

11-16-2011

Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)

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Recommended Citation

Burbank, Stephen B.; Farhang, Sean; and Kritzer, Herbert M., "Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)" (2011). *Faculty Scholarship*. Paper 347.

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**PRIVATE ENFORCEMENT OF STATUTORY AND
ADMINISTRATIVE LAW IN THE UNITED STATES
(AND OTHER COMMON LAW COUNTRIES)**

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Prepared for
International Association of Procedural Law
XIVth World Congress
Heidelberg, Germany
July 25-30, 2011

Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)

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I. Introduction

Our aim in this paper is to advance understanding among those from other legal systems of private enforcement of statutory and administrative law in the United States and, to the extent supported by the information that colleagues have provided, of comparable phenomena in other common law countries. A copy of the questionnaire we used to seek information about private enforcement in other common law countries is included in Appendix A. Interpolated in the questionnaire are the edited responses of colleagues who generously took the time to answer all or some of the questionnaire. We are indebted to Neil Andrews, Chris Hodges, Richard Moorhead, Martin Partington and Iain Ramsay for information about private enforcement in England and Wales, to Peta Spender for information about private enforcement in Australia, and to Jasminka Kalajdzic and Marina Pavlovic for information about private enforcement in Canada.¹

The organizers of this conference have made clear that the “private enforcement” in which they are interested involves government policy decisions to rely on private actors to enforce statutory or administrative law, whether in place of or in addition to the enforcement efforts of public officials. Put otherwise by one of the organizers, the interest is in learning more about the concept of the “private attorney general.”

Long part of American legal culture, private enforcement has in recent years attracted considerable interest and provoked considerable controversy abroad. Indeed, both domestic and foreign discussions and debates about this phenomenon are often heated and freighted with interests and ideology, making it important at the outset to define with some care what we mean by private enforcement.

“Privately-initiated enforcement” may be a more appropriate term than “private enforcement” because private initiation does not ensure that enforcement, if it occurs, will also be private. Thus, for instance, under U.S. federal law *qui tam* actions (i.e., “whistleblower” cases) under the False Claims Act are privately-initiated, but notice must be given to the United States, which has the right to assume control of the litigation (Bucy 2002). As another example, a privately-initiated complaint of employment discrimination contrary to federal law that contemplates private litigation at the conclusion of the administrative process may result in a civil action brought by the Equal Employment Opportunity Commission (Belton 1978). We will use the phrase “private enforcement” for both enforcement initiated by private parties but taken over by public officials and enforcement initiated and prosecuted by private parties. We will 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

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¹ We also received helpful comments from W.A. Bogart, Simon Halliday, Alan Paterson, and Simon Deakin.

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 how little private enforcement litigation will actually be mobilized” (Farhang 2010a: 1-2).

The organizers’ interest in the use of private enforcement as an alternative or complement to administrative or other public actions presumably does not include private litigation as an alternative to, for instance, social insurance for purposes of compensation for personal injury. Yet, in countries where most law is codified, focus on the enforcement of statutory law does not serve as a useful basis for distinguishing private from public enforcement. Moreover, even where administrative or other publicly-initiated proceedings have not previously been used for the purpose of securing compensation for injury -- for instance to consumers – the perception that existing law is inadequate may prompt consideration of new substantive norms and different enforcement regimes. For example, it appears that an impetus for the attention that some countries have recently given to representative litigation are EU directives (e.g., Directive 93/13/EEC, Art. 7; Directive 84/450/EEC, Art. 4.1) requiring that member states provide “adequate and effective means” to protect consumers (Hodges 2008; Valguarnera 2010). Presumably this is why the organizers have expressed interest in the use of class or group actions as part of the phenomenon of private enforcement.

Debates about collective actions abroad suggest that much of the angst about “American-style class actions,” as about American litigation more generally, stems from the perception that such lawsuits are conceived by and serve to enrich lawyers.² Putting aside whether such impressions have an adequate empirical basis (Hensler 2009), they suggest that consideration of enforcement goals may be skewed by concern that compensation would go to the wrong actors. This may help to explain why some countries that permit representative litigation only provide for injunctive relief, while some existing representative litigation mechanisms and some proposals for class actions that provide for compensation require that they be brought by officially recognized associations (Hensler 2009; Hodges 2008; Valguarnera 2010).³ Neither

² In his response to our questionnaire, Martin Partington stated:

From a practical, political point of view, all the options for progress identified by researchers [to satisfy “unmet legal need ...through the provision of legal aid, the creation of law centres, or other enforcement mechanisms which utilize the courts”] are currently seen by governments as expensive and often benefiting lawyers and other advisers as much as (sometimes more than) the people whom the legislation is designed to help. These concerns – always present – are even more acutely felt in an age of austerity and cut-backs in government expenditure.

³ Valguarnera (2010) argues that insistence on enforcement by associations, particularly those previously recognized by the state, is consistent with the hierarchical nature of continental European states, a compromise with the traditional insistence on a rigid public/private dichotomy that enables the state to retain a measure of control. Hensler observes that “[w]hen authority to bring representative actions must be sought from the state or is solely granted to a public official,

available remedies – damages or injunction? -- nor perceived remedial goals – compensation, deterrence or disgorgement? – appear to be a reliable basis for setting the boundaries of our topic.

Similar ambiguity afflicts the concept of the “private attorney general.” 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” (Boyer and Meidinger 1985: 940). Among those not troubled by such matters of first principle, including most Americans (Merryman 1968), 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 (Johnson 2001). 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” (Thompson 2000b: 198).

John Coffee (1983) chose to use the term “private attorney general” in a narrow, idiosyncratic way that may have contributed to its disrepute abroad. Those who are not familiar with the larger landscape or with Coffee’s definitions and qualifications may have been led to believe that all private attorneys general are ethically challenged “bounty hunters.” In fact, Coffee was concerned exclusively with one type of class action, conceived and controlled by the attorney, and his incentive-based critique does not apply even in theory to class actions in which the client is able to monitor the attorney, or to non-class (individual) litigation.

One of the best articulations of the private attorney general concept as practiced in the United States can be found in Justice Brennan’s separate opinion in *Hensley v. Eckerhart* (1983: 444), a case involving attorney fee-shifting under the federal civil rights acts:

For most private-law claims, the public interest lies primarily in providing a neutral, easily available forum for resolving the dispute, and a plaintiff’s choice to compromise a claim or to forgo it altogether based on his private calculation that what he stands to gain does not justify the cost of pursuing his claim, is of little public concern. But, in enacting § 1988 [the fee-shifting provision], Congress determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff.

Four years later, in *Agency Holding Corp. v. Malley-Duff Associates, Inc.* (1987: 151), Justice O’Connor, speaking for the Court, observed:

Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and

it is reasonable to infer that there will be pressure on the association or official not to pursue actions that are inconsistent with state policies (2009: 14).”

attorney's fees. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury "in his business or property by reason of" a violation.

We have been guided by the request of the organizers of this conference rather than by any views that we may have about the essential attributes of private or public law or the proper roles of public or private actors in the legal system. We understand that there are (or have been) deep differences between the civil law and common law worlds about the feasibility and utility of attempting to define those attributes and roles (Merryman 1968). Indeed, discussions with scholars in other *common law* countries in connection with the preparation of the questionnaire we used to solicit information about their legal systems alerted us to the confusion that might result from framing this as a project about "private enforcement of public law." Some of our colleagues in those countries see state involvement in terms of public enforcement of private law. Moreover, in his response to our questionnaire, Chris Hodges observed that "[t]here are admittedly some situations in which private individuals can take action following breach of public or criminal law provisions, but they are very rare in Europe. Basically, we keep the two sides separate. We do not regard private actions (whether for damages or for injunctive relief) as performing a public enforcement function."

Although we acknowledge some inevitable definitional issues, in this paper we focus on situations in which government responds to a perception of unremedied systemic problems by creating or modifying a regulatory regime and relying in whole or 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,⁴ whether by manipulating incentives so as 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 (Fiorina 1982; Kalev and Dobbin 2006; Reiss 1984). We do consider the perceived advantages and disadvantages of private and public enforcement in the United States. We are not seeking, however, to quantify and compare their respective benefits and costs, either in gross (were that possible) or as to any specific area or sector in the United States.

The main purpose of this paper is rather to inform those from other legal systems in which private enforcement has not traditionally played a major role about some of the most important aspects of private enforcement in the United States and, to the extent responses to our

⁴ 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 (the Civil Rights Act of 1964). Republican members of the Senate favored private enforcement precisely because they believed that it would be less robust than administrative enforcement (Farhang 2010a).

questionnaire permit, other common law countries.⁵ We consider both the typical origins of and processes characterizing private enforcement regimes (Fiorina 1982), as well as aspects of the broader social, political and legal landscapes that might be thought to influence those origins and processes.

Although we will not neglect theory, we believe that “abstract speculation on the functioning or desirability of [private enforcement] will get us nowhere” (Boyer and Meidinger 1985: 964; see also Hensler et al. 2009), This work will be more valuable if it enables readers to assess private enforcement in practice. To that end, 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. Timing constraints required us to seek data in existing research, limiting what we are able to say about many important issues. Our questionnaire reflects the belief that it is useful to ask a series of normatively driven empirical questions, to identify what we don’t know and need to know, and what is amenable to empirical investigation.

Our desire to avoid “abstract speculation” combined with the need to make our account of private enforcement manageable are important reasons why we decided to take a sectoral approach, choosing a few areas to study from a much longer list of legal domains in which private enforcement plays a role in the United States. In addition, previous research has established that “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 ... 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” (Stephenson 2005: 106). 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 and Meidinger 1985: 889). Indeed, our assessment that decisions about private enforcement should be made on a retail rather than a wholesale basis helps to explain our view, discussed further below, that class action (or other representative litigation) mechanisms should not be designed or deployed *for that purpose* on a general (trans-substantive) basis, necessarily neglecting the different regulatory policies and goals of different bodies of substantive law (Burbank and Wolff 2010). In sum, because purposeful regulatory design of private enforcement regimes can be seen to represent an exercise of state power (Farhang 2010a), “sectorally specific investigations” appropriately reflect the insight that “one of the most important facts about the power of a state may be its *unevenness* across policy areas” (Skocpol 1985: 17).

⁵ We are not concerned with “judicial review” in the sense of private litigation challenging action or inaction of the government qua government (Stephenson 2005). Our inquiry does include, however, private actions to enforce statutory and administrative norms that are binding on the government when it acts as would a person pursuing his or her individual interests, for instance as a market participant (whatever the relevant market). We are interested in problems that the government’s dual role as enforcer and target of enforcement may create for the efficacy or integrity of the enforcement regime, as for instance when it is claimed that government officials discriminated in employment (Belton 1978; Moorhead 2010; Selmi 1998).

Like others involved in comparative projects that consider “United States law” and legal institutions, we face the dilemma of how to deal with the existence of fifty states, each with its own courts and laws, an overhanging body of federal (national) law and a separate system of federal courts. Although we concentrate on U.S. federal law, state (sub-national) law plays a prominent 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” (Belton 1978: 922; Fiorina 1982: 43) or “judicial intervention” (Kalev and Dobbin 2006: 891). Like exclusive focus on formal legal rules (Nielsen et al. 2010), 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 (Farhang 2009; 2010a).⁶ 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 brought in separate tribunals abroad.

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 that engine -- creating “beautiful cars without engines” (Valguarnera 2010: 42) -- suggests that impotence need not be purposeful (Hensler et al. 2009). It also 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 (Farhang 2010a) 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 because we believe that understanding private enforcement requires familiarity with the social, political and legal context. We focus our discussion on those aspects that reasonably can be thought to have contributed to the growth and subsequent development of private enforcement in the United States. As throughout the paper, we will present comparable information about other common law systems that responses to our questionnaire have made available or that have otherwise come to our attention.

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

⁶ 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” (Hensler et al. 2009: 26). 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.

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 (Burbank 2009; Burbank and Subrin 2011). Realists cringed when the Supreme Court of the United States 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” (Burbank and Wolff 2010). The case in question usefully reminds us, however, what a wild card the modern class action (dating to 1966) has been in the history of private enforcement in the United States. 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,

Having laid out what we take to be the general cultural, social and political influences on private enforcement and the general legal environment in which any private enforcement regime would operate, we turn to the business of institutional architecture: designing an enforcement regime. We first describe the considerations that affect or should affect the choice of an enforcement strategy. That is, 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 hybrid strategy), we turn to 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 and to the market for legal services. Thus, as to the general legal landscape, the architects of the private enforcement regime must consider whether existing formal rules concerning court access, such as standing doctrine, would adequately serve the enforcement goals, while as to the market for legal services, questions concerning incentives are dominant.

Overarching both the choice of an enforcement strategy and structuring a private enforcement regime loom questions of institutional structure. Thus, 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 (Burke 2002; Farhang 2010a). 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.

We have explained why a general approach to the choice of an enforcement strategy and to the design of a private enforcement regime is inadequate, standing alone, for the real-life business of governance. In the penultimate part of this paper, we seek to demonstrate 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, with particular reference to hiring and wages. Here, as noted above, 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 (national) law has played an important role in regulating employment discrimination – even if not as important as generally assumed (Blasi and Doherty 2010) – state (sub-national) 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, and that of readers unfamiliar with the complexities of a federalist legal system, 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.

Even if a sectoral approach were not essential to sensible regulatory design, it has been important to our effort to broaden the scope of this paper so as to address the phenomenon of private enforcement in other common law countries. We recognize and regret that we were not able to gain significant comparative leverage. Our questionnaire was undoubtedly too ambitious, and the perspectives driving the questions asked may have been unfamiliar to some of our respondents. Yet, although this is primarily a paper about private enforcement of statutory and administrative law in the United States, we seek self-consciously to raise questions that will be useful to those who are concerned with regulatory design in other legal systems.

II. General Historical, Cultural and Political Influences on Private Enforcement

A. The United States

For most of its history, by reason of the circumstances of its founding, the United States has depended far more on state and local (sub-national) laws and institutions than it has on federal (national) laws and institutions for solutions to systemic problems unremedied by judge-made common law rules applied in actions between private parties. States have historically 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. Indeed, despite enormous increases in federal regulation since the 1960s, the states of the United States continue to guard their prerogatives, even if inconsistently,⁷ and it remains true that most law governing citizen-to-citizen relationships is state law and much of that is judge-made common law.

⁷ 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 U.S., presents a problem” (Kagan 2001: 15). The same “antistatist sentiments” underlie the tendency of many Americans to explain “business practices that are driven by public policy as

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: during and immediately after the Civil War in the 1860s, during the Progressive Era that bridged the 19th and 20th centuries, during the Great Depression in the 1930s, and during and following the Civil Rights and “Great Society” period in the 1960s. Each of these periods saw increases in the amount of federal statutory and administrative law and in the federal government’s reliance on private enforcement. As to the latter, a data base assembled by Sean Farhang (2010a: 66-68) for the years 1887-2004 contains all federal statutes with (1) a fee-shifting provision or (2) authority to award multiple or punitive damages in cases brought by private plaintiffs. There were three statutes containing either or both of such provisions 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. In some cases, a single statute might contain multiple private enforcement regimes. For some of this period, increasing resort to private enforcement regimes may have reflected in part the slow growth of federal administrative capacity.

Although federal administration is not as much a development of the twentieth century as has often been portrayed (Mashaw 2010), “the absence of an autonomous federal bureaucracy in nineteenth-century U.S. democracy allowed patronage-wielding political parties to colonize administrative arrangements in th[is] countr[y], thereby determining that voters would be wooed with nonprogrammatic appeals, especially with patronage and other ‘distributive’ allocations of publicly controlled resources” (Skocpol 1985: 24). As late as 1941 prominent scholars noted that “an administrative body does not normally act to remedy wrongs which have occurred ... [and that] [t]his power, to act affirmatively after the injury, is still in the tentative stage” (Kalven and Rosenfield 1941). These scholars also pointed out that “there are, of course, many fields in which administrative bodies have not made an appearance” (id.) and that “to impose upon public agencies the task of asserting sanctions on behalf of injured groups will require a substantial increase in size, personnel and expenditures” (id.: 720). They were skeptical about the prospects of that happening because, “[d]espite the great improvement 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” (id.: 720-21).

Government institutions are a reflection of the preferences of those who fashion them. The circumstances of the founding – in particular, the fact that the country, much of it still a vast wilderness, was populated by immigrants some of whose forebears had fled religious or other persecution elsewhere and who sought in the American Revolution to escape the perceived tyranny of royal government – contributed to certain attitudes that 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, particularly “big government.” The federal income tax is only one hundred years old, and although Americans are known as relatively law-abiding in the tax realm, that does not mean that they like paying taxes or want to see their tax dollars used to enlarge bureaucratic authority.

driven by market forces” – a tendency “to underestimate the importance of policy in part because the federal government appears to be weak” (Kelly and Dobbin 1999: 457-58).

Distrust of national government, big government and bureaucratic authority, manifested in part by antagonism towards taxes, are 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. 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” (see also Burke 2002; Kagan 2001: 9). Kagan defines the “engines of adversarial legalism” as including “ready access to the courts, contingency fees, class actions, large money damages, broad judicial authority to reverse government decisions, a politically appointed judiciary, and relatively high levels of legal malleability and uncertainty” (2003: 839). 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 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, often dominate discussions of the role of litigation in American society. Kagan is correct, however, that “adversarial legalism does not arise from a deep-rooted American propensity to bring lawsuits” (2001: 34). 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 (id.)”⁸ 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 legalism weapons” (id.), 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 his recently published book, *The Litigation State*, Sean Farhang (2010a) uses both statistical analysis of systematically collected data and qualitative empirical work focusing on

⁸ Although Kagan (2001) emphasized the problematic aspects of adversarial legalism, he also acknowledges 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 too often underfunded government 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 (Kagan 2003: 859).

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. 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 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.

Although cultural explanations of adversarial legalism oversimplify, there is certainly an 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 later in this paper, the Federal Rules of Civil Procedure (1938) 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 (Belton 1978; Thompson 2000b), 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; see *Bates v. State Bar of Arizona* (1977)). 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 “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” (Hadfield 2010: 143).⁹

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 rulemaking and judicial decisions, often under cover of resource constraints, that compromise steps previously taken to afford effective access to court.

B. Other Common Law Countries

Previous work by American scholars sheds some light on general historical, cultural and political influences that are relevant to regulatory policy in other countries. Thus, Kagan notes that the “winds of change” that brought so much change to the United States in the 1960s and 1970s also “blew through ... Western Europe ... The difference is that the winds were filtered through sharply contrasting political structures and traditions” (2001: 40). Explaining why the United States is unique among economically advanced democracies in the “powerful political role” played by plaintiffs’ tort lawyers, Kagan observes:

In parliamentary democracies with cohesive political parties, the policymaking process is dominated by party leaders in the ruling party or coalition, along with the top civil servants in the relevant ministries, leaders of major business federations ... Changes in the codes of civil justice are enacted only after long deliberation and consultation among legal experts, jurists, relevant central government bureaucrats, and cabinet ministers (2001: 151).

Reflecting on Kagan’s work, David Nelken observes that “[t]reating law as a matter of demand and supply may itself be a variable aspect of legal culture. Europeans are less likely than

⁹ Hadfield (id.) 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) law is in practice less a salient part of everyday life in the U.S. than elsewhere?”

Americans to think about law in these terms because, as Kagan argues, law is more likely to be seen as a topdown task for the state rather than for the citizenry” (Nelken 2003: 823; see also Valguarnera 2010). Work arguing that “civil administrators in both Britain and Sweden have consistently made more important contributions to social policy development than political parties or interest groups” (see also Hecllo 1974; Skocpol 1985: 11) may be to the same effect.

1. England and Wales

In response to our questionnaire, Martin Partington suggests that “the lack of a written constitution with a rigid divide between the executive and the judiciary arguably makes it easier in the UK to create dispute resolution models outside of the formal court structure.” He also notes “that there is greater flexibility in the UK about who can offer legal/advisory services ...[with the result that in areas not reserved for professionally qualified lawyers] non-legally qualified people [i.e., persons lacking formal qualifications] do much of the work ...and, in some cases, receive public funding for so doing.” Concerning private enforcement, Partington writes:

I think awareness of the possibility of taking individual actions became greater in the later 1960’s when there was a new focus on ‘rights’ – that was the era of the creation of law centres, and socially motivated law firms, the Legal Action Group and the like – much of the inspiration being taken from similar developments in the US. The last 40 years has in my view tested the capacity of law to deliver individualized justice – too often the individual case takes away resources that might be better spent for the collective good (for example several houses might be repaired for the cost of one court case.)

Having summarized research findings concerning private enforcement and unmet legal need, Partington continues:

What is common to the empirical studies is the assumption that there are protective rules set out in legislation; individuals must enforce them through the courts if they are to benefit as fully from them as parliamentarians/lawmakers may be assumed to have intended; and that because of the failure of many people to take advantage of these opportunities to enforce ‘their rights’ this demonstrates that there is ‘unmet legal need’ that needs to be met through the provision of legal aid, the creation of law centres, or other enforcement mechanisms which utilize the courts.

....

From a practical, political point of view, all the options for progress identified by researchers are currently seen by governments as expensive and often benefitting lawyers and other advisers as much as (sometimes more than) the people whom the legislation is designed to help. These concerns – always present – are even more acutely felt in an age of austerity and cut-backs in government expenditure.

Different winds may be blowing in England and Wales, however. Thus, recent interest in representative litigation mechanisms has been linked to “the general decline in the last fifteen years of welfare programs in most European countries” (Valguarnera 2010: 2n7). To be sure, “[t]here is a popular belief that a ‘compensation’ culture attitude in the last ten years or so has led to a sustained increase in the number of (Royal Commission on Civil Liability and Compensation for Personal Injury) claims,” whereas in fact “the statistics deny any suggestion that the introduction of CFAs [conditional fee agreements] ... led to a ‘have a go’ world and an increase in litigation” (Lewis 2011: 278). Still, following a flat personal injury claims rate for seven years, there has been a ten percent increase over the past two years, most of them automobile claims. Moreover, elsewhere in the litigation landscape, the reality is closer to popular perception. Geraint Howells documents “a remarkable explosion of borrowers challenging the enforceability of credit agreements and otherwise alleging they were missold financial products,” noting that [p]opular media is full of advertisements encouraging consumers to sue their creditors” (Howells 2010: 617).

Lewis associates the recent increase in personal injury claims with the rapid growth of BTE [before-the-event] insurance cover against legal expenses, which “has been sold as an additional benefit to be included in existing motor liability or household insurance” (Lewis 2011: 278). In order to improve access to justice, he proposes making such cover mandatory for motorists as an alternative to the “radical changes” advocated in a package of “complex, inter-related reforms” proposed by Lord Justice Rupert Jackson (see Jackson 2009; Lewis 2011: 272).¹⁰ The picture Howells (2010) paints is of a classic unremedied systemic problem: weak private law remedies, failure of administrative enforcement, private litigation (in this case enabled by claims management companies and lawyers working under conditional fee agreements) taking up the slack, burgeoning court dockets and consequent interest in representative litigation. He concludes:

Consumer credit litigation symbolizes a modern rights-based consumer society. However, there is need to find a balanced set of rights and effective and affordable means of delivering justice. The challenge is to prove that consumers can be rigorously protected by regulators and the [Financial Ombudsman Service]. It is a test of whether the regulatory welfare state is strong enough to prevent the need for US-style consumer Regulation ... What is needed to prevent consumer claims from falling over the edge and becoming marketable commodities for litigators are effective consumer protection laws that consumers can access for the most part without the need for legal assistance, but also crucially access to publicly funded legal assistance when needed (id: 644).

¹⁰ The new Conservative/Liberal Democrat government is moving toward adopting Lord Justice Jackson’s key proposals (“Clarke Gives Full Backing to Jackson,” *Solicitors Journal*, November 23, 2010, p. 3), publishing a consultation paper in November 2010 (see <http://www.justice.gov.uk/consultations/docs/jackson-consultation-paper.pdf>), with a request for comments by February 14, 2011.

In their responses to our questionnaire, both Martin Partington and Chris Hodges point out what the former calls “the changing approach to regulation by government.” Hodges notes that in England and Wales “criminal courts and regulatory agencies have not regarded it as part of their function to deal with civil (i.e., private) damages issues.” He continues:

But that policy has changed, at least at government level, in relation to consumer protection issues. The change has emerged as part of the debate during the past decade on two different issues. Firstly, there is the ‘Better Regulation’ policy, which is an attempt to reduce regulatory and economic burdens on business, and also to reduce costs and increase effectiveness for the activities of public agencies. Secondly, there has been the ongoing debate on ‘collective redress’ for consumers. That debate aims at delivering increased damages to consumers in mass situations where claims are usually low, whilst positively avoiding what is seen as the potential for abuse and high unnecessary transactional costs that would flow from the privatised solution of a ‘class action-type’ mechanism.

The outcome of these two streams of thought has been a governmental decision that is the converse of privatisation of the compensation function. It was heavily influenced by looking at the Nordic (especially Danish, but the other Nordics have similar systems) Consumer Ombudsman (who is not a neutral intermediary-style ombudsman, but a governmental enforcement officer for consumer and competition law). The new UK policy has been called ‘regulation plus’. It is still developing, and being trialled, so as to persuade the main local consumer officers (called Trading Standards Officers, employed by local Councils) that they can deliver re-balanced markets and effective enforcement not just by using their traditional quasi-criminal and administrative enforcement powers but also new powers aimed at delivering private compensation.

2. Australia

Responding to our question about structural influences on regulatory strategy, Peta Spender notes:

The federal system in Australia complicates enforcement generally. There are 6 states, 2 territories and the federal system to take into account when considering enforcement strategies. Increasingly there are co-operative regimes which create uniform regimes but they are still the exception rather than the rule. In the federal system, a rigid interpretation of the separation of powers has created a strange bifurcation between court and tribunals which has complicated the choice of forum. There tribunals deal with public law remedies and courts do most other claims, especially private law claims. At the state

and territory level there are fewer constitutional constraints and there many tribunals deal with a wider range of remedies both in public and private law.

She places Australia “somewhere between” the United States and England and Wales “in general views about government.” In her view, arrangements about private enforcement in Australia reflect the fact that “Australians are not as individualistic as the US but they are more suspicious of central government than the British,” with the result that “there is a mixture of public and private enforcement of laws with a current tendency to expand private rather than public enforcement due to resources.” Noting that, although “[o]verall Australians are probably conservative,” they have “been willing to embrace social change at various times,” Spender reports that Australia “had a comparable ‘Civil Rights period’ to the US in the 1970s-1980s, and this led to conferral of new rights and causes of action.” She adds that “it didn’t necessarily lead to higher rates of private enforcement and by the 1990s it led to broader control of enforcement by the courts through strategies such as case management.” Along the same lines, Spender observes that “[t]here is some reservation about giving the legal profession too much control of enforcement.” Notwithstanding “considerable reticence to allow lawyers to use contingency fees,” however, “in other respects lawyers play a critical role in a comparatively large range of enforcement activity.” Finally, Spender links (relatively) high private enforcement to “areas which were the subject of co-operative federal legislative reform in the 1970s to 1990s, e.g., securities and consumer claims. The passage of federal legislation which effected structural reform of the markets, together with the introduction of procedural devices such as class actions, facilitated private enforcement to a significant extent.”

3. Canada

Having described Canada’s federalist structure, Jasminka Kalajdzic observes:

It is difficult to gauge the impact of this federalist structure on choices between public and private enforcement mechanisms. More than anything else, the enactment of the *Charter of Rights and Freedoms* in 1982 (Canada’s bill of rights) contributed significantly to a “rights consciousness” among Canadians. The *Charter* also substantially enlarged the powers of courts, critically at a time when trust in representative politics was low and continued to decline over the next few decades (Bogart 2005, ch. 2). There continues to be widespread general faith in the court system to resolve private disputes and enforce individual rights, and an increasing gap between private citizen and elected government (*Back on the Map*, 2010).

She notes that since the *Charter* became effective Canadian courts “have dealt with a multitude of issues that could broadly be categorized as harbingers of social change,” that the “Canadian judiciary has not escaped the charge of inappropriate judicial activism,” but that the Supreme Court of Canada “has been sensitive to adjudicating questions of social policy.” Finally, with regard to the current status of and prospects for private enforcement in Canada, Kalajdzic writes that “human rights have long been enforced by way of privately-initiated litigation and/or

administrative tribunal.” She also notes that although “employment standards are supposed to be enforced by provincial government agencies, [they] have been, on the whole, inadequately enforced, leading to a call for private prosecutions” (citation omitted).

III. The General Legal Landscape in Which Decisions about Private Enforcement Are Made: Costs and Funding, Procedure, and the Powers of the Judiciary

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. The United States

1. Costs and Funding

a. Court Costs

Civil court systems in the United States 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 appeal is \$450. Those who cannot afford to pay the filing fees may be entitled to relief under provisions for *in forma pauperis* filings. Different fee arrangements govern specialized courts, such as the bankruptcy courts in the federal system.

Determining whether public funding of American courts is adequate for their needs is an extremely challenging enterprise. Although some scholars have voiced skepticism that the federal courts are underfunded (Galanter 2004; Resnik 2004), reliance for that purpose on docket statistics can be misleading (Burbank 2004a). 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) cases¹¹ and more recently immigration cases, have made it impossible for civil litigants to obtain a reasonably prompt trial date. Some have 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 (Fiss 1984).

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

¹¹ Constitutional and statutory requirements providing for speedy trials may force courts to give criminal cases precedence over civil cases.

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 (Burbank and Subrin 2011; see also Genn 2010). One such value is honoring congressional decisions to rely on private enforcement of statutory and administrative law. In a country whose citizens distrust bureaucratic authority and dislike taxes, and in a time of budgetary stringency, it may be 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 lawmakers have made the federal courts unattractive to business and inaccessible to the middle class – a very effective way to control the civil docket.¹² Similar concerns arise with respect to some of the ways in which federal appellate courts have coped with their expanding caseloads, for instance, by rationing oral argument and creating a functionally discretionary docket through enhanced reliance on staff attorneys and tiered appellate review that distinguishes between precedential and non-precedential opinions (Burbank 2005; Cohen 2002).

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 (ABA Coalition for Justice 2009; Thornburg 2010). Moreover, 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 advanced and transitioning European countries" (Hadfield 2010:

¹² Although the extent to which corporations favor arbitration over (federal) litigation for the resolution of inter-corporate disputes is less clear than often asserted (Eisenberg and Miller 2007), it is clear 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 1925) 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 the 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" (2010: 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 (Hodges 2008). 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.

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.).

b. Party Costs

The general rule in American courts, federal and state, is that the loser in litigation pays the winner’s costs, in the sense of the incidental expenses of litigation such as copying expenses and witness fees. Such costs do not include attorneys’ fees (unless a statute otherwise provides), and because the limited universe of expenses they do include is prescribed by statute, there is no need for an elaborate process, let alone for taxing masters.¹³

As is well known, but for historical reasons that remain somewhat obscure (Leubsdorf 1984), it has long been the law in virtually every American court system – Alaska is the exception -- that each party is responsible for that party’s attorneys’ fees -- win or lose. In other words, the default rule¹⁴ 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” (which can now clearly be seen as a rule only about attorneys’ fees) 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 which, as has often been remarked, would more accurately be called the “Most-of-the-World Rule” (Kritzer 1992).

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 (Kritzer 2002a: 1947-61). That said, since this part of our project seeks to identify what in the general landscape wise public policymakers would consider when choosing a regulatory strategy and building a private enforcement regime, there may be some value in noting some of the conclusions of a recent review and assessment of the theoretical and empirical literature.

¹³ This is not to say, however, that the determination of attorneys’ fees in those situations where an exception to the American Rule applies does not consume substantial judicial resources. Americans have had their “Attorneys’ Fees Wars” just as the English have had their “Costs Wars.”

¹⁴ American 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” (Donohue 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 enjoys an overwhelming efficiency advantage” (Eisenberg and Miller 2010: 37-38).

But the ongoing political debate over litigation costs in the US does not seem to have assimilated the main lesson of the economic literature on the topic – that the effects of cost shifting on the amount and intensity of litigation are substantially more complicated than a superficial consideration of the matter may suggest. Indeed, the current state of economic knowledge does not enable us reliably to predict whether a move to a 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. The reason for this agnosticism is straightforward. In short, fee shifting is too coarse a tool for the multifaceted problem that it is meant to solve.

....

All in all, despite the substantial scholarly and popular attention that the question of indemnity for legal fees has attracted, the number of robust conclusions that can be drawn regarding its consequences are few. Fee shifting does appear to increase legal expenditures per case, in some cases significantly. It also encourages parties with poorly 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 it on balance 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. In this regard, the relative lack of systematic empirical investigation of these questions is particularly lamentable.

....

Whether the English rule is more just than the American rule, or whether its greater fairness justifies its incentive properties cannot be settled by lawyers or economists alone. The citizenry as a whole must decide whether the principle of full compensation for victorious litigants outweighs the procedural values of providing citizens with an open forum for grievances and an opportunity to be heard, the uncertainty imposed on those who cannot predict the outcome of court decisions, and the political implications of regulating legal fees through a system of bureaucratic oversight rather than through private contract between attorney and client. Moreover ... rules of cost allocation feed back through the selection of cases to influence the development of other areas of substantive and procedural law. 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 (Katz and Sanchirico 2010: 2, 34-35).

The American Rule is subject to a number of exceptions, both judge-made and statutory. In the former category is the rule that a court has the power, without benefit of statute or court rule, to order attorney fee shifting as a sanction for bad faith litigation conduct. In addition, at a time when class actions were solely the province of equity – that is, in the federal courts before the 1938 Federal Rules -- courts carved out an exception in order to ensure that those who created a common fund could be reimbursed from that fund.¹⁵ From the perspective of incentives, the courts altered the normal rule about attorneys’ fees in order to prevent free-riders from discouraging those who would otherwise seek to create value for a group through representative litigation (Hensler 2009).

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, as we shall see, did the influence of the class action on private enforcement. Both that development and increasing congressional resort to attorney fee-shifting provisions to stimulate private enforcement starting in the late 1960s (Farhang 2010a) emboldened a number of plaintiffs’ attorneys to seek to extend the common fund exception to the American Rule by persuading lower courts to authorize fee shifting when an individual plaintiff had created a common benefit and thus might be thought to qualify as a private attorney general. The Supreme Court put a stop to this development in 1975 (*Alyeska Pipeline Service Co. v. Wilderness Society* 1975), holding that the creation of any additional exceptions was a matter for Congress.

Alyeska quickly elicited legislation prescribing fee shifting for federal civil rights cases, see 42 U.S.C. §1988 (originally enacted in 1976), only some of which had previously been governed by statutory fee shifting provisions. *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.¹⁶

The common fund exception to the American Rule and the exception for bad faith litigation conduct serve very different purposes. As we have seen, the former reflects principles of equity and, although probably not originally designed to promote class actions, made it possible for class representatives to confine the risk of footing the legal bill for the class to the event of defeat; for the future, it provided a potentially potent incentive to use the class form of litigation. Attorneys’ fees as a sanction available as a matter of inherent judicial power, by

¹⁵ 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).

¹⁶ 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 than any other ... at best the effects are ambiguous” (Katz and Sanchirico 2010: 12).

contrast, are intended as a disincentive to willfully frivolous or vexatious litigation behavior.¹⁷ As we shall see, Congress has typically sought to deploy attorneys' fees for both purposes.

c. Funding

The norm in the United States is that 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 (Leubsdorf 1984).

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 in the United States, and federal legal aid is prohibited for class actions (Hadfield 2010). Non-profit groups played an important role in private enforcement of statutory and administrative law in the 1960s and 1970s, particularly in the fields of civil rights (Belton 1978; Farhang 2010a) and environmental law (Thompson 2000b), and their success spurred the creation and private funding of groups with radically different legal and political agendas (Southworth 2008; Teles 2008). 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. In the United States, 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 (delict) litigation, and they most commonly call for the lawyer to receive one third of any monetary judgment (Kritzer 2004). 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.

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

¹⁷ Beginning with amendments in the 1980s, federal court rules increasingly relied on sanctions, including attorneys' fees, to deter violations of those rules, including negligent violations. An attempt by some federal courts to use one such rule, Federal Rule of Civil Procedure 11, for the purpose of altering the American Rule was frustrated by Supreme Court decisions and a 1993 amendment (*Cooter & Gell v. Hartmarx* 1990; Burbank 1989). Moreover, the federal judiciary was unsuccessful in efforts to sell proposed amendments to Rule 68, which were designed to facilitate settlement, by switching from a fee-shifting to a sanctions rationale (Burbank 1986).

nature of a particular lawyer's practice. 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 (Kritzer 2004; but see Moorhead 2010).

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 forty or fifty 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" -- may have increased apace. To date we lack reliable empirical evidence for these phenomena. To the extent that such evidence confirms them, it will thereby also confirm the enhanced importance of class actions and statutory attorney fee-shifting provisions. We defer additional discussion of the latter to Section IV, where we take up structuring a private enforcement regime. We end this subsection with some additional observations about the class action.

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 (Burbank 2009). 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 thereby 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, see 28 U.S.C. § 2072 et seq., Rule 23 immediately overlaid pre-1966 private enforcement regimes and became part of the general landscape in which subsequent regimes were constructed (*Califano v. Yamaski* 1979).

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 (Gilles and Friedman 2006).

Granted that, as discussed in Section I, notions of private vs. public enforcement do not map neatly onto remedies or remedial purposes, we are now clearly in the territory that is our primary concern. 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 which 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 under Rule 23, 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” (28 U.S.C. § 2072(b)), and that the Federal Rules apply trans-substantively (Burbank and Wolff 2010).¹⁸

¹⁸ Readers may have noticed our failure to discuss either insurance or third-party funding. From the perspective of access to court for private enforcement, insurance is not an important consideration for plaintiffs in the United States because of 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 alternative litigation funding (ALF), so called because the contingent fee and liability insurance covering defense costs are themselves mechanisms of third-party funding (Garber 2010). ALF has only recently made an appearance on the U.S. legal scene; it confronts significant barriers erected by the self-regulating legal profession (Hadfield 2000; Hadfield 2008a; Sebok 2011), and, to the extent 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 (Garber 2010).

2. Procedure

Litigation in federal court and many state courts is commenced by the plaintiff filing a complaint. Under the Federal Rules of Civil Procedure, which have served as a model for many state procedural systems, the filing of a complaint may elicit a number of responses from those who are sued. Thus a defendant can choose to state all available defenses or objections to the complaint in a responsive pleading called an answer, or he can seek to have certain defenses or objections determined before filing, and may do so in the hope of avoiding the need to prepare, an answer. One such defense or objection, prescribed by Federal Rule of Civil Procedure 12 (b) (6), is failure to state a claim upon which relief may be granted.

How particular and how persuasive a procedural system requires a complaint to be have important implications for the ability of potential plaintiffs to pursue adjudication of disputes on the merits (withstand a motion to dismiss), including their ability to discover relevant information from defendants in order to prove their allegations at trial (or to defeat a motion for summary judgment). They thus also have important implications for the ability of those who have been injured to use litigation in order to secure compensation, and the ability of government to use private litigation effectively for enforcement.

From the perspective of those who are or may be sued, pleading requirements determine the ease with which they can be brought into court and forced to incur direct and opportunity costs in defending against, or even settling, what may be meritless claims. Finally, from the (self-interested) perspective of the judiciary, pleading requirements affect the volume of civil litigation and the types of litigation activity that filed cases produce, both of which affect the allocation of resources by court systems.

The Advisory Committee that assisted the Supreme Court by drafting the 1938 Federal Rules of Civil Procedure preferred pleading rules that were simple and flexible. The committee was in part reacting to the existence in many states of pleading rules – applicable in federal courts in those states -- that required the plaintiff to state facts supporting each element of the cause of action relied on. Those who drafted the Federal Rules objected to this type of “fact pleading” because it led to wasteful disputes about arbitrary distinctions among “facts,” “conclusions,” and “evidence.” In addition, vast changes in social and economic life since the mid-nineteenth century had made it harder for many of those suffering injuries – for instance those without resources to conduct an extensive pre-filing investigation – to know exactly what the facts were. This was another reason the Advisory Committee determined to reduce the role of pleading – and to provide for wide-ranging discovery through written interrogatories, oral depositions and requests for the production of documents -- in the new procedural system it was fashioning for the twentieth-century federal courts (Subrin 1987).¹⁹

¹⁹ The members were also aware that Congress had in the past sought to promote private enforcement of statutory law (as in the antitrust statutes) and that the 1930s New Deal Congress was enacting an unprecedented number of regulatory statutes. Knowing that new legal bases of relief were being developed as a result of federal legislation, the committee wanted to escape the confinement of prior pleading regimes. They repeatedly emphasized that the procedures they had drafted should help insure that cases were decided on the merits rather than on the pleadings (Burbank and Subrin 2011).

To achieve its goals of simplicity and flexibility, the original Advisory Committee decided to provide in Rule 8 that “[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings and motions are required.” The Rule only required the plaintiff to supply in the complaint “a short and plain statement of the claim showing that the [plaintiff was] entitled to relief.” The committee attached forms to the rules showing how very little was required of plaintiffs -- just enough that (1) the defendant could answer the complaint and the case could proceed to the next step, discovery, and (2) in the event of other litigation involving the same parties and subject matter, the law of *res judicata* (claim preclusion) could be applied.

Having dismantled one barrier to effective court access (restrictive pleading rules), the Advisory Committee sought to enable resolution of disputes on the basis of mutual knowledge of the relevant facts by providing for the sharing of information through discovery processes of very broad scope. The discovery rules furnished those seeking evidence of wrongdoing with the functional equivalent of administrative subpoenas, and, from a regulatory perspective, furthered the progressives’ goal of transparency (Kersch 2002). Indeed, a decade before the chief architect of the discovery provisions in the Federal Rules started work on those provisions, and under the influence of English procedure, he observed:

The spirit of the times calls for disclosure, not concealment, in every field – in business dealings, in governmental activities, in international relations, and the experience of England makes it clear that the courts need no longer permit litigating parties to raid one another from ambush (Sunderland 1925: 116; see also Burbank 2004c).

The Federal Rules of 1938 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* (1947) and *Conley v. Gibson* (1957), 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 the 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.

As the volume of federal litigation increased, and as the federal judiciary became more conservative, the rulemakers responded by turning to one approach after another -- from managerial judging, to sanctions, to summary judgment. 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 whether a case should be permitted to proceed (Burbank 1989; 2004c). 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 thirty 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 which is born by the party from which 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. Thus, Paul Carrington observed:

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 accomplished 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 disincentives for lawless behavior across a wide spectrum of forbidden conduct (Carrington 1997:54).

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 enforcement mechanism for the anti-trust laws, the securities laws, environmental law, civil rights, and more. In the main, the plaintiff in these suits must discover evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress (Higginbotham 1997: 4-5; see also Burbank and Subrin 2011).

The rulemakers have responded to complaints about discovery with round after round of amendments designed to streamline the discovery process. They introduced (but then restricted the ambit of) required disclosures (i.e., without waiting for a discovery demand), presumptive limits on the number of interrogatories and depositions and the length of depositions, and even purported to reduce the universe of discoverable material from that which is relevant to the subject matter of the action to that which is relevant to a claim or defense. More 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 research – a phenomenon characteristic of discourse about all of American civil litigation (but see Willging and Lee 2010).

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” (Gordon 2009: 1199; Hadfield 2008b). With

respect to discovery in particular, empirical research conducted over forty years has not demonstrated that it is a problem – is disproportionately expensive -- in more than a small slice of litigation. 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 (Mullenix 1994). Most recently, 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 (Lee and Willging 2009, 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).

The failure of empirical study to verify the oft-told tale of pervasive discovery abuse and pervasively crushing discovery expense notwithstanding, 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 impositions of discovery (Easterbrook 1989), the Supreme Court made it more difficult for the plaintiffs in such cases to survive a motion to dismiss (*Bell Atlantic Corp. v. Twombly* 2007). 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. Thereafter, in another case where the Court 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 (*Ashcroft v. Iqbal* 2009; see Burbank 2009).

Notice pleading and broad discovery were created under the auspices of the Supreme Court pursuant to congressional delegation. Once firmly entrenched through *Conley v. Gibson* (1957), 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 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 such amendments were unlikely to survive the congressional review to which they would have been subject before becoming effective.

It is no surprise that in discussions and debates about these decisions, the anecdotes one hears from their defenders 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 United States Chamber of Commerce, which lobbies on behalf of American business and has been a major source of attacks on lawyers and litigation, if the proposal were to give the Equal Employment Opportunity Commission adequate resources, raised through increased taxes, to enforce federal anti-discrimination law.

3. 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 are thought to restrict 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.

As noted in Section I, most American law that has been developed to resolve disputes between private parties has been state law and has been made by state courts and state legislatures. Federal courts do not have common lawmaking powers remotely approximating those of state courts. As a result when, for instance, existing tort (delict) 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. 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” (*City of Milwaukee v. Illinois* 1981: 314).

Subject to the Constitution, Congress holds ultimate lawmaking power concerning procedure in the federal courts (Burbank 2004b). 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; 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 – or, as we observed above, 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. With respect to procedural common law, *Twombly* and *Iqbal* suggest how the judiciary may be able sap private enforcement regimes through change to the background rules under the guise of interpretation, evading congressional review before the judiciary’s policy choices become effective (Burbank 2009; Hatamyer 2010).

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 (Boyer and Meidinger 1985; Chayes 1981). 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 (*Touche Ross & Co. v. Redington* 1979).

B. Other Common Law Countries

Appendix A contains a great deal of information provided by our respondents concerning the arrangements for costs, funding, procedure and judicial power in the other common law countries we selected for comparison. In addition, a detailed comparative study on costs and funding has just been published, co-edited by Chris Hodges, one of our respondents (Hodges et al. 2010). In the circumstances, we will only briefly summarize what we take to be the most salient differences between the United States and the other common law countries on these subjects.

1. Costs

a. England and Wales

As to court costs, some of our respondents echo the criticisms of Dame Hazel Genn (2010) concerning government policy to make civil courts largely self-supporting (and even to use part of the sums collected to subsidize criminal proceedings), although Martin Partington cites research to the effect that “by themselves, the fees charged by the courts do not act as a significant deterrent to individuals taking cases to court.” Partington’s response also reminds us of the role of “other fora, such as tribunals or ombudsmen,” which “typically involve the individual incurring no initial costs or only modest initial fees,” and where it may not be necessary for the parties to hire lawyers. This suggests that a simple comparison of court costs as between the United States and another country would be misleading, or at least incomplete, to the extent that either country provided an accessible alternative forum. In that regard, having ventured the “hunch” that “courts are not well equipped to deal with mass litigation,” Partington states that “the reason that employment tribunals were established was fear of swamping of the county courts by employment disputes.”

As discussed in connection with the costs and benefits of the American Rule on attorneys’ fees, the rule that the loser must bear some (party-party costs) or all (indemnity costs) of the winner’s costs, including attorneys’ fees, prevails in England and Wales. Yet, as Richard Moorhead points out, costs are very rarely shifted in employment tribunal cases, and even in court cases there have been significant exceptions since the development of legal aid. The recommendations of Lord Justice Jackson, if adopted, could lead to additional exceptions (Jackson 2009).

There is a developed market in before-the-event (BTE) insurance, which covers both the insured’s own legal costs and an adverse costs order, and Richard Moorhead notes research suggesting that it is widely purchased. Indeed, as discussed in Section II, a proposal to make such cover mandatory for motorists has recently been advanced as an alternative to the “radical changes” proposed by Lord Justice Jackson (see Jackson 2009; Lewis 2011: 272). After-the-event (ATE) insurance is a relatively new development (White and Atkinson 2000). As Neil Andrews observes, because ATE premiums have been shifted in actions funded under a

conditional fee agreement (CFA, discussed below),²⁰ they have featured prominently in the recent “costs war” (Kritzer 2009).²¹ This aspect of the landscape would change if Lord Justice Jackson’s recommendations (2009) were to be adopted.

b. Australia

Australia appears to be closer to the United States than to England and Wales in its approach to court costs. By contrast, Australia also follows the English Rule on party costs, distinguishing between costs calculated on a party-party vs. solicitor-client or indemnity basis. As Peta Spender notes, however, the American Rule applies in a significant group of tribunals (as it does in England and Wales)

The ubiquity of fee-shifting under the English Rule in court actions has fostered a market for BTE insurance in Australia, and it “is routinely taken out for certain claims such as motor vehicle accident and public liability claims.” According to Spender, ATE insurance “is rarer in Australia although some financiers provide it.”

c. Canada

Like Australia, Canada seems closer to the United States than to England and Wales in its approach to court costs but closer to England and Wales than to the United States with respect to party costs. Jasminka Kalajdzic reports that, notwithstanding the prevalence of the English Rule in Canada, “European-style legal expense insurance (LEI) is still rare in Canada. Commercial LEI is available but is narrow in its coverage and does not have a wide market among non-professionals.”

2. Funding

a. England and Wales

The sudden change of attitude that led those who had derided contingency-fee litigation as “litigation on spec” to adopt its cousin, the conditional fee, prompted Richard Abel (2001) to draw on a comment by an opponent of contingency fees for the title of his article “An American Hamburger Stand in St. Paul’s Cathedral: Replacing Legal Aid with Conditional Fees in English Personal Injury Litigation.” For present purposes, the important point is that, as suggested by that title and as Neil Andrews observes, the change was a clear and direct result of the perceived need

²⁰ Neil Andrews’s comments are drawn from his recent book (see Andrews 2010).

²¹ In a communication to the authors, Professor Alan Paterson observed that Scotland has allowed speculative fees (normal fee if you win, no fee if you lose) since time immemorial and that Scotland followed England and Wales in permitting the conditional fee but did not make it recoverable from the losing side. In addition, according to Paterson, in part because Scotland has kept legal aid for personal injury cases, it has not experienced so many claims companies, and ATE insurance has been much less common. Percentage-based contingent fees are banned as a matter of legal ethics, but claims companies can charge them because they are not lawyers.

drastically to reduce the Legal Aid budget for civil cases. The details of the post-1990 development of the CFA, which, as Andrews points out, “now embraces all civil litigation or arbitration, other than certain family law matters,” need not detain us (for a detailed history, see Abel 2003). We do note, however, that although the American percentage-based contingency fee may “remain[] unlawful in English law,” that is not true for employment tribunals (Moorhead 2010). Moreover, Lord Justice Jackson’s recommendations, if adopted, would introduce percentage-based fees in sectors of civil litigation.

In Section II we included excerpts from the responses of Chris Hodges and Martin Partington, and summarized a few recent articles, that shed light on current discussions and debates in England and Wales that implicate representative litigation. As described by Neil Andrews, “representative proceedings remain distinctly marginal in England” because of the English Rule and the fact that absentees “are not subject as parties to liability for costs.” Notwithstanding vigorous advocacy of reforms along American lines domestically and in the EU, Hodges observes that to date regulatory policymakers have chosen other paths for dealing with unremedied systemic problems. With one exception, we are not sufficiently informed about those decisions and their underlying reasons to express any view. The exception relates to Hodges’ suggestion that the door lies open to the use of class actions in particular sectors. As our discussion of Rule 23 in this Section clearly suggests, we agree with the conclusion that the decision whether to use representative litigation for compensation or deterrence (as opposed to litigation efficiency and consistency) should be made on a sector-by-sector basis. Indeed, to the extent that the class action is considered as an instrument of private enforcement, any other approach is, in our view, inconsistent with good regulatory policy.

b. Australia

Peta Spender’s response observes that civil legal aid “is very restricted both on merits and income bases” and sets forth the pertinent criteria. As might be expected, therefore, although lawyers “are not permitted to enter into contingency [percentage-based] fee arrangements,” “no win no fee arrangements are common, as are uplift fees, which allow lawyers to charge an additional percentage fee if they are successful in the litigation.” Moreover, third party funders are permitted to work on a percentage fee basis even though the lawyers they retain are not. Spender notes that such funders “have become more active in Australia over the last 10 years but tend to be involved in the large claims” such as class actions, which, as she notes in response to our targeted question on that subject, are available “in Federal Court in the Victorian Supreme Court” (see also Hensler 2009).

c. Canada

Jasminka Kalajdzic notes that legal aid certificates, which enable retention of private counsel payable according to the legal aid tariff, “are rarely approved for civil litigation matters in Ontario and the rest of Canada.” Moreover, although funded clinics “do offer legal advice and assistance regarding a number of non-criminal matters,” she points out that the “usual two-way costs rule applies to cases involving a clinic lawyer or private practitioner working on a legal aid certificate,” and that, at least in Ontario, the costs are “to be borne by the client personally, and

not Legal Aid Ontario, unless the court is satisfied on the evidence that Legal Aid Ontario acted unreasonably in funding a client.” It is perhaps no surprise then that “[c]ontingency fees are now permitted throughout Canada, in both class actions and most non-representative proceedings.” Because the normal two-way cost shifting applies to class actions in the majority of Canadian provinces – albeit “sometimes modified, having regard to the underlying purposes of the *Class Proceedings Act, 1992*, one of which is to secure access to justice” – it is also no surprise that “the issue of third party funding and indemnity agreements in class actions is receiving increasing judicial attention. In 2009, the Ontario Superior Court of Justice considered the propriety of such an arrangement with an Irish funder in *Metzler Investment GMBH v. Gildan Activewear Inc.*, 2009 CanLii 41540. The agreement was not approved in that case, but without foreclosing the third party funding option in principle. In an unreported decision of the Supreme Court of Nova Scotia, however, the same plaintiff’s law firm involved in the *Metzler* case was successful in obtaining court approval of a third party indemnity agreement against adverse costs between the representative plaintiff and a private funder.”

3. Procedure

The Appendix contains extensive information about pleading and discovery in each of the three countries whose institutions we sought to cover in our survey. That information defies summary, which would in any event risk error or distortion. It does appear that pleading (“statement of case”) in England and Wales has long required greater factual specificity than was true under the notice pleading regime of the 1938 Federal Rules and that it does so in Ontario and perhaps elsewhere in Canada; that does not appear to be true in Australia. If this is correct, the U.S. Supreme Court’s recent pleading decisions would move federal law closer to the English court model, where, however, private enforcement has not played a role akin to that it has played in the United States since the 1960s.

Similarly, even though English discovery was one of the sources of inspiration for the 1938 Federal Rules on that subject, it is doubtful that it has ever been as broad as it was (and is) under those rules. Moreover, it seems that discovery of non-parties under English law is much more restricted than it is under the Federal Rules. By contrast, we infer that English disclosure – required exchanges without request -- which also was one of the inspirations for federal law, remains broader than it now is under the Federal Rules (after amendments removing the requirement to disclose documents helpful to your opponent).²² Neil Andrews’ account of discovery tells us that there has been a widespread perception of disproportionate discovery in England and Wales, particularly as a result of electronic documents, similar to that discussed above in connection with federal litigation in the United States. We do not know, however, whether the perception there has a firmer basis in empirical research than it does here.

Jasminka Kalajdzic’s account of recent discovery reform in Canada sounds many of the themes that have been prominent on the federal level in the United States. It is not clear the

²² Another difference in the respective disclosure regimes – one that recent discussions suggest may be a cause for regret in England and Wales – is that disclosure is part of the pre-action protocols introduced as part of Lord Woolf’s reforms in the 1990s, whereas the Federal Rules provide for it only after the commencement of proceedings.

extent to which, if at all, the reforms in question were undergirded by empirical evidence. For those who believe that trials should be a realistic prospect in far more cases than is true today (Burbank and Subrin 2011), the model of a simple case track, with very limited disclosure/discovery, that she describes is likely to be of interest.

4. Judicial Power

Our questionnaire elicited little information about the judiciary. As previously noted, Martin Partington suggests for England and Wales that “the lack of a written constitution with a rigid divide between the executive and the judiciary arguably makes it easier in the UK to create dispute resolution models outside of the formal court structure.” He also notes that the “judiciary do have powers to make procedural rules in both courts and tribunals,” stressing the importance of keeping in mind that “there are two distinct branches of the judiciary with somewhat different approaches to judging,” and noting the greater experience that the tribunals judiciary has in dealing with pro se litigants.

Peta Spender’s description of court rulemaking power in Australia suggests a view of separation of powers and of judicial power more characteristic of states of the United States than of the federal judiciary, which claims very limited inherent power and regards supervisory court rulemaking as an exercise of delegated legislative power. Spender also observes, however, that “overall the courts would consider that it is the responsibility of the legislature to initiate consequential reform in” areas such as third-party funding and security for costs. Finally, Spender’s discussion of implied rights of action suggests an approach very much like that in U.S. federal jurisprudence prior to the retrenchment beginning in the late 1970s.

Jasminka Kalajdzic notes that, although “drafted by rules committees, on which judges and lawyers sit, [civil procedure rules] are passed by the legislature,” a system that apparently is not restricted to Quebec, where it would be expected. On the question of standing, she observes that “[e]ven before the passage of the *Charter* the Supreme Court of Canada considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources. It expanded the rules of standing in a trilogy of cases.” She also discusses a post-*Charter* decision of the Supreme Court of Canada in which the Court “extended the scope of the trilogy and held that, where a private litigant with a direct private interest in the matter is not expected to initiate an action, courts have a discretion to award public interest standing to challenge an exercise of administrative authority as well as legislation.”

IV. Choosing an Enforcement Regime

In this section 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 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 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 section.

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 Section 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.²³

²³ In reviewing this literature we draw partly upon the excellent review by Stephenson (2005).

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 (Gilles 2000: 409-10; Rose-Ackerman 1992: 192; Sunstein 1992: 221; Thompson 2000b: 191-92). Allowing and encouraging private litigation can bring vastly more resources to bear on enforcement, potentially mobilizing private litigants and plaintiffs' attorneys in numbers that dwarf agency capacity (Boyer and Meidinger 1985: 883; Coffee 1983: 218; Gilles 2000: 1387, 1413; Roach and Trebilcock 1996: 479-81; Stephenson 2005: 107-08; Stewart and Sunstein 1982: 1214). 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 (Boyer and Meidinger 1985: 879; Coffee 1983: 224-25; Shermer 1999: 469-70; Thompson 2000b: 200).

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 focusing on the U.S. 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 to private parties (Burke 2002: 15-16; Kagan 2001: 15-16; Melnick 2005; O'Connor and Epstein 1985; Farhang 2010a: 129-71). 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 implementation costs are born by the government.²⁴

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 achieve through monitoring, even under the most optimistic budget scenarios (Bucy 2002: 5, 8; Gilles 2000: 1387, 1413; Roach and Trebilcock 1996: 480-81; Shermer 1999: 473; Thompson 2000b: 190-92). 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" (Gilles 2000: 1413).

Private enforcement regimes encourage legal innovation. Private litigants stand in sharp contrast with a centralized and hierarchical bureaucracy, which frequently engenders what

²⁴ 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.

Richard Stewart and Cass Sunstein characterize as comparative “diseconomies of scale, given multiple layers of decisions and review and the temptation to adopt overly rigid norms in order to reduce administrative costs” (see also Boyer and Meidinger 1985: 836; Stewart and Sunstein 1982: 1298). 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 are likely to expand the parameters of liability and the methods for establishing it, innovations that may be adopted by public enforcers (First 1995: 179-80; Selmi 1998: 1403-04, 1426; Thompson 2000b: 206-07). Freedom from bureaucratic constraint also allows private litigants to mobilize and reallocate their enforcement resources more flexibly and expeditiously than bureaucrats (Coffee 1983: 226).

The decentralized nature of private enforcement litigation, as contrasted with centralized bureaucracy, also can encourage policy innovation for reasons similar to those associated with federalist governing arrangements (e.g., Busch et al. 1999: 208-11). 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.

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 underenforce for a number of reasons. Given that intense preferences for underenforcement exist in the regulated population, while preferences 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 (Gordon and Hafer 2005; Merrill 1997: 1039; Stewart and Sunstein 1982: 1294; Thompson 2000b: 190-92). Regulators themselves may have preferences for underenforcement for many reasons, including ideological preferences, career goals, to protect or enhance budget allocations, to avoid political controversy, or simple laziness (DeShazo and Freeman 2003: 1454; McCubbins et al. 1987: 247; Roach and Trebilcock 1996: 482). Finally, administrators may face pressure to underenforce from executives or legislatures who may be motivated by ideological preferences, electoral imperatives in general, or the desire to protect specific constituents in particular (Burke 2002; DeShazo and Freeman 2003: 1454-55; Faith et al. 1982). 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 (Farhang 2010a: 94-128).

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 (Cross 1989: 56; Greve 1990: 350; Roach and Trebilcock 1996: 482; Zinn 2002: 133-37). Given the tendency of the sources of underenforcement 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” (Coffee 1983: 227).

Private enforcement regimes may provide a compromise alternative to bureaucratic state-building in political environments in which anti-bureaucracy sentiments are salient and influential (Burke 2002: 13-14, 172-73; Ginsburg and Kagan 2005: 8; Kagan 2001: 15-16, 50-51, 193-94). Private litigation, 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 (Farhang 2010a: 94-128). Legislators and the public tend to regard private enforcement regimes, as Kagan (2001: 15-16) puts it, as “nonstatist mechanisms” of policy implementation. 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 (Busch et al. 1999; Feeley and Rubin 1998: 330-35; Lawrence 1991a; Zemans 1983). 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 (1998: 333).

In concluding this section on the potential advantages of private enforcement, we note that the contention that private enforcement regimes can constitute a potent tool to advance legislative goals is predicated on the supposition that it will enhance anticipatory compliance and deter unlawful conduct by would-be violators. This policy outcome is distinct from private enforcement regimes operating as a vehicle to provide compensation to victims injured by violations, or to rehabilitate through punishment individuals or organizations caught violating. To clarify this point and highlight its importance, it is useful to distinguish between “specific deterrence” and “general deterrence,” where specific deterrence refers to the effects of enforcement against a particular violator on *that* violator’s future conduct, while general deterrence refers to effects of visible enforcement efforts in the legal environment on *other* would be violators who have yet to actually be the targets of enforcement, and hope never to be (Reiss 1984). In legislative interventions in such spheres as civil rights, consumer, and environmental policy, we believe that the legislature’s highest goal is to achieve general

deterrence—to stop discrimination, end unfair and exploitative business practices, and prevent environmental destruction.

Specific deterrence has important limits as a mechanism to garner compliance across the economy and society at large, for in reality there is typically too little enforcement activity relative to the number of regulated entities for specific deterrence to accomplish regulatory goals, or to account for the level of compliance that we actually observe (Gray and Shadbegian 2005; Vandenberg 2003). This mismatch between modest overall enforcement levels and comparatively substantial compliance efforts has led some regulation scholars to posit the existence of a puzzle of “overcompliance” (Gunningham et al. 2003; Mehta and Hawkins 1998; Prakash 2000). Consider the case of Title VII, which, as discussed in the next section, is among the federal statutes in the United States that produces the most litigation. Nonetheless, in 2004 only about one percent of private employers covered by that law were subject to an enforcement action under it, and approximately ninety-nine percent were not.²⁵ At this rate, on average a covered employer can expect to be subject to an enforcement action about once in a century, which may not give rise to a substantial compliance incentive from a specific deterrence point of view. Consequently, a high degree of policy significance turns on whether general deterrence, in which enforcement activity against a small fraction of the regulated population serves as a compliance-garnering signal to the entire community of potential violators, is actually operative. Explicitly or implicitly, scholars of legal regulation who maintain that private litigation can serve as an effective policy tool believe that it can have general deterrence effects (e.g., Bucy 2002: 17; Coffee 1983: 227; Frankel 1981: 556-57; Shermer 1999: 474-76; Stephenson 2005: 98-100, 103-04; Zinn 2002: 134).

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

²⁵ Title VII covers employers with 15 or more employees. In 2004, according to a Bureau of Labor Statistics study, there were approximately 1,179,147 private business establishments in the United States (Butani et al. 2005). (We interpolate using data in Table 1 to arrive at the figure for employers with 15 or more employees). In 2004, there were 17,641 job discrimination suits filed across all federal statutes covering job discrimination, against both private employers and states. Annual Report of the Administrative Office of the United States Courts, Table C-2 (see suits categorized under civil rights, employment, and federal question jurisdiction). Based upon EEOC charge statistics, we estimate that approximately 73 percent of these federal job discrimination claims were filed under Title VII. See <http://www.eeoc.gov/stats/all.html> (EEOC received 79,432 charges across all statutes in 2004), and <http://www.eeoc.gov/stats/vii.html> (EEOC received 58,328 charges under Title VII in 2004). Thus, a reasonable estimate is that approximately one percent of private employers covered by Title VII were subject to federal suit under Title VII in 2004.

courts; (3) weaken the administrative state's capacity to articulate a coherent regulatory scheme by preempting administrative rulemaking; (4) usurp governmental prosecutorial discretion; (5) discourage cooperation with regulators and voluntary compliance; (6) weaken oversight of policy implementation by the legislative and executive branches; (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 (Bawn 1995; Epstein and O'Halloran 1999; Huber and Shipan 2002; Volden 2002). Critics of private enforcement emphasize that most judges are generalists by training, lacking the specialized training necessary to deal with complex policy problems. 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 as policymakers (Davis 1986; Merrill and Hickman 2001: 861-62; Pierce 1989: 1251; Spence and Cross 2000: 140).

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 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 (Bucy 2002: 66-67; Cross 1989: 68-69; Grundfest 1994: 969-71). In response to issues presented in this fashion to a decentralized court system, non-expert judges make policy piecemeal, 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” (see also Cross 1989: 69; Pierce 1996: 8; Stewart and Sunstein 1982: 1292-93).

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 (Austin 1987:223; Pierce 1996: 2; Stewart and Sunstein 1982: 1292). 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. With wide opportunities for private enforcement litigation, prosecutorial discretion ceases to operate as a safety valve and this regulatory strategy

is undermined (Bucy 2002: 64; Cross 1989: 69; Kalven and Rosenfield 1941: 717; Thompson 2000b: 190). 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 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 (Bucy 2002: 66-67; Cross 1989: 69).

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 (Austin 1987: 223; Cross 1989: 67; Scholz 1984a; b). 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 (Blomquist 1988:409; Stewart and Sunstein 1982: 1292-93; Zinn 2002: 84). 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 (Grundfest 1994: 969-70; Kagan 1999: 227; Stephenson 2005: 116). 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 is 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 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 (Aberbach 1990; Cross 1999: 1295-96; Eskridge et al. 2001: 1129-73). Executives also possess considerable capacity to influence agency behavior, particularly through appointment (and removal) of agency leadership (Moe 1982; 1990; Moe and Caldwell 1994). 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 (Cross 1999: 1303-05; McCubbins et al. 1989: 444-45; Shipan 1997a: 10; 1997b: 555-56).

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 (Garry 1997; Glazer 1975; Kagan 1999; 2001; Olson 1991; 1997; Rabkin 1989; Sandler and Shcoenbrod 2002). 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, and judges are not electorally accountable, and they will stray from the democratic will precisely because they cannot be disciplined by it.²⁶

In contrast, agencies are a far more democratically legitimate, accountable, and responsive delegatee than private litigants and courts (Cross 1999: 1290-1306; McCubbins et al. 1989: 444-45; Merrill 1992: 978-79, 999, 1002; Pierce 1989: 1251; Silberman 1990: 821-24). At bottom, this argument is founded on the ability of executives, legislatures, and voters to hold administrators accountable. Administrative bodies generally are led by people who are appointed by the executive, can be influenced by executive oversight instruments such as executive orders, and often can be removed by the executive if they pursue a policy course sufficiently offensive to public preferences to risk electoral repercussions for the executive or her party. Legislatures, too, have recourse to a variety of mechanisms to oversee administrators—including investigations, oversight hearings, and control over agency budgets—if administrators depart too much from legislative preferences. Ultimately, executive administrations can be replaced by voters in elections, bringing new executives to power, who will appoint new bureaucratic leaders with preferences closer to the polity. Bureaucrats thus can be overseen by both of the political branches, and by the electorate itself. Therefore, administrative implementation, as contrasted with private enforcement litigation, creates a more democratic and more accountable policy regime.

In concluding this section on 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 don’t 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.

²⁶ 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.

Many of the criticisms of private enforcement draw on underlying theoretical expectations about organizational capacity and behavior that are quite different from those of scholars who anticipate general deterrence effects from private litigation. One line of thinking here is grounded in bounded rationality premises, and another in a psychology of resistance. Some regulation scholars have doubted whether corporate managers, amid the din of news and information, and the organizational brush fires that require immediate attention, are actually able to receive and process adequate information about enforcement activities targeted at other organizations in order to make compliance decisions in the informed manner contemplated by general deterrence theory (Braithwaite and Makkai 1991; Cyert and Marsh 1963; Thornton et al. 2005). When managers with these cognitive limits encounter contradictory signals from courts, a weakened signal emanating from the administrative state, and apparently capricious enforcement decisions by private litigants, they will not be able to discern meaningful guidance. Further, the inconsistent, incoherent, and unpredictable character of a regulatory scheme implemented through private enforcement will appear to regulated organizations as unfair, unequal, and unreasonable, which may engender a “culture of resistance” that will erode compliance (Bardach and Kagan 1982: 114; see also Boyer and Meidinger 1985: 896; Cross 1989: 67; Vogel 1986: 191). According to critics of private enforcement regimes, if general deterrence is the goal, “[w]hen it comes to litigation, more is not necessarily better” (Grundfest 1994: 971), because using private litigation to achieve “greater enforcement may in some circumstances actually reduce compliance and increase the number of violations” (Cross 1989: 67)

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.²⁷ 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.

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

²⁷ 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 (MacCoun 2005), utility derived from litigation as a form of political participation (Giles and Lancaster 1989; Lawrence 1991b; Zemans 1983), or disutility resulting from feelings of embarrassment or victimization (Bumiller 1988).

expectation of suffering financial loss (see Kritzer 1990: 28-34; but see Merry and Silbey 1984; Relis 2007). 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” (MacCoun 2006: 539). 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 (Galanter and Luban 1993; Johnson 1980-81; Kritzer 2002b; 2004).

It bears emphasis here that the idea of private enforcement regimes is linked to a line of scholarship concerning the importance of legal infrastructures to the enforcement of rights in court. In a landmark article, Galanter (1974) argued that “repeat players” (who use the courts frequently, and are typically “haves”) possess critical advantages over “one-shotters” (who use the courts infrequently, and are typically “have-nots”). One significant advantage includes access to greater legal resources, skill, and expertise in the litigation process, and Galanter speculated that legal rules might be adjusted in ways that could increase the supply of legal services to have-nots. Building on Galanter’s work, Epp (1998) finds that successful “rights revolutions” were more likely in nations with more extensive “support structures,” including sources of funding, for mobilizing lawyers to enforce rights through litigation. We stress that an important support structure to enforce regulatory policy—a bar of ready, willing, and able lawyers—can be created and sustained by the legislative construction of private enforcement regimes with adequate economic incentives (Dorfner 1977; Farhang 2010a; Frymer 2007: ch. 4; Melnick 2009: 40; O’Connor and Epstein 1985; Sander and Williams 1989: 470). In this sense private enforcement regimes can create private enforcement infrastructures.

1. Structuring Formal Access Rules

In discussing the key elements of private enforcement regimes, we provide examples from American federal statutory law. Our purpose in providing these examples is to highlight the wide variation in rules governing enforcement of rights across statutes, and the clear attention to detail manifest when legislators craft enforcement regimes. 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.²⁸ In considering the latter question, the legislature must decide whether the universe of private enforcers should be limited

²⁸ As we discuss in Section 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.

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 Section III that Article III of the U.S. Constitution, as interpreted by the Supreme Court, sets limits on the 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 (Thompson 2000b).²⁹ As we discuss in Section 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.

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 amendments³⁰ 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.³¹

In most countries, 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.³² 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 (Friedenthal et al. 2005: 758). As discussed in Section III, however, 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 (Burbank 2008: 1500). That is why we have referred to the class action as a “wild card” in the context of private enforcement in the United States. Since 1966, when Congress 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

²⁹ 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 (*Vermont Agency of Natural Resources v United States* 2000: 772-73).

³⁰ 15 U.S.C. § 298.

³¹ House Report No. 928, 91st Cong., 2nd sess., 1970.

³² We do not address other, non-representative, forms of aggregation that may also enable private enforcement.

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 (*Califano v. Yamaski* 1979). As a result there have been some obvious instances of potential over-enforcement, notably under the Truth-in-Lending Act, 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. 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, which sweeps most consequential class litigation on matters of state law into federal court (Burbank 2008), and more recently by a Supreme Court decision that appears to prevent federal courts from honoring state law limitations on class actions (Burbank and Wolff 2010).

As we discuss in Section 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 (Gillette and Krier 1990: 1049-51; Yeazell 2000: 963). At the same time as it 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 (Green 1997: 798, 803; Shapiro 1998: 928).

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 (Butler and Johnston 2010). 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 (Burbank and Wolff 2010). 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.³³

³³ 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. See Appendix A of Respondent’s Brief in *Shady*

Until recently class actions were almost uniquely an American phenomenon in modern governance,³⁴ but they have spread rapidly in the past decade. Currently, twenty-two other countries employ some form of the class device, and six employ some form of consolidated group proceedings, varying with respect to who has standing to enforce under the procedure, whether they are limited to specific substantive areas or are general (trans-substantive), whether economic damages are recoverable, and whether the class is constituted with an opt-in or an opt-out procedure (Hensler 2011).³⁵ As this approach to legal regulation has spread, its adoption around the world has been important in many domains of statutory regulation (Hensler 2009: 7-8). In reviewing the extent to which class or group litigation rules have actually been put to use in countries that have adopted them, Hensler (2011) argues that they have been most effective in facilitating private enforcement in countries that take account of background rules by joining rules allowing class or group litigation with rules facilitating payment of class or group counsel, such as one-way fee shifting in favor of plaintiffs or contingency fee arrangements (we turn to the issue of attorneys' fees below). As we discuss in Section I, failure so to coordinate incentives risks creating "beautiful cars without engines" (Valguarnera 2010: 42).

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 individual recovery, the acceptability of percentage-based fees in the United States, which we discuss in Section 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 Section 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

Grove Orthopedic Associates, P.A. v. Allstate Insurance Company, 2009 WL 2777648. The 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.

³⁴ This is not to say that they are an American innovation. "Group litigation" has roots in medieval England (Yeazell 1987).

³⁵ See generally *Annals of the American Academy of Political and Social Science*, vol. 622, 2009).

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 in the United States since the late 1960s, including in the areas of civil rights and consumer law (Farhang 2010a).³⁶ One-way fee shifting in favor of defendants is extremely rare in practice (Rowe 1984: 141 & n.8). The U.S. 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" (*Alyeska Pipeline Serv. Co. v. Wilderness Soc'y* 1975: 263).

We include excerpts from a review of the current state of theoretical and empirical knowledge about fee-shifting (Katz and Sanchirico 2010) in Section 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. The problem, according to Avery Katz (2000: 64-65), 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 number of underlying opportunities for litigation. Changing the rules governing legal fees thus "remedies some externalities while failing to address and even exacerbating others."

Although scholars disagree about the comparative merits of the American and English Rules, from the standpoint of the incentives facing plaintiffs and their attorneys, it is clear that, as compared to either rule, under a one-way plaintiff's shift no matter who wins, expected costs of suit will be equal or less, causing the expected value of the case to be equal or greater.³⁷ 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 (Shavell 1982; Zemans 1984).

³⁶ 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 (Farhang 2010a: 82). The federal Copyright Act is a rare exception (*Fogerty v. Fantasy, Inc.* 1994).

³⁷ 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 0 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 0 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.

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 (Blakey 1997; Galanter and Luban 1993; Polinsky and Rubinfeld 1998). 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 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 (Scheuerman 2009; Schwartz and Silverman 2005).³⁸ U.S. courts have recognized that damages enhancements "are justified as a 'bounty' that encourages private lawsuits seeking to assert legal rights" (*Smith v. Wade* 1983; see also *United States v. Snepf* 1978; *TVT Records v. Island Def Jam Music Group* 2003). 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" (*Jackson v. Johns-Manville Sales Corp.* 1986; *Perrone v. Gen. Motors Acceptance Corp.* 2000), and provides an "incentive to litigate" that is "designed to fill prosecutorial gaps" (*Sedima, S.P.R.L. v. Imrex Co.* 1985).

In the job discrimination title of the Civil Rights Act of 1964 (Title VII) legislators elected to limit monetary damages to back pay. Under this rule a plaintiff discriminatorily denied a promotion to a position associated with a salary increase of \$1000 per year would be entitled to recover damages of \$1000 per year for the period she was subjected to the discrimination within the limitations period. Congress could have provided for damages in the amount of double the wages illegally withheld, as it did in Equal Pay Act of 1963, or of triple the economic injury, as it did in the Sherman Antitrust Act of 1890. Aside from damages keyed to actual economic injuries, legislators can also increase incentives for private enforcement (and seek to punish and deter violations) by allowing awards of compensatory damages for both economic and non-economic injuries, and of punitive damages, as it did when it amended Title VII in the Civil Rights Act of 1991.

We note that Congress has sometimes incentivized private enforcement by using damages enhancements in conjunction with fee shifting. In some policy contexts, fee shifting

³⁸ In combination with class actions, statutory damages can create massive liability, inefficiently high levels of private enforcement pressure, and over-deterrence (Burbank and Wolff 2010; Scheuerman 2009). 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. American Multi-Cinema, Inc.* 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* (discussed earlier in this section) Congress is deemed to legislate against the background of the Federal Rules (including Rule 23) absent clear expression to the contrary.

alone will not be sufficient to generate private enforcement of meritorious claims (Farhang 2010a: 190-91; Thompson 2000a: 216). This is so because of delay lawyers experience in receiving payment of fees, uncertainty of case outcome, and, sometimes, difficulty in recovering fees by winning plaintiffs (Judicial Conference of the United States 1989: 50; Judicial Conference of the United States 1990: 28-29). 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 relevance of the proportionality of the fee to the outcome achieved—in ways that produce awards below market rates (Judicial Conference of the United States 1990: 29; Terry 1989) 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 (Kornhauser and Revesz 1994), evidence (Farhang 2010a: 27-28), burdens and standards of proof (Cooter and Ulen 2004: 431-32), and, as discussed in Section III, pleading (Burbank 2009) and discovery (Cooter and Robinfeld 1994). 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 in this section 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 Section 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 (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.

Before elaborating these institutional explanations, we briefly return to more widespread cultural explanations for “litigiousness” in the U.S., also noted in Section 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. One strand of this view maintains that in the U.S. individualist and anti-statist 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” (King 1973; Lipset 1996: 270). 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. 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” (Auerbach 1976: 42; Manning 1977: 767). 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 (Garry 1997; Glendon 1991). As we note in Section II, however, “[n]otwithstanding 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.’” Further, serious empirical scholars have not been able to confirm a “litigation explosion” across American court systems as a whole during this period (Galanter 1983; 1986; 1990), though, as discussed below, there was a sharp increase in the rate of private enforcement of federal statutes in the late 1960s.

The triumphal story of transformation apprehends, rather than disease, 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 (Foner 1998: 299-305; Schudson 1998: ch. 6; Walker 1998).

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’ 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 (Moe 1989; 1990; Moe and Caldwell 1994). 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 (Epstein and O'Halloran 1999; Huber and Shipan 2002).

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 regimes (Burke 2002: 14-15; Farhang 2010a; Ginsburg and Kagan 2005: 6-7; Kagan 2001: 48-49; Melnick 2005; Smith 2005). 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 (Farhang 2010a). 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 percent of the time, as contrasted with 21 percent in the period between 1901 and 1968. At the same time, the ideological distance between the two dominant political parties steadily increased (Jacobson 2003; McCarty et al. 2006). 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 percent between President Nixon assuming office and the end of the twentieth century (Farhang 2010a: 66, 221-23).

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 (Eskridge et al. 2001: 1129-73; Moe 1990; Moe and Caldwell 1994). 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 (Burke 2002: 173-74; Kagan 2001: 49; Landes and Posner 1975; Farhang 2010a; Ginsburg and Kagan 2005: 6). This strategy of insulation assumes, of course, that such future legislative majorities will not simply pass a new law to achieve their goals.

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 (Shugart and Carey 1992; Brady and Volden 2005; Steinmo 1994; Sundquist 1988; Weaver and Rockman 1993). In a lawmaking system with so many gatekeepers, as Moe puts it, “Whatever is formalized will tend to endure” (Moe 1990: 240). 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 (Farhang 2010a).

The threat of bureaucratic drift arises from the prospect that bureaucrats may pursue their own interests at the expense of the enacting Congress' preferences, leading to bureaucratic shirking of delegated work, capture of the bureaucracy by the regulated population, careerism, and bureaucrats' pursuit their own policy preferences rather than those of the elected officials who empowered them (McCubbins et al. 1987). 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 (Cross 1999: 1303-04; McCubbins et al. 1987). In contrast, the autopilot character of private enforcement, sufficiently incentivized, renders the enforcement function insulated from the problem of bureaucratic drift (Kagan 2001; Burke 2002; Farhang 2010a; Melnick 1995; Melnick 2004). As discussed in Section V.B, concerns about bureaucratic drift have contributed to reliance on private enforcement in civil rights regulation in the U.S. (Farhang 2010a).

The many veto points that characterize America's fragmented lawmaking institutions encourages 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 ambitious policy initiatives (e.g. Farhang and Katznelson 2005; Hattam 1993; Lieberman 1998; Skocpol and Ritter 1991). Summarizing this literature, Sven Steinmo (1994: 126) concludes: 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 "wheel their way through the labyrinth and past so many veto points," they often will have been scaled back to satisfy multiple gatekeepers.

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 publically 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 American lawmaking process (Hacker 2002; Howard 1997). One reason for this is that raising tax revenue for new spending is frequently controversial in the U.S. (and elsewhere we suspect). 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 in the U.S. (Burke 2002: 15-16; Farhang 2010a; Melnick 2005). As discussed in Section V.B, budgetary considerations have contributed importantly to the preference of some legislators for private enforcement of civil rights laws in the U.S., and to the coalition-building process necessary to achieve passage (Farhang 2010a).

V. Examples of Enforcement Regimes

A. Why the Sectoral Approach?

As we discussed in Section 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 in the United States. Equally important, however, is our conviction, also discussed in Section I, that regulatory design should 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 four hundred distinct enforcement regimes specified in *federal* legislation between 1947 and 2002.³⁹ Table 1 summarizes information on the nature of those enforcement regimes. As the tables shows 24 percent of the enforcement regimes include private enforcement mechanisms, although only about 13 of those rely exclusively on private enforcement.

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 covered. Consequently, we have chosen to focus on two specific areas: discrimination in hiring and wages, and consumer protection vis-à-vis unfair or deceptive acts and practices (UDAP).

With regard to employment discrimination, we originally omitted discrimination with regard to dismissal because many countries other than the United States provide broad remedies for unfair dismissal regardless of whether discrimination might be involved. Nonetheless, we ultimately determined that empirical research related to employment discrimination in the U.S. does not separate out where in the employment process the discrimination occurs, nor does there appear to be any perception that doing so would yield any insights beyond looking at hiring, wages, and dismissals together. There is research that considers specific bases of employment-related discrimination (i.e., race/ethnicity, age, gender, disability), although that research does not generally single out the enforcement regime for comparison across different bases. As the discussion below will make clear, anti-discrimination enforcement draws largely on federal law and the rights of private action in those laws.

In the area of consumer protection, we have restricted our purview to enforcement of the general statutes dealing with unfair or deceptive acts and practices (UDAP). There are many specialized statutes, particularly at the federal level, dealing with areas such as banking, credit cards, debt collection, insurance, and the like. However, we have chosen to concentrate our

³⁹ Sean Farhang identified these enforcement regimes by examining 333 laws passed by the U.S. Congress between 1947 and 2002 that David Mayhew (2005) has labeled as “significant” legislation; 189 of those laws included enforcement regimes of one kind or another.

attention on general laws dealing with deceptive acts and practices, and for reasons we discuss below private enforcement in this area relies mostly on state 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.

TABLE 1: FEDERAL REGULATORY ENFORCEMENT REGIMES, 1947-2002

ALL 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
										N=623
SOCIAL v. ECON										
Economic Regulation	20	61	50	36	63	71	4	80	16	142
Social Regulation	27	76	29	24	65	67	3	73	23	467
										N=609**
BY POLICY AREA										
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 significant 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 2005). 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 in bold 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).

Admin 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 United States

a. 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. 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) within 180 days of the conduct complained of, or 300 days in states with an administrative mechanism to address such complaints, with the longer limitations period intended to offer a period of deference to state agencies to afford them an opportunity to resolve complaints. 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, as a matter of right, within 90 days.

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. *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 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 agency does sue, the complainant has the right to intervene in the action. As we will discuss below, in practice, due to resource constraints, in the vast majority of cases in which the agency finds reasonable cause it declines to sue and instead

authorizes private suit. Claimants are required to “exhaust” the forgoing administrative process and obtain a right to sue letter in order to establish jurisdiction in federal court. However, if the agency fails to render a finding within 180 days of the filing of the complaint, the complainant is entitled to request and receive a right to sue letter, thereby exiting the administrative process.

If the claimant elects to file a private suit in federal court, proceedings are “de novo,” meaning that they start anew and courts are not required to give agency determinations any weight whatsoever. Remedies available under the current version of Title VII include injunctive relief, back pay, compensatory and punitive damages, and attorneys’ fees. The sum of (1) punitive damages, (2) compensatory damages for pain, suffering, and other non-pecuniary losses, and (3) future pecuniary losses, are capped at between \$50,000 and \$300,000 in a graduated scheme increasing with the size of the employer (ranging from \$50,000 for employers with 15 to 100 employees, to \$300,000 for employers with 501 or more employees). Compensatory damages for pecuniary losses already incurred (i.e., excluding future losses) are not capped. Plaintiffs seeking compensatory or punitive damages are entitled to trial by jury. As mentioned in Section IV.B and as we discuss below, when Title VII was originally enacted, damages were limited to back pay only. The provisions allowing for other compensatory damages and punitive damages were added in 1991, as was the provision allowing for trial by jury when persons seek such damages.

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. 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. Both were passed as amendments to the Fair Labor Standards Act of 1938 and adopted many of that law’s enforcement provisions. The Secretary of Labor originally had responsibility for administration and enforcement of these laws, but in 1978 responsibility was shifted to the EEOC. Under the ADEA claimants must file charges with the EEOC within the same 180/300 day limitations period that applies to Title VII, and the agency subjects ADEA charges to the same process of investigation and voluntary conciliation used for Title VII claims. However, ADEA claimants need not obtain a right to sue letter prior to proceeding with a de novo private civil suit. They are free to exit the EEOC’s administrative process 60 days after filing a charge with the agency. The EPA contains a private right of action with no administrative filing requirement, although if an employee elects to file an EEOC charge the agency will subject it to its process of voluntary conciliation. As under Title VII, the EEOC lacks the authority to issue binding orders following its administrative proceedings under either the ADEA or EPA, and it has the authority to act as prosecutor in civil actions, with the effect of terminating the individual’s right to file a separate action. Plaintiffs who undertake private suits under the ADEA or EPA have the right to trial by jury, and to recover back pay, double damages for willful violations, and attorneys’ fees.

Two federal civil rights laws passed during the Reconstruction period also provide some protections from job discrimination. The Civil Rights Act of 1866 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 (*Sanders v. Dobbs Houses, Inc.* 1970; *Waters v. Wisconsin Steel Workers* 1970). 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 (*Monell v. City of New York Department of Social Services* 1978). With respect to enforcement, both statutes provide private rights of action, but 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 (Lewis and Norman 2001a: 2-19; 2001b: ch. 1.A). As construed by courts, they afford more extensive economic remedies for successful plaintiffs in the form of uncapped compensatory and punitive damages. They have significantly longer limitations periods. They cover a wider range of work relationships (reaching “independent contractors” as well as “employees”). And they cover very small employers not reached by the other laws, which all have threshold size requirements (based on the number of employees) necessary to trigger coverage. The Civil Rights Attorneys’ Fees Awards Act of 1976 added a fee shifting provision to the Reconstruction civil rights statutes.

The federal statutes governing job discrimination are overlaid by a set of state statutes of varying substantive reach and heterogeneous enforcement provisions. Every American state but Alabama has statutory prohibitions against job discrimination on the grounds regulated by Title VII (race, national origin, gender, and religion). Some important differences between state and federal law arise where state statutes go beyond federal statutes and provide additional protections and remedies. Among the most common expansions of statutory protection are coverage of employers with fewer than fifteen employees (which is Title VII’s threshold); provision of additional remedies, such as uncapped compensatory damages; longer limitations periods; and protection of classifications not reached by federal law, such as sexual orientation, marital status, association, arrest record if no conviction followed, genetic information, and tobacco use (Buckley and Green 2000; Rutherglen 2010).

There are also significant differences in enforcement provisions. Of twenty-eight states with fair employment practice laws in 1964 (i.e., pre-existing Title VII), twenty-one used the administrative cease-and-desist model, four used only criminal and no civil sanctions, and three lacked enforcement provisions and were strictly voluntary (Equal Employment Opportunity Commission 1968: 5-6; Bureau of National Affairs 1964). None contained a private right of action. 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.

All state laws provide that an agency or department will handle complaints of discrimination (General Accounting Office 1997). Most states have fair 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 (Buckley and Green 2000; Rutherglen 2010). A large majority of states have incorporated private enforcement into their job discrimination statutes. Although there is extensive variation in the details of enforcement rules in state job discrimination statutes, the enforcement frameworks can be grouped into three broad categories (Bureau of National Affairs 2005; Buckley and Green 2000; Catania 1983: 819-32; General Accounting Office 1997: 6-7). First, some states follow an election of remedies model, allowing the claimant to choose between a private lawsuit and recourse to the administrative adjudication procedure, with no requirement of using the administrative procedure before filing suit. Second, some states require that claimants submit claims to the state agency and wait for it to reach a decision, or until some specified period has elapsed, at which time a private *de novo* lawsuit is permitted. As in the case of Title VII, this model can allow a full and fresh evaluation of a claim by a trial court after an administrator has found the claim to lack merit. A third group of states have no private right of action, making the administrative venue the only one for seeking relief, with access to appellate review in court based on a highly deferential standard of review. The third approach—containing no private right of action—is the least common of the three models (Eisenberg 2009).

b. Legislative Motivations for Creating the Title VII Framework

Recent work has investigated what has motivated 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 (Farhang 2010a). We draw on this work for the summary account provided below. Consistent with the discussion of separation of powers institutions in Section IV.C, 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. 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. 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 CRA of 1964 depended on conservative Republicans joining non-southern Democrats in support of the bill.

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. 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. 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/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. 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 underenforcement 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. Even aside from resource issues, the federal 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, to voting rights cases in 1975, 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. 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. 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 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 (Melnick 2005). 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, 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 were clearly intended to reduce private enforcement. 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.

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 Section 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.

c. 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 last decade, there has been an average of 16,861 such suits per year, 98 percent of which were privately prosecuted, with two percent prosecuted by the EEOC or the Department of Justice.⁴⁰ 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 (Blasi and Doherty 2010). It is possible to estimate, extrapolating from data in the study, that roughly 42,782 private job discrimination suits were filed in California state courts in the eleven years from 1997 to 2007.⁴¹ 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

⁴⁰ Judicial Business of the United States Courts, 2001-10 (<http://www.uscourts.gov/Statistics/JudicialBusiness.aspx>).

⁴¹ Our 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 twelve years from 1997 to 2008 (Blasi and Doherty 2010: 26). In order to match the period for which we have data on federal job discrimination filings in California, discussed later in this paragraph, 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 twenty-two percent of these charges were followed by a private lawsuit in state court (*id.*: 11). Thus, our rough estimate is that for the period 1997 to 2007, twenty-two percent of 194,465 charges led to 42,782 state court job discrimination suits filed by private plaintiffs.

federal district courts.⁴² Thus, during this period about 78 percent of job discrimination suits in California were filed in state courts.

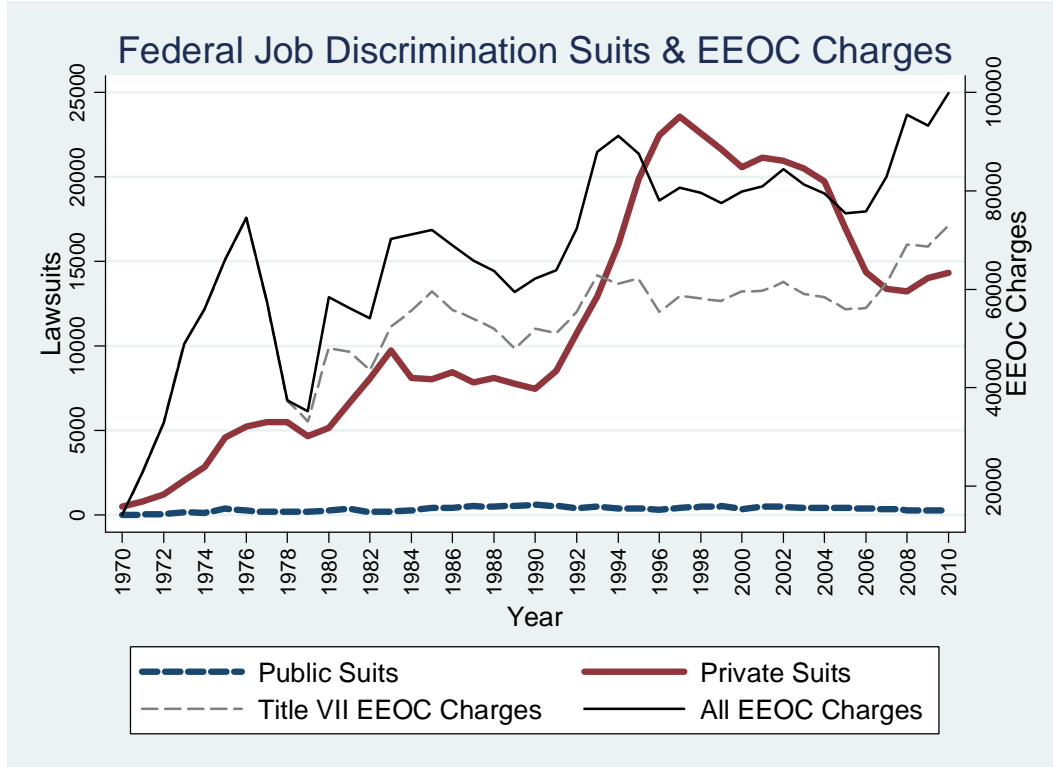
This suggests that, in at least some parts of the county, state courts are the primary locus of private enforcement of job discrimination laws. However, we think that it would be a mistake to generalize from the case of California, for it is likely among the states where the federal-state balance on 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. 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.

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.⁴³ 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.

⁴² *Federal Court Cases: Integrated Data Base*, maintained by the Inter-University Consortium for Political and Social Research.

⁴³ 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 (<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*, maintained by the Inter-University Consortium for Political and Social Research, and for the years 2001-2010 they were drawn from *Judicial Business of the U.S. Courts, 2001-2010* (<http://www.uscourts.gov/Statistics/JudicialBusiness.aspx>), produced by the Administrative Office of the U.S. Courts.

FIGURE 1: Trends in Job Discrimination Litigation



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.

There have been several studies to evaluate 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 (2009) examined the influence of the CRA of 1991 on the volume of private Title VII charges filed with the EEOC from 1980 to 2002. 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.⁴⁴ 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 (Mnookin and Kornhauser 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 percent. Farhang and Spencer (2011) evaluate the impact of the CRA of 1991 on the probability that Title VII plaintiffs are represented by counsel in litigation. 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 Section IV.B, 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 Section IV.A). There is a 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 (see, e.g., Dobbin et al. 1993; Edelman 1992; Edelman 1990; Sutton and Dobbin 1996; Kalev et al. 2006). 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 whether such formalized employment 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, as we did in Section IV.A, 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, separately from whether they have actually been the target of enforcement.

⁴⁴ No data exist that would allow an estimate of what percentage of EEOC charges 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.

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 (e.g., Edelman 1992: 1559, 1564; Konrad and Linnehan 1995: 805). However, as Edelman (1992: 1550) points out, comparisons *across* organizations subject to suit and those not subject to suit is 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.

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 (Kalev and Dobbin 2006; Skaggs 2008). 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 women and racial minorities in management. 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.

Other studies have investigated the general deterrence effects of job discrimination lawsuits. In the earliest study of this sort that we found, Leonard (1984) 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. 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.

Kelly and Dobbin (1999) test the effects of the "risk of litigation" on compliance behavior by organizations concerning pregnancy discrimination prohibited by the CRA of 1964, and they find no general deterrence effects. However, because they were interested in the effects of litigation in general, rather than private litigation in particular, they aggregated enforcement actions prosecuted by the administrative state and by private parties. Further, due to lack of data on actual filings of the type of cases studied (pregnancy discrimination), the authors' measure of "the risk of litigation" was based on a count of federal judicial opinions appearing in the Lexis database, at both the district and appellate level, of the relevant type of cases. It is not evident that this count of trial and appellate level judicial opinions is directly or consistently correlated

with case filings so as to capture the “risk of litigation.” Finally, the study did not attempt to capture any geographic variation in where the litigation occurred relative to the location of organizations studied—it simply evaluated whether a single national number (of judicial opinions) was correlated with policy adoption by organizations spread across the country.

Two recent studies attempt to investigate the issue of general deterrence and job discrimination litigation with more attention to geographic variation, and both find general deterrence effects. Charles Epp (2009), 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. The U.S. Supreme Court has recognized workplace sexual harassment as a form of gender discrimination that violates Title VII (*Meritor Savings Bank v. Vinson* 1986), 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. It seems reasonable to assume that lawyers specializing in suits against 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. 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 practice area interestingly captures the potential for litigation to be mobilized against violators.

Farhang (2010b) analyzes a sample of primarily private organizations and assesses what explains 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 (Kalev et al. 2006). The policies are affirmative action plans with concrete goals and time tables, 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. 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.⁴⁵ 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. 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. Clermont and Schwab’s (2004) strategy of evaluation is to compare job discrimination suits to the rest of the civil docket

⁴⁵ There are ninety federal districts across the fifty states and the District of Columbia.

in aggregate. 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.⁴⁶

Nielsen, Nelson, and Lancaster (2010) 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. They report that:

- 19 percent of cases are dismissed;
- of cases that continue (81 percent of overall filings), 50 percent are settled prior to the filing of a summary judgment motion;
- of cases that reach summary judgment (31 percent of overall filings), plaintiffs lose 57 percent of the time;
- of cases that survive summary judgment (14 percent of overall filings), 57 percent settle prior to trial;
- of cases that continue to trial (six percent of overall filings), plaintiffs prevail 33 percent of the time.

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 mean settlement amount for those 75 cases was \$30,000. We note that the mean settlement value reported is based on only eight percent 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 eight percent.⁴⁷

2. Other Common Law Countries

a. England and Wales

Job discrimination in England and Wales is prohibited by a series of laws. The earliest such laws were the Equal Pay Act of 1970, the Sex Discrimination Act of 1975, and the Race Relations Act of 1976, and over the past fifteen years the principle of nondiscrimination in employment has been extended to disability, sexual orientation, religion, and age, among other classifications (Dickens 2007: 464). The Equality Act of 2010 consolidated numerous antidiscrimination laws, including job discrimination laws, into a single and more uniform statutory framework. The enforcement regime governing job discrimination laws is a hybrid of

⁴⁶ It bears noting here that all civil litigation other than job discrimination is a quite broad category (which includes contracts disputes, securities, antitrust, banking, consumer, labor, and environmental litigation, among many other 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.

⁴⁷ 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.

private and public enforcement, with private enforcement playing the dominant role. In this system, “the individualized, private law model predominates” (id.: 479).

Employees wishing to assert claims under these laws must submit them to administrative employment tribunals, which handle all manner of employment disputes, with discrimination claims comprising a small fraction their total work. Designers of this system of employment tribunals—which preexisted job discrimination statutes, and which were previously called industrial tribunals—self-consciously chose administrative tribunals rather than courts based partly on the judgment that they would be less costly, less procedurally formal, and less adversarial, while being more expeditious and expert (Mankes 1994: 88-89; Sternlight 2004: 1431-32). Martin Partington reports that another “reason that employment tribunals were established was fear of swamping of the county courts by employment disputes.” Calls have repeatedly been made to create a tribunal system focused specifically on employment *discrimination* claims, but this reform has not materialized (Dickens 2007: 477).

Employment tribunals are three-person panels, each composed of an attorney chair, a lay member from the management side, and a lay member from the employee side, although laypersons are directed to be impartial rather than to act as representatives of one side or the other. In gender cases tribunal administrators attempt to place at least one woman on the panel, and in race cases they attempt to select at least one person with “race relations” experience or expertise (Mankes 1994: 89; Sternlight 2004: 1433). The hearings held by employment tribunals are adjudicatory in nature, and although less formal than court proceedings, they follow a simplified model of the adversarial process. The process is party-centered in the sense that parties or their counsel are responsible for presenting their own cases. Each side can adduce documentary evidence and call witnesses, with hearings typically lasting from one-half to three days. Tribunal decisions are appealable on matters of law only (Dickens 2007: 474, 478; Mankes 1994: 92; Sternlight 2004: 1433-34).

Alongside this administrative adjudicatory process there is a simultaneous conciliation process. The conciliation function is performed by the Advisory Conciliation and Arbitration Service (ACAS), which is a wholly separate governmental agency. When an employment discrimination complaint is filed with the employment tribunal, a copy is forwarded to the ACAS, and a conciliation officer is assigned. The officer’s function is to provide information to the parties about the tribunal process and relevant law, and to attempt to facilitate a voluntary settlement (Mankes 1994: 91; Sternlight 2004: 1434-35). According to data from 2001-02, 77.5 percent of employment discrimination claims were resolved during this conciliation phase, while 22.5 percent were resolved in the tribunal process (Sternlight 2004: 1435). However, the high rate of resolution during the conciliation phase includes both cases that claimants simply abandon as well as cases in which some settlement is achieved, and withdrawal or abandonment comprises about one-third of cases sent to ACAS (Dickens 2007: 479; Sternlight 2004: 1443).

One recurrent concern surrounding the tribunal process is the frequent lack of representation for claimants. Martin Partington reports that one of the initial intentions behind the design of the tribunal system was to fashion a process sufficiently uncomplicated “to operate in ways which enable parties to take cases without the expense of hiring lawyers to prepare cases and represent them.” He continues, however, by noting that in practice “the complexity of the law has grown to such an extent as to make use of legal representation if not essential at least a very important consideration for those taking cases [of discrimination] against their employers”

(see also Sternlight 2004: 1437-40). Richard Moorhead observes that “[l]egal aid is not generally available for employment tribunal cases.” Many claimants in this system are unrepresented, and this places them at a considerable disadvantage (Dickens 2007: 478-79; Sternlight 2004: 1436). Some critics have also suggested that the increasing complexity in job discrimination proceedings in employment tribunals, noted by Partington, also necessitates greater claimant access to discovery than is currently allowed (Sternlight 2004: 1440-41).

There is one exception to this process of administrative adjudication and conciliation that pertains to gender claims only. Under a European Union Directive issued in 1976, persons asserting claims based on gender discrimination must be permitted to pursue their claims in a court of general jurisdiction rather than only in specialized administrative tribunals. Despite this option, however, the vast majority of claimants asserting gender discrimination proceed through the administrative tribunal process rather than in court (Sternlight 2004: 1437).

The general approach to damages is that plaintiffs can be awarded compensation for all past and future injuries, including financial loss, personal injury, and injury to feelings (Dickens 2007: 480; Mankes 1994: 92). There had been damages caps in job discriminations claims, but starting in the early 1990s EU requirements encouraged their removal, first in the area of gender and subsequently with respect to other classifications as well (Dickens 2007: 466-67, 480-81; Sternlight 2004: 1441-42). In 2005-06, the mean and median employment tribunal compensation awards, respectively, were £30,000 and £6,600 in race discrimination cases (of 73 awards), £10,800 and £5,500 in gender cases (of 168 awards), and £19,300 and £9,000 in disability cases (of 76 awards) (Dickens 2007: 481, 489). Although employment tribunals can “recommend” that employers take affirmative steps, such as awarding a promotion to remedy a discriminatory course of conduct, they lack the authority to order such relief (Dickens 2007: 480).

As for litigation costs and attorneys’ fees, Richard Moorhead reports that the English loser-pays rule generally does not apply in employment tribunals and thus job discrimination claimants cannot recover costs and attorneys fees if they prevail. Nor are they liable for the other side’s costs if they lose (which may explain why those with gender discrimination claims seem to prefer the tribunal over the court). However, explains Moorhead, damage-based contingency fees are permitted in employment tribunals, and this approach to funding representation in job discrimination claims has grown in recent years (see also Moorhead and Cumming 2008).

The governmental enforcement role is now concentrated in the Commission for Equality and Human Rights, created in the Equality Act of 2006. Earlier and more specialized commissions focusing on race, gender, and disability discrimination were consolidated into the CEHR. Although the commission has powers to undertake formal investigations as an enforcement tool, and is given the exclusive power to litigate to remedy some forms of structural (unintentional) discrimination, its current emphasis is on seeking to achieve policy goals by providing advice, announcing best practices, and informal persuasion (Dickens 2007: 475-76). Further, although the commission may provide assistance to individual claimants, lack of resources has led it to provide such assistance only in cases with broad policy ramifications. In 2000-01, the three equality commissions (race, gender, disability) combined provided assistance to about 300 claimants out of 20,000 discrimination cases that came before tribunals (*id.*). Private enforcement through the employment tribunals is the dominant mode of enforcement by a wide margin.

b. Australia

In Australia's federalist system, there are job discrimination laws at the state, territorial, and federal levels. Peta Spender reports that the protected classifications in Australia are wide-ranging, including, but not limited to, race, religion, age, disability, sex, sexuality, gender identity, relationship status, and profession. Federal laws include the Racial Discrimination Act of 1975, Sex Discrimination Act of 1984, Disability Discrimination Act of 1992, and Age Discrimination Act 2004. In both the federal and state systems, Spender explains, "[g]overnment initiated enforcement plays almost no role," with the system being centered on private enforcement.

As in the American and British systems, conciliation is an important part of the process at the initial stage. In the federal system the conciliation process is supervised by the Human Rights and Equal Opportunity Commission, and states possess similar administrative authorities (Sternlight 2004: 1452). The HREOC and parallel state and territory conciliation processes are strictly voluntary in nature and if conciliation fails claimants are free to pursue their claims privately (in the fora described below). Creation of this conciliation system was motivated by the belief that it would be easy, inexpensive, flexible, user-friendly, and conducive to repairing relationships (Chapman 2000: 321-22). It also represented a self-conscious choice to avoid a litigation-centered process that policy designers believed could be excessively slow, formal, costly, and likely to exacerbate rather than ameliorate employment discrimination disputes (Thornton 1990: 145). The agency is authorized to terminate a complaint without conciliation if it deems the complaint to lack merit, or the conciliation process fails to achieve settlement (Sternlight 2004: 1452-57). Once conciliation is terminated, the claimant can proceed to the next stage; in practice most claims never proceed beyond the conciliation stage (id.: 1453). Peta Spender reports that "[t]here is an ongoing concern about whether the relevant agencies are sufficiently resourced and the consequences of this for the conciliation phase of the proceedings."

In the federal system, following conciliation the claimant can file a federal lawsuit. It used to be the case that after conciliation in the federal system, HREOC was authorized to hold administrative hearings on claims and there was no private right to litigate. In the 1990s Australian courts identified constitutional problems with the tribunal system, and this encouraged a move to the current private right to litigate in federal court (Sternlight 2004: 1458-59). At the state and territory levels, after the conciliation phase claimants have recourse to administrative tribunals and not to courts.

Spender describes the two track federalist framework for processing job discrimination claims in Australia as follows:

In most cases, the complaint is privately initiated by an individual with the relevant State, Territory or Federal agency that deals with discrimination matters. The complaint is subject to conciliation and if conciliation fails to resolve the dispute, the complaint is either referred by the agency to a tribunal or the complainant brings separate proceedings in the tribunal... The discrimination legislation states where cases will go and most of the legislation of the State and Territory level adopts a more informal model of dispute resolution,

which points to tribunals rather than courts... These tribunals are empowered under legislation to decide their own procedures and therefore their rules are less prescriptive than courts and their procedures (including their procedures regarding disclosure) are more informal.

At the federal level, the Federal Court and Federal Magistrates Court perform the functions that are otherwise performed by the tribunal at the State and Territory level... At the federal level, where the Constitution requires that judicial power may only be vested in courts, the courts are the nominated venue for discrimination cases and enforcement of orders can remain within the court system, although the procedures are often more formal.

With respect to damages, Peta Spender reports: “The relief that may be claimed includes injunctions (both mandatory and prohibitory) and damages. Although damages are payable, the quantum is low relative to comparable tort claims. A recent average amount is about \$24,000.” She further reports: “The English rule as to costs generally applies in Australia i.e. the loser pays the winner’s costs. However, in some claims (e.g. workers compensation claims) and in a significant group of tribunals (e.g. the State and Territory civil and administrative tribunals) the US rule applies so that each party bears their own costs,” and job discrimination claims before tribunals are within this category.

c. Canada

In Canada’s federalist system job discrimination statutes exist at both the federal and provincial levels, with federal law only covering governmental employers, and state laws regulating both governmental employers and the private sector. Thus, a very large majority of claims are handled at the provincial level. Jasminka Kalajdzic explains the scope of Canadian job discrimination laws at the federal and provincial levels:

Human rights legislation in each province and federally provides protection against discriminatory treatment in a number of sectors, including employment. Such legislation prohibits employers from discriminating against job applicants or employees on the basis of race, nationality, ethnicity or place of origin, colour, religion or creed, marital status, mental or physical disability, sex and sexual orientation. Most, but not all, provinces also protect against discrimination on the basis of family status or due to a criminal conviction for which a pardon has been granted. All jurisdictions prohibit discrimination based on age, but the definition of age varies. In Ontario, protection against discrimination in employment only extends to persons over 18 years of age. Mandatory retirement at age 65 is no longer permitted under human rights codes.

Human rights protection in employment has been interpreted very broadly, to include all aspects of the employer-employee relationship –

from advertising a job posting and interviewing candidates, to wages, promotion, workplace culture and termination.

Section 15 of the [federal] *Charter of Rights and Freedoms* also guarantees equality of treatment in the same protected spheres, but the *Charter* applies to unlawful conduct of government agencies and officials (and therefore applies only to employees of government bodies).

The enforcement framework is predominantly dependent on private initiation, primarily in a tribunal system, and also in court for a narrow range of claims (to be discussed below), although in some provinces human rights commissions possess the authority to initiate proceedings. The provincial human rights statutes typically allow individuals to file complaints with a human rights commission that is charged with investigating the claim and seeking to facilitate a voluntary settlement. Most cases are settled or withdrawn without entering the tribunal process. Several Canadian practitioners recently summarized the system as follows:

With the notable exceptions of British Columbia and Ontario, Canadian human rights statutes typically use an indirect complaint system to process and resolve human rights disputes, whereby complaints are filed with a human rights commission that is charged with investigating the complaint and attempting to mediate a settlement. If the complaint cannot be settled, the commission decides whether to dispose of the complaint or refer it to the human rights tribunal for adjudication. Under this system, the commission, as opposed to the complainant, generally has carriage over the complaint and the commission, as opposed to the complainant, generally has party status before the tribunal (Goodman and Mantas 2009: 271-72).

Note that under this system the human rights commissions play a critical gatekeeping role in deciding which complaints will be forwarded to the tribunal. In Ontario in 2006-07, only seven percent of claims were forwarded to the tribunal by the human rights commission (id.: 269-70). Interestingly, in 2008 Ontario enacted a reform whereby claimants would be free to bypass the commission and file their claims directly with the tribunal, a change that some speculate will dramatically increase the number of claims heard in tribunals in Ontario (id.)

Jasminka Kalajdzic explains the system for initiating and processing claims, as well as available remedies, as follows:

Human rights commissions in some provinces have the authority to conduct self-initiated investigations and prosecutions of suspected violations, usually those of a systemic nature. Most human rights complaints, however, are initiated by the affected individual... A complaint of breach of the act is normally filed by the victim personally, although some provincial codes (like Ontario's *Human Rights Code*, R.S.O. 1990, c.H-19) permit a person or organization to file a complaint on behalf of the victim, with the latter's consent. Although the majority of complaints are settled via mediation, the

Tribunal adjudicates many cases and has very broad remedial authority. The legislation adopts a “make whole” approach, which results in the employer being liable for all reasonably foreseeable losses, including loss of future earnings and benefits, reinstatement and damages for mental distress. The Tribunal also has the power to order any number of anti-discrimination initiatives in furtherance of its mandate to eliminate discrimination from the workplace for the benefit of all workers (citation omitted).

Although substantial damages are available in theory, Jasminka Kalajdzic observes that, in practice, “as damage awards are not usually very high in human rights matters, it is difficult to retain the services of a lawyer in private practice.” This issue is addressed partially because “[t]he Ontario Human Rights Legal Support Centre is staffed by lawyers who assist complainants in filling out forms, answering general legal and procedural questions, and in some cases providing legal representation before the Tribunal..., and [s]ome community legal clinics specialize in employment claims, while others will provide advice if the client meets strict income requirements.” Kalajdzic also reports, regarding cost shifting, that “[a]dministrative tribunals do not possess an inherent jurisdiction to award costs to a successful party.” The rules on costs are a function of statute and vary across provincial jurisdictions, with some (like Saskatchewan) providing for cost shifting, while others (like Ontario) do not. She also observes that “few human rights class actions have been litigated in Canada,” apparently because current Canadian human rights law presents many obstacles to class certification (Goodman and Mantas 2009: 273).

Although the jurisdiction of administrative tribunals over statutory job discrimination claims is usually exclusive, one exception to this arises in Ontario if a plaintiff asserts concurrent related claims in court such as common law claims of wrongful dismissal, intentional infliction of emotional distress, or breach of an employment contract (id: 271-72). Only in that event can an individual litigate a statutory job discrimination claim in court. Jasminka Kalajdzic explained this fairly recent development:

Although the Supreme Court of Canada once held, out of deference to the expertise of the human rights tribunals, that a human rights breach could not be litigated in civil courts, courts now do permit a common law action in tort on a contract involving behaviour by the employer that potentially runs afoul of human rights codes, so long as the cause of action can stand on its own, and does not depend exclusively on the breach of the code. Recent amendments to Ontario’s Code create a new substantive jurisdiction in the Superior Court for breaches of the Code, so long as the claim does not rest solely on the statutory breach (section 46.1 of the *Human Rights Code*, which came into force on June 30, 2008; citation omitted).

C. Protecting Consumers from Unfair or Deceptive Acts and Practices

1. The United States

a. 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.” The FTC Act created procedures to be followed by the Commission along with penalties 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 action⁴⁸) and reasonable attorneys’ fees and expenses.⁴⁹

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;⁵⁰ 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. One’s first reaction on hearing about the case would probably be that it was filed in federal court. In fact, it was filed in California state court under several California statutes

⁴⁸ In class actions, the statutory penalty can be up to the lesser of \$500,000 or one percent of the net worth of the debt collector.

⁴⁹ Other federal statutes authorizing private rights of action include the Truth-in Lending Act, Consumer Leasing Act, Fair Credit Reporting Act, Equal Credit Opportunity Act, Real Estate Settlement Procedures Act, Homeowner’s Protection Act, and the Truth in Savings Act. Many of these statutes also include public enforcement provisions, often delegating that authority to the FTC.

⁵⁰ The filing of the suit was reported on several national broadcast outlets including National Public Radio and MSNBC, as well as in newspaper both in the U.S. and in other countries (e.g., a story appeared in the *Guardian* as well as the *Financial Times*).

including California's False Advertising Law, all of which, unlike federal statutes, authorize private rights of action.

All of the 50 states have some form of general statute dealing with UDAP issues, often referred to as "little FTC Acts."⁵¹ These acts vary from state to state, with regard both to scope and to enforcement provisions. A 2009 report prepared for the National Consumer Law Center (Carter 2009) describes these variations; Appendix B of that report (pp. 7-10) shows a chart summarizing some of the key differences among the states.⁵² 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).⁵³

Appendix B 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 Appendix B was prepared⁵⁴) allow consumers to recover compensatory damages. Many states provide for multiple or punitive damages and/or statutory damages (i.e., set amounts unrelated to actual damages),⁵⁵ and many also provide for attorneys' fees for consumers who prevail in their claims.⁵⁶ Many states specifically allow class actions under their statutes,⁵⁷ and many allow

⁵¹ See Butler and Wright (2010: MSpp. 3-10) for a brief history of the development of these state laws.

⁵² For more detailed analyses of the individual state statutes, see (Carter 2009), Appendix B ("State-by-State Summaries of State UDAP Statutes"), available at <http://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf> [last visited December 8, 2010]. See Dunbar (1984) for an earlier effort to compile comparative information on the strength of enforcement regimes under state deceptive trade practices legislation.

⁵³ Iowa was the last state to provide for private rights of action, with that state's law (Iowa Ann. Code §714H) taking effect on July 1, 2009.

⁵⁴ 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 Ann. Code §714H.5(4)).

⁵⁵ Information on statutory damages is from a data set assembled by the Searle Center at Northwestern University Law School, and which was kindly provided to us by Professor Joshua Wright (George Mason University School of Law).

⁵⁶ 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; five 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" (AS §§ 45.50.537(c)).

FIGURE 2: PRIVATE ENFORCEMENT STRENGTH OF STATE UDAP LAWS



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 Appendix B, 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 Appendix B). 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

⁵⁷ Presumably class actions would be permitted in other states under general procedural rules providing for class actions unless a statute specifically disallowed class actions.

citizen liberalism — 0.20 (Berry et al. 1998) -- and with a measure of states' tendency to adopt innovative policies — 0.38 (Walker 1969).⁵⁸

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 law suits brought under UDAP statutes.⁵⁹

b. Empirical Research on Private Enforcement Regarding Consumer Problems⁶⁰

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 scattered research related to specific problems that could be labeled unfair or deceptive practices, such as disputes with securities dealers (Gross and Black 2009) or arising from used-car purchases. (McNeil et al. 1979).

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 (Day 1984; Mason and Himes 1973) and by scholars approaching the question from more of a law-in-action perspective (Best 1981; Best and R.Andreasenn 1977; Ladinsky and Susmilch 1985). Meili (2010b: 179-80) 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, [with] a descending order of complaint probability, beginning with non-professional services (the most likely source of complaints), followed

⁵⁸ 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 2010: 27-29). The Searle Center measure, which coded state consumer protection laws in effect in 2004, correlated 0.30 with the measure of citizen liberalism and .28 with state orientation toward policy innovation.

⁵⁹ See Dunbar (1984) for a discussion of his effort to collect such information, and the problems in using the information he was able to obtain to make systematic comparisons among the states.

⁶⁰ This section borrows generously from a recent review of empirical research related to consumer protection (Meili 2010b).

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 frequencies 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). [citations omitted]

Meili goes on to note:

[T]he extensive empirical research on complaining behavior has revealed that third-part 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 group of consumers, i.e., consumers who fit into one or more of these categories are more likely to prevail after complaining.⁶¹

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 (see Meili 2010b: 183); 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 (Meili 2010: 194). Under the Federal Arbitration Act, contractual agreements to take disputes to arbitration can trump rights of action in state UDAP laws. 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 which has produced decisions cutting in both directions (Bland et al. 2007, 180n82). Although there is a body of empirical research on consumer

⁶¹ Meili (p. 181) also notes that there has been research on consumer complaining in numerous countries including Australia, Canada, and the United Kingdom.

arbitration,⁶² none of that research focuses specifically on issues that would be covered under UDAP laws. As we observed in Section III, “[g]overnment reliance on (and enforcement under the Federal Arbitration Act of 1925) private ordering to create alternative dispute resolution processes to litigation, although characteristic of some of the general aspects of American society discussed above, looks considerably less benign when considered in light of recent developments in England and Wales and elsewhere in Europe (Hodges 2008).”

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. A recent article (Butler and Johnston 2010) argues that current state UDAP laws produce over-enforcement, which has negative consequences for consumer welfare. 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). 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. 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.⁶³ Moreover, the study finds that there is very substantial variation from state to state (*id.*, pp. 21-24), with almost half the states showing either no increase or a decline in reported cases between 2000 and 2007.

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 (Butler and Wright 2010). This study 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. 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. The panel members reviewed 110 case scenarios (10 of which were based on actual FTC enforcement actions) and then indicated (1) whether the practice was “unfair or deceptive according to FTC standards,” and (2) “whether he or she believed the FTC would initiate an enforcement action.” The results showed, first, that of the 100 scenarios based on state cases, the shadow FTC

⁶² See Cole and Frank (2008) for a brief review of some recent studies of consumer arbitration. The most recent study (Drahozal and Zyontz 2010), 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).

⁶³ This point is acknowledged by the author of the report upon which Butler and Johnston draw (see Wright 2010: 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).

members found that 42 involved possible illegal conduct under the FTC Act; they found that all 10 of the actual FTC scenarios constituted violations. Interestingly, the shadow FTC members thought that only 16 of the 42 state cases would have led to possible FTC action.

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. 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 percent 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 are an area where the small claims class action has obvious potential as a mechanism of private enforcement,⁶⁴ there is relatively little empirical research on consumer class actions. Early studies focused on a variety of areas other than consumer cases (Alexander 1991; DuVal 1976; Garth 1992; Wolfram 1976). 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 (see Hensler et al. 1999), 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 fact, a recent study of federal class action settlements found that 30 percent 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 (Fitzpatrick 2010, 824).⁶⁵ Most of these appear to be cases involving truly small claims, which defy plausible grounding in a compensatory rationale. As we observed in Section III:

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 which is not part of the applicable regulatory

⁶⁴ Hensler et al. (1999, p. 54) found that consumer cases constitute about a quarter to a third of federal class actions; a more recent study of federal class action settlements found that only 12-13 percent were consumer cases, plus another 6 percent dealing with debt collection (Fitzpatrick 2010: 818).

⁶⁵ The next highest category was antitrust at 13 percent. Thirty-seven (37) percent of the consumer class action case settlements involved injunctive or declaratory relief. None of the debt collection case settlements involved in-kind relief, and only 12 percent involved injunctive or declaratory relief. Fitzpatrick also reports that about a quarter of the settlement value was awarded as fees in consumer class actions (p. 835), a figure in line with the percentage in most other types of class actions.

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 under Rule 23, 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” (28 U.S.C. § 2072(b)), and that the Federal Rules apply trans-substantively (Burbank and Wolff 2010).

We were able to locate only one empirical study focused on consumer class actions. Meili (2010a) looks at lawyers and lead plaintiffs, basing his analysis on interviews with thirty-three lawyers and twenty lead plaintiffs;⁶⁶ the former were selected from among the membership of the National Association of Consumer Advocates. The lawyers were asked to select a case they had been involved in to discuss during the interviews; “about half of the cases involved some form of misrepresentation, fraud, or breach of contract against product manufacturers; [t]he other half involved abusive debt collection practices, credit reporting errors, or discriminatory credit terms” (p. [15]). 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. 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.

2. Other Common Law Countries

a. Great Britain⁶⁷

As is true in most countries, in Britain there is a complex of laws dealing with unfair and deceptive practices.⁶⁸ As explained by Iain Ramsay, the primary regulations are the Consumer Protection from Unfair Trading Regulations promulgated in 2008⁶⁹:

⁶⁶ In an earlier book chapter, Meili (2006) 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.

⁶⁷ We refer here to Great Britain (and subsequently Britain) rather than to England and Wales because the consumer protection regime is the same in Scotland as in England and Wales; the Office of Fair Trading (OFT) and the local Trading Standards Officers (TSO) function in Scotland in the same way as in England and Wales and apply the same legal standards and procedures.

⁶⁸ There are a number of studies that include information on the frequency of significant consumer problems and actions that consumers take in response to those problems; most of these studies include consumer problems among a much broader range of problems that individuals or households might encounter (Genn 1999; Genn and Paterson 2001; Pleasence et al. 2006; Pleasence et al. 2010; Pleasence et al. 2003). The Office of Fair Trading has in the past done

The Consumer Protection from Unfair Trading (CPUT) Regulations 2008 is the primary law addressing unfair and deceptive consumer practices in the UK. This regulation implements in UK law the 2005 EU Unfair Commercial Practices Directive and involved the repeal of over 20 existing consumer protection statutes, including the previous “workhorse” statute in this area, The Trade Descriptions Act 1968.

There are other specialized laws on misleading and unfair practices (e.g. the Consumer Protection (Distance Selling) Regulations 2000 and credit and financial services legislation (see e.g. Consumer Credit Act 1974 enforced by the Office of Fair Trading and overlapping role of the Financial Service Authority under the Financial Services and Markets Act 2000). These agencies can police misleading credit practices through licensing and conduct of business rules and the Financial Services Authority may require firms to make restitution. In addition the Financial Ombudsman Service plays an important role in consumer redress in relation to financial services.

General consumer protection issues in Great Britain fall under the purview of the national Office of Fair Trading and local Trading Standards Officers (TSO). Iain Ramsay describes the role of these offices in the following way:

Government enforcement combines decentralized enforcement by Trading Standards Officers throughout the UK (about 200 local authority trading standards departments throughout the UK) and the Office of Fair Trading. Both have a duty to enforce the Act. Local enforcement involves some proactive monitoring. The regulations may be enforced by quasi-criminal sanctions (liability arising from fact of offence with defences of due diligence: mens rea is required in relation to offences under grand general clause). Sanctions are fine or imprisonment.

Thus, rather than initiating actions themselves, consumers will bring complaints to their local TSO, which will employ quasi-criminal and administrative enforcement powers to resolve problems.⁷⁰ The idea of creating a position of Consumer Advocate, who would be empowered to bring collective action cases to obtain consumer redress, was proposed by the Labor government in 2009, but has not been implemented by the Conservative/LibDem coalition that came into

some surveys specific to the experience of consumer problems (Office of Fair Trading 1986). None of these studies singled out problems resembling those covered by UDAP statutes in the U.S.

⁶⁹ Available at http://www.opsi.gov.uk/si/si2008/draft/ukdsi_9780110811574_en_1.

⁷⁰ In 2009-10, TSOs brought only 169 criminal prosecutions [see http://www.offt.gov.uk/shared_offt/annual_report/2009/hc301-annual-report2009-10g.pdf, last visited December 12, 2010].

office in May 2010.⁷¹ Under existing British law and procedure, there is nothing equivalent to the American consumer class action.

In addition to the OFT and the local TSOs there are a number of specialized regulatory agencies that also act in response to consumer complaints. These include OFCOM (for the communication industry), OFWAT (the regulator of water and sewerage providers), and the Financial Services Authority (FSA). As noted by Iain Ramsay, in the financial services sector, one also finds the Financial Ombudsman Service (FOS), which will investigate consumer complaints regarding banks, insurers, investment firms, and a range of credit providers, and then seek to mediate and if necessary adjudicate, to resolve valid claims. The Advertising Standards Authority is an independent, nongovernment agency that deals with complaints about false or deceptive advertising;⁷² The ASA enforces Advertising Codes created by the Committee on Advertising Practice (an industry organization).⁷³ Iain Ramsay described the activities of the ASA in the following way:

[I]n relation to deceptive and unfair advertising [consumers can complain to] the Advertising Standards Authority... The ASA is an industry financed body but it would be misleading to describe it purely as self-regulation since the government has delegated the day to day administration of broadcast advertising to it under a co-regulation contract. In relation to print ads the ASA investigates complaints and also monitors advertising. It can ask advertisers to withdraw ads, require them to have ads vetted, with the ultimate sanction of requesting media not to carry an ad (rarely used). It gives adverse publicity to ads which contravene its code. It is well financed and although originally established in 1960s as a method of preventing further legal regulation, governments view it as an integral part of regulation of UK advertising. In relation to the CPUT, the OFT regards it as perhaps the "first port of call" in relation to misleading ads, reducing calls on its resources. The ASA may refer cases to the OFT as it did in relation to e.g. Ryanair advertising.⁷⁴ It is often used as a model for European wide regulation. Consumers do not receive any compensation for a successful complaint so one might speculate whether it is sometimes a method for "letting off steam."

Overall, although enforcement activities in the consumer area in Britain are often initiated in response to consumer complaints, there is no general recourse to the courts by consumers in the absence of a common law claim of breach of contract, breach of warranty, or

⁷¹ Ostensibly, the Government is consulting on the Consumer Advocate proposal. Whether it will proceed in light of the financial situation and the drastic budget cuts underway in the UK is very unclear.

⁷² The ASA's website can be found at <http://asa.org.uk/>.

⁷³ In addition to creating the Advertising Codes (one for broadcast advertising and one for nonbroadcast advertising), the Committee on Advertising Practice provides a service to review advertising copy prior to advertisements being released in order to insure that the copy is in conformance with the relevant Advertising Code.

⁷⁴ See <http://www.offt.gov.uk/news-and-updates/press/2009/79-09>.

fraud. Consumers can turn to the courts for individual redress in situations where a specific statute imposing requirements on sellers and providers has been breached. A relatively unique aspect of the process employed by the Financial Ombudsman Service is that a consumer dissatisfied with the FOS's adjudicatory decision may proceed to court (assuming a basis for a legal claim), but a financial services provider is bound by the FOS's determination and may not initiate an appeal to a court.⁷⁵

As we noted in Section I, one area where there has been substantial activity in court in recent years is in the financial products area. According to Iain Ramsay:

There appears to be significant numbers of claims [related to credit transactions] facilitated partly by internet sites. Claims management companies advertised the possibility of getting out of credit card contracts by relying on failure by creditors to follow proper formalities. Recent decisions have reduced the possibility of success in these cases. Many claims have been taken to the Financial Ombudsman Service in relation to credit cards and payment protection insurance [PPI] which has now been almost prohibited by the Financial Services Authority. The Financial Services Authority has been given powers under Financial Services Act 2010 s14 to require firms to establish "consumer redress schemes" for mass claims ("where there has been widespread or regular failure to comply"). Judges refer to the contemporary "spate" of consumer credit litigation but there have been no systematic empirical studies of this phenomenon.⁷⁶

*b. Australia*⁷⁷

The system for enforcing consumer protection laws in Australia is something of a hybrid between the largely public enforcement system in Britain and the heavily private enforcement system that exists in the U.S. Australia is a federal system, and consumer protection laws exist at both the national and subnational (state and territorial) levels. The Federal Trade Practices Act 1974 covers issues such as misleading and deceptive conduct, unconscionable conduct, false representations, bait advertising, pyramid selling, breach of implied warranties such as unmerchantable quality;⁷⁸ the laws at the state and territory level are similar.

⁷⁵ Empirical studies of the Financial Ombudsman Service are reported by Gilad (2008a; b; 2009) and Schwarcz (2009).

⁷⁶ See Howells (2010), for an extended discussion of how this litigation came about and some of the issues it presents.

⁷⁷ As with the U.S. and Britain, there are studies in Australia that include consumer problems among a larger set of legal problems that individuals and households encounter (Coumarelos et al. 2006; FitzGerald 1983); as with the studies elsewhere, these studies do not single out UDAP-type problems.

⁷⁸ Major legislative changes were recently made to the Trade Practices Act, legislated as the Trade Practices Act (Australian Consumer Law) Act 2010. These changes substantially improve the substantive rights of consumers. Legislation entitled the "Australian Consumer

Governmental consumer protection agencies—the Australian Competition and Consumer Commission (ACCC) at the federal level and equivalent agencies at the state and territorial levels—play a significant role in bringing enforcement actions. As described by Peta Spender:

Government-initiated enforcement plays a significant role here because the regulator (the Australian Competition and Consumer Commission—“ACCC”) can bring proceedings for breach of the Trade Practices Act. Similarly, the regulatory agencies operating at the State and Territory level can also initiate actions for breach of the Fair Trading Acts. The relevant venues are as follows. At the federal level, the Federal Court and Federal Magistrates Court have jurisdiction and at the State and Territory level, actions can be brought in tribunals for claims up to a certain value (e.g. \$10,000) and over that threshold in Local/Magistrates Courts up to a certain value (e.g. \$50,000) and over that threshold in the Supreme Courts. Most remedies are available in the courts e.g. declaratory relief, injunctive relief and compensatory damages though, as stated above, punitive damages are rarely awarded. These remedies are generally available in courts and tribunals up to the monetary threshold, however because the powers of the statutory courts (i.e. the courts that are not superior courts with an inherent jurisdiction) are conferred by legislation, there may occasionally be disputes about the ambit of the power of the statutory court and tribunals to make certain orders.

However, because the consumer protection laws do not differentiate between public and private enforcement, and because the governmental agencies tend to focus on systemic issues needing resolution, private enforcement activities play a significant role. Peta Spender explains:

In most cases, the statutory provisions which create the cause of action do not differentiate between regulator- initiated and privately-initiated claims. Therefore privately-initiated claims are quite common because the regulator generally only brings proceedings where there is a systemic issue that needs to be resolved. A hybrid of this approach is where a prosecution or a civil penalty proceeding is initiated by the regulator followed by private enforcement action, by example through class-action proceedings. Most of the remedies available to the regulator are also available to the private individual other than the power to bring a prosecution or a civil penalty proceeding. However, the ACCC has greater power to compel information than is available to private litigants under a private enforcement action

The ACCC will bring proceedings when a systemic issue has arisen but in other respects relies upon private litigants to bring claims for breach

Law” replaced the TPA (effective January 1, 2011), introduced a power to declare unfair contracts void and gave additional enforcement powers to the ACCC. Also, it appears that the Australian Consumer Law authorizes courts to declare as null and void consumer contract clauses mandating private dispute resolution mechanisms (i.e., mandatory arbitration).

of the consumer provisions of the TPA. The misleading and deceptive conduct proceedings ... are very common in all Australian jurisdictions.

According to Peta Spender, “these claims are very common in court and tribunal proceedings.” Although there do not appear to be any national-level tribunals that handle consumer problems, at least some of the Australian states have such tribunals.

- In New South Wales one finds the Consumer, Trader and Tenancy Tribunal (CTTT) which was created in 2002 to combine the Fair Trading Tribunal and the Residential Tribunal.⁷⁹ During the 2009-2010 fiscal year, the CTT disposed of about 62,000 matters, issuing almost 86,000 orders.⁸⁰ How many of these involved what we would label deceptive or unfair acts or practices, we do not know.
- In Victoria state, the Victorian Civil and Administrative Tribunal (VCAT) deals with a wide range of disputes including purchase and supply of goods and services, consumer credit, home construction, and discrimination.⁸¹
- In Queensland, what was the Commercial and Consumer Tribunal has been amalgamated into the Queensland Civil and Administrative Tribunal (QCAT), which as with the Victorian Civil and Administrative Tribunal handles a wide range of disputes.⁸² QCAT has a much lower volume of consumer cases than does CTTT, disposing of only 542 matters in Fiscal Year 2008-09.⁸³

In addition to tribunals that handle consumer matters, there are specialized ombudsman operations at the federal level (e.g., the Telecommunications Industry Ombudsman⁸⁴ and the Financial Ombudsman Service (which merged the Banking And Financial Services Ombudsman, the Financial Industry Complaints Services, and the Insurance Ombudsman Service in 2008).⁸⁵ There are also a number of ombudsman operations dealing with consumer problems at the subnational level. As with the tribunals, what percentage of the caseloads of these operations is comprised of matters that would might be labeled unfair or deceptive acts or practices is not clear.

c. Canada

In common with both the United States and Australia, Canada is a federal system, and there are consumer protection provisions at both the federal and provincial level. As explained by Marina Pavlovic:

⁷⁹ The Tribunal’s website can be found at <http://www.cttt.nsw.gov.au/default.html>.

⁸⁰ See http://www.cttt.nsw.gov.au/About_us/Facts_and_statistics.html.

⁸¹ The Tribunal’s website can be found at <http://www.vcat.vic.gov.au>.

⁸² Website at <http://www.qcat.qld.gov.au/>.

⁸³ Data from the QCAT annual report (p. 29) accessed at http://www.qcat.qld.gov.au/Publications/QCAT_Annual_Report_2009-10.pdf

⁸⁴ See <http://www.tio.com.au/>.

⁸⁵ See <http://www.accc.gov.au> and <http://fos.org.au/>.

Legislative jurisdiction with respect to consumer protection is divided between the two spheres of government. Broadly speaking, “traditional” consumer protection issues related to the sale of goods and services, including unfair business practices under Consumer Protection statutes, are within exclusive provincial jurisdiction. Competition law (including misleading marketing), intellectual property rights, and criminal law are within federal jurisdiction. The federal and provincial legislatures share jurisdiction over privacy and data protection.

...

Broadly speaking, “traditional” consumer protection issues that are legislated provincially, including unfair business practices under provincial consumer protection legislation, are within the jurisdiction of provincial courts. Civil aspects of the [federal] Competition Act are within the exclusive jurisdiction of the Federal Court of Canada. Intellectual property rights are within concurrent jurisdiction of the provincial courts and the Federal courts. Access to information and privacy regulated by federal statutes are within the jurisdiction of Federal courts and within the jurisdiction of provincial courts if regulated by provincial statutes.

In addition, certain aspects of consumer protection may be within the jurisdiction of various administrative tribunals either at the federal or provincial level (for example, Privacy Commissioner of Canada, Competition Tribunal, Canadian Radio Television and Telecommunications Commission, the Commissioner for Complaints for Telecommunications Services. Judicial review of administrative tribunals’ decisions is within the jurisdiction of the federal courts (for federal tribunals) and provincial courts (for provincial tribunals).

There are both federal and state agencies in Canada that have enforcement powers. Marina Pavolic describes the Competition Bureau, the central agency at the federal level, in the following way:⁸⁶

The Competition Bureau, headed by the Commissioner of Competition, is an independent law enforcement agency responsible for the administration and enforcement of the federal Competition Act, as well as several other statutes. The Act provides for a dual enforcement regime—criminal and civil (administrative) and these two regimes cannot be pursued concurrently. “The Commissioner can launch inquiries, challenge civil and merger matters before the Competition Tribunal, make recommendations on criminal matters to the Director of Public Prosecutions of Canada (DPP), and intervene as a competition

⁸⁶ The quotations in the material from Professor Pavlovic’s report are drawn from official sources; in order to conserve space we have chosen to omit the citations she provided.

advocate before federal and provincial bodies.” The Commissioner can also use “public education, written opinions, information contacts, voluntary codes of conduct, written undertakings and prohibition orders.”

The specific enforcement arrangements at the provincial level vary from province to province. Professor Pavlovic provided descriptions for the two largest provinces, Ontario and Quebec:

The Ontario CPA grants the Minister of Consumer and Business Services the right to enforce the act and other legislation for the protection of consumers. The Minister may also delegate her powers, and may also enter into agreements with law enforcement agencies from Ontario and other jurisdictions for the purpose of consumer protection. These agreements allow the Minister to exchange information concerning breaches or possible breaches of the Ontario CPA or related consumer protection legislation. The Director of the Ministry of Consumer and Business Services must maintain a public record of compliance orders issued under the Ontario CPA as well as other documentation (“Consumer Beware List”). The Director of the Ministry of Consumer and Business services (directly or through delegated authority to others) has both investigative and enforcement powers regarding consumer protection... When a consumer makes a complaint to the Ministry, attempts are made by the Consumer Services Bureau to resolve the matter. If the attempt fails and if the matter falls under the contraventions identified in the Act, the Ministry will conduct an investigation... If the matter proceeds to trial and there is a successful penalty decision, in-house crown counsel can apply to court to have the defendant pay restitution to the consumer... The Director may also order a person to stop making false, misleading or deceptive representations in respect of any consumer transactions, if there are reasonable grounds to believe that person is doing so... From January 2008 to November 2009, the Ministry of Consumer Services conducted 597 compliance inspections and field visits and laid 2,777 charges.” ... In addition, the Ministry of Consumer Services (Consumer Services Bureau) is responsible for mediating/handling consumer complaints. In 2009, the Ministry received 55,000 complaints.

The Quebec CPA established the Office de la protection consommateur (“Office”) and defines the scope of its duties. The Office is responsible for protecting consumers by supervising the application of the Quebec CPA, receiving complaints from consumers, educating the public and merchants about consumer protection, conducting research, co-operating with other departments in Quebec on matters of consumer protection and promoting the interests of consumers generally. The office maintains a public record of merchants who have not complied with the Quebec CPA, and the merchant’s profile includes the number

and the nature of complaints received by the Office, as well as the number of complaints that were resolved... The appointed President of the Office may investigate any matter related to any of the acts administered by the Office... A person who contravenes the Quebec CPA or the Regulations under the Act, obstructs an investigation under the Act (i.e. by misrepresentation), does not comply with a voluntary undertaking, disobeys a decision of the President or refuses to comply with a court order is guilty of an offence (provincial offence)... The President may require security from a merchant, or may apply for an injunction if there is reason to believe that consumer payment funds may be misappropriated by the merchant. A court may, on the application of a prosecutor, order that a convicted merchant communicates to consumers the judgment rendered against him and provide adequate explanations and warnings relating to the goods or services in question... Merchants may enter into a written undertaking of voluntary compliance. The President sets the conditions for undertakings, which may include: publication or distribution of the content of the undertaking, compensation of consumers, reimbursement of costs of investigation, and security or guarantee to indemnify consumers... The President may apply to the Superior Court for an injunction ordering a person to cease a prohibited practice under the Quebec CPA. The court may grant additional orders to that person, for example, to reimburse the costs of investigation or publish and distribute communication to the consumers... In 2008–2009, the Office conducted 646 investigations, 183 legal interventions, and charged nearly CAN\$600,000 \$ in penalties... In addition, the Office is responsible for handling (and informally mediating) consumer complaints. In 2008–2009, the Office received 198,382 inquires, of which 5,752 were filed as complaints.

Except for the initiation of complaints, the discussion above reflects public enforcement regarding consumer protection. Marina Pavlovic summarizes private enforcement in Canada in the following way:

Private enforcement of consumer rights in individual disputes revolves around three principal methods, which, in most instances, can also be considered as successive phases of dispute resolution—negotiation with the business, failing which the consumer should engage the appropriate complaint handler, failing which the consumer should resort to the formal court system (small claims court, individual litigation, or class action). This section presents a brief overview of the private enforcement mechanisms, including alternative dispute resolution framework (negotiation, mediation, and arbitration); collective redress through class proceedings; and small claims courts.

Professor Pavlovic notes several nongovernmental entities that provide venues for resolving consumer grievances through informal processes, including:

[T]he Complaint Courier, an Industry Canada-operated clearing house for consumer complaints, requires that the consumer contacts the business first, before funneling the consumer's complaint to the appropriate complaint handler. Other organizations, whether governmental (such as Ontario Ministry of Consumer Services), merchant (such as the Canadian Council of Better Business Bureaus), or consumer organizations (such as Consumers' Council of Canada) all suggest direct negotiation and settlement as the first, if not the principal, dispute resolution mechanisms for individual consumer complaints. Direct negotiation with the other side, whether encouraged or not, has emerged as the most dominant method for the resolution of justiciable consumer problems in Canada. A recent survey on the handling of justiciable problems found that in 58.7% of consumer problems consumers attempted to resolve the problem on their own.

With regard to private enforcement, the materials provided by Professor Pavlovic do not allow us to separate out private enforcement vis-à-vis unfair and deceptive acts and practices (UDAP) versus fairly routine issues of consumer dissatisfaction. According to Professor Pavlovic's most UDAP enforcement in Canada is through public enforcement mechanisms. The one exception is privately-initiated class actions. The significance of UDAP class actions, which might be brought either under provincial consumer protection laws or under the federal Competition Act, is unclear. Respondents to a recent survey of leading plaintiff-side class action counsel in Canada reported a total of 332 pending class actions as of Spring 2009, 73 of which were categorized as either Competition Act claims or consumer claims; there is no information on the percentage of those claims that might be labeled as UDAP (Kalajdzic 2011).⁸⁷

Finally, we should note that there appears to be little empirical research on enforcement related to consumer cases in Canada. There have been recent surveys that assess the frequency of consumer problems and what actions consumers take in response to those problems (Bogart and Vidmar 1990; Currie 2006; 2009; 2010; Vidmar 1988),⁸⁸ and we know of some now quite old research on consumer problems in a Canadian small claims court (Vidmar 1984).

VI. Conclusion

In this paper we have provided a great deal of doctrinal, normative and empirical information about private enforcement of statutory and administrative law in the United States. Our aim has been to enable those from other legal systems to understand the historical, cultural and political background of U.S. private enforcement, the reasons why U.S. legislators may choose a private enforcement (or a hybrid) strategy when they sincerely wish to address an

⁸⁷ The single largest category reported by the survey respondents, a total of 138 cases, fell broadly into the tort category including medical device and drug (60), product liability (38), mass tort (29), and tainted food (11). Interestingly, only 37 of the cases were securities class actions.

⁸⁸ With one exception, these surveys were directed specifically at consumer problems, but included consumer problems along with a full range of potential legal problems individuals and households could encounter.

unremedied systemic problem, and what features of both the general U.S. legal landscape and a particular private enforcement regime are likely to determine whether that regime is effective. We have also sought to provide some comparable information about a number of other common law countries, information that we have gathered from responses to our questionnaire and from our own research.

We acknowledge the great difference between the information provided for the United States and other common law countries. Given our approach to private enforcement, that was perhaps inevitable. 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 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 paper, 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 (Farhang 2010: 76-81). We noted in Section IV.C 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 percent. Over the same period the rate of private lawsuits enforcing federal statutes increased by about 800 percent (Farhang 2010a: 66). This is not to say that Congress uses private enforcement regimes as the norm. On the contrary, as we observed in Section 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 (27 percent of the time), and exclusive reliance on private enforcement was quite rare indeed (occurring only five percent of the time).

We see little reason to suspect that Congress's reliance on private enforcement is likely to abate anytime soon. Important variables driving this legislative outcome remain highly salient today. We persist 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.”

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 so, however, that would be small comfort given that the cure is 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 derive 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 Section 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 (Hadfield 2010: 155).”

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 (Hodges 2008) is a sobering reminder of the baneful influence that tradition, ideology and professional self-interest can have on 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 (1990) 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, we suggested in Section IV.C, incentivize legislative reliance on private enforcement regimes in the U.S. 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. He offered this explanation of the comparative structure of the American administrative state in response to James Q. Wilson's (1989: ch. 16) noted lament of the weakness of American bureaucracy as compared to those in parliamentary democracies.

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

[T]he 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 (Moe 1990: 241).

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 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 (id.: 241).

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 (see Kagan 2001: 6-9). 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 (2001: 15-16) 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."

Interestingly, similar institutional arguments have been marshaled to explain growing private enforcement (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 though the creation of rights that are privately enforceable in both judicial and administrative fora (see, e.g., Alter 1998; Alter and Vargas 2000; Dickens 2007; Hodges 2009; Kagan 2007; Kelemen 2006; Kelemen and Sibbitt 2004; Sweet 2000). 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.
- 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 (Kagan 2007; Kelemen 2006; Kelemen and Sibbitt 2004). Putting aside other rival or supplementary hypotheses,⁸⁹ 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.

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⁸⁹ For a discussion of other explanations, see (Kelemen and Sibbitt 2004).

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