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Public Programs and Private Rights

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PUBLIC PROGRAMS AND PRIVATE RIGHTS

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By what right may courts seek to remedy deficient administrative performance, and by what methods should they do so? This question has been answered in fits and starts, in the context of several existing remedies: rights to contest regulatory impositions, hearing rights concerning government benefits, implied rights of action, and most recently, rights to require an agency itself to take enforcement action. Professors Stewart and Sunstein offer a theory to explain both the conceptual similarities and the evolutionary differences among these remedies. They show how the remedies are linked with particular conceptions of the deepest purposes particular statutes are meant to advance: security of entitlements, expansion of production, and advancement of public values. These conceptions, they argue, justify judicial creation of such remedies in the face of legislative silence. Ordinarily, courts create these remedies as a matter of federal common law, subject to congressional preclusion; occasionally, however, the remedies are compelled by the Constitution itself. By thoughtful use of their remedial powers, courts can fill, in the regulatory era, the same role in protecting the citizenry that they filled when the common law stood nearly alone.

I. INTRODUCTION

What role should private initiatives play in enforcing regulatory programs? Consider this judicial quandary: Congress has authorized a federal agency to control private conduct in order to reduce pollution, eliminate sex discrimination, or prevent securities fraud. An individual or class, claiming to be among the beneficiaries of the regulatory program, comes forward to assert that the agency has failed to enforce the applicable statute. To ensure obedience to regulatory norms, the beneficiary sues either the agency, to compel enforcement, or a private party subject to those norms, to compel compliance. The governing statute is silent on whether a federal court may afford relief. How should the court respond to such claims, and what relief should it award?

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The debate over these questions has centered in recent years on the creation by federal courts of private rights of action—suits brought by private litigants against private persons allegedly acting in violation of a statute. At common law such rights were generally recognized, even when the legislature had provided for enforcement by a public authority.[1] This practice was followed by the federal courts in many decisions.[2] After the Supreme Court enthusiastically endorsed this form of federal common law in its 1964 decision in *J.I. Case Co. v. Borak*,[3] lower federal courts recognized private rights of action under regulatory statutes with increasing frequency.[4]

The past few years, however, have seen a sharp reversal. The Supreme Court has all but repudiated *Borak* and has created a strong presumption against judicial recognition of private rights of action.[5] The Court's restrictive approach has provoked sharp controversy. Some commentators argue that it has deprived regulatory beneficiaries of an appropriate and effective remedy for administrative failure.[6] Others maintain that Congress alone should decide how regulatory statutes are

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[1] *See infra* pp. 1300–01.

[2] *See* Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

[3] 377 U.S. 426 (1964).

[4] *See, e.g.*, Bratton v. Shiffrin, 635 F.2d 1228 (7th Cir. 1980) (Federal Aviation Act), *cert. denied*, 449 U.S. 1123 (1981); Riggle v. California, 577 F.2d 579 (9th Cir. 1978) (Rivers and Harbors Appropriation Act); Abrahamson v. Fleschner, 568 F.2d 862 (2d Cir. 1977) (Investment Advisors Act), *cert. denied*, 436 U.S. 913 (1978); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) (Rehabilitation Act of 1973); McDaniel v. University of Chicago, 548 F.2d 689 (7th Cir. 1977) (Davis-Bacon Act), *cert. denied*, 434 U.S. 1033 (1978); Lodge 1858, Am. Fed'n of Gov't Employees v. Paine, 436 F.2d 882 (D.C. Cir. 1970) (National Aeronautics and Space Act).

[5] *See* Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981); Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 148–50 (1980); Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Chrysler Corp. v. Brown, 441 U.S. 281 (1979). The question whether a statute creates a private right of action is now solely "one of congressional intent, not . . . whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross*, 442 U.S. at 578. Because Congress' failure to provide expressly for private remedies is taken as an indication that those remedies were not intended, *see TAMA*, 444 U.S. at 19–24, it is plain that both the hospitable approach adopted in *Borak* and the more cautious but still flexible approach espoused in Cort v. Ash, 422 U.S. 66 (1975), have been substantially repudiated.

[6] *See, e.g.*, Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977) (arguing for explicit legislative creation of private rights of action in order to remedy the situation); Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1 (1978) (same).

to be enforced.[7] Meanwhile, some lower federal courts have continued to create private remedies, although the controlling standards are obscure and conflicts among courts are common.[8]

During the past fifteen years, beneficiaries[9] of regulatory programs have also sought to protect their interests in another way — by suing the responsible agencies and challenging their failure to take action.[10] We shall say that such suits assert a private right of initiation. Under the traditional model of administrative law, an agency's decision whether to initiate proceedings against third parties was generally immune from judicial review.[11] Indeed, the doctrine of prosecutorial discretion is still taken to bar judicial supervision of many enforcement decisions.[12] In the past twenty years, however, federal courts have frequently required agencies to implement and enforce regulatory statutes, or at least to explain their failure to do so.[13]

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[7] *See, e.g.*, Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CALIF. L. REV. 80 (1981).

[8] Conflicts have appeared, for example, in the interpretation of the Commodities Exchange Act, 7 U.S.C. §§ 1–19 (1976). *Compare* Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980) (private right of action available under the Act), *and* Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980) (plaintiffs not required to exhaust administrative reparations procedures before bringing a private action under the Act), *with* Rivers v. Rosenthal & Co., 634 F.2d 774 (5th Cir. 1980) (no implied right of action under the Act as revised in 1974). Conflicts have also surfaced in the interpretation of § 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793 (1976). *Compare* California Paralyzed Veterans Ass'n v. FCC, 496 F. Supp. 125 (C.D. Cal. 1980) (finding a private right of action under § 503), *and* Clarke v. FELEC Servs., 489 F. Supp. 165 (D. Alaska 1980) (same), *with* Davis v. United Air Lines, 662 F.2d 120 (2d Cir. 1981) (finding no private right of action under § 503), *and* Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) (same).

[9] The term "beneficiary" is used as shorthand for "purported beneficiary" throughout this Article.

[10] *See infra* pp. 1205–06.

[11] This result was alternately based on the notions that such decisions were not "ripe" for review, offended no legally cognizable right on the part of a statutory beneficiary, or represented an unreviewable exercise of prosecutorial discretion. *See, e.g.*, FTC v. Klesner, 280 U.S. 19, 25 (1929) (no review of FTC decision not to issue complaint); United Elec. Contractors Ass'n v. Ordman, 366 F.2d 776 (2d Cir. 1966) (NLRB refusal to institute unfair labor practice complaint is a matter of unreviewable discretion), *cert. denied*, 385 U.S. 1026 (1967).

[12] *See* Southern Ry. v. Seaboard Allied Milling Corp., 442 U.S. 444 (1979) (no right of initiation against ICC); Natural Resources Defense Council v. SEC, 606 F.2d 1031 (D.C. Cir. 1979) (dictum) (suggesting that decisions whether to enforce are unreviewable if formal proceedings have not begun); Bays v. Miller, 524 F.2d 631 (9th Cir. 1975) (NLRB decision not to issue unfair labor practice complaint); Pendleton v. Trans Union Sys. Corp., 430 F. Supp. 95 (E.D. Pa. 1977) (FTC decision to initiate proceedings).

[13] *E.g.*, Dunlop v. Bachowski, 421 U.S. 560 (1975) (reviewing decision of Secretary of Labor not to file suit to invalidate union election); WWHT, Inc. v. FCC, 656 F.2d

This Article is primarily concerned with determining whether and in what circumstances the creation of private rights of action and initiation is a legitimate form of judicial lawmaking. We believe, however, that these two remedies must be examined in relation to two other remedies for faulty administrative performance. The first we call the "right of defense" — the right of those regulated to obtain judicial review of allegedly unauthorized government controls. The second we call the "new-property hearing right" — the due process right to an administrative hearing concerning an individual's claimed entitlement to assistance payments, job tenure, or other advantageous opportunities furnished by the government.

These four remedies have generally been considered by courts and commentators to be independent, and Part II of this Article summarizes their divergent development. But the remedies have important similarities. Each is a judicially created corrective for defective administrative performance. And in our system of separated powers, each raises the same basic question of the ability and authority of courts to engraft private correctives onto a statutory system of public administration.

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807 (D.C. Cir. 1981) (reviewing FCC denial of petition to institute rulemaking proceedings); Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419 v. Brown, 656 F.2d 564 (10th Cir. 1981) (holding that federal officials may be required to enforce Davis-Bacon Act); Natural Resources Defense Council v. SEC, 606 F.2d 1031 (D.C. Cir. 1979) (reviewing SEC refusal to promulgate rules requiring disclosure of environmental and employment policies); Pennsylvania v. National Ass'n of Flood Insurers, 520 F.2d 11 (3d Cir. 1975) (ordering HUD to disseminate flood insurance information); REA Express, Inc. v. CAB, 507 F.2d 42 (2d Cir. 1974) (reviewing CAB decision not to prohibit use of an allegedly confusing trade name); Davis v. Romney, 490 F.2d 1366 (3d Cir. 1974) (requiring FHA to make reasonable efforts to ascertain whether homes with insured mortgages meet municipal housing code standards); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam) (requiring the Secretary of Health, Education, and Welfare (now Health and Human Services) to commence enforcement proceedings against certain segregated school districts); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971) (requiring Secretary of the Interior to adopt rules governing traders doing business on Indian reservations); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (requiring Secretary of Agriculture to commence proceedings to cancel registration of DDT by issuing cancellation notices); Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970) (requiring SEC to specify reasons for decision not to require inclusion of shareholder proposals in management's proxy materials), *vacated as moot*, 404 U.S. 403 (1972); NAACP v. Levi, 418 F. Supp. 1109 (D.D.C. 1976) (reviewing decision by Attorney General not to conduct extensive investigation of a crime); Guerrero v. Garza, 418 F. Supp. 182 (W.D. Wis. 1976) (holding that the Department of Labor may be required to monitor activities of farm labor contractors employing migrant workers); *see* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1752–56 (1975).

A. The Formalist Thesis and Its Flaws

The recognition by courts of private rights of action and initiation has often been regarded as a form of federal common law created pursuant to relevant federal statutes.[14] As such, this practice is subject to two related objections. First, decisions about the implementation of administrative programs determine the effective content of those programs. By creating new remedies and enlisting private enforcement initiatives, courts usurp the power over regulatory policy that statutes typically confer on agencies. Because agency choices about enforcement are subject to legislative oversight, this usurpation also diminishes political control over regulatory policy. Second, Congress often explicitly provides for one or more of the four remedies. In the absence of constitutional compulsion, courts invade the legislative domain by creating remedies that Congress has not provided.[15] And no constitutional basis for judicial creation of private rights of initiation or action appeared to exist before the Supreme Court's recent decision in *Logan v. Zimmerman Brush Co.*[16]

These objections to judicial creation of new remedies — more fully elaborated in Part III — can be summarized in what we call the formalist thesis: federal courts must have some textual warrant, constitutional or statutory, for adding new remedies to administrative systems. In this Article, we seek to rebut the formalist thesis and to defend judicial authority to create remedies for defective administrative performances. Our argument is founded on three major points.

First, the courts' protection, through the common law, of liberty and property has served an important separation-of-powers function that is not automatically displaced by the legislature's creation of administrative agencies.[17] In an administrative era, courts should generally assume, unless the legislature provides otherwise, that they may continue to serve

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[14] *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 798–800 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

[15] Our equation of the four remedies and our ultimate conclusion are complicated by the fact that regulatory benefits are predominantly collective in character. Judicial intervention finds its strongest and most conventional justification when protection of individual interests is required; collective benefits are arguably the appropriate province of the political branches. *See infra* pp. 1227–28.

[16] 50 U.S.L.W. 4247 (U.S. Feb. 24, 1982). Of course, rights of defense and new-property hearing rights have sometimes been held to be constitutionally compelled.

[17] The federal courts historically served this function by enforcing law made by both federal and state judges. *See* HART & WECHSLER, *supra* note 14, at 694–702.

that function by protecting private interests through the creation of remedies for deficient agency performance.

Second, the link between electoral representation and administrative decision is too weak to support the formalist thesis; the weakness of this link undermines the claim that judicial creation of additional remedies would circumvent political controls on administration. Indeed, such remedies may help promote agency fidelity to statutory purposes.

Third, the inherent limitations of textual directives require that the enterprise of government be based upon shared background understandings about the most general purposes of government programs. These background understandings, we maintain, consist of three different conceptions of institutional purpose: entitlement, production, and public values. The courts have drawn upon these conceptions in devising the four remedies for defective agency performance; the conceptions help determine whether a text that is silent on the availability of private remedies should be construed to allow such remedies or to forbid them.

Under the entitlement conception, the purpose both of the common law and of administrative regimes is the protection of basic personal rights.[18] Administrative agencies are needed to supplement or supplant common law arrangements that no longer protect those rights adequately. If administrative regulation then fails to protect personal rights, courts may intervene anew to create appropriate remedies for rightholders.

The production conception views regulatory agencies as instruments for maximizing the output of goods and services.[19] Under this view, administrative regulation may be necessary to correct market failures that the private law system cannot remedy. Regulatory agencies, however, are subject to various forms of "government failure" that invite judicial correctives.

Under the public values conception, regulation is a process for the collective determination of social and economic life.[20] Rules governing private activity both shape and express societal norms. The goal of the public values conception is to ensure that choices among such norms are made through democratic processes, rather than through a private law system in which important social decisions are made by judges and private rightholders. This goal, however, is frustrated by the need for specialized agencies to implement administrative programs adopted by the legislature. The courts have responded

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[18] *See infra* pp. 1235–36.

[19] *See infra* pp. 1236–38.

[20] *See infra* pp. 1238–39.

by creating remedies designed to increase public participation and influence in agency decisionmaking processes.

B. Toward a Theory of Remedies for Administrative Beneficiaries

The differences in the evolution of the four remedies are puzzling, because each remedy is a variation on a single theme — judicial relief for defective administrative performance. Part III attempts to explain these differences through a "forms of action" thesis. This thesis explains how each of the alternative conceptions of institutional purpose has become linked with one of the different remedies. These links, which depend on the identity of the litigants and the administrative function in controversy, create four distinct remedial structures. In this sense, each of the four remedies operates as a distinct administrative law "form of action."

Parts IV through VII examine each of the four remedies in greater detail and seek to illustrate how particular remedies converge with particular conceptions of institutional purpose. In these Parts we also address the question of judicial authority to create such remedies. We conclude that all of the remedies have a similar two-part structure. In most instances, such remedies represent a legitimate form of federal common law, subject to legislative displacement. In a few instances, they are required by the Constitution.

Although the focus of this Article is on judicial creation of remedies for defective administrative performance, it also provides two reference points for a broader assessment of administrative conduct and remedial incentives. The first is the question of the appropriate mix of public and private enforcement — a matter about which no general theory now exists.[21] In many fields of social control, it is no longer feasible to rely solely on private litigation to enforce regulatory standards and deter violations. But experience has shown that there are also

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[21] For an early discussion, see Jaffe, *The Individual Right to Initiate Administrative Process*, 25 IOWA L. REV. 485 (1940). For discussions with an economic perspective, see K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES (1976); Block, Nold & Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429 (1981); Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975). For an early analysis of the problem of optimal sanctions, see Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). For comparative works, see Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, in 2 ACCESS TO JUSTICE: PROMISING INSTITUTIONS 767 (M. Cappelletti & J. Weisner eds. 1979); Kötz, *Public Interest Litigation: A Comparative Survey*, in ACCESS TO JUSTICE AND THE WELFARE STATE 85 (M. Cappelletti ed. 1981).

hazards in giving public authorities a monopoly on the enforcement process.[22] Although the theoretical literature has often assumed that private and public enforcement are mutually exclusive,[23] the best solution may be a mix of the two, along with private review of public enforcement. Our analysis represents a preliminary effort to develop a general theory addressing these matters. We conclude provisionally that a substantial role for initiation rights and a more modest one for rights of action are warranted.

The second reference point is the larger issue of incentives and controls over administrative decisions that are disciplined neither by the market nor by the electorate. Because their institutional role lies between traditional private law and traditional public law, administrative agencies present an anomaly in our legal tradition.[24] Judicial creation of remedies for defective agency performance can be understood as a response to this anomaly. But the remedies developed by the courts are surely not the only ones available, nor are they necessarily the most appropriate.

II. THE DEVELOPMENT OF REMEDIES FOR ADMINISTRATIVE BENEFICIARIES

A. The Traditional Model of Administrative Law: Private Rights of Defense

Under the traditional model of administrative law, courts police the boundary between two realms. The first is the realm of private law, in which citizens enjoy liberty and property defined by common law entitlements, and contract with one another within a juridically defined framework. The second is the realm of government, in which elected representatives and other government officials make decisions under procedures laid down by the Constitution and by statutes.[25] The

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[22] Judicial and legislative development of private enforcement rights is in substantial part a response to this experience. To take one example, the failure of the Department of Health and Human Services (formerly HEW) to enforce title VI of the Civil Rights Act of 1964 has spawned considerable litigation. *See, e.g.*, Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam); *see also infra* note 71 (discussing *Adams*).

[23] *See* sources cited *supra* note 21 (Prof. Jaffe's article is an exception).

[24] Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 394 (1981).

[25] *See* Stewart, *supra* note 13, at 1671–76.

boundary between the two realms is crossed when government decisions are implemented against private persons through the coercive exercise of official power. An invasion of common law rights is legitimate only if it has been authorized by the elected legislature — the representative mechanism through which members of society collectively consent to invasions of that sort. A common law action by a citizen against an officer becomes the occasion for a judicial determination whether the legislature has authorized what would otherwise be a common law wrong.

By creating private rights of defense, the traditional model of administrative law curbs official bias or arbitrariness in the enforcement process and thus promotes impartial treatment. At the same time, the system limits the power of government, maintains a well-ordered sphere of private liberty, and preserves the system of market exchange. These are the classic functions of the rule of law.[26]

B. Limitations of the Traditional Model

The traditional model contains no ready basis on which courts could entertain claims by the beneficiaries of a regulatory scheme that an agency had improperly failed to take enforcement action against third parties.[27] If enforcement was declined, the beneficiary was denied an advantageous opportunity to which he had no common law right.

An alternative basis for judicial review — the prerogative writs, such as mandamus[28] — was deprived of its practical utility by encrusted restrictions on its availability.[29] Tradi-

[26] *See* F. HAYEK, THE ROAD TO SERFDOM (1944); R. UNGER, KNOWLEDGE AND POLITICS (1975); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereinafter cited as Kennedy, *Form and Substance*]; Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

[27] *See* Stewart, *supra* note 13, at 1687.

[28] *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 165–93 (1965) (discussing availability of writs of certiorari, mandamus, and prohibition).

[29] *See* Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967). The Supreme Court early held that federal courts do not have general authority to issue writs of mandamus. M'Intire v. Wood, 11 U.S. (7 Cranch) 504 (1813). Moreover, mandamus would not issue to control the exercise of discretion. Wilbur v. United States, 281 U.S. 206, 216–17 (1930); *see also* Jarrett v. Resor, 426 F.2d 213 (9th Cir. 1970) (no federal mandamus jurisdiction when complaint does not allege a failure to perform a "plainly ministerial duty"). In conjunction with the development of the private right of initiation, some courts have become more receptive to the mandamus remedy, *see* Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419 v. Brown, 656 F.2d 564 (10th Cir. 1981); Note, *Mandamus in Administrative Actions: Current Approaches*, 1973 DUKE L.J. 207, but only a few initiation suits are brought as mandamus actions.

tionally, courts also refused to endow many governmental benefits, such as employment, with the protections of due process.[30] Beneath the technical learning of these decisions lies the conviction that private rights to regulatory protection or to other benefits would be inconsistent with needed administrative flexibility, and the associated fear that recognition of such rights would thrust judges into a supervisory role for which they lack ability and authority.[31]

C. The Modern Development of Beneficiary Remedies

During the past century, regulatory controls have proliferated; government has assumed a major role as insurer, redistributor, manager of the economy, and purchaser and provider of goods and services. Individual welfare is shaped less and less by common law rules, more and more by legislative and administrative action.

Contemporary government furnishes two types of advantageous opportunities that concern us here. The first consists of regulatory benefits obtained through government control of the conduct of regulated firms or persons. These benefits, exemplified by the cleaner air resulting from pollution controls, are typically collective in character, in that they cannot be afforded to one person without simultaneously being provided to many others. Courts have sought to protect collective interests in regulatory benefits through initiation rights. The second type of advantageous opportunity consists of individual benefits such as social assistance payments and individual rights such as the right to be free from racial discrimination.[32] The private right of action and the new-property hearing right have increasingly been limited to the protection of such individual benefits and rights.

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[30] *See* cases cited in S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 593–603 (1979).

[31] *See* Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840); Kendall v. United States, 38 U.S. (12 Pet.) 524 (1838); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951); L. JAFFE, *supra* note 28, at 178–80.

[32] Two caveats are in order. First, government also confers collective goods through the spending power — for example, provision for the national defense, prevention of recession through fiscal controls, and revenue sharing. The judicial process has generally not been extended to control these functions. *But see* Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam). Second, the common law and traditional administrative processes confer collective benefits because enforcement actions against individual violators have a generalized deterrent effect and bolster security of expectation. Traditional juristic thinking has, however, sharply distinguished these benefits from the collective goods provided by the regulatory welfare state.

1. Initiation Rights. — Statutes designed to protect regulatory beneficiaries would be undone if agency implementation and enforcement were inadequate or nonexistent. Responding to this possibility, courts have relaxed traditional principles of standing, ripeness, and prosecutorial discretion in order to permit review of agency inaction or of action that is assertedly inadequate.[33] These developments amount to the judicial creation of a private right of initiation.[34]

Occasionally, a court reads a statute to require an agency to take enforcement action whenever a statutory violation is shown. The duty to enforce is held to override agency claims of inadequate resources, competing responsibilities, the need for discretion, and the desirability of further study or negotiation.[35] Such decisions create a strongly responsive right of initiation.[36]

More commonly, right of initiation decisions adopt a deferential standard of review. Courts require agencies to show that they have considered the evidence and claims submitted by beneficiaries and to explain allegedly unlawful inaction; nevertheless, courts acknowledge the importance of discretion, competing interests, and limited budgets.[37] Courts using this approach will not compel enforcement simply because a violation has been shown; the claims of the agency or of third parties must be demonstrably outweighed by the interests as-

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[33] *See* Stewart, *supra* note 13, at 1723–56. In some cases, courts have held that statutory hearing requirements provide a right to formal agency proceedings for beneficiaries who can make out a prima facie case. *See* Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971). In the absence of such requirements, courts have required agencies to provide relevant data and an explanation for inaction, *see* Dunlop v. Bachowski, 421 U.S. 560 (1975), or assertedly inadequate action, *see* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981), and have also given statutory beneficiaries the right to intervene in formal administrative proceedings initiated by others, *see* National Welfare Rights Org. v. Finch, 429 F.2d 725 (D.C. Cir. 1970); *see also* cases cited *supra* note 13 (review of agency inaction).

[34] Congress has emulated these developments by including private rights of initiation in many recent regulatory statutes. *See infra* note 90.

[35] Caswell v. Califano, 583 F.2d 9, 16–18 (1st Cir. 1978); White v. Mathews, 559 F.2d 852, 858–60 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

[36] For the term "strongly responsive," we are indebted to Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410 (1978).

[37] *See, e.g.*, Dunlop v. Bachowski, 421 U.S. 560, 570–71 (1975); Wright v. Califano, 587 F.2d 345, 353–56 (7th Cir. 1978). The court may remand for a more adequate statement of the agency's position, but it rarely rejects a plausible explanation. *See generally* Note, *Judicial Resolution of Systematic Delays in Social Security Hearings*, 79 COLUM. L. REV. 959, 961–65 (1979) (discussion of the level of scrutiny in the social security context).

serted by the beneficiary.[38] Such cases recognize a weakly responsive right of initiation.

Whether strongly or weakly responsive, private initiation rights may raise serious problems for regulatory administration. Successful suits could squander agency resources on isolated, minor controversies, thereby diverting energy from larger patterns of misconduct.

2. Private Rights of Action. — At common law, courts created private rights of action either by relying upon statutes to give specific content to the open-textured "reasonable man" standard of negligence, or by creating an action in damages for statutory wrongs.[39] In creating private rights of action, federal courts have relied on the notion of federal common law, bolstered at times by reference to legislative intent[40] and the need to effectuate the goals of regulatory statutes.[41]

Before the twentieth century, private right of action cases typically involved enforcement of criminal statutes.[42] The resulting system of private and public enforcement did not pose a serious threat of divided administration. Whether enforcement was brought by a public prosecutor in a criminal proceeding or by a private plaintiff in a civil action, a court would decide the ultimate reach of the statute.

Judicial creation of private rights of action raises greater difficulties when the legislature has entrusted enforcement of a statutory scheme to a specialized administrative agency that

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[38] *See* Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979).

[39] At times, the "statutory tort" action was said to be a common law remedy. Lord Coke, for example, stated that at common law, "[u]pon every statute, made for the remedy of any injury, mischief, or grievance, an action lies by the party grieved, either by the express words of the statute, or by implication." 1 J. COMYNS, A DIGEST OF THE LAWS OF ENGLAND 434 (A. Hammond 5th ed. 1822) (1st ed. published in installments, London 1762–1767) (citing E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55, 118 (London 1642)). Similarly, Chief Justice Holt stated that "where-ever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have a remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute . . . ." 87 Eng. Rep. 791 (1703). For a general discussion of the wavering historical development of private rights of action, see Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1 (1968). At other times, however, "statutory tort" actions are portrayed as the product of judicial recognition of remedies implicit in statutes. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 717 (1979).

For discussion of the use of statutes to particularize common law standards, see Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

[40] *See, e.g.*, Cannon v. University of Chicago, 441 U.S. at 717.

[41] *See* J.I. Case Co. v. Borak, 377 U.S. 426, 431–34 (1964).

[42] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36 (4th ed. 1971).

is empowered to issue rules or to adjudicate controversies under the statute. In this context, private rights of action may usurp the agency's responsibility for regulatory implementation, decrease legislative control over the nature and amount of enforcement activity, and force courts to determine in the first instance the meaning of a regulatory statute.

3. New-Property Hearing Rights. — Goldberg v. Kelly[43] and later decisions[44] established that agencies may not withdraw or reduce certain individual statutory benefits, such as welfare payments, without providing procedures ranging from a statement of reasons to a trial-type hearing. A statute creates a constitutionally protected "property" entitlement if it limits the discretion of administrative officials so as to mandate the provision of a benefit to those meeting specified terms.[45] Court-ordered procedural safeguards are designed to promote accuracy in the agency's resolution of the entitlement claim; the extent of protection required is determined by considering the interest of the beneficiary, the probable value of additional safeguards, and the burden on the government of providing those safeguards.[46]

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[43] 397 U.S. 254 (1970).

[44] *See, e.g.*, Dixon v. Love, 431 U.S. 105 (1977); Mathews v. Eldridge, 424 U.S. 319 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Arnett v. Kennedy, 416 U.S. 134 (1974). Procedural safeguards must also be afforded in a limited class of cases in which the government has denied a benefit on the basis of a constitutionally impermissible purpose, *see* Perry v. Sindermann, 408 U.S. 593, 597–98 (1972), or has infringed one of a small category of interests that, solely by virtue of their importance, amount to constitutionally recognized "liberty" rights. In several cases the Court has indicated that, if an interest is of sufficient magnitude, it will be constitutionally protected as a liberty, even if it does not have formal statutory protection. *See* Vitek v. Jones, 445 U.S. 480, 491–94 (1980) (interest in not being transferred from prison to mental hospital); Ingraham v. Wright, 430 U.S. 651, 672 (1977) (interest in not being subject to corporal punishment in public schools). *But see* Meachum v. Fano, 427 U.S. 215, 224 (1976) (liberty interest not necessarily implicated by every "grievous loss").

[45] For example, a statute permitting discharge of a government employee only for "cause" creates an entitlement requiring an administrative or judicial hearing in which the existence of "cause" must be established. Arnett v. Kennedy, 416 U.S. 135, 167, 171 (1974) (Powell, J., joined by Blackmun, J., concurring in part and concurring in the result in part) (hearing is constitutionally required before final termination of employment, but not before provisional removal); *id.* at 226–27 (Marshall, J., joined by Douglas and Brennan, JJ., dissenting) (Constitution requires hearing before provisional removal). By contrast, a statute permitting discharge at will creates no protected interest. Board of Regents v. Roth, 408 U.S. 564 (1972). The breadth of the class of entitlements depends on how generous the statutory criteria are. For further discussion of the criteria of entitlement, see *infra* pp. 1256–57.

[46] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

D. Remedies for Regulatory Beneficiaries: Four Systems

Assume that a regulatory program provides for public enforcement. Given the two private enforcement remedies — rights of action and initiation — four different systems of regulatory enforcement are possible. The following table illustrates the possibilities:[47]

		PRIVATE RIGHT OF ACTION	
		Not Available	Available
PRIVATE RIGHT OF INITIATION	Not Available	Exclusive Public Enforcement	Supplementary Private Enforcement
	Available	Judicial Supervision	Maximum Enforcement

Although courts have generally not framed their decisions as choices among alternative enforcement systems,[48] analysis of the alternatives clarifies the considerations at stake in judicial decisions about private remedies.

1. Exclusive Public Enforcement: Neither Right of Initiation nor Right of Action. — The exclusive public enforcement approach rejects any role for private enforcement in a system of administrative regulation. Courts that follow this approach conclude that the enforcement of a statute cannot be divorced from the agency's delegated task of giving life to that statute.[49]

This approach emphasizes three defects in private enforcement remedies. First, courts lack the self-starting investigatory and analytical capacities needed to deal with complex social and economic problems.[50] This point assumes particular force

[47] Admittedly, this table is somewhat crude. It disregards important variations, including whether the right of initiation is strongly or weakly responsive, and whether damages or some other form of relief is being sought.

[48] Indeed, it is only recently that courts have begun to recognize that rights of action and initiation can be treated as alternatives, or even that initiation rights form a distinct remedial category. *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (denying private right of action but reserving decision whether initiation right is available); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 465 (1974) (Brennan, J., concurring) (same); *see also* Morris v. Gressette, 432 U.S. 491 (1977) (denying private right of initiation, partially because of availability of private right of action); Kixmiller v. SEC, 492 F.2d 641 (D.C. Cir. 1974) (same).

[49] *See infra* note 58.

[50] *See* J. LANDIS, THE ADMINISTRATIVE PROCESS 123–55 (1938); Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 822–23 (1977); Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1056–60 (1975) (collecting authorities).

when Congress, in writing vague or general laws, relies on agency specialization to particularize and narrow statutory norms.[51] Second, courts are unable to ensure centralized and coordinated enforcement.[52] A passive and largely decentralized judiciary, dependent on the vicissitudes of private initiative, is likely to create ad hoc and inconsistent regulatory policies. Finally, courts are largely isolated from the processes of political oversight that serve to legitimate regulatory programs. Congress can control an agency's enforcement processes through appropriations and other forms of review; the President can also assert a measure of supervision over agency enforcement policies.[53] Congress, the President, or agency officials may well conclude, on the basis of administrative experience or changing social norms, that full enforcement is not warranted.

The premises of a public enforcement approach are well illustrated by Judge Leventhal's opinion in *Holloway v. Bristol-Myers Corp.*[54] In that case, the court of appeals refused to create a private right of action under the Federal Trade Commission Act lest the "carefully erected legislative [enforcement] scheme" be "skewed by the courts."[55] It considered irrelevant the plaintiffs' allegation that the Commission had failed to respond effectively to consumer grievances,[56] and found that coordinated enforcement might be disrupted by "piecemeal

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[51] For example, the "reasonableness" standard in the Federal Power Act, 16 U.S.C. § 824d(a) (1976) ("[A]ny . . . rate or charge that is not just and reasonable is hereby declared to be unlawful."), was meant to be given specific but continually adjusted content by the Federal Power Commission. *See* Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951).

[52] *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 462–65 (1974); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 997–99 (D.C. Cir. 1973); *cf.* Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 58 ("An agency experienced in administering the act is better able to make consistent and intelligent decisions involving interrelated issues than a district court that may see only one labor case a year.").

[53] A recent example is Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), which requires executive agencies to conform to principles of cost-benefit analysis to the extent permitted by law. *See* Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267 (1981); *see also* Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979) (courts should adopt flexible approach in evaluating role of President in agency supervision).

[54] 485 F.2d 986 (D.C. Cir. 1973). Alleging that defendant's advertisements about an analgesic compound were deceptive and misleading, plaintiffs sought to bring a private action under the Federal Trade Commission Act, 15 U.S.C. §§ 45(a), 52(a)(1), 54(a) (1976 & Supp. III 1979), which empowers the FTC to issue cease-and-desist orders against unfair and deceptive practices. *See* 485 F.2d at 988.

[55] 485 F.2d at 989.

[56] *Id.* at 1000–01. The court also relied in part on the Commission's lack of power to award monetary damages and suggested that an implied damage remedy would violate an intended restriction on remedies. *See id.* at 999.

lawsuits."[57] Further, the opinion noted that courts "lack the expertise and knowledge of business practices" needed to assume responsibility for enforcement.[58]

Courts have refused to recognize private rights of initiation for similar reasons. An agency's decision not to undertake a regulatory initiative may be based not only on the legality of private conduct, but also on a wide variety of other managerial, political, and substantive considerations.[59] Agencies are thought specially competent and experienced at weighing such considerations,[60] and the weighing process may be difficult to recreate on judicial review. Furthermore, decisions not to act are ordinarily made informally, without elaborate records. If such decisions were subject to judicial review, some would later have to be explained in detail; agencies might have to use more formal procedures to make enforcement decisions; and regulatory programs might be severely disrupted. Public funds would also be expended in defending against initiation requests; resources needed for the protection of other beneficiaries might be depleted.[61] And it would often be difficult for courts either to judge the merits of agency allocations of en-

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[57] *Id.* at 997.

[58] *Id.* at 998. Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951), also exemplifies these conclusions. The Court there held that the reasonableness of rates must be decided through "the Commission's judgment, in which there is some considerable element of discretion." *Id.* at 251. Asserting that the "[p]etitioner cannot separate what Congress has joined together," the Court concluded that reasonableness "is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce." *Id.* This rationale is frequently offered in support of decisions refusing to imply private rights of action under regulatory programs. *See, e.g.*, T.I.M.E., Inc. v. United States, 359 U.S. 464, 468–72 (1959); Acevedo v. Nassau County, 500 F.2d 1078, 1084 (2d Cir. 1974); Danna v. Air France, 334 F. Supp. 52, 59–61 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 407 (2d Cir. 1972); Rosdail v. Western Aviation, Inc., 297 F. Supp. 681, 684–87 (D. Colo. 1969).

[59] These factors include: (1) the conduct of regulated entities, (2) the costs of the initiative, (3) the impact of proceedings on the agency's relations with the regulated class and with other affected interests, (4) the availability of negotiated alternatives, (5) the probability of success, (6) the importance of establishing a favorable precedent, (7) the harm that would be caused by judicial reversal, (8) the social benefits and costs of the activity that might be challenged, and (9) the importance of competing demands on scarce agency resources.

[60] *Cf.* Moog Indus. v. FTC, 355 U.S. 411, 413–14 (1958) (it is no defense to an enforcement action that agency is not proceeding against competitors who have engaged in similar conduct); Nader v Saxbe, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974) ("[T]he balancing of these permissible factors . . . is an executive, rather than a judicial, function . . . .").

[61] The agency "alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." Moog Indus. v. FTC, 355 U.S. at 413.

forcement resources or to contribute to improved agency performance.[62]

2. Judicial Supervision: Private Right of Initiation, No Private Right of Action. — The judicial supervision approach is based on doubt that the political process can be trusted to ensure proper performance of administrative responsibilities.[63] Courts that follow this approach acknowledge the value of an agency's specialized experience, political accountability, and capacity to plan for coordinated enforcement. For these reasons, they refuse to create private rights of action under statutes that provide for public enforcement. They believe, however, that initiation rights can improve agency performance while avoiding many of the drawbacks of private rights of action.

This belief is based on three grounds. First, the scope of judicial review in initiation cases normally permits considerable deference to agency discretion. Only rarely will a relevant statute unambiguously command enforcement in a particular case; hence rights of initiation are generally weakly responsive. By contrast, if a plaintiff has a private right of action, the

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[62] The court in Pendleton v. Trans Union Sys. Corp., 430 F. Supp. 95 (E.D. Pa. 1977), adopted this reasoning and dismissed a suit brought to compel the FTC to investigate the defendant for possible violations of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1693r, 18 U.S.C. §§ 891–896 (1976 & Supp. IV 1980). The court stated that "[i]n our legal system, powers of enforcement are broadly discretionary." 430 F. Supp. at 97. For a discussion and criticism of the numerous cases holding, on similar grounds, that courts may not review a decision by the NLRB not to issue a complaint, see Rosenblum, *A New Look at the General Counsel's Unreviewable Discretion Not to Issue a Complaint under the NLRA*, 86 YALE L.J. 1349 (1977). *See also* Vaca v. Sipes, 386 U.S. 171, 181–83 (1967) (unreviewable discretion not to issue a complaint means that NLRB should not have exclusive jurisdiction over cases involving "duty of fair representation").

Courts have frequently held, especially in the criminal area, that prosecutorial inaction may not be scrutinized even if the governing statute is phrased in mandatory terms. *See, e.g.*, Howard v. Hodgson, 490 F.2d 1194, 1196–97 (8th Cir. 1974); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379–82 (2d Cir. 1973). Although such results have been severely criticized, *see* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 28.00-4 (1976), they are not necessarily unsound. That Congress has used the word "shall" rather than "may" in describing an agency's enforcement responsibility does not by itself subject inaction to judicial review, for the use of mandatory language does not necessarily imply a judicially enforceable duty. Given traditions of prosecutorial discretion, this conclusion is especially plausible in the area of criminal prosecutions.

On the other hand, some courts have held that agency inaction may be reviewed even when the statutory language is permissive. *See, e.g.*, Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), *discussed at infra* note 71.

[63] For an early analysis of the problem, see Jaffe, *supra* note 21. For an elegant discussion of the value of judicial review, see L. JAFFE, *supra* note 28, at 320–27, 589–92.

court must give de novo consideration to every asserted regulatory violation.

Second, recognition of a private right of action is much more likely to undermine coordinated administration and orderly legal development than is recognition of a right of initiation. Dangers of ad hoc and inconsistent judgments are minimal under a weak right of initiation.[64] Even if a strong initiation right is recognized, agencies can attempt to coordinate initiation orders with their overall enforcement schemes.

Third, initiation rights are less likely than rights of action to subvert legislative oversight and fiscal control of the nature and amount of enforcement. In initiation cases, courts will ordinarily respect budget constraints aimed at limiting implementation and enforcement activity.[65] Rights of action, by contrast, circumvent budgetary limits by enlisting private enforcement resources.

In *Dunlop v. Bachowski*,[66] the Supreme Court endorsed an application of the judicial supervision approach. The plaintiff sought to compel the Secretary of Labor to bring suit to set aside a union election allegedly conducted in violation of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).[67] Distinguishing cases holding the exercise of prosecutorial discretion unreviewable, the Third Circuit had noted that the LMRDA "demonstrate[d] a deep concern with the interest of individual union members,"[68] and that judicial review was appropriate to ensure that the members were not "left without a remedy."[69] The court had also noted the absence of a private right of action.[70] The Supreme Court expressly endorsed the Third Circuit's ruling that enforcement failure was judicially reviewable.[71]

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[64] Private rights of action, by contrast, may be asserted even though an agency might reasonably choose not to bring suit against activities that violate overinclusive statutes.

[65] Thus, if an agency can plausibly show that it has sought to use its limited budget to bring proceedings against the worst offenders, a court should generally not require enforcement in a particular case. This is hardly to say, however, that a talismanic reference to "budget constraints" does or should shield an agency's inaction from judicial scrutiny. *See infra* p. 1269.

[66] 421 U.S. 560 (1975).

[67] 29 U.S.C. §§ 401–531 (1976 & Supp. III 1979).

[68] Bachowski v. Brennan, 502 F.2d 79, 87 (3d Cir. 1974), *rev'd on other grounds sub nom.* Dunlop v. Bachowski, 421 U.S. 560 (1975).

[69] *Id.* at 88.

[70] *Id.* at 84.

[71] Dunlop v. Bachowski, 421 U.S. 560, 566–68 (1976). The Court accepted the court of appeals' conclusion that prosecutorial discretion applies to statutes protecting general social interests but not to those protecting individual rights. *Id.* at 567 n.7.

3. Supplementary Private Enforcement: Private Right of Action, No Private Right of Initiation. — The supplementary private enforcement approach regards the creation of administrative agencies as a useful but by no means exclusive method

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The Court left open the issue whether a court might, upon finding his explanation for inaction insufficient, order the Secretary to bring suit under the Act. *Id.* at 575. It has occasionally been suggested that such an order would raise serious constitutional problems deriving from the separation of powers. *See, e.g.*, Note, Dunlop v. Bachowski *and the Limits of Judicial Review under Title IV of the LMRDA: A Proposal for Administrative Reform*, 86 YALE L.J. 885, 901–02 & nn.61–62 (1977). The suggestion is probably misguided in light of the long history of judicial control of executive action. "The Executive's constitutional duty to 'take Care that the Laws be faithfully executed,' Art. II, § 3, applies to all laws . . . . It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review." Nader v. Saxbe, 497 F.2d 676, 679 n.19 (D.C. Cir. 1974) (citation omitted).

For a discussion of *Bachowski*, see Note, *supra*, at 896–98. *See also* Bachowski v. Brennan, 413 F. Supp. 147 (W.D. Pa.) (on remand, court found arbitrariness in refusal to act), *appeal dismissed*, 545 F.2d 363 (3d Cir. 1976).

In a case similar to *Bachowski*, Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), the court held EPA's failure to ban DDT reviewable at the request of an environmental group. Finding that the group had made a prima facie showing of undue hazard, the court required the EPA to explain why it did not immediately suspend the registration of DDT. *Id.* at 596. The EPA was also required to initiate formal proceedings to determine whether to cancel DDT's registration permanently. *Id.* at 595.

The *Ruckelshaus* court held that a statute providing that an agency "may" institute enforcement does not shield agency inaction from judicial review. *Id.* at 590 & n.9; *see also* Barlow v. Collins, 397 U.S. 159, 165–66 (1970) (permissive language in Soil Conservation and Domestic Allotment Act, § 4(3), 16 U.S.C. § 590d(3) (1976), does not bar judicial review); Rockbridge v. Lincoln, 449 F.2d 567, 570 (9th Cir. 1971) ("A permissive statutory term . . . is not by itself to be read as a congressional command precluding judicial review."); Guerrero v. Garza, 418 F. Supp. 182, 186 (W.D. Wis. 1976) (permissive terms of Farm Contractor Registration Act, 7 U.S.C. § 2046 (1976), do not expressly prohibit judicial review). Such reasoning is generally correct. That an agency is not required to redress all statutory violations does not mean that decisions about which violations should be redressed are committed to agency discretion. Similarly, a decision not to initiate proceedings may be based on factors that Congress did not intend the agency to consider. In such cases, the fact that the governing statute is phrased in permissive terms does not automatically immunize agency inaction from judicial review. *Cf. supra* note 62 (that statute is phrased in mandatory terms does not automatically subject agency inaction to judicial review).

Judicial willingness to scrutinize an agency's enforcement policies is reflected in Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam). In that case, plaintiffs alleged that the Department of Health, Education, and Welfare (HEW) had not fulfilled its statutory duty to enforce title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), which required public educational institutions to eliminate segregation before they could receive funds. The court read the statute to require HEW to undertake enforcement action, and distinguished cases declining to review the exercise of prosecutorial discretion. Other private right of initiation cases are cited at *supra* note 13.

for implementing statutory requirements. Public regulation may be needed because of the inadequacies of the common law system in coping with industrial conditions.[72] Public enforcement is, however, frequently inadequate because of budget constraints; private actions can be a useful supplementary remedy by providing additional enforcement resources.[73]

J.I. Case Co. v. Borak[74] reflects these considerations.[75] The Supreme Court created a private right of action under section 27 of the Securities and Exchange Act of 1934[76] on behalf of shareholders challenging management's proxy statements as deceptive, notwithstanding the power of the SEC to bring suit and the failure of Congress explicitly to authorize private enforcement. The Court emphasized the Act's "broad remedial purposes"[77] as well as the apparent inability of the SEC to effectuate those purposes adequately.[78] The Court did not discuss the possibility that private enforcement might subvert political control over enforcement.[79] Instead, the Court

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[72] The most important barriers to a common law solution are the difficulties posed by collective goods. When the social benefits of eliminating an unlawful activity are widely shared, the stake of any individual is often small and each individual can enjoy a "free ride" on the enforcement efforts of others. As a result, no individual may have sufficient incentive to bring suit. *See* R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 107–09 (1978). *See generally* M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1971) (discussing implications of the free-rider problem).

[73] *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544, 556–57 (1969); J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

[74] 377 U.S. 426 (1964).

[75] Allen v. State Bd. of Elections, 393 U.S. 544 (1969), provides another illustration of this approach. In that case, plaintiffs brought suit to enforce § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976), which prohibits racial discrimination in voting. The Act provides for enforcement by the Attorney General. Concluding that private suits would enhance the statutory scheme, the Court observed:

> The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements.

393 U.S. at 556–57.

Creating a private right of action against conduct that the FTC had previously found to violate § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (Supp. IV 1980), the court in Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582 (N.D. Ind. 1976), not only emphasized the inadequacy of agency enforcement efforts to protect consumers against continuing violations, but also recognized the potential advantages of a competing system of private enforcement with its own independent assessment of enforcement benefits and costs. *Id.* at 588.

[76] 15 U.S.C. § 78aa (1976).

[77] 377 U.S. at 431.

[78] *Id.* at 432. The Court noted that the SEC has limited resources available to handle 2000 proxy statements annually, and that the courts' duty is "to provide such remedies as are necessary to make effective the congressional purpose." *Id.* at 432–33.

[79] The securities field is one in which there may be significant savings in a system

asserted that the statutory goal of "'protection of investors' . . . implies the availability of judicial relief where necessary to achieve that result."[80]

Private rights of action, unlike rights of initiation, do not divert limited agency resources from other violations that may be more important.[81] The supplementary private enforcement approach rejects private rights of initiation, both because of this problem of diversion of resources and because of the drawbacks discussed earlier in this Section.[82]

This rejection of initiation rights is illustrated by *Morris v. Gressette*.[83] Plaintiffs sought judicial review of the Attorney General's decision to approve a reapportionment plan submitted pursuant to the provisions of the Voting Rights Act.[84] The Court interpreted the statute to preclude such review, because judicial scrutiny of the Attorney General's inaction would defeat Congress' "desire to provide a speedy alternative method of compliance to covered States,"[85] and because a private right

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of decentralized, private enforcement. Affected individuals are likely to be knowledgeable and thus able to uncover statutory violations at lower costs than public agencies. These perceptions probably account for the courts' traditional receptiveness to private rights of action in the securities area. *See infra* pp. 1303–05.

[80] *Borak*, 377 U.S. at 432.

[81] Diversion of resources could displace political controls on the use of public funds. *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW § 23.1 (2d ed. 1977) ("[T]he structure of the administrative process is designed to increase political control over the process of legal regulation . . . .").

In addition, courts may have difficulty in assessing an agency's overall enforcement program, particularly in light of the "polycentric" nature of decisions on the allocation of limited enforcement resources. This fact has played some role in the cases by justifying either a denial of review or a generally deferential standard of review. *See supra* pp. 1209–10.

[82] *See supra* pp. 1208–11.

[83] 432 U.S. 491 (1977). In Kixmiller v. SEC, 492 F.2d 641 (D.C. Cir. 1974), the plaintiff sought to obtain review of informal advice given by the Commission staff to a corporation. The staff had advised that it would not recommend SEC action to challenge the exclusion of a stockholder proposal from management's proxy materials. Holding the advice immune from judicial inspection, the court stated that "'the agencies' internal management decisions and allocations of priorities are not a proper subject of inquiry by the courts.'" *Id.* at 645 (quoting Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 674 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972)). The distinction between *Kixmiller* and Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972), the celebrated case in which the D.C. Circuit held that a no-action letter by the SEC was subject to judicial review, is that, in *Medical Committee*, the Commission itself reviewed the no-action recommendation. This distinction has been criticized, and properly so: it ignores the functional identity of the claims in the two cases. *See, e.g.*, Vickery, *Judicial Review of Informal Agency Action: A Case Study of Shareholder Proposal No-Action Letters*, 28 HASTINGS L.J. 307 (1976). The *Kixmiller* court referred to the availability of a private right of action under the Act "with or without prior administrative resort to the staff or the Commission." 492 F.2d at 645–46.

[84] 42 U.S.C. § 1973c (1976).

[85] 432 U.S. at 503.

of action was available under *Allen v. State Board of Elections*.[86]

4. Maximum Enforcement: Both Right of Action and Right of Initiation. — Under a maximum enforcement approach, the values of political control, specialization, and centralization are considered less important than maximizing private participation in the enforcement process. A powerful concern with the possibility of agency abdication of regulatory responsibilities is characteristic of the maximum enforcement approach.

In *Medical Committee for Human Rights v. SEC*,[87] the District of Columbia Circuit followed this approach. The court held reviewable a decision by the SEC not to initiate proceedings against a corporation that had refused to include a shareholder proposal in its proxy statement, even though the shareholders had a private right of action against the corporation. The shareholders were permitted to forgo a private suit and proceed against the SEC for two reasons — the desirability of augmenting private enforcement with public resources and experience,[88] and the "independent public interest in having the controversy decided" with agency participation.[89]

E. The Evolution of Beneficiary Remedies[90]

Forty years ago, the exclusive public enforcement approach was dominant in the federal courts.[91] The supplementary pri-

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[86] *Id.* (citing *Allen*, 393 U.S. 544 (1969)); *see supra* note 75.

[87] 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972). Maine v. Thiboutot, 448 U.S. 1 (1980), which expanded private rights of action under § 1983, also reflects a maximum enforcement approach. *See* Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. (1982) (forthcoming).

[88] 432 F.2d at 667, 674.

[89] *Id.* at 672.

[90] The evolution of new remedies has not been solely the work of the courts. Congress has increasingly made explicit provisions for rights of initiation and rights of action in numerous regulatory statutes. A maximum enforcement approach was adopted in "citizen suit" provisions included in a number of environmental regulatory statutes adopted in the 1970's. These provisions authorize private plaintiffs to institute litigation against agencies for failure to perform duties mandated by the relevant statute and also create private rights of action. *See, e.g.*, Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (Supp. II 1978) (right of action and right of initiation); Energy Policy and Conservation Act, 42 U.S.C. § 6305 (Supp. III 1979) (right of action and right of initiation); Clean Air Act, *id.* § 7604 (right of action and right of initiation).

In our view, these provisions are best understood as a codification and reformulation of the new remedies created by the courts. For discussion of the significance of this development, see *infra* note 152.

[91] For discussion of some of the earlier federal decisions, see Note, *supra* note 2. Few initiation suits were sought or permitted before the 1960's. *See generally* S.

vate enforcement approach prevailed during the past several decades,[92] as courts reacted to perceived inadequacies in agency enforcement efforts by creating private rights of action. Today, judicial supervision appears to be the most widely accepted approach. The Supreme Court's narrow construction of the exception to reviewability for those decisions "committed to agency discretion,"[93] as well as the Court's willingness in *Bachowski* to supervise enforcement discretion,[94] confirms the tendency of lower courts to permit regulatory beneficiaries to challenge agency failure to enforce regulatory programs adequately. It seems increasingly clear, however, that a deferential standard of judicial review will ordinarily be followed in initiation cases.[95] At the same time, the Court's restrictive approach to private rights of action[96] makes it far less likely that such rights will be recognized.[97]

This is not to say that the cases follow a consistent pattern, for courts sometimes depart from the judicial supervision approach. When litigants seek to protect important personal liberties, such as freedom from discrimination, courts often create both initiation rights and rights of action.[98] By contrast,

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BREYER & R. STEWART, *supra* note 30, at 324–36, 921–35 (discussing growth of initiation rights); *infra* note 100; pp. 1267–69.

[92] After *Borak* and Cort v. Ash, 422 U.S. 66 (1975), the lower federal courts freely created private causes of action. For a catalog of twenty such decisions in the two-year period following *Cort v. Ash*, see Cannon v. University of Chicago, 441 U.S. 677, 741–42 (1979) (Powell, J., dissenting).

[93] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

[94] Dunlop v. Bachowski, 421 U.S. 560, 566–68 (1975); *see also* Marshall v. Jerrico, Inc., 446 U.S. 238, 249–50 (1980) (unanimous decision) (dictum) (reaffirming *Bachowski*).

[95] *See supra* p. 1205; *infra* pp. 1267, 1282–89.

[96] *See* cases cited *supra* note 5; *infra* pp. 1302–07.

[97] Aside from occasional cases such as *Medical Committee*, a supplementary private enforcement approach continues to be followed in the limited but important setting of securities regulation. Private rights of action have become so well established under a variety of securities provisions that it is unlikely that the Court will do away with them. *See infra* pp. 1303–05; *cf.* Cannon v. University of Chicago, 441 U.S. 677, 692 n.13 (1979) (stating that the Court had acquiesced to history in accepting implied rights of action under Rule 10b-5); Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971) ("It is now established that a private right of action is implied under § 10(b)."); Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium — Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333 (1980) (implied-private-remedies approach retains vitality at least in securities and civil rights areas).

[98] Provisions of title IX of the Civil Rights Act of 1964 provide an example. In *Cannon v. University of Chicago*, for instance, the Supreme Court implied a private right of action under 20 U.S.C. § 1681 (1976), even though after Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam), it seemed plain that a private right of initiation was available. The Court found that the initiation alternative was

when an agency has been granted broad discretion in an area such as regulation of rates and competitive practices, courts are likely to deny both private remedies.[99]

What explains this pattern of development? The analysis in this Part suggests a balance of factors. Judges have been influenced by institutional considerations: the limited analytic and factfinding capacities of courts, the need for consistency and coordination in enforcement, and the comparatively greater political accountability of agencies. Courts have also given varying weights to certain regulatory goals: effective implementation of administrative programs, compensation of those injured by statutory violations, and the need to adjust regulatory objectives in light of implementation problems and changing public attitudes.

The variations among judicial decisions during any given period might be explained by variations in the particular regulatory programs involved and in the particular beneficiary interests asserted. The differences in judicial approach over time might be understood as a response to shifting judicial perceptions of the weight to be accorded institutional considerations on the one hand and regulatory objectives on the other. These shifting perceptions may in turn be attributable to changes in the general climate of professional and public opinion concerning agency "failure" and in the appropriate role of the judiciary in responding to that failure. Other relevant variables might include the successive "waves" of regulatory statutes upon which private rights of action and initiation could be based and the remedial incentives and funding sources available to potential plaintiffs and their counsel.[100]

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less desirable: it would disrupt agency resource management and might not furnish an adequate remedy. 441 U.S. at 704–07 & n.41.

[99] The Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (1976 & Supp. IV 1980), is an example. *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973) (denying private right of action); *see also* Pendleton v. Trans Union Sys. Corp., 430 F. Supp. 95 (E.D. Pa. 1977) (denying right of initiation under the Consumer Credit Protection Act, which is enforced by the FTC under 15 U.S.C. §§ 1607 & 1681s (1976 & Supp. IV 1980)).

[100] Private rights of action tend to appear in the reports about a decade after the enactment of the statutes on which they are based. Beginning in the late 1940's, a new wave of private rights of action followed the enactment of the federal securities laws. The most recent wave of private actions has been based on laws prohibiting environmental pollution and discrimination and on other "social" legislation enacted in the 1960's and 1970's.

The prospect of substantial recoveries stimulated the private bar to provide representation in private actions under the securities laws. Some forms of the new social legislation, such as prohibitions of discrimination in employment, can lead to large damage claims; other forms of social regulation, such as those banning generalized environmental harms, generally do not. In a few instances, redress for injuries has

Any attempt to explain these judicial decisions by reference to pragmatic factors of context and policy, however, is seri-

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been sought by determined individuals with a passionate commitment to vindicating their own rights. *See* Cannon v. University of Chicago, 441 U.S. 677 (1979). More frequently, litigation has been initiated by a new breed of "public interest" lawyers. Because substantial damages are infrequently awarded and because no mechanism exists for identifying and taxing those who might benefit from litigation, these lawyers depend on funding from foundations, mass-mail organizations, or (for Office of Economic Opportunity (OEO) or Legal Services lawyers) the government. *See* Trubek & Trubek, *Civic Justice Through Civil Justice: A New Approach to Public Interest Advocacy in the United States*, in ACCESS TO JUSTICE AND THE WELFARE STATE, *supra* note 21, at 119, 119–44.

Private rights of initiation were first developed in the late 1960's. Based both on the new "social" legislation and on older "economic" regulatory statutes, these actions were also brought by the public interest lawyers and generally sought prospective, collective relief and a redirection of agency priorities. *See, e.g.*, Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

"New property" hearing rights were also developed in the 1960's, primarily by a subgroup of the public interest bar — "poverty lawyers" — which includes those working for OEO and Legal Services as well as lawyers who represent prisoners. These lawyers sought hearings in individual cases of deprivation, although the systematic failure to provide such hearing rights was the ultimate target. Even when the ultimate object was the restoration of monetary benefits, the amounts involved were generally too small to cover litigation costs; reliance on outside funding was necessary. The decision to focus on hearing rights was apparently the product of strategic decisions by a relatively few lawyers and an influential essay by Charles Reich, which was devoted to the vindication of the value of individualism in the modern state. *See* Reich, *The New Property*, 73 YALE L.J. 733, 741–74, 782–87 (1964). The focus on individual procedures has succeeded in particular cases. But this strategy has often proved less successful in achieving the lawyers' political and social goals.

Remedies for faulty agency performance are but one part of a larger system of judicial controls on bureaucratic organizations of all kinds — not only agencies, but also labor unions, corporations, universities, and similar entities. These "intermediate organizations" are uneasily positioned between the realm of civil society (defined by private law) and the realm of representative government (defined by public constitutional law). The judicial creation of remedies to control these organizations is one of the great achievements of the law. One of the current authors (Prof. Stewart) is developing a general account of judicial control of intermediate organizations, which classifies the remedies created as "exit," "voice," "appeal," and "self-help." *See generally* A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (discussing exit and voice remedies).

The latter three types of remedies are illustrated in this Article. In the case of the private right of initiation, the mechanisms for registering dissatisfaction with agency performance include both "voice" and "appeal." Beneficiaries are entitled to a formal hearing process within the organization to register their views ("voice"). To the extent that their voice goes unheard, they can seek to persuade a court to modify the agency's allocation of regulatory resources in their favor ("appeal"). The new-property hearing right relies principally on the mechanism of "voice." In contrast, the private right of action provides dissatisfied beneficiaries a "self-help" mechanism; they abandon reliance upon the agency and seek a remedy directly from the courts in actions against third parties. The significance of these differences is explored at *supra* pp. 1208–16.

ously incomplete. Such an explanation fails to respond to the most fundamental objections to judicial creation of private enforcement rights — objections that derive their force from the role of the federal judiciary in a scheme of separated powers. These objections themselves operate as factors in judicial decisions. This type of explanation also fails to address the more basic conceptions of judicial role and institutional purpose that, we believe, have played the central role in the development of alternative systems of public and private enforcement. These matters are addressed in Part III.

III. The Problem of Judicial Authority

Judicial creation of new remedies under federal regulatory statutes mushroomed with remarkably little consideration of the question of judicial authority. Leading cases, such as *J.I. Case Co. v. Borak*,[101] gave the question only cursory treatment.[102] But the problem is a serious one, for the jurisdiction and remedial powers of the federal courts are limited to what has been granted by the Constitution and Congress. The current attack on judicial creation of new remedies has centered on private rights of action — ironically, one of the longest established of these remedies. But the attack has more far-reaching implications that endanger many accepted forms of federal common law, including the other beneficiary remedies and the right of defense.

A. Judicial Authority and the Formalist Thesis

Among the possible sources of authority to create private rights of action are the relevant substantive provisions of the regulatory statute, the general grant of federal question jurisdiction,[103] and the principles of federal common law. Authority to create private rights of initiation may derive from these three sources, as well as from the Administrative Procedure Act (APA).[104] Without more, however, such sources do not

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[101] 377 U.S. 426 (1964).

[102] *See, e.g., id.* at 433.

[103] 28 U.S.C.A. § 1331 (West Supp. 1981).

[104] 5 U.S.C. §§ 551–706 (1976 & Supp. III 1979). In particular, § 706 authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." Courts recognizing rights of initiation have relied on this provision. *See, e.g.*, EEOC v. Exchange Sec. Bank, 529 F.2d 1214, 1216–17 (5th Cir. 1976); Nader v. FCC, 520 F.2d 182, 206 (D.C. Cir. 1975). There is, however, little evidence that the provision was intended to displace the ordinary discretion vested in the administrative prosecutor, and the APA bars review of action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The question whether enforcement decisions are

justify the enormous expansion of judicially created private remedies that has occurred during the past two decades.

Two separation-of-powers considerations support this assertion. First, as both an analytical and a practical matter, the procedures for implementing a regulatory program cannot be separated from its substance. By enlisting new enforcement resources, courts that create private remedies substantially affect the content of regulatory policy — a task properly reserved for the political branches. Indeed, judicial creation of private remedies may invite Congress to "shirk its constitutional obligation" by leaving controversial choices about implementation to the courts.[105] Second, judicial creation of remedies that Congress failed to provide is arguably a usurpation of Congress' lawmaking authority. That Congress sometimes provides explicitly for private rights of action and initiation[106] suggests that the absence of such provisions may not be inadvertent.[107] Judicial creation of such rights may thus hand regulatory beneficiaries a victory that they failed to win in Congress.

In light of these considerations, general jurisdictional statutes cannot plausibly be read to authorize judicial creation of private rights of action. Moreover, in view of traditions of prosecutorial discretion, it is doubtful that the APA's general provisions for review warrant wholesale creation of rights of initiation.[108]

These objections to judicial creation of private remedies can be summarized in what we term the formalist thesis. That thesis holds that legal rights cannot be derived from conceptions of natural justice, background understandings, or theories of sound government. Unless the right to be vindicated is granted by the Constitution or a statute, courts lack authority to recognize it; the only basis of legal rights is a textual instrument drawn by a sovereign lawmaking authority.[109]

The formalist thesis derives its vision of rights and judicial authority from the conception of law as sovereign command.

"committed to agency discretion" cannot be resolved simply by reference to the text of the APA.

[105] *See* Cannon v. University of Chicago, 441 U.S. 677, 743 (1979) (Powell, J., dissenting). The "constitutional obligation" to which Justice Powell refers stems from the doctrine that Congress may not delegate legislative powers.

[106] *See, e.g.*, statutes cited *supra* note 90.

[107] *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

[108] *See supra* note 104.

[109] *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 11–18 (1981); Cannon v. University of Chicago, 441 U.S. at 717–18 (Rehnquist, J., concurring); Arnett v. Kennedy, 416 U.S. 134 (1974) (plurality opinion of Rehnquist, J.).

The supreme sovereign is the citizenry, and the Constitution is the instrument by which the citizenry has created legal rights and authorized the creation of courts to enforce them.[110] Congress and the President possess derivative lawmaking powers; statutes are the instrument by which they create rights and confer judicial authority. Other sources of law — judicial decisions and administrative rulings — depend on textual instruments for their authority. Basing judicial action on nontextual sources — such as the "spirit of the Constitution" or "the underlying legislative purpose" — creates a grave risk of usurpation of sovereign power. The written word of an authoritative text is thus the indispensable safeguard of legitimacy.

The formalist thesis bars private rights of action or initiation unless such rights are conferred by statute or required by the Constitution. Because only recently and in unusual circumstances has the Constitution been thought to require such remedies,[111] the thesis generally denies judicial authority to create them. The formalist thesis is also inconsistent with a judicial presumption in favor of rights of defense:[112] when no substantive constitutional prohibition is violated[113] and no statute explicitly calls for judicial review, the thesis dictates that courts may not decide whether particular regulatory impositions either exceed statutory limits or represent an unreasonable exercise of discretion.[114] Finally, the formalist thesis is

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[110] *See* H.L.A. HART, THE CONCEPT OF LAW 70–76 (1961).

[111] Logan v. Zimmerman Brush Co., 50 U.S.L.W. 4247 (U.S. Feb. 24, 1982).

[112] *See* S. BREYER & R. STEWART, *supra* note 30, at 891–919 (presumption in favor of judicial review). Although the formalist thesis has recently been used by the Supreme Court to insulate private firms from private enforcement of regulatory controls, the thesis has also been embraced by liberals seeking to limit judicial development of rights of defense that favor regulated firms. *See* Wright, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R.-C.L. L. REV. 1 (1980).

[113] Basing review on substantive constitutional violations would justify creation of a right of defense in only a small percentage of cases. A broader justification for rights of action would be afforded if the due process clause were read to protect "liberty" or "property" interests in addition to substantive constitutional entitlements. But such a reading raises two questions. How are courts, consistent with the formalist thesis, to identify such additional interests? And if such a category of protected interests can support judicial creation of rights of defense, why does it not also support creation of private rights of action and initiation?

The right of defense might be treated differently, because it can be argued that, when government intrudes on a common law interest, it is invading a preexisting liberty or property interest of a kind familiar to the framers and thus protected by the due process clause. The pedigrees for rights of action and initiation, as well as that for new-property hearing rights, are far less well established.

[114] Despite this conclusion, the federal courts developed a strong presumption in favor of review and have also created a "hard look" approach to review of discretion in order to control regulatory impositions on industry. *See infra* pp. 1248–49.

inconsistent as well with judicial creation of new-property hearing rights.[115]

The formalist thesis is reflected in recent Supreme Court decisions denying private rights of action in a wide variety of situations.[116] Other areas of federal common law have likewise been repudiated. The Court's refusal in *Northwest Airlines v. Transport Workers Union*[117] to create a right of contribution among joint violators of a federal statute, like its readiness in *City of Milwaukee v. Illinois*[118] to find statutory displacement of the federal common law of interstate pollution, exemplifies the thesis' requirement of a textual basis for the "rights-making" process. The "mid-twentieth century type of federal common law" celebrated by Judge Friendly[119] seems rapidly headed for oblivion.

B. The Inadequacy of Traditional Justifications for Judicial Creation of Beneficiary Remedies

There are a number of conventional responses to the formalist thesis; history provides the first. For centuries, English judges created private rights of action to compensate plaintiffs injured by conduct that violated statutes,[120] and both federal and state judges in the United States have followed their example. Traditionally, such decisions were founded on the common law: the defendant was charged with negligence or nuisance, and the statute was used to particularize the common

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[115] *See* Arnett v. Kennedy, 416 U.S. 134, 151–54 (1974) (plurality opinion).

[116] *See, e.g.*, California v. Sierra Club, 451 U.S. 287 (1981) (Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403 (1976)); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) (Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000–6081 (1976 & Supp. III 1979)); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981) (Davis-Bacon Act, §§ 1(a), 3, 40 U.S.C. §§ 276a(a), 276a-2 (1976) (federal construction contracts)); Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979) (Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 to -21 (1976 & Supp. III 1979)).

[117] 451 U.S. 77 (1981).

[118] 451 U.S. 304 (1981).

[119] Friendly, *supra* note 14, at 413.

[120] There is evidence that, in connection with a growing acknowledgment of Parliamentary supremacy, judicial creation of such remedies was curtailed during the 17th and 18th centuries. *See* Katz, *supra* note 39. Judicial creation of damage remedies for statutory violations was not, however, extinguished. *See, e.g.*, Couch v. Steel, 118 Eng. Rep. 1193 (K.B. 1854) (private right of action for violation of statute requiring shipowners to keep medicine aboard vessel). For a discussion of current English practice, see Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MOD. L. REV. 233 (1960).

law standard of conduct.[121] Since *Erie R.R. v. Tompkins*,[122] however, federal courts have not enjoyed any general authority to make common law. And the common law analogy is unavailing for the many cases, such as *Borak*, in which courts create private remedies even though no common law wrong could be charged.

Two decades ago, champions of the "new federal common law," most notably Judge Friendly, sought to defend federal judicial lawmaking against attacks based on *Erie*.[123] The defense of decisions like *Borak* was straightforward: the new remedies created by the federal courts were based on federal statutes that invaded no constitutionally protected area of state autonomy. Intent on meeting the *Erie* charge, Judge Friendly did not adequately address the equally serious intramural question[124] — the authority of federal courts in relation to that of Congress.

The most well-recognized justifications for federal common law are likewise inadequate bases for judicial creation of regulatory remedies. The creation of federal common law to decide interstate disputes,[125] for example, is compelled by the federal courts' jurisdiction and duty to decide such disputes, the obvious unsuitability of state law, and the silence of Congress. Such compulsion is absent when Congress gives adjudicatory and rulemaking powers to an administrative agency

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[121] *See* Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Thayer, *supra* note 39. Later, courts developed the notion of "statutory tort" to create private rights of action. Rather than rely on a statute to particularize common law standards of conduct, courts created a remedy upon a violation of the statute itself. *See* sources cited *supra* notes 239 & 242. But the "statutory tort" remedy is either an exercise of general common law powers, which federal courts now lack, or it must be defended as "statutory interpretation," a justification that is generally not persuasive in light of the separation-of-powers objections to judicial creation of new administrative remedies.

[122] 304 U.S. 64 (1938).

[123] *See* Friendly, *supra* note 14.

[124] The failure to address separation-of-powers issues was understandable in light of the undifferentiated arguments calling for federal court deference to state law in the name of *Erie*. A more discriminating analysis — like that subsequently offered in Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974), distinguishing the legal bearing of the Constitution, the Rules of Decision Act, 28 U.S.C. § 1652 (1976), the Rules Enabling Act, *id.* § 2072, and other federal statutes — would have focused concern on the separation-of-powers issues.

[125] *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (pollution of Lake Michigan); Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925) (diversion of water from Lake Michigan).

to implement a regulatory program.[126] Similarly, courts have created federal common law under statutory provisions, such as section 301 of the Labor Management Relations Act,[127] that give decisional jurisdiction to courts rather than agencies and that provide no substantive standards for decision. Here again, judicial creation of new law is motivated by much stronger forces than exist in the case of an ordinary regulatory statute.[128]

Another justification for judicial creation of beneficiary remedies derives from a conception of inherent judicial authority — authority enjoyed by article III courts as well as common law judges. This conception was well expressed by Justice Frankfurter:

> Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations. A duty declared by Congress does not evaporate for want of a for-

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[126] *Compare* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (creating federal common law of water pollution), *with* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (comprehensiveness of congressional scheme precludes private right of action), *and* City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (same scheme preempts federal common law).

Judicial creation of federal common law has been defended on the ground that, because of an overloaded agenda, Congress does not have the capacity to foresee or enact subsequent amendments to deal with the myriad problems turned up by statutory implementation. *See* D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 465–70 (1942) (Jackson, J., concurring) ("futility of attempting all-complete statutory codes"); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 799–800 (1957). With regulatory programs, however, Congress can control implementation through means other than statutory amendment, such as appropriations and oversight. *See infra* pp. 1290–91.

[127] 29 U.S.C. § 185 (1976); *see, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (interpreting § 301). Also distinguishable is the creation of remedies under statutes that prohibit defined conduct without providing any remedy at all. *See* Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916) (Federal Safety Appliance Acts of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 15, 45, & 49 U.S.C.)). But even this practice is vulnerable to a formalist attack. First, the argument for creation of a federal remedy in such a case is undermined by the probability that an analogous remedy exists under state law. *See* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969); Note, *supra* note 2, at 292–94. Second, Congress may occasionally intend to enact hortatory legislation.

[128] Statutory interpretation blends imperceptibly into federal common law. If the statutory language and history are silent on the point, however, the creation of private remedies is vulnerable to the charge of pure judicial lawmaking, *see* Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 219 (1934), at least in the absence of shared understandings that permit courts to interpret statutory silence as an invitation to exercise their own creativity.

> mulated sanction. When Congress has 'left the matter at large for judicial determination,' our function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations. If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized.[129]

Justice Frankfurter's argument, however, begs the key question: has Congress in fact delegated to the federal courts discretionary authority to create private rights of action? Perhaps Congress has legislated on the general assumption that courts would and should decide whether private remedies are desirable. But no such authority has been explicitly granted, and there is scant evidence that Congress generally operates on the basis of any such assumption.[130] In light of the separation-of-powers considerations identified previously, the "inherent powers" argument alone cannot justify the conclusion that such a de facto delegation has been made or is unnecessary.[131]

Judicial creation of beneficiary remedies has also been defended as a means of overcoming systemic obstacles to implementation of regulatory statutes. These obstacles are sometimes attributed to various forms of "capture."[132] A more subtle diagnosis attributes "implementation failure" to basic features of the political and administrative system.[133] New

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[129] Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting) (citations omitted) (quoting Board of County Comm'rs v. United States, 308 U.S. 343, 351 (1939)). Note that the recognized inherent authority of the federal courts to create new remedies for constitutional violations, *see* Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), cannot support similar authority with respect to obligations and programs created by Congress and entrusted to administrative agencies.

[130] In some instances, the legislative history of particular statutes contains evidence that some congressmen assumed or hoped that courts would decide whether to create private remedies. *See infra* note 405. But such isolated instances do not support, and arguably negate, the existence of a general assumption of judicial power to create private remedies.

[131] That federal courts have historically created private rights of action might lend support to a claim that there has been an understanding on Congress' part that creation of such remedies is within judicial authority. *Cf. infra* p. 1233 (judicial creation of second-order remedies as response to growth of regulatory activity).

[132] *See* sources cited in Stewart, *supra* note 13, at 1684–87.

[133] *See* Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243, 248 (1978) ("gap between statutory promise and administrative reality" rooted in interest-group politics); Stewart, *supra* note 13, at 1684–87; *see also* Weisbrod, *Problems of Enhancing the Public Interest: Toward a Model of*

regulatory programs are characteristically launched with the political support of the many diverse and often poorly organized persons who stand to benefit from the programs or who believe them to be just. Implementation is then entrusted to a bureaucratic agency. Here a pervasive imbalance in influence comes into play. The implementation process often turns on issues that are technical, obscure, and unlikely to inspire the individuals favoring regulatory initiatives to continue organized advocacy. The constituency that supported the original legislation dissipates, not because its stake has diminished, but because transaction costs defeat efforts at continuous mobilization. Regulated firms and other organized interests opposed to full implementation do not face the same impediments. They are able to press their case relentlessly before the legislature and the agency and thus to encourage the delay or dilution of enforcement efforts. This systemic imbalance in representation diminishes the reformist zeal of agency officials. Moreover, because its resources are limited, the agency must depend on the cooperation of the regulated parties.[134]

Regulatory programs, according to this diagnosis, suffer from a classic "collective good" failure. Effective implementation cannot be provided to one beneficiary without being provided to all; because any individual beneficiary can take a "free ride" on the efforts of others, no beneficiary is likely to exert the influence required to ensure the level of enforcement needed to realize the objectives of the original legislation. Thus, the argument goes, courts should recognize private remedies to correct for these systemic obstacles and to ensure properly balanced regulatory implementation. Private remedies afford personal, noncollective relief — and hence give plaintiffs the incentive to press for full implementation. In addition, the Archimedean force of individual court rulings can help to compensate for the inevitably limited resources available to "public interest" advocacy groups that seek to vindicate collective interests. If the legislature believes that the additional enforcement these remedies stimulate is unduly disruptive, it can explicitly exclude such remedies.

But there are strong counterarguments. Electoral representation is the traditional mechanism for pooling collective interests. Since Congress has many tools for supervising the

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Governmental Failure, in PUBLIC INTEREST LAW 30–41 (1978) (discussion of "government failure").

[134] This process "filters" citizen demands and satisfies them with measures that are largely symbolic. *See* Offe, *Political Authority and Class Structures — An Analysis of Late Capitalist Societies*, 2 INT'L J. SOC. 73 (1972).

regulatory process — budgets, oversight hearings,[135] and statutory authorization of private remedies — a failure fully to implement a regulatory program may well reflect a considered legislative judgment that further implementation would be undesirable.[136] Moreover, it seems bizarre to resolve the problem of imbalance in influence by relying upon judges and self-appointed litigants, who are hardly subject to political review and whose views may not be representative.[137] Judicially created enforcement rights may also do little to improve the performance of administrative agencies — and may even worsen it. The studies of Donald Horowitz suggest that adversary litigation generates a distorted and narrow perspective on implementation problems, and that courts are frequently incapable of comprehending the full complexity of the issues.[138]

A final, more embracing justification for the creation of private remedies is the argument that the courts' role is to ensure completeness and consistency in the whole fabric of the law, including those legal norms established through regulatory schemes.[139] Consider, for example, a plaintiff harmed by a defendant's tortlike violation of a regulatory prohibition intended to protect the plaintiff. Because the law generally awards compensation in analogous contexts, a private right of action in damages might be regarded as necessary in order to achieve consistency and completeness in the legal system.

This justification, however, begs the question: is there a need for a single juridical system for the reconciliation and realization of legal norms? If regulatory administration is considered an independent system of normative ordering, the case

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[135] The recent controversy in Congress concerning the Federal Trade Commission's consumer protection initiatives is a notable example of such control. *See FTC Funds Bill With Legislative Veto Clears*, 36 CONG. Q. ALMANAC 233, 233–36 (1980).

[136] Some claim that legislatures may adopt measures that are purely symbolic:

> [In the case of] social legislation that places the burden of progress on those whom it regulates, a very low prospect of effectiveness may be the *sine qua non* of winning enactment of the law at all. . . . Contrary to the instrumentalist canon, the ineffectiveness of a law to achieve its goal may be itself a policy, a policy shared by the act's opponents and some of its supporters, and may be the price for permitting the law to reach enactment. . . . People have reasons for wanting a law, and the lawmaker will see a value in meeting their wishes, quite apart from any practical good it may do.

Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 233 (1976).

[137] *See* Stewart, *supra* note 13, at 1713–15.

[138] *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 255–98 (1977).

[139] *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163–66 (1982); R. DWORKIN, TAKING RIGHTS SERIOUSLY 105–10 (1977); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

for judicial creation of new regulatory remedies is considerably weakened. Indeed, the situation may most closely resemble that in the courts before the merger of law and equity. Criteria must be developed to route business to one system or another; conflicts of jurisdiction must be resolved; and the two systems must be harmonized where they overlap. In administrative regulation, these functions are performed by the doctrine of primary jurisdiction, the rules that govern the scope of judicial review, the principle that agencies must explain the exercise of discretion, and so on. With the aid of these tools, the law can be maintained as a system that is complete although divided. A need for vesting remedial omnipotence in the courts has not yet been established.[140]

C. The Necessity of Background Understandings

The formalist thesis separates administrative law into two domains — administrative discretion and private ordering. If a statute confers authority but does not limit its exercise in particular circumstances, the administrator has unreviewable discretion; if authority is not conferred, or if its exercise is limited, a realm of private ordering is preserved. The text provides the dividing line.

The thesis, however, is both incomplete and inconsistent. It is a commonplace that a lawmaker cannot anticipate all of the situations to which a law may be applied; as a result, he cannot specify in advance the legal consequences of all future events. Moreover, statutory language cannot be intelligently interpreted in isolation from the background understandings from which it arises.[141] The formalist thesis therefore leaves significant gaps — cases that cannot be resolved by reference to the statutory text alone.[142] Because the thesis is inescapably agnostic with respect to the existence or possible content of a text's underlying purposes, the gaps cannot be filled by reasoned elaboration of any such purposes.[143] The text must be

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[140] Indeed, Congress has at its disposal more flexible tools for creating private remedies.

[141] *Cf.* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (3d ed. 1958) (rules generally cannot be understood in isolation from the "form of life" of which they are a part).

[142] *Cf.* Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981) (discussing gaps in Constitution). For discussion of the nature of gaps in another context, see C. FRIED, CONTRACT AS PROMISE 57–73 (1981).

[143] For discussion of the relation between formalism and reasoned elaboration, see Kennedy, *Legal Formality*, *supra* note 26, at 395–98. The Supreme Court's recent tendency has been to resolve close issues of agency authority against the agency and

taken to be an arbitrary expression of sovereign will.[144] The thesis is therefore fatally incomplete, for it cannot generate solutions to unforeseen cases.[145]

Suppose, for example, that a civil rights statute creates a right to be free from certain forms of discrimination and provides for enforcement by a federal agency. Congressional silence on private rights of action may be a product of legislative indifference,[146] willingness to delegate the matter to the courts, failure to achieve a consensus on the matter, inability to foresee that the issue would arise, or some combination of all of these. How, then, shall such textual silence be understood? To authorize private rights of action? To preclude them? Or to leave the matter to the judiciary? The text cannot resolve the issue; it must be supplemented by understandings that give content to legislative silence.

Courts must nonetheless decide cases. Even adherents to the formalist thesis are driven to invoke a variety of "policy" considerations in order to decide cases that fall into textual gaps. But because of the normative agnosticism of the formalist approach, resolution of these policy issues becomes ad hoc and arbitrary.[147]

In practice, moreover, the formalist thesis denies the respect for the sovereign lawgiver upon which it is supposedly based and is thus internally inconsistent. If a judge insists that the sovereign use a particular verbal formula to confer authority,[148] he restricts the sovereign's lawmaking authority by precluding other approaches, such as reliance on back-

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to decide close issues of affirmative private relief against such relief. *See* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 910–12 & n.126 (1982). These choices, which tend to enlarge business firms' freedom of action, can be justified only by appeal to considerations going beyond the formalist thesis.

[144] *See* Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 828 (1982).

[145] *Cf.* J. ELY, DEMOCRACY AND DISTRUST 12–14, 101 (1980) (offering similar analysis in the context of constitutional "intent").

[146] Judicial embrace of the formalist thesis may give legislatures some incentive to strive for greater specificity in statutes, but the extent of the incentive is doubtful. *Cf.* O'Neil, *Public Regulation and Private Rights of Action*, 52 CALIF. L. REV. 231, 233 (1964) (discussing ambiguities of statutory interpretation when legislative history neither mentions private remedies nor explains reasons for such omission).

[147] *See* Williams, *supra* note 120, at 244 ("This process of looking for what is not there, unaided by any compelling presumptions, naturally leads to the most surprising diversity of outcome."); *see also* Landis, *supra* note 128, at 233–34 (noting that statutes are often cryptic about purposes and legislative motives).

[148] *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (if Congress wishes private rights of action to be available, it should "specify as much").

ground understandings. Touted as a safeguard against usurpation, the formalist thesis in this sense itself leads to usurpation.[149]

When courts apply or interpret a statute, they must look to general background understandings as a basis for identifying the norms — sometimes hypostatized as "legislative intent" — that underlie the statute. But the identification of such background understandings is no simple task. The more general and powerful the background understanding, the less likely it is to have been stated explicitly by the legislature, even if the legislature in fact shares that understanding.[150] Moreover, because background understandings derive from an evolving political and social context, they must also change over time. Finally, because they provide the context that gives meaning to a large variety of statutes, the understandings among legislature, agency, and judge necessarily remain fluid.

The entitlement, production, and public values conceptions represent general and powerful background understandings of the basic functions of government.[151] In interpreting statutes that are silent on the existence of private enforcement rights, courts have derived guiding principles from these conceptions. Because reliance on these background understandings is inevitable, such reliance should be viewed as an established and legitimate device of lawmaking through statutory construction rather than a controversial intrusion on legislative prerogatives.

To some extent most regulatory programs can be understood to serve each of these three functions. In practice, courts in particular cases tend to follow a single conception, determined largely by the remedy sought and the administrative function in question. For example, in creating private rights of action under civil rights statutes, the courts have concluded that the general purpose of the applicable regulatory system is to vindicate individual entitlements and that private rights of action are needed to effectuate that purpose. By contrast, in declining to create beneficiary remedies under ratemaking statutes, the courts have suggested that the statutes are designed

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[149] *Cf.* H. Hart & A. Sacks, The Legal Process 515–16 (1958) (unpublished manuscript on file at Harvard Law School Library) (discussing the "Paradox of Making Law by Refusing to Make Law" and suggesting that every decision makes law and that judges cannot make "no law" in deference to a lack of guidance from the legislature).

[150] Indeed, any effort to state a background understanding in fixed, authoritative form would be self-defeating, because it would create the gaps and inconsistencies already discussed in connection with the formalist thesis.

[151] For an exposition of these three conceptions, see *infra* pp. 1232–39.

to promote production and that private remedies would disrupt the coordinated enforcement scheme necessary to achieve that goal. As this example suggests, the background understandings embodied in the conceptions do not invariably argue in favor of creation of private remedies. In its recent decisions denying private rights of action, the Supreme Court has buttressed the formalist thesis with a public values conception that calls on Congress to make all decisions about the availability of private remedies. This approach concludes that judge-made remedies are inconsistent with the basic premise of representative democracy.[152]

Such a sweeping conclusion is inappropriate in light of our government's structure and traditions. In our system of separated powers, courts have traditionally provided remedies to vindicate individual entitlements, to encourage productive private ordering, and to limit the power of public agencies and enhance their political accountability.[153] Given legislative silence and this accepted tradition, it is unclear why the courts should refuse to create private remedies that would perform these well-recognized functions.

D. Traditional Arrangements of Public and Private Law and the Three Conceptions of Institutional Purpose

When the Republic was created, private law defined a system of private economic ordering, regulated by the courts, that was thought to be both distinct and insulated from the public law system of electoral representation and legislation.[154] The reservation of a major share of economic life to a system

[152] Frequently, after courts have created a private right of action or initiation under a particular statute, Congress has amended the statute to provide specifically for such a right, or for one closely analogous to that created by the court. This "ratification," however, does not constitute legislative recognition of authority for courts to create private enforcement rights whenever courts consider such action appropriate. Congress may believe that courts do not have authority to create private enforcement rights, but that a particular private enforcement right is desirable and should be secure from shifts in judicial opinion. In fact, absent clear congressional sentiment going beyond the specific right at issue, there is no basis for ascertaining whether a broader principle of remedial creativity has been ratified. Accordingly, the notion of "ratification" is no more helpful than the formalist thesis.

[153] Justice Frankfurter may have been invoking this tradition when he championed the inherent authority of courts to provide appropriate remedies. *See supra* pp. 1225–26.

[154] *See* P. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES at ix (Philadelphia 1824) (noting reaction in America to English system "in which all the rights of the sovereign as well as the privileges of the people are to be deduced from the *common law*" and "[j]udges are a useful check against the encroachments of the monarch or his ministers"); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 259–305 (1969).

structured through private litigation was a key element in the separation-of-powers scheme. This structure was based upon and supportive of the three conceptions of production, entitlement, and public values. But the creation of extensive regulatory and welfare programs disrupted this structure. The grant of extensive lawmaking authority to administrative bodies deprived the courts of much of their established dominion, granted vast responsibilities to bureaucratic entities not anticipated in the Constitution, and undermined the separation of powers.[155]

This displacement created obvious risks to the integrity of the system of rights and duties defined by the common law and to the economic order built upon that system. Public law threatened to swallow up private law. At the same time, the expansion of executive authority threatened the established framework of public law by combining traditionally separated powers and weakening the checks imposed by electoral representation. The courts bowed to perceived historical and political exigency and ultimately sustained, against direct constitutional assault, this displacement of power.[156] But they also created a system of second-order remedies to control the power thus transferred — remedies designed to further, under new conditions, the same three conceptions upon which arrangements of private and public law had been traditionally based. Through creation of new remedies, courts have continued to exercise their historic responsibilities in the era of administrative agencies.

1. The Common Law. — Each of the three conceptions generates a different account of the common law. The entitlement view of the common law (which is currently enjoying a rebirth[157] in reaction to accounts of rights derived solely from economic or utilitarian principles) is premised on an enduring commitment to the legal protection of certain zones of individual action and choice — for example, bodily integrity, private property, and voluntary agreement with others. These zones, the contours of which are subject to judicial adjustment in the light of changing circumstances, are described and protected by common law rules of entitlement.

Under the production conception, common law rules (and the individual rights based upon them) are designed to increase

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[155] *See* M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 287 (1967).

[156] *See* S. BREYER & R. STEWART, *supra* note 30, ch. 2.

[157] *See, e.g.*, C. FRIED, RIGHT AND WRONG 100 (1978); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 198–201 (1973); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 166 (1974); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

economic output by reducing or compensating for transaction costs that inhibit private bargaining and create externalities.[158] The goal of legal rules and remedies is to maximize aggregate wealth.[159]

The public values account portrays the common law as a system that covertly channels economic and political power to a dominant class of private rightholders.[160] Structured by litigants and judges, the common law is seen to be antithetical to a conception of public values in which distributional decisions and other basic social choices are made through an open and democratic political process.

Although the public values conception generally aims at supplanting the common law system, the production and entitlement conceptions can be viewed as complementary accounts that mutually sustain that system. Because the last two approaches favor decentralization, it is plausible to suppose that common law rules that protect entitlements may also

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[158] *See, e.g.*, R. POSNER, *supra* note 81, chs. 8, 20.

[159] *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093–98 (1972). In order to determine whether a given legal rule is more efficient than another, some background set of entitlements must be specified to determine the value (based on willingness of affected individuals to pay or demand compensation) of the alternative resource allocations associated with the two rules. *See* Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 388–89 (1981). In the context that we examine, it is most plausible to equate that set of entitlements with existing law, on the assumption that the latter will be fully enforced. Under this approach, the economic value of a new rule or of a change in any given rule would be determined by the willingness to pay of those who would benefit by the implementation of the rule. Costs would be determined by the compensation demanded by those injured. Since the common law does not take account of moral externalities (such as the distress of third parties over enforcement of a slavery contract), they should be excluded from the calculus. *Cf. id.* at 410–19 (effects on third parties of entitlement-setting decisions, such as adjudication of enslavement contracts); Stewart, Book Review, 88 YALE L.J. 1559, 1571–72 (1972) (collective interests, such as those in environmental quality, are implicated in bilateral rights); Sunstein, *supra* note 53, at 1276–77 (discussing factors to be considered in economic cost-benefit analysis).

We believe that this approach, which assesses the efficiency of successive particular changes in law rather than that of the legal system as a whole, is a coherent and appropriate basis for analyzing the economics of judge-made law. But we do not claim that courts have necessarily internalized this conception of efficiency or that judge-made law is always efficient. The production conception, as it is understood by the courts, is both looser and more limited than this technical approach. As applied by the courts, the production conception tends to equate efficiency with competitive markets and industrial output, and ignores many potential sources of market failure. It also emphasizes the importance of incentives for capital investment. Judicial decisions explicitly addressing resource allocation often appear to reflect concern with both static efficiency and dynamic incentives for investment and growth. *See, e.g.*, Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974); Spur Indus. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972) (en banc).

[160] *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977).

foster production, and vice versa. A system of market ordering, in which private property and contract are secured by common law rules, has historically been considered economically productive.[161] But those rules can also be understood as minimal conditions of individual liberty and respect.[162] In an idealized Hayekian system of law, all legal rules that vindicate entitlements to individual liberty and security would simultaneously promote productivity by encouraging investment and mutually advantageous cooperation.[163]

2. The Rise of Administrative Regulation. — (a) Entitlement Account: More Effective Protection. — Under the entitlement view, the common law is a system of individual rights that empower their bearers to make contracts and prohibit or redress specified conduct by others. But the rise of an urban industrial economy has, for several reasons, undermined the capacity of the common law system to vindicate such rights.

First, common law rules of exchange, designed for face-to-face transactions, are increasingly inadequate when applied to mass markets dominated by large firms. Such markets may create acute disparities in information and bargaining power.

Second, modern industrial society taxes the common law's ability to define private entitlements. Direct transgressions proscribed by the common law of trespass give way to complex and collective harms, such as pollution. The content of common law entitlements must be redefined, but the task of redefinition is often beyond the capacity of judges involved in case-by-case decisionmaking.[164]

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[161] *See, e.g.*, J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956). *But see* Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980) (challenging view that common law rules are necessarily efficient).

[162] *See* C. FRIED, *supra* note 157, at 114–16, 123–24, 132–39.

[163] To the extent that legal rules are regarded as cultural or social institutions that are not fabricated by individual calculations but that develop through an evolutionary process, explanations that link the two accounts even more closely are possible. *See* F. HAYEK, LAW, LEGISLATION AND LIBERTY 35–54 (1973).

Even if a total reconciliation cannot be effected, there are elements of a working compromise. All rules and entitlements cannot be derived from an unadorned principle of economic efficiency. *See* Kennedy, *supra* note 159; Kennedy & Michelman, *supra* note 161. There must be some logically prior core of entitlements that defines the basic features of the environment in which individuals strive for gain. *See* C. FRIED, *supra* note 157, at 91–105. On the other hand, few if any contemporary advocates of the entitlement approach would argue that all common law rules can be derived from basic moral conditions of individual liberty and reciprocity. For example, Professor Epstein has sketched out a considerable role for collective "utilitarian considerations" in defining the remedial attributes of legal rules and institutions. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 77–98 (1979).

[164] *See* J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 14–15 (1927); J. LANDIS, *supra* note 50, at 6–15, 31–35, 96.

Third, new types of harms typically affect large numbers of individuals simultaneously; the impact is large in the aggregate but small for any individual. Because the costs of litigation are likely to exceed any individual's expected recovery, private damage actions no longer deter socially undesirable actions or provide compensation for violations of entitlements.[165] The alternative — the prophylactic deployment of injunctive relief — presents courts with discouraging managerial complexities.

Fourth, it is difficult to ensure uniform treatment of similarly situated individuals through decentralized private litigation. Such uniformity became important in the late nineteenth century, when monopolies such as railroads discriminated among consumers,[166] and is important today because of heightened concern with race and sex discrimination.

The failure of the common law effectively to protect entitlements created a morally based, politically effective demand for the creation of regulatory agencies to safeguard personal security and dignity under industrial conditions. The performance of an administrative agency is thus to be judged by how well it protects rights to clean air, nondiscrimination, safe products, and so on. During the past fifteen years, it has been widely believed that agencies have substantially failed in this task.[167]

(b) Production Account: Market Failure. — The production conception justifies administrative regulation as a response to the failure of the market, as structured by the common law, to deal with the dramatic increase in spillovers, information costs, and other transaction costs in industrial society.[168] In this view, the regulatory agency is designed to correct market failures by altering the behavior of regulated actors in order, for example, to reduce pollution. Because such benefits are collective goods, "free rider" effects prevent the market and

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[165] *See* J. LANDIS, *supra* note 50, at 36–38; Epstein, *supra* note 163, at 98–102.

[166] *See* Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 440–41 (1907).

[167] Some critics have argued that the entire enterprise is flawed, because the attempt to protect individuals through administrative intervention inevitably involves destruction of liberty. *See* F. HAYEK, THE CONSTITUTION OF LIBERTY (1960). A less radical critique holds that the flaw lies in the pervasive failure of administrators to adopt and enforce regulatory measures with a vigor sufficient to protect individual rights. This failure may be attributed to the corruption of the political process, the dominance in that process of regulated firms and other "special interests," or bureaucratic inertia and lack of accountability. *See* sources discussed in Stewart, *supra* note 13, at 1684–88.

[168] *See* R. STEWART & J. KRIER, *supra* note 72, at 155–324 (failure of private litigation to deal with pollution).

common law litigation from producing them. Public enforcement, financed by tax revenues, overcomes the free rider problem and secures allocative efficiency.[169] The success of the effort can be measured by standard economic criteria — the value of the good, as measured by the willingness of beneficiaries to pay,[170] and the costs of producing the good, as measured by the forgone benefits of other possible uses of the relevant resources.

Under an optimistic view, those whose economic welfare is reduced by pollution or false advertising will demand and obtain regulatory programs that correct the failures of the market and the common law and thus advance aggregate economic welfare. But many contemporary critics, invoking a variety of reasons, argue that regulation often reduces economic welfare.[171] This failure is sometimes blamed on the inability or disinclination of mission-oriented bureaucrats to account for all aspects of benefit and cost when formulating regulatory policy. Others maintain that regulation is sought and manipulated by well-organized groups in order to restrict competition, to redistribute income, and to ward off more intrusive forms of government control.[172] A third theory views the regulatory system as one primarily serving the interests of a "new class" of advocates, bureaucrats, and professionals.[173] And a final theory of "government failure" emphasizes that

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[169] *See* R. STEWART & J. KRIER, *supra* note 72, at 107–10.

[170] The "willingness to pay" criterion assumes that beneficiaries are not entitled to prevent the harm in question and must pay to avoid it. Alternatively, the value of regulatory protection might be measured by the price beneficiaries could demand for agreeing to endure the harm in question; such a measure assumes an entitlement in beneficiaries to prevent the harm. *See* Kennedy, *supra* note 159.

[171] *See generally* Weisbrod, *supra* note 133, at 30–31 (collecting suggestions of political scientists for dealing with "governmental failures").

[172] *See* Stigler, *The theory of economic regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); *see also* G. KOLKO, RAILROADS AND REGULATION 1877–1916, at 3–6, 231–39 (1965) (discussing Progressive era). Firms are better organized and therefore politically more effective than the unorganized class of consumers or other "small-stake" individuals who are the scheme's intended beneficiaries. *See* G. STIGLER, THE CITIZEN AND THE STATE ch. 1 (1975). Efficient regulation is itself a collective good that the political market fails to produce because of free-rider effects. *See supra* note 72.

[173] *See* I. KRISTOL, TWO CHEERS FOR CAPITALISM 25–31 (1978). Under this theory, advocates of regulation use single issue politics and media publicity to secure legislation for widespread regulatory intervention. At the same time, bureaucrats seek to expand their budget, personnel, and authority, and may be able to disregard or deemphasize many of the external costs of their initiatives. It is extremely difficult for legislators to determine whether such expanded initiatives are warranted. *See* W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971). The overall tendency is to create swollen bureaucracies administering unnecessarily elaborate regulatory controls that produce few if any net benefits.

regulation retards efficient market adaptation to new conditions.[174]

(c) Public Values Account: The Progressive Critique of the Common Law. — The third account of regulation posits the existence of shared but evolving public values.[175] In this view, the purpose of administrative agencies is to help to define and realize social and economic norms in industrialized society. The regulation of nuclear power, consumer fraud, or occupational health is seen to be not a matter of counting economic costs and benefits, or of defending private entitlements, but part of a continuing process of deciding what sort of a society we shall be — how risk averse, how hospitable to entrepreneurial change, how solicitous of the vulnerable, and how willing to allocate resources through markets or public control.

The public values conception criticizes the common law system for delegating the determination of economic life to private rightholders, to judges who are not adequately accountable, and to a litigation process that invites domination by "repeat players."[176] The Progressives' solution was the regulatory administrative agency,[177] whose specialized nonpartisan structure and self-starting capabilities would ensure the steady implementation of public values.[178]

In recent years, this solution has been widely regarded as self-defeating. Bureaucracies have been seen as overly influenced by parochial interests and incentives and to be shrouded from public accountability by the proliferation of regulatory activities and by the remote and seemingly technical character

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[174] *See* B. OWEN & R. BRAEUTIGAM, THE REGULATION GAME (1978). Regulation can have such an impact in a number of ways. Because regulatory action is often required for the entrance of a new firm or the introduction of new technology, existing firms use the administrative process to limit competition. Environmental or other advocacy groups opposed to new plants or products can delay or block their approval. A market system, in contrast, promotes efficient adaptation to new circumstances precisely because those injured economically by change generally have no legal right to prevent it.

[175] *See* J. VINING, LEGAL IDENTITY 28–29, 35–36, 47, 52 (1978); Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977–1978) (contrasting the public-value model with the market-failure model in the context of land-use regulation).

[176] This process assertedly generates distributional outcomes that reinforce the dominance of private rightholders. *See* M. HORWITZ, *supra* note 160.

[177] The initial program of the reformers who shared this critique of the common law system was legislative regulation through detailed statutory prescription. This response, however, proved to be infeasible because of the demands on scarce legislative resources and the need for specialized and adaptive implementation mechanisms. *See, e.g.*, State *ex rel.* R.R. Warehouse Comm'n v. Chicago, M. & St. P. Ry., 38 Minn. 281, 300–02, 37 N.W. 782, 788 (1888), *rev'd*, 134 U.S. 418 (1890).

[178] *See* J. LANDIS, *supra* note 50, at 28–42.

of regulatory issues. We have become disabused of faith in the efficacy of distinctively administrative methods for identifying public values, or in the existence of an invisible but inevitable rapport between the administrators and the citizenry at large.[179]

E. Remedies for Faulty Administration and Conceptions of Institutional Purpose

In this Section, we first examine the general relation between remedies and conceptions of institutional purpose and then show how each of the remedies for faulty administration — the rights of defense, action, and initiation, and the new-property hearing right — has become associated with, and seeks to advance, one of the three conceptions of institutional purpose. We next analyze the conflicts among the conceptions themselves. Finally, we discuss the difficulties courts face in protecting entitlements in the modern regulatory context.

1. Paradigm Remedies as Forms of Action. — Paradigms are, in Thomas Kuhn's words, "the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science."[180] In administrative law, a paradigm is an exemplary case in which a particular remedy advances a particular conception of institutional purpose.

Under the traditional model of administrative law, the paradigm right of defense prohibited, at the instance of regulated entities, coercive administrative acts that exceeded an agency's statutory authority. As we later show,[181] this remedy was

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[179] The Senate recently expressed its dissatisfaction with the performance of regulatory agencies in a 94–0 vote to amend the APA so as to empower both houses of Congress to veto an agency regulation by majority vote. The action reportedly responded to an "outcry against . . . regulatory excesses." N.Y. Times, Mar. 25, 1982, at 1, col. 2.

Such legislative oversight, however, is often episodic and is frequently the province of a committee or subcommittee that may not be representative of Congress as a whole and that is subject to imperfect electoral accountability. This perception may inform recent holdings that "one house" legislative vetoes are unconstitutional. *See* Consumer Energy Council v. FERC, Nos. 80-2184, -2312 (D.C. Cir. Jan. 29, 1982); Chadha v. Immigration & Naturalization Serv., 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 102 S. Ct. 87 (1981); *infra* note 254.

[180] T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 175 (2d ed. 1970). Kuhn acknowledges that the first edition of his book had created misunderstanding by using the term "paradigm" also in the broader sense of "the entire constellation of beliefs, values, techniques and so on shared by the members of a given community." *Id.*

[181] *See infra* pp. 1246–47.

originally associated with an entitlement conception based on traditional distinctions between private and public law. The contemporary pervasiveness of regulatory discretion, however, has undermined the foundations of the entitlement conception; the right of defense now rests upon a production conception. The private right of initiation, which aims to reallocate administrative resources among competing regulatory objectives, is associated with a public values conception.[182] Finally, the private right of action and the new-property hearing right are both linked with the entitlement conception.[183]

Each of these remedies originates in a particular combination of litigants and a particular administrative function, and each is primarily linked to a single conception.[184] For example, new-property hearing rights are recognized when individuals seek private benefits directly from agencies; this structure invites an entitlement conception of agency functions. An entitlement conception, however, would be unworkable in connection with an initiation right, through which beneficiaries seek to obtain collective benefits by influencing the exercise of agency discretion in enforcing regulatory controls against third parties. This situation invites a public values conception. In later parts of this Article, we discuss these matters in detail and show how each remedy is founded on a distinctive tripartite structure of litigants, institutional function, and conception. Like the forms of action at common law, each remedy protects a narrow spectrum of social concerns through a distinctive system of substantive and adjective law.

The three conceptions we have identified are not the only means of defining and evaluating the performance of administrative agencies.[185] But courts have an institutional tunnel vision that restricts them to only a few of the possible conceptions. This tunnel vision is attributable to the nature of fo-

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[182] *See infra* pp. 1278–84.

[183] *See infra* pp. 1263–67, 1307–16.

[184] Although a particular remedy is primarily associated with a particular conception, it may sometimes be associated with a different conception. For example, rights of defense, usually linked with the production conception, are sometimes used to secure entitlements, such as those guaranteed by the first amendment. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[185] For example, the performance of administrative regimes could be measured in terms of the degree to which the regimes successfully restructure the pattern of political and economic power resulting from a system of private ordering. *See* L. JAFFE, *supra* note 28, at 3–27. Another conception could invoke the Weberian theory of bureaucratic rationality to account for the rise of administratve regimes and to assess their performance. *See* J. Mashaw, Bureaucratic Justice: Administrative Law from an Internal Perspective (forthcoming). But a system of judicial remedies is functionally ill suited to advance these conceptions.

rensic decisionmaking and to the grounding of American courts in traditional conceptions of private and public law.

2. Relations Among Competing Paradigms. — In many studies employing the notion of paradigms, a single paradigm is seen to dominate an entire discipline for a lengthy period, only to be succeeded by another dominant paradigm following a revolutionary struggle.[186] But the pattern that emerges from our study is quite different: a number of conflicting remedial paradigms coexist over a considerable period of time,[187] even within the confines of a single administrative program.

The perseverance within administrative law of divergent conceptions of institutional purpose has received little attention. This neglect, we believe, has occurred because the remedies to which conceptions are linked are each invoked by a particular class of litigants in a particular context, and because each remedy has a particular doctrinal origin. The remedial forms of action thus disguise the conflicts among the different underlying conceptions.

Could one emulate, in the administrative law context, the nineteenth century reformers who sought to abolish the common law forms of action and create a unitary civil action? Imagine a new federal statute that provides: "Private rights of action, private rights of initiation, rights of defense, and new-property hearing rights are hereby abolished. There will henceforth be one form of action for review of unlawful administrative performance, to be denominated an action for administrative relief." Could a single remedy be developed that would integrate the entitlement, production, and public values conceptions? The remainder of this Section attempts to explain how conflicts among the three conceptions would make

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[186] T. KUHN, *supra* note 180, portrays paradigms of scientific thought as succeeding one another over time. A given paradigm is accepted by a scientific community until it generates anomalies that cannot be solved. The end of the reign of one paradigm and the accession of its replacement occur in a revolution that takes place when the anomalies stimulate the creation of a new paradigm that resolves the anomalies.

Applications of Kuhn's approach to law and other disciplines have employed or discovered similar patterns of a linear succession of single paradigms, punctuated by revolutionary periods. *See, e.g.*, M. HORWITZ, *supra* note 160; Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982). *But see* E. KITZINGER, BYZANTINE ART IN THE MAKING (1977) (dialectical interplay between competing paradigm styles extending over centuries); Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises* (Book Review), 94 HARV. L. REV. 561 (1981) (earlier paradigms persist but are subsumed by later ones).

[187] *Cf.* Kennedy, *Form and Substance*, *supra* note 26 (judicial insistence on rules derived from individualist conception of social life coexists with use of equitable standards to further altruistic conception). Indeed, Kuhn supposed that the persistence of inconsistent rival paradigms for considerable periods would typify law and other disciplines. *See* T. KUHN, *supra* note 180, at 160–73.

such an integration impossible, and how courts have dealt with conflicts among the different conceptions and their associated remedies.

The incompatibility of the production conception and the entitlement conception is evident. For example, the production conception requires that regulatory policies be adjusted to rapidly changing economic and social conditions.[188] This need for flexibility, however, is inconsistent with a system of entitlements to regulatory protection: an entitlement to the advantages conferred by particular regulations would thwart needed changes in regulatory policy.[189] Conversely, if production is the overriding goal of regulation, the individual is no longer secure against fraud, discrimination, or serious injury to health. His entitlements may, in principle, be sacrificed whenever the economic calculus so requires.[190]

It would be fortunate if this clash could somehow be resolved under the public values conception, but no such happy ending is likely. The premises of the production conception and those of the public values conception are incompatible. Under the production conception, regulatory policies are determined by the willingness of individuals to pay for regulatory benefits.[191] Under a regime of public values, by contrast, decisions are made not on the basis of dollars, but instead on that of voices and votes; regulation is thought to succeed when

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[188] *See* J. LANDIS, *supra* note 50, at 10–12.

[189] By contrast, the conceptions of production and entitlement do not conflict in a common law system of market exchange, because that system relies upon a decentralized mechanism for allocating resources. Entitlements do not determine outcomes; they simply provide the starting points and framework for individual choices and agreements. Because such choices and agreements respond to changes in opportunities, the common law system of entitlements permits adaptation to changing conditions.

[190] To the extent that risks are widely distributed, the application of an economic calculus may result in roughly equivalent risk exposure for each individual. *See* C. FRIED, AN ANATOMY OF VALUES 183–206 (1970) (risk pool concept); Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331 (1980). But disparities in individual conditions and susceptibilities, geographic variations, and limitations on mobility may result in nonuniform risk distribution. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (local risks associated with nuclear generating facility).

[191] The production approach enshrines either the existing distribution of income and set of preferences, or a system of investment in future economic growth, and must give dominant weight to maximization of wealth. A public values approach, by contrast, must deliberately cultivate and weigh divergent conceptions of value. It aspires to the moral development of citizens and communities that reflectively and deliberately choose their own ends. Preferences are not an exogenous "given"; their selection is the very object of the enterprise. *See* J. RAWLS, A THEORY OF JUSTICE (1971). Citizens are regarded as bearers of alternative social values, not as purchasers or investors. They may, but need not, choose production as a dominant public value.

it advances goals that the community has endorsed though collective political processes.[192]

The public values conception of administrative regulation is also incompatible with the entitlement-based approach. Under the entitlement conception, an aggrieved entitlement-holder can "trump" (by resort to litigation) the outcome of a community process for making — and changing — regulatory policy. In this respect, the static and individual character of judicially protected entitlements is at odds with the community dynamics of public values.[193]

These conflicts have sometimes surfaced when different litigants in a single case espouse different conceptions of institutional purpose. The recent Supreme Court decisions involving federal regulation of occupational exposure to benzene[194] and cotton dust[195] provide examples. The principal issue was whether the Secretary of Labor was required to prove, first, that Occupational Safety and Health Administration (OSHA) standards were necessary to eliminate a "significant risk" to employee health, and second, that the costs of compliance were reasonably related to the benefits. The regulated industries invoked a production approach to argue that both questions should be answered affirmatively. Regulatory beneficiaries and the Secretary urged a negative answer to each question by asserting the protection of health as an overriding public value chartered by statute.[196] The cases involved the functional equivalent of an initiation right by the beneficiaries and a right of defense by the regulated firms.[197]

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[192] *See* Baker, *Starting Points in Economic Analysis of Law*, 8 HOFSTRA L. REV. 939, 971 (1980); *cf.* Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) (denying that wealth maximation can be considered a normative good); Sager, *Pareto Superiority, Consent, and Justice*, 8 HOFSTRA L. REV. 913 (1980) (arguing that a pareto-optimal state is not necessarily just). *But see* Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) (defending wealth maximization as a legitimate ethical norm).

[193] Although it is theoretically possible that an institution charged with selecting and implementing public values might choose to safeguard entitlements, that choice is hardly inevitable.

[194] Industrial Union Dep't, AFL-CIO v. American Petroleum Inst. (Benzene), 448 U.S. 607 (1980).

[195] American Textile Mfrs. Inst. v. Donovan (Cotton Dust), 101 S. Ct. 2478 (1981).

[196] Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (1976).

[197] Tripartite litigation involving a regulatory agency, regulated firms, and regulatory beneficiaries is common. In some cases, such as *Benzene* and *Cotton Dust*, the industry asserts a right of defense while beneficiaries support the agency. In other cases, the beneficiary asserts an initiation right and the regulated firm defends the agency. In still other cases, the beneficiary challenges an agency's action as inadequate, and the industry claims that the agency has gone too far. Each of these tripartite cases represents a functional combination of defense and initiation rights.

The Court resolved the conflict by mediating between the conflicting remedial paradigms, rather than by subordinating one to the other. In *Benzene*, it forbade OSHA from imposing regulatory controls unless the exposure presented a "significant" risk of harm. In doing so, the plurality pointed out the threat to production posed by regulatory intervention on the basis of agency speculation.[198] But in *Cotton Dust*, a significant health risk was shown and the Court insisted that the public health norm be wholeheartedly vindicated without regard to costs and benefits.[199] The mediating technique that emerges from the two decisions is the delineation of independent spheres of application, within each of which a single conception could hold total sway. The Court has taken a rather different mediating approach in other instances of conflict among paradigms. For example, in the context of new-property hearing rights, the threshold qualification for protection is solely a function of entitlement, but considerations of production help to determine the process that is due.[200]

Benzene and *Cotton Dust* also provide a lesson about the relative status of the three conceptions. When the relevant public values are ascertainable and definite, they must be respected even in the face of a conflicting claim of production. Arguments based on production do not have the constitutional authority that is necessary to override a legislative consensus favoring a different value. Principles of entitlement, by con-

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[198] 448 U.S. at 639–45 (plurality opinion). Justice Rehnquist found the statutory provision for setting standards to be so vague that it amounted to an unconstitutional delegation of legislative power. *Id.* at 687–88 (Rehnquist, J., concurring in the judgment). He thus would have given to Congress the choice among the competing conceptions, in accordance with the formalist thesis.

[199] 101 S. Ct. at 2491–92; *see* Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1150–51 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980). Firms must generally reduce significant risks as long as it is economically and technologically feasible to do so; but courts use the right of defense to ensure that regulatory requirements are feasible and will not cause widespread plant shutdowns and unemployment. *See, e.g.*, American Textile Mfrs. Inst. v. Donovan (Cotton Dust), 101 S. Ct. 2478 (1981); National Lime Ass'n v. EPA, 627 F.2d 416 (D.C. Cir. 1980). Because avoidance of shutdowns is a crude proxy for production, this result represents a further form of mediation between competing conceptions. A similar approach is followed in decisions in which an injunction against an industrial facility is sought on grounds of nuisance. *See* Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975) (en banc); Reynolds Metals Co. v. Yturbide, 258 F.2d 321 (9th Cir.), *cert. denied*, 358 U.S. 840 (1958).

When this mediating technique is inapplicable, the basic responsibility for balancing production concerns and regulatory norms is left to the agency, subject to a "hard look" standard of review. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (coal-fired power plants).

[200] *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

trast, may prevail over general public purposes, as in cases involving the first amendment or constitutional "takings."

3. The Formal-Functional Dilemma. — In attempting to remedy deficient agency performance, courts frequently encounter a persistent dilemma. Private entitlements to regulatory protection or other government benefits are of two types, formal and functional. Formal entitlements are established by common law or statute; they define a relation between rightholders and duty-bearers that empowers a rightholder to prohibit or command specific conduct by a duty-bearer. Such entitlements, although enforceable as rights with definite content, do not necessarily protect particularly important interests of the rightholder. The right to redress insignificant invasions of the exclusive possession of land illustrates this point. Another example is the requirement in the Veterans' Act that veterans' benefits checks must be mailed in envelopes bearing the notice "POSTMASTER: PLEASE FORWARD if addressee has moved and filed a regular change-of-address notice."[201]

A functional entitlement, by contrast, is a morally grounded claim to protection of interests or expectations that are central to private security and liberty of action. Although a functional entitlement need not be embodied in any existing common law rule or statutory text, many common law rules protecting privacy, reputation, and liberty of the person are functional as well as formal.

For reasons cataloged above, the common law system proved ill equipped to adapt to industrial conditions. Although the common law still protected formal entitlements, in many cases those entitlements either could no longer be effectively enforced or had lost their functional significance. Administrative agencies were created in part to correct these shortcomings and to define and secure new and important liberties, such as freedom from discrimination.

When asked to create remedies to correct inadequate administrative protection of entitlements, courts face serious problems. Courts might attempt to identify those private interests that are functionally important and to protect them by creating formal entitlements to regulatory protection, new-property benefits, or freedom from regulatory impositions. Whether based on constitutional principles or federal common law, however, this approach would require courts to select certain private economic and social interests as "basic" or "fundamental" — a hazardous enterprise that might appear subjective and arbitrary. By creating entitlements to particu-

[201] 38 U.S.C. § 3020(a) (1976).

lar forms of regulatory protection, government assistance, or immunity from regulatory control, this approach would also impair needed administrative or legislative flexibility.

Rather than create formal entitlements to protect interests they deem basic, courts might instead attempt to supervise regulatory programs to ensure that the functional entitlements recognized by the legislature in creating a program are in fact secured. But courts are ill suited to perform this managerial task.

Finally, courts might adopt a purely formal approach and provide remedies to protect whatever entitlements the legislature or agencies have cast in formal terms. Since by hypothesis a political branch has concluded that it is desirable to define the relevant interests in formal terms, protecting those interests through private remedies cannot as readily be attacked as subjective or arbitrary, and will probably disrupt administration less than a system in which courts define formal entitlements on their own. But the formal entitlements created by a legislature or agency will not necessarily be functionally important, and it is unclear why courts should create remedies to protect unimportant interests. Moreover, many functional entitlements may not be recognized at all under positive law.

This, then, is the formal-functional dilemma. Courts are ill equipped to identify functional entitlements or to give them enforceable content. But if courts protect only formal entitlements created by positive law, they may fail to carry forward their historic function of securing important private liberties and expectations.

IV. Private Rights of Defense

Between 1885 and 1940, the federal courts created rights of defense to enable individuals and regulated firms to prevent agencies from imposing controls not authorized by statute.[202] Courts repeatedly held that due process requires a hearing and judicial review when administrators impose taxes or assessments,[203] fix prices,[204] or regulate business activity in other ways.[205] The right of defense was originally founded on a

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[202] *See* L. Jaffe, *supra* note 28, at 339–43. *See generally* Stewart, *supra* note 13, at 1671–76, 1723–25 (traditional model required regulation to conform to specific legislative standards, and granted standing to challenge any regulation to plaintiffs whose "legal right" under common law was infringed).

[203] *See, e.g.*, Londoner v. Denver, 210 U.S. 373, 385–86 (1908).

[204] *See, e.g.*, Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 300–05 (1937); Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418, 458 (1890).

[205] *See, e.g.*, Southern Ry. v. Virginia, 290 U.S. 190, 198–99 (1933).

stable system of common law liberty and property rights. In the original conception of the Republic, the independent judiciary was to protect these rights against political factions bent on the exploitation of government power for parochial ends.[206] Administrative intrusions on common law rights were regarded as presumptively illegitimate and required explicit legislative authorization.[207]

This traditional, pre-New Deal model of administrative law integrated the conceptions of entitlement, production, and public values. Property rights were protected by hearings and judicial review.[208] Production was likewise served by limiting regulatory intrusion on private investment decisions. And the requirement of clearly stated legislative authorization for regulatory intervention[209] furthered public values by placing policy decisions in the hands of elected representatives rather than those of administrative officials.[210]

In championing the creation of rights of defense, early students of administrative law viewed agency discretion with great suspicion. Ernst Freund and John Dickinson, for example, believed that such discretion was a temporary expedient that would disappear once the legislature and reviewing courts had accumulated sufficient experience to fix clear and consistent regulatory principles.[211]

These attitudes were challenged during the New Deal, as the number of federal regulatory agencies — and their powers — were expanded significantly in response to the breakdown of the private economy. This breakdown inspired the defenders of the new agencies to create a novel administrative jurisprudence, based on the notion that full employment and productivity could be achieved only by replacing decentralized private ordering of economic life with centralized public man-

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[206] *See* sources cited *supra* note 154; *infra* note 357.

[207] *See* Stewart, *supra* note 13, at 1673–76.

[208] *See, e.g.*, ICC v. Louisville & N.R.R., 227 U.S. 88, 91–94 (1913); *see also* American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108–10 (1902) (right of review).

[209] *See, e.g.*, ICC v. Alabama Midland Ry., 168 U.S. 144, 166–69 (1897); ICC v. Cincinnati, N.O. & T.P. Ry., 167 U.S. 479, 505 (1897).

[210] Repeated judicial invocation of clear-statement principles could actually subvert public values by restricting regulation designed to increase public supervision or control of economic and social life. *See* cases cited *supra* note 209. Congress has sometimes responded to such rulings by explicitly expanding an agency's statutory authority. *See* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 32 (1962); 1 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 22–35 (1931).

[211] *See* E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 97–103, 580–83 (1928); *see also* J. DICKINSON, *supra* note 164, at 203–35 (noting, however, that there will be some areas in which the courts and legislature will not be able to accumulate experience because the fact situations that arise will be unique).

agement. From this perspective, administrative discretion represented not a necessary evil, but an opening for desirable managerial initiatives in the service of production.[212] Technocratic premises were invoked to reconcile broad agency discretion with the conception of public values. There was a public consensus that it was necessary to expand production; agency professionals who were "bred to the facts,"[213] it was believed, could diagnose the malaise of the old economic order and administer the necessary restorative tonic. It was on this premise that James Landis could assert that agencies were a mechanism by which "our democratic institutions" could ensure "the economic integrity of industries and their normal development."[214]

This view was utterly inconsistent with a conception of economic ordering based on a stable set of private entitlements. Many members of the bar seized upon this inconsistency to decry the New Deal goal of regulatory management as a flimsy pretext for administrative absolutism.[215] The defenders and critics of the New Deal eventually achieved a working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.[216]

These procedural safeguards have been extended in the past twenty years, as courts have created a strong presumption in favor of rights of defense even when the relevant organic statute does not authorize them.[217] Defense rights have also been strengthened by the development of "hard look" review[218] and by the use of clear-statement principles to restrict agency power.[219]

The kernel of "hard look" review is the requirement that agencies explain and justify their exercise of discretion on the basis of a detailed record containing data and analysis both for and against the agency's position. Such review seeks to

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[212] *See* J. LANDIS, *supra* note 50, at 14–16. Dean Landis argued that government regulation, as a form of public business enterprise, is no more amenable to a system of trial-type hearings and judicial review than is private business. *See id.* at 10–12.

[213] *Id.* at 155.

[214] *Id.* at 16.

[215] *See* sources cited in K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.7, at 24 (2d ed. 1978).

[216] *See, e.g.*, 5 U.S.C. §§ 551–559, 701–706 (1976 & Supp. III 1979).

[217] *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 139–43 (1967).

[218] *See* cases cited in S. BREYER & R. STEWART, *supra* note 30, at 291–309; Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

[219] *See* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 639–52 (1980) (plurality opinion); Note, *supra* note 143, at 899–907.

discipline agency discretion through scrutiny of the economic costs and technological feasibility of compliance with regulations and of the benefits that compliance will assertedly produce.

"Hard look" review has been supplemented by judicial principles of clear statement that limit an agency's discretion to impose burdensome regulations, even when the agency has seemingly been delegated broad powers by Congress. The plurality opinion in *Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene)*[220] illustrates this use of clear-statement principles.[221] The plurality held that OSHA had authority to regulate only "significant risks" of occupational disease. In reaching this result, the plurality concluded that "[i]n the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give [OSHA] the unprecedented power over American industry that would result from the Government's view"[222] that "significant" risks need not be established before imposing controls costing hundreds of millions of dollars.[223]

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[220] 448 U.S. 607, 611 (1980).

[221] *Id.* at 639–52.

[222] *Id.* at 645. This position, which commanded only a plurality of four, is consonant with the hostility to regulatory burdens evident in an increasing number of lower court decisions. *See, e.g.*, Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831 (5th Cir. 1978); American Meat Inst. v. USDA, 496 F. Supp. 64 (E.D. Va. 1980), *vacated and remanded*, 646 F.2d 125 (4th Cir. 1981). It is also consistent with other Supreme Court decisions that have protected private investment and business activity from administrative control on quite different rationales, including first amendment protection of commercial advertising, *see, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566–71 (1980); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761–70 (1976), and a modest revival of the contracts clause, *see* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

[223] 448 U.S. at 641 & n.46. The plurality's concern for production was underscored in the concurrences. *See, e.g., id.* at 664 (Burger, C.J., concurring) ("[R]esponsible administration calls for avoidance of extravagant, comprehensive regulation. Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible."); *id.* at 669 (Powell, J., concurring in part and in the judgment) (expressing concern over "the ability of American industries to compete effectively with foreign businesses and to provide employment for American workers").

The plurality also indicated that OSHA's suggested construction of the statute might represent an unconstitutional delegation of legislative power. 448 U.S. at 646. To the extent that the nondelegation doctrine simply prohibits Congress from delegating fundamental policy choices, that suggestion was misguided. As Justice Marshall pointed out in dissent, there would be no delegation problem if Congress explicitly authorized OSHA to require the elimination of all carcinogens to the extent technologically and economically feasible. *See id.* at 717–18 n.30 (Marshall, J., dissenting). Although he accepted Justice Marshall's point, Justice Rehnquist found the relevant provision of the OSHA statute so ambiguous that he would have invalidated it as an

What is the source of the federal courts' authority to create this modern system of defense rights? To answer this question, we look to the three conceptions of institutional purpose; we also discuss whether defense rights are constitutional or nonconstitutional in status. We begin by examining these rights in relation to the entitlement conception.

A system of defense rights aimed at protecting entitlements would need to derive those entitlements from one of three sources of substantive law — the Constitution, common law, or statutes.[224] First, when administrative controls transgress a substantive constitutional limit on government,[225] such as the first amendment, judicial review is probably required by the due process clause.[226] Only a few rights of defense, however, could be accounted for in this way. Most regulation falls well short, for example, of a "taking" of property.[227]

If common law entitlements were "liberty" or "property" subject to the procedural protections of the due process clause,

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unconstitutional delegation. *See id.* at 672 (Rehnquist, J., concurring in the judgment).

[224] The general jurisdictional statutes cannot fairly be read to grant federal courts general power to create such remedies. *See supra* pp. 1220–21. Nor can the current system of rights of defense be explained solely by reference to the Administrative Procedure Act. First, the APA cannot plausibly be read to create a "hard look" doctrine. Second, the current system creates a presumption in favor of rights of defense even when the APA is inapplicable. *See* Johnson v. Robison, 415 U.S. 361 (1974). Third, the APA provisions for review were originally designed to codify existing judge-made law by allowing rights of defense not whenever there was "injury in fact," but only at the behest of (1) those suffering an injury to common law interests, and (2) those adversely affected or aggrieved under the relevant organic statute. *See* Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41; Stewart, *supra* note 13, at 1723–30. If, however, the APA can be read to create a general rule of reviewability in the context of rights of defense, it should also be so read in the context of rights of initiation.

[225] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (first amendment); Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418, 458 (1890) (reasonableness of railroad rate "is eminently a question for judicial investigation, requiring due process of law for its determination").

[226] Professor Hart suggests that due process requires judicial review when the government acts coercively against an individual. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1386–1401 (1953), *reprinted in* HART & WECHSLER, *supra* note 14, at 330. The Court has endorsed this argument in situations in which the government curtails an individual's physical liberty. *See* Vitek v. Jones, 445 U.S. 480 (1980), *discussed at infra* note 232.

[227] Any regulation of property use, including most regulation of business, presents a potential "taking" claim that could serve as a basis for judicial review. But the extent to which government can regulate property use without committing a compensable taking is so vast, *see, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), that this remedy would be of little practical importance. Certainly it cannot account for the "hard look" right of defense afforded by contemporary courts.

the common law might provide a foundation for defense rights. The Supreme Court's decision in *Ingraham v. Wright*[228] unambiguously holds that procedural due process protects at least some categories of common law entitlements against invasion by a government official.[229] *Ingraham* involved the allegedly unjustified corporal punishment of a public school student. The Court found no substantive constitutional violation,[230] but nonetheless concluded that the student's interest in personal security — a core common law right — was entitled to due process protection.[231] Similar reasoning was employed in *Vitek v. Jones*.[232]

The due process protection found in *Ingraham* does not, however, extend to all common law rights. For example, in numerous cases — including *Paul v. Davis*[233] and *Barr v. Matteo*[234] — the courts have denied any relief under federal law to citizens defamed by government officials.[235] Many interests protected at common law are less weighty than the reputation interests at stake in *Paul v. Davis* and *Barr* and would not be regarded today as sufficiently important to merit due process protection.[236] Conversely, courts have often

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[228] 430 U.S. 651 (1977).

[229] *Id.* at 673–74; *cf.* PruneYard Shopping Center v. Robins, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring) (discussing whether common law rights are protected under due process clause).

[230] 430 U.S. at 671.

[231] *Id.* at 672–74 & n.41. The Court observed that the liberty protected by the fifth amendment "included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Id.* at 673 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). The Court also found, however, that the state law remedy furnished all the process that was due. 430 U.S. at 676–80; *see also* Parratt v. Taylor, 451 U.S. 527 (1981) (same).

[232] 445 U.S. 480, 488–94 (1980). In *Vitek*, the Court held that a state prisoner who had been duly convicted of a felony had a liberty interest in avoiding involuntary transfer to a state mental institution for the duration of his sentence. His conviction did not extinguish his interest in avoiding the additional personal constraints accompanying such commitment; due process still required an administrative hearing on his mental condition. *Id.* at 491–96.

[233] 424 U.S. 693, 699–701, 710–12 (1976).

[234] 360 U.S. 564 (1959) (denying damage remedy for libel against official on ground that statement was privileged); *see also* Expeditions Unlimited Aquatic Enters. v. Smithsonian Inst., 566 F.2d 289 (D.C. Cir. 1977) (en banc) (governmental official held to have absolute immunity from liability for defamation), *cert. denied*, 438 U.S. 915 (1978).

[235] Although *Barr* was not explicitly decided on constitutional grounds — it treated defamation as a common law rather than a constitutional injury — its preclusion of a damage remedy against the responsible official, when coupled with *Paul v. Davis*' denial of an administrative hearing, forecloses federal relief for defamation by federal officials. *Barr* is explained in Butz v. Economou, 438 U.S. 478, 487–95 (1978).

[236] Consider, for example, a government official's trespass that causes no physical or economic injury.

created rights of defense even when no common law right was at stake.[237] Accordingly, the current system of defense rights cannot be justified by common law entitlements. And in light of the formal-functional dilemma, an equation of defense rights and common law entitlements would be undesirable.

A third potential source of judicial authority to create rights of defense might be statutory limits on agency power. The Constitution does not require a right of defense whenever a statutory violation is alleged, but some statutory limits arguably create corresponding formal entitlements for persons or entities subject to regulation.[238] As we develop later in the context of new-property hearing rights and private rights of action, due process may demand procedural protection for such formal entitlements.[239] Because of the breadth of statutory delegations of lawmaking power to administrative agencies, however, such entitlements are irrelevant to most regulatory controversies.[240] Certainly, "hard look" review of agency discretion cannot be justified by such statutorily derived entitlements.

Thus, the entitlement conception that once provided the foundation for defense rights can no longer serve as their principal justification. Numerous factors combine to make futile any effort to identify fixed, judicially enforceable limits on agency authority. The factors include the pervasiveness of regulation, the inevitable discretion enjoyed by agencies in resolving difficult technical issues,[241] the need to adjust regulations in light of changing circumstances, and the fact that regulation affects the economic welfare of firms in many different, often unexpected ways.[242] A useful illustration is the *Benzene* case itself, in which the petroleum industry protested

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[237] *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136 (1967) (promulgation of labeling regulations).

[238] *See* Stewart, *supra* note 13, at 1718. For discussion of the absence of constitutional grounding for the view that a remedy must be available for every statutory wrong, see generally *infra* pp. 1255–67.

[239] *See infra* pp. 1262, 1266, 1307–16.

[240] Courts have taken a "hard look" when the relevant organic statute does not provide for judicial review at all, *see, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (Federal-Aid Highway Act of 1968, § 138, 23 U.S.C. § 138 (1976); Department of Transportation Act of 1966, § 4(f), 49 U.S.C. § 138 (1976)), as well as when the statute provides for review in general terms, *see, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); cases cited *infra* note 246.

[241] *See, e.g.*, Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1145–47 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

[242] *See* Koch & Leone, *The Clean Water Act: Unexpected Impacts on Industry*, 3 HARV. ENVTL. L. REV. 84 (1979).

OSHA's lowering of the standard for occupational exposure to benzene from ten parts per million (ppm) to one ppm. The epidemiological data on the relevant health risks were inconclusive.[243] The extra costs of complying with the stricter standard were high, but would not force industry shutdowns. How can constitutional entitlements, common law rules of property or tort, or opaque statutory language[244] explain the "hard look" approach that eight Justices took to review of the technical issues involved?[245]

A public values conception is also inadequate to explain judicial creation of "hard look" review in defense cases. For the most part, the aim is neither to vindicate regulatory norms nor to establish a community forum for dialogue;[246] it is instead to protect private investment and management from governmental intrusions. Hearing rights and judicial review are enlisted, through a case-by-case process of federal common-law-making, to limit and justify the economic burden of particular regulatory initiatives. Both the plurality opinion in *Benzene*[247] and numerous lower court decisions probing the technological and economic explication of regulatory controls[248] make it plain that the modern defense right rests principally upon a production conception.[249]

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[243] 448 U.S. at 634–35.

[244] The statute at issue in *Benzene* states that the agency is to take action "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," 29 U.S.C. § 652(8) (1976); standards should be designed to assure, "to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity." *Id.* § 655(b)(5).

[245] The plurality's effort to develop a "significant risk" test could be seen as an effort to develop a substitute for common law rules; but the test is inherently subjective, and its outcome is inevitably determined by an ad hoc balancing of the putative justification of a particular regulation against the burdens that regulation imposes on private production. For further discussion of *Benzene*, see *supra* pp. 1243–44.

[246] Occasionally, however, "hard look" review is justified as a means of assuring that an agency's decisions are responsive to the various norms reflected in the governing statute, even though such norms may be so general or vague that they do not fix precise limits on the agency's authority. *See* Ethyl Corp. v. EPA, 541 F.2d 1, 35–36 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); *id.* at 652 (Bazelon, C.J., concurring in result); Leventhal, *supra* note 218, at 511.

[247] *See supra* p. 1249.

[248] *E.g.*, McCulloch Gas Processing Corp. v. Department of Energy, 650 F.2d 1216 (Temp. Emer. Ct. App. 1981); Central Power & Light Co. v. United States, 634 F.2d 137 (5th Cir. 1980); National Lime Ass'n v. EPA, 627 F.2d 416 (D.C. Cir. 1980); United States v. Nova Scotia Food Prods., 568 F.2d 240 (2d Cir. 1977); South Terminal Corp. v. EPA, 504 F.2d 646, 662–67 (1st Cir. 1974).

[249] If an agency regulation is simultaneously attacked by a beneficiary claiming it to be inadequate and by industry claiming it to be excessive, both a public values and a production conception may come into play. *See supra* note 197.

It is no accident that the rise of "hard look" review coincided with the implementation of a new generation of costly and intrusive "social" regulations,[250] a sharp deterioration in the performance of the American economy,[251] and mounting distrust of bureaucratic institutions disciplined neither by the market nor by demonstrable political accountability.[252] For a variety of institutional reasons,[253] Congress has been unable to provide an appropriate corrective, either by rewriting organic statutes or through case-by-case review of particular initiatives.[254] Drawing on the production conception as a background understanding, courts have sought to fill the gap in order to prevent unwarranted regulatory impositions on the national economy. New Deal administrative jurisprudence, which counseled deference to the expertise of regulators as the surest path to a productive economy, has thus been stood on its head.

But the courts' development of "hard look" defense rights rests on more than a naked concern with economic productivity. In creating rights of defense in the face of statutory si-

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[250] Broader notions of productivity, including the value of renewable resources and human capital, often offer a more powerful justification for health, safety, and environmental regulation than do conventional measures of economic output. *See* A. FREEMAN, THE BENEFITS OF ENVIRONMENTAL IMPROVEMENT (1979). But popular and judicial perceptions of the benefits of such regulation are framed primarily in moral rather than economic terms, in part because of the difficulties in measuring these broader values. *See infra* pp. 1296–97 & note 418.

[251] *See generally* G. GILDER, WEALTH AND POVERTY (1981) (analyzing reasons for deterioration in the American economy's performance).

[252] *See generally* J. FREEDMAN, CRISIS AND LEGITIMACY (1978) (examining "crisis" in the administrative process, its sources, and the legitimacy of administrative agencies); Stewart, *supra* note 13, at 1711–60 (chronicling expansion of the traditional model of administrative law to allow fuller representation of interests affected by agency action).

[253] The legitimacy that Congress might lend to agency actions through close legislative attention has not been forthcoming; the nature of bureaucracies, Congress' own crowded agenda, and severe information limitations have precluded serious supervision. *See e.g.*, W. NISKANEN, *supra* note 173 (discussing information difficulties faced by Congress in evaluating administrative performance).

[254] The legislative veto is intended to provide such congressional review, but both its practical effectiveness, *see* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1409–12, 1414–17 (1977) (wide range of effectiveness in negotiations between Congress and agencies; time burdens inhibit effective review in Congress), and its constitutionality, *see* Consumer Energy Council v. FERC, Nos. 80-2184, -2312 (D.C. Cir. Jan. 29, 1982); Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 429–36 (9th Cir. 1980), *cert. granted*, 102 S. Ct. 87 (1981), are subject to serious question.

The Bumpers Amendment, which would strengthen judicial review of agency action, *see* 125 CONG. REC. S12,145 (daily ed. Sept. 7, 1979), would essentially delegate policymaking responsibility to the courts and endorse the development of "hard look" review.

lence, courts have continued to perform their historic role of limiting governmental intrusions upon private ordering. This practice belies the formalist thesis and the claim that judicial creation of remedies violates principles of separation of powers.

Rights of defense secure production only very imperfectly, however; courts are institutionally ill equipped to assess the technical and managerial questions presented by regulatory controversies. Moreover, as charged in the *Benzene* dissent, clear-statement limits on agency discretion can become a device for judicial usurpation of legislative authority to define public norms.[255]

These drawbacks support the conclusion that rights of defense, particularly those of the "hard look" variety, are usually not constitutionally mandated, but are instead a form of federal common law. Concededly, rights of defense are constitutionally required in some circumstances: when a prohibited "taking" is involved or some other constitutional provision has been violated; when there has been an infringement of a common law interest, such as personal security, that is part of the "liberty" protected by the due process clause; or when formal statutory limits on regulatory power create entitlements that are also protected by the due process clause as "liberty" or "property."[256] In such cases, rights of defense must be made available against state as well as federal regulators. But there is a far broader category of cases, including "hard look" cases, in which judicial creation of rights of defense represents no more than federal common law; in such cases, rights of defense apply only to federal measures and are subject to preclusion by Congress.

V. NEW-PROPERTY HEARING RIGHTS[257]

During the past fifteen years, federal courts have held that due process requires procedural safeguards for many statutory benefits, even though an individual's interest in these benefits is not protected by the common law or by any substantive provision of the Constitution. The basic purpose of these safeguards is to ensure that benefits are in fact provided to those entitled to them under the applicable statute.[258] The

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[255] In this respect, Justice Marshall's reference to Lochner v. New York, 198 U.S. 45 (1905), was apt. *See* 448 U.S. at 723–24 (Marshall, J., dissenting).

[256] *See* Londoner v. Denver, 210 U.S. 373 (1908); *infra* pp. 1256–57, 1266.

[257] The term "new property" is taken, of course, from Reich, *supra* note 100.

[258] The Supreme Court has repeatedly asserted that the purpose of procedural protection is to ensure accurate application of the relevant statute. *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 259–62 (1978); Mathews v. Eldridge, 424 U.S. 319, 335

leading cases — involving government employment, the administration of public education, and the provision of assistance and disability payments — typically concern benefits that are private rather than collective, in that they can be conferred on one individual without being conferred on others.[259]

The Supreme Court has held that due process protection is limited to "liberty" rights safeguarded by the Constitution and "property" rights derived from federal or state statutes and regulations or from state common law. Such "property" entitlements are created by provisions that limit an administrator's choice rather than grant him broad discretion. For example, a statute providing that an employee may be fired only for cause creates a "property" right; statutory authority to discharge at will defeats any such claim of right.[260] More specifically, the following criteria have been used in determining whether a "property" interest has been created:

(1) *Class of entitlement-holders.* Does the relevant statute explicitly define the class holding such entitlements?[261]

(2) *Incisiveness.* Does the statute furnish criteria that enable a court readily to determine, without extrapolating from general statutory purposes, whether the decisionmaker has violated a statutory duty in any given case?[262]

(3) *Responsiveness.* To what extent does the statute require a strongly responsive administrative decision, in which the

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(1976); Fuentes v. Shevin, 407 U.S. 67, 97 (1972). The process required normally consists of an administrative proceeding in which the individual claiming an entitlement may participate. The proceeding need not always precede the deprivation. *See* Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1, 19 (1978); Mathews v. Eldridge, 424 U.S. 319, 332–43 (1976); Arnett v. Kennedy, 416 U.S. 134, 156–58 (1974) (plurality opinion). Judicial review of the merits is ordinarily available, although it has not been determined whether such review is required by due process. In some cases, the alternative of a damage remedy against responsible officials may satisfy due process. *See* Parratt v. Taylor, 451 U.S. 527 (1981); Ingraham v. Wright, 430 U.S. 651, 678 (1977).

[259] In this respect, new-property hearing rights resemble common law remedies and rights of defense, which also protect benefits that are primarily private.

[260] In some cases, however, due process may require administrators to adopt ascertainable standards of decision. *See* Holmes v. New York City Hous. Auth., 398 F.2d 262, 264–65 (2d Cir. 1968); Ressler v. Landrieu, 502 F. Supp. 324 (D. Alaska 1980); Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1139–40 (D.N.H. 1976). Such standards may in turn create entitlements that trigger procedural safeguards.

[261] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); *see also* Logan v. Zimmerman Brush Co., 50 U.S.L.W. 4247, 4250 (U.S. Feb. 24, 1982) (under the relevant statute, "claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State").

[262] *See, e.g.*, Bishop v. Wood, 426 U.S. 341 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Arnett v. Kennedy, 416 U.S. 134 (1974); Aero Schirch v. Thomas, 486 F.2d 691 (7th Cir. 1973).

result depends on information put forward by the individual claimant rather than on information submitted by others or on general considerations of policy?[263]

(4) *Polarity.* Does the statute establish rights and obligations solely between the claimant and government officials, or must the rights of third parties also be taken into account?[264]

(5) *Individuation.* Is the benefit personal in character, like a welfare check, or collective, like clean air?[265]

The Court has thus defined new-property hearing rights formally rather than functionally. It has declined to extend due process safeguards to discretionary exercises of official power that affect important personal interests,[266] even though general statutory purposes or social policies might be elaborated to limit the exercise of that discretion.[267]

A formal definition of entitlements was not inevitable. The Court might have sought to identify those interests that are as central to individual well-being in contemporary society as were the interests protected at common law in a different era. The judicial discretion inherent in any such task has been a major factor in the Court's refusal to follow a functional approach.[268] Moreover, if courts were to select certain "impor-

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[263] *See* Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970); Eisenberg, *supra* note 36.

[264] *Compare* Mathews v. Eldridge, 424 U.S. 319 (1976) (due process protection for social security benefits), *with* O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 788 (1980) (no due process protection in context of transfer from a particular nursing home when governmental action is "directed against a third party and affects the citizen only indirectly or incidentally"), *and* Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970) (no due process protection in context of rent increase in federally subsidized housing when increase would affect many persons).

[265] *Compare* Mathews v. Eldridge, 424 U.S. 319 (1976) (due process protection for social security benefits), *with* O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 799–801 (1980) (Blackmun, J., concurring in the judgment) (where alleged deprivation of property affects 180 patients, it is impracticable to give each a hearing), *and* Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972) (no substantive constitutional right to clean air).

[266] *See, e.g.*, Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1 (1979) (parole); Meachum v. Fano, 427 U.S. 215 (1976) (prison transfer); Paul v. Davis, 424 U.S. 693 (1976) (defamation).

[267] *See, e.g.*, Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1 (1979); Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972).

[268] For criticism of the Court's formal approach, see K. DAVIS, *supra* note 215, §§ 11:13, :14; L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 10-11, -12 (1978); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977). Professor Van Alstyne suggests that the formal new-property approach be rejected in favor of a standard that recognizes an independent liberty interest in "freedom from arbitrary adjudicative procedures." *Id.* at 487.

tant" interests as those deserving due process protection, they might be driven to give those interests substantive as well as procedural protection; procedural rights alone might be of little value if administrators were free to decide cases as they pleased as long as procedural formalities were observed.[269] A functional approach could thus invite courts to rule the welfare state through a new form of substantive due process.

A. Sources of Authority for Judicial Imposition of Procedural Requirements

Even a formal approach to defining entitlements must address the question of judicial authority to create procedural remedies beyond those provided by the legislature. If the legislature is free to grant or withhold statutory benefits, why should it not be equally free to select the remedies through which the statutory plan is vindicated?[270] There are several possible answers.

1. Legislative Candor. — The legislature may be evading accountability for its actions when it purports to grant statutory entitlements but simultaneously specifies enforcement procedures that substantially but surreptitiously diminish the protection afforded. Democratic processes could arguably be strengthened if courts were to insist on procedures that forced Congress to deliver on its substantive promises.[271]

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[269] A court could conceivably require procedural formalities, such as a hearing, whenever it found a functional entitlement, but leave administrators free to exercise statutorily conferred discretion on the merits. Such procedural protection of entitlements would not be absurd; an administrator exercising otherwise unreviewable discretion might, because of a hearing, become sympathetic to an individual's claim. *See* Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS: DUE PROCESS 126 (J. Pennock and J. Chapman eds. 1977). Nevertheless, it would be much more logical for courts to protect functional entitlements through substantive as well as procedural review; without substantive limitations, procedural checks could have little consequence.

[270] *See* Easterbrook, *Due Process and Parole Decisionmaking*, in PAROLE IN THE 80'S, at 77 (B. Borsage ed. 1981); *cf.* Arnett v. Kennedy, 416 U.S. 134, 154 (1974) (plurality opinion) (employee challenging limited procedural safeguards in statute that requires "cause" for discharge "must take the bitter with the sweet").

[271] The argument is similar to the "structural due process" approach. *See* L. TRIBE, *supra* note 268, §§ 17-1 to -3; Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); *see also* Fullilove v. Klutznick, 448 U.S. 448, 532 (1980) (Stevens, J. dissenting) (Congress must demonstrate reasons for its action); Linde, *supra* note 136 (role of due process clause is to provide procedural protection in lawmaking, not to restrict the legislature's use of constitutional ends or means); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977) (courts should overturn only legislation that Congress does not appear to have considered fully).

This argument, however, ignores the political necessity and virtue of compromise. Limited procedural protections may have been necessary to obtain sufficient legislative support for the substantive entitlement in the first place. More fundamentally, the most basic separation-of-powers considerations prohibit courts from seizing on the due process clause as a basis for imposing their own notions of political responsibility on the process by which elected officials make laws.[272] If Congress wishes to enact legislation that is to some degree hortatory, it is unclear from what source the courts obtain authority to provide otherwise.[273]

2. Honoring Expectations. — A variant of the "candor" argument emphasizes that procedural qualifications of substantive entitlements disappoint reasonable expectations derived from the public's understanding of legislation.[274] Under this theory, citizens are aware of substantive statutory entitlements, but are ignorant of the procedural riders that compromise those entitlements. In its traditional role as guardian of reasonable expectations, the judiciary may demand procedures that will enable citizens to plan their activities with an enhanced sense of security.[275]

This argument too rests on shaky ground. Do citizens really know that statutes contain formal entitlements, and is it likely that those who do know are ignorant of the effect of procedural riders? Even if statutory procedures might result in surprise or disappointed expectations, what is the constitutional basis for striking such procedures down if the legislature believes that they serve important policies, such as reduction of cost and delay?[276] Moreover, arguments based on disappointed expectations must take account of the legislature's rec-

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[272] For an argument that such a judicial role may sometimes be appropriate, see Fullilove v. Klutznick, 448 U.S. 448, 532 (1980) (Stevens, J., dissenting). Note that there are more specific constitutional provisions designed to promote political accountability, but it may be that no citizen has standing to enforce them. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974).

[273] *See* passage quoted *supra* note 136.

[274] *Cf.* cases cited *infra* note 276 (applying principles of estoppel).

[275] F. HAYEK, *supra* note 167, at 205–09.

[276] Disappointed expectations have been a factor in judicial application of estoppel principles against administrators. *See, e.g.*, United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970); Roberts v. United States, 357 F.2d 938 (Ct. Cl. 1966). But estoppel is by no means automatic, *see, e.g.*, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (Frankfurter, J.); Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972), and it has never been suggested that estoppel of administrators — much less of federal and state legislators — is constitutionally required.

ognized power to disappoint expectations through amendment or repeal of statutes that confer new-property entitlements.[277]

3. The Ontological Argument. — Professor Michelman has suggested that, in a system based on legal rights, it may be unnecessary to find a "functional" explanation for due process protection of entitlements.[278] In the separation-of-powers scheme, the essential duty of the judiciary is to enforce and defend legal rights.[279] The legislature has broad discretion in creating such rights, but once they are created the judiciary has the power to enforce them.[280]

Unquestionably, this way of thinking exercises a powerful hold on the legal mind. But is it so fixed in the Constitution as to disable Congress from providing for delivery of welfare benefits through systems that do not involve the courts? The administrative necessities of an industrial age caution against reading the due process clause to forbid departures from traditional methods of vindicating legal rights.

4. Nondelegation Considerations. — Under the nondelegation doctrine, the legislature is required to confine the authority of administrative officials through relatively precise standards or directives.[281] This requirement serves three principal purposes. First, it promotes political accountability by ensuring that policies are made by elected representatives rather than administrators.[282] Second, it promotes predicta-

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[277] *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Flemming v. Nestor, 363 U.S. 603 (1960).

The expectations argument for due process protection might be based instead on a system of functional entitlements designed to foster certain types of expectations deemed intrinsically worthwhile. *See* C. FRIED, *supra* note 142. But for reasons already discussed, the Court has rejected this approach, on the apparent premise that judicial reason is inadequate to the task. *See supra* pp. 1257–58. Still another approach would provide procedural protection to those expectations that are "objectively reasonable" because they are rooted in community practice and custom. *See* Bishop v. Wood, 426 U.S. 341, 353 (1976) (Brennan, J., dissenting); F. HAYEK, *supra* note 167, at 94–109. But the identification of such expectations and customs is a task that may be beyond judicial competence in a pluralistic, dynamic society.

[278] Michelman, *supra* note 269.

[279] The third-party beneficiary doctrine in contract law is a familiar example. *See* Choate, Hall & Stewart v. SCA Serv., 1979 Mass. Adv. Sh. 1877, 392 N.E.2d 1045.

[280] This argument resembles that made by Justice Frankfurter. *See, e.g., supra* pp. 1225–26.

[281] *See* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 732 (D.D.C. 1971); Stewart, *supra* note 13, at 1693–97. The requirement has been used almost exclusively to confine discretion in the context of rights of defense; it has never been applied to require Congress to limit the discretion of government officials in the dispensation of new-property benefits. *But see* Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d Cir. 1968) (due process requires administrators to draft ascertainable standards to select residents for public housing).

[282] *See* J. ELY, *supra* note 145, at 131–34, 177.

bility for individuals benefited or burdened by regulatory programs. Third, it protects against arbitrary or discriminatory action by minimizing the discretion of administrators. By serving the latter two functions, the nondelegation doctrine simultaneously promotes due process and equal protection goals.[283]

Despite the threat to the constitutional structure posed by broad delegation to agencies, federal courts have generally failed to enforce the nondelegation doctrine. This failure can be explained partly by the difficulty of prescribing how much delegation is permissible, and partly by the spectre of wholesale invalidation of established administrative programs.[284] A formal approach to due process protection of statutory benefits operates as a substitute for the nondelegation doctrine that avoids the crippling defects of that doctrine.

The formal approach is, to be sure, only a "second best" substitute, for it does not require the legislature to make "hard political choices" by enacting precise statutes.[285] But it does serve the latter two purposes of the nondelegation doctrine. If Congress has chosen to mandate statutory benefits in specific terms, new-property hearing rights help to ensure predictability and to combat arbitrariness in the distribution of those benefits, without endangering entire statutory programs or requiring judicial review of the legislature's decision to delegate discretion.[286] Moreover, to some degree procedural safeguards

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[283] *See* Logan v. Zimmerman Brush Co., 50 U.S.L.W. 4247 (U.S. Feb. 24, 1982) (equal protection), *discussed at infra* note 395; Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (due process; void-for-vagueness doctrine promotes predictability and limits discretion); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (due process).

[284] *See* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980); *id.* at 671–88 (Rehnquist, J., concurring in the judgment) (indicating that toxic substance provisions of OSHA should be invalidated); *supra* note 245.

[285] Indeed, it is quite possible that procedural requirements may discourage Congress from enacting specific provisions, because specificity would cause courts to demand procedural safeguards that would not be required if a statute simply left decisions to an administrator's discretion. There is, however, little evidence of any such effect.

[286] There are substantial dangers of discrimination when no standards constrain the exercise of official discretion. The dangers may be equally severe when standards have been promulgated without a mechanism for ensuring that they are respected by the relevant officials. Political and operational considerations make courts reluctant to invalidate broad delegations on equal protection grounds. *But cf.* Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) (absence of "ascertainable standards" in allocation of subsidized housing creates "an intolerable invitation to abuse" that violates due process). But when the legislature is able to agree upon substantive provisions limiting administrative discretion, courts are competent to impose procedural safeguards that will ensure adherence to the provisions and decrease the risk of arbitrariness and discriminatory treatment.

may promote political accountability by ensuring bureaucratic conformity to legislative limitations.

In short, although courts may lack the authority and competence to require that Congress legislate with specificity, when Congress does so of its own volition courts may impose procedural safeguards to ensure that Congress' specific standards are carried out evenhandedly.[287] In this respect, considerations of equal protection and due process also argue in favor of judicial creation of procedural safeguards for statutory entitlements when the formal criteria are met, at least when the legislature has not clearly ruled out such procedures.[288]

Admittedly, new-property hearing rights serve these purposes quite imperfectly. Because such rights attach only when the political branches cast a benefit in entitlement form,[289] a

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[287] *See infra* pp. 1295, 1315–16.

[288] One may well ask, however, why the notion of entitlement is necessary to achieve the objectives described. Why not let any citizen bring suit to require that officials employ accurate procedures to implement legislation that contains specific directives? Why have courts insisted upon a class of beneficiaries holding individual entitlements, and why are members of that class the only persons qualified to invoke those procedural requirements? The answers most probably lie in the entitlement conception and in associated notions of "private rights" that undergird our conception of administrative law and the role of the judiciary. *See* J. VINING, *supra* note 175.

To the extent that the argument in text rests on the due process clause, it might be objected that our conclusion cannot be squared with the language of that clause. The due process clause creates a right to procedural safeguards not when any benefit is denied, but only when there has been a deprivation of "life, liberty, or property." For reasons already given, the formal-functional dilemma generally prohibits courts from selecting particular statutory benefits for treatment as "liberty" or "property." Nonetheless, when the formal criteria are met, it is proper for the courts to treat freedom from arbitrary deprivation or other imposition of harm as an aspect of the liberty and property protected by the due process clause.

[289] The various arguments offered in support of judicial authority to create procedural safeguards when the legislature has chosen to impose formal limits on agency discretion would also seem to support a requirement that specific directives (legislative or administrative) govern all official action. But courts do not have the competence to determine the extent to which formal standards are workable or appropriate for particular benefit programs. A fortiori, the courts are not competent to require the legislature to confer such benefits where the legislature has not done so in any manner. *Cf.* Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 39 (1969) (equal protection may require "remedies which cannot be directly embodied in judicial decrees").

These competing considerations are resolved by imposing on government, as a matter of due process, the quite modest burden of furnishing some rational justification for not providing standards for the distribution of statutory benefits. The withholding of a benefit to which an individual has a plausible claim is a harm, and it is a general requirement that government justify the infliction of harm.

This compromise is reflected in the cases. In the contexts of parole and employment, in which determinations are necessarily highly subjective and dependent upon ad hoc evaluations of a broad range of personal factors, courts do not require standards. *See* Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S.

number of important interests — such as the interest in continued employment — may enjoy no procedural protection from unwise or arbitrary exercises of discretion. When protection is afforded, moreover, the use of adversary procedures may prove ineffective or may impede efficient administration or compromise important program objectives.[290] Accommodating these problems by adjusting the extent of procedural formalities through "what-process-is-due" balancing is a difficult and often clumsy task.[291] Nevertheless, the current system of new-property hearing rights does preserve the traditional role of courts in promoting individual security and in limiting official power,[292] while accommodating the need for legislative and administrative flexibility under contemporary conditions.

B. New-Property Hearing Rights and the Three Conceptions

The entitlement conception, not the production or public values conceptions, explains the new-property hearing right cases. In these cases, the threshold question — whether an

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1 (1979); Bishop v. Wood, 426 U.S. 341 (1976). Welfare and housing benefits, however, are quite different. At least under current assistance programs, eligibility involves determinations for which standards are appropriate and often required. *See* White v. Roughton, 530 F.2d 750 (7th Cir. 1976) (per curiam); Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d Cir. 1968); Baker-Chaput v. Cammett, 406 F. Supp. 1134 (D.N.H. 1976); *see also* Logan v. Zimmerman Brush Co., 50 U.S.L.W. 4247, 4251 (U.S. Feb. 24, 1982) (suggesting that the state had little or no interest in not affording procedural protection for regulatory benefits in context of civil rights/employment discrimination). For discussion of *Logan*, see *infra* notes 395–96.

Such a compromise approach may be criticized on the ground that it invites open-ended legislative grants of discretion that create too great a danger to personal security. But the danger is less serious than that suggested by the possibility that legislatures might redraft statutes to eliminate language granting formal entitlements. In a juridical society with responsive legislatures, many, perhaps most statutorily protected interests central to individual liberty and well-being will be defined and protected through formal directives.

[290] *See, e.g.*, D. BAUM, THE WELFARE FAMILY AND MASS ADMINISTRATIVE JUSTICE 35–69 (1974); P. NONET, ADMINISTRATIVE JUSTICE (1969); Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 1011 (1976) (civil service law has sought for 100 years to avoid evidentiary trials as precondition to removal); Harvard Center for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. CRIMINOLOGY & POLICE SCI. 200, 223 (1972) (noting that necessity of preserving staff morale diminishes value of prisoners' procedural rights).

[291] *See* Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 775–76 (1974); J. Mashaw, *supra* note 185.

[292] *See supra* pp. 1232–35.

interest constitutes "liberty" or "property" — turns on whether the criteria of formality are met by positive law. Requiring hearings when this formal test is satisfied seems entirely unrelated to maximizing production.[293] In the context of government employment, for example, hearing requirements impede the discharge of incompetent personnel.[294] In addition, new-property hearing rights have not been and cannot be justified as a means either of bringing the full range of public values to the government's attention or of recognizing the intrinsic value of participation in decisionmaking processes.[295] Hearing rights are designed to secure individual rights to statutory benefits when claimants meet the relevant formal criteria.

As the degree of formality in statutory benefits declines, however, the entitlement becomes "thinner";[296] as it becomes progressively thinner, it no longer "trumps" all other interests. Agencies are nonetheless charged by statute and by the principle of reasoned discretion with taking these thinner interests into account and balancing them against competing interests. To monitor this process, courts have developed techniques to ensure "interest representation" in administration and "adequate consideration" of all the interests at issue.[297]

Because no formal or functional individual entitlement is at stake, these techniques are not constitutionally compelled;

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[293] *See infra* note 463.

[294] *See* Frug, *supra* note 290, at 990–96. *But see* Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196, 272 (1973) (removal procedures "frequently ignore or undervalue the interests of employees"). Similarly, deciding unemployment compensation issues through case-by-case judicial hearings may impede the larger effort to maintain a healthy work force. *See* P. NONET, *supra* note 290.

[295] First, the formal criteria used by the Court in rationing due process protection imply that the purpose of such protection is not to promote participation and dialogue or otherwise to encourage examination of competing public values. Board of Regents v. Roth, 408 U.S. 564 (1972) (due process protections limited to "legitimate claim[s] of entitlement" to benefits); Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970) (no hearing on tenants' protest of housing project rent increase). Second, the stated aim of procedural requirements is simply to ensure accuracy in the allocation of entitlements, and may therefore include procedures other than oral hearings. *See* Mathews v. Eldridge, 424 U.S. 319 (1976) (social security disability benefits may be terminated on the basis of written submissions by doctors). Third, due process may be satisfied by damage awards after the deprivation has occurred; this remedy cuts off any opportunity for those affected to provide input before a decision is made. *See* Ingraham v. Wright, 430 U.S. 651 (1977).

[296] For example, a statute might provide that highways may not be built through parklands if there is a feasible and prudent alternative. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

[297] Stewart, *supra* note 13, at 1760–90. This "interest representation" approach parallels the weak right of initiation in the regulatory context. *See infra* pp. 1278–84.

they are a form of federal common law. Under current due process doctrine, the existence of constitutional protection thus depends on the thinness of the relevant entitlement.[298] But the distinction between this federal common law and the procedures imposed on agencies as a matter of due process is not always crisp or certain; it is largely one of degree rather than of kind. Even when the relevant statute does not explicitly create formal entitlements to benefits, courts have used clear-statement principles to narrow agency authority to withdraw those benefits without notice and the opportunity for a relatively formal hearing.[299] This form of federal common law parallels the contemporary creation of clear-statement techniques and "hard look" standards in judicial review of federal regulatory impositions,[300] but is based on principles of entitlement rather than of production.

At the same time, when the legislature does define statutory benefits in formal terms, due process does not always require a court to insist upon its version of appropriate procedural safeguards. The justifications we have offered for granting protection to formally defined statutory benefits do not have irresistible force. In most cases, they are sufficient to require a substantial showing by government that procedural safeguards are incompatible with the effective operation of an administrative program; but once such a showing is made, they are too diffuse to override it. Ordinarily, courts find that the legislature has deemed a procedure incompatible only if the statute explicitly excludes it. But when the statute is so explicit, courts should in most cases accept the statutory procedures as controlling.[301]

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[298] *See* O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 795–97 (1980) (Blackmun, J., concurring); Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970).

[299] *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682, 693 (1979) (using clear-statement principles to require hearing on decision whether to waive recoupment of social security overpayments; court "assume[s] congressional solicitude for fair procedure, absent explicit statutory language to the contrary"); Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973); Jamroz v. Blum, 509 F. Supp. 953 (N.D.N.Y. 1981). The federal courts have also developed other nonconstitutional remedies to protect beneficiaries. *See, e.g.*, National Welfare Rights Org. v. Finch, 429 F.2d 725 (D.C. Cir. 1970) (permitting intervention in administrative proceedings in which termination of federal welfare grants to states was being considered). In the absence of a clear statement by Congress excluding such remedies, the question of their constitutional status need not be and has not been addressed.

[300] *See supra* pp. 1248–49.

[301] When a legislature deliberately and conspicuously qualifies substantive measures with procedures that may not correspond fully to judicial notions of accuracy, the Supreme Court is likely to accept such procedures. It has done so by concluding either that the process afforded was all that was due, *see* Parratt v. Taylor, 451 U.S.

As with rights of defense, however, a small core of interests enjoys constitutional protection through judicially specified procedures substantially immune from legislative or administrative efforts to exclude or limit such procedures. As we have seen, limited categories of important common law rights are afforded constitutional protection against deprivation by government officials. In a welfare state, an analogous core of functional entitlements — most conspicuously, the interest in the means of subsistence — also enjoys such protection. *Goldberg v. Kelly*[302] is the new-property analogue of *Vitek* and *Ingraham*. When the legislature has formally conferred entitlements to minimum levels of income, food, or shelter, the courts have invalidated, with little deference to the legislature or agency, procedures they regard as inadequate.[303] When the legislature has not conferred basic benefits formally, courts have invoked due process to require the responsible administrators to adopt formal criteria for dispensing such benefits;[304] once adopted, those criteria create formal entitlements that trigger procedural guarantees of accuracy and impartiality.[305]

If the doctrinal form of new-property hearing rights were restructured in accordance with this analysis, it would exhibit

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527, 543–44 (1981), or that no constitutionally protected entitlement existed, *see* Bishop v. Wood, 426 U.S. 341 (1976). The Court has shown similar deference in the regulatory context. *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of food supplement for misbranding); Bowles v. Willingham, 321 U.S. 503 (1944) (wartime price controls); *cf.* The Permian Basin Area Rate Cases, 390 U.S. 747 (1968) (FPC allowed to use rulemaking rather than adjudicatory hearings to regulate natural gas prices).

Accordingly, the procedural requirements imposed on both state and federal benefit programs may be viewed as a form of constitutional common law, because these requirements may be replaced by well-supported contrary legislation. *See* Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). There is thus a series of fine gradations in judicial decisions imposing procedural safeguards, gradations that run along a continuum from statutory interpretation through federal common law, constitutional common law, and traditional constitutional adjudication. The formalist thesis is hard to square with this continuum.

[302] 397 U.S. 254 (1970).

[303] *See id.*; Tatum v. Mathews, 541 F.2d 161 (6th Cir. 1976); Johnson v. Matthews, 539 F.2d 1111 (8th Cir. 1976); *see also* Basel v. Knebel, 551 F.2d 395 (D.C. Cir. 1977) (per curiam) (reversing and remanding decision denying food stamps pending administrative review of applicant's qualifications).

[304] *See* Carey v. Quern, 588 F.2d 230, 232 (7th Cir. 1978); Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968); Ressler v. Landrieu, 502 F. Supp. 324, 328–30 (D. Alaska 1980) (citing *Holmes*).

[305] *See supra* note 260.

a two-tiered structure similar to that of rights of defense: one tier based on the Constitution, the other on federal common law.

VI. PRIVATE RIGHTS OF INITIATION

A. Introduction

The private right of initiation is a relatively recent innovation in the control of administrative performance.[306] Regulated entities have traditionally been permitted to contest administrative action in court, but the beneficiaries of regulation have been barred from challenging agency inaction. Principles of prosecutorial discretion partially account for this asymmetry. Decisions of attorneys general and public prosecutors to initiate or to forgo civil or criminal litigation have historically been insulated from judicial review.[307] With the advent of modern regulatory agencies, courts have shown similar deference to administrators' decisions on the initiation of enforcement action.[308] When the courts extended principles of prosecutorial discretion to regulatory programs, however, they overlooked important differences between the two systems of public enforcement.

Traditional public law remedies — criminal prosecutions and actions for injunctions — were frequently supplemented with private remedies, including private prosecutions[309] and tort actions,[310] that enabled citizens to protect their rights even when the government failed to act. Indeed, legal historians have suggested that the doctrine of prosecutorial discretion developed in England and America largely because private prosecutions were also available.[311] In theory, regulatory pro-

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[306] *See supra* pp. 1205–06; note 100.

[307] *See* Linda R.S. v. Richard D., 410 U.S. 614 (1973); Howard v. Hodgson, 490 F.2d 1194 (8th Cir. 1974); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973); Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

[308] *See, e.g.*, Bays v. Miller, 524 F.2d 631 (9th Cir. 1975) (National Labor Relations Act); Pendleton v. Trans Union Sys. Corp., 430 F. Supp. 95 (E.D. Pa. 1977) (Consumer Credit Protection Act).

[309] *See generally* Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 315–18 (1973) (until the 19th century, the English legal system relied predominantly on private citizens, rather than on public prosecutors, to prosecute felonies).

[310] If the defendant is indigent, of course, a civil action for damages would hardly be an adequate remedy.

[311] *See* Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 443–46 (1974). Professor Langbein suggests that the current American

grams involve a similar mixed enforcement system, because regulatory statutes have rarely been held to preempt common law remedies for conduct that might also violate such statutes.[312] But the availability of private enforcement is often a mirage. The inadequacy of conventional common law remedies in dealing with modern industrial conditions was a principal reason for the creation of regulatory schemes.[313]

The traditional model of administrative law[314] encouraged courts to apply settled principles of prosecutorial discretion to regulatory enforcement decisions. Government officials were required to show legislative authorization for their conduct only if that conduct violated a citizen's common law rights.[315] Because the failure of administrative officials to undertake enforcement would not ordinarily constitute a violation of the common law rights of statutory beneficiaries, that failure to act was not reviewable.

Judicial reluctance to intervene was reinforced by prevailing doctrines that conceived the right of review in "all or nothing" terms. Within this context, a right of initiation, if recognized, would necessarily be strongly responsive: if a person subject to regulation had violated the relevant statute, the court would have to mandate specific enforcement action at a victim's insistence, notwithstanding competing agency priorities and budget constraints.[316] Control over the deployment of enforcement resources would thus be remitted to private litigants.[317] Moreover, a basic purpose of administrative agencies would be thwarted. The Progressives had designed the regulatory structure to bypass a conservative and unaccountable judiciary; agencies were to be responsible to the legisla-

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system of plea bargaining partially accounts for the unavailability of private remedies in the criminal context. *See* Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1979). A similar need for negotiated settlements has been relied upon as a reason for denying private rights of action. *See supra* pp. 1206–07; *infra* pp. 1292–93.

[312] *See* Marshall v. Consumers Power Co., 65 Mich. App. 237, 247, 237 N.W.2d 266, 275 (1975); State v. Dairyland Power Coop., 152 Wis. 2d 45, 187 N.W.2d 878 (1971). *See generally* R. STEWART & J. KRIER, *supra* note 72, at 548–50 (preclusion of private actions by regulatory statutes).

[313] *See supra* pp. 1235–39.

[314] *See* Byse & Fiocca, *supra* note 29; Note, *supra* note 29.

[315] For discussion of why government enforcement could generally not be compelled under the prerogative writs, such as mandamus, see *supra* p. 1203 & note 29.

[316] In application, of course, the doctrine was less rigid than its logic might imply.

[317] Judicial control of regulatory enforcement might have been justified under classical conceptions if an agency's failure to enforce the law were considered to have invaded private rights. But no system of private rights to public enforcement had been developed in the past, perhaps because the historical system of mixed private and public enforcement allowed for considerable "self help" through private actions.

ture, which was in turn accountable to the citizenry. From this perspective, it would be paradoxical to rely on judges to invigorate administrators.

In the face of these obstacles, how did private initiation rights gain recognition? First, there developed a now-widespread perception that agencies do not enforce regulatory norms adequately; both the social responsiveness and the technical competence of agencies have been questioned, as has Congress' ability to supervise their performance.[318] Second, judicial review of agency decisions has become considerably more flexible than the classical "all or nothing" review exercised by the courts in the nineteenth century. Courts have developed various supervisory techniques[319] to review discretion while leaving the agency considerable freedom of action. Such techniques allow courts to recognize weak initiation rights, which require only that an agency show a reasonable justification for failure to take enforcement action. This approach avoids the need to mandate enforcement whenever a regulatory violation is shown, and allows deference to competing priorities and budgetary limits.

Despite this second development, the creation of initiation rights still presents special problems. Agencies charged with providing regulatory benefits[320] have limited resources and multiple responsibilities, and face severe political and organizational constraints.[321] As a result, enforcement decisions are

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[318] *See supra* pp. 1226–27.

[319] These techniques include new procedural requirements, insistence on reasoned articulation of the factors governing discretionary decisions, and an "arbitrary and capricious" standard of review on the merits. *See, e.g.*, Rosenblatt, *supra* note 133, at 322–29.

[320] The creation of regulatory agencies can be understood as a response to the failure of market exchange arrangements, as structured by the common law, to secure certain collective goods (or to remedy collective "bads") whose value rose dramatically with the industrialization of society. Regulatory protection typically provides collective goods that have a certain "size" and "shape." "Size" refers to the costs and benefits of producing particular collective goods. "Shape" refers to the distribution of these costs and benefits among affected individuals. Economic measures of size and shape must, of course, be based upon some assumed background of entitlements and wealth distribution. *See* Kennedy, *supra* note 159, at 427–29; Stewart, *supra* note 13, at 1706–09. Collective goods could be measured by willingness to pay minus compliance costs, but they might also be measured in physical terms (*X* cases of lung disease avoided by installing *Y* coal power plant scrubbers), or, conceivably, in terms of impacts on personal well-being (increments or decrements of utility). The choice among alternative shapes and sizes of regulatory policies typically presents polycentric problems of resource allocation.

[321] These constraints include the need for the cooperation of regulated firms and the terms on which such cooperation is conditioned, judicial review and the costs and hazards of litigation, constraints imposed by congressional and executive officials, and other factors such as media attention and public support. For example, the adoption

a highly complex — indeed, "polycentric"[322] — task. In adopting an enforcement plan, the agency presumably has weighed the advantages and disadvantages of a variety of alternative regulatory initiatives.[323] A private right of initiation forces a court to compare, with greater or lesser deference to the agency, the net benefits of the initiative demanded by the plaintiff with those of the myriad potential alternatives that the initiative might foreclose.[324] The judiciary, bound to forensic methods of proof and decision, is poorly equipped to make such an evaluation. For this and other reasons,[325] control over an agency's allocation of resources is traditionally regarded as a legislative or executive rather than a judicial responsibility.

By contrast, a right of defense usually requires a court to examine only the particular agency initiative at issue. If that action is invalidated, the agency is ordinarily free to deploy its resources as it sees fit, subject to judicial review of subsequent decisions.[326] The right of defense therefore involves a much more manageable judicial task.

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of a more stringent standard for air pollution from coal-fired power plants may require an agency (1) to ease water pollution standards applicable to those plants, (2) to appease an influential senator from a coal-producing state by acquiescing in environmentally questionable "synfuel" projects, or (3) to divert scarce analytical and legal resources from other projects in order to defend litigation initiated by the industry.

Vigorous enforcement in one area, however, does not necessarily entail a reduction of efforts elsewhere. On the contrary, successful implementation policies may enhance popular support for an agency, add to its credibility among regulated firms, and thus facilitate enforcement in other areas.

[322] *See* Fuller, *supra* note 139, at 393–405.

[323] It may be, of course, that the agency has not attempted to optimize (in any relevant sense) the use of its resources. If courts attempted to determine whether agencies had made conscientious efforts to optimize resource use, however, they would encounter many of the difficulties noted in the text. *See supra* pp. 1210–11, 1228.

[324] Alternatives might include initiatives that the agency does not currently plan to pursue, but which might be demanded by other plaintiffs not then before the court. This possibility is most apparent in the case of strong initiation rights, but it also exists with weak initiation rights. If the agency is required to present a reasoned justification for inaction and the requirement is to be more than nominal, the court must assess the initiative demanded against alternative uses of agency resources. And even a purely procedural requirement of hearings or consultation will have effects on the allocation of agency resources, effects that the court may be unable to evaluate.

[325] *See infra* note 353.

[326] A right of defense might, however, be used to invalidate agency action on the ground that the action represents a misallocation of agency resources. For example, an agency might focus on relatively trivial risks, and in the process waste social resources by directing industry compliance efforts toward these risks and away from more serious ones. A production approach to review of regulation might imply such an inquiry, which would be designed to steer the agency toward the optimal use of limited enforcement and compliance resources. Such an approach, however, would require the court to undertake the same wide-ranging inquiry into alternative resource

The fact that initiation rights invite courts to evaluate the entire pattern of an agency's allocation of limited resources raises anew the question of judicial power to create such rights in the absence of explicit constitutional or statutory warrant. The courts' role in decisions about the allocation of scarce governmental benefits is generally quite limited. What justifies courts in policing, in the course of an initiation suit, agency decisions about how to allocate resources in order to produce collective goods? The three conceptions help to resolve this question.

B. Entitlement: Judicial Refusal to Recognize Private Rights to Regulatory Collective Goods

Under the entitlement conception, regulatory benefits would be considered the contemporary successors to a plaintiff's common law rights — modern forms of liberty and property deserving judicial protection.[327] Such protection could take the form either of a private right of action against private parties who violate regulatory requirements, or of a private right of initiation to force an agency to prevent or redress such violations. A plaintiff would be entitled to the statutory benefit of regulatory protection if he could establish that he was within the class of beneficiaries that the regulatory scheme was enacted to protect, and that he had been injured by, or was threatened with injury from, conduct that the statute was enacted to prevent.[328]

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uses as it undertakes in initiation cases. *Cf.* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst. (Benzene), 448 U.S. 607, 670 (1980) (Powell, J., concurring in part and in the judgment) (suggesting that agency regulatory decisions be judged by whether they achieve regulatory objectives at the lowest possible cost); *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91, 326–29 (1981) (same).

[327] This parallel is not exact. First, in the common law system it is primarily the courts that define both sets of entitlements, as is reflected in the maxim *ubi jus, ibi remedium* ("where there is right, there is remedy"). In the regulatory system, on the other hand, defining the controls imposed upon regulated entities is the shared responsibility of legislature, agency, and court, while the definition of rights against the government is (in the absence of statutory citizen-suit provisions) wholly the responsibility of the courts. Second, the common law remedy, unlike a regulatory remedy, ordinarily results in a good that is predominantly private rather than collective. Finally, in the common law system, public and private enforcement are largely independent, with public enforcement decisions insulated from judicial review by the principle of prosecutorial discretion. In contrast, the recognition of private rights of initiation by the regulatory system merges public and private enforcement.

[328] Thus, for example, if a statute delegated to an agency the authority to enforce a prohibition against unsafe working conditions and if an employee were to show that his employer had violated the prohibition, that employee would have standing to sue and would — if his allegations were proved — be entitled to relief. Relief would

In creating initiation rights, however, courts have generally not followed this entitlement rationale.[329] In the vast majority of cases, the plaintiff is unable to mandate regulatory enforcement merely by showing that a statute has been violated to his detriment. At best, plaintiffs obtain a weakly responsive initiation right; the courts require little more than a reasoned justification for agency inaction.[330] Such rights cannot fairly be termed substantive entitlements without depriving that concept of its meaning.[331] An entitlement, as we are reminded, is a trump;[332] in cases to which an entitlement applies, it excludes consideration of all other factors and commands protection or redress. A requirement of reasoned justification, by contrast, is designed only to structure a process of decision, not to direct a result.[333] A weakly responsive initiation remedy may be the most that a court is willing or able to offer, but it is a pale substitute for a common law entitlement.

The failure to embrace an entitlement rationale in initiation cases is also reflected in the fact that private rights of initiation are far more likely to be granted to a beneficiary class alleging a systemic wrong than to a single beneficiary.[334] This pattern is at odds with the traditional role of entitlements; as exem-

consist of an order from the court requiring the agency to enforce the law against the employer or a direct order to the employer to obey the law.

[329] *See infra* pp. 1287–88. Rights of initiation have been based on principles of entitlement in cases in which the government was actively implicated in the wrong. An example is Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam). The *Adams* court noted that the government's active role in supplying segregated institutions with federal funds made that case distinguishable from government failure to deter purely private wrongdoing. *Id.* at 1162; *see supra* note 22; *see also* Norwood v. Harrison, 413 U.S. 455 (1973) (states may not aid discriminatory private schools). The current controversy over tax credits to segregated schools provides another instance in which rights of initiation might be asserted on the basis of government participation in wrongdoing.

[330] *See* Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1045–47, 1053 (D.C. Cir. 1979); Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 674–75 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

[331] A requirement of reasoned justification might be recast as a substantive entitlement: plaintiffs are entitled to all regulatory initiatives that an agency cannot reasonably justify withholding. But this formulation is largely verbal artifice. An "entitlement" with a content so fluid does not possess trumping power that is both reliable and general.

[332] *See* R. DWORKIN, *supra* note 139, at xi.

[333] *See* J. VINING, *supra* note 175, at 100–01.

[334] *See* Linda R.S. v. Richard D., 410 U.S. 614 (1973) (individual lacks a judicially cognizable interest in the prosecution of another); *see also* Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc) (per curiam) (that an action challenged a general policy, rather than isolated decisions not to act, argues in favor of review); *cf.* Bachowski v. Brennan, 502 F.2d 79 (3d Cir. 1974) (review of agency failure to enforce election regulations designed to ensure union members' right to vote), *aff'd in part and rev'd in part sub nom.* Dunlop v. Bachowski, 421 U.S. 560, 567 n.7 (1975).

plified in cases involving the classical right of defense and the contemporary new-property hearing right, entitlements are trumps asserted by individuals.

Moreover, regulatory programs typically seek to reduce risks of harm across large populations, rather than to eliminate all risk for any particular individual. For example, whatever its rhetoric, the Occupational Safety and Health Act[335] aims not at eliminating all workplace injuries, but at reducing such injuries to a tolerable level.[336] Such a task, which is designed to produce a collective good,[337] cannot easily be squared with the notion of private entitlements to regulatory protection. Of course, courts might seek to create an individual entitlement to no more than a given level of risk. But the uncertainties and fine gradations associated with most risks in an industrial society would make this exercise vexing and essentially arbitrary.[338] And an especially susceptible or concerned plaintiff seeking additional protection might simply be one of the statistically acceptable "casualties."

The distinction between collective and individual goods thus explains why the entitlement conception is able to account for traditional rights of defense and new-property hearing rights, but not for rights of initiation. The first two rights vindicate entitlements by redressing individual deprivations, whereas rights of initiation remedy the failure to provide collective goods.[339]

Even if courts attempted to define entitlements to collective goods, they would face additional difficulties in creating a system of initiation rights based on such entitlements. Courts might seek to create an exhaustive hierarchy of beneficiary entitlements that would lexically allocate any given level of agency resources among possible initiatives.[340] But unless such

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[335] 29 U.S.C. §§ 651–678 (1976).

[336] *See* W. LOWRANCE, OF ACCEPTABLE RISK 8–11 (1976) (goal of regulatory schemes is reduction rather than elimination of risk); Stewart, *Paradoxes of Liberty, Integrity and Fraternity: The Collective Nature of Environmental Quality and Judicial Review of Administrative Action*, 7 ENVTL. L. 463, 470–71 (1977) (same).

[337] *See supra* pp. 1236–38.

[338] A simple requirement that an agency keep risk at some minimum level would be meaningless unless the court were able to determine what types of conduct generate various risks and how particular regulatory initiatives would affect that conduct. But this determination would require the specialized information-gathering and analytic capabilities that courts lack and that agencies were created to provide. Moreover, even with perfect information, the specification of a cutoff point would necessarily be arbitrary, because levels of harm tend to fall along a continuum rather than at discrete points.

[339] *See* cases cited *supra* note 334.

[340] The common law can also be understood as a system of entitlements determining the allocation of economic resources. *See* R. POSNER, *supra* note 81, at 27–

a system were continually readjusted by a judicial Hercules,[341] it would straitjacket the administrative process by reintroducing many of the common law rigidities that regulatory programs were designed to eliminate. No such Hercules exists.[342] Total control of regulatory programs through initiation rights would far exceed judicial capacity to deal with changes in technical knowledge and social or economic conditions. Because they would entail judicial allocation of resources through a system of ex ante controls, initiation rights might in fact prove even more unworkable than the common law system, which generally provides for damage remedies and allows parties to contract out of many obligations. The decentralized character of the judicial system, its slowness in reaching decisions, and the division of responsibilities between courts and agencies would make coordinated direction of regulatory initiatives impossible.

Alternatively, courts could devise a less comprehensive system that would grant entitlement status to a small range of initiatives well within an agency's resources and leave allocation of the remaining resources to agency discretion. But which interests would be eligible for this special protection?[343] The selection and definition of entitlements within such a system would reintroduce the formal-functional dilemma. For all

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159. There are, however, important differences between the two contexts. Common law rules do not directly determine the ultimate allocation of resources, but merely define the starting points for an elaborate process of negotiation, agreement, and adjustment on the part of individual economic actors. Command and control regulation, in contrast, require specific conduct by those regulated. Further, common law remedies consist primarily of damage awards imposed after a violation of entitlements has occurred; this system allows defendants the flexibility to violate rules on payment of damages. Public enforcement of regulation, however, provides flexibility in a different way — by permitting an agency to enforce standards selectively and to change the substantive content of regulatory commands. This flexibility would be greatly reduced by a system of regulatory entitlements enforceable by any beneficiary. *See supra* pp. 1245–46.

341 If the judicial system consisted of a single Hercules, *see* R. DWORKIN, *supra* note 139, at 105, who had access to all relevant information and high-speed computational capability, such mastery might be achievable. Hercules would constantly redefine the entire polycentric structure of regulatory entitlements; regulatory agencies would function as so many special masters in Hercules' service.

342 The judicial system, consisting of thousands of judges responding fairly passively to individual lawsuits and acquiring information through cumbersome forensic devices, is certainly no Hercules. Agencies are no Hercules either, but they are better equipped to deal with the fluid demands of an industrial society than are courts engaged in case-by-case adjudication.

343 In rare cases entitlements to regulatory protection may be defined with such formality that it would be relatively easy to single them out for special protection. *See infra* note 395.

of these reasons, initiation rights cannot ordinarily be based on an entitlement conception.

C. *Production: Judicial Refusal to Adopt an Economic Approach to Agency Inaction*

A production approach to regulatory enforcement would measure the benefits of regulatory protection by the aggregate amount that beneficiaries would be willing to pay for them.[344] The goal would be to maximize the net amount of such benefits, computed by subtracting from total willingness to pay for those benefits the overall costs of providing them.[345] Initiation rights might be thought likely to increase these net benefits. For example, exercise of such rights might reduce the danger that administrators will ignore or discount the potential benefits of certain enforcement measures — particularly those aimed at producing collective goods. In light of growing evidence of "government failure" in providing such goods,[346] initiation rights might yield an economically more productive mix of regulatory initiatives.

Nevertheless, judicial treatment of initiation suits strongly suggests that a production rationale has not accounted for the creation of these rights. First, private remedies are most likely to be efficient when the costs of identifying and prosecuting a violator are relatively low in comparison with the value of the

[344] This criterion implicitly assumes that beneficiaries do not have an entitlement to regulatory protection. If the contrary assumption is made, the appropriate measure of value is the amount that they would demand for being deprived of such protection. *See supra* note 170.

[345] A dynamic approach to productive efficiency would trace the impact of regulation over time and would consider, for example, the contribution of a cleaner environment to a healthier and more productive population, and the chilling effect of regulatory uncertainty on investment. *See supra* note 159. Such an approach would require that costs and benefits occurring over long periods of time be aggregated and compared, a process that raises the so-called discount problem. A thoroughgoing production-oriented analysis would need to look not only at the allocation of agency resources, but also at the allocation of private sector resources between the production of private commodities and that of collective regulatory benefits. *See* Wood, Laws, & Breen, *Restraining the Regulators: Legal Perspectives on a Regulatory Budget for Federal Agencies*, 18 HARV. J. ON LEGIS. 1 (1981).

[346] Reasons for such failure include bureaucratic tendencies to economize on information and decision costs, to adhere to an established sense of agency mission, and to continue existing patterns of regulatory and administrative accommodation, as well as the ability of regulated firms to subvert regulatory programs by withholding cooperation. *See supra* pp. 1237–38. *See generally* J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962) (defects of majority rule prevent economically efficient government provision of collective goods); W. NISKANEN, *supra* note 173 (inability of legislature to evaluate bureaucratic provision of public goods); Weisbrod, *supra* note 133, at 30–41 (explaining government failures in allocating resources).

victim's legal claim.[347] When the costs are high, public enforcement may be necessary to provide adequate deterrence of undesirable activity, such as widespread air or water pollution. Under this analysis, courts seeking to advance production should be most willing to recognize private rights of initiation when an individual has suffered a discrete, easily identifiable injury. In fact, however, the courts have generally denied initiation rights in such situations, and have instead created private rights of initiation primarily when an agency has failed to prevent a widely diffused or collective harm.[348]

More fundamentally, the production view of initiation rights would require courts to determine aggregate beneficiary willingness to pay for protection. To do so, courts would have to ascertain the number of persons represented (directly or indirectly) by a litigant seeking an initiation right, the intensity of their preferences, and their wealth or income.[349] Parties might be required to furnish studies indicating the willingness of the population in general to pay for regulatory benefits. Courts do not, however, follow such an approach in initiation cases.[350]

By contrast, in cases involving "hard look" defense rights, regulated firms or their trade associations are often encouraged to document in detail the monetary costs of regulatory initiatives[351] — the capital and operating cost of pollution "scrubbers," for example — and courts take these cost measures seriously. But the costs of regulation, which are usually con-

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[347] Landes & Posner, *supra* note 21. The victim is often best equipped to identify the offender and to determine whether the benefits of a lawsuit would justify its costs. In such cases, however, giving the victim a private right of action may be preferable to granting him a right of initiation. Requiring the victim to pay the costs of litigation imposes a discipline that discourages inefficient enforcement. *See infra* pp. 1297–99.

[348] *See* cases cited *supra* note 334. The Landes-Posner conclusion that private enforcement is efficient in cases involving easily identifiable harms may, however, be inapplicable when a harm is collective and individual injuries are small. In such cases, public enforcement is likely to be more efficient. But it would be difficult to justify a private right of initiation in such cases on efficiency grounds. There is no reason to believe that judicial review of a private litigant's claim that public enforcement is inadequate or misdirected will lead to economically superior outcomes.

[349] For example, claims of environmental organizations with large memberships might be given greater weight than claims advanced by individuals.

[350] Furthermore, the initiation cases frequently describe participation by regulatory beneficiaries in the enforcement process as an intrinsic good. *See infra* pp. 1279–81. Under a production conception, participation ordinarily has no such intrinsic value: it is simply a costly impediment that is tolerable only if it helps achieve a result that maximizes value.

[351] *See, e.g.*, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst. (Benzene), 448 U.S. 607 (1980), *discussed at supra* pp. 1243–44, 1252–53; American Paper Inst. v. EPA, 660 F.2d 954 (4th Cir. 1981).

crete cash outlays or opportunity costs incurred by particular firms, are almost always much easier to express in monetary terms than the benefits, which are usually hard-to-quantify collective goods such as environmental integrity. In part, this asymmetry reflects the fact that the economic analysis of regulatory benefits is less advanced than analysis of costs.[352] But it also reflects the institutional setting in which courts operate.[353] Regulatory costs are largely defined by available market measures that can be readily assimilated to prevailing modes of proof in administrative law. Such market measures are generally unavailable for regulatory benefits, which must be identified and aggregated through nonmarket mechanisms. Because litigation is a poor device for accomplishing these tasks, it is understandable that the courts have failed to adopt an economic approach to regulatory benefits.[354]

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[352] Economists are developing methods for determining willingness to pay for such collective goods as clean air. These methods include question surveys and surrogate market measures such as the differences in residential property values associated with variations in air quality. *See* A. FREEMAN, *supra* note 250. However, the techniques have not been sufficiently developed to serve as a basis for judicial decision.

[353] *See generally* D. HOROWITZ, *supra* note 138 (basic shortcomings of adjudicatory process in evaluating public policy). The representativeness of public interest plaintiffs is difficult to establish. *See supra* pp. 1227–28. However great the imperfections of electoral representation and delegation to administrative agencies as means of registering aggregate preferences for regulatory benefits, these mechanisms are likely to be superior to forensic processes. It might be argued that the political process, dominated as it is by certain groups having special access to power, is a wholly inadequate mechanism for registering collective preferences and that the courts, which are largely insulated from such pressures, can operate from a kind of ongoing "original position," *see* J. RAWLS, *supra* note 191, at 17–22, and are thus far superior to political methods of collective choice. *Cf.* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 32 (1966):

> [T]he lawmaker to whom the nasty old undemocratic Supreme Court is supposed to yield so reverently because of his greater democratic virtues is the entire mass of majoritarian-anti-majoritarian, elected-appointed, special interest-general interest, responsible-irresponsible elements that make up American national politics. If we are off on a democratic quest, the dragon begins to look better and better and St. George worse and worse.

We do not suggest that this position is irresponsible — though we do not share it — but rather that it depends on a sweeping repudiation of the basic premises of American representative government, a repudiation not readily accepted by judicial lawmakers, who must to a considerable degree accept those premises. *See* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 31–39 (1977) (judges believing in judicial restraint assume that societal institutions are "well-ordered").

[354] The problem of incomparability between benefits and costs produces a different emphasis in initiation cases than in right of defense cases. When regulated firms oppose controls, the court's attention is focused on the quantifiable (cost) side; when beneficiaries seek more effective enforcement, the focus is on the unquantifiable (benefit) side. This difference helps to explain the courts' adoption of the production conception in right of defense cases and of the public values conception in initiation cases. Of course, courts must examine potential regulatory benefits in defense cases,

The difficulties courts face in quantifying benefits and comparing them to costs make it infeasible to create a system of strong initiation rights based on production. A system of weak initiation rights, however, might conceivably advance production by requiring agencies to give more careful consideration to the benefits of various initiatives and to improve the process for selecting among those initiatives. Nevertheless, such a system involves the substantial costs of litigation, of agency responses to initiation proposals, and of delay and uncertainty. The benefits to be achieved are speculative; indeed, the system may have little or no impact on agency decisions.[355] Alternatively, the agency may avoid litigation by accommodating the demands of a few vocal but unrepresentative litigants.

Any claim that initiation rights promote economic productivity is thus too problematic to serve as the predicate for judicial lawmaking. And even if such a claim were more plausible, a production rationale for initiation rights would still lack roots in traditional arrangements of private and public law. Unlike the production-based right of defense,[356] a production-based approach to initiation rights does not further the traditional objective of insulating private ordering from government direction.

D. Public Values: A Rationale for Initiation Rights

Under the public values conception, private initiation rights are justified as a means of filling the gaps that have arisen between the traditional system of electoral representation and the present reality of bureaucratic regulation. The creation of regulatory bureaucracies with wide discretion undermined the constitutional system by breaching two key safeguards: separation of powers and electoral accountability. The private law function of the courts was an important element in the separation of powers. Resolution of privately initiated controversies by an independent and largely decentralized judiciary offered a system that was to be impervious to "capture" by any factional interest bent on exploitation of government power to redistribute wealth.[357] This system was breached by the trans-

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see Benzene, 448 U.S. 607, *discussed at supra* pp. 1243–44, 1252–53, and costs in initiation cases.

[355] *See, e.g.*, Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973).

[356] *See supra* pp. 1246–55.

[357] *See* THE FEDERALIST No. 51 (J. Madison); *id.* Nos. 78, 79 (A. Hamilton); sources cited *supra* note 154.

fer of responsibility over the economy from the judiciary to administrative agencies, which were created in deliberate rejection of the passivity, decentralization, and independence of courts — the very attributes thought to prevent "capture."

The traditional model of administrative law sought to close these gaps by requiring specific directives in legislative delegations to agencies and by creating a system of defense rights to enforce those directives. These requirements were designed to secure the purposes of separation of powers and electoral accountability in the administrative era. But old fears of factional domination are now widely perceived to have been realized; broad legislative delegations have left agencies vulnerable to the sustained and organized political pressure of regulated firms, unions, and other powerful interest groups. In these circumstances, private remedies can serve as a supplement to traditional safeguards against domination of administrative decisions by parochial interests. The "hard look" version of the right of defense relies on principles of production to provide such a remedy in favor of regulated entities. The initiation right relies on public values to provide a corresponding remedy for regulatory beneficiaries.

When a plaintiff asserts a strong initiation right, a court determines whether an agency's failure to provide regulatory protection violates a dominant statutory norm. When a plaintiff asserts a weak initiation right, a court requires an agency to provide a reasoned justification for the balance it has struck among several relevant statutory norms. Both versions of the initiation right aim to ensure that regulatory power is exercised in the interest of the community through processes open to public scrutiny.

The public values rationale for initiation rights is reflected in the rhetoric of participation that frequently accompanies initiation cases.[358] Unlike the production and entitlement conceptions, the public values conception regards participation as inherently valuable; citizen involvement in community self-determination is desirable without regard to notions of efficiency or private rights.[359] Public values are defined and

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[358] *See, e.g.*, Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1046 n.18 (D.C. Cir. 1979), *discussed at infra* pp. 1280–81; Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 667 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972), *and quoted at infra* note 364.

[359] An argument for participation rights based on recognition of individual dignity is developed in Michelman, *supra* note 278, at 126, and in L. TRIBE, *supra* note 268, § 10-7, at 501–06. The conception examined in the text is based on a process of community self-determination similar to that developed in Michelman, *supra* note 175.

sharpened during the process of examination, advocacy, and response; they are not simply reflections of the existing stock of individual preferences or of an exogenous structure of entitlements.[360]

The connection between a public values conception and the creation of initiation rights is also revealed in expanded principles of standing and judicial review. As some cases make explicit, private rights of initiation have been recognized in order to allow representatives of public values to articulate a point of view that might otherwise be disregarded in the formulation of regulatory policy.[361] A good example is *Natural Resources Defense Council, Inc. v. SEC*,[362] in which the Natural Resources Defense Council (NRDC) sought to force the SEC to promulgate regulations requiring corporations to disclose their environmental and equal employment policies. The Court of Appeals for the District of Columbia Circuit stated that the NRDC "brought to the Commission's attention a perspective, different from that of most of its registrant corporations, that it might not otherwise have fully appreciated." The plaintiff thus "performed the public service of causing the Commission to re-examine its disclosure policies in light of the

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[360] The ideal of citizen participation and education is an elusive one in an industrialized society in which government is highly centralized and bureaucratic. The American tradition of voluntary organization, however, promotes this ideal. Many citizens derive satisfaction not from participating directly in public proceedings, but from contributing to organizations that will do so in their stead. It is difficult to fathom the source of this satisfaction if participation is viewed only as a form of personal dialectic with governmental officials in which officials acknowledge the citizen's individual dignity. *See* sources cited *supra* note 359. But the satisfaction becomes readily understandable when we assume that a major goal of participation is advocacy of certain public values, for this task may well be accomplished better by a representative than by ordinary citizens.

[361] Rights to intervene in ongoing administrative processes, while not pure rights of initiation, serve similar purposes. Both rights empower regulatory beneficiaries to energize and to redirect an agency's enforcement efforts.

Intervention rights have been recognized in many cases. For example, in Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), plaintiffs, who included certain civil rights leaders, were permitted to intervene to challenge the renewal of a station's broadcasting license, on the ground, inter alia, that the station had failed to provide a balanced and fair discussion of public issues, especially those concerning blacks. Similarly, in Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), conservation groups were allowed to intervene in a proceeding under the Federal Power Act ch. 285, §§ 1–30, 41 Stat. 1063–77 (1920) (current version at 16 U.S.C. §§ 791a–828c (1976 & Supp. IV 1980)), on the ground that the public values represented by those groups might otherwise be ignored in the regulatory process. *See* 354 F.2d at 616.

[362] 606 F.2d 1031 (D.C. Cir. 1979).

fundamental national priorities expressed in NEPA [National Environmental Policy Act] and in federal equal employment legislation."[363] In these circumstances, "[j]udicial review of agency decisions not to adopt rules would help ensure that the agency gives due consideration to citizen participation, and in this sense might actually enhance the agency's effectiveness in furthering the public interest."[364]

The tests for standing articulated in *Association of Data Processing Service Organizations v. Camp*[365] and subsequent decisions also serve the public values conception in initiation cases.[366] These decisions have extended standing to representatives of interests that suffer "injury in fact" as a result of the agency decision challenged and that are "arguably within the zone" of the protection offered by a relevant statutory provision. The "injury in fact" test, coupled with the substantial dilution of the "zone of interests" test,[367] might suggest that initiation actions may be brought by anyone who can show specific adverse impact. But the "zone of interests" test has continuing vitality and serves an important function in defining initiation rights by identifying the public values relevant to a particular administrative policy.

At times, the organic statute lists the operative public values.[368] But frequently the agency's mandate is more opaque. In such cases, courts must identify the relevant values in order to determine whether the plaintiff has standing (as well as to decide the merits).[369] In initiation cases, as in other cases of

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[363] *Id.* at 1046.

[364] *Id.* In a supporting footnote, the court added that "[p]ublic participation in agency decision making is increasingly recognized as a desirable objective." *Id.* at 1046 n.18. *See also* Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 667 (D.C. Cir. 1970) ("substantial public interest in having important issues of corporate democracy raised before the Commission and the courts by interested, responsible private parties"), *vacated as moot*, 404 U.S. 403 (1972). A similar rationale has been followed in other cases. *See* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

[365] 397 U.S. 150 (1970).

[366] *See* cases cited *infra* note 367.

[367] *See* Bryant v. Yellen, 447 U.S. 352 (1980); Sneaker Circus, Inc. v. Carter, 457 F. Supp. 771, 779–80 (E.D.N.Y. 1978).

[368] *See Scenic Hudson*, 354 F.2d at 614–17.

[369] Because defense rights are based on a production rationale, standing is ordinarily grounded in economic loss — although standing is usually not seriously contested in such cases. For new-property hearing rights and private rights of action, standing is based on entitlement, which in turn determines the ultimate resolution of the merits as well as the threshold question of access to the court.

There is a potential difficulty in reconciling a public values account with that aspect of the law of standing that limits initiation rights to persons who can demon-

statutory construction, the courts' task is often "not simply a process of drawing out of the statute what the maker put into it but is also in part . . . a process of adjusting the statute to the implicit demands and values of the society to which it is to be applied."[370] Although these demands and values are dynamic, statutes cannot be constantly rewritten and bureaucracies too often adhere to outdated missions. Because they are sometimes more accessible than legislatures and bureaucracies, courts can encourage the adaptation of cumbersome administrative institutions to emergent public values.[371] Decisions such as *Natural Resources Defense Council, Inc. v. SEC*[372] or *Adams v. Richardson*,[373] which require old-line administrative agencies to give new weight to environmental concerns or to the elimination of racial discrimination, exemplify this sometimes controversial process of judicial renovation of statutory norms.[374]

These arguments are not advanced to suggest that initiation suits are by any means a panacea for "government failure." Courts may misconceive the social norms at issue in a statutory scheme or give a particular norm undue weight. Initiation suits also raise difficult remedial questions. Recognition of a strong right of initiation may result in a judicial order compelling regulation or enforcement that an agency cannot un-

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strate "injury in fact." *See* Bryant v. Yellen, 447 U.S. 352 (1980); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970). If the public values conception in fact accounts for the initiation cases, why have the courts not simply allowed assertion of initiation rights by any litigant who speaks on behalf of a relevant public value? The answer, we believe, has been identified by Professor Vining: unrestricted standing would raise the question whether a litigant sincerely represented the value for which he purported to speak. *See* J. VINING, *supra* note 175, at 124–25. The "injury in fact" requirement ensures that the relevant value is embedded in the litigant's extra-forensic activities in ways that the legal system can grasp and verify. Given the impossibility of determining the number of persons that a given litigant represents and the extent of their stake, the requirement of "injury in fact" can be understood as a very crude mechanism for promoting the integrity of representation.

370 L. FULLER, ANATOMY OF THE LAW 59 (1968); *see also* G. CALABRESI, *supra* note 139.

371 *See, e.g.*, *supra* pp. 1280–81 & notes 361–364. The plural character of the values that regulatory agencies are held to serve is made explicit in the creation of initiation rights on behalf of parties asserting values in opposition to one another. *See, e.g.*, *Scenic Hudson*, 354 F.2d 608. The array of litigants presents a comparable array of public values. This conception of standing draws heavily on J. VINING, *supra* note 175, and is a revision of the views expressed in Stewart, *supra* note 159.

372 606 F.2d 1031 (D.C. Cir. 1979).

373 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam).

374 *But see* NAACP v. FPC, 425 U.S. 662 (1976) (FPC's duty to advance "public interest" is not a basis for prohibiting regulated firms from engaging in racial discrimination).

dertake because it lacks the necessary information or resources. Courts can do little to resolve such an impasse.[375]

Even if the necessary information and resources are available, a court may have to resort to timetables and deadlines to enforce its orders and thus assume a supervisory and managerial role that courts traditionally eschew.[376] It is exceptionally difficult to police the vigor and good faith of agency enforcement efforts and settlement negotiations.[377] Initiation suits to force agencies to comply with implementation deadlines have frequently presented frustrating enforcement problems to district judges.[378]

Weak initiation rights avoid some of these problems, but they create others. Because they are deferential, weak initiation rights depend on the good faith of the agency. When this faith is well placed, an initiation right may lead an agency, after considering the contentions of the beneficiaries, to take enforcement action or to modify previous policies.[379] But in other cases, an order that an agency "adequately consider" beneficiary interests may be little more than a symbolic vic-

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[375] *See* Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 791–92 (1978).

[376] There has been a great deal of commentary on this problem in recent years. *See, e.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1301–02 (1976); Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 27–28 (1979); Note, *Judicial Control of Systematic Inadequacies in Federal Administrative Enforcement*, 88 YALE L.J. 407, 420–22, 432–33 (1978).

[377] *See, e.g.*, Adams v. Richardson, 480 F.2d at 1165–66 (affirming order to HEW to commence title VI enforcement proceedings against scores of school districts, yet relying on HEW's good faith in the face of limited resources); *see also* Note, *supra* note 376, at 423 (describing subsequent history of *Adams*).

In some situations, such as licensing, the remedy is far more simple: a court can simply order an agency to vacate a license and to invite new applications. *See* Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 550 (D.C. Cir. 1969).

[378] *See* Illinois v. Gorsuch, Nos. 78-1689, -1715, -1734, -1899 (D.D.C. Jan. 28, 1982) (recounting "years of futility" experienced by court in attempt to force EPA to promulgate regulations concerning hazardous waste land disposal facilities).

[379] For example, following Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), the EPA cancelled the registration of DDT. *See* N.Y. Times, June 15, 1972, § 1, at 1, col. 1; *id.*, Jan. 16, 1971, at 59, col. 3. Following the first *Scenic Hudson* decision, Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), the FPC modified the power project in controversy to reduce some of the adverse environmental effects. *See* Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463, 465–66 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); *see also* Trubek, *Environmental Defense, I: Introduction to Interest Group Advocacy in Complex Disputes*, in PUBLIC INTEREST LAW, *supra* note 133, at 151–94 (intervention by an environmental group led to AEC decision to require a cooling tower for nuclear plant).

tory.[380] To achieve more, a court might have to evaluate the agency's entire enforcement program and compel enforcement should it determine that the agency has miscalculated the applicable norms or acted in less than full good faith. Such a step would reintroduce the remedial problems associated with the strong right of initiation.

To identify the remedial problems in initiation cases is not to say that rights of initiation should be denied. But these considerations do suggest that judicially created remedies are only a partial solution to the problem of inadequate regulatory protection.

E. Judicial Authority to Create Initiation Rights

In light of the existence of rights of defense for regulated "defendants," mere symmetry may appear to require an initiation remedy for "plaintiff" beneficiaries. The initial justification in each case is that the displacement of the common law by regulatory schemes has created a need for new safeguards to protect important private interests and to promote accountability. But this symmetry masks potential differences between the two situations that may bear on the decision whether to create private remedies. As a matter both of tradition and of competence, courts are best suited to protect private individuals against particular impositions by government;[381] Congress and administrative bodies are better equipped to determine how public resources should be allocated to secure collective benefits.

This dichotomy suggests that courts should create defense rights and deny initiation rights. But the dichotomy is too simplistic. The development of large bureaucracies and the proliferation of governmental functions have attenuated the link between regulation and electoral representation.[382] As a

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[380] *Cf.* Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429, 1445–68 (1978) (demonstrating the weakness of legal requirements that seek voluntary cooperation in pursuit of values that run counter to institutions' interests); Sax, *supra* note 355, at 239 (requirements that agency "consider" values not congruent with its mission are ineffective, because based on false behavioral assumptions).

[381] The hornbook rule that due process ordinarily requires some sort of evidentiary hearing in adjudication, but not in rulemaking, indicates that courts are readier to provide remedies when the consequences of government action are individual rather than collective.

[382] *See supra* pp. 1226–27, 1238–39. To reach this conclusion, it is unnecessary to embrace a theory of industry "capture" or of symbolic "filter" politics. *See supra* note 134. One must merely acknowledge the weakness of the link to the ballot box and the vulnerability of regulators to incentives and influences that threaten the adequacy of regulatory protection under a public values conception.

result, one cannot readily assume that a public enforcement monopoly will yield an appropriate pattern of regulatory protection. Traditional common law remedies, which provided a means by which citizens could obtain protection from the courts if administrative officials failed to provide such protection, are often ineffective today. In addition, rights of defense are no longer limited to the prevention of particular impositions. Such rights are frequently asserted by an entire industry or by groups of industries seeking to protect collective interests, often by striking down or modifying the terms of far-reaching regulations.[383] Nonetheless, the courts have correctly concluded that — given the weakness of the political link — a "hard look" judicial remedy is appropriate for regulated firms. A similar conclusion should be reached in the case of beneficiary remedies.

For the most part, the institutional differences between protection of beneficiaries and protection of regulated entities can more appropriately be taken into account by adjusting the degree of deference that courts accord to agencies, rather than by automatically foreclosing relief.[384] Courts may, however, more readily deny relief altogether in initiation than in defense cases, on the ground that "agency action is committed to agency discretion by law."[385] Unlike administrative inaction, an agency's decision to promulgate a rule or bring an enforcement action crystallizes its discretion in a particular measure with a particular rationale; a court can both determine whether the agency has statutory authority and take a "hard look" at the specific justification for the agency's decision. By contrast, if inaction is challenged as arbitrary and unreasonable, meaningful review will ordinarily be precluded: unless the statute specifically mandates enforcement, or the agency has a well-developed system of enforcement priorities, or the court is willing to order the agency to adopt such a system, there will be little at which to "look hard."[386] In these circumstances,

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[383] *See, e.g.*, National Lime Ass'n v. EPA, 627 F.2d 416 (D.C. Cir. 1980).

[384] Except in unusual cases in which a statute mandates enforcement, the contemporary right of initiation is weakly responsive; like the "hard look" right of defense, it sidesteps many of the problems that might otherwise be presented by judicial review of agency discretion over enforcement of broad regulatory programs.

[385] 5 U.S.C. § 701(a)(2) (1976).

[386] *See also infra* pp. 1293–94 (discussing burdens imposed by creation of new remedies); *cf.* Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (private person lacks a judicially cognizable interest in the prosecution of another). As this decision illustrates, the extreme example of "no law to apply" in connection with rights of initiation is criminal prosecution. With only limited resources, prosecutors must enforce hundreds of substantive statutes without any external guidance about how to resolve competing priorities; nor do prosecutors typically articulate internal enforce-

it may be better for courts to deny review than to undertake a difficult inquiry that not only promises little benefit but also might generate considerable litigation costs and administrative burdens.

An additional difference between rights of initiation and rights of defense is that the availability of a private right of action may justify denial of initiation but not defense rights.[387] But a private action may not be an adequate surrogate for a right of initiation if a litigant is challenging an agency's pattern of enforcement or interpretation of its mandate,[388] or if the litigation is a "big case" whose prosecution would, because of its costs and the collective nature of the regulatory benefit, exhaust the resources of a private litigant. A right of initiation allows for an overview of agency enforcement policies that is preferable to piecemeal lawsuits for ensuring that the relevant public values are taken into account.

Because of these considerations, courts are justified in creating initiation rights to implement the background understandings provided by the public values conception and to furnish modern surrogates for traditional judicial safeguards upon the exercise of government power. Further, like rights of defense[389] and new-property hearing rights,[390] rights of initiation have a two-tiered structure.

Ordinarily, the interest of beneficiaries in regulatory protection and the weakness of the link between agency decisions and electoral representation do not justify giving constitutional status to initiation rights. The formal-functional dilemma generally prevents courts from singling out particular regulatory benefits for constitutional protection because the benefits are

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ment guidelines. Review of prosecutors' decisions is therefore generally unavailable. For similar reasons, judicial review is usually not available in the new-property and regulatory contexts unless there are clear statutory or self-imposed limits on the administrator's discretion.

Review should be available, however, if a plaintiff's particular allegation is one to which there is "law to apply" — for example, a claim of complete default in the enforcement process or of influence by factors, such as racial discrimination, that are irrelevant under the governing statute. Claims of particular instances of "abuse of discretion," by contrast, will be less likely to justify review in the absence of a reference to agency reliance on factors made irrelevant or impermissible by law.

387 Correspondingly, the lack of either a private right of action or an adequate common law remedy bolsters the case for private rights of initiation.

388 *See* Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam) (involving HEW's failure to enforce title VI of the Civil Rights Act of 1964). The same conclusion is appropriate if the controversy is a test case implicating a more general pattern of agency action. *See, e.g.*, Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

389 *See supra* pp. 1254–55.

390 *See supra* pp. 1263–67.

"basic" or "fundamental" to citizens' welfare.[391] Moreover, the combination of formal and informal access to the political process, in addition to whatever administrative procedures are provided by law, usually satisfies minimal due process standards.[392] Indeed, such political participation in collective institutions is itself desirable under the public values conception. Public values justifications thus support recognition of initiation rights in the absence of a clear statement from Congress. But such rights are not constitutional in status; the creation of private rights of initiation is for the most part a species of federal common law.[393]

There are, however, three categories of cases in which due process does require an initiation right. The first category consists of cases in which the government's failure to enforce a regulatory scheme jeopardizes a plaintiff's common law "liberty" or "property" interest, and no adequate alternative remedy is available. Suppose, for example, that the government were to create a regulatory program to displace common law protections against assault and battery with a scheme involving only public civil or criminal enforcement. The harm for which the plaintiff would seek redress is not collective, and the remedy sought would be limited to his case. Moreover, the formal-functional dilemma would not come into play, because both formal and functional criteria would be simultaneously met.[394]

The second category of cases consists of those in which a statute unambiguously grants a formal entitlement to regulatory protection, and a private right of action is unavailable or wholly inadequate. Although the demanding standard of formality developed in the case of new-property hearing rights suggests that few statutes are likely to meet this test, the

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[391] The difficulties inherent in such an enterprise are discussed in C. FRIED, *supra* note 157, at 108–31, and in Stewart, *supra* note 336. Decisions such as San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29–39 (1973), and Tanner v. Armco Steel Corp., 340 F. Supp. 532, 536–37 (S.D. Tex. 1972), reflect a similar sense of judicial incapacity.

[392] *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). Indeed, the legislature should be encouraged to create new mechanisms for control of the administrative process, mechanisms that may possess important advantages over judicial remedies. *See* Sunstein, *supra* note 53; J. Mashaw, *supra* note 185.

[393] Indeed, in only one case, Logan v. Zimmerman Brush Co., 50 U.S.L.W. 4247 (U.S. Feb. 24, 1982), has the Court used the Constitution as a basis for creating initiation rights to prevent harms to personal interests by private parties. The lack of cases taking this approach may be explained by the availability in most cases of a direct remedy against private wrongdoers. In addition, when government officials are "directly" responsible for a wrong, a remedy is often required by substantive commands of the Constitution, such as equal protection. *See supra* note 329; *infra* pp. 1308–16.

[394] *See supra* pp. 1245–46.

Supreme Court recently held in *Logan v. Zimmerman Brush Co.*[395] that, when such a statute has been enacted, due process requires a remedy to vindicate the statutory entitlement. Six Justices found that equal protection likewise requires such a remedy.[396]

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[395] 50 U.S.L.W. 4247 (U.S. Feb. 24, 1982). In *Logan*, the Illinois legislature had passed a Fair Employment Practices Act that barred job discrimination on the basis of handicap. Illinois Fair Employment Practices Act §§ 1–67, ILL. REV. STAT. ch. 48, §§ 851–867 (1977) (amended 1980). Logan filed charges with the Illinois Fair Employment Practices Commission, alleging that the Zimmerman Brush Company had engaged in illegal discrimination by discharging him. The Act required the Commission to provide redress unless no "substantial evidence" supported the claim; the Act also stated that the Commission "shall" hold a hearing within 120 days of the filing of a charge. *See* 50 U.S.L.W. at 4249. Through apparent inadvertence, the Commission failed to take action on Logan's claims within the 120-day period. The state court held that the 120-day period was mandatory and that the Commission's failure to act terminated Logan's claim.

Logan contended that the Commission's failure to provide a hearing violated due process because the Act created a property interest in redress from discrimination. A direct action against the employer was an inadequate remedy, Logan argued, because reinstatement would not be possible. Effectively, Logan thus demanded a right of initiation as a matter of due process. Logan also argued that the Commission's inaction violated the equal protection clause because it resulted in an irrational distinction: claims processed within 120 days received full consideration; otherwise identical claims were terminated solely because of Commission negligence.

A unanimous Court ruled for Logan. Six Justices accepted Logan's due process argument. A different group of six Justices, represented by two different opinions, accepted the equal protection claim. *Id.* at 4252 (opinion of Blackmun, J.); *id.* at 4253 (Powell, J., concurring in the judgment). Concerning the due process claim, the Court said that the "cause of action" created by the state "is a species of property protected by the Fourteenth Amendment's Due Process Clause." 50 U.S.L.W. at 4249. That clause "protect[s] civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* Because Logan's "right to redress is guaranteed by the State . . . under what is, in essence, a 'for cause' standard," *id.* at 4250, Logan had a constitutionally protected property interest similar to that in Goss v. Lopez, 419 U.S. 565 (1975), and in other cases involving the dispensation of government benefits.

The Court distinguished enforcement actions like those brought by the NLRB. The NLRB's General Counsel has control over decisions to prosecute, the Court noted, and his refusal to issue a complaint is not subject to judicial review. 50 U.S.L.W. at 4250 n.6. This reasoning, however, fails to explain why the General Counsel's decisions are exempt from review, but those of the Employment Commission in *Logan* are not. A more plausible distinction is that the National Labor Relations Act does not create a formal entitlement, but instead vests complete discretion in the General Counsel. If so, the NLRB case is analogous to Board of Regents v. Roth, 408 U.S. 564 (1972), Bishop v. Wood, 410 U.S. 614 (1973), and Linda R.S. v. Richard D., 426 U.S. 341 (1976), rather than to *Logan*.

The statute at issue in *Logan* was recently amended to make discretionary the holding of a hearing. Act of June 29, 1980, Pub. Act No. 81-1267, § 7–102(c)(3), 1980 Ill. Laws 250, 257. This amendment might vitiate the right of initiation found in *Logan*.

[396] Justice Blackmun, joined by Justices Brennan, Marshall, and O'Connor, wrote a separate opinion in which he stated that the Commission's inaction violated equal

The third category in which due process demands an initiation right consists of cases involving new contemporary equivalents of core common law rights: personal interests on whose functional importance there is deep social consensus and that also can be expressed as formal entitlements. Freedom from racial discrimination is an example.

Few cases are likely to arise, however, in which courts will be required to create initiation rights on constitutional grounds. Legislatures have rarely preempted basic common law remedies, created unambiguous formal entitlements to regulatory protection, or foreclosed private remedies for racial discrimination.

VII. Private Rights of Action

A. Introduction

If initiation rights are available to remedy agency inaction, why are private rights of action needed at all? There are several answers. For the plaintiff, initiation is often a less attractive option than a private right of action. A weak initiation right — which is all the courts will usually afford[397] — places a substantial burden on the plaintiff to demonstrate that the agency's inaction was unreasonable. Moreover, "victory" may consist merely of a remand for a better explanation of the agency's decision not to act.[398]

There are also institutional advantages. A private right of action does not require courts to monitor the use of public enforcement resources, nor does it require the agency to divert those limited resources to the defense of initiation suits. Moreover, private rights of action impose a budget discipline on plaintiffs more stringent than that in initiation cases. Private rights of action permit private parties to enforce a statute

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protection, because "terminating a claim that the State itself has misscheduled" is not "a rational way of expediting the resolution of disputes." *Logan*, 50 U.S.L.W. at 4252 (opinion of Blackmun, J.). Justice Powell, joined by Justice Rehnquist, basically accepted this reasoning in a separate concurring opinion, and stated that the challenged classification is "arbitrary and irrational" in relation to the goals of "redressing valid claims of discrimination [or] of protecting employers from frivolous lawsuits." *Id.* at 4253 (Powell, J., concurring in the judgment). Query: does the equal protection holding mean that a litigant has a constitutional claim to an explanation of why an agency has failed to act on his complaint when it has decided to act on the complaints of others?

[397] *See supra* pp. 1205–06.

[398] *See supra* pp. 1283–84.

beyond the level permitted by an agency's limited budget only if they believe that the benefits of additional enforcement outweigh its costs. This method of making enforcement decisions may be desirable, since private litigants — who are often closer to local controversies than are public officials — may know more about the costs and benefits of particular enforcement initiatives.[399] Finally, since private right of action cases tend to be more narrowly focused than initiation suits, the right of action may better reflect differing preferences for collective goods.

Judicial creation of private rights of action, however, poses special hazards. Such rights could disrupt legislative judgments concerning appropriate enforcement levels, undermine legislative decisions to entrust regulatory decisions to centralized, specialized, and politically accountable bodies, and impose undue burdens on the courts. We examine each of these considerations in turn.

1. Legislative Calibration of Regulatory Compliance. — Assume that a regulatory statute is silent on the availability of private rights of action. If that statute specifies in precise terms the conduct that it prohibits, the extent of compliance with the statute will be a function of the level of enforcement and the sanctions imposed. The legislature can control both of these variables through specification of penalties and appropriations. By generating additional sanctions and enforcement, judicial creation of private rights of action might upset legislative fine-tuning of compliance levels.[400]

This objection is largely unpersuasive. Statutory language is often so general or ambiguous that the legislature could not confidently predict the specific kind of activity against which enforcement action will be brought. The fine-tuning argument is even less convincing when, as is common, an agency has a lump-sum budget to cover enforcement of numerous provisions. Moreover, statutes often give agencies considerable discretion in selecting among alternative sanctions and penalty levels.[401] These considerations severely weaken the argument that the legislature anticipates and controls enforcement levels in a way that would be undermined by judicial creation of private rights of action.

The legislature can also monitor and control agency enforcement by increasing or decreasing appropriations or by

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[399] *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544, 556–57 (1969).

[400] *See* R. POSNER, *supra* note 81, § 22.1 (analyzing on efficiency grounds the relative advantages of public and private enforcement); *see also* Landes & Posner, *supra* note 21 (same).

[401] *See infra* p. 1291 & note 403.

other forms of oversight.[402] But agencies can shift enforcement resources and adjust the content of regulatory controls and the sanctions imposed; as a result, variations in appropriations may have little impact on the nature or amount of enforcement that agencies undertake.[403] Occasionally, as exemplified by Congress' recent curbs on the Federal Trade Commission,[404] the legislature acts decisively to control enforcement policies. But such control is infrequent and episodic.

Moreover, the objection that creation of private rights of action disturbs careful legislative decisions about compliance levels begs the question by assuming that congressional silence reflects an intention to foreclose judicial creation of such rights. It is equally plausible that sanctions and appropriations have been tailored in contemplation of possible private enforcement.[405] Congress may wish to take advantage of the courts' ability to draw upon experience with implementation of a particular regulatory program and to judge the impact and desirability of private rights of action.[406]

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[402] Professor Posner notes that "the annual appropriations hearing affords the legislature an opportunity to assure that the agency has not strayed too far from the intended, as distinct from the enacted, legislative regulations that the agency is enforcing." R. POSNER, *supra* note 81, at 472. This conclusion is echoed in cases rejecting the argument that a record of substantial nonenforcement is a reason for implying private rights of action. *See, e.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973).

[403] COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, AMERICAN BAR ASS'N, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969). When an agency is charged with enforcing a wide variety of rules, a general budget reduction does not ensure that a particular rule will be enforced less enthusiastically. The use of line item appropriations to direct enforcement activity may be difficult. Amendment of the governing statute or application of informal political pressures would seem more effective, although each has costs of its own.

[404] For example, in 1980 Congress "punished" the Federal Trade Commission — for what Congress considered misguided enforcement decisions — by almost totally cutting off FTC appropriations. *See FTC Funds Bill With Legislative Veto Clears*, 36 CONG. Q. ALMANAC 233–36 (1980).

[405] On occasion, Congress has pointedly left it for the courts to determine whether private rights of action should exist. One example can be found in the enactment of the provision in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), that allows, at the court's discretion, the recovery of attorney's fees for successful suits under title IX of the 1972 Education Amendments, 20 U.S.C. §§ 1681–1686 (1976). Congressional debates indicate that this provision was not meant to influence the judicial decision whether to infer a private right of action. *See* Cannon v. University of Chicago, 559 F.2d 1063, 1077–80 (7th Cir. 1976), *rev'd on other grounds*, 441 U.S. 677 (1979). The legislative history of § 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 (1976), includes similar caveats. *See* Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979).

[406] *See* Note, *supra* note 2, at 291. It might be objected that the legislature can also engage in ongoing supervision and that its failure to act should be binding on the courts. But legislative inaction can result from a number of factors; it is not necessarily the product of satisfaction with an agency's failure to enforce a statute vigorously. *See* Note, *supra* note 143, at 995.

In addition, courts can refuse to create rights of action when such rights would be inconsistent with clearly expressed legislative policies about enforcement. For these reasons, we conclude that judicial creation of private rights of action would generally not be inconsistent with respect for legislative control over enforcement levels.

2. Displacing Agency Responsibility for Specifying Regulatory Controls. — Private rights of action circumvent administrative responsibility for regulatory policy. Litigants asserting such rights can force courts to define the content of necessarily overbroad regulatory statutes, thereby undermining the advantages of political accountability, specialization, and centralization that administrative regulation was designed to provide.[407] Private rights of action may also impair an agency's ability to harmonize potentially conflicting statutory provisions[408] and to negotiate with regulated firms and other

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[407] Under the doctrine of primary jurisdiction, courts can refer to the agency those questions that should first be resolved by specialized administrators. *See* K. DAVIS, *supra* note 215, §§ 19.01–.09; Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964). It has been contended that this doctrine can solve the problems discussed in the text by divorcing the questions of judicial competence from those of recognition of private suits. O'Neil, *supra* note 146; *see* Note, *supra* note 2, at 295–96. This argument derives some support from Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962), which suggested that, although the legality of routing practices is within the primary jurisdiction of the Interstate Commerce Commission, courts may award damages after the ICC finds conduct unlawful.

But use of the doctrine of primary jurisdiction to avoid problems of de novo judicial construction exacerbates many of the difficulties involved in recognizing private rights of initiation. It allows a private litigant to conscript agency resources: public funds will be devoted to resolution of a controversy that the agency has not judged sufficiently serious to require public intervention. But unlike initiation suits, this conscription occurs without a court's first determining whether the agency's failure to act was improper. The agency may be forced to consider the question even though it believes that its resources would be better spent on other, more egregious violations. *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973).

Thus, the combination of implied rights of action and the primary jurisdiction doctrine could result in the worst of all possible worlds: the level of enforcement would not be subject to legislative control, since private parties could bring unlimited suits under regulatory programs that agencies were unable or unwilling to enforce; but the public would bear at least part of the cost of such suits, since agency resources would have to be expended in order for the suits to proceed.

[408] This consideration is reflected in Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972). Suing under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 407, 411 (1976), the plaintiff contended that private rights of action should be created because no right of initiation was available. The court rejected the argument, noting that the Department of Justice's selective enforcement was an effort to coordinate with other federal and state pollution laws and to give new content to the governing statute. 457 F.2d at 87. The court approved of this effort and noted that private rights of action would disturb that coordination and result in conflicts between environmental programs. *Id.* at 88.

affected interests in order to establish a workable and consistent regulatory system.[409]

These dangers are minimal when statutory language is specific or when an agency has adopted a definitive rule or precedent that a court can apply. In such cases, the court should ordinarily reach the same result as would the agency. But when the governing statute is vague or ambiguous and when centralized and coordinated enforcement appears to be critical to the regulatory scheme, judicial creation of private rights of action should be discouraged.[410]

3. Judicial Burdens and Costs. — Regulatory controversies often raise economic and scientific questions that courts are ill equipped to resolve. These burdens are greater in suits asserting private rights of action than in initiation or defense cases, for the court must decide issues de novo, without the benefit of prior agency deliberations. Additional burdens are imposed in suits involving private rights of action for damages, particularly when sought on behalf of a class, because of the scientific and economic uncertainties involved in tracing the perturbations caused by a defendant's actions.[411]

Moreover, private suits to enforce regulatory provisions may merit lower priority in the courts than do traditional lawsuits. The victim of a tort or of a breach of contract may have a remedy only in court; an individual seeking regulatory protection has the alternative of pressing his claim in the administrative process. Furthermore, given the increasing cost and complexity of private litigation — especially that involving large-scale regulatory issues — courts may well doubt that

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[409] Such problems might be mitigated by allowing an affirmative defense to private suits when an agency's failure to act was based on a rational policy and was not motivated by budget constraints. Professor Mashaw argues that an agency should be permitted to intervene to make this argument in private suits brought under public programs. *See* Mashaw, *Private Enforcement of Public Regulatory Provisions: The "Citizen Suit,"* 4 CLASS ACTION REP. 29 (1975). Such solutions, however, have little support in the cases. *But see* Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972). Such a form of intervention would raise in a new guise the difficulties of judicial review of agency enforcement policies.

[410] *See, e.g.*, Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951); Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973). If agency enforcement is not uniform with respect to all members of the regulated class, a right of initiation could rectify the situation more effectively than could a right of action. Selective enforcement, however, may be a rational means of implementing agency policy. Thus, private rights of initiation can also undermine an agency's considered decisions regarding the optimal method and level of compliance.

[411] Not only must the court resolve the question whether a violation of regulatory requirements occurred, but it also must attempt to measure the economic impact of noncompliance. In complex areas of economic regulation, such measurements may approach the impossible. *See* J. VINING, *supra* note 175, at 80–101.

private enforcement is more cost-effective than public enforcement or that it will secure social benefits commensurate with its costs.

These considerations supplement the most fundamental objections to judicial creation of private enforcement rights: those derived from the constitutional scheme of separated powers. These objections, examined in detail in Part III,[412] have greater force when applied to private rights of action than to private initiation rights, which generally reserve final authority over enforcement matters to the political branches. In the following Sections, we consider whether, despite these objections, the three conceptions provide a justification for judicial creation of private rights of action, and whether they help to explain the evolution of judicial doctrine.

B. Private Rights of Action Under a Public Values Conception

There is paradox in the notion that the private right of action could serve as a crucible for the advancement of public values; the very origins of administrative agencies lay in dissatisfaction with private litigation as an undemocratic mechanism for social choice and control. Nonetheless, one could base a public values justification for private rights of action on a theory of the regulatory process that focuses on transaction-cost barriers to organized advocacy by regulatory beneficiaries. In the implementation process, administrative bureaucracies sometimes tend to sacrifice the diffused interests of widely scattered beneficiaries in favor of the interests of more cohesive and better-organized groups, such as regulated firms and the bureaucrats themselves. This tendency could block the full realization of the public values embodied in regulatory programs.

On such a theory, private rights of action might be justified as an open, nonbureaucratic means of asserting public values, ensuring their enforcement, and reestablishing the balance struck in the regulatory statute. The courtroom might also serve as a stage for dramatizing these social values and for awakening the concern of the media, the public, and the legislature.[413]

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[412] *See supra* p. 1221.

[413] The litigation itself focuses public attention on the problem that prompted regulation. Moreover, the only method by which regulated entities can avoid such litigation and the consequent publicity is to secure an explicit legislative injunction against private rights of action — which may call attention to the issue of why the legislature would dilute enforcement of its statute. It is not clear, however, that this

Nevertheless, courts have generally not adopted a public values rationale in private right of action cases. Under a public values theory, the case for private enforcement rights would be especially strong when a statute grants substantial discretion to an administrator; participation by various statutory beneficiaries would be most needed in such a case to force consideration and vindication of the full range of affected interests. But courts have recognized private rights of action only when a statute sharply limits agency discretion by granting formal entitlements to regulatory protection.[414] When the statutory standard vests the administrator with broad discretion or includes several competing norms, private rights of action have usually been denied.[415] Moreover, the rhetoric employed in creating private rights of action includes no reference to the values of beneficiary participation and public education.[416]

Judicial rejection of the public values conception in this setting is quite understandable. Litigation between private parties is an unlikely forum for achieving community self-determination, and there is little evidence that such litigation has awakened public or congressional concern over regulatory policies. Furthermore, the premise that unorganized beneficiary interests are systematically underrepresented is not easily verified; one person's "implementation slippage" is another's safeguard against excesses of regulatory zeal. Even if the premise of transaction-cost barriers were accepted, private rights of initiation are a superior remedy from a public values perspective because they seek to invigorate administrative and political processes. Private rights of action, by contrast, bypass such processes and give power to judges and self-selected private litigants to determine whether enforcement is desirable in particular cases.[417]

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watchdog role is appropriate for the courts. *See supra* pp. 1258–59. Further, it is rare that judicial creation of private rights of action prompts either legislative reconsideration of regulation or widespread public debate. *But cf.* Board of Regents v. Bakke, 438 U.S. 265 (1978) (decision on affirmative action prompting public dialogue).

[414] *See* California v. Sierra Club, 451 U.S. 287 (1981) (no cause of action found); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981) (same); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (same); Cannon v. University of Chicago, 441 U.S. 677 (1979) (cause of action found).

[415] *See, e.g.*, California v. Sierra Club, 451 U.S. 287 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973); Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972).

[416] *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979).

[417] The public values argument for private rights of action, however, is particularly strong when a private right of initiation is unavailable because agencies lack authority

C. A Production Rationale for Private Rights of Action

1. Analysis of Mixed Enforcement Systems. — Under the production conception, the creation of private rights of action would be justified when two conditions are met. First, the regulatory agency must have devoted inadequate resources to enforcement or must lack the sanctions needed to obtain an economically appropriate level of compliance from regulated firms. Second, private enforcement must promote a higher level of compliance without costing more than its incremental benefits.

In order to make these determinations in particular cases, judges would have to measure and weigh numerous variables that are usually inaccessible to courts — including the relative costs of, incentives for, and effectiveness of public and private enforcement. To perform such a calculus in each case would be absurd: decisional costs would be high and the risk of error substantial. Rules of thumb are required that can be applied to decide individual cases. The following issues must be addressed in developing such rough guidelines:

(1) *Whether the statutory norm promotes efficiency.* The first inquiry in evaluating whether a private right of action is desirable under the production conception is whether the relevant statute promotes efficiency at all. Some statutes are demonstrably aimed at doing so; certain antitrust laws are a prime example. Other statutes promote — both in purpose and in effect — goals other than the maximization of wealth.[418] Examples of statutes within the second category are laws forbidding discrimination against the handicapped and those protecting wilderness areas. These statutes are probably best regarded as regulations designed to advance noneconomic goals — such as personal dignity or the preservation of areas free

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or capacity to enforce a regulation. For example, the Hill-Burton Act conditions federal construction grants for hospitals on the provision of free medical care to the indigent. But there is no federal regulatory body to enforce this requirement once the hospital has been constructed. Courts have thus created private rights of action against the hospitals. *See, e.g.*, Saine v. Hospital Auth., 502 F.2d 1033 (5th Cir. 1974); Euresti v. Stenner, 458 F.2d 1115 (10th Cir. 1972). Creation of these rights has been defended on the ground that it promotes public values. *See* Rosenblatt, *supra* note 133.

[418] For a catalogue of possible purposes of legislation, see Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 267 (1982). It is, of course, desirable to achieve the appropriate level of compliance with such statutes at the lowest possible cost. But it is difficult for courts to determine the appropriate level of compliance, and in this context neither private damage awards nor injunctive remedies display the automatic efficiency-promoting characteristics of damage actions in the context of externalities and forced wealth transfers.

from human domination. Under the production conception, private actions brought to enforce statutes of this type should presumptively be dismissed.

(2) *Whether additional compliance with the relevant norm is presumptively efficient.* In most cases, it would not be economically desirable to achieve 100 percent compliance with regulatory norms. The incremental costs to firms (and hence to society) of achieving higher levels of compliance often rise rapidly; in most cases, these costs will at some point exceed the incremental benefits of greater compliance. Private enforcement may push compliance beyond this social break-even point. As we explain below, this result is not true of private actions awarding compensatory damages, which tend automatically to promote a more efficient level of compliance by taxing defendants for the costs they impose upon others.[419] Remedial injunctions, however, do pose serious dangers of overdeterrence.[420]

(3) *Whether the benefits of additional compliance outweigh enforcement costs.* Even if the additional compliance produced by private enforcement yields economic benefits,[421] these benefits must be compared with the costs of the enforcement process itself — a comparison that is exceptionally difficult for courts to make. But limiting plaintiffs to damage remedies and requiring them to bear their own litigation expenses discourages lawsuits in which costs exceed social benefits.

(4) *Whether private enforcement would generate serious problems of overinclusiveness.* It is a commonplace that statutory standards are often overinclusive because of empirical and institutional obstacles to greater precision.[422] Private plaintiffs may wish to exploit overinclusive — and therefore economically inefficient — applications of statutory norms. Private rights of action should accordingly be denied under such overinclusive statutes unless statutory boundaries can be trimmed appropriately by the courts.

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[419] *See* Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

[420] For comparative economic analysis of damages and injunctive remedies, see Calabresi & Melamed, *supra* note 159, at 1115–27; Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1088–91 (1980). For illustrations of the difficulties in calibrating efficient injunctions, see R. STEWART & J. KRIER, *supra* note 72, at 233–55.

[421] In addition to stimulating higher levels of compliance, damage remedies for victims of regulatory violations could increase economic welfare by efficiently spreading risk. These benefits should be included in the calculus.

[422] *See* Landes & Posner, *supra* note 21, at 38–41; Stewart, *supra* note 13, at 1693–97.

(5) *Whether there is a need for consistency and coordination in norm enforcement.* Nonuniform enforcement of a statutory standard might create economic distortions. For example, a regulatory crackdown aimed at certain categories of firms in an industry could yield several undesirable results: the closing of those firms, inefficient expansion of the remaining firms, or both. Private rights of action create this danger because they lead to decentralized enforcement that is uncoordinated, unpredictable, and sometimes inconsistent.[423] Decisions to initiate enforcement actions are left in the hands of numerous individual litigants; statutory norms are interpreted by widely scattered judges and juries; and appellate review provides only limited assurance of consistency.

(6) *The relative costs of private and public enforcement.* If private enforcement is substantially more costly than additional public enforcement, private rights of action should presumptively be denied. There is, however, scant basis for concluding that public enforcement is generally cheaper.[424] To be sure, public enforcement may enjoy scale economies. But private enforcement can tap such economies through development of a specialized plaintiffs' bar. Centralized public enforcement may also involve diseconomies of scale, given multiple layers of decision and review and the temptation to adopt overly rigid norms in order to reduce administrative costs. In addition, private enforcement will often be less costly than public enforcement when an injury is caused to discrete individuals rather than to large groups.[425] Finally, the legislature may — for reasons unrelated to efficiency — fail to provide additional public enforcement even though such enforcement is economically desirable and is cheaper than private enforcement.[426]

The safeguards achieved by requiring plaintiffs to bear their own litigation expenses and by awarding compensatory

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[423] *See, e.g.*, Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 90 (2d Cir. 1972).

[424] The government might economize on enforcement costs by increasing sanctions to offset reduced enforcement, *see* Landes & Posner, *supra* note 21, but that strategy has costs of its own, *see* Polinsky & Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979).

[425] *See supra* pp. 1275–76.

[426] In this context, a right of initiation would be an ineffective remedy, for it would not add to the resources allocated to enforcement. In addition, judicial decisions whether to devote additional resources to private enforcement — by creating private rights of action — are probably less vulnerable to political pressures unrelated to efficiency than are legislative decisions on appropriations for public enforcement. Creation of private rights of action might thus be justified by a form of second-best calculation, even if additional enforcement could be more cheaply produced by a public authority than through private litigation.

damages create what might be called a "victim compensation hedge" protecting against overdeterrence and excessive enforcement costs. Because common law damage remedies were generally aimed at compensation for spillovers and forced wealth transfers,[427] they embody the victim compensation hedge. If private rights of action were limited to enforcement, through damage remedies, of regulatory norms that resemble common law norms, such actions would similarly promote production.

The victim compensation hedge operates somewhat differently in the two classes of norms involved: prevention of socially costly spillovers and prevention of forced wealth transfers. In the case of spillovers such as pollution, a private damage remedy forces defendants to "internalize" the social costs of activity that violates the regulatory norm.[428] Subject to minor qualifications,[429] award of compensation to victims is unlikely to lead to overdeterrence. By hypothesis, defendant's violation has not been deterred and has resulted in social costs. The award of damages to those who actually incur those costs (assuming damages are properly computed) will provide incentives for defendants to maintain an efficient level of compliance.[430] The danger of excessive enforcement is small:[431] before a rational plaintiff will sue, the social costs sought to be internalized (expected damage awards) must exceed the plaintiff's expected litigation costs. This calculation tends to ensure that the social benefits of private enforcement exceed its costs.[432]

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[427] Externalities could, of course, be viewed as a form of coerced wealth transfer.

[428] This account assumes, of course, that the plaintiff is ordinarily entitled to be free of defendant's invasions. *See generally* Kennedy, *supra* note 159 (arguing that all cost-benefit analysis involves inherent value judgments).

[429] One qualification is that the plaintiff, or a third party, might be able to reduce the social costs associated with defendant's and plaintiff's activity more cheaply than could the defendant. *See* Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973). But such situations are relatively rare in the context of the classic criminal prohibitions and could be made the subject of affirmative defenses.

[430] If the benefits of activity to the defendant outweigh its social costs, an order to compensate the plaintiff will not cause a defendant to change his conduct, at least in the short run. The internalization of the costs will, however, be partially reflected in the higher price at which the regulated entity will sell its goods and services — an efficiency-promoting market signal. This signal may lead to output changes, which would be desirable from the standpoint of the production conception. *See* Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

[431] Moreover, a system in which the victim has a monopoly on private enforcement avoids many of the potential costs in a competitive system. *See* Landes & Posner, *supra* note 21, at 21–22.

[432] This generalization ignores a number of complicating factors, including the defendant's litigation expenses, settlement incentives, and court costs. *See* Shavell, *supra* note 419. Further, the social benefit of "taxing" the defendant may not be

In the context of forced wealth transfers resulting from trespass, fraud, abuse of fiduciary trust, or exercise of market power, the damage remedy taxes the transferred wealth to the extent of the victim's loss.[433] This loss will normally not equal the overall social costs associated with the violation, which will include such costs as increased insecurity. But the remedy should deter such transfers unless the transferred resources would be far more valuable in the hands of the wrongdoer,[434] and — for reasons similar to those in the case of spillovers — it should not result in overdeterrence or excessive enforcement costs.[435]

Although private victim compensation remedies do guard against excessive enforcement, they do not eliminate the problem of underenforcement; particularly if the harms inflicted are diffuse and individually small, litigation costs may deter private actions even though higher compliance levels would be efficient.[436] But the alternative of injunctions raises problems of overdeterrence so serious that a grant of injunction will often be held inappropriate in the case of sporadic forced wealth transfers and spillovers that are isolated or costly to correct.[437]

2. Applications: The Record of Judicial Decisions. — In this Section, we apply the six criteria identified above to the historical development of private rights of action, and attempt to derive rules of thumb for identifying cases in which creation of such rights is likely to promote efficiency.

(a) Victim Compensation Remedies for Criminal Violations. — The classic example of a judicially created private right of action is a common law decision to extend civil damage remedies to a person injured by the violation of a criminal statute

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equivalent to the amount of the tax. The gains in efficiency obtained by virtue of the tax "signal" may be less than the amount of the damage award, and hence less than plaintiff's litigation costs.

[433] This generalization ignores several complications introduced by variations in the measure of damages.

[434] Criminal and injunctive sanctions will also be available, but they may not be sought — and courts may decline to impose them — when the forced transfer works a clear net social benefit.

[435] Note, however, that the expected recovery is unlikely to be identical to the social benefits of private enforcement. *See supra* note 432.

[436] It does not appear that courts could resolve this problem by abandoning the victim compensation hedge — for example, by awarding multiple damages — without creating serious dangers of overdeterrence or excessive enforcement costs. For a discussion of the effects of the treble damage provision in the antitrust area, see 2 P. AREEDA & D. TURNER, ANTITRUST LAW §§ 311a–311b (1978).

[437] Spillovers resulting from continuing activity could lend themselves to injunctive remedies; the judicial practice of "balancing the equities" helps to eliminate the danger of resulting inefficiencies. *See* R. STEWART & J. KRIER, *supra* note 72, at 233–47.

designed to protect a class of which he is a member.[438] In this context, the argument that the legislature has made careful calibrations to ensure a particular level of compliance is unpersuasive, both because of the enormous discretion afforded in the criminal enforcement process and because the prosecutor enforces hundreds of statutes for which he generally receives funding on a lump-sum basis.

Moreover, the six efficiency-related criteria all normally point in favor of private rights of action for victim compensation. Traditional criminal prohibitions parallel common law entitlements; increased compliance with these prohibitions tends to advance production.[439] The remedy is available only to a limited beneficiary class for whom the costs of identifying and proving harm will be comparatively low. Constitutional strictures of overbroad criminal statutes reduce the danger of overinclusiveness; similarly, procedural safeguards and overbreadth doctrines mitigate the need for coordinated enforcement by reducing the likelihood of inconsistent application. And the victim compensation hedge serves to limit overdeterrence and excessive enforcement costs.

(b) Victim Compensation Actions Under Regulatory Statutes. — After the creation of regulatory agencies, litigants often sought victim compensation remedies for violations of regulatory prohibitions. Under the production conception, however, this extension is not always desirable; private enforcement of regulatory statutes is less likely to be efficient than is private enforcement of criminal statutes. Because the stigma associated with regulatory violations is less than that associated with crimes, society is willing to tolerate overinclusive regulatory standards. Moreover, overbreadth is inevitable when agencies are given responsibility to supervise an entire sector of the economy under changing conditions. Finally, unlike the criminal law, regulation is often prompted by the need for coordinated and centralized enforcement; decentralized private enforcement undercuts that goal.

Courts have been sensitive to these problems. They tend to refuse to create private rights of action when broadly phrased regulatory statutes delegate "planning" responsibility, require specialized experience and resources for implementation, or necessitate coordinated enforcement.[440] When broad

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[438] *See supra* p. 1206; *see also, e.g.*, Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889) (failure to perform statutory duty gives rise to liability for injuries to those whom statute was designed to protect).

[439] *See* R. POSNER, *supra* note 81, §§ 7.1–.6.

[440] *See* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975) (Securities Investor Protection Act of 1970); National R.R. Passenger Corp. v. Na-

regulatory norms resemble those of the common law, however, courts handle overinclusiveness not by denying private rights of action, but by narrowing applicable standards.[441]

Courts have been guided to these results by the same criteria applied in creating private rights of action under criminal statutes. These criteria limit private actions to situations in which (1) the statute imposes a standard of conduct for the special benefit of a class to which plaintiff belongs; (2) the plaintiff suffers harm from the defendant's violation of the standard; and (3) the plaintiff's harm is of the type that the statute was designed to prevent.[442] These private enforcement criteria, which create an entitlement in the plaintiff and a corresponding duty in the defendant, are most likely to be satisfied by regulatory statutes similar to criminal or common law prohibitions of spillovers and forced wealth transfers.[443] When the criteria are met, private rights of action will simultaneously promote efficiency and protect individual entitlements. Rights of action are thus akin to the traditional defense rights in the context of regulation; both integrate the entitlement and production conceptions by enforcing dyadic right-duty obligations similar to those created by the common law.

(c) The Supreme Court's Reassessment. — During the past fifteen years, the lower federal courts have greatly expanded the availability of private rights of action under regulatory statutes. In some cases they have created rights of action in situations that superficially appeared to satisfy private enforce-

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tional Ass'n of R.R. Passengers, 414 U.S. 453 (1974) (Rail Passenger Service Act of 1970); T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959) (Motor Carrier Act of 1935); Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951) (Federal Power Act); Clark v. Gulf Oil Corp., 570 F.2d 1138 (3d Cir. 1977) (Natural Gas Act), *cert. denied*, 435 U.S. 970 (1978); Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973) (Federal Trade Commission Act); Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972) (Rivers and Harbors Appropriation Act of 1899). Alternatively, courts have relied on the doctrine of primary jurisdiction to dismiss or defer decision of private actions under regulatory statutes. *See supra* note 407.

[441] The most obvious example is judicial interpretation of the antifraud provisions of the securities laws. *See, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

[442] *See supra* pp. 1300–01.

[443] *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976) (acknowledging civil remedy under Securities and Exchange Act of 1934, § 10(b), which prohibits use of manipulative or deceptive devices in securities trading); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916) (violation of federal statute requiring use of safety devices by railroads gives rise to a private damage action). *See generally* Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981) (acknowledging problems of overdeterrence and economic waste in private litigation under the securities laws, but claiming that the Supreme Court has overreacted by undermining private rights of action even when plaintiff suffers substantial individual injury).

ment criteria, but that in fact lacked the efficient self-regulating properties of the common law damage action.[444] In recent decisions the Supreme Court has severely restricted the availability of private remedies in a wide variety of regulatory contexts,[445] including election campaign regulation,[446] provision of passenger train service,[447] and financial rescue operations for brokerage houses.[448] These decisions apparently reflect a general perception that the expansion of private rights of action, in association with the proliferation of regulation during the past fifteen years, has resulted in overdeterrence and excessive enforcement costs. They can also be understood as a specific reaction to erosion of the victim compensation hedge resulting from the extension of private rights of action to new situations that do not in fact satisfy private enforcement criteria.

The landmark decision in *J.I. Case Co. v. Borak*[449] illustrates this erosion. The plaintiff, a shareholder, sought damages from the corporation and its directors. Plaintiff alleged that management had secured shareholder approval of a disadvantageous merger by distributing a misleading proxy statement in violation of the Securities Exchange Act. The Court found an implied right of action for damages under the Act.

Borak and other "informed market" cases do not fit within the traditional structure of private law entitlements: they impose liability not to provide individual victims redress for forced wealth transfers,[450] but to ensure the efficient operation of the market system as a whole — a diffuse collective good.[451]

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[444] One respect in which these cases depart from the common law model is that many private rights of action, particularly those in the area of securities and financial regulation, are brought as derivative suits or class actions. Because lawyers interested in legal fees play a large role in initiating and sustaining such actions, the cases display features of a competitive enforcement system, including seemingly wasteful conflicts among rival counsel seeking control over a potential recovery. The discipline of the victim compensation hedge on enforcement has been further eroded by the possibility that a corporation will be required to pay plaintiffs' litigation expenses for a derivative suit even if no damages are recovered. *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389–97 (1970).

[445] *See, e.g.*, California v. Sierra Club, 451 U.S. 287 (1981); Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Piper v. Chris-Craft Indus., 430 U.S. 1 (1977).

[446] Cort v. Ash, 422 U.S. 66 (1975).

[447] National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

[448] Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975).

[449] 377 U.S. 426 (1964).

[450] *See, e.g.*, Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

[451] *See* Redington v. Touche Ross & Co., 592 F.2d 617 (2d Cir. 1978), *rev'd*, 442

The social costs of the defendants' distribution of misleading information include allocational inefficiencies in the capital market resulting from reliance on that information and deterrence to investment resulting from the increased risk of such reliance. The challenged conduct often involves omissions rather than falsehoods. Judgments of causation are hazardous. In the case of a class action, damage awards may be huge sums that far exceed social costs[452] and that do not equal wealth forcibly transferred from the plaintiffs to the defendants. The damages awarded often dwarf the defendants' gains. By circumventing the victim compensation hedge, *Borak* thus presents a serious threat of overdeterrence and excessive enforcement costs.[453] This threat is even more dramatic in actions seeking to recover damages from accountants, target companies and their directors, inside traders, and tippees — all of whom have some responsibility for maintaining an informed and efficient capital market.[454]

The Supreme Court has responded to these developments by denying private rights of action altogether,[455] or by limiting them through arbitrary statutory interpretation that reflects the formalist thesis.[456] Not content to reinstate the traditional

U.S. 560 (1979); Wilson v. First Houston Inv. Corp., 566 F.2d 1235 (5th Cir. 1978), *vacated*, 444 U.S. 959 (1979); Abrahamson v. Fleschner, 568 F.2d 862 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); Hughes v. Dempsey-Tegeler & Co., 534 F.2d 156 (9th Cir.), *cert. denied*, 429 U.S. 896 (1976).

[452] The amount of a particular plaintiff's damages, based on the changes in the value of his own stock, bears little relation to such social costs. The judicial system, however, is not well suited to measuring these costs, and it has limited flexibility to abandon conventional measures of liability. Although the damages in classic forced-wealth-transfer cases do not equal the social costs of the transfers, the relatively limited and foreseeable character of the damages awarded is an important brake on overdeterrence and excess enforcement costs. This brake is lacking in many current cases in which courts are called upon to create private rights of action.

[453] Rather than deny rights of action, some courts have tried to mitigate this threat by imposing various restrictions on damage awards in an attempt to approximate social costs. *See, e.g.*, Redington v. Touche Ross & Co., 592 F.2d 617 (2d Cir. 1978), *rev'd*, 442 U.S. 560 (1979); Wilson v. First Houston Inv. Corp., 566 F.2d 1235 (5th Cir. 1978), *vacated*, 444 U.S. 959 (1979); Abrahamson v. Fleschner, 568 F.2d 862 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). But such restrictions are apt to be quite arbitrary. *See supra* note 452.

[454] *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Piper v. Chris-Craft Indus., 430 U.S. 1 (1977). Such suits are brought, not on behalf of those who have dealt with the defendants, but by investors who claim that their decisions to purchase or sell were prejudiced by market information or price signals that were distorted by the defendants' conduct.

[455] *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Piper v. Chris-Craft Indus., 430 U.S. 1 (1977).

[456] *See, e.g.*, Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

common law criteria for creation of private rights of action,[457] the Court has instead restricted private actions to statutes whose language singles out a class of statutory beneficiaries and explicitly confers on them a right to be free of specified conduct.[458] These restrictions have not been confined to cases involving diffuse social harms. In *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*,[459] for example, the Court denied a private right of action for damages under the securities laws to redress injuries caused by fiduciary self-dealing — a classic example of coerced wealth transfer that falls within the victim compensation hedge.

From the viewpoint of production, this overreaction is regrettable,[460] if understandable. On balance, however, the practical significance of the Court's new approach may be small, for it is increasingly difficult to satisfy even the traditional criteria when regulatory schemes become pervasive and must adjust to the dynamics of complicated economic and social systems. These conditions require statutory norms that allow considerable flexibility in regulating conduct; such norms are unlikely to satisfy even the traditional criteria for recognizing private rights of action, because they rarely create bipolar right-duty legal relations.[461] This is yet another example of the formal-functional dilemma, and of the limited capacity of courts to provide correctives for deficient administrative performance.

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[457] *See supra* pp. 1301–02.

[458] *See* California v. Sierra Club, 451 U.S. 287 (1981); Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Cannon v. University of Chicago, 441 U.S. 677 (1979). In *Cannon*, the Court stated that it would imply a private right of action under statutory language that "expressly identifies the class Congress intended to benefit" — language that "contrasts sharply with statutory language customarily found in criminal statutes . . . and other laws enacted for the protection of the general public." *Id.* at 690 (footnote omitted); *cf.* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (characterizing statutes that merely ban specified conduct as regulations intended to benefit the public at large); City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (same). The Court's new approach will, of course, lead to fewer implied rights of action.

[459] 444 U.S. 11 (1979).

[460] *See* Frankel, *supra* note 443.

[461] For example, automobile emissions standards are constantly readjusted in response to changing assessments of technology, cost, and other factors such as dependence on oil imports. *See* R. STEWART & J. KRIER, *supra* note 72, at 406–10. Similarly, the partial deregulation of broadcasting, including the loosening of restrictions on cable television, has proceeded by small, irregular steps. NATIONAL ASS'N OF BROADCASTERS, BROADCASTING AND GOVERNMENT: A REVIEW OF 1981 AND A PREVIEW OF 1982, at vii–xi, 1–11 (1982). To impose a dyadic right-duty structure of legal relations upon such enterprises would be procrustean.

As we have seen, the pervasiveness of regulation also undermined the entitlement justification for rights of defense.[462] When that justification became unworkable, the production conception remained, animating a technocratically oriented "hard look" approach to rights of defense. With private rights of action, courts have responded to the same problems very differently, adopting instead a formal version of the entitlement conception.[463]

This difference in the evolution of the two remedies reflects both the different identities of the litigants in the two types of cases and the institutional limitations of the courts. In right of defense cases, the preregulation market is presumed to operate productively; this presumption supports "hard look" review to limit the imposition of regulatory burdens. No comparable guide to the advancement of production is available when courts confront plaintiffs seeking enforcement of regulatory norms. Moreover, as we have seen,[464] courts lack the capacity to gather and analyze data that are needed to gauge the economic benefits of increased regulatory protection.[465] Courts are thus institutionally ill equipped to determine whether economic welfare would be improved by creating private rights of action in particular situations.

The Supreme Court and the lower federal courts have, however, continued to recognize private rights of action when litigants have challenged discrimination (against minority-group members,[466] women,[467] or the handicapped[468]), protested the failure to pay minimum wages or to provide ade-

[462] *See supra* pp. 1246–48, 1250–52.

[463] In two respects, the Supreme Court's formal, linguistic approach to private rights of action is inconsistent with a production rationale. First, in the context of prohibitions of spillovers and forced wealth transfers, damage actions may promote efficiency under a statutory tort approach even if the linguistic criteria are not satisfied. The Court has, however, denied private rights of action in such cases. *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615 (1981); Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979). Second, the courts have created private rights of action even when the applicable regulations are not designed to promote efficiency and when the additional enforcement generated by private rights of action may therefore be inefficient. *See* cases cited *infra* notes 466–70. Thus, although the use of formal criteria is compatible in many contexts with both a production and an entitlement approach to regulation, the production conception alone cannot explain the formal approach.

[464] *See supra* pp. 1275–78.

[465] *See supra* pp. 1276–77; note 452.

[466] *See* Allen v. State Bd. of Elections, 393 U.S. 544 (1969); NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979).

[467] *See* Cannon v. University of Chicago, 441 U.S. 677 (1979).

[468] *See* Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); United Handicapped Fed'n v. Andre, 558 F.2d 413

quate working conditions,[469] or sought to redress restriction of voting rights.[470] These decisions do not seek to enhance production, for they involve norms whose enforcement often does not promote efficiency; moreover, they present potentially severe problems of overinclusiveness and overdeterrence. The decisions instead reflect a conception of entitlement that still has a tenacious hold in the area of "personal rights."

D. Private Rights of Action Under an Entitlement Conception

In this Section, we first examine the parallels and differences between private rights of action under regulatory statutes on the one hand, and new-property hearing rights on the other. We then discuss the question of judicial authority to create private rights of action.

1. Parallels and Differences Between Private Rights of Action and New-Property Hearing Rights. — In the previous Section, we examined the obvious parallels (as well as the often significant differences) between common law remedies and private rights of action under regulatory statutes. The similarities between new-property hearing rights and private rights of action may be less obvious, but the two remedies are nonetheless closely allied. The new-property hearing right protects recipients of certain statutory benefits, such as welfare assistance, from arbitrary or discriminatory decisions by government officials to withhold those benefits. Private rights of action protect different statutory beneficiaries — those dependent upon enforcement of regulatory laws. We have seen how nondelegation, due process, and equal protection considerations account for judicial creation of new-property hearing rights.[471] The same considerations support creation of private rights of action to ensure that statutory entitlements to regulatory benefits are provided evenhandedly.

Like the new-property hearing right, the private right of action presents a formal-functional dilemma for courts attempting to determine what benefits should be protected. For reasons discussed in Part V, the courts have restricted new-property hearing rights to cases in which the relevant statute

(8th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

[469] Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969); Jenkins v. S & A Chaissan & Sons, Inc., 449 F. Supp. 216 (S.D.N.Y. 1978); Abraham v. Beatrice Foods Co., 418 F. Supp. 1384 (E.D. Wis. 1976); Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969).

[470] Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

[471] *See supra* pp. 1260–63.

formally confers individual entitlements to benefits. The Supreme Court has taken precisely the same route in the case of private rights of action. The justifications for a formal approach are essentially the same as those in the new-property context. In both situations, a formal approach relieves the courts of a difficult task; it also limits protection to situations in which the legislature has apparently concluded that a system of entitlements is administrable.

Despite these parallels, the Supreme Court, until its recent *Logan* decision,[472] had never explicitly accorded constitutional protection to regulatory entitlements. New-property entitlements, by contrast, have enjoyed such protection for some time. These differences in received doctrine may reflect two potentially important differences between the two sets of remedies. First, new-property entitlements are characterized, at least formally, by a bilateral relation between the government and a statutory beneficiary. By contrast, the regulatory context involves a trilateral structure of legal relations among the government, the regulatory beneficiary, and the regulated entity. In this trilateral structure, "state action" might be considered lacking when the government simply fails to undertake enforcement action.[473] Second, regulatory benefits, unlike new-property benefits, are frequently collective in nature.

To what extent do these differences explain the traditional failure to treat regulatory benefits as entitlements deserving of constitutional protection? To answer this question, we first examine the related issue of constitutional protection for common law entitlements.

2. Violation of Common Law Entitlements by Private Parties. — If a government official violates or threatens to violate certain common law rights, such as liberty of the person, due process entitles the affected individual to a remedy that will redress or prevent the violation.[474] There are two possible

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[472] Logan v. Zimmerman Brush Co., 50 U.S.L.W. 4247 (U.S. Feb. 24, 1982).

[473] The argument that we offer, *see infra* pp. 1308–11, depends on our conclusion that state action may be present when the government has failed to furnish protection against intrusion by third parties. Cases such as Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), indicate that the Court has sometimes been unwilling to accept such a broad approach. *But see* Logan v. Zimmerman Brush Co., 50 U.S.L.W. 4247 (U.S. Feb. 24, 1982); *cf.* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (not questioning presence of state action when state constitution protects rights of free speech on shopping center property and thus permits private parties to enter onto the property of other private parties).

[474] *See* Ingraham v. Wright, 430 U.S. 651 (1977); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972). Traditionally, the remedy provided was a right to damages against the government official. *See, e.g.*, Miller v. Horton,

theories for requiring due process safeguards in such a case. Under the first and narrower theory, the due process clause requires a hearing or other protection against legislatively unauthorized invasions by government officials of common law rights to "liberty" or "property."[475] Under a second and broader theory — which has support in both political history and judicial precedent — the government is in some circumstances required to redress one citizen's violation of another's common law rights, at least if the legislature has not authorized the violation.[476] Under this view, the government would, for example, be obliged to furnish some remedy if one person assaulted another. The commission of wrongs against

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provided was a right to damages against the government official. *See, e.g.*, Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891) (Holmes, J.). More recently, the standard required by due process was a pre-deprivation hearing of some sort. In the past few years, the doctrinal evolution has come full circle: the Supreme Court has held that a damage remedy against officials satisfies due process in some circumstances. *See* Parratt v. Taylor, 451 U.S. 527 (1981); Ingraham v. Wright, 430 U.S. 651 (1977).

[475] Authorization from the legislature is the ultimate "process due" for any governmental invasion of common law entitlements. When an isolated invasion occurs, the due process clause accordingly demands a reliable process for determining whether the particular invasion is among those authorized by a statute. Under this rationale, the legislature would have broad latitude to abolish or limit common law entitlements as long as it did so on some general basis. *See supra* pp. 1250–52.

[476] This second rationale is more consonant with the contractarian political theory out of which the Declaration of Independence and the Constitution emerged. The view that protection by the government is a constitutional right has been echoed frequently in constitutional history. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, Circuit Justice) (referring to "[p]rotection by the government" as a privilege or immunity under art. IV, § 2 of the Constitution); CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1865) (remarks of Rep. Bingham) (listing "the right to . . . be protected in life, liberty, and property" among rights protected by the 14th amendment).

The celebrated dialogue of Professor Hart, *see* Hart, *supra* note 226, might be read to support the narrower view — that the due process clause extends only to official and not to private deprivations of common law protected interests. But Professor Hart was concerned with a different distinction — the distinction between cases in which courts are called upon affirmatively to enforce government power, and cases in which officials act without use of the courts and citizens then seek to redress those acts. In Professor Hart's view, Congress can withdraw federal jurisdiction to consider the legality of the government's action in the second class of cases, but not in the first. *See* Hart, *supra* note 226, at 1374–79, 1386–87. Thus, Professor Hart cannot be taken to support the narrow view; he simply takes an entirely different approach to the problem.

But the availability of state court action as an alternative source of remedies — emphasized throughout Professor Hart's dialogue — is relevant to our discussion. That the state courts have generally been available to redress invasions by private citizens of the rights of others has meant that the question whether government has a constitutional obligation to provide such redress has rarely arisen. As a result, there is little judicial learning that helps to select between the broader and narrower views.

other citizens by individuals who happen to be government officials is simply a special case of government failure to protect common law "liberty" and "property" rights.[477] The common law is consistent with the broad theory; it has enabled a private citizen to protect his rights against fellow citizens — including government officials, who were generally liable on the same basis as were private persons unless they could show legislative authorization for their conduct.

Now suppose that it is a private third party who invades an individual's common law rights. If the third party can invoke a principle of self-help endorsed by the government, the third party is acting in an official capacity, for the state has delegated to him the power to enforce the law.[478] Even under the narrower theory, due process would require that the victim be afforded a hearing at which the third party, as a state actor, would be required to show legislative authorization for his action. This hearing would typically take the form of a common law action for damages by the victim. The victim might also have a due process claim against the government on the ground that the delegation of law enforcement authority to citizens makes the protection of entitlements intolerably uncertain and thus violates due process. The claim would be closely analogous to contentions in new-property cases that government procedures for the allocation of statutory benefits are not sufficiently reliable.

But suppose there is no rule or practice permitting self-help by citizens. The third party is then simply a naked lawbreaker, and under either theory the victim has no due process rights against him. But under the broader theory, the victim would have a due process claim against the government to furnish reasonably accurate procedures for the protection of entitlements against third parties. If the government failed to provide any protections at all for entitlements, it would violate its due process obligation to protect common law "liberty" and "property" interests.[479] If the government does protect some entitlements, but fails to protect others, it may violate equal

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[477] *Cf.* H. KELSEN, THE PURE THEORY OF LAW (1967) ("rights" are simply derivatives of statutory and administrative instructions to government officials that direct them to provide specified remedies in particular circumstances).

[478] *See* L. TRIBE, *supra* note 268, §§ 18-3 to -7 (1978).

[479] Governmental refusal to offer any protective mechanisms might be understood as the abolition of all entitlements rather than the mere refusal of a remedy. This view raises the substantive due process question of the legislature's authority to abolish common law entitlements. *See supra* pp. 1250–52.

protection as well as due process.[480] Such violations were found in *Logan*.[481]

Even if the government shut the doors of the courts to private civil business, and thus foreclosed private enforcement, it might meet its due process obligations by punishing or redressing violations of entitlements through criminal prosecutions or other forms of public enforcement. Under such a system, the due process clause might require a relatively strong right of initiation against prosecutors to ensure at least some reliability in the protection of entitlements. As we have seen, however, such a relatively strong right of initiation is undesirable to the extent that it relegates the allocation of scarce public resources to private litigants and judges.[482] For this reason, private civil actions, relator actions, and other privately initiated criminal prosecutions[483] can be understood as a system of private rights of action — a system that represents an alternative to initiation rights as a means of protecting common law entitlements.

3. Due Process Protection of Regulatory Benefits. — Regulatory programs, as we have seen, are often designed to provide more effective protection for common law entitlements. The previous Section analyzed the constitutional basis for requiring government to protect those entitlements. That analysis strongly suggests that counterpart interests in regulatory protection should enjoy similar constitutional safeguards and that courts should create private remedies when necessary to provide such protection.

At the very least, that analysis should dissolve the objection that regulatory entitlements cannot be recognized because they involve control of the conduct of third parties. The common law itself is inevitably a trilateral set of relations among rightholders, duty-bearers, and government. The existence of that trilateral relation has not inhibited the recognition of entitlements on the part of rightholders to government protection of their rights against defaulting duty-bearers. Private rights of action or initiation, both of which are designed to redress regulatory violations by regulated entities, simply engraft the trilateral structure of the common law onto a system of stat-

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[480] Individuals disfavored under such rules or practices could, like welfare claimants or discharged employees, challenge the procedures on the ground that they introduce the sort of unreliability and unchecked official discretion in the protection of entitlements that due process is designed to prevent.

[481] Logan v. Zimmerman Brush Co., 50 U.S.L.W. 4247 (U.S. Feb. 24, 1982).

[482] *See supra* pp. 1282–83.

[483] *See supra* pp. 1267–68.

utory lawmaking. Accordingly, due process protection for regulatory beneficiaries should not be denied simply because such protection will involve other private parties.[484] The Supreme Court thus erred in *O'Bannon v. Town Court Nursing Center*,[485] when it indicated that due process protections should rarely apply when the impact of a government decision on a person is "indirect" because it is a consequence of government action against third persons.[486] That error has been corrected (albeit without acknowledgment) by *Logan*.

The fact that regulatory benefits can be produced only by altering the conduct of third parties assumes greater significance, however, when linked with the fact that regulatory benefits are often collective. By contrast, common law and new-property remedies secure benefits that are predominantly private. Because the goals of regulatory policies are collective, it is often hard to show a close link between those policies and the welfare of a particular individual.[487] Moreover, private

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[484] Indeed, one might argue that new-property benefits are ultimately trilateral, because their financing is generally provided by taxpayers. The nature of the treasury as a common fisc, as well as the legal rules that have developed to exclude standing for taxpayers, has obscured this trilateral character.

[485] 447 U.S. 773 (1980).

[486] In *O'Bannon*, nursing home residents receiving Medicaid assistance claimed that they were entitled to a hearing before the home in which they resided was "decertified." The consequence of decertification was that the residents would be transferred to another home. According to the Court, the transfer was merely an "indirect" product of government action taken against and with respect to a third party — the nursing home. The Court offered no explanation for this conclusion, nor did it explain why the indirect nature of the impact was relevant to the due process question. In a significant footnote, the Court stated that it did not "hold that a person may never have a right to a hearing before his interests may be indirectly affected by government action." *Id.* at 789 n.22.

O'Bannon may have been correctly decided. The Court noted that "the Government is enforcing its regulations against the home for the benefit of the patients as a whole and the home itself has a strong financial incentive to contest its enforcement decision." *Id.* This more limited rationale provides a plausible basis for the *O'Bannon* result. As Justice Blackmun elaborated, the nursing home was apparently an effective functional representative of the interests of its residents, and an additional hearing for the residents might therefore have been unnecessary. *Id.* at 790–805 (Blackmun, J., concurring). A different analysis must be applied when the interests of the third party are totally different from those of the statutory beneficiary. Such a conflict occurs by definition in the context of private rights of action. *O'Bannon* is thus inapplicable in the ordinary context of regulatory benefits, as the Court recognized in Logan v. Zimmerman Brush Co., 50 U.S.L.W. 4247 (U.S. Feb. 24, 1982).

[487] In addition to providing benefits that are private rather than collective, statutes defining the terms under which welfare payments or employment is to be provided are frequently more specific than are regulatory statutes. *Cf.* Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974) (discussing the conditions under which greater specificity or greater generality of legal rules is the

rights of action might allow particular litigants to dictate regulatory policies that affect the welfare of many others, and thus to short-circuit collective processes for adjusting regulatory controls.[488]

But these difficulties can be minimized by limiting private rights of action to statutes that grant individuals formal entitlements to regulatory protection. The Supreme Court has followed such a course. Indeed, the logic of the common law and of the new-property hearing cases suggests that protection for such formal entitlements is constitutionally compelled.[489] Such protection could be afforded through either a right of initiation or a private right of action. As we have seen, however, protection of regulatory entitlements through initiation rights presents serious difficulties.[490] A private right of action against the regulated firm thus serves as an alternative means of securing due process protection for regulatory entitlements. By creating such rights, judges and court officials themselves carry out the government's obligation to protect such entitle-

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more efficient choice). Legislatures have faced stronger political incentives to adopt specific statutory controls in the welfare payment context, because such payments involve a conspicuous outlay of social resources, whereas regulation (at least until recently) has not. With developing awareness of the costs imposed by regulatory statutes, legislatures have drafted some of those statutes more specifically. *See* R. STEWART & J. KRIER, *supra* note 72, at 325–554.

[488] The distinction between regulatory benefits and new-property benefits should not be overdrawn. Even though benefits such as welfare payments or employment may be statutorily defined in individual and nominally formal terms, there are operational interdependencies among beneficiaries because of budget limitations and bureaucratic management of such resources on a "mass justice" basis. *See* J. Mashaw, *supra* note 185. Flexibility in adjusting such benefits in light of changing circumstances may be as important here as in the regulatory context. But because individual new-property benefits are more readily defined in formal terms than are collective regulatory benefits, courts will more frequently impose their own procedures to ensure that new-property benefits are provided.

[489] *See Logan*, 50 U.S.L.W. 4247. It is, however, more difficult to establish an individual entitlement to regulatory protection. *See supra* pp. 1271–75. For example, it would ordinarily be quite difficult for a plaintiff to prove that he would have benefited had officials undertaken certain regulatory initiatives. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 42–44 (1976). In the welfare assistance context, by contrast, the slip between official duty and private benefit is much easier to ascertain. Similarly, a regulated firm can readily show that it would benefit if regulatory controls were not enforced against it.

[490] To the extent that a court perceives "capture" of a regulatory agency by regulated or client entities, it may be willing to infer a strongly responsive right of initiation to protect a beneficiary interest. The situation is analogous to a conspiracy between a government official and a private individual to violate common law entitlements. Such a perception may explain decisions like Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam), and Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

ments, rather than derivatively enforcing them against administrative officials.[491]

Despite this logic, courts creating private rights of action have not based their decisions on the due process clause. There are two basic explanations for this phenomenon. First, statutory entitlements to regulatory protection are constitutionally protected in only three limited situations. One instance, exemplified by *Logan*, is that presented when a statute creates a formal entitlement by specifically granting an individual a right to a particular form of regulatory protection.[492] But statutes that grant such entitlements are quite rare.[493] Certain common law rights, such as the interest in bodily integrity, are also constitutionally entitled to government protection.[494] If common law remedies for protection of such interests were totally preempted by a regulatory scheme, some kind of private remedy — such as a private right of action — might be required in order to ensure the protection of those rights.[495] But such preemption occurs infrequently.[496] Finally, some interests protected by regulatory norms — such as the right to be free from racial discrimination — are today accepted as so important functionally that they are also entitled to constitutional protection.[497] But few other interests have achieved that status.

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[491] Note that the distinction between rights of initiation and rights of action vanishes at common law because the two coalesce into one action. The private lawsuit is both the assertion by the plaintiff of an entitlement against the defendant (a private right of action) and the assertion against government officials — the judges — of a right of initiation. But we are understandably disposed to view the primary responsibility for enforcing a regulatory entitlement as resting with administrative officials and not with judges. Under this view, the right of initiation properly consists of a hearing at which an administrative agency is requested to protect the asserted entitlement, followed by judicial review if the agency fails to do so.

[492] *Logan*, 50 U.S.L.W. at 4249–51. However, a substantial showing that legitimate state interests are secured by the failure to provide procedural protection will be sufficient to justify denial of a remedy if the interest at stake does not receive protection under a functional approach. *See id.* at 4251; *supra* p. 1265.

[493] Indeed, the statute at issue in *Logan* was amended to eliminate the entitlement almost immediately after commencement of the lawsuit. *See* 50 U.S.L.W. at 4248 n.1.; *supra* note 395.

[494] *See* Ingraham v. Wright, 430 U.S. 651, 673–74 (1977).

[495] Professor Hart pointed to this conclusion in his famous dialogue. Hart, *supra* note 226, at 1384–85.

[496] For an example of such preemption, albeit one in which an adequate quid pro quo was provided, see Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978).

[497] Although the decisions creating private rights of action to redress discrimination technically turn on statutory interpretation and are not couched in constitutional terms, their rhetoric makes clear that they are acting in response to a norm of great power. *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); cases cited

The second reason that courts have not resorted to due process reasoning in right of action cases is that other remedies are usually available.[498] As we have noted, common law remedies are typically not preempted. Invoking the entitlement conception, federal courts may create private rights of action as a matter of federal common law. State courts can also use their own common law power to create rights of action. Furthermore, statutes often provide remedies for their own enforcement. Finally, a private right of initiation may be available.[499] Only if the legislature ruled out all such remedies would courts be required to face the constitutional issue, and such preclusion is extremely rare.[500]

Like the other remedies we have examined, private rights of action are a partial and imperfect remedy for defective administrative performance. The remedy is limited to violations of statutorily defined entitlements and may therefore fail to protect important private interests; the remedy creates a danger that legislative and administrative management of regulatory programs will be disrupted by the initiatives of judges and private litigants; and the remedy depends on private resources for financing. Nonetheless, private rights of action represent a justifiable effort by courts to draw upon the entitlement conception in order to carry forward their traditional responsibility of safeguarding individual security and private ordering.

4. Conclusion. — There are significant parallels between judicial protection of statutory beneficiaries through new-prop-

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supra notes 466–67; *cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (Civil Rights Act of 1866 bars private as well as public racial discrimination in the sale or rental of property).

[498] A further reason that courts have not invoked due process may be that private rights of action do not fit the contemporary picture of a due process remedy — an administrative hearing with judicial review. As the Court has recently recognized, however, damage remedies are alternative means of satisfying due process requirements. *See* Parratt v. Taylor, 451 U.S. 527 (1981); Ingraham v. Wright, 430 U.S. 651 (1977). These decisions may focus attention on the constitutionality of doctrines of official immunity that preclude damage remedies for official harms when no adequate alternative remedy is available. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); Barr v. Matteo, 360 U.S. 564 (1959).

[499] The private right of initiation is typically weak when statutory norms are weak or conflicting, but in such cases the criteria of entitlement are unlikely to be met. When the formal or functional criteria of entitlement are fully met, a relatively strong right of initiation would be required to satisfy due process. Courts may, however, be reluctant to grant such a right for fear of disrupting an agency's management of limited enforcement resources. In such cases, creation of a private right of action may be preferable. *Cf.* Cannon v. University of Chicago, 441 U.S. 677 (1979) (upholding private right of action).

[500] *See supra* note 496.

erty hearing rights and protection through private rights of action. In both contexts, the entitlement conception accounts for judicial intervention into the administrative process. Moreover, the Supreme Court has relied in both situations primarily on a formal test that makes the availability of judicial protection turn on whether Congress has imposed constraints on agency discretion to define and distribute the benefit in question.

Like all the administrative remedies considered in this Article, the right of action exhibits a two-tiered structure. Judicial creation of private rights of action should ordinarily be understood as a justifiable exercise of federal common law. The entitlement conception and associated due process considerations serve to justify judicial creation of private rights of action when regulatory statutes grant common-law-like protection to an identifiable beneficiary class and the legislature has not expressly precluded private rights of action. In a few instances, however, the beneficiary interest — a formal entitlement to regulatory protection, a "core" common law interest, or a widely accepted functional entitlement — will be sufficiently powerful to require that a right of action or initiation be provided as a matter of due process.

VIII. CONCLUSION

In this Article, we have sought to remove some of the doctrinal and conceptual partitions that have traditionally separated the four remedies for deficient administrative performance: private rights of initiation, private rights of action, rights of defense, and new-property hearing rights. With the ground thus cleared, we are able to begin an assessment of the remedies in relation to three questions: (1) whether courts have the authority to create such remedies; (2) why such remedies have had different histories and doctrinal foundations, and why they have each been associated with a particular conception of institutional purpose; and (3) whether and in what circumstances such remedies will improve administrative performance.

In evaluating the authority of courts to order these four remedies, we have been confronted with a puzzle. The remedies are quite similar: each is a means of correcting faulty agency decisions. Yet while two of these remedies — rights of defense and new-property hearing rights — have been created by the courts with only an occasional ripple of criticism, the other two have been sharply attacked as usurpations of legislative authority. We believe that this difference in reac-

tion is more the product of historical accident than of thoughtful analysis and that the four remedies must stand or fall together on the basic question of judicial authority. Each should be seen as a response to the displacement of common law ordering by administrative regimes. Each represents part of a judicial effort to maintain, in an administrative era, aspects of traditional arrangements of public and private law.

The formalist thesis would forbid such remedial creativity. Although that thesis suffers from fatal logical and operational infirmities, it is grounded in powerful separation-of-powers concerns: because it is for Congress to determine the substance of administrative programs and because questions of implementation are inseparable from those of substance, Congress should enjoy broad authority over implementation. That authority is improperly invaded when a court responds to a statutory violation by creating remedies not provided in the statute itself. Courts thus have no power to intervene in order to promote production, to protect what the courts regard as entitlements, or to overrule congressional decisions concerning values that the public ostensibly supports. When litigants challenge state administrative programs, considerations of federalism dictate a similar conclusion.

These arguments have been most forcefully directed against private rights of action, but all four of the remedies are vulnerable. In our view, the four remedies are nonetheless valid forms of judicial lawmaking. When Congress is simply silent on the question of remedies for defective administrative performance, that silence cannot automatically be read to negate judicial authority to create such remedies. Silence is inarticulate in the absence of background understandings that give it meaning. The conceptions that we have identified — entitlement, production, and public values — provide that meaning by helping courts to determine when it is appropriate to create private remedies and by providing the background understandings that justify judicial creation of remedies in the absence of express textual warrant. The threads that connect electoral representation and administrative decisions are too slender to support the separation-of-powers objections to such a judicial role.

Each remedy represents a reaction to the displacement of traditional public and private law by administrative regimes. Accordingly, each seeks to harmonize traditional norms with new institutions. The right of defense protects the system of private exchange and production from ill-considered government controls and simultaneously disciplines the exercise of administrative discretion. The new-property hearing right

maintains, in a welfare state, a measure of the economic and personal security afforded in an earlier era by private law entitlements. The private right of action seeks to furnish similar security in the context of regulatory programs. Finally, in order to promote bureaucratic fidelity to the public values embodied in regulatory programs, the private right of initiation provides citizens with a partial substitute for the traditional system of electoral representation.

This process of judicial lawmaking cannot be validated by any single knockdown proof. Its justification rests on an amalgam of concerns, including the desirability of enforcing statutory limits on official discretion, the need for judicial checks in a system of separated powers, and the importance of personal security. These factors, which are the classic underpinnings of the Rule of Law, are constitutionally recognized in the due process clauses of the fifth and fourteenth amendments. We have explored this amalgam of factors most fully in the context of new-property hearing rights. The same factors, however, have for three hundred years supported the presumption of review upon which the right of defense was built, and have also justified the creation of private rights of action through traditional judicial practices. With a suitable adjustment of emphasis, the same considerations support the more recent development of initiation rights.

On the other hand, the case for judicial creation of beneficiary remedies is weakened by the absence of any definitive constitutional basis for such remedies and the plenary power of Congress over the substance of administrative programs. These considerations suggest that the four remedies are not constitutionally mandated, except in those rare cases involving interests — like bodily integrity, subsistence, or freedom from discrimination — on whose importance there is deep social consensus, or in cases in which the legislature has explicitly created formal entitlements to statutory benefits or immunities. Under this two-tiered structure, most of the cases in which courts create remedies for deficient administrative performance represent federal common law that Congress may displace.[501]

To some, this structure will appear an unduly fragile status for judicial safeguards of private security and public accountability. The conclusion that the four remedies are not ordinarily compelled by the Constitution must, however, be qual-

[501] The tunnel vision that is built into each of the remedies is itself a reason not to conclude that the four remedies are constitutionally required. Each remedy has a valuable core of insight into institutional purpose, but in an administrative state none can ordinarily be considered indispensable.

ified with the expectation that legislatures will not arbitrarily bar such remedies. The historic elements of due process of law that were created by English courts have always been vulnerable to the overarching power of Parliament.[502] Not every judicial norm must be constitutionalized in order to have enduring moral power.

Moreover, enthusiasm for judicial remedies must be tempered by an acknowledgment of their considerable limitations. As we have emphasized, courts apprehend and implement only a few of the various possible conceptions of institutional purpose. Because of the formal-functional dilemma and the difficulties faced by the courts in assessing complex regulatory programs, the scope of judicial remedies must be limited in order to avoid serious disruptions. Congress and the President should therefore be encouraged to develop nonjudicial methods for controlling administrative authority. The four remedies have seen much service because the courts have responded to those dissatisfied with the performance of particular agencies. By contrast, Congress and the executive have on the whole shown relatively little interest in administrative performance or in ways of improving it, even though the goals of the judge-made remedies might in many instances be better served by other means that only Congress or the President can devise.[503]

In addition to examining the question of judicial authority to create the four remedies, we have discussed why these remedies have had such distinct doctrinal structures and fields of application. We have shown how each of the four different administrative law "forms of action" has developed and how each has joined a particular party structure, a particular administative function, and a particular conception of institutional purpose.

Under the traditional model of administrative law, the right of defense was founded on a system of private common law rights against which regulatory controls could be measured and checked. The right of defense was thus based on an entitlement conception, although its application might also ad-

[502] *But see* M. SHAPIRO, COURTS, ch. 3 (1980) (in Britain, administrative functions are substantially insulated from judicial review).

[503] For example, reliance on an external system of judicial review through an adversary process may serve production less well than a system of agency decision that relies on negotiations or expert consensus, internal administrative review by economists and policy analysts, or basic changes in regulatory tools. *See* B. ACKERMAN, S. ROSE-ACKERMAN, J. SAWYER & D. HENDERSON, THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY 147–61 (1974); Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1259 (1981); Sunstein, *supra* note 53. Congress and the President can provide and enforce such remedies; the courts ordinarily cannot.

vance production by limiting the extent of governmental intervention. When regulatory controls became pervasive and deep, however, the entitlements defined by the common law could no longer function as standards by which to judge particular regulatory actions. Judicial review invoked by regulated firms has therefore turned to questions of technological and economic feasibility. Despite various forms of market failure, preservation of private market ordering is presumed to favor production. The result has been the emergence of production as the dominant conception supporting the "hard look" right of defense.

In the case of the private right of initiation, the regulatory enterprise is understood to involve choice among, and reconciliation of, competing public values, with the ultimate decision normally resting with the agency. The initiation right is justified as a means of assuring that all such values are considered in the regulatory process. In light of competing claims on scarce agency resources, the necessity of flexibility in regulatory policy, and the difficulties faced by courts in determining the economic benefits of greater regulatory protection, neither the conception of entitlement nor that of production provides a feasible basis for initiation rights. The public values conception is thus the principal foundation for rights of initiation.

Judicial creation of private rights of action has been based on an entitlement conception. The context requires courts to resolve controversies without the aid of a prior agency decision. This fact, together with the formal-functional dilemma, has led the courts to limit the availability of private rights of action to cases in which the regulatory statute creates a right-duty relation analogous to that created by common law entitlements. Such a limitation ensures that the benefit sought will be individualized and capable of judicial assessment. Private lawsuits are a poor forum for reconciling the various social norms involved in regulatory programs. The production conception also fits many private rights of action poorly: under most modern regulatory schemes, it is difficult for courts to know whether creation of a particular private right of action will promote economic welfare.

Analogous reasoning rules out a production or public values foundation for new-property hearing rights, which have also been based on an entitlement conception. Because of the formal-functional dilemma, new-property hearing rights have generally been recognized only when the claimed benefits are individual in character and when formal criteria of entitlement

are met. The procedural safeguards of hearing and review are used to ensure that the government honors these entitlements.

While recognizing the limitations of courts and of the forms of action that they create, we conclude that courts have authority to create rights of action and rights of initiation. These remedies should, we believe, stand with rights of defense and new-property hearing rights as legitimate and useful correctives for deficient administrative performance.

The presumption in favor of review of administrative decisions should be extended to beneficiaries as well as to regulated entities, an extension that is achieved by countering rights of defense with rights of initiation. Unless direct private enforcement is clearly a preferable remedy, courts should generally recognize weakly responsive private rights of initiation. On occasion, however, courts may be justified in viewing a relevant public value — such as the government's responsibility to eliminate racial discrimination in federally supported activities — as an overriding norm that compels enforcement action through a strongly responsive initiation right.

Judicial creation of private rights of action is an alternative method of protecting statutory interests. When the regulatory statute creates a right-duty relation similar to those established by the common law, courts may ordinarily provide private remedies without exceeding their competence, subverting legislative control of regulatory policy, or contradicting any of the reasons for the creation of an administrative enforcement system. The common law analogy will not, however, support private rights of action when a statutory norm is vague or ambiguous, delegates broad managerial authority, or presents a context in which coordination and consistency in regulatory policy is important. A private right of initiation is more appropriate in such circumstances,[504] which will be common in the modern regulatory setting.

We have explained that, without background understandings of institutional purpose, it is impossible to give content to legislative silence on remedies or to determine in which circumstances particular remedies are appropriate. The three conceptions of institutional purpose that we have identified are

[504] A private right of initiation is also likely to be preferable to a right of action in cases in which the courts are asked to provide systemic injunctive relief to restructure existing institutions. For example, in Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981), the plaintiff unsuccessfully asserted a private right of action against a state mental health facility in an attempt to enforce statutory conditions on federal financial assistance. An initiation right against the federal officials would have been the preferable remedy.

a means of liberating courts from the formalist thesis. Such conceptions justify the judicial creation of remedies for defective administrative performance and, at the same time, guide the process of judicial lawmaking by demarcating the larger purposes that these remedies can serve.

But the conceptions are a form of bondage as well. Grounded in eighteenth century principles of public and private law, they generate remedial regimes that are narrow and often dysfunctional in an industrially developed polyarchy administered by bureaucracies. The traditional notions of private and public law on which the three conceptions are bottomed are not fully compatible with the administrative process. The four paradigm remedies are thus partial and perhaps anachronistic approaches to inadequate agency performance. In this sense, the four remedies suffer from shortcomings similar to those presented by the common law forms of action in the nineteenth century.

May it be possible to clear the ground and to develop a single cause of action to remedy deficient administrative performance? If so, what form would that cause of action take? Could it provide the foundation of a distinctive administrative jurisprudence that would create a distinct realm for administrative agencies between the traditional poles of private and public law? Could such a jurisprudence develop background understandings of institutional purpose that were not borrowed from traditional public and private law?

These questions we simply note, leaving to another day the attempt to answer them. The hope of an affirmative answer must, however, be tempered by two suspicions. The first is that there is truly nothing new under our sun; perhaps we can only recycle the original conceptions of private and public law upon which our republic was founded and continues to endure. The second is that the effort to collect every administrative function of modern government under a single overarching conception may simply be a Realist mistake. If we strip away our traditional conceptions and remedial doctrines, we may be left with a mass of discrete and disparate administrative activities, forfeiting the capacity to order them through law.