be cases involving truly small claims, which defy plausible grounding in a compensatory rationale.

We were able to locate only one empirical study focused on consumer class actions. Meili looks at lawyers and lead plaintiffs, basing his analysis on interviews with 33 lawyers and 20 lead plaintiffs; the former were selected from among the membership of the National Association of Consumer Advocates.<sup>329</sup> The lawyers were asked to select a case they had been involved in to discuss during the interviews; “approximately one half of the cases involved some form of misrepresentation, fraud, or breach of contract against mortgage companies, insurance companies, landlords and various product manufacturers. The other half involved abusive debt collection practices, credit reporting errors, or discriminatory credit terms.”<sup>330</sup> The analysis that Meili presents, which focuses on the lawyers’ goals and the relationships between the lawyers and the lead plaintiffs, does not single out UDAP-related claims for specific discussion.<sup>331</sup> Still, some of his findings are interesting, particularly the way that lawyers shaped lead plaintiffs’ goals to look beyond their individual interests and toward the interests of the class as a whole, and the tendency of the lawyers to conflate the client and the larger cause of consumer rights.

## VI. CONCLUSION

We have provided a great deal of doctrinal, normative, and empirical information about private enforcement. Our aim has been to enhance understanding of the historical, cultural and political background of private enforcement, the reasons why legislators may choose a private enforcement (or a hybrid) strategy when they sincerely wish to address an unremedied systemic problem, and what features of both the general legal landscape and

---

<sup>328</sup> Fitzpatrick, *supra* note 325, at 824. The next highest category was antitrust at 13%; 37% of the consumer class action settlements involved injunctive or declaratory relief. None of the debt collection case settlements involved in-kind relief, and only 12% involved injunctive or declaratory relief. Fitzpatrick also reports that about a quarter of the settlement value was awarded as fees in consumer class actions, a figure in line with the percentage in most other types of class actions. *Id.* at 835.

<sup>329</sup> Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 78–79 (2011) [hereinafter Meili, *Collective Justice*]. In an earlier book chapter, Meili focused on consumer cause lawyers, drawing on a small number of interviews and his own experience running a consumer law clinic at the University of Wisconsin Law School. Stephen Meili, *Consumer Cause Lawyers in the United States: Lawyers for the Movement or a Movement unto Themselves*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 120 (Austin Sarat & Stuart A. Scheingold eds., 2006).

<sup>330</sup> Meili, *Collective Justice*, *supra* note 329, at 81.

<sup>331</sup> *See id.* at 86–87, 97–99.

a particular private enforcement regime are likely to determine whether that regime is effective.

If within a single legal system, regulatory policy and strategy can only sensibly be determined on a sectoral basis, and if the choice between public and private enforcement (or a hybrid approach) depends on a host of context-dependent variables, and if the efficacy of a private enforcement regime turns on a complex of both specific and general rules and incentives, and if traditional cultural explanations of the role that private enforcement plays in the United States are radically incomplete because they ignore institutional and political influences, then it is no surprise that, in the larger project on which this Article is based, we were unable to gain substantial comparative traction. Nor, after all, is it ground for regret. For comparative purposes the inquiries we have pursued, the questions we have asked, the perspectives we have brought to bear, and the data we have sought about private enforcement in the United States are more important than the data we have found and the answers we have secured.

Yet, some of those data and answers are suggestive for the future of private enforcement in the United States, and both they and the perspectives we have brought to bear raise a number of questions for the future of private enforcement elsewhere. In concluding this Article, we offer some tentative thoughts about both.

The frequency with which Congress has resorted to private enforcement increased dramatically starting in the late 1960s, even after controlling for the extent of regulatory legislation being passed.<sup>332</sup> We noted in Part IV.D that there was a dramatic increase in the incidence of divided government in the twentieth century beginning with the Nixon administration, at about the same time that the ideological distance between the parties began to widen, and that this was associated with growing congressional reliance on private enforcement. There were about 48 fee shifts and damages enhancements (double, triple, and punitive damages provisions) attached to private rights of action in federal statutes in 1968, and the number had increased to 326 by century's end, for an increase of 680%.<sup>333</sup> Over the same period the rate of private lawsuits enforcing federal statutes increased by about 800%.<sup>334</sup> This is not to say that Congress uses private enforcement regimes as the norm. On the contrary, as we observed in Part V.A, in highly significant regulatory enactments between 1947 and 2002 Congress provided for any private enforcement of its regulatory enactments far less often than may be commonly imagined (24% of the time), and exclusive reliance on private enforcement was rare indeed (occurring less than 5% of the time).<sup>335</sup>

We see little reason to believe that Congress's reliance on private enforcement will abate any time soon. Important variables driving this

---

<sup>332</sup> See FARHANG, *supra*, note 2, at 76–81.

<sup>333</sup> See *id.* at 66.

<sup>334</sup> See *id.*

<sup>335</sup> *Supra* Part V.A.

legislative outcome remain highly salient today. The country persists in an era of divided government. Polarization between the political parties continues in full flower. The scarcity of revenue to fund direct bureaucratic regulation grows more acute. The use of counter-majoritarian legislative tactics, necessitating broad coalition building, is virtually normal politics in the modern American state, and such broad coalitions are, we believe, more likely to converge on private enforcement than bureaucratic state-building, particularly in a period when a common political slogan is that “government is the problem, not the solution.”

It is much more difficult to assess the future of private enforcement of statutory and administrative law at the state level largely because we know so little about its past. While it may be reasonable conjecture to anticipate similar patterns governing its use and effectiveness at the state level, it is clear that far more work is necessary to produce an accurate picture of the current state of affairs. Researchers of private enforcement have very largely focused their attention on Congress, federal legislation, and federal litigation. The need for research at the state level is especially pointed in a country in which the vast majority of legislative policymaking comes out of state legislatures, and the vast majority of litigation is handled by state courts. The similarity of political institutions, politics, and budgetary conditions at the state and federal levels in the U.S. suggests that the body of research on private enforcement of federal statutory and administrative law provides a critical starting point for work on the states. At the same time, students of legislative regulatory policy have found that some regions of the U.S., such as the South, have distinctive political and institutional properties that depart from the federal model in important ways,<sup>336</sup> counseling against hasty generalization from federal to state regulatory regimes created through legislation. A research agenda focused on private enforcement in the states, of course, is not wholly separate from federal regulation. Recent expansive understandings of federal preemption doctrine—curtailing private enforcement of state tort law—have implications for state legislative regulation more broadly, and thus will provide important context for the study of private enforcement regimes in the states.<sup>337</sup>

Just because institutional and budgetary considerations suggest that private enforcement will remain an attractive regulatory strategy does not mean, however, that the private enforcement regimes of the future will be efficacious. Both Congress and the federal judiciary have taken steps to make one oft-found element of modern American private enforcement regimes—class action litigation—harder to maintain. Their actions may have been motivated in part by the intent to administer a back-door remedy for inevitable instances of over-enforcement resulting from authorizing representative litigation on a trans-substantive basis (usually by court rule). If

---

<sup>336</sup> See HUBER & SHIPAN, *supra* note 122, at 139–70.

<sup>337</sup> See, e.g., PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2581 (2011) (Federal Food, Drug and Cosmetic Act preempts state law failure to warn claims against manufacturers of generic pharmaceuticals).

so, however, that would be small comfort, given that the cure is often no more nuanced than the disease. Moreover, both Congress and the Supreme Court have substantially impaired the power of the states to pursue different visions of regulatory policy—whether more or less robust—through class litigation.

We have noted the capacity of private enforcement regimes to insulate legislative preferences from the inroads of an ideologically distant judiciary by structuring incentives for potential litigants and their lawyers. We have also discussed the use of remedial escalation in the Civil Rights Act of 1991 as a response to just such inroads. Much of the power and the potential mischief of the class action derives from its traditional classification as procedure. Effective control of procedure ensures that means are available for an ideologically distant judiciary to frustrate legislative preferences by constricting access to court—refashioning doctrine so as to alter the balance of power in litigation and diminishing the incentives of those the legislature sought to recruit as private enforcers. That certainly is a plausible way of viewing the Supreme Court's recent decisions on pleading that we discuss in Part III. Moreover, notwithstanding decades of anecdotes about American litigation that are not supported by systematic data, a realistic approach to the American litigation model requires acknowledgment that, at least in recent decades, the promise of access to justice has too often been broken as the result of political decisions to starve the courts and institutionally self-regarding behavior by judges, some of whom have been quite content to use resource constraint arguments, often in tandem with attacks on lawyers, to disable litigants from securing rights that those judges disfavor.

Most other countries in the world are better positioned than the United States to achieve a sensible regulatory regime, because they have not previously abdicated key elements of regulatory design and implementation to the bar and the judiciary, in other words, to the legal profession. As Professor Hadfield observes:

The bar [in the United States] has by and large steered utterly clear of the idea that it is responsible—politically responsible—for the system-wide cost and complexity of the legal system, far beyond the ethical call to help the poor and perform pro bono work. It requires a political process to shift perceptions—much as perceptions about the federal government's responsibility for high gas prices or stock market failures are molded not in the abstract but in the crucible of political contest and public debate.<sup>338</sup>

Thus, a key deficit of U.S. regulatory strategy may be the failure to provide adequate *public* alternatives to court-based litigation for private enforcement of statutory and administrative law. The variety of such alternatives in other countries<sup>339</sup> is a sobering reminder of the baneful influence that tradition, ideology, and professional self-interest can have on

---

<sup>338</sup> Hadfield, *supra* note 39, at 155.

<sup>339</sup> See HODGES, *supra* note 1, at 103.

access to justice. That fact, however, should not prevent other countries from recognizing either the limitations of such alternatives or the social progress that U.S. litigation systems have enabled in the past. Nor should it prevent them from acknowledging the possibility of harnessing the generative power of American-style litigation without replicating its destructive elements. Ultimately, the remedy for litigation's negative externalities is the same as in any other market: regulation. In the case of representative litigation, as we have indicated, the place to start is by avoiding trans-substantive regulatory strategy.

Thinking in comparative institutional terms suggests both the limits of the American model of private enforcement and its potential in parliamentary democracies. Terry Moe has argued that parliamentary regimes provide a notable contrast with the American separation-of-powers system precisely on the issues of legislative-executive conflict and the stickiness of the status quo that, as we suggested in Part IV.C, incentivize legislative reliance on private enforcement regimes in the U.S.<sup>340</sup> Moe identifies these distinctions as an explanation for the more coherent, unified, and centralized character of European administrative states, and the greater policy discretion enjoyed by their leadership, as compared to the American administrative state.<sup>341</sup> He offers this explanation of the comparative structure of the American administrative state in response to James Q. Wilson's noted lament of the weakness of American bureaucracy as compared to those in parliamentary democracies.<sup>342</sup>

Moe suggests that, from the standpoint of legislators, executive subversion of implementation is not a problem in parliamentary regimes;

the executive arises out of the legislature and both are controlled by the majority party. Thus, unlike in the United States, the executive and the legislature do not take distinctive approaches to issues of structure; they do not struggle with one another in the design and control of public agencies; they do not push for structures that protect against or compensate for the other's political influence.<sup>343</sup>

Likewise, in parliamentary regimes, coalition drift does not present a significant incentive to formalize into law rules and procedures meant to insulate bureaucratic power from manipulation by future coalitions. Though certainly stylized, the simple two-party case is illustrative. Moe writes:

[W]hichever party gains a majority of seats in parliament gets to form a government and, through cohesive voting on policy issues, is in a position to pass its own program at will. Similarly, should the other party gain majority status down the road, that party would be able to pass its own program at will—and, if it wants, to subvert or completely destroy everything the first party has put in place. . . . This means that formal

---

<sup>340</sup> See Moe, *Political Institutions*, *supra* note 191.

<sup>341</sup> *Id.*

<sup>342</sup> See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 297–301 (1989).

<sup>343</sup> Moe, *Political Institutions*, *supra* note 191, at 241.



structure does not work as a protective strategy—at least, not in the simple, direct way that it works in a separation-of-powers system.<sup>344</sup>

Moe's perspective suggests that bureaucratic drift also does not present the same risk in parliamentary regimes as it does in separation-of-powers regimes. Because a ruling coalition in a parliamentary institutional setting is much more able to act decisively against errant bureaucrats, it is less in need of an *ex ante* guard against bureaucratic drift.

It is widely understood that private litigation plays an unusually large role in policy implementation in the U.S. as compared to a large majority of industrial democratic countries with predominantly parliamentary systems.<sup>345</sup> This disparity appears significant in relation to the institutional differences between separation-of-powers and parliamentary systems that we have been considering. The discussion here suggests the possibility that these institutional differences are at the root of the twin phenomena of a greater role for private litigation in American policy implementation (noted by Kagan), and a more limited and constrained American administrative state (noted by Wilson), as contrasted with the norm in democratic parliamentary systems. Focusing partly on separation-of-powers structures as an explanation for American "adversarial legalism," Kagan writes, "It is only a slight oversimplification to say that in the United States lawyers, legal rights, judges, and lawsuits are the functional equivalent of the large central bureaucracies that dominate governance in high-tax, activist welfare states."<sup>346</sup>

Interestingly, similar institutional arguments have been marshaled to explain growing private enforcement (based on the American model, it is often argued) in the European Union over the past several decades. Over about the last decade there has been mounting scholarship demonstrating growing reliance in the EU on regulation through the creation of rights that are privately enforceable in both judicial and administrative fora.<sup>347</sup> This body of work yields the following set of insights about the growth of private enforcement in the EU:

- It has been encouraged by decisions of the European Commission, the European Parliament, and the European Court of Justice.

---

<sup>344</sup> *Id.* at 240.

<sup>345</sup> See KAGAN, *supra* note 21, at 6–8.

<sup>346</sup> *Id.* at 16.

<sup>347</sup> See, e.g., ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000); Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998); Karen J. Alter & Jeannette Vargas, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, 33 COMP. POL. STUD. 452 (2000); Linda Dickens, *The Road is Long: Thirty Years of Equality Legislation in Britain*, 45 BRIT. J. INDUST. REL. 463, 466–67 (2007); Robert A. Kagan, *Globalization and Legal Change: The "Americanization" of European Law?*, 1 REG. & GOVERNANCE 99 (2007); R. Daniel Kelemen, *Suing for Europe: Adversarial Legalism and European Governance*, 39 COMP. POL. STUD. 101 (2006); R. Daniel Keleman & Eric C. Sibbitt, *The Globalization of American Law*, 58 INT'L ORG. 103 (2004).

- It has spanned the waterfront of policy areas, embracing the regulatory domains of environmental, anti-trust, securities, intellectual property, anti-discrimination, and consumer protection policy, among others.
- It has encouraged reliance upon procedural devices to aggregate claims and upon economic damages to incentivize private enforcement.
- It has involved expansion of private enforcement in adjudicatory venues at the institutional levels of both the EU and its member states.

Although there has been much talk of the “Americanization” of European law—with private enforcement being a characteristic frequently attributed to the American style of legal regulation—no one is arguing that the EU has converged with the U.S. in the degree of its reliance upon private enforcement, but only that the degree has increased materially in recent decades.

There is disagreement about what has caused this development, and in our discussion of the relationship between political institutions and private enforcement, we highlight an explanation grounded in political institutions that has been proffered by a number of scholars.<sup>348</sup> Putting aside other rival or supplementary hypotheses,<sup>349</sup> we synthesize the political institutions explanation as follows: Beginning in the mid-1980s, economic liberalization in the EU and the push for an integrated market had the gradual effect of displacing regulatory policymaking from member states to the governing institutions of the EU. The EU governing structure is highly fragmented, both vertically (between the EU and member states), and horizontally (between the EU Council, Parliament, Commission, and Court of Justice). Such fragmentation hampers the ability of those who make regulatory policy to effectuate decisive enforcement action, with EU influence upon the distant and heterogeneous bureaucracies of member states presenting a particular challenge. The EU government does not have an enforcement bureaucracy that penetrates the local level, and distrust of remote “Eurocrats” limits the likelihood that it will develop a strong one in the near future.

This institutional fragmentation, and the impediments that it creates for effective control by policymakers of an enforcement bureaucracy, may help to explain growing EU reliance on the alternative of private enforcement. The development of EU governing structures in Western Europe has introduced forms of state fragmentation, and public distrust of a far-off central government, that are familiar in the U.S. One outcome appears to have been growing reliance on American-style private enforcement, though surely in muted form.

---

<sup>348</sup> See Kagan, *supra* note 347, at 110; Kelemen, *supra* note 347, at 102; Kelemen & Sibbitt, *supra* note 347, at 106.

<sup>349</sup> For a discussion of other explanations, see Kelemen & Sibbitt, *supra* note 347.

VII. APPENDIX: STATE LAW PROVISIONS REGARDING UNFAIR AND DECEPTIVE ACTS AND PRACTICES

**State UDAP Statutes at a Glance**  
*Strengths and Weaknesses*

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL
<i>Prohibition of unfairness, deception</i>														
Broad deception prohibition	○	○	○	○	○	●	○	○	○	○	○	○	○	○
Broad unfairness prohibition	○	○	●	○	○	●	○	●	○	○	○	○	○	○
Rulemaking authority	●	○	●	●	●	●	○	●	○	○	○	○	○	○
<i>Scope</i>														
Covers credit	●	●	○	●	○	○	○	●	○	●	●	○	●	●
Covers insurance	●	●	○	●	○	○	●	●	○	●	●	○	●	○
Covers utilities	●	●	○	●	○	○	○	●	○	●	●	○	●	○
Covers post-sale acts	●	○	●	○	○	○	○	●	○	●	○	○	○	○
Covers real estate	○	○	○	○	○	○	○	○	○	●	○	○	○	○
<i>State enforcement</i>														
Civil penalty amount	●	○	○	○	●	●	●	○	●	○	●	○	●	○
Deception sufficient without proof of intent or knowledge	○	○	○	●	○	●	○	○	○	○	○	○	○	○
<i>Remedies for consumers</i>														
Compensatory damages for consumers	○	○	○	○	○	○	○	○	○	○	○	○	○	○
Multiple or punitive damages	○	○	●	●	○	○	○	●	○	●	○	○	○	●
Attorney fees for consumers	○	●	●	○	○	○	○	●	○	●	●	○	○	○
Class actions	●	○	○	○	○	○	○	○	○	○	●	○	○	○
Allows consumer suit without proof of reliance	●	○	●	●	●	○	○	○	○	●	●	●	●	○
Allows consumer suit without proof of public impact	○	○	○	○	○	●	○	○	○	○	●	○	○	○
Allows consumer suit without pre-suit notice	●	○	○	○	●	○	○	○	○	○	●	○	○	○

Key: ○ - strong   ● - mixed or undecided   ● - weak

**State UDAP Statutes at a Glance (continued)**

*Strengths and Weaknesses*

	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE
<i>Prohibition of unfairness, deception</i>														
Broad deception prohibition	●	◐	○	○	○	○	○	○	○	○	◐	○	○	○
Broad unfairness prohibition	○	◐	○	○	○	○	○	○	○	●	◐	○	○	○
Rulemaking authority	●	○	●	●	○	○	○	○	●	●	○	○	○	●
<i>Scope</i>														
Covers credit	○	○	○	○	●	○	○	○	●	○	◐	○	○	●
Covers insurance	●	○	●	◐	●	○	●	○	●	○	●	◐	●	○
Covers utilities	○	○	○	○	●	○	●	○	●	○	○	○	●	●
Covers post-sale acts	○	○	○	○	○	○	○	○	●	◐	○	◐	○	○
Covers real estate	●	○	○	◐	○	○	◐	○	●	○	◐	○	○	◐
<i>State enforcement</i>														
Civil penalty amount	◐	○	○	●	◐	○	●	◐	○	○	○	○	●	○
Deception sufficient without proof of intent or knowledge	●	○	◐	○	○	○	○	○	○	○	○	○	○	○
<i>Remedies for consumers</i>														
Compensatory damages for consumers	○	●	○	○	○	○	○	○	○	○	○	○	○	○
Multiple or punitive damages	○	●	●	○	○	●	●	○	●	●	●	○	○	●
Attorney fees for consumers	◐	●	○	◐	○	○	○	○	○	○	●	◐	○	○
Class actions	○	●	○	○	●	○	○	○	○	○	●	○	●	○
Allows consumer suit without proof of reliance	●	●	○	◐	◐	◐	◐	○	○	◐	◐	○	◐	◐
Allows consumer suit without proof of public impact	○	●	○	○	○	○	○	○	○	●	○	○	○	●
Allows consumer suit without pre-suit notice	●	●	○	○	○	●	○	●	○	○	●	○	○	○

Key: ○ - strong   ◐ - mixed or undecided   ● - weak

**State UDAP Statutes at a Glance (continued)**

*Strengths and Weaknesses*

	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD
<i>Prohibition of unfairness, deception</i>														
Broad deception prohibition	○	○	○	○	○	○	○	○	○	●	●	○	○	●
Broad unfairness prohibition	●	○	○	○	●	○	●	○	○	○	●	○	○	●
Rulemaking authority	○	●	○	○	●	●	○	○	●	○	○	○	●	●
<i>Scope</i>														
Covers credit	○	●	○	○	○	○	○	●	●	●	○	●	○	○
Covers insurance	○	●	○	○	●	○	○	●	●	●	○	●	●	○
Covers utilities	○	●	●	○	○	○	○	●	●	○	○	●	○	○
Covers post-sale acts	○	○	○	○	○	○	○	○	○	○	○	○	○	○
Covers real estate	○	○	○	●	○	○	○	●	○	○	○	●	○	●
<i>State enforcement</i>														
Civil penalty amount	●	○	○	●	●	●	●	○	○	○	○	●	●	●
Deception sufficient without proof of intent or knowledge	●	○	○	●	○	○	●	○	○	○	○	○	○	○
<i>Remedies for consumers</i>														
Compensatory damages for consumers	○	○	○	○	○	○	○	○	○	○	○	○	○	○
Multiple or punitive damages	●	○	○	○	●	○	○	○	●	○	○	○	○	●
Attorney fees for consumers	○	○	○	○	○	○	○	○	○	○	●	○	○	●
Class actions	○	○	○	○	○	○	○	○	○	○	○	○	○	○
Allows consumer suit without proof of reliance	●	●	○	○	○	●	●	○	●	●	●	●	●	○
Allows consumer suit without proof of public impact	○	○	○	○	●	○	○	○	○	○	○	○	●	○
Allows consumer suit without pre-suit notice	○	○	○	○	○	○	○	○	○	○	○	○	○	○

Key: ○ - strong ● - mixed or undecided ● - weak

*State UDAP Statutes at a Glance (continued)**Strengths and Weaknesses*

	TN	TX	UT	VT	VA	WA	WV	WI	WY
<i>Prohibition of unfairness, deception</i>									
Broad deception prohibition	○	●	○	○	○	○	○	○	○
Broad unfairness prohibition	○	○	○	○	●	○	○	○	○
Rulemaking authority	●	●	○	○	●	●	○	○	●
<i>Scope</i>									
Covers credit	●	●	●	○	●	●	●	●	○
Covers insurance	○	○	●	●	●	○	○	●	●
Covers utilities	●	○	●	○	●	●	●	○	○
Covers post-sale acts	●	○	○	○	●	○	○	●	○
Covers real estate	○	○	○	○	●	○	●	○	○
<i>State enforcement</i>									
Civil penalty amount	●	○	●	○	●	●	●	○	○
Deception sufficient without proof of intent or knowledge	○	○	○	○	○	○	○	○	●
<i>Remedies for consumers</i>									
Compensatory damages for consumers	○	○	○	○	○	○	○	○	○
Multiple or punitive damages	○	○	●	○	○	○	●	○	●
Attorney fees for consumers	○	○	○	○	○	○	○	○	●
Class actions	●	○	○	○	●	○	○	○	○
Allows consumer suit without proof of reliance	○	●	●	○	●	○	●	○	●
Allows consumer suit without proof of public impact	○	○	○	○	○	●	○	○	○
Allows consumer suit without pre-suit notice	○	●	○	○	○	○	●	○	●

Key: ○ - strong ● - mixed or undecided ● - weak

Source: Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, 7-10, (2009), NATIONAL CONSUMER LAW CENTER, [http://www.nclc.org/images/pdf/udap/report\\_50\\_states.pdf](http://www.nclc.org/images/pdf/udap/report_50_states.pdf). Reprinted with permission of the National Consumer Law Center.