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The Structural Role of Private Enforcement Mechanisms in Public Law

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THE STRUCTURAL ROLE OF PRIVATE ENFORCEMENT MECHANISMS IN PUBLIC LAW

J. MARIA GLOVER*

ABSTRACT

The American regulatory system is unique in that it expressly relies on a diffuse set of regulators, including private parties, rather than on a centralized bureaucracy for the effectuation of its substantive aims. In contrast with more traditional conceptions of private enforcement as an ad hoc supplement to public law, this Article argues that private regulation through litigation is integral to the structure of the modern administrative state. Private litigation and the mechanisms that enable it are not merely add-ons to our regulatory regime, much less are they fundamentally at odds with it.

Yet, mechanisms of enforcement attendant to private suits are being restricted in numerous ways, and on numerous fronts, in the form of prohibitions on the use of the class action device, the recalibration of procedural mechanisms through private contract to discourage suit, the heightening of pleading standards, and the pre-emption of state law causes of action, just to name a few. Although in some instances these restrictions may provide necessary correctives to the system of private litigation in particular and to the functioning of overall regulatory schemes more generally, in their broad-sweeping

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forms, they threaten to systematically undermine substantive regulatory law. Yet the larger regulatory consequences of these efforts receive inadequate attention.

This Article thus offers a more systemic view of these private enforcement mechanisms by providing elements of a conceptual framework for tailoring mechanisms of private enforcement to the contours of particular regulatory regimes. This framework seeks to effectuate and extend the systemic interests in aligning private enforcement mechanisms with the regulatory goals of particular areas of substantive law. At the same time, it seeks to balance the value of such mechanisms with concerns that they will, in some substantive regimes, generate undesired regulatory consequences. Indeed, this framework highlights the need, in some instances, for limitations on the use of private enforcement mechanisms, as well as the need, in other circumstances, for the creation of new mechanisms that are more carefully calibrated to address potential pathologies. This framework is therefore preferable to one-size-fits-all, abstract approaches to a number of seemingly disparate debates regarding restrictions on private enforcement mechanisms across our legal landscape. By offering sounder analysis of, and adding conceptual clarity to, various debates about these mechanisms, this framework offers the hope of eventual resolution of these seemingly intractable disputes. This framework also seeks to provide guidance to judges, agencies, and legislatures in the task of tailoring mechanisms of private enforcement to achieve public regulatory objectives.

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INTRODUCTION

Americans have a love-hate relationship with private enforcement of their laws. On the one hand, our system often relies heavily and explicitly on enforcement by private parties to achieve public regulatory objectives. Whereas European nations regulate the conduct of their citizens largely using ex ante regulations promulgated by a centralized bureaucracy,¹ we frequently rely on ex post law enforcement, much of which results from private suits rather than from governmental actions.²

At the same time, Americans have a great distrust of private regulation in general and of private litigation in particular. Various scholars and practitioners criticize its excesses and inefficiencies.³ Courts, Congress, private parties, and administrative agencies seek to limit private enforcement's role and prevent its abuses.⁴

1. See *infra* text accompanying note 382.

2. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 9 (2001) (describing the "American way of law" as a system that emphasizes litigant participation and activism). A number of legal scholars believe that this system of ex post private enforcement is in many ways for the good. See, e.g., Gillian K. Hadfield, *Don't Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Democracies*, 56 DEPAUL L. REV. 401, 401, 405 (2007); Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377 (2007) (arguing that ex post regulation yields substantial economic benefits because it dramatically lowers impediments to market entry); William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 710 (2006).

3. See, e.g., Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1990 (1992) (arguing that America needs to reorient its civil justice system to better allocate expenditures to victim compensation); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2176 (2010) (arguing that securities litigation is often ineffective at deterring securities fraud); John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 261-62 (2007) (noting that the plaintiffs' bar is typically free of market controls when pursuing tort claims).

4. See, e.g., Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 247-48 (2007) (noting that administrative agencies try to limit lawsuits by issuing broad preemptive statements in their preambles). And just two years ago, the Supreme Court expanded the power of private contracts to restrict the availability of the class action. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010) (holding that parties must specifically contract for the class action device in arbitration). Congress also limits the scope of citizen suits in, for instance, environmental laws. See, e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62-

Especially in the current political environment, measures to curtail the mechanisms for pursuing existing private rights of action are widespread, sweep broadly, and emanate from a number of fronts. These include, for instance, legislative and judicial reform of the mechanisms for vindicating state tort law claims, limitations on the use of the class action device, the robust enforcement of contractual provisions through which defendants eliminate or discourage private lawsuits, the imposition of a heightened pleading standard for all cases brought in federal court, and increased federal preemption of state law claims.⁵

This Article argues that this intense focus on the pathologies of private enforcement mechanisms in isolation tends to discount across the board the structural role these mechanisms play within regulatory regimes in the American system.⁶ Regulation of wrongdoing by private parties is not merely an ad hoc, “private law” supplement to public enforcement by regulators.⁷ It is often an institutional feature of our public law⁸—one whose contours need to be better understood and rationalized, and one whose enabling mechanisms ought to be appropriately tailored to the achievement of public regulatory objectives. The goal of this Article is to analyze as a conceptual matter the structural role that private parties, as litigant regulators through various mechanisms of enforcement, play across a number of substantive areas, and to examine the

64, 67 (1987) (holding that the Clean Water Act provided no jurisdiction for citizens to seek penalties for past violations); *see also infra* notes 124-41 and accompanying text (discussing private parties’ attempts to limit private litigation through contractual provisions prohibiting the use of class actions).

5. *See infra* Part II.

6. To be clear, when I refer in this Article to private enforcement mechanisms, I refer principally to those mechanisms attendant to private rights of action as opposed to other types of private enforcement mechanisms that exist outside the context of private suits. For a review of several nonlitigation enforcement mechanisms in environmental law, see David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens’ Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1, 6, 35-36 (2008).

7. Evaluating private enforcement as a structural feature of the American regulatory state has only quite recently begun to develop in political science literature, and little of this has penetrated the legal academy. This Article systematically aligns its structural approach to private enforcement mechanisms with that emerging in the social sciences literature, which contends that intrabranch conflicts encourage Congress to effectuate its aims through private lawsuits. *See, e.g.*, SEAN FARHANG, *THE LITIGATION STATE* 4-5 (2010).

8. *See infra* Part I.A.

implications of that role both for particular issues before the courts and for the regulatory state more generally.⁹

Legal scholars have observed that private litigation serves as a complement—often a crucial one—to public enforcement of various laws,¹⁰ and that restrictions of the mechanisms that make such litigation possible may, as a general matter, lead to undesirable consequences for the vindication of substantive rights or the deterrence of socially undesirable conduct.¹¹ Indeed, our system of regulation is only as good as the enforcement mechanisms underlying it.¹² A systematic effort to rationalize the role of private enforcement

9. Administrative law scholars have begun to explore the implications of congressional reliance on the judicial system to enforce given regulatory regimes. *See, e.g.*, Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 372-73 (2010); Matthew C. Stephenson, *The Legislative Choice Between Agencies and Courts: A Response to Farber and Vermeule*, 119 HARV. L. REV. F. 183, 183-84 (2006). The focus on courts and judges necessarily directs scholars to grapple with questions regarding the extent and consequences of judges' policy-making authority. *See, e.g.*, Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2087 (1990) (“[Statutory interpretation] calls for an inquiry into questions of both policy and principle.”).

10. *See, e.g.*, Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1088 (2007); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 409 (2008) (arguing that private enforcement is necessary for some statutes “because the threat that federal funds will be withheld is remote at best”); Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 137 (2001) (noting private litigation can “supplement regulatory enforcement by administrative agencies that are underfunded, susceptible to capture ... or politically constrained”); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1213-16 (1982); Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 860-62 (2003) (highlighting public and private enforcement mechanisms in securities law).

11. *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 378 (2005) (arguing that class action waivers prevent deterrence of wrongdoing); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185 (noting the Court’s trend of leaving a formal private right of action in place, but “constrict[ing] the remedial machinery,” thus “dilut[ing] the value of the right” and potentially signaling to wrongdoers that “they can infringe the right with impunity”); Jean R. Sternlight, *No: Permitting Companies to Skirt Class Actions Through Mandatory Arbitration Would Be Dangerous and Unwise*, DISP. RESOL. MAG., Spring 2002, at 13, 19-20 (arguing that class action waivers prevent deterrence of wrongdoing); J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1764 (2006) (arguing that a normative concern raised by class action waivers is their ability to prevent the vindication of substantive rights).

12. *See, e.g.*, Samuel Issacharoff & Ian Samuel, *The Institutional Dimension of Consumer*

mechanisms and to present a conceptual framework for tailoring such mechanisms to the needs of particular regulatory regimes is needed. This Article takes initial steps in this direction by offering a more systematic account of private regulation's role in the American regulatory system and by presenting elements of a conceptual framework for evaluating the extent to which the preservation or modification of existing private enforcement mechanisms, or the design of new mechanisms, may or may not be needed within a specific regulatory scheme.

By offering a more unified view of the structural role of private enforcement mechanisms within our regulatory system, this Article reveals that a number of seemingly disparate doctrinal and scholarly debates regarding restrictions on the use of private enforcement mechanisms are in fact dimensions of a common problem: the degree to which carefully tailored mechanisms will better effectuate overall regulatory objectives and ensure meaningful regulation of conduct deemed wrongful by appropriate lawmaking bodies.¹³ The tendency has been to evaluate these debates in isolation from one another and without attention to the structural role that these mechanisms play in a particular regulatory framework. The essential goal of tailoring private enforcement mechanisms to the specific exigencies of particular areas of law in order to enable private regulation to better serve the structural role it has been given in the American regulatory state is often lost from sight.¹⁴

This Article proceeds in three parts. Part I traces the historical origins of the United States' diffuse system of regulation and the role private-party litigants play as regulators in that system. It also explores the American regulatory system's functional dependence on private regulation and the mechanisms that enable it. As Part II explains, however, the country is flooded with efforts to curtail these

Protection, in *NEW FRONTIERS OF CONSUMER PROTECTION* 47, 49 (Fabrizio Cafaggi & Hans-W. Micklitz eds., 2009) (noting that regulation cannot spring into being without the support of institutional commitments).

13. *See infra* Part III.

14. To be sure, a system of diffuse regulation heavily dependent on private enforcement for the achievement of its substantive goals is not the only system that the United States could have adopted. It is not the aim of this Article to advocate for the superiority or inferiority of such a system. Rather, the goal here is to better integrate and design mechanisms of private enforcement within the diffuse regulatory structure that exists today.

mechanisms of enforcement. Although such efforts, in many circumstances, may provide necessary correctives to the litigation system, they may pose serious problems in other contexts when they threaten to undermine the achievement of regulatory objectives.

Two vital implications of private ex post enforcement mechanisms' role in our regulatory structure are, first, the need to identify the circumstances in which such mechanisms are more or less important to the functioning of a given regulatory scheme and, second, the need to design and calibrate appropriate mechanisms to facilitate that enforcement. Part III provides elements of a conceptual framework both for evaluating the importance of and for designing appropriate private enforcement mechanisms within a given regulatory scheme.

In particular, this Part provides four operational criteria that seek to better guide courts, legislatures, and administrative agencies in tailoring mechanisms of private enforcement to the particular exigencies of the regulatory scheme and the potential private-party regulator. First, all things being equal, enforcement mechanisms should be entrusted to, and tailored to the needs of, the regulator with superior information relevant to potential wrongdoing under a given regulatory scheme.¹⁵ Second, private enforcement mechanisms should be integrated with other regulatory efforts when necessary to effectuate the complete range of remedies provided in a given scheme, but tailored appropriately so as not to generate over-remediation.¹⁶ Third, evaluation and design of private enforcement mechanisms, and particularly analysis of such mechanisms under preemption doctrines, should explicitly account for the potential importance of these ex post mechanisms to a regime's comprehensive regulation of harm that is difficult to prevent ex ante, while also paying careful heed to the extent to which private enforcement may disrupt national uniformity of regulation.¹⁷ Fourth and finally, even for regulatory regimes in which a public regulatory body possesses informational advantages relative to private parties, and even for those in which the relevant public regulatory scheme technically provides for complete and comprehensive regulation of

15. *See infra* Part III.A.

16. *See infra* Part III.B.

17. *See infra* Part III.C.

wrongdoing absent private regulation, to the extent regulatory experience indicates a pattern of underenforcement by the public regulatory body, appropriate enforcement mechanisms should be allocated to private parties to ensure the proper achievement of regulatory goals.¹⁸

Although these criteria are not exhaustive, collectively they present a more unified approach to the design of private enforcement mechanisms better tailored to the exigencies of particular regulatory regimes. This framework is offered in place of existing, ad hoc approaches to various debates regarding the curtailment of private enforcement.¹⁹ This approach, I argue, is commended by a rigorous analysis of the need for better integration of private enforcement mechanisms into the American regulatory state.

I. THE AMERICAN SYSTEM OF DIFFUSE REGULATION: PRIVATE LITIGANTS AS REGULATORS

Legal scholars and political scientists alike have long recognized that the American approach to regulation is unique. With some notable exceptions—for instance, Food and Drug Administration (FDA) approval for pharmaceuticals and other biologics and licensing or permitting requirements under various environmental regulations²⁰—the predominant approach to regulation in the United States is *ex post* rather than *ex ante*.²¹ In other words, we often regulate by imposing consequences on those who violate substantive law *after* the resulting harms have occurred. Our regulatory system tends not to require individuals or entities to comply with detailed regulatory schemes *before* acting.²² As one scholar

18. See *infra* Part III.D.

19. See *supra* notes 9-12.

20. See, e.g., Decision in *Wash. Legal Found'n v. Henney*, 65 Fed. Reg. 14,286, 14,286 (Mar. 16, 2000); Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1330 (1999).

21. Issacharoff, *supra* note 2, at 377-78.

22. As a descriptive matter, it is uncontroversial that the United States regulatory regime relies largely on *ex post* regulation. See, e.g., KAGAN, *supra* note 2, at 16 (“[I]n the United States lawyers, legal rights, judges, and lawsuits are the functional equivalent of the large central bureaucracies that dominate governance in high-tax, activist welfare states.”); Issacharoff, *supra* note 2, at 377. As a normative matter, scholars have long debated the tradeoffs between *ex ante* versus *ex post* regulation in general and the reliance on private civil

put it, the United States generally regulates “consequences,” not “[market] entry.”²³

The American approach to regulation is also extraordinary in that it entrusts ex post law enforcement not to a centralized state bureaucracy but rather to a diffuse set of regulators. The United States harnesses private citizens, public regulatory bodies, nongovernmental organizations, and private market agents to regulate social harm.²⁴ Within that diffuse enforcement system, the primacy of private enforcement through litigation is partly a consequence of America’s earliest regulatory design, which relied largely on common law for the imposition of liability.²⁵ More recently, private enforcement has been a consequence of deliberate statutory design and, further, of functional limitations of public regulatory bodies’ ability to achieve regulatory objectives.²⁶ This Part traces the historical roots of the private parties’ structural role in the American system of ex post regulation and then discusses the functional need for enforcement by private parties to ensure reliable regulation of wrongdoing.²⁷

A. A Brief History of the Role of Private Enforcement in the American Regulatory State

The unique regulatory regime in the United States, with its pronounced reliance on private enforcement through litigation, was

litigation in particular. *See, e.g.*, Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2075-78 (2002) (cataloguing critiques of the civil justice system’s costs); Jules Stuyck, *Public and Private Enforcement in Consumer Protection: General Comparison EU-USA*, in NEW FRONTIERS OF CONSUMER PROTECTION, *supra* note 12, at 63, 77 (noting that private enforcement may be less preferable to public enforcement because of problems of “accountability, legitimacy and transparency, frivolous action and over deterrence”). This Article does not seek to revisit these debates; rather, it seeks to provide a framework for evaluating mechanisms of enforcement within our existing regulatory system.

23. Issacharoff, *supra* note 2, at 377.

24. *See* KAGAN, *supra* note 2, at 29.

25. *See infra* text accompanying note 30.

26. *See supra* text accompanying notes 31-33.

27. It is difficult, if not impossible, to isolate with precision optimal levels of enforcement. Entire schools of scholarship have attempted to do so, with no one account fully satisfying all. One can safely suppose, however, that zero or near-zero levels of enforcement are not optimal and that reliable enforcement is a good minimum target. That said, in achieving that target, we should seek to avoid undesirable regulatory consequences. *See infra* Part III.B.

by no means inevitable. As a theoretical matter, ex post regulation could be conducted by governmental bodies; indeed, that is the framework in which criminal law operates. That said, the primacy of ex post private enforcement in the American regulatory system is not terribly surprising; it is in large part an outgrowth of America's inherited regulatory design, which relied largely on private suits brought pursuant to common law doctrines, as opposed to ex ante public regulation of wrongdoing by governmental bodies.²⁸

At the turn of the twentieth century, and partly in response to industrial modernization and the nationalization of various types of harms, Congress began to enact a number of laws that relied increasingly on public governmental bodies for their enforcement. During the height of America's gravitation toward centralized regulation in the New Deal Era, Congress generally chose "bureaucracy-centered enforcement regimes" that entrusted to administrative agencies the primary responsibility for investigating wrongdoing, holding hearings, and issuing orders.²⁹ But even then, Congress's reliance on centralized bureaucracies was circumscribed in that it left a great deal of ex post regulation to the already functioning common law system, the reach of which only increased in the latter half of the twentieth century with the emergence of a number of

28. To be sure, compared with the nature of the modern administrative state, the regulatory landscape throughout much of America's history was characterized by relatively little ex ante or ex post regulation. Some scholars argue that such a state of affairs is normatively preferable. See PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 11 (1994) (arguing that the United States' regulatory system "goes too far"); see also DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* 114-15 (2001) (arguing that antiregulatory decisions like *Lochner* protected minorities from discriminatory regulations); RICHARD A. EPSTEIN, *OVERDOSE: HOW EXCESSIVE GOVERNMENT REGULATION STIFLES PHARMACEUTICAL INNOVATION* 10-12 (2006).

29. Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963-1976*, 23 *STUD. AM. POL. DEV.* 23, 24 (2009).

relatively expansive tort doctrines.³⁰ In any event, heavy relative reliance on bureaucratic enforcement was short lived.

During the second half of the twentieth century, the role of private litigation in the American regulatory system was enhanced considerably when it was given a meaningful foothold across a broad spectrum of statutory law. This development was the product of conscious congressional choice: particularly in the last five decades, Congress has put into place a number of private ex post enforcement mechanisms—often in the form of statutes creating private rights of action³¹—to help effectuate its substantive aims. At the same time, Congress has often explicitly rejected bureaucratic enforcement regimes for the implementation of those directives.³² As one scholar put it, instead of building a European-style regulatory state, the United States “constructed the litigation state.”³³

The design of employment discrimination regulation provides a clear instantiation of this broader trend. Congress originally entrusted enforcement of federal employment and labor laws princi-

30. See George L. Priest, *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 DENV. U. L. REV. 115, 134-39 (1993) (discussing the expanded tort doctrines that emerged in the second half of the twentieth century); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 619 (1992) (investigating reasons for the large rise in tort liability in the 1960s and 1970s); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 963-64 (1981) (documenting the rise of strict liability and the lessening of requirements for negligence).

31. Of course, Congress has enacted a number of statutes that are silent on whether their provisions create a private right of action. In these instances, established doctrine specifies the conditions under which courts should find an implied private right of action. See *Cort v. Ash*, 422 U.S. 66, 78 (1975) (setting forth a four-part inquiry for determining whether a statute contains an implied right of action). Whether that doctrine produces too much, or too little, private enforcement of a given regulatory scheme can also be analyzed under the conceptual framework presented in this Article. Moreover, there is ongoing debate about how to interpret the laws that Congress has passed against a background assumption that implied rights of action are the norm and not the exception. Compare, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 294 n.1 (1998) (Stevens, J., dissenting) (noting that the Court should, when engaging in statutory interpretation, take into account background assumptions in favor of the availability of private enforcement against which Congress has legislated), and *Cannon v. Univ. of Chi.*, 441 U.S. 677, 698-99 (1979) (same), with *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (arguing that the Court should not infer private rights of action). Although the framework set forth here may provide guidance for this debate, the attendant issues raised by such questions require a more robust analysis than one article can provide. I therefore defer such questions to a subsequent article.

32. See, e.g., FARHANG, *supra* note 7, at 3.

33. *Id.* at 214.

pally to administrative agencies.³⁴ But when Congress enacted Title VII of the Civil Rights Act of 1964 (Title VII), it transferred primary responsibility for regulating such discrimination to private party litigants and refused the requests of civil rights advocates to vest such authority in the Equal Employment Opportunity Commission (EEOC) through cease-and-desist powers.³⁵ In an effort to promote private enforcement of Title VII, Congress included a provision for awarding attorneys' fees to prevailing plaintiffs.³⁶ Congress solidified its reliance on private enforcement in the 1970s; when asked again by civil rights advocates to give cease-and-desist powers—which such advocates had since determined were indispensable to the enforcement of Title VII—to the EEOC as a complement to private lawsuits, Congress once more refused.³⁷ Congress accorded the EEOC very little power to promulgate regulations under Title VII.³⁸ Congress also restricted the EEOC's authority to bring suit under Title VII,³⁹ instead relegating its role to one of administrative gatekeeping for private lawsuits.⁴⁰ Empirical evidence reveals the significant practical consequences of these choices: in the last decade, a mere 2 percent of job discrimination suits were prosecuted

34. *See id.* at 85.

35. PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* 39-40 (2008).

36. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(k), 78 Stat. 241, 261 (codified at 42 U.S.C. § 2000e-5(k) (2006)).

37. FARHANG, *supra* note 7, at 132-33.

38. When Title VII was originally enacted, Congress gave the EEOC authority only to promulgate "procedural regulations." Civil Rights Act of 1964 § 713(a) (codified at 42 U.S.C. § 2000e-12(a)). When it amended Title VII in 1972, Congress gave the EEOC more enforcement responsibility but left the agency's authority to promulgate regulations unchanged. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 5, § 707, 86 Stat. 103, 107 (codified at 42 U.S.C. § 2000e-8). As a consequence, the EEOC frequently finds its positions rejected by the Supreme Court. *See, e.g.,* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248-49 (1991) (rejecting the EEOC's position that Title VII applies extraterritorially to regulate employment practices of American employers employing American citizens abroad); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 140-43 (1976) (rejecting EEOC guidelines on coverage of pregnancy-based discrimination under Title VII).

39. *See* 42 U.S.C. § 2000e-5 (creating a private right of action); 42 U.S.C. § 2000e-6 (granting EEOC limited authority to bring suits).

40. *See, e.g.,* *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 824 (1976) (noting a lower court's holding that private parties are required to exhaust administrative remedies before filing a private action, but declining to decide the issue); *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 460-61 (1975) (concluding that Congress did not anticipate that remedies available under 42 U.S.C. § 1981 would be sought until Title VII procedures had been completed).

by the federal government, and 98 percent of suits were brought by private parties.⁴¹

Similarly, the Fair Labor Standards Act (FLSA)—which established minimum wage, overtime pay, and other labor standards—also established a regulatory scheme that was largely dependent on enforcement by private litigation.⁴² Over time, Congress increased incentives for private suit under the FLSA,⁴³ while simultaneously limiting funding for the Department of Labor (DOL),⁴⁴ which, as a consequence, decreased significantly its own FLSA enforcement efforts.⁴⁵ Further, Congress did not seek to secure compliance with wage standards through continuing public regulatory supervision of employer practices but rather relied on information and complaints provided by employees bringing claims in court.⁴⁶ Again, empirical evidence reveals the significance of these choices: the DOL investigates fewer than 1 percent of FLSA-covered employers each year.⁴⁷ Moreover, the DOL has largely fallen off the radar with regard to FLSA interpretation. Rather, in recent years, it is the courts, by way of private litigation, that have driven interpretation of the FLSA.⁴⁸

41. FARHANG, *supra* note 7, at 3.

42. That said, even the original enactment of FLSA placed a lot of enforcement responsibility in private hands: it provided a private right of action, it provided a class mechanism, and it provided for awarding attorneys' fees to prevailing parties. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, § 16, 52 Stat. 1060, 1069 (codified at 29 U.S.C. § 216).

43. Fair Labor Standards Act Amendments of 1977, Pub. L. No. 95-151, sec. 10, § 16(b)-(c), 91 Stat. 1245, 1252 (codified at 29 U.S.C. § 216).

44. From 1975 to 2004, the number of DOL investigators decreased by 14 percent to a total of only 788 individuals nationwide. Annette Bernhardt & Siobhán McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004*, ECON. POL'Y BRIEF (Brennan Ctr. for Justice, New York, N.Y.), Sept. 2005, available at http://www.brennancenter.org/page/-/download_file_8423.pdf.

45. See, e.g., *id.* at 1-2 (noting that DOL enforcement actions under FLSA decreased by 36 percent between 1975 and 2004); Catherine K. Ruckelshaus, *Labor's Wage War*, 35 *FORDHAM URB. L.J.* 373, 375 (2008) (noting that DOL enforcement of FLSA is quite low).

46. *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

47. As of 2007, there were 7.3 million employers regulated under the FLSA by the Wage and Hour Division (WHD). The WHD has roughly 1000 full-time investigators and inspects approximately 40,000 employers each year. "The probability of any single employer or workplace being inspected is therefore very small"—roughly 0.5 percent. DAVID WEILL, *IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT* 49 (2010), available at <http://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

48. See, e.g., *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37, 39-40 (2005) (holding that the time

The labor and employment law story is typical. In various domains of public law, as in Title VII and the FLSA, Congress has vested in private parties a great deal of responsibility for enforcement by extending the statutory mechanisms provided to private parties in order to facilitate and incentivize private suits; Congress has correspondingly decreased the enforcement mechanisms available to relevant public regulatory bodies, which have suffered budget cuts and have decreased their enforcement efforts, even as the number of employers covered by these laws has grown significantly.⁴⁹ This trend can be seen in a wide range of substantive areas, ranging from consumer lending to civil rights abuses to antitrust. In these areas, Congress has created private rights of action and incorporated other enforcement incentives, such as damage multipliers, statutory damages, punitive damages, and fee-shifting.⁵⁰

A wealth of explanations has been offered for the rise of congressional reliance on private litigation, as opposed to centralized bureaucracy, for the regulation of wrongdoing. Some political scientists argue that Congress entrusted private parties with primary enforcement responsibility because it doubted the government's capacity to meet enforcement needs.⁵¹ Others argue, more cynically,

spent walking between production and changing areas where employees “don” and “doff” protective gear, as well as time spent waiting to “doff,” is compensable time under the FLSA). The Court recently decided that an employee may state a claim under the FLSA based solely on oral complaints to supervisors and human resources personnel. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) (holding that the anti-retaliation provision of FLSA protects oral as well as written complaints).

49. For instance, from 1975 to 2004, the number of DOL wage-and-hour dispute investigators decreased by 14 percent and enforcement actions decreased by 36 percent; meanwhile the number of businesses covered by the wage-and-hour laws increased from 3.9 million to 8.4 million. Bernhardt & McGrath, *supra* note 44, at 2.

50. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2072 (2006) (creating a private right of action and allowing plaintiffs to recover attorneys' fees and expert fees); Toxic Substances Control Act, 15 U.S.C. § 2619 (same); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (“Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney’s fees.”); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401-03 (1968) (noting that attorneys’ fee provisions are needed in Title VII cases to incentivize individuals with racial discrimination claims to sue); *Davis v. Werne*, 673 F.2d 866, 869 (5th Cir. 1982) (noting that statutory damages are available under the Truth-in-Lending Act (TILA) to encourage “private attorneys general” to assist in the enforcement of that statute).

51. For instance, one commentator notes that Congress believed that “the federal

that legislators rely on private parties when they want credit for crafting broad policies but not the burdens of administering and enforcing them.⁵² Relying on empirical evidence, Sean Farhang contends instead that ideological conflict between Congress and the President accounts for the increased reliance on private attorneys, as opposed to executive agencies, for the implementation of various statutory regimes.⁵³

Farhang's hypothesis is consistent with the view of leading administrative law scholars, who have posited, under the "slack minimization" theory, that "legislators prefer delegation to an agency rather than a court when the ideological distance between legislator and agency is smaller than that between legislator and court."⁵⁴ Another explanation, referred to as the "blame deflection" theory, posits that congressional delegations to courts may be preferred to delegations to administrative agencies, given that the latter are subject to ongoing congressional control and, therefore, might take actions for which the electorate will hold Congress at least partially responsible.⁵⁵ Other scholars have hypothesized that Congress might delegate to courts when it wishes to achieve stability of interpretation, or stickiness—that is, non-fluctuating decisions over time.⁵⁶

government would be unable to handle all the cases involving [public accommodations and employment] discrimination." Mary Frances Derfner, *One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976*, 21 ST. LOUIS U. L.J. 441, 442 (1977).

52. FRYMER, *supra* note 35, at 76-77.

53. FARHANG, *supra* note 7, at 60-61. The scholarly community has long accepted the notion that the President exercises a great deal of control over administrative agencies, although recent work by administrative law scholars has challenged this assertion empirically. See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49-50, 69 (2006) (concluding that the President does affect agency decision making, but to a lesser degree than many proponents of the presidential control model have espoused).

54. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1043 (2006).

55. *Id.* at 1044.

56. See, e.g., Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 327-28 (2005) ("A majority of the circuits has explicitly adopted the super-strong presumption against overruling statutory precedents, and in those circuits that have never explicitly applied the rule, separate opinions assume that it applies." (citation omitted)); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1247 (2002) ("[J]udges ... are subject to strong institutional norms that render judicial

Although resolving these competing explanations is beyond the scope of this Article, the consensus binding all of these scholars is that the American system of separation of powers has produced a heavy dependence on ex post mechanisms of regulation that are spread among a diffuse set of institutional actors, including private litigants. Consequently, the availability of meaningful ex post private enforcement is a significant determinant of the rule of law's operation within the United States. And given the various limitations of public agencies in conducting meaningful ex post regulation, whether sufficient and appropriately designed mechanisms exist to marshal private parties to engage in ex post enforcement has a dramatic effect on the extent to which behavior deemed harmful by democratically accountable bodies is in fact regulated.

B. The Functional Role of Private Enforcement in the American Regulatory State

This Subpart focuses, with specific examples, on the pathologies that result from overreliance on inadequate public regulatory bodies, and argues that reliance on private enforcement is not only descriptively accurate but also functionally necessary in some circumstances. First, such enforcement is critical when private parties, as a functional matter, bear primary responsibility for enforcement if there is to be meaningful regulation of wrongdoing in a particular area at all. Second, private parties may need to assume a regulatory role—though to an admittedly lesser degree—in areas of the law in which private parties provide complementary enforcement to constrained public regulatory bodies.

1. Private Litigants as Primary Regulators

Private parties function as crucial regulators within various areas of law because of limitations on public bodies that circumscribe their effectiveness in achieving regulatory goals. To begin, public governmental enforcement bodies have limited resources that are often insufficient to perform the functions with which they are tasked.

interpretation more stable and consistent over time than interpretation by successive political administrations.”).

Indeed, for most public regulatory bodies, scarce resources are the rule, not the exception.⁵⁷ Moreover, public civil enforcers in some regulatory areas suffer informational disadvantages.⁵⁸ Those disadvantages arise for a simple reason: the best sources of information about private wrongs are often the parties themselves, because they tend to have superior knowledge regarding the costs and benefits of given activities, the costs of reducing risks of harm, and the probability or severity of risk.⁵⁹ By contrast, public regulatory bodies are generally distant geographically from sites of harm, which not only limits their ability to access or be accessed by those who suffered alleged harm but also reduces their ability to even know

57. For example, because of limited resources, the FDA relies largely on voluntary compliance with the Federal Drug and Cosmetic Act once a drug has been approved. *See* Decision in *Wash. Legal Found'n v. Henney*, 65 Fed. Reg. 14,286, 14,286 (Mar. 16, 2000) (explaining that to introduce an approved drug into interstate commerce for a "new use," an individual must submit an application to the FDA for approval). There are also a number of drugs, like homeopathics, that the FDA simply lacks the resources to regulate at all. *See* Amy Gaither, Comment, *Over the Counter, Under the Radar: How the Zicam Incident Came About Under FDA's Historic Homeopathic Exception*, 62 ADMIN. L. REV. 487, 490, 500-01 (2010). As another example, the National Highway Traffic and Safety Administration (NHTSA) has few resources to devote to its regulatory functions, which include "inspecting vehicle defects and creating new federal safety standards." Joel Finch, Student Article, *Toyota Sudden Acceleration: A Case Study of the National Highway Traffic Safety Administration: Recalls for Change*, 22 LOY. CONSUMER L. REV. 472, 492 (2010). Indeed, the NHTSA closed the investigation of Toyota accelerator problems, despite having received sixty-four complaints alleging sudden acceleration in the same model of Toyota, because of limited resources. *Id.*; *see also* Denial of Motor Vehicle Defect Petition, 74 Fed. Reg. 56,686, 56,686, 56,690-91 tbl.2 (Nov. 2, 2009). As yet another example, the Bureau of Land Management (BLM) often abbreviates its Environmental Impact Study process in ways that are "scientifically incomplete," because it "lack[s] the resources to fully apply [its] expertise." Aliza M. Cohen, Note, *NEPA in the Hot Seat: A Proposal for an Office of Environmental Analysis*, 44 U. MICH. J.L. REFORM 169, 203 (2010). Similarly, because of its budget constraints, the BLM must also limit the range of alternatives it will consider for all land use planning projects to four options. *See The Role of NEPA in the Intermountain States: Oversight Field Hearing Before the H. Comm. on Res.*, 109th Cong. 29 (2005) (statement of Dave Brown, Regional Regulatory Advisor (Rocky Mountain Region), BP America, Inc.). Indeed, the regulatory landscape for environmental law is generally characterized by limited government resources. *See* David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 22 (2000) (quoting Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,706-07 (Dec. 22, 1995)).

58. *See* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 359, 365 (1984) (noting that information differentials cut in favor of private versus public regulation of injury risk).

59. *See id.* at 359.

that such harm occurred in the first place.⁶⁰ Finally, as public choice scholars have long lamented, public regulatory bodies are potentially subject to capture by well-capitalized or politically influential interest groups.⁶¹

Private enforcement provides, in many respects, a direct response to the functional limitations of public regulatory bodies in the enforcement of various laws. It provides protections against harm based on the initiative of a few, which counters the problem of limited agency resources. It also provides a “back-up” system of redress, which responds both to the problem of limited agency resources and to the limited ability of *ex ante* regulations to anticipate and prevent malfeasance.⁶² Moreover, reliance on private suits addresses the informational disadvantages to which public regulatory bodies can be subject, given that—as noted above—it is often those who have suffered some sort of harm who possess the best information about any alleged statutory or common law violation.⁶³ Although private parties will not always possess such informational advantages—as is the case, for instance, in situations where regulation requires technical and specialized expertise⁶⁴ or access to and ability to comprehend comparative data⁶⁵—those who commit wrongdoing, and victims of such wrongdoing, often have superior access to relevant information.⁶⁶ Private litigation also gives individuals a “personal role and stake in the administration

60. See Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT'L L.J. 135, 139 (1999) (noting that distance from victims of consumer fraud reduces the likelihood that public enforcement officials will be aware of such harms).

61. See, e.g., MAXWELL L. STEARNS, *PUBLIC CHOICE AND PUBLIC LAW* 16-17, 21 (1997); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 32, 35-36 (1991).

62. See Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 198 (1987) (discussing private enforcement as a method to address problems inadequately dealt with by public institutions).

63. See *supra* notes 59-60 and accompanying text.

64. See Steven Shavell, *supra* note 58, at 369 (noting that there are some instances in which a regulatory agency “may enjoy a positive [informational] advantage relative to private parties”).

65. For instance, in the environmental arena, the Environmental Protection Agency (EPA) and other public regulatory bodies have access to information about compliance through various mandatory reporting requirements and government inspections that is less available to private parties. See, e.g., Markell, *supra* note 57, at 59-60 (discussing the relationship between the EPA and the states with respect to enforcement and compliance programs).

66. See Shavell, *supra* note 58, at 366-67.

of justice” and provides an avenue of redress that is more insulated from political capture than public agencies.⁶⁷

The area of consumer product safety provides one of the clearest examples of the need for private enforcement in light of the functional limitations of the relevant public regulatory bodies. The Consumer Product Safety Commission (CPSC) was described at its inception as “the most powerful Federal regulatory agency ever created,”⁶⁸ and was given broad powers to investigate;⁶⁹ promulgate safety standards;⁷⁰ ban products;⁷¹ seek judicial seizure and condemnation of “imminently hazardous” products;⁷² and seek orders requiring public notification of hazards, recalls, and the like.⁷³ Despite these broad powers, “the CPSC has been chronically underfunded and understaffed.”⁷⁴ Between 1975 and 1990, its budget decreased by 60 percent and its staffing by 41 percent.⁷⁵ These resource limitations had an unsurprising effect on the CPSC’s ability to enforce consumer-protection laws: its investigations were limited, and it was required to close various offices.⁷⁶ The CPSC was thus relegated to a “little known” and “obscure” federal agency.⁷⁷

Moreover, the CPSC in particular, and consumer-protection agencies more generally, proved especially vulnerable to capture by

67. Stewart, *supra* note 62, at 198. To be sure, private enforcement has its share of disadvantages. For example, the system of litigation is complex and expensive and, as such, may be out of reach for a number of people, particularly the poor. See, e.g., Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1426-35 (2011) (detailing the ways in which poor students are insufficiently aided by private enforcement mechanisms under the Individuals with Disabilities Education Act (IDEA)).

68. David Swit, An Overview of Public Law 92-573, Speech Before Proceedings of the Briefing Conference on the Consumer Product Safety Act 7 (June 11-12, 1973).

69. 15 U.S.C. § 2054(b) (2006).

70. 15 U.S.C. § 2056(a) (stating that standards must be “reasonably necessary to prevent or reduce an unreasonable risk of injury”).

71. 15 U.S.C. § 2057.

72. 15 U.S.C. § 2061(a), (b)(2).

73. 15 U.S.C. § 2064.

74. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 67 (2010).

75. U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-92-37R, INFORMATION ON CPSC 7-9 (1992); see also Barkow, *supra* note 74, at 67.

76. Robert S. Adler, *From “Model Agency” to Basket Case—Can the Consumer Product Safety Commission Be Redeemed?*, 41 ADMIN. L. REV. 61, 75 (1989).

77. See, e.g., Issacharoff, *supra* note 2, at 382.

the well-capitalized entities they were set up to regulate.⁷⁸ Though created to solicit the input of consumer groups regarding issues of consumer safety, the Consumer Product Safety Act (CPSA)⁷⁹ carried with it a notice and rulemaking process so burdensome that it was “affordable only to industry groups with an economic stake in the outcome.”⁸⁰ And although Congress just recently provided for a more cooperative relationship between the CPSC and state attorneys general in the enforcement of consumer protection laws, the 2008 changes leave in place the CPSA provision that preempts state product safety requirements, and state attorneys general are still prohibited from seeking civil penalties.⁸¹ If there is to be reliable regulation of consumer product safety, then it must emanate from private parties under traditional common law doctrines or consumer protection statutes.

The public regulatory landscape is also quite weak in the area of Title VII employment discrimination.⁸² Under Title VII, the EEOC is charged with investigating employee complaints, but its historical level of activity on this score, across multiple presidential administrations, is so limited as to be essentially inconsequential in terms of achieving the regulatory objectives of Title VII.⁸³ Indeed, even when the EEOC finds cause to believe that employment discrimination has occurred in any given complaint, it takes action in such instances less than 5 percent of the time.⁸⁴ For instance, in fiscal year 2000, the EEOC found reasonable cause to believe that employ-

78. See, e.g., Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business?: Assessing Interest Group Influence on U.S. Bureaucracy*, 68 J. POL. 128, 129 (2006) (“[B]usiness interests enjoy disproportionate influence over rulemaking outputs despite the supposedly equalizing effects of notice and comment procedures.”).

79. 15 U.S.C. §§ 2051-2089 (2006).

80. Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 63-64 (1982). The process was so burdensome that Congress revoked it. Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35, § 1210, 95 Stat. 703, 721 (amending scattered sections of 15 U.S.C. and repealing § 2059).

81. Consumer Product Safety Improvement Act of 2008 (CPSIA), Pub. L. No. 110-314, 122 Stat. 3016 (to be codified in scattered sections of 15 U.S.C.).

82. See 42 U.S.C. § 2000e-2 (2006).

83. See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1430-31 (1988); see also Karlan, *supra* note 11, at 204-05.

84. EEOC v. Waffle House, Inc., 534 U.S. 279, 290 n.7 (2002).

ment discrimination had occurred in 8248 employee complaints, yet the EEOC filed only 291 lawsuits that year.⁸⁵ Overall, in fact, “the EEOC files fewer than two percent of all antidiscrimination claims in federal court.”⁸⁶ Moreover, the EEOC’s success rates in obtaining relief for claimants are significantly below that of other administrative agencies.⁸⁷

2. *Private Litigants as Supplementary Regulators*

Even when public enforcement is relatively robust, private enforcement may serve a complementary regulatory role in the achievement of various substantive goals.⁸⁸ Scholars have in recent years rightfully challenged the extent to which this state of affairs is desirable, particularly when private litigation may result in duplicative punishment of particular actors, or when private parties may suffer informational disadvantages relative to public regulatory bodies.⁸⁹ To be sure, in areas of the law in which robust public enforcement exists, limitations on private litigation should, as a functional matter, be met with less skepticism, and indeed might provide needed correctives to problems of regulatory overkill.⁹⁰ For instance, the area of antitrust law is characterized by fairly rigorous public *ex post* regulation. Congress gave the Department of Justice (DOJ) “primary enforcement authority” for Sherman Act viola-

85. *Id.*

86. *Id.*

87. For instance, the Occupational Safety and Health Administration (OSHA) settles approximately 90 percent of filed charges, Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 472-73, 495 nn.240 & 243, 503 (1992), and the Labor Department settles a high percentage of charges filed under the FLSA, though recovery is low: 87 percent of the charges filed with the NLRB are resolved before a complaint is issued. *Id.* The EEOC, in contrast, finds in favor of defendants in “approximately 95% of the complaints” resolved. Selmi, *supra* note 83, at 1429.

88. In some instances, the complementary enforcement by private parties is directly intertwined with public enforcement of a statutory regime. For instance, private parties play an explicitly complementary role in the enforcement of the False Claims Act through the bringing of *qui tam* lawsuits. See, e.g., Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 130 S. Ct. 1396 (2010). This Section discusses less formalized arrangements for complementary enforcement by private parties.

89. See, e.g., Rose, *supra* note 3, at 2175-76 (arguing that securities class actions bring about overregulation of the securities markets).

90. See Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 114, 116-17 (2005).

tions.⁹¹ As a functional matter, DOJ enforcement of the antitrust laws is relatively robust,⁹² in part because of its Corporate Leniency Program (Amnesty Program), whereby the DOJ reduces the criminal penalty that would otherwise be incurred by the first entity to disclose details of an antitrust conspiracy to which it was a party.⁹³ Accordingly, in the context of antitrust and similar regimes, private enforcement mechanisms need to be carefully tailored to regulatory needs and potentially circumscribed to the extent they combine with public regulation in a way that clearly threatens to achieve over-deterrence.

In other areas of the law, however, private parties arguably remain a necessary complement to public enforcement of statutory directives. Take, for instance, the area of securities law. Although the Securities and Exchange Commission (SEC) has primary enforcement authority of federal securities laws, even SEC commissioners acknowledge that private enforcement plays a crucial role in regulating securities fraud: “Private enforcement is a necessary supplement to the work that the S.E.C. does. It is also a safety valve against the potential capture of the agency by industry.”⁹⁴ As just one example, two pension funds that filed suit under the securities laws were responsible for exposing WorldCom’s fraud, eventually leading to the compensation of investors.⁹⁵ Given that “[t]he re

91. Phillip G. Oldham, *Regulatory Consent Decrees: An Argument for Deference to Agency Interpretations*, 62 U. CHI. L. REV. 393, 409 (1995).

92. In fiscal year 2007, for instance, the DOJ “obtained over \$630 million in criminal fines.” Scott D. Hammond, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Recent Developments, Trends, and Milestones in the Antitrust Division’s Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law Spring Meeting 1 (Mar. 26, 2008), available at <http://www.justice.gov/atr/public/speeches/232716.pdf>.

93. At the least, the DOJ considers the program successful as compared to its other enforcement efforts. See Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep’t of Justice, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual’s Freedom?, Speech Before the ABA Criminal Justice Section National Institute on White Collar Crime 2 (Mar. 8, 2001), available at <http://www.justice.gov/atr/public/speeches/7647.htm> (noting that between 1995 and 2000, “the Amnesty Program [was] responsible for detecting and prosecuting more antitrust violations than all of [the Antitrust Division’s] search warrants, consensual-monitored audio or video tapes, and cooperating informants combined”).

94. Stephen Labaton, *Businesses Seek New Protection on Legal Front*, N.Y. TIMES, Oct. 29, 2006, at A1 (quoting a former SEC commissioner).

95. See *In re MCI WorldCom, Inc.*, Sec. Litig., 191 F. Supp. 2d 778 (2002); see also *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV 3288, 2004 WL 2591402, at *1, *23 (S.D.N.Y. Nov. 12,

sources of the [SEC] are adequate to prosecute only the most flagrant abuses,”⁹⁶ private litigation mechanisms—perhaps even some not yet in existence, given the inability of many existing mechanisms to detect fraud—may often be needed to prevent a noninsignificant amount of misconduct from escaping regulation.

In short, private parties, at least as a functional matter, are often necessary for meaningful enforcement of regulatory directives to occur.⁹⁷ As the next Part shows, however, the mechanisms by which such regulation is achieved are being removed from the legal landscape, thus indirectly cutting back private enforcement more generally from the legal landscape. Such limitations may be appropriate and necessary correctives to an integrated system of private and public regulation in some instances. However, the reduction of private mechanisms of enforcement too frequently occurs with little attention by the courts to the role of those mechanisms in the achievement of particular regulatory objectives.

II. EFFORTS TO CURTAIL MECHANISMS OF PRIVATE ENFORCEMENT

Efforts to curtail mechanisms of private enforcement have come from a number of fronts: tort reform; restrictions on the class action device; the recalibration of procedural mechanisms through private contract to discourage or impair private suits; the introduction of a heightened “plausibility” pleading standard for all cases brought in federal court; and federal preemption of state law claims themselves, just to name a few. Spurred by discontent with the private litigation system, many of these reform measures seek not simply to change our system of private litigation but to eliminate private

2004).

96. *Berner v. Lazzaro*, 730 F.2d 1319, 1322 (9th Cir. 1984); see also Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 503-04 (2009) (“The staffing and budget of the S.E.C. have lagged far behind the explosive growth of the markets the commission must police.”); Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 BROOK. J. CORP. FIN. & COM. L. 289, 321 (2009) (“[I]t is clear that no matter how much money is appropriated, the SEC will never have enough resources to adequately protect investors against fraud, manipulation, and inadequate or inaccurate corporate disclosure.”).

97. Again, to recognize private parties' role in the regulatory landscape is not to specify precisely optimal levels of enforcement but rather to reveal their integral role in the enforcement of laws beyond some minimal level achievable by constrained public agencies.

litigation entirely or in large part. To be sure, any given private enforcement mechanism may, in the context of a particular regulatory regime, be unnecessary and even distortive. But, the reform efforts discussed below tend to be far reaching and context neutral; in other words, they often cut back at private enforcement with no regard for the particular exigencies of a given regulatory framework.

A. Tort Reform Efforts

Tort reform measures have been at the forefront of a number of legislative agendas, state and federal, for at least two decades.⁹⁸ Many politicians demand it; entire organizations exist to lobby for it; websites, such as Overlawyered.com,⁹⁹ cry for it. And not for nothing: common criticisms of the tort system are that its costs do not correspond meaningfully with compensation to victims of harms, that “runaway juries” hand out vastly disproportionate and overly punitive awards to sympathetic and perhaps undeserving plaintiffs, that tort litigation increases insurance premiums for all, that the threat of litigation stunts innovation, and that tort litigation harms businesses in general.¹⁰⁰ Although some tort reform measures target substantive laws explicitly, by redefining existing rights in narrower terms, many are more indirect; they leave the existing right in place but cut back at its enforcement mechanisms—or, as Pamela Karlan puts it, “the remedial machinery.”¹⁰¹ To be sure, some of these mechanisms may in fact need to be limited to avoid undesirable regulatory consequences. That said, overly sweeping reform may impair the critical function of private litigation in the enforcement of substantive regulatory regimes.¹⁰²

Tort reform measures that limit mechanisms of private enforcement, both proposed and enacted, abound. Numerous states have

98. See, e.g., Rachel M. Janutis, *The Struggle over Tort Reform and the Overlooked Legacy of the Progressives*, 39 AKRON L. REV. 943, 944 (2006).

99. OVERLAWYERED: CHRONICLING THE HIGH COST OF OUR LEGAL SYSTEM, <http://www.overlawyered.com> (last visited Feb. 17, 2012).

100. See, e.g., THE PUB. POLICY INST. OF N.Y. STATE, “AN ACCIDENT AND A DREAM”: HOW THE LAWSUIT LOTTERY IS DISTORTING JUSTICE AND COSTING NEW YORKERS BILLIONS OF DOLLARS EVERY YEAR 2 (1998), available at <http://bcnys.org/ppi/accont.htm>.

101. See Karlan, *supra* note 11, at 185.

102. See Shavell, *supra* note 58, at 366-67 (noting that private plaintiffs are better situated than public regulators, in some circumstances, to regulate tort-based harm).

enacted reforms, including caps on noneconomic damages, changes in standards of proof, and restrictions on the availability of punitive damages.¹⁰³ As just one example, Oklahoma has enacted or proposed a number of significant changes to liability rules, restrictions on remedies, and procedural changes in the last decade. Examples of these changes include a requirement that potential class members opt in to a class,¹⁰⁴ as well as a \$300,000 cap on noneconomic damages “regardless of the number of parties against whom the action is brought or the number of actions brought” unless the court finds gross negligence or intentionality and malice beyond a reasonable doubt.¹⁰⁵ Empirical studies demonstrate that, across the United States, such measures have resulted in a significant drop both in the number of cases filed and the number of claims paid.¹⁰⁶

B. Restrictions on the Class Action Device

Perhaps no other procedural device has received more scholarly attention than the class action. The modern class action facilitates the aggregation of small claims that are not economically viable on an individual basis;¹⁰⁷ realigns asymmetric investment incentives

103. For instance, as of 2010, “thirty states, the Virgin Islands and Puerto Rico” have laws limiting “jury awards in malpractice cases,” according to the National Conference of State Legislatures. Robbie Brown, *Ruling Strikes Down Georgia’s Cap on Malpractice Awards*, N.Y. TIMES, Mar. 23, 2010, at A19 (citing NCSL report).

104. S.B. 1467, 51st Leg., 2d Sess. § 11 (Okla. 2008).

105. *Id.* § 19.

106. See, e.g., NAT’L CTR. FOR STATE COURTS, *Tort and Contract Caseloads in State Trial Courts*, in EXAMINING THE WORK OF STATE COURTS 26, 26-32 (2001), http://www.ncsconline.org/D_Research/csp/2001_Files/2001_Tort-Contract.pdf (reporting a 10 percent decline in tort filings from 1991-2000 in thirty states studied, not including Oklahoma); Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. 5183, 5206 (2007) (providing state-level statistical analysis of medical malpractice claims nationwide from 1991-1998 and finding that “caps on pain and suffering damages reduce the number of cases by 10-13 percent” and that “[r]eforming joint and several liability decreases the number of cases by 8-9 percent”); Bernard Black, et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. EMPIRICAL LEGAL STUD. 207, 210 (2005) (finding that the number of paid medical malpractice claims in Texas declined from 6.4 per 100 practicing Texas physicians per year in 1990-1992 to “4.6 per 100 practicing Texas physicians per year in 2000-2002” after the enactment of tort reform measures); Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1225 (2004) (reporting a 24.8 percent drop in “new tort cases filed in the Texas trial courts” from 1995-2001).

107. See Linda Silberman, *The Vicissitudes of the American Class Action—With a*

often present in one-on-one litigation; and enables enforcement of large-scale, market-wide wrongs.¹⁰⁸ The class action device has evolved as a central mechanism of enforcement for a broad range of laws, including those governing products liability, securities fraud, consumer fraud, and antitrust violations.¹⁰⁹ It has also been invoked in attempts to address a wide spectrum of alleged harms, from allegations of smoking-related injuries¹¹⁰ to allegations that the U.S. government failed to provide adequate medical treatment to troops wounded in Iraq and Afghanistan.¹¹¹

The significant role the class action plays is fully consistent with the American regulatory regime described in Part I. Modern class action practice emerged at the same time that the American regulatory system was coming to rely more on private enforcement of a number of laws,¹¹² and the practice accordingly developed in response to the inability of centralized government institutions to comprehensively address a number of widespread wrongs.¹¹³ As Chief Justice Burger recognized, “[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.”¹¹⁴ The class action device also evolved in response to what one scholar has termed the “massification” phenomenon, wherein “human actions and relationships assume a collective, rather than a merely individual, character.”¹¹⁵

Comparative Eye, 7 TUL. J. INT’L & COMP. L. 201, 201-02 (1999) (“[Since] its inception, group litigation—in particular the [modern] class action—was perceived as a device to *empower* individuals in affording them access to justice.”).

108. See, e.g., Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 19 (2010) (describing the class device as being capable of generating “an industry-changing event”).

109. See Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 101-02 (2007); William W. Schwarzer, *Structuring Multicclaim Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250, 1250 (1996).

110. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 734, 737 (5th Cir. 1996).

111. Complaint for Declaratory and Injunctive Relief Under United States Constitution and Rehabilitation Act at 9, *Veterans for Common Sense v. Nicholson*, No. C-07-3758 (N.D. Cal. July 23, 2007).

112. See *supra* Part I.

113. See *supra* Part I.B.2.

114. *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980).

115. Mauro Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparativist’s Contribution*, 25 BUFF. L. REV. 643, 646 (1976).

Given the modern class action's expansive reach, it is wholly unsurprising that it has been criticized by scholars, courts, and practitioners alike. In fact, almost as soon as the 1966 revisions to Federal Rule of Civil Procedure 23¹¹⁶ were promulgated, both the popular and business presses were flooded with complaints about excessive litigation under Rule 23(b)(3) and the attendant burdens on courts and corporations.¹¹⁷

Not long after the 1966 revisions, the Court began to limit class action practice, primarily by requiring plaintiffs' attorneys to bear the often significant costs of providing notice to all prospective class members under Rule 23(b)(3).¹¹⁸ And in the late 1990s, the Court imposed restrictions on the certification of classes in the settlement context, limiting the ability of class actions to achieve globalized peace in situations of mass harm.¹¹⁹

Partly in response to industry pressure, Congress too has limited the reach of the class action device. In 2005, Congress enacted the Class Action Fairness Act (CAFA), which amended the diversity jurisdiction statute in order to bring more class actions—often those involving issues of national significance¹²⁰—out of state court and into federal court.¹²¹ Although the motivation for the CAFA

116. FED. R. CIV. P. 23 (governing class actions).

117. James M. Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 400 (2004).

118. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974). Further, the Court required plaintiffs' attorneys to provide notice to all prospective class members early in the litigation—before any financial payoff could be realized. *Id.* at 177-79; *see also Snyder v. Harris*, 394 U.S. 332, 335 (1969); *cf. Zahn v. Int'l Paper Co.*, 414 U.S. 291, 291 (1973) (requiring each class member to satisfy the jurisdictional amount for suits in federal court).

119. Specifically, in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court refused to let a class settlement tied to a request for class certification go forward when some among the group of plaintiffs appeared to have been bargained away in favor of other plaintiffs in order to reach a global settlement. *Id.* at 617, 620-21. The Court emphasized that neither the predominance inquiry under Rule 23(b)(3) nor the requirement of adequate representation is satisfied when the settlement reflects the high likelihood of collusion between class counsel and defendants' attorneys. *Id.* at 628.

120. *See, e.g.,* Suzanna Sherry, Commentary, *Overruling Erie: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135, 2138 (2008) (“[In enacting] CAFA, Congress intentionally and explicitly sought to ... place[]cases involving the national economy into the federal courts.”); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2111 (2008) (“The unavoidable import of CAFA ... is that class actions of national scope and importance should be decided in a federal tribunal.”).

121. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4), (b), 119 Stat. 4, 5

is debated, legislative history indicates that some members of Congress supported it because they thought that entrusting to federal judges the question of class certification—the decision that generally triggers the end point of class litigation, given the certification decision’s unique impact on settlement pressure¹²²—would result in fewer certifications overall.¹²³

The most recent and controversial efforts to restrict the class action have come from private parties, who have used arbitration agreements—often contained in consumer, employment, and franchise contracts—to ban the use of class-wide dispute resolution.¹²⁴ As other scholars and I have noted, these waivers emerged in the wake of the Supreme Court’s burgeoning jurisprudence under the Federal Arbitration Act (FAA),¹²⁵ which gives little heed to the Act’s history regarding its scope.¹²⁶ Building on its proclamation in 1983 that the FAA sets forth a “liberal federal policy favoring arbitration agreements,”¹²⁷ the Supreme Court, in a series of decisions, expanded the FAA’s reach to statutory claims¹²⁸ and to franchise, consumer, and employee contracts of adhesion,¹²⁹ which both the Court and Congress once considered as beyond the FAA’s reach.¹³⁰

(codified at 28 U.S.C. § 1711 (2006)).

122. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (noting that the certification of a class of claims can place defendants “under intense pressure to settle”).

123. See Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1912-13 (2006).

124. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 439-40 & n.16 (2011).

125. See, e.g., *id.* at 437; Glover, *supra* note 11, at 1740-42.

126. See Glover, *supra* note 11, at 1740; see also Karlan, *supra* note 11, at 204 (noting that Congress likely meant to exclude employment contracts from FAA § 1).

127. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

128. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Supreme Court changed course from a number of earlier decisions, in which it had refused to order arbitration of numerous statutory claims. See Horton, *supra* note 124, at 439, 441, 452.

129. See Gilles, *supra* note 11, at 393-96; Glover, *supra* note 11, at 1740-41, 1761-63. In January of 2012, the National Labor Relations Board (NLRB) ruled that requiring employees to sign mandatory arbitration agreements that prohibited employees from filing class actions for claims regarding wages, hours, or working conditions violated the National Labor Relations Act (NLRA). *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012). Until resolved on a likely appeal, the extent of employers’ ability to use mandatory arbitration agreements is in question.

130. Early uses of arbitration were generally limited to contracts between businesses or between management and unions, consistent with congressional intent behind the FAA. See Horton, *supra* note 124, at 439. Legislative history reveals that the Act was not intended to

As the Court's FAA jurisprudence expanded, so did corporations' use of arbitration agreements in "form contracts, mail inserts, shrink-wrap licenses, and the like."¹³¹ These contracts required consumers, employees, patients, and others to agree ex ante to resolve future claims through arbitration rather than through litigation.¹³² In line with a larger trend toward contractual tailoring of procedural mechanisms to optimize one side's substantive outcomes,¹³³ these contracts often banned class-wide arbitration. Some scholars argue that potential defendants, keenly aware of the class action's significant impact on the economics of claiming, use mandatory arbitration and prohibitions on the class device to eliminate private enforcement altogether.¹³⁴

In a recent 5-4 decision, *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the use of state unconscionability law, to which courts have turned pursuant to section 2 of the FAA, to declare some class action waivers unenforceable, is preempted by the FAA.¹³⁵ Although it remains to be seen whether arbitration is claimant friendly—at least pursuant to AT&T's particular arbitration clause, which contains provisions designed to address criticisms that arbitration is too costly for consumers¹³⁶—one thing is quite

apply to parties, such as consumers and employees, who possessed unequal bargaining power. *See Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 3 (1923) [hereinafter *Hearing on S. 4213 and S. 4214*] (statement of Mr. Charles L. Bernheimer, cotton goods merchant). In fact, when Senator Walsh expressed concern that arbitration contracts might be "offered on a take-it-or-leave-it basis to captive customers or employees," he was assured by the bill's supporters that they had no such intention. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting) (describing the hearing). Moreover, W.H.H. Piatt, one of the bill's key supporters, stated that he "would not favor any kind of legislation that would permit ... forcing a man to sign [a take-it-or-leave-it] contract," and that an arbitration clause "is a contract between merchants one with another, buying and selling goods." *Hearing on S. 4213 and S. 4214, supra*, at 10 (statement of W.H.H. Piatt, attorney). Further, Mr. Piatt also stated that "[i]t is not intended that this shall be an act referring to labor disputes ... at all." *Id.* at 9 (statement of W.H.H. Piatt, attorney).

131. Glover, *supra* note 11, at 1741.

132. *See id.*

133. *See infra* Part II.C.

134. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 11 (2000); Glover, *supra* note 11, at 1738, 1748.

135. 131 S. Ct. 1740, 1753 (2011).

136. For instance, AT&T's "third-generation" arbitration clause provides that AT&T will

clear under the current landscape: the class action mechanism will not be available to most consumers, employees, or franchisees whose contracts are governed by arbitration clauses with class waivers. Indeed, as of 2005, class action waivers were present in virtually all areas of contemporary class action practice: consumer cases; antitrust cases; civil rights, employment and entitlement cases; “other” commercial cases, such as insurance cases; and securities fraud cases.¹³⁷ A recent study of contracts imposed by financial services and telecommunications firms on their customers found that 75 percent contained mandatory arbitration clauses, and 80 percent contained class action waivers.¹³⁸ Moreover, a stunning 93 percent of these companies’ employment agreements mandated arbitration.¹³⁹ And as the dissenting Justices in *Concepcion* recognized, individual arbitration, even if consumer-friendly, is likely an inadequate mechanism for bringing small claims.¹⁴⁰ As such, to the extent the class action mechanism is necessary to private regulation of wrongdoing,¹⁴¹ such waivers may subvert the operation of significant portions of our regulatory state.

C. Procedural Private Ordering to Discourage Suit

Class action waivers are an instantiation of a more unified phenomenon: the systematic customization by private parties of procedural mechanisms through which substantive laws would otherwise be enforced.¹⁴² Although so-called “procedural private ordering” has the potential to produce efficiency gains by precluding

cover initial arbitration fees and will pay an additional amount (\$5000) to consumers who receive an award in arbitration that exceeds AT&T’s last settlement offer. Petition for a Writ of Certiorari app. C at 58a-60a, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-09-893).

137. Gilles, *supra* note 11, at 414, 417-21.

138. See, e.g., Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882-84 (2008). *But see* Christopher R. Drahozal & Quentin R. Wittlock, *Franchising, Arbitration, and the Future of the Class Action*, 3 ENTREPRENEURIAL BUS. L.J. 275, 278 (2009) (disputing some of this empirical evidence).

139. Eisenberg et al., *supra* note 138, at 883.

140. *Concepcion*, 131 S. Ct. at 1760-61 (Breyer, J., dissenting).

141. See *infra* Part III.C-D.

142. See Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 728, 731 (2011).

ex post cost escalations, such provisions can also enable substantial circumvention of the drafting party's exposure to liability under substantive law.¹⁴³ This concern is by no means abstract. Courts typically invalidate such terms, if at all, only when they directly contravene a procedure expressly provided for in a statute or when they prevent the bringing of a claim or defense in the first place.¹⁴⁴ Moreover, contractual provisions that modify or eliminate procedural devices tend to be evaluated and enforced in a context-neutral way, with little regard for particular substantive regulatory consequences.¹⁴⁵

Consequently, to the extent parties desire to commoditize procedure to optimize substantive results to their own advantage, "almost limitless" methods of modification are available to them.¹⁴⁶ For instance, parties have inserted forum selection clauses in contracts to recalibrate the stakes of litigation by making the filing of suit prohibitively inconvenient and have also made use of the following tools: waivers to objections to jurisdiction, statutes of limitation, and jury trials; provisions to modify filing requirements, default burdens of proof, and the American rule regarding attorneys' fees (putting in its place a requirement that the losing party pay the prevailing party's fees); and limitations on damages.¹⁴⁷ Many of these provisions are designed to change the stakes of litigation and therefore discourage suit in the first place.¹⁴⁸

The use of procedural private ordering has also enabled entities to export the lenient law of a particular state onto nonresidents, effectively immunizing them from suit and, by extension, from any meaningful form of regulation.¹⁴⁹ As an example, banks and credit card companies use choice-of-law and choice-of-forum clauses to ensure the export of lenient state law—law that frequently provides

143. *See id.* at 725.

144. In fact, since the Supreme Court's decision in *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 591 (1991), in which the Court created "a presumption of enforceability" for such contractual provisions, the Court has not found that "a procedural contract violates fundamental fairness." Dodge, *supra* note 142, at 735-36.

145. Dodge, *supra* note 142, at 728, 731-32.

146. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 465 (2007).

147. Dodge, *supra* note 142, at 746-48.

148. *Id.*

149. *Id.* at 741-43.

these entities a wide berth to engage in undesirable conduct or that imposes strict damages restrictions, thereby discouraging private suits.¹⁵⁰ These clauses, in concert with the permissive regulatory regime that emerged under the National Bank Act (NBA), provide financial institutions an environment largely unregulated by private parties and, at least until quite recently, largely unregulated by public institutions.

In particular, section 85 of the NBA permits banks to charge “interest at the rate allowed by the laws of the State, Territory, or District where the bank is located.”¹⁵¹ The Supreme Court interpreted the term “located” to mean that a bank is accountable to the laws of the state in which it is chartered, even if it conducts its commercial activities in other areas throughout the country.¹⁵² Unsurprisingly, banks and credit card companies quickly relocated to a handful of states—primarily South Dakota and Delaware—with favorable legal regimes, including the absence of usury regulations.¹⁵³ After the Supreme Court later adopted the Office of the Comptroller of the Currency’s (OCC) interpretation of the term “interest” as including any charges associated with credit card usage,¹⁵⁴ financial institutions existed in a regulatory safe haven: liability for imposing unduly high rates, confusing variable interest rates, and hidden and/or exorbitant late fees has been largely precluded by the exportation into the national market of the lax law of two outlier states. Virtually all state banks have now converted to federal charters to avail themselves of this exportation regime,¹⁵⁵

150. See Scott J. Burnham, *Contractual Relations in Small Business: Do the Benefits of a Custom-Made Contract Outweigh the Costs?*, 7 J. SMALL & EMERGING BUS. L. 425, 428-29 (2003); Erin Ann O’Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1556 (2000).

151. 12 U.S.C. § 85 (2006).

152. See *Marquette Nat’l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 310-13 (1978).

153. See Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 160-61 (2006).

154. See *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 746-47 (1996). Since the Supreme Court’s decision in *Smiley*, the OCC has declared that interest includes, among other things, “numerical periodic rates, late fees, creditor-imposed not sufficient funds (NSF) fees ... overlimit fees, annual fees, cash advance fees, and membership fees.” 12 C.F.R. § 7.4001(a) (2005).

155. JP Morgan Chase, HSBC, and the Bank of Montreal together moved \$1 trillion in assets from state-regulated banking systems to federal systems. Oren Bar-Gill & Elizabeth

and these entities have inserted choice-of-law and choice-of-forum clauses in their contracts with consumers to ensure application of the favorable law.¹⁵⁶ The recent congressional overhaul of consumer finance law in 2009 and 2010 does nothing to change this exportation regime.¹⁵⁷

Provisions that circumscribe the availability of procedural mechanisms or that shift liability in favor of the drafting party do not appear at random. Rather, one tends to find them in particular types of contracts, such as consumer and employment contracts (as opposed to commercial contracts, in which sophisticated parties tend to maximize equally the value of their transactions).¹⁵⁸ As scholars have recognized, this reality raises concerns regarding disparities in bargaining power.¹⁵⁹ However, the landscape of asymmetric procedural private ordering portends more fundamental problems: these provisions frequently appear in areas of the law arguably in most need of private, *ex post* mechanisms of enforcement, and the use of these provisions will in many instances undermine significantly the policing of wrongdoing within those regulatory schemes.

D. Heightened Pleading Standards

Through two recent decisions, *Bell Atlantic v. Twombly*¹⁶⁰ and *Ashcroft v. Iqbal*,¹⁶¹ the Supreme Court replaced the notice pleading regime under the Federal Rules of Civil Procedure that had been perceived as settled for decades¹⁶² with a new “plausibility” pleading standard for all cases in federal court.¹⁶³ The decision in *Twombly*

Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 82-83 (2008). And in 2006, the Bank of New York, one of the largest remaining state banks, sold its 338 retail branches to J.P. Morgan Chase. *Id.* at 83.

156. See Burnham, *supra* note 150, at 425, 429.

157. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7 U.S.C. and 15 U.S.C.).

158. See Gilles, *supra* note 11, at 412-13 & n.222.

159. See *id.* at 399, 418.

160. 550 U.S. 544 (2007).

161. 129 S. Ct. 1937.

162. See *Conley v. Gibson*, 355 U.S. 41, 45 (1957) (stating that a claim should not be dismissed under Rule 12(b)(6) unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”).

163. *Twombly*, 550 U.S. at 562-64 (abrogating the “no set of facts” standard articulated in *Conley v. Gibson*, 355 U.S. 41 (1957)); see also *Iqbal*, 129 S. Ct. at 1949 (making clear that the

has been lauded for bringing long-overdue reworking of overly permissive pleading standards.¹⁶⁴ It has at the same time been criticized on a number of fronts—as an impermissible exercise of the judiciary’s power, as a proclamation of an impossibly vague and unwieldy standard, and as an outright assault on private litigation.¹⁶⁵

At bottom, these decisions are at least defensible on the grounds that they correctly identify a problem of modern litigation. The costs associated with an expansive discovery regime embodied in the Federal Rules may generate significant settlement pressure even if the defendants did nothing wrong and are ultimately likely to be exonerated.¹⁶⁶ In some regulatory regimes, particularly those in which potential plaintiffs can reasonably be expected to have access to factual information about their claims sufficient to state a “plausible” claim,¹⁶⁷ this heightening of the pleading mechanism standard may serve as a more effective screener of meritless cases before they proceed to the frequently settlement-extracting discovery phase of litigation. But, because the new “plausibility” pleading standard applies broadly,¹⁶⁸ it is likely that in some significant subset of cases the new standard will sweep too broadly and simply remove from the regulatory landscape a number of potentially meritorious lawsuits. To the extent private enforcement plays an

“plausibility” pleading standard articulated in *Twombly* applies to all complaints filed in federal court under Rule 8(a)(2)).

164. See Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POLY 61, 62 (2007) (welcoming the decision, though criticizing its analysis).

165. See, e.g., Hillel Y. Levin, *Iqbal, Twombly, and the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143, 152 (2010) (“[T]he Supreme Court’s plausibility standard is extraordinarily vague.”); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 8-9 (2010) (arguing that the fear of excessive discovery costs is hurting the ability of an average person to have her day in court); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1855 (2008) (arguing that the new regime violates the Seventh Amendment’s limits on judicial and congressional power over juries).

166. See J. Maria Glover, *The Federal Rules of Civil Settlement 15-20* (Oct. 20, 2011) (unpublished manuscript) (on file with author) (noting, however, that settlement pressure was likely not a potential issue in *Iqbal*, making the case a particularly poor vehicle for broadening a pleading standard designed in part to reduce such pressure).

167. See *id.* at 49.

168. See *Iqbal*, 129 S. Ct. at 1949 (extending *Twombly*’s “plausibility” standard to all complaints filed in federal court under Rule 8(a)(2)).

important role in the achievement of a given set of regulatory objectives for any of those cases, this heightened pleading standard will undermine the functioning of those regulatory regimes.

E. Preemption of State Law Claims

Another controversial effort to reduce mechanisms of private regulation—this time, state common law claims—is not achieved through the elimination or direct alteration of such claims under common law but through federal preemption.¹⁶⁹ To be sure, preemption of state law claims is sometimes needed and appropriate, particularly in the context of a comprehensive public regulatory scheme. Indeed, as proponents of preemption argue, national markets may “demand uniformity” in the interpretation of federal regulations across the United States;¹⁷⁰ preemption can help circumvent negative spillover effects, whereby one experimenting or perhaps aberrant state shifts costs in favor of its own citizens;¹⁷¹ and preemption can prevent unfairness to businesses that have complied with federal regulations only to face unpredictable and conflicting liability under state law.¹⁷² On the other hand, opponents of preemption argue that removal of state law tort liability from the regulatory landscape dilutes incentives for manufacturers to design safe products or to inform consumers about dangers,¹⁷³ compels national uniformity while “stifling state-by-state diversity and

169. See David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims*, 96 GEO. L.J. 461, 464 (2008).

170. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1369 (2006).

171. See *id.* at 1370; see also Richard L. Revesz, *Rehabilitating Interstate Competition, Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222 (1992) (“The presence of interstate externalities is a powerful reason for intervention at the federal level.”).

172. See Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 13-14 (1995).

173. See, e.g., Micah L. Berman, *Smoking Out the Impact of Tobacco-Related Decisions on Public Health Law*, 75 BROOK. L. REV. 1, 40 (2009) (“[I]mmunity from tort litigation ... removes a major incentive for manufacturers to make their products as safe as possible or to alert consumers to newly-discovered dangers.”); Kessler & Vladeck, *supra* note 169, at 476 (noting that preemption of failure-to-warn claims removes incentives for drug manufacturers to update labels).

experimentation,”¹⁷⁴ and provides de facto immunity for regulated entities.¹⁷⁵ And these latter concerns are particularly pronounced vis-à-vis the meaningful regulation of wrongdoing if the overall regulatory scheme in which an entity operates is not comprehensive.

Preemption issues appear all across the regulatory landscape.¹⁷⁶ Moreover, statements on preemption are not just the province of Congress and the courts. In recent years, federal agencies have attempted, albeit somewhat unsuccessfully, to expand preemption through statements in regulations. In particular, during George W. Bush’s administration, various federal agencies included statements in the preambles of their regulations indicating the agency’s view that such regulations should preempt all state law claims in the regulated field.¹⁷⁷

174. Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 130 (2004).

175. See, e.g., Eva B. Stensvad, *Immunity for Vaccine Manufacturers: The Vaccine Act and Preemption of Design Defect Claims*, 95 MINN. L. REV. 315, 315 (2010).

176. For instance, the Medical Device Act expressly provides that states may not maintain device requirements “different from, or in addition to” the FDA’s requirements. 21 U.S.C. § 360k(a)(1) (2006). The Court has interpreted this language as preempting not only state regulatory measures, but state tort law as well. See *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-24 (2008) (holding that plaintiffs’ claims that a device manufacturer’s catheters were not reasonably safe under state tort law were preempted); *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 343-44 (2001) (holding as preempted plaintiffs’ claims that they had been injured by orthopedic bone screws and that the manufacturer of those screws had made fraudulent misrepresentations to the FDA in the course of obtaining market approval). The Court has so held despite the fact that the FDA approves pharmaceuticals based solely on information provided by the manufacturer, see Brief for the States of New York et al. as Amici Curiae in Support of Petitioners at 17, *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (No. 06-179), which in turn is based on few clinical trials (perhaps only one), see DAVID C. VLADECK, AM. CONSTITUTION SOC’Y FOR LAW & POLICY, THE EMERGING THREAT OF REGULATORY PREEMPTION 6-8 (2008), available at http://www.acslaw.org/sites/default/files/Vladeck_Issue_Brief.pdf. Once on the market, these products are subject to very limited ongoing supervision by the FDA. David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95, 128 (2005).

177. See Sharkey, *supra* note 4, at 227. For instance, in its January 2006 prescription drug labeling rule, the FDA stated that “FDA approval of labeling under the act ... preempts conflicting or contrary State law.” Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, 601). In that same year, the CPSC handed down rules regarding bedding and mattress fire safety and stated within those rules that “inconsistent state standards and requirements, whether in the form of positive enactments or court created requirements” are preempted. Final Rule: Standard for Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13,472, 13,496 (Mar. 15, 2006) (to be codified at 16 C.F.R. pt. 1633). For the time being, it is unclear how effective such statements will be in

In essence, preemption shapes the regulatory environment for most major industries—including, for instance, drugs and medical devices, tobacco, banking, air transportation, securities, automobiles, and boats.¹⁷⁸ And for many regulatory regimes, preemption is necessary to ensure, for instance, national uniformity of standards in certain industries and to prevent the imposition of negative spillover effects by one state on out-of-state defendants.¹⁷⁹ That said, evaluation of whether state law causes of action are preempted within any given regulatory regime should also consider the ways in which that regime is changed by the absence of private litigation. In small pockets of the law, such considerations are being made. In the wake of the recent financial crisis, Congress enacted a bill that takes steps to roll back preemption both of state law claims and state administrative regulation of national banks, with the purpose of strengthening the regulatory regime in which these institutions operate.¹⁸⁰ In many instances, however, such systemic considerations are given short shrift, either by Congress or by the Court, through strict applications of preemption doctrines.¹⁸¹ The

influencing the courts on preemption. Recently, the Supreme Court, in *Wyeth v. Levine*, 555 U.S. 555 (2009), over a vigorous dissent, *id.* at 604-29 (Alito, J., dissenting), made clear that the FDA's preemptive statement, because it was expressed in a regulatory preamble, was not entitled to deference. *Id.* at 577 (majority opinion). This decision, combined with a recent memorandum to federal agencies from President Obama, Memorandum on Preemption, 2009 DAILY COMP. PRES. DOC. 384 (May 20, 2009), available at http://whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption, indicates that—at the very least—administrative agencies must not issue statements on preemption so “silently” but rather must do so through more formal procedures such as the notice-and-comment process.

178. On drugs and medical devices, see, for example, *Wyeth*, 555 U.S. at 555; *Riegel*, 552 U.S. at 312; *Buckman Co.*, 531 U.S. at 341; *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). On tobacco, see, for example, *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). On banking, see, for example, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Barnett Bank v. Nelson*, 517 U.S. 25 (1996). On air transportation, see, for example, *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). On securities, see, for example, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006); *Dahl v. Charles Schwab & Co.*, 545 N.W.2d 918 (Minn. 1996); *Guice v. Charles Schwab & Co.*, 674 N.E.2d 282 (N.Y. 1996). On automobiles, see, for example, *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). On boats, see, for example, *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

179. See Issacharoff & Sharkey, *supra* note 170, at 1369-70.

180. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7 U.S.C. and 15 U.S.C.).

181. The Court's recent decision in *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), illustrates the way that preemption doctrines largely fail to accommodate these systemic concerns. In

combination of a diffuse regulatory system, frequently functionally reliant on ex post regulation by private parties for the effectuation of particular substantive aims, on the one hand, and the curtailment of private enforcement mechanisms on the other, raises fundamental questions about whether and to what extent such restrictions threaten a given regulatory regime. Moreover, the frequently context-neutral approach to such restrictions impedes the needed integration of regulatory objectives among enforcement channels. Accordingly, the following Part presents the elements of a framework for evaluating and tailoring appropriate private enforcement mechanisms in light of the exigencies of a particular regulatory scheme. This framework will guide courts, legislatures, and when appropriate, administrative agencies in more completely harmonizing various enforcement efforts with underlying regulatory goals.

Pliva, patients who had taken a generic form of the drug Reglan and had later suffered tardive dyskinesia filed suit under state law against the generic manufacturer, alleging that it had failed to update the drug's warning labels to reflect recent evidence of this potential severe side effect. *Id.* at 2572-73. The applicable state laws—those of Louisiana and Minnesota—required manufacturers of all drugs, including generics, to provide up-to-date warnings based on scientific evidence of the drug's potentially harmful effects. Federal law, however, required that a generic drug's warnings should match those of the brand name drug. *Id.* at 2573. The majority held that the federal drug regulations directly conflicted with the relevant state law because it was impossible for manufacturers to comply with both laws. *Id.* at 2577. The impossibility preemption doctrine left little room for the consideration of the systemic concerns raised by the majority's holding; indeed, the majority simply noted that "it is not this Court's task to decide whether the statutory scheme ... is unusual or even bizarre." *Id.* at 2582 (citation omitted) (internal quotation marks omitted). In her dissent, Justice Sotomayor argued that preemption doctrines must take into account the more systemic consequences of removing private enforcement mechanisms from this particular regulatory scheme. *Id.* at 2582-93 (Sotomayor, J., dissenting). Specifically, Justice Sotomayor contended that the majority's holding "create[d] a gap in the parallel federal-state regulatory scheme in a way that could have troubling consequences for drug safety," noting that state tort suits provided a crucial complement to FDA regulation by "uncover[ing] unknown drug hazards and provid[ing] incentives for drug manufacturers to disclose safety risks promptly." *Id.* at 2592 (citation omitted) (internal quotation marks omitted). Even if the appropriate application of the impossibility preemption doctrine, as it currently exists, tracks the majority's interpretation, the decision in *Pliva* highlights a serious deficiency in both that doctrine and in the design and function of the regulatory regime for prescription drugs—namely, that neither successfully integrates within a system of diffuse regulation the relevant objectives of protecting and warning patients and of treating regulated entities, both producers of brand-name and generic drugs, equally, as Congress intended.

III. A CONCEPTUAL FRAMEWORK FOR INTEGRATING PRIVATE MECHANISMS OF ENFORCEMENT INTO REGULATORY REGIMES

Parts I and II have argued that private enforcement is integral to our larger system of public regulation. Indeed, such public regulation could not exist as it does without such enforcement. And as scholars have recognized, the American regulatory state requires a level of investment in the private legal system in order to ensure that substantive laws are enforced and to achieve deterrence of wrongdoing.¹⁸²

Of course, maximum enforcement of any given regulatory scheme is both unnecessary and frequently not optimal. Private enforcement has the potential to disrupt regulatory schemes by generating, among other things, excessive overall enforcement.¹⁸³ And even in a diffuse system of regulation, there are myriad reasons within specific regulatory regimes that enforcement mechanisms are better entrusted to public regulatory bodies.¹⁸⁴

That said, efforts to curtail private mechanisms of enforcement sweep too broadly and without attention to the ways in which various private enforcement mechanisms interact with the overall regulatory goals.¹⁸⁵ Therefore, they may leave in place insufficient ex post accountability in various substantive areas of American law. Rigorous analysis of the role private enforcement mechanisms play in a given regulatory regime has been obscured both in doctrine and in scholarship by the tendency to formulate acontextual, abstract metrics for the evaluation of such mechanisms,¹⁸⁶ and by normative

182. See, e.g., Stewart & Sunstein, *supra* note 10, at 1201-02.

183. See Stephenson, *supra* note 90, at 114.

184. See, e.g., Pasachoff, *supra* note 67, at 1461-65 (arguing that public enforcement of IDEA is preferable to private enforcement).

185. See *supra* Part II.

186. For instance, courts have attempted to construct various metrics to govern class waivers in particular, and class actions in general, in a largely context-neutral manner. Cases and materials addressing unconscionability and preemption under the FAA are illustrative. See, e.g., *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1747-48, 1750-53 (2011); *Laster v. AT&T Mobility L.L.C.*, 584 F.3d 849, 853 (9th Cir. 2009); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005); *Kinkel v. Cingular Wireless L.L.C.*, 857 N.E.2d 250, 274-75 (Ill. 2006); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1007-08 (Wash. 2007); Brief for Petitioner at 48, *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893); see also Sternlight, *supra* note 11, at 21.

accounts of these restrictions that focus less on the relationship between a private enforcement mechanism and the *particular* exigencies of a given regulatory scheme and more on the relationship between those mechanisms and a system of private litigation in general.¹⁸⁷ These broad criticisms of private enforcement might be better understood in some instances, instead, as a call for better *tailoring* of the mechanisms of that enforcement to regulatory exigencies.¹⁸⁸ Indeed, the diffuse nature of regulation in the American system of public law calls for more nuanced approaches to fundamental questions about the potential insufficiency, or insufficient tailoring, of ex post private enforcement mechanisms within specific regulatory schemes—questions that receive little attention.¹⁸⁹

This Part seeks to address these questions more systemically by setting forth elements of a framework for evaluating private enforcement mechanisms that will enable courts, legislatures, and, where appropriate, administrative agencies, to better tailor private enforcement mechanisms to the achievement of specific regulatory objectives. In particular, this Part sets forth four operational criteria for evaluating these mechanisms of enforcement.

First, all things being equal, enforcement mechanisms should be entrusted and tailored to the needs of the regulator with superior

187. See, e.g., Stephen J. Werber, *Ohio: A Microcosm of Tort Reform Versus State Constitutional Mandates*, 32 RUTGERS L.J. 1045, 1046-47 (2001) (arguing that tort reform is needed to protect defendants from frivolous lawsuits); Sternlight, *supra* note 11, at 19-20 (asking whether class actions are a “good thing” and ultimately concluding that they are). For an example of context-specific evaluation of tort reform in the area of medical malpractice, however, see David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1089-91, 1107 (2006) (providing thorough research on the occurrence and success rates of malpractice suits).

188. For instance, Steven Shavell has argued that public regulation is preferable to private regulation when harm is dispersed across the population. Shavell, *supra* note 58, at 363, 370. However, particularly when public regulatory bodies are ill equipped as a matter of resources to deal with widespread harm within a given regulatory regime, a mechanism like the class action or multidistrict litigation (MDL) might be employed. And as discussed below, see *infra* text accompanying notes 292-94, the Supreme Court's opinion in *Bell Atlantic Corp. v. Twombly*, which expressed concern about private suits resulting in remedial overkill in the context of antitrust regulation, 550 U.S. 544, 569 n.14 (2007), might be better understood as issuing a call for more nuanced mechanisms of private enforcement at the pleading stage that better screen meritless suits.

189. See *infra* text accompanying notes 274-75.

command of information relevant to potential wrongdoing.¹⁹⁰ Ideally, such mechanisms should be allocated not only to informationally superior parties but to those parties who have sufficient incentives to operationalize that information through enforcement.¹⁹¹

Second, private enforcement mechanisms should be integrated with other regulatory efforts when necessary to effectuate the complete range of remedies provided in a given scheme, but carefully calibrated so as not to generate substantial remedial overkill.¹⁹²

Third, evaluation of private enforcement mechanisms, particularly under preemption doctrines, should explicitly include consideration of the extent to which those mechanisms are necessary to a regime's comprehensive regulation of harm.¹⁹³ Further, courts, and, when appropriate, the Civil Rules Advisory Committee or Congress, should calibrate enforcement mechanisms attendant to state law claims with a careful eye toward the need to preserve national uniformity and to prevent the negative spillover effects.¹⁹⁴

Fourth and finally, even when a regulatory scheme allocates enforcement authority to public regulatory bodies with informational advantages relative to private parties, and even when a public regulatory scheme technically provides for complete and comprehensive regulation of wrongdoing, to the extent those regimes are characterized by significant underenforcement and regulatory failure on the part of the public regulatory body, appropriate enforcement mechanisms should be allocated to private parties for the achievement of regulatory goals.¹⁹⁵

To be clear, this Part does not purport to resolve questions about whether a system of public regulation in general or with regard to a particular substantive area is ultimately better than one heavily reliant on private enforcement. In addition, this Part does not provide ironclad prescriptions for the precise calibration of any regulatory scheme, as such prescriptions necessarily require a balancing of many of the considerations set forth here. Rather, the goal is to

190. *See infra* Part III.A.

191. *See infra* notes 225-39 and accompanying text.

192. *See infra* Part III.B.

193. *See infra* Part III.C.

194. *See infra* Part III.C.

195. *See infra* Part III.D.

provide elements of a framework for thinking more systematically about how to calibrate and design appropriate mechanisms of private enforcement within the specific contours of a given regulatory scheme. The systemic analysis of enforcement mechanisms within this framework reveals that, in a number of areas of law, there may be insufficient, or insufficiently nuanced, mechanisms of ex post enforcement.¹⁹⁶ At the same time, with respect to specific regulatory regimes, some mechanisms of private enforcement may not be as crucial to a given regulatory landscape as many believe and, in fact, may generate undesirable regulatory consequences.¹⁹⁷

Although this framework does not seek to, nor could it, resolve all the complex issues of regulatory design present across innumerable areas of substantive law, it does for the first time situate, within a larger account of private regulation's structural role, current efforts to curtail enforcement mechanisms that support that regulation.¹⁹⁸ The conceptual elements presented here thus offer a needed and more systemic approach to a number of seemingly disparate debates about private enforcement mechanisms across our legal landscape—an approach that accounts for the effect of those mechanisms on the operation of a *particular* regulatory scheme and thus offers hope of eventual resolution of these seemingly intractable disputes.

A. Allocating Enforcement Mechanisms to the Regulator with Superior Information

All other things being equal, enforcement mechanisms should be entrusted to the regulator with the best regulatory command of information relevant to wrongdoing. In particular, evaluating the need for or design of enforcement mechanisms within a given regulatory scheme should involve two related inquiries about informational advantages as between potential regulators of wrongdoing. First, as between a potential public and private regulator, courts, legislatures, and agencies—to the extent an agency exercises regulatory supervision over private enforcement¹⁹⁹—should ask which

196. See *infra* Part III.A-D.

197. See *infra* Part III.B.

198. See *supra* Part II.

199. See, e.g., Stephenson, *supra* note 90, at 95-98 (suggesting heightened agency

potential regulator has better access to, ability to evaluate, and, as a result, command of the factual information relevant to the alleged wrongdoing. Second, courts, legislatures, and agencies should determine whether the actors with superior command of the relevant information are in fact adequately incentivized to operationalize that information via enforcement of the underlying substantive law, and then make adjustments to the relevant enforcement mechanisms as required.²⁰⁰

Regarding the first inquiry, public regulators will generally have informational advantages for those regulatory regimes in which (1) a fairly large set of data is needed for the illumination of potential wrongdoing,²⁰¹ (2) comparative analysis of that factual information is required or particularly helpful for the discovery of potential wrongdoing,²⁰² or (3) the information relevant to potential wrongdoing is of a complex nature such that it is not easily understandable by non-experts.²⁰³ In such situations, the operation of various private enforcement mechanisms may not only be unnecessary but may also disrupt the achievement of regulatory objectives by, for instance, introducing into the litigation system potentially meritless lawsuits filed by informationally disadvantaged private plaintiff regulators.²⁰⁴ On the other hand, private parties will tend to possess such advantages for those regulatory regimes in which (1) private

supervision of private enforcement initiatives); *see also* Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983? A Theoretical Approach*, 69 BROOK. L. REV. 163, 163, 165 (2003) (suggesting that agencies play a greater role in determining whether a private right of action should be permitted to enforce a “law” under 42 U.S.C. § 1983 (2006)).

200. To be sure, the party with superior information will not always be the party best incentivized to operationalize that information through enforcement efforts, and vice versa. As this Part discusses, this situation requires careful consideration of a given regulatory regime’s contours for purposes of allocating mechanisms when such considerations diverge, and to the extent enforcement must be entrusted to an informationally inferior party to ensure meaningful regulation under a given scheme, mechanisms must be put in place to cure informational asymmetries. *See infra* text accompanying notes 226-39.

201. *See supra* note 64 and accompanying text.

202. *See supra* note 65 and accompanying text; *see also, e.g.*, Selmi, *supra* note 83, at 1409-10 (noting that potential renters or buyers may not know that they have been the victims of housing discrimination without comparative information).

203. *See* Shavell, *supra* note 58, at 360 (arguing that public regulation is better when information related to wrongdoing is “difficult to communicate to private parties because of its technical nature”).

204. *See* Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 576, 596 (1997) (arguing that informational asymmetries best explain the filing of meritless suits).

individuals, as opposed to public regulators, are geographically close to the locus of the alleged harm,²⁰⁵ (2) the alleged wrongdoing is fairly concrete and aimed directly at or knowingly suffered by private individuals,²⁰⁶ or (3) the potential private-party regulator is integrated into a market or other structured environment in a way that gives it first-hand awareness of wrongdoing.²⁰⁷

As an example, consider the regulatory landscape of consumer finance. The overall consumer credit regulatory landscape is dominated primarily by disclosure laws,²⁰⁸ which are widely criticized as ineffective both as a means of informing consumers and as a means of affecting the behavior of consumers or regulated industries.²⁰⁹ Consumers generally do not comprehend such disclosures, nor do they tend to operationalize such information in a way that might alter their decision-making processes as market participants²¹⁰ or as potential regulators. Indeed, empirical studies show that increased disclosures do not influence consumers in the least.²¹¹ And given these informational disadvantages, even when disclosure suits are brought, they typically generate no meaningful change in the operation of the consumer market,²¹² because disclosed information

205. See *supra* notes 59-60 and accompanying text.

206. See Shavell, *supra* note 58, at 360 (arguing that private parties enjoy a relative advantage in knowledge about injuries to themselves and the risks of their activities).

207. See Stephenson, *supra* note 90, at 108.

208. See, e.g., Home Mortgage Disclosure Act of 1975, 12 U.S.C. § 2801 (2006); Truth in Savings Act, 12 U.S.C. § 4301 (2006); Truth in Lending Act (TILA) of 1968, 15 U.S.C. § 1601 (amended 2010); Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1704-1705 (2006); Fair Credit and Charge Card Disclosure Act, Pub. L. No. 100-583, § 136(b), 102 Stat. 2960, 2967 (1988) (codified as amended in scattered sections of 15 U.S.C.).

209. See, e.g., Bar-Gill & Warren, *supra* note 155, at 28, 42 (describing numerous studies that conclude that consumers misunderstand mortgage and credit card disclosures); Jonathan M. Landers & Ralph J. Rohner, *A Functional Analysis of Truth in Lending*, 26 UCLA L. REV. 711, 715 (1979) (“Behavioral scientists, public opinion research, [and] consumer research ... tell us the same thing: consumer behavior in a particular transaction is almost certainly *not* going to be affected by a [TILA] disclosure statement, notwithstanding the quality of that statement.”).

210. Samuel Issacharoff, *Disclosure, Agents, and Consumer Protection* 4-7 (NYU Ctr. for Law, Econ. & Org., Research Paper No. 10-33, 2010), available at <http://ssrn.com/abstract=1640624>.

211. See Ralph J. Rohner & Thomas A. Durkin, *TILA “Finance” and “Other” Charges in Open-End Credit: The Cost-of-Credit Principle Applied to Charges for Optional Products or Services*, 17 LOY. CONSUMER L. REV. 137, 145 (2005).

212. For example, studies show that TILA disclosures did almost nothing to correct consumer error in the mortgage lending market, largely blamed for much of the recent

does not tend to reveal to consumers, who are looking at a single credit card statement, practices like predatory lending or the charging of usurious interest rates.²¹³ The overall landscape is one in which public regulatory bodies, such as the newly created Bureau of Consumer Financial Protection (BCFP),²¹⁴ are likely to have a significant informational advantages.

For starters, determining whether financial agencies are engaged in unlawful practices generally requires a broad-based understanding of their financial practices vis-à-vis a number of consumers, not just one isolated consumer.²¹⁵ Moreover, determining the nature and scope of potential wrongdoing requires analysis of comparative data²¹⁶—for example, the difference in rates between one type of consumer and another, or between a business entity and a consumer. And finally, credit card bills and financial statements are increasingly technical and difficult for the average consumer to understand.²¹⁷ Thus, the expertise of a public regulatory agency is needed to spot wrongdoing within a labyrinth of complex data. All other things being equal, mechanisms of enforcement ought therefore to be put in place for regulatory enforcement by the BCFP—and

financial crisis. *See, e.g.*, JAMES M. LACKO & JANIS K. PAPPALARDO, FTC BUREAU OF ECON., IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE DISCLOSURE FORMS 29-30, 121 (2007), *available at* <http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf> (finding that the disclosures misled consumers, that consumers spent almost no time looking at disclosures, and that consumers never used the disclosures for their stated purpose).

213. *Cf. Selmi, supra* note 83, at 1409-10 (explaining that it is difficult for people to know when they have been victims of housing discrimination because they do not have access to comparative data).

214. The just-created BCFP, which was given authority to regulate consumer financial products, may strengthen somewhat the regulatory landscape of consumer finance. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011(a), 124 Stat. 1376, 1964 (2010) (codified in scattered sections of 7 U.S.C. and 15 U.S.C.). Importantly, both Elizabeth Warren and Oren Bar-Gill had significant influence over the formation of this agency. These two experts recognize the limitations of disclosure laws on correcting consumer error and understand many of the limitations prior agencies faced in enforcing consumer protection laws. *See* Bar-Gill & Warren, *supra* note 155, at 100-01 (recommending the creation of a new federal regulator). For more on the authors' understanding of these issues, see generally Bar-Gill & Warren, *supra* note 155.

215. *See, e.g., Selmi, supra* note 83, at 1409-10.

216. *See id.*

217. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-929, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS 77-78 (2006), *available at* www.gao.gov/new.items/d06929.pdf.

at least in its current form, a fair number of enforcement mechanisms have in fact been entrusted to that bureau (though it took a massive financial crisis to enact them).²¹⁸ It is too early to analyze the effectiveness of this agency and, more fundamentally, to know whether it will receive the funding necessary to exercise its powers. But purely as a matter of informational advantage, the creation of the BCFP is a welcome addition to the regulatory landscape of consumer finance.

As another example, public regulatory bodies are better positioned informationally in the context of housing discrimination. It is particularly difficult for individuals who might have been victims of such discrimination to ascertain their status as such because, as a general matter, prospective renters or buyers lack the “necessary comparative information.”²¹⁹ For instance, a realtor might inform an individual that “an apartment has already been rented” in order to conceal discriminatory animus.²²⁰ In general, housing audits play a crucial role in documenting and revealing housing discrimination,²²¹ this information is typically unavailable to private parties,²²² placing them at a significant informational disadvantage as potential regulators of wrongdoing under statutes such as the Fair Housing Act (FHA).

On the other hand, in other regulatory regimes like the FLSA, employees, as opposed to public regulators, generally possess infor-

218. The BCFP’s powers are broad. It has power over “covered persons,” defined as a person, or any affiliate of a person, who “engages in offering or providing a consumer financial product or service,” Dodd-Frank Act § 1002(6), though not over merchants and retailers, unless they have significantly engaged in “offering or providing any consumer financial product or service,” or over lawyers, entities regulated by the SEC, or insurance agents. *Id.* § 1027(a), (e), (i), (m). The BCFP also has rulemaking power to prevent “unfair, deceptive, or abusive [consumer financial] acts or practices,” *id.* § 1031(b), and it has supervisory and enforcement power over “nondepository covered persons,” “very large banks, savings associations, and credit unions,” and “other banks, savings associations, and credit unions.” *Id.* §§ 1024-1026. Finally, the BCFP can commence a civil action against “any person” who violates “[f]ederal consumer financial law.” *Id.* § 1054(a). Through such an action, the Bureau can obtain civil penalties of up to one million dollars per day, but the BCFP cannot seek punitive damages. *Id.* § 1055. For information regarding the role of the financial crisis in prompting the passage of the Dodd-Frank Act, see Manuel A. Utset, *Complex Financial Institutions and Systemic Risk*, 45 GA. L. REV. 779, 781-82 (2011).

219. See Selmi, *supra* note 83, at 1409-10.

220. *Id.* at 1410.

221. *Id.*

222. See *id.*

mational advantages regarding potential wrongdoing. Specifically, employees protected by the FLSA will usually have the best information regarding underpayment of wages or nonpayment of overtime.²²³ Employees are, quite obviously, geographically close to any potential harm at their place of work, and any wrongdoing is suffered by them directly—they are aware of the hours they have worked and of the values of their paychecks. As a practical matter, even if the DOL could obtain wage, hour, and working condition information as easily as employees, it lacks the resources to do so—the DOL has resources to investigate less than 1 percent of FLSA-regulated employers.²²⁴ Thus, in the context of the regulatory regimes such as the FLSA, enforcement mechanisms are better entrusted, as an informational matter, to private regulators.

But this is not the end of the analysis. Enforcement mechanisms should be tailored to the specific characteristics of those parties best positioned informationally to be potential regulators in a particular regulatory scheme. For example, the FLSA systematically tends to generate low-value claims because of the nature of its protected class: wage-and-hour employees.²²⁵ Consequently, to bring about enforcement of the FLSA by informationally superior private plaintiffs, mechanisms that facilitate the economics of claiming are required. Mechanisms already in place under the FLSA include the fee-shifting provision and the collective action proceeding, whereby an employee may opt in to a suit on behalf of himself and similarly situated employees.²²⁶ The fee-shifting mechanism is unlikely to provide sufficient enforcement incentives for anyone other than individuals possessing high-value claims²²⁷—a rarity under the

223. See Ruckelshaus, *supra* note 45, at 377, 383 (“[T]he DOL conducts its current wage and hour law enforcement based almost wholly on worker complaints.”).

224. See *supra* text accompanying note 47.

225. See Philip L. Bartlett II, *Disparate Treatment: How Income Can Affect the Level of Employer Compliance with Employment Statutes*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 419, 474-75 & n.260 (2001).

226. See 29 U.S.C. § 216(b) (2006).

227. Fee-shifting provisions also tend not to motivate private attorneys to ferret out wrongdoing, given (1) doctrinal developments that require suits to generate more than a voluntary change in a defendant’s conduct for the awarding of fees, *Buckhannon Bd. & Care Home Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001), and that permit defendants to condition settlement on waiver of such fees, *Evans v. Jeff D.*, 475 U.S. 717 (1986); and (2) functional uncertainty surrounding fee recovery, sometimes involving litigation but always involving supplemental costs in fee documentation, see *Selmi*, *supra* note 83, at

FLSA given its application to hourly wage workers. Further, among those with high-value claims, fee-shifting is helpful only to those who can obtain “prevailing party” status under *Buckhannon Board & Care Home Inc. v. West Virginia Department of Health & Human Resources*.²²⁸ The fee-shifting provision thus may enable only a small number of employee regulators, given that claims are typically of low value and given problems of strategic capitulation by defendants. Regulation, therefore, may be incommensurate with the often extensive reach of wrongdoing in the context of the FLSA.

Additional damages provisions, such as those for double or treble damages, which might improve the economics of claiming, likely would not sufficiently align regulation of the typically widespread harm under the FLSA with the scope of that harm.²²⁹ The collective action proceeding under the FLSA, the opt-in procedure that was largely an historical accident,²³⁰ can help overcome these asymmetries in litigation stakes and align more closely the scope of regulation with the scope of harm, but in many instances will fail on both counts absent the presence of employee agents to facilitate the opt-in process.²³¹

The more typical opt-out class action under Federal Rule of Civil Procedure 23 may be better designed to facilitate the economics of claiming and to more closely align the scope of regulation and the scope of wrongdoing, at least when employee agents are not in place.²³² At the very least, therefore, courts should reconsider their

1453-54.

228. 532 U.S. at 600.

229. This is particularly true given that double damages are available under the FLSA only for “willful” violations. 29 U.S.C. § 216(b); 29 U.S.C. § 626(b); *see also* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985) (noting that section 7(b) of the Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621-634), qualified the remedy available under section 16(b) of the FLSA “by a proviso that a prevailing plaintiff is entitled to double damages ‘only in the case of willful violations’”).

230. *See* Elizabeth K. Spahn, *Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and the Equal Pay Act Through the Fair Labor Standards Act*, 71 GEO. L.J. 119, 126-28 (1982) (discussing that the type of class action that would apply under the 1938 version of Rule 23 was the “spurious” class action, which required plaintiffs to opt in).

231. *See id.* at 133 (explaining that the current version of the FLSA does not provide for the “agency class action procedure”).

232. *See* FED. R. CIV. P. 23. Employee agents may not be in place either because relevant employees are not members of unions or other similar organizations, or because such agents

overwhelmingly permissive stance toward class action waivers in the context of the FLSA.²³³ The tendency under current doctrine toward one-size-fits-all metrics that focus on class action's normative desirability as a dispute resolution mechanism will not do. As this Part reveals, such abstract efforts only obscure crucial inquiries about whether and to what extent the class action mechanism is necessary for the effectuation of particular regulatory goals through private enforcement, given the substantive claims at issue and the relative abilities of various parties to reliably serve as regulators.

A final inquiry about informational advantages is required. Informational advantages do not always inure to the party with motivation or incentive to operationalize that information through enforcement of the regulatory scheme. To the extent the informationally advantaged party is insufficiently able or motivated to enforce regulatory objectives, enforcement mechanisms may well need to be entrusted to alternative regulators. However, such mechanisms should be carefully tailored to provide for either some modicum of supervision by the informationally superior party or for the curing of informational asymmetries.

Consider, for example, the "Indirect Purchaser Rule" under federal antitrust law, under which only direct purchasers—and not indirect purchasers—have standing to sue for federal antitrust violations.²³⁴ Scholars have long debated the merits of the rule, many lamenting that it prevents the "true victims" of antitrust violations from suing.²³⁵ In fact, a number of states have enacted statutes enabling indirect purchasers to sue.²³⁶ But as a matter of identifying the person in the line of harm with the best information,

are not even in existence for a particular industry.

233. See, e.g., *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1371, 1378-79 (11th Cir. 2005); *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 387 n.8 (6th Cir. 2005); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004).

234. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977).

235. Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447, 447-48 (2010); see also Andrew I. Gavil, *Thinking Outside the Illinois Brick Box: A Proposal for Reform*, 76 ANTITRUST L.J. 167, 170-71 (2009) (arguing that *Illinois Brick* should be overruled).

236. See, e.g., ALA. CODE § 6-5-60(a) (1975); CAL. BUS. & PROF. CODE § 16750(a) (West 2008); D.C. CODE § 28-4509(a) (2011); 740 ILL. COMP. STAT. ANN. 10/7(2) (West 2010); MICH. COMP. LAWS § 445.778 (2009); MINN. STAT. § 325D.57 (2010); MISS. CODE ANN. § 75-21-9 (1972); N.M. STAT. ANN. § 57-1-3(A) (1978); S.D. CODIFIED LAWS § 37-1-33 (2011); WIS. STAT. § 133.18(1)(a) (2011).

incentive, and ability to sue, the rule seems to make sense, as the Court has recognized: direct purchasers have better information, because they are integrated directly into a market for goods, giving them first-hand awareness of wrongdoing, and moreover, because they tend to have a larger stake.²³⁷

However, the limitation on indirect purchaser suits is problematic, even if direct purchasers are informationally advantaged, when direct purchasers are unlikely or unable to sue. Those with the best information about antitrust violations—arguably, direct purchasers—may not be the parties with any motivation to sue, given that direct purchasers often wish to avoid “disrupting relationships with [limited] suppliers.”²³⁸ This is especially true if direct purchasers are able to pass on any overcharges that result from antitrust violations to consumers.²³⁹ Viewed through this Article’s conceptual framework, the Supreme Court’s all-or-nothing “Indirect Purchaser Rule” sweeps too broadly.

The framework therefore calls for the design of carefully circumscribed mechanisms of enforcement to enable indirect purchasers to fill a void in the regulation of antitrust conduct within certain typically nationalized markets.²⁴⁰ Perhaps, for example, Congress

237. In contradistinction with indirect purchasers, who “have only a tiny stake in the lawsuit and hence little incentive to sue,” and whose suits might be hampered by “attempts to trace the effects of [an antitrust overcharge violation] on the purchaser’s prices, sales, costs, and profits,” *Ill. Brick*, 431 U.S. at 725, 726 (internal quotation marks omitted) (citations omitted), direct purchasers need not litigate complicated cost-passing theories, given their relationship of privity with suppliers, and thus are better positioned to ensure “vigorous private enforcement of the antitrust laws.” *Id.* at 745-46.

238. *Id.* at 746; see also Kevin J. O’Connor, *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST 34, 38 (2001) (noting that “indirect purchasers are perhaps more likely to bring suit” because they do not risk severing a “direct business relationship with the alleged violator”); Adam Thimmesch, *Beyond Treble Damages: Hanover Shoe and Direct Purchaser Suits After Comes v. Microsoft Corp.*, 90 IOWA L. REV. 1649, 1668 & n.127 (2005) (showing that in many monopoly situations a direct purchaser is unwilling to sue because the purchaser is dependent on the monopoly).

239. Thimmesch, *supra* note 238, at 1656-57 (describing the process by which direct purchasers pass on costs to indirect purchasers).

240. Existing state laws that permit indirect purchaser suits do not provide an adequate response. Such statutes do not exist in all states; moreover, these statutes frequently do not reach extraterritorial conduct and thus cannot enable regulation of violations in ever-increasing nationalized product markets. Compare, e.g., MO. REV. STAT. § 416.131 (2010) (“No action under [this act] shall be barred on the ground that the activity or conduct complained of in any manner affects or involves interstate or foreign commerce.”), with, e.g., *In re Microsoft Corp. Antitrust Litig.*, 2003-2 Trade Cas. (CCH) ¶ 74,138 (D. Md. 2003) (finding that

could enact federal legislation allowing indirect purchaser suits, but *only* in product markets with few suppliers. Alternatively, Congress might permit indirect purchaser suits more broadly, but insert provisions in the relevant legislation to address the risk of duplicative liability if, in fact, direct purchasers bring suit for the same conduct.²⁴¹

In addition, concerns that indirect purchasers generally possess fractional stakes in any given suit and, moreover, do not benefit from the efficiencies of scale that often inure to defendants who have an incentive to invest optimally in the various phases of litigation, may be surmountable only by additional mechanisms of enforcement. Available mechanisms for overcoming such problems are the class action and the *qui tam* regime.²⁴² Regarding the latter, a *qui tam* regime for indirect purchasers could trigger, in appropriate circumstances, government investigation and prosecution of antitrust violations.²⁴³ Such a mechanism is not available under current law, but it could help indirect purchasers overcome barriers to enforcement and might also better integrate public and private enforcement of antitrust violations.²⁴⁴ Unless and until such a mechanism comes into being, however, courts should skeptically approach attempts to limit the availability of the class action device in the area of antitrust, at least in the context of indirect purchaser

Mississippi antitrust act is limited to conduct “lying wholly within” Mississippi). These statutes may also sweep too broadly: very few address the problem of duplicative recovery that may arise in situations where both direct and indirect purchasers are motivated to bring suit. *But see infra* note 243.

241. There is precedent for such a regime in some state laws permitting indirect purchaser suits, *see, e.g.*, 740 ILL. COMP. STAT. 10/7 (“[When] claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability for the same injury.”), and in separate federal laws, such as the FLSA, *see* 29 U.S.C. § 216(c) (2006).

242. Other mechanisms, not yet in existence in the United States, could theoretically be adopted to address the problem of negative-value suits. As just one example, Australia has begun experimenting with private third-party financing of litigation. *See* IMF, <http://www.imf.com.au> (last visited Feb. 17, 2012) (“IMF is a public[ly] listed company providing funding of legal claims.”). To the extent it is desirable for such a market to emerge in the United States—a question for future work—that market could help facilitate the economics of claiming.

243. *See* William E. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, 58 ANTITRUST L.J. 1059, 1076-77 (1990) (describing *qui tam* procedure and its potential applicability to private antitrust litigation).

244. *See id.*

claims. Finally, given the difficulty indirect purchasers face in proving injury causation—yet another concern expressed by the Supreme Court in adopting the “Indirect Purchaser Rule”²⁴⁵—mechanisms outside the law, in the form of sophisticated experts who can detect and testify to the existence of things like price-fixing conspiracies,²⁴⁶ must continue to develop if indirect purchasers are to serve as regulators.

B. Tailoring Private Enforcement Mechanisms to Remedial Gaps and Remedial Overkill

A great number of regulatory regimes provide for remediation of harms—in the forms of compensation and deterrence—by both public and private regulatory efforts. Better integration of the means for achieving regulatory goals in a diffuse enforcement regime therefore requires increased attentiveness to the twin problems of remedial gaps and remedial overkill within any particular scheme. All other things being equal, and again drawing on specific examples, this Part posits that, in general, to the extent a public regulatory body is limited in its ability to seek certain types of remedies for a given form of wrongdoing, both underdeterrence and undercompensation within a particular regulatory scheme may result in the absence of private enforcement mechanisms to obtain those remedies.²⁴⁷ Alternatively, remedial overkill can result within the context of specific regulatory regimes when, for instance, two or more mechanisms of private enforcement combine vis-à-vis the enforcement of a particular substantive law to create excessive or duplicative liability that is vastly disproportionate to the underlying harm.²⁴⁸ Remedial overkill can also result when a particular mechanism of enforcement in a specific regulatory context too easily permits private parties to extract settlement values either for meritless claims or for conduct that the relevant legislature has not even deemed wrongful.²⁴⁹

245. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746-47 (1977).

246. *See* Issacharoff & Samuel, *supra* note 12, at 60-61 (noting that complex harms require nonlawyer experts to aid in enforcement).

247. *See, e.g., infra* text accompanying note 346.

248. *See infra* notes 257-58 and accompanying text.

249. *See infra* text accompanying notes 256-57.

Again, it helps to think not just conceptually but also concretely. Regarding underremediation, consider the regulatory framework in which the Racketeer Influenced and Corrupt Organizations Act (RICO) operates. The DOJ is hindered in its ability to obtain remediation for RICO violations, particularly for mass fraud, given its inability to seek disgorgement.²⁵⁰ The Supreme Court recognized the problem, at least partially, in *Bridge v. Phoenix Bond & Indemnity Co.*²⁵¹ Rejecting explicitly the argument that RICO carried with it a requirement of first-party reliance, the Court pointed out that respondents “were the *only* parties injured by petitioners’ misrepresentations,” and that “no more immediate victim [was] better situated to sue.”²⁵² Moreover, the Court observed that there was no risk of duplicative recovery.²⁵³ The Court’s holding reflects a concern that a key mechanism of RICO’s private enforcement—an interpretation of the statute that allows plaintiffs to claim third-party reliance—be preserved. Lower courts, however, have interpreted and applied *Bridge* in a way that effectively requires proof of direct reliance, thereby cutting off ex post regulation—sometimes the only form of regulation likely to occur for a given RICO violation.²⁵⁴ This is an undesirable result in light of the overall regulatory scheme.

This one mechanism—allowing indirect proof of reliance—may be sufficient to enable private enforcement across much of the RICO landscape. Indeed, for larger RICO fraud claims, additional mechanisms that facilitate the economics of enforcement, such as the class action, may not be necessary to encourage suits. This is particularly true given the tendency of high-value RICO cases, even those involving allegations of the same conduct, to settle on an aggregate basis either informally or through MDL.²⁵⁵ In such situ-

250. See Leah Bressack, Note, *Small Claim Mass Fraud Actions: A Proposal for Aggregate Litigation Under RICO*, 61 VAND. L. REV. 579, 580-81 (2008).

251. 553 U.S. 639, 657-58 (2008).

252. *Id.* at 658.

253. *Id.*

254. See, e.g., *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 134 (2d Cir. 2010) (cutting off ex post regulation of drug manufacturers’ alleged RICO fraud by third-party payors, likely the only parties in position to bring suit).

255. See *infra* text accompanying notes 375-77 (providing further discussion of MDL).

ations, the class action device is not needed to align the scope of regulation with the scope of the harm.

For small-value RICO claims, however, mechanisms like the class action device are critical to facilitate private enforcement. And more importantly, the class action device is likely able to function in the context of RICO fraud claims if parties can allege causation or reliance by means of statistical or aggregate proof.²⁵⁶ The types of proof that parties must show is highly variant among cases, and the complexities of articulating statistical models are not the work of this Article. But at the very least, the types of aggregate proof that are permitted must be carefully policed: broad leeway for statistical proof may, in combination with liberal pleading—which is discussed in more detail below²⁵⁷—give plaintiffs the ability to file meritless or highly speculative complaints and leverage hydraulic settlement pressure.

Enforcement mechanisms must also be carefully tailored to preserve meaningful enforcement while at the same time avoiding significant remedial overkill. First, some enforcement mechanisms, in combination, may result in vast overremediation. Take, for example, the combination of the class action mechanism and statutory damages. Both exist to overcome the problem of small-value claims, but the combination of the two may go too far. Statutory damages, in particular, often exist to compensate for the fact that only a small percentage of those affected by various harms will initiate suit to penalize the wrongdoer, and thus the wrongdoer would pay only a small percentage of the total actual damages that exist. The class action separately overcomes the “small percentage of claimants” problem, effectively bringing all plaintiffs to the table through class certification. Deploying both enforcement mechanisms simultaneously may bring about crushing liability wildly disproportionate to the total actual damages.

The Court recently discounted this very problem in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*²⁵⁸ *Shady Grove* involved a potential conflict between Federal Rule of Civil Procedure 23, which authorizes federal courts to certify a class action provided

256. See generally Bressack, *supra* note 250.

257. See *infra* Part III.B.

258. 130 S. Ct. 1431 (2010).

that certain conditions are met,²⁵⁹ and a provision of New York law that prohibits plaintiffs seeking statutory damages from joining together as a class.²⁶⁰ If New York's law had been allowed to govern the case, class litigation would be disallowed in federal court, just as it was in state court. Both the district court and the Second Circuit concluded that New York's law governed and, further, that Rule 23 did not displace the state law.²⁶¹ The Supreme Court reversed. Writing for a sharply divided Court,²⁶² Justice Scalia concluded that the New York law and Rule 23 were indeed in conflict, that Rule 23 trumped state law, and that plaintiffs could therefore bring a class action for statutory damages in federal court even though they would not have been permitted to do so in state court.²⁶³

Looking to the Court's jurisprudence under the Rules Enabling Act,²⁶⁴ and more specifically to *Hanna v. Plumer*,²⁶⁵ Justice Scalia found it "obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together" are valid under the Rules Enabling Act.²⁶⁶ He noted—somewhat paradoxically²⁶⁷—that the class action is nothing more than a mere joinder device that "alter[s] only how [plaintiffs'] claims are processed."²⁶⁸ Justice

259. See FED. R. CIV. P. 23(a)-(c).

260. See N.Y. C.P.L.R. 901(b) (MCKINNEY 2006) ("Unless a statute ... specifically authorizes the recovery [of statutory damages or penalties] in a class action, an action to recover a penalty [or statutory damages] ... may not be maintained as a class action.").

261. The district court and the Second Circuit decisions were in line with nearly all other district courts and their decisions. See Burbank & Wolff, *supra* note 108, at 23 & n.27 (citing cases).

262. *Shady Grove*, 130 S. Ct. 1431 (Majority Opinion Parts I, II-A: Scalia, J., joined by Roberts, C.J., Thomas, J., Sotomayor, J., and Stevens, J.; Plurality Opinion Parts II-B, II-C, II-D: Scalia, J., joined by Roberts, C.J., Thomas, J., and Sotomayor, J. (Parts II-B, II-D only); Concurring: Stevens, J.; Dissenting: Ginsburg, J., joined by Kennedy, J., Breyer, J., and Alito, J.).

263. *Id.* at 1438-39 (majority opinion).

264. 28 U.S.C. § 2072 (2006).

265. 380 U.S. 460 (1965).

266. See *Shady Grove*, 130 S. Ct. at 1443 (Scalia, J., joined by Roberts, C.J., Thomas, J., and Sotomayor, J.).

267. In so concluding, Justice Scalia ignored the significant and unique impact that the class action has on the economics of claiming, on settlement (in the form of hydraulic pressure to settle), on deterrence of widespread wrongs, and on the administration of litigation itself—ironically, features that the Court, in the same term, found so fundamentally altered the litigation process that parties must explicitly contract for the class action device in arbitration. See *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1783 (2010).

268. *Shady Grove*, 130 S. Ct. at 1443 (Scalia, J., joined by Roberts, C.J., Thomas, J., and

Scalia was unpersuaded by the concern underlying the New York legislature's decision to enact section 901(b), namely that the availability of class-wide relief would result in remedial overkill²⁶⁹—or, as one New York commentator put the point, “annihilating punishment.”²⁷⁰ The concern is by no means insignificant: by attempting to obtain certification, class counsel sought to “transform a \$500 [individual] case into a \$5,000,000 award.”²⁷¹ Nonetheless, the plurality dismissed this concern regarding the distortion of a given statute's remedial scheme as merely an “incidental effect” of the class action.²⁷²

By paying scant heed to the problem of remedial overkill that the New York legislature sought to prevent, the result in *Shady Grove* reveals the failure of contemporary legal doctrine to take systematic account of the proper structural role of private enforcement mechanisms in our diffuse regulatory system and, in particular, of the ways in which private enforcement mechanisms must be carefully tailored to ensure that they advance rather than impair regulatory objectives. The plurality in *Shady Grove* refused to take into account the New York legislature's concern, in part because it was not obvious from the statute's text but, more fundamentally, because the doctrinal framework of *Hanna v. Plumer* has left little room for considerations of remedial overkill.²⁷³ *Shady Grove* thus illustrates the need for more nuanced analysis—which may require doctrinal change under *Erie*—of the potential for these mechanisms to work

Sotomayor, J.).

269. *See id.* at 1443-44.

270. N.Y. C.P.L.R. cmt. 901:11 (MCKINNEY 2005) (quoting *Ratner v. Chem. Bank of N.Y.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972)).

271. *Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting).

272. *See id.* at 1444 (Scalia, J., joined by Roberts, C.J., Thomas, J., and Sotomayor, J.).

273. *See id.* at 1440 (majority opinion). In particular, the Court held that, under *Hanna v. Plumer*, 380 U.S. 460 (1965), Rule 23 and section 901(b) of New York's Civil Practice Law and Rules conflicted, and that, because Rule 23 is “rationally capable of classification” as “governing practice” within the meaning of the Rules Enabling Act, Rule 23 displaced section 901(b) in federal court. *Hanna*, 380 U.S. at 472-74. For a more thorough discussion of the Court's analysis in *Shady Grove*, see Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1075 (2011) (“[S]ince *Hanna*, if the Federal Rule [of procedure] truly conflicts with state law, then the real-world effects of that Rule upon claiming are deemed merely incidental and, hence, short of the Rules Enabling Act stricture against the alteration of substantive rights.”); *see also* Burbank & Wolff, *supra* note 108.

regulatory distortions within the context of the given substantive scheme.²⁷⁴

Another potential form of remedial overkill is what may be properly termed “regulatory expansion,” whereby private parties’ enforcement enables them to expand the law to include prohibitions that the legislature never enacted. As with the availability of statutory damages in class actions, the Court has not crisply identified the problem of regulatory expansion, nor has it framed such expansion as implicating either the remedial effects of enforcement mechanisms or the ways in which such effects reveal the need for the modification or addition of mechanisms to mitigate overremediation. The landmark decision in *Bell Atlantic v. Twombly* provides a perfect vehicle for evaluating these issues.²⁷⁵ As discussed above, the decision in *Twombly* is most famous for imposing a new “plausibility” test in standards for notice pleading that scholars and jurists had perceived as settled for decades.²⁷⁶ Situated within this Article’s conceptual framework, *Twombly* represents a recognition of the danger of regulatory expansion in the context of antitrust law. It also highlights the need—unrecognized by the Court—for careful consideration both of whether private enforcement mechanisms are necessary to enable conspiracy claims under antitrust laws and whether additional mechanisms, perhaps not yet in use or existence,

274. The Court’s decision in *Shady Grove* also generates an odd regulatory mismatch vis-à-vis state and federal legislatures’ crafting of remedial schemes. This oddity became apparent immediately following the Court’s decision, when on grant, vacate, and remand (GVR), the Second Circuit in *Holster v. Gatco, Inc.*, 618 F.3d 214 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 2151 (2011), reaffirmed its prior holding that section 901(b) prohibited a defendant from removing to federal court under CAFA a putative class action arising under the Telephone Consumer Protection Act (TCPA), which provided for statutory damages. *Id.* at 215-16. Because the TCPA states that suits under the Act may proceed “if otherwise permitted by the laws or rules of [the] court of a State,” the court held that claims under the Act were limited by section 901(b). *See id.* at 216 (citing the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3)). The combination of *Shady Grove* and *Holster* creates a strange regulatory mismatch: Although a state legislature is constrained in its ability to calibrate the enforcement levels of its own laws—at least through broad pronouncements via enactments such as section 901(b)—Congress may give life to those same enactments. In other words, state prerogatives concerning the contours of remedial schemes embodied in state law are subject to significant reworking simply by the filing of suit in federal court, but state prerogatives may nonetheless control the contours of remedial schemes embodied in *federal law*, if Congress so provides.

275. 550 U.S. 544 (2007).

276. *See supra* text accompanying notes 160-63.

could mitigate the regulatory expansion that such enabling mechanisms might create.

In *Twombly*, consumers brought suit against the major incumbent local telephone companies (ILECs), alleging that they had engaged in an antitrust conspiracy in violation of section 1 of the Sherman Act.²⁷⁷ In particular, the plaintiffs alleged that the ILECs had agreed not to enter each other's territorial markets and to fight against the entry of additional competitors into the market.²⁷⁸ The plaintiffs' complaint paired factual allegations of parallel conduct with a conclusory allegation that such conduct gave rise to an inference of unlawful conspiracy.²⁷⁹ The Court held the complaint insufficient under Federal Rule of Civil Procedure 8(a)(2).²⁸⁰ In light of the history of telecommunications regulation, including the fact that the defendants had previously been granted monopolies in their territories,²⁸¹ the Court held that the plaintiffs had failed to meet the "plausibility" test because it was at least equally plausible (and maybe more so) that the parallel conduct was driven by independent market considerations rather than by illicit anticompetitive motives.²⁸²

Scholars have debated whether *Twombly* is defensible on the Court's reasoning.²⁸³ But the framework set forth in this Article offers a different perspective. A fundamental problem with allowing the particular suit in *Twombly* to go forward is that it would likely have led to regulatory expansion. Parallel conduct in a market economy is perfectly lawful; indeed, it is encouraged.²⁸⁴ Such conduct

277. See *Twombly*, 550 U.S. at 549-50 (describing the "local telephone business" as "a system of regional service monopolies" or "Incumbent Local Exchange Carriers (ILECs)").

278. See *id.* at 551.

279. See *id.* (citing Consolidated Amended Class Action Complaint ¶ 51, *Twombly v. Bell Atl. Corp.*, 550 U.S. 544 (2007) (No. 02 CIV. 10200)). The Court discounted the plaintiffs' conspiracy allegation as too conclusory to be credited. See *id.* at 556-57.

280. See *id.* at 557.

281. *Id.* at 549 ("The upshot of the 1984 divestiture of the American Telephone and Telegraph Company's (AT&T) local telephone business was a system of regional service monopolies (variously called ... 'Incumbent Local Exchange Carriers (ILECs)')." However, "[m]ore than a decade later, Congress withdrew approval of the ILECs' monopolies by enacting the Telecommunications Act of 1996.").

282. See *id.* at 566-68.

283. See, e.g., Epstein, *supra* note 164, at 62.

284. See *id.* at 67 (citing *Twombly*, 550 U.S. at 554).

may indicate that the market is functioning well.²⁸⁵ Discovery in antitrust conspiracy cases is extremely costly,²⁸⁶ and under the American rule of litigation—whereby each party bears his own litigation costs—virtually all of the costs in these cases will be borne by defendants, who likely have little to request in the way of discovery from plaintiffs.²⁸⁷ As a result, discovery alone can generate significant settlement pressure even if the defendants did nothing wrong and are likely to be ultimately exonerated.²⁸⁸ The combination of these factors made the plaintiffs' allegations of parallel conduct, accompanied by a conclusory assertion of conspiracy, problematic from the standpoint of substantive regulatory objectives. If private parties are permitted through artful pleading to make every instance of parallel conduct the basis for a lawsuit, and if those lawsuits generate economic pressure leading to settlements based on that pressure in a significant number of cases, private parties will have, through creative pleading, written prohibitions into substantive law that Congress never imposed nor wanted to impose.²⁸⁹

That said, the potential for regulatory expansion does not necessarily warrant a response that all but eliminates private parties' regulation of antitrust conspiracies. Putting aside a number of other objections one might level against the holding in *Twombly*, it is the proverbial bazooka to the regulatory distortion's ant when viewed on context of a system of diffuse regulation of antitrust violations. Even if a liberal pleading regime leads to too much—or the wrong kind of—private regulation, antitrust law likely needs some modicum of private ex post regulation of conspiracy for more complete remediation of such wrongdoing. The DOJ relies heavily on antitrust wrongdoers to come forward under its Amnesty Program for the remediation of conspiracy-related harm,²⁹⁰ but the DOJ also relies on private enforcement to detect instances of wrongdoing

285. *See id.* at 67-68.

286. *See Twombly*, 550 U.S. at 558.

287. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

288. *See Twombly*, 550 U.S. at 559.

289. *Id.* at 553.

290. James M. Griffin, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, A Summary Overview of the Antitrust Division's Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law Annual Meeting 7-8 (Aug. 12, 2003), available at <http://www.justice.gov/atr/public/speeches/201477.htm>.

when parties are not so forthcoming.²⁹¹ *Twombly* thus reveals that the procedural mechanisms of enforcement currently in place are insufficient to render private parties capable regulators of antitrust conspiracies without simultaneously creating unwanted regulatory distortion.

Specifically, although both the majority and the dissent in *Twombly* lamented the high costs of discovery in antitrust conspiracy cases,²⁹² the resulting remedial overkill would be better addressed by more nuanced procedural mechanisms of enforcement. For instance, perhaps the Civil Rules Advisory Committee could construct a permissive pleading standard for antitrust conspiracy and couple that standard with a modified discovery regime, whereby plaintiffs are allowed circumscribed discovery for a limited period of time, after which point their allegations must extend beyond evidence of parallel conduct. This approach would leave in place the enforcement mechanism of Rule 8 *and* address its potential to create regulatory distortions.²⁹³ Such a regime is not without precedent; circumscribed discovery is often allowed prior to class certification.²⁹⁴ Whatever the right mechanisms are, they must ensure ex post enforcement but mitigate the ability of parties to generate remedial overkill. Such mechanisms are needed across broad swaths of the legal landscape in which the relative ease of alleging wrongdoing, combined with the difficulty of proving such wrongs, has the potential to lead to regulatory expansion.

And of course, none of these suggestions precludes better communication among private parties, courts, legislatures, and public agencies regarding enforcement prerogatives. If anything, and to the extent coordination mechanisms could be designed to function efficiently, the foregoing analysis reveals the need for such mechanisms. For example, *Shady Grove* provides an example of the potential need for more formalized channels of communication between the Court and the state legislature vis-à-vis enforcement preroga-

291. See, e.g., Kent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws*, 34 OSGOODE HALL L.J. 461, 472, 478-80 (1996) (pointing out that many violations of antitrust statutes are exceedingly difficult for the government to detect).

292. See *Twombly*, 550 U.S. at 558 (majority opinion); *id.* at 573 (Stevens, J., dissenting).

293. See Glover, *supra* note 166, at 44-51.

294. See, e.g., FED. R. CIV. P. 26 (governing discovery).

tives.²⁹⁵ Moving forward, with or without better communication, much of the legal landscape needs private enforcement mechanisms that are carefully tailored to the enforcement needs of a particular regulatory scheme and sensitive to their potential, alone or in combination with other private mechanisms or public enforcement efforts, to generate remedial overkill.

C. Preserving Private Claims When Needed to Address Harm that Tends Not to Be Prevented by Ex Ante Regulation

Although various regimes within the American legal system rely on private, ex post enforcement for the achievement of regulatory objectives, many industries are regulated by extensive public regimes. For instance, within areas of law largely reliant on ex ante regulation, the need for private mechanisms of enforcement is less pronounced. In such situations, when a public regulatory scheme comprehensively addresses particular forms of wrongdoing, state law claims may well be distortive of overall regulatory goals. Indeed, such mechanisms can generate such distortions when, for example, a regulatory regime is characterized by a need for uniformity of obligations across a nationalized industry, or state law claims in a particular regulatory context tend systematically to generate negative spillover effects against out-of-state defendants.²⁹⁶ Consequently, statements of preemption or the judicial analysis of preemption issues should take into account the potential generation of these pathologies.

However, these pathologies should not prove talismanic in the preemption analysis. Rather, preemption doctrines should take these concerns into account along with *express* consideration of the extent to which those claims provide, in a particular regulatory

295. See *supra* notes 258-74 and accompanying text. One scholar, for instance, has suggested that courts certify difficult questions of statutory interpretation to Congress. See Amanda Frost, *Certifying Questions to Congress*, 101 NW. U.L. REV. 1, 3 (2007). A similar idea could be deployed here, although, at least under the circumstances of *Shady Grove*, the Court was presented with ample evidence that the New York legislature wished to prevent the combining of these two mechanisms of enforcement in a single suit—evidence, as the dissent points out, that the Court should not have ignored. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1464-65 (2010) (Ginsburg, J., dissenting).

296. See *supra* Part II.E.

scheme, ex post stopgap remedial measures to address situations involving significant levels of harm that simply could not be, nor were, foreseen ex ante. Particularly if the matter at issue is one of traditional state regulation through common law,²⁹⁷ preservation or creation of such mechanisms to provide comprehensive regulation may be warranted.

One of the most prominent examples of a regulatory regime characterized by robust ex ante public enforcement is the FDA-administered preapproval and supervisory system for drugs and other biologics.²⁹⁸ Under this regime, unconstrained ex post regulation by private parties would result in overregulation and discourage innovation of new products.²⁹⁹ As such, preemption of state law tort claims in areas governed by robust ex ante regulatory enforcement may be desirable. That said, preemption can sweep with too broad a brush. To begin, private, ex post regulation may be needed to fill gaps left by the ex ante regime. Further, such regulation may provide a necessary complement to ex ante regimes to the extent the public regulatory bodies are unable to anticipate all forms of harm or the countless ways in which regulated entities may try to evade compliance.

Regarding the former, the Court recently rejected arguments that private enforcement should fill such ex ante regulatory gaps in the context of the National Childhood Vaccine Injury Act (Vaccine Act).³⁰⁰ Specifically, as highlighted in the recent arguments in *Bruesewitz v. Wyeth*,³⁰¹ the FDA does not regulate vaccines, drugs, and medical devices ex ante to ensure that such products reflect the safest possible design in light of current scientific knowledge.³⁰²

297. See generally *United States v. Lopez*, 514 U.S. 549 (1994).

298. See *supra* text accompanying notes 20-21.

299. See, e.g., *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (expressing concern that permitting state law tort claims against the manufacturers of medical devices would discourage manufacturers from seeking FDA approval in the first place).

300. 42 U.S.C. §§ 300aa-1 to -34 (2006); *Bruesewitz v. Wyeth*, 131 S. Ct. 1068, 1078-80 (2011).

301. 131 S. Ct. at 1079.

302. For example, to demonstrate a vaccine's safety under FDA regulations, the vaccine's sponsor need not show that it adopted the safest feasible design. *Id.* In this way, the FDA is a passive agency because it considers only the designs that manufacturers put before it. See, e.g., *Jones by Jones v. Lederle Labs.*, 695 F. Supp. 700, 711 (E.D.N.Y. 1988) ("[T]he agency takes the drugs and manufacturers as it finds them.... [I]t is limited to reviewing only those drugs submitted by various manufacturers, regardless of their flaws.").

The FDA's ex ante review of such products simply requires manufacturers to provide a "reasonable assurance" of safety³⁰³—often based on small clinical trials. Once they are on the market, the FDA's surveillance of these products is far more modest.³⁰⁴ Consequently, as scientific knowledge and technology have progressed, a number of products have remained on the market long after they became outdated and, crucially, less safe than available alternatives.³⁰⁵ The FDA's ex ante approval process is then arguably ill equipped to deal comprehensively with all of the potential dangers that these outdated products may pose.³⁰⁶

The majority in *Bruesewitz* gave short shrift to these arguments and held that the Act preempted state law design defect claims.³⁰⁷ The majority did note, however, that because the Vaccine Act contains a stopgap remedial scheme of ex post enforcement designed to address at least some of the weaknesses of ex ante regulations, the enacting Congress could not have intended private regulation.³⁰⁸ Specifically, the Vaccine Act sets up a fund, maintained through an excise tax on vaccine manufacturers, to compensate the families of children who later develop diseases likely attributable to particular vaccines.³⁰⁹ However, as the dissent recognized, the compensation regime in the Vaccine Act is not optimally designed as a matter of deterrence—it is not actually funded by the manufacturers at all. The costs of the excise tax that the Act levies against all vaccines are passed on to the patients.³¹⁰ And in the absence of informal competitive market pressures to update products in light of scien-

303. 21 C.F.R. § 860.7 (2011).

304. *See supra* note 176.

305. *See* Vladeck, *supra* note 176, at 127-29.

306. *See id.* at 129.

307. *Bruesewitz v. Wyeth*, 131 S. Ct. 1068, 1083 (2011).

308. *See id.* at 1080. Congress also provided such a scheme in the Price-Anderson Act, 42 U.S.C. § 2210(n)(2) (2006), which federalizes personal injury and property damage claims arising from significant accidents at nuclear power plants.

309. The Vaccine Act, 42 U.S.C. §§ 300aa-1 to -34, created the National Vaccine Injury Compensation Program, which compensates people injured by covered vaccines from money held in the Vaccine Injury Compensation Trust Fund. 26 U.S.C. § 9510; *see also National Vaccine Injury Compensation Program* (VICP), HEALTH RESOURCES & SERVICES ADMIN., <http://www.hrsa.gov/vaccinecompensation> (last visited Nov. 7, 2011). Covered vaccines are listed in 26 U.S.C. § 4132. Money for the fund comes from an excise tax on vaccines. 26 U.S.C. § 4131.

310. *Bruesewitz*, 131 S. Ct. at 1086, 1099 n.22 (Sotomayor, J., dissenting).

tific advances, which are nonexistent in the context of the vaccine market because that market has only one or two manufacturers per vaccine,³¹¹ these regulatory gaps remain. Thus, in the vaccine context, no regulation places a duty nor does any regulatory scheme impose economic pressure on manufacturers to keep up with scientific advances.³¹²

That said, viewed in this Article's framework, the *Bruesewitz* Court may well have reached the correct result, at least in light of the comparative comprehensiveness of the public regulatory scheme for vaccines versus other biologics. The regulatory gaps discussed above are in fact far more pronounced outside the context of the regulatory framework for vaccines.³¹³ Indeed, despite its imperfections, the framework for vaccines is more comprehensive than those for any other product regulated by the FDA: there is ex ante approval on the front end, a modicum of supervision in the interim, and a stopgap compensation regime on the back end.³¹⁴ In other words, the Vaccine Act represents an exception within the FDA ex ante regulatory regime.³¹⁵

In theory, administrative agencies could impose additional ex ante regulations to fill the remaining regulatory gaps. There is certainly room for greater rigor in the ex ante approval process for pharmaceuticals, which is far from comprehensive. For instance, the data submitted at the premarket stage is provided entirely by the manufacturer,³¹⁶ is often based on a single clinical trial,³¹⁷ and is

311. *Id.* at 1098.

312. *Id.* at 1097.

313. See TASK FORCE ON RISK MGMT., FDA, MANAGING THE RISKS FROM MEDICAL PRODUCT USE: CREATING A RISK MANAGEMENT FRAMEWORK 30 (1999), <http://www.fda.gov/downloads/safety/safetyofspecificproducts/ucm180520.pdf> ("The majority of FDA program resources are devoted to premarketing scientific risk identification and assessment and approval or nonapproval. Significant, but substantially fewer, resources are devoted to postmarketing surveillance and risk assessment activities.")

314. See *supra* notes 298-312 and accompanying text.

315. See Stensvad, *supra* note 175, at 322-23 (describing the unique circumstances leading to the enactment of the Vaccine Act).

316. See Stuart R. Cohn & Erin M. Swick, *The Sitting Ducks of Securities Class Action Litigation: Bio-Pharmas and the Need for Improved Evaluation of Scientific Data*, 35 DEL. J. CORP. L. 911, 916-19 (2010) (describing approval data as provided exclusively by manufacturers); see also *supra* note 176.

317. See Cohn & Swick, *supra* note 316, at 918 (describing how high-priority medications may be expedited through the clinical trial review phase of the approval process).

often otherwise unreliable.³¹⁸ Postmarket supervision of these products is relatively minimal—there is no requirement that manufacturers update their products in light of scientific advances nor is there any requirement of periodic recertification.³¹⁹

It is far from clear, however, that increased approval requirements or more rigorous postapproval supervision would sufficiently address the remaining regulatory gaps in the FDA's regulation of pharmaceuticals and biologics, because it is implausible to ask regulatory bodies to craft *ex ante* measures that anticipate all future harm or to close every potential compliance loophole, at least without drastically overregulating on the front end so as to foreclose or discourage market entry in the first place.³²⁰ Consider, for instance, the harms that resulted from the use of Vioxx,³²¹ which would have gone completely unaddressed under the current regulatory scheme absent the filing of state law tort claims by individuals who suffered harm.³²² It is far from clear, as the FDA admitted, that additional *ex ante* regulations—which would likely discourage innovation and market entry to an intolerable degree—would have been sufficient to prevent the Vioxx debacle.³²³

State-law tort claims, then, can play an important role in addressing harms *ex post* to the extent they are not prevented or covered by *ex ante* regulations, and particularly when the matter at issue is one that states traditionally regulate through the common

318. See, e.g., Vladeck, *supra* note 176, at 126-30.

319. See *id.* at 127-28.

320. See, e.g. Gerald A. Faich, *Adverse Drug Experience Reporting and Product Liability*, 41 FOOD DRUG COSM. L.J. 444, 444 (1986) (“[P]reapproval clinical trials and other testing cannot tell us everything we would like to know about a drug.... [W]e usually have little human information about rare events, late latent effects, drug interactions, or effects in specialized populations.”).

321. See, e.g., Gina Kolata, *A Widely Used Arthritis Drug Is Withdrawn*, N.Y. TIMES, Oct. 1, 2004, at A1.

322. See David Henderson & Charles Hooper, *Clear Thinking About Vioxx*, REASON (Jan. 3, 2005), <http://www.reason.com/archives/2005/01/03/Clear-thinking-about-vioxx> (suggesting that it was the threat of litigation that led Merck to withdraw Vioxx, not the threat of government action).

323. FDA, *Merck and Vioxx: Putting Patient Safety First?: Hearing Before the S. Comm. on Fin.*, 108th Cong. 1 (2004) (statement of Sandra Kweder, M.D., Deputy Director, Office of New Drugs, Center for Drug Evaluation and Research, FDA) (“[A]ll approved drugs pose some level of risk.... [W]e cannot anticipate all possible effects of a drug during the clinical trials that precede approval.”).

law.³²⁴ But such claims are often preempted under doctrines that pay little heed to the relationship between private tort claims and gaps in the regulatory scheme.³²⁵ What this framework calls for is a more nuanced approach that makes the need for private enforcement mechanisms, in light of the comprehensiveness of a specific regulatory scheme, an *express* doctrinal consideration. Specifically, for instance, preemption in the context of biologics may be tolerable, if not desirable, when an overall regulatory scheme is fairly comprehensive, particularly given the national interest in uniform drug standards,³²⁶ the potential for state tort suits to impose negative spillover effects on out-of-state manufacturers,³²⁷ and the societal need for innovative medical treatment. But in the absence of ex post statutory compensation regimes—which would likely be preferable to private enforcement efforts, all other things being equal, given the FDA’s informational advantages about drug design—courts should nonetheless cautiously approach the wholesale elimination of ex post enforcement via expansive applications of preemption doctrines. Whether such mechanisms of private enforcement are needed—that is, whether preemption should be scaled back—depends on careful examination of the needs of a particular regulatory scheme.

D. Providing Private Enforcement Mechanisms in the Face of Public Regulatory Failure

As a practical matter, certain regulatory regimes—even those for which a public regulatory body possesses informational advantages

324. See James M. Beck, *Federal Preemption in FDA-Regulated Product-Liability Litigation: Where We Are and Where We Might Be Headed*, 32 *HAMLIN L. REV.* 657, 694-96 (2009).

325. See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 312 (2008) (holding as preempted state tort claims regarding the safety of catheters); *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 341 (2001) (holding as preempted claims against a consultant to a spinal screw manufacturer for making misrepresentations to the FDA); *Colaccio v. Apotex, Inc.*, 521 F.3d 253, 253 (3d Cir. 2008) (finding failure to warn claims regarding the side effect of suicide for antidepressants preempted); *Sykes v. Glaxo-SmithKline*, 484 F. Supp. 2d 289, 318 (E.D. Pa. 2007) (concluding that the FDCA preempted failure-to-warn claims).

326. See, e.g., *Harley v. Lederie Lab.*, 651 F. Supp. 993, 1004 (E.D. Tex. 1986), *rev’d on other grounds*, 851 F.2d 1536 (5th Cir. 1988).

327. See, e.g., *Issacharoff & Sharkey*, *supra* note 170, at 1386-88.

relative to private parties, and even those for which the public regulatory scheme theoretically provides for complete remediation and comprehensive regulation of wrongdoing—are characterized by historical levels of significant underenforcement, thus necessitating private enforcement mechanisms to achieve regulatory goals. A point of clarification is in order: public regulatory bodies can always be criticized for not doing “enough,” and it is not this Article’s goal to nitpick agency enforcement decisions. Nor is it this Article’s contention that something approaching maximum enforcement is required of public agencies—simple dissatisfaction along these lines is not an adequate basis for demanding increased private enforcement mechanisms.

That said, there are certain public regulatory bodies for which empirical evidence reveals trends, over a number of years, of enforcement to such a minimal degree as to constitute a difference in kind.³²⁸ Significant levels of underenforcement may be the result of a host of factors, such as the systematic underfunding of the relevant agency—which is not a reliable predictor of congressional intent vis-à-vis enforcement prerogatives³²⁹—or pervasive capture by regulated entities.³³⁰ It may well be that as a matter of optimal design—in the presence of, say, informational advantages inuring to the public regulatory body—these regulatory failures call for the enabling of increased and better enforcement by those public regulatory bodies, and to the extent such levels of underenforcement have not persisted over a number of years, regulatory reforms are best directed toward improving the public enforcement apparatus.

However, in the presence of historical trends of significant underenforcement, the potentially “perfect” allocation of enforcement mechanisms to public regulatory bodies cannot, and should not, be the enemy of the “good”—namely, the entrusting of enforcement mechanisms to private parties in order to achieve some meaningful modicum of regulation under the governing substantive

328. See, e.g., *supra* text accompanying note 41.

329. Underfunding of agencies is not necessarily a deliberate congressional choice but rather may be the result of a number of potential factors, including simple scarcity, and the disproportionate influence of congressional minorities—in particular, appropriations and oversight committees—on enforcement appropriations. See Stephenson, *supra* note 90, at 107 n.40.

330. See *supra* text accompanying note 61.

law. Therefore, in evaluating the need for and appropriateness of various private enforcement mechanisms within a given regulatory scheme, courts, legislatures, and, when appropriate, administrative agencies, should not just look at an aspirational version of the enforcement scheme but rather should explicitly take into account the extent to which a certain regulatory regime is in fact characterized by significant historical levels of regulatory inadequacy. In so doing, these entities should appropriately calibrate private enforcement mechanisms to enable private litigants to bring about regulation of harm left largely unaddressed by the public regulatory body.

For instance, recall that the EEOC is historically underfunded and has achieved significantly low levels of enforcement.³³¹ As one scholar put the point, “[w]hatever the EEOC’s original mission, and whatever the original hope, today the agency is clearly a failure, serving in some instances as little more than an administrative obstacle to resolution of claims on the merits.”³³² As a consequence, even though Title VII provides the EEOC with significant regulatory authority, the practical reality is that, for enforcement of Title VII to occur on any meaningful level, private enforcement, and more specifically, private enforcement mechanisms tailored to the specific needs of potential employee regulators, must be in place.

The Department of Housing and Urban Development’s (HUD) enforcement of the FHA provides another example of this practical problem. Although HUD has superior access to information relevant to housing discrimination,³³³ and although the 1988 amendments to the FHA gave HUD broader authority to police housing discrimination,³³⁴ its enforcement levels have been substantially meager as a historical matter. Specifically, HUD documents roughly six merits-based determinations of housing discrimination per state per year;³³⁵ the private bar is responsible for almost 84 percent of

331. See *supra* notes 35-41 and accompanying text.

332. Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 64 (1996).

333. See *supra* Part III.A.

334. Fair Housing Amendments Act, 42 U.S.C. § 3610(e) (2006) (permitting HUD to pursue claims of discrimination in federal court).

335. See Selmi, *supra* note 83, at 1413.

housing discrimination cases filed annually.³³⁶ And of the few cases HUD does bring, nearly a third involve plaintiffs who had already secured an attorney.³³⁷ Accordingly, HUD's enforcement is, at best, unhelpful vis-à-vis those plaintiffs who may most need their help and is wasteful and duplicative at worst. Moreover, HUD tends systematically to avoid pursuing large claims or claims that involve more than a single potential plaintiff.³³⁸

Therefore, even though HUD is better situated informationally than private parties for purposes of enforcing the FHA, as a practical matter, private enforcement mechanisms are needed to enable private party claiming and to help cure existing informational disadvantages. Accordingly, perhaps more strict disclosure requirements regarding housing demographics should be imposed on apartment buildings, condominium complexes, and neighborhoods, with such disclosures made available to the public. Alternatively, at the very least, the heightened pleading standard under *Twombly* and *Iqbal* ought to be accompanied, at least for FHA claims, with a provision for some modicum of pleading-stage discovery, such that potential plaintiffs can access aggregate, comparative information about housing statistics—likely uniquely in the hands of potential defendants—for evaluation of whether discrimination claims are meritorious.³³⁹

As a final example, consider again the regulatory failures that characterize the landscape of consumer safety. At the federal level, recall that public regulation in the area of product safety is significantly hindered by limited resources, limited authority, and capture,³⁴⁰ as the federal government itself has recognized.³⁴¹ Regulatory bodies at the state and local level are also constrained in their ability to police wrongdoing, particularly wrongdoing that

336. *Id.* at 1418.

337. *Id.* at 1439.

338. *Id.*

339. See generally Glover, *supra* note 166, at 39-42 (arguing that tailored discovery at the pleading stage of litigation is likely needed for those subsets of claims characterized by informational asymmetries between plaintiffs and defendants).

340. See *supra* notes 57-67 and accompanying text.

341. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-803, CONSUMER SAFETY: BETTER INFORMATION AND PLANNING WOULD STRENGTHEN CPSC'S OVERSIGHT OF IMPORTED PRODUCTS 13 (2009) ("[I]mplementation is limited by competing priorities and resource and practical constraints.").

is national or even global in scope.³⁴² For instance, state attorneys general are limited, both as a matter of resources and jurisdictional reach, vis-à-vis interstate wrongdoing,³⁴³ as are other state regulatory bodies. Even states with very active Consumer Affairs Departments, are hindered in their efforts by increasingly scarce resources and jurisdictional limitations. This is not to say that public enforcement should be discouraged—just the opposite, particularly given that public regulatory bodies are uniquely situated to take into account broader considerations regarding the public interest in the area of consumer harm.³⁴⁴ Rather, the point is that regulation of consumer welfare by public bodies is insufficiently robust to reach a great number of consumer transactions. Accordingly, unless and until public regulatory efforts change drastically, private enforcement mechanisms tailored to the particular needs of potential consumer-regulators are critical to ensure the regulation of consumer harm.

Again, though, private regulation is only as good as the mechanisms that enable it. The last example about consumer safety, broadened for illustrative purposes to encompass consumer welfare more generally, enables exploration of issues of mechanism design in light of public regulatory failure. Consumer transactions increasingly occur on a national or even global scale; this, along with the generally hidden nature of misconduct in the consumer context, reduces the effectiveness of ordinary market mechanisms, such as reputational constraints, in the absence of private market agents to prevent wrongdoing.³⁴⁵ Moreover, expansive markets enable sellers to engage in “democratized theft,” whereby a single actor engages in various forms of wrongdoing—such as misrepresentation, charging usurious rates, and producing defective products—that result in substantial aggregate gains to that actor but inflict relatively small harms to any one consumer.³⁴⁶

342. For instance, local regulatory bodies, like the Better Business Bureau, assist consumers and businesses in specific *localized* regions. See THE BETTER BUSINESS BUREAU, <http://www.bbb.org> (last visited Feb. 17, 2012).

343. See Issacharoff, *supra* note 60, at 138.

344. See *id.* at 137.

345. *Id.* at 138-39.

346. Issacharoff & Samuel, *supra* note 12, at 58 & n.26.

One promising mechanism of regulation—particularly given that individual consumers frequently lack the access to or ability to comprehend information about relevant wrongdoing³⁴⁷—is one that is not generally associated with litigation. Rather, it is the provision of new—or capitalization of existing—private market agents, who could more systematically impose pressures on sellers to refrain from engaging in wrongdoing.³⁴⁸ The Internet's broad reach could help such agents—like *Consumer Reports*, which tests and reports on product safety and effectiveness, and Progressive Auto Insurance, which provides on-the-spot insurance rate comparisons based on driving history—impose constraints even on nationalized or globalized product markets.³⁴⁹ The ability of these agents to impose reputational and other market pressures, however, depends on the availability and accessibility of reliable and relevant information: whereas auto insurance rates are relatively easy to calculate given the public availability of driving records and accident reports, account information for, say, cell phone or credit card usage, is generally not accessible en masse for sound privacy reasons.³⁵⁰ The relevant sellers—cell phone companies, airlines, computer merchants, just to name a few—have this information on hand and naturally guard it closely.³⁵¹ To the extent tolerable, then, given concerns for consumer confidentiality, instead of enacting more laws that require disclosures to consumers—laws rarely read, more rarely understood, and almost never acted upon³⁵²—Congress could, as one scholar has suggested, pass laws requiring disclosure of information to consumer market agents in a usable form and on an aggregate scale, sanitized of individual identifiers.³⁵³

347. See *supra* notes 64-65 and accompanying text.

348. See Issacharoff, *supra* note 210, at 8-11. Consumers are frequently ineffective agents on their own behalf. They rarely read, understand, or incorporate disclosures. Even if they had time to read through the disclosures, they have no access to the aggregate information to which the seller is privy and which is necessary to ferret out wrongdoing. See Issacharoff, *supra* note 210, at 7-8.

349. See Issacharoff, *supra* note 210, at 4, 10.

350. See *id.* at 10.

351. See *id.*

352. In one revealing experiment, a computer software maker put an offer of one thousand dollars at the end of its mandated disclosure. All consumers had to do to claim the money was to call and ask. After four months, a single individual called, strongly suggesting that no other customer had even read the disclosure. *Id.* at 6-7.

353. See *id.* at 11.

Nonetheless, although private market agents are a promising source of regulation in the area of consumer welfare, the current consumer landscape reveals that private, *ex post* litigation through state-law claims is critical to the regulation of wrongdoing. And given that such wrongdoing increasingly occurs on a nationalized or even globalized scale, effective consumer protection requires mechanisms that address both the negative value of any individual's potential claim and the difficulty of detecting wrongdoing in the first place. Regarding the former, the class action mechanism, of course, exists in part to overcome the problem of negative-value claims.³⁵⁴ Yet it is precisely in the context of consumer transactions—and largely in the context of transactions for goods provided to individuals on a national or global scale—that the class action device is being banned via private ordering.³⁵⁵ As discussed above, such bans have recently found favor with the Court.³⁵⁶

In an attempt to preserve the viability of class action waivers, some companies have inserted arbitration clauses providing that the drafting party will pay any relevant arbitration fees in order to make individual arbitration economically viable.³⁵⁷ Perhaps in other areas of the law, where victims of harm are more likely capable of recognizing wrongdoing, arbitration pursuant to such clauses could serve as a viable enforcement mechanism, and potentially even as a substitute for the class action device, for cases involving low-value claims.³⁵⁸

354. See *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

355. See *supra* notes 136-41 and accompanying text.

356. See *supra* text accompanying note 135. In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), plaintiff consumers brought a class action against AT&T claiming that its offer of a “free” phone was fraudulent because AT&T charged consumers sales tax based on the retail value of each phone. *Id.* at 1740. Although each individual claim was small, AT&T's overall gain was quite substantial, given its large customer base. The relevant contracts between consumers and AT&T contained an arbitration clause with a class action waiver. *Id.* at 1742. AT&T argued—and the Supreme Court in a divided opinion agreed—that the FAA implicitly preempted California state law banning the use of such waivers. *Id.* at 1753. AT&T also contended that, because its contract provided that it would, among other things, cover consumers' arbitration fees, the class action was not needed for the vindication of claims. Brief for Petitioner at 1, *Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893).

357. See Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 893-94 (2008).

358. That said, the wholesale elimination of the class action from the regulatory landscape

However, within the area of consumer welfare, where harm is frequently hidden and widely dispersed, the availability of arbitration pursuant to such fee-shifting clauses is insufficient to bring about private enforcement of wrongdoing. Rather, the ferreting out of misconduct like consumer fraud requires expertise frequently not in the hands of consumers.³⁵⁹ They are thus unlikely, on their own, to possess or process relevant information in such a way that will motivate them to arbitrate. Moreover, it is inconceivable that a private attorney, who might have sufficient expertise in consumer fraud, will have the economic incentive to root out consumer fraud if the only economic gain to be had is through individual arbitrations. The significant investment of resources required to identify wronged individuals and to pursue their small claims on an individualized basis likely will not justify any eventual gains.³⁶⁰ As a result, very little private enforcement is likely to occur—much less enforcement that would come close to bringing about recovery for the aggregate loss sustained by numerous customers—absent enforcement mechanisms, such as the class action, that would motivate those with expertise to investigate and pursue meritorious claims.³⁶¹ Again, however, courts and scholars have approached class action waivers in the consumer context abstractly, applying a

would remove the very pressure valve that forced companies like AT&T to include fee-shifting provisions in their contracts in the first place. The fact that the class action imposed such pressure on AT&T is plainly evident from its contracts with consumers, which contain a severability clause whereby the invalidation of its class waiver by any court triggers the severance of the arbitration clause altogether. *See Wireless Customer Agreement* § 9.2, AT&T, <http://www.wireless.att.com/learn/articles-resources/wireless-terms.jsp> (last visited Feb. 17, 2012).

359. *See supra* notes 215-18 and accompanying text.

360. In theory, firms devoted to the investigation of widespread consumer harm and the processing of individual claims through arbitration might well arise, though such entities have yet to spring into being. *See generally* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011) (discussing firms devoted to processing low-value tort claims).

361. Of course, this is one of the most controversial aspects of the class action device: namely, that it works precisely because it motivates self-interested third parties to investigate and pursue claims on an aggregate basis in hopes of recovering a substantial “bounty” for their efforts. *See, e.g.*, Martin H. Redish & Nathan D. Larson, *Class Actions, Litigation Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1601-02 (2007) (characterizing class action attorneys as “bounty hunters”). Absent other mechanisms of enforcement, however, this may be a necessary cost—and all regulatory regimes have costs—of ensuring some modicum of regulation of consumer harm.

single metric of analysis.³⁶² Instead, courts and scholars alike must be attentive to the regulatory framework at issue in evaluating these prohibitions. More specifically, in the area of consumer claims, courts should err on the side of striking down such waivers.

But refining enforcement mechanism in light of particular regulatory exigencies should not stop there. For instance, existing mechanisms of private enforcement, and particularly class actions, are often insufficient to regulate widespread wrongdoing.³⁶³ At the same time, many of these same enforcement mechanisms—in particular the class action mechanism—may go too far: in regulating widespread harm, such mechanisms may export aberrant regulation onto nationwide or globalized disputes involving noncitizens.³⁶⁴ Addressing these regulatory mismatches thus requires the creation of new mechanisms, or the modification of existing mechanisms, that will sufficiently regulate widespread harm, while also constraining the reach of such mechanisms so as to prevent the exportation of aberrant law.

At the national level, existing enforcement mechanisms designed to address widespread harm are in many instances inadequate to align the remediation of wrongdoing with its scope. In particular, neither the class action mechanism nor the consolidation of cases in MDL courts—which exist partly to bring into alignment the regulation of harms with their widespread scope³⁶⁵—are perfectly situated to address these regulatory mismatches. To begin, variance among state laws governing class procedures and among state substantive laws often prevents class certification, and thus renders the class device unable to effectuate private regulation of widespread wrongdoing on a nationalized level. Such variance exists not only in the form of differing state court interpretations of state analogues of Federal Rule of Civil Procedure 23³⁶⁶ but also in

362. See *supra* note 186 and accompanying text.

363. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1355-56 (1995).

364. See Jesse T. Smallwood, Note, *Nationwide, State Law Class Actions and the Beauty of Federalism*, 53 DUKE L.J. 1137, 1149-50 (2003) (describing the Seventh Circuit's concerns over the sweeping effect of class action decisions).

365. See, e.g., Yvette Ostelaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 48-50 (2007).

366. See, e.g., Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1005-06 (2005) (describing the predominance

the form of variance among different state laws governing, for example, tort liability.³⁶⁷ In a few instances, judges have attempted to overcome such certification problems through creative interpretation of choice-of-law rules,³⁶⁸ but such efforts are both ad hoc and controversial under existing conflicts of law principles.³⁶⁹ For class actions to resolve widespread harm on a national scale, additional mechanisms may be needed, including perhaps substantive federal law governing consumer harm or uniform choice of law rules that make it easier to aggregate claims under Rule 23.

At the same time, the use of the class action device to address widespread harm can also generate a separate sort of regulatory mismatch whereby an aberrant court exports its idiosyncratic regulatory views on the entire nation. Because the denial of class certification generally does not carry preclusive effect,³⁷⁰ plaintiffs may be able to obtain certification of a nationwide class by an aberrant state or federal court,³⁷¹ which along with a state's law, will effectively regulate a particular area of law nationwide.³⁷² Defendants may also engage in aberrant court shopping of their own, looking for a court to sanction a deal that is desirable from their perspective, but that may be a product of collusion between

test as "rel[ying] on a subjective comparison of inherently incomparable factors").

367. For instance, variance among state laws governing tort liability has in large part prevented the nationwide resolution of claims against Phillip Morris Tobacco Company for widespread harm arising from the same alleged conduct by Phillip Morris. *See, e.g., Grill v. Phillip Morris USA, Inc.*, 653 F. Supp. 2d 481 (S.D.N.Y. 2009); *City of St. Louis v. Am. Tobacco Co.*, No. 982-09652, 2003 WL 23277277 (Cir. Ct. Mo. Dec. 16, 2003); *In re Tobacco Litig.*, No. 00-C-5000, 2000 WL 34016275 (Cir. Ct. W. Va. Jan. 11, 2000).

368. *See, e.g., In re "Agent Orange" Prods. Liab. Litig.*, 560 F. Supp. 2d 1352, 1353-54 (J.P.M.L. 2008).

369. *See, e.g., Larry Kramer, Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 561-63 (1996).

370. *See Rhonda Wasserman, Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 841 (2006).

371. A practical effect of CAFA has been that plaintiffs simply attempt to file class action suits, in the first instance, in federal courts thought to be friendly to plaintiffs or class actions. *See Nicole Ochi, Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA*, 41 LOY. L.A. L. REV. 965, 1031 (2008) (noting that CAFA has eliminated vertical, but not horizontal, forum shopping).

372. Judge Easterbrook put the problem thus: "A single positive trumps all the negatives. Even if just one judge in ten believes that a nationwide class is lawful, then if the plaintiffs file in ten different states the probability that at least one will certify a nationwide class is 65%." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 333 F.3d 763, 766-67 (7th Cir. 2003).

defense and plaintiffs' counsel, and that may unfairly distinguish among class members.³⁷³ This aberrant court shopping works not only to enable deals that might not have otherwise occurred but also to break up deals that would, under most courts' analysis, be preserved.³⁷⁴ Accordingly, more sophisticated doctrines of preclusion or, at the very least, doctrines requiring courts to review the denial of class certification by a sister court under a deferential standard, may be needed to address these mismatches.

Given the class action's many shortcomings as a mechanism for regulating nationalized harm, parties have increasingly turned to MDL proceedings, which consolidate for pretrial purposes cases alleging similar wrongdoing in order to achieve claim resolution on a larger scale.³⁷⁵ In particular, MDL judges increasingly conduct bellwether trials to enable the settlement of claims for widespread harm on a scale more commensurate to the scope of the harm and, from defendants' perspective, to enable the achievement of global peace.³⁷⁶ Scholars have only just begun to explore the benefits of the bellwether mechanism for clarifying issues, assembling "pre-trial packages" of information relevant to many plaintiffs, and giving parties a window into the likelihood of success on the merits of cases of widespread harm.³⁷⁷

However, in addition to being disproportionately costly—given the tendency to invest large amounts of resources in a bellwether trial

373. See Coffee, *supra* note 363, at 1378-82.

374. This is the problem engendered by the combination of collateral attacks on a class settlement with conceptual confusion among courts regarding the functioning of the "adequate representation" requirement under Rule 23. See Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 18, 76-77 (2009). Although the Anti-Injunction Act somewhat mitigates this problem at the federal level, state courts have little authority to enjoin collateral attacks on their judgments in other judicial systems. The preclusive effect of a state court judgment is instead determined by other courts employing "Full Faith and Credit" principles. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2006). The Court recently faced an iteration of this issue: it decided that a federal court that denied class certification could not prevent unnamed class members from seeking class certification in state, instead of federal, court. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011).

375. See 28 U.S.C. § 1407 (governing multi-district litigation).

376. Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008).

377. For a thorough introduction to bellwether trials, see generally *id.*

that involves few claimants but will influence thousands more—bellwether trials can, like the class action, lead to the export of an aberrant MDL judge’s idiosyncratic regulatory views to the entire nation.³⁷⁸ The phenomenon of bellwether trials is in its infancy; it is sufficient here to note that, as such procedures develop, carefully designed mechanisms regarding trial selection and adjudication ought to be implemented. Perhaps, for instance, rules currently not in place—or even suggested in any meaningful way in the Manual for Complex Litigation³⁷⁹—requiring a certain number of bellwether trials by a variety of MDL judges could be enacted to avoid these regulatory mismatches. Alternatively, or in addition, perhaps a group of independent adjudicators, whose only responsibility would be to impartially select the test cases for bellwether adjudication, could be empanelled.

When harm occurs on a global scale, many of the regulatory mismatches discussed above are more pronounced, given the inadequacy of existing mechanisms to resolve disputes on a global level. To begin, for example, a great deal of variance exists among procedural rules regarding aggregate litigation among European nations and between Europe and the United States; consequently, bringing into an aggregate unit numerous individuals harmed by transnational wrongdoing is difficult, and often impossible.³⁸⁰ Combined with European nations’ general reluctance to “enable” litigation,³⁸¹ in part because of Europe’s heavier reliance on centralized, ex ante mechanisms of regulation, such disparities often prevent regulation in any way commensurate with the scope of alleged harm.³⁸² Although Europe has begun to put in place devices for aggregate litigation,³⁸³ such devices are not yet supported by the additional mechanisms necessary for their proper functioning.

378. Cf. *supra* notes 370-73 and accompanying text.

379. See generally MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004).

380. See, e.g., Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 13-17 (2009).

381. See, e.g., Julia Werdigier, *Survey Sees More U.S.-Style Class-Action Lawsuits in Europe*, N.Y. TIMES, Oct. 30, 2007, <http://nytimes.com/2007/10/30/business/worldbusiness/30iht-class.4.8118070.htm>.

382. See generally Filippo Valguarnesa, *Legal Tradition as an Obstacle: Europe’s Difficult Journey to Class Action*, 10 GLOBAL JURIST, no. 2, 2010.

383. See *id.* at 1.

Specifically, aggregate litigation mechanisms are not self-starting; they require both competent private attorneys with expertise in particular areas that enables them to discover certain types of harm and sophisticated experts who can sort through the complexities underlying alleged widespread wrongdoing.³⁸⁴ Moreover, aggregate devices rely in part upon well-capitalized and motivated plaintiffs' attorneys. In the United States, the contingent fee has served as a mechanism for motivating plaintiffs' attorneys; most European nations forbid such arrangements.³⁸⁵ Although Europe need not necessarily adopt contingent fee arrangements, it should adopt mechanisms that enable both plaintiffs and firms to finance and assume the risk of aggregate litigation. Such mechanisms may be emerging: third-party financing of litigation has taken hold in Australia, and such arrangements have started to make their way to the United Kingdom and the United States.³⁸⁶ Such financing arrangements raise a host of ethical and managerial questions that are beyond the scope of this Article, but it is sufficient to note that such mechanisms are coming into existence, and in many ways, need to exist, if ex post regulation of globalized harm is to occur.

Even in the absence of aggregation devices, as Richard Nagareda has recognized, more sophisticated preclusion and judgment recognition mechanisms may address some of these globalized regulatory mismatches, as such mechanisms could enable systems with aggregate devices in place, like the United States, to resolve inter-

384. See Issacharoff & Samuel, *supra* note 12, at 60-61.

385. Generally, European nations require class members to pay fees up front. See Hensler, *supra* note 380, at 22. This naturally discourages participation. For instance, in the largest European consumer protection class action in 2003, 6000 of 55,000 members dropped out because of the up-front costs required before trial could begin. See Weir v. State, [2005] EWHC (Ch) 2192, [1] (Eng.). The class members were also responsible for paying the government's costs once the court found for the government. Mark Milner, *Railtrack Shareholders Lose Court Battle for Compensation*, GUARDIAN, Oct. 15, 2005, <http://www.guardian.co.uk/business/2005/oct/15/transportintheuk.politics>.

386. See, e.g., Daniel Fisher, *Litigation-Finance Contract Reveals How Investors Back Lawsuits*, FORBES, June 6, 2011, <http://www.forbes.com/sites/danielfisher/2011/06/07/litigation-finance-contract-reveals-how-investors-back-lawsuits/> (discussing the Burford Group, which has funded litigation in the United Kingdom and the United States); *Litigation Funding (Third Party Funding)*, ARGENT LAW, http://www.argentlaw.co.uk/site/business_services/litigation_funding/ (last visited Feb. 17, 2012); see also *supra* note 174.

national claims.³⁸⁷ A few such mechanisms, though highly imperfect, are beginning to take shape. For instance, the European Union's 2000 Regulation on Jurisdiction and the Recognition of Judgments (EU Regulations) provides in Article 34 that judgments shall be recognized among member states unless "such recognition is manifestly contrary to public policy in the Member State in which recognition is sought."³⁸⁸ In the United States, the American Law Institute's (ALI) proposal for the recognition of foreign judgments in U.S. courts is modeled on Article 34.³⁸⁹ For preclusion to apply, judgments thus "need only meet an 'international standard' of fairness."³⁹⁰ Although such mechanisms are a good start, future work must continue to explore both enforcement mechanisms that can regulate harm that occurs on a national or global scale and mechanisms that limit the ways courts or adjudicators can export aberrant law.

As the foregoing discussion suggests, exploring both the role of private *ex post* mechanisms of enforcement and the appropriate design of those mechanisms in light of the exigencies of overall regulatory schemes has broader implications. It allows us to consider, in a more unified analysis, relationships among issues of informational advantage, issues of statutory interpretation, procedural mechanisms such as those providing for aggregate litigation, and problems associated with the integration of regulatory objectives between potential regulators and across nationalized and even globalized forms of harm. Consideration of these topics independently misses the interlocking dimensions that this Article's conceptual framework reveals and thus will often fail to guide the design of enforcement mechanisms in a way that achieves comprehensive regulation and addresses potential regulatory pathologies.

387. See Nagareda, *supra* note 374, at 9.

388. Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 34.1, 2000 O.J. (L 12) 1 (EC).

389. See AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 5(a)(vi) (2006).

390. *Id.* reporters' notes at 77.

CONCLUSION

This Article has focused on the important yet often underappreciated structural role that private enforcement mechanisms play in our diffuse, decentralized regulatory system. Indeed, there is a decidedly public dimension, both structural and functional, to private regulation of wrongdoing. This Article has argued that the ability of private parties to take on this role within our regulatory state depends critically on the existence of various enforcement mechanisms appropriately calibrated to the functional exigencies of a given substantive scheme.

A clear framework carefully tailored to the structural role mechanisms of private enforcement through litigation within our public regulatory system is much needed in a world of increasingly complex and globalized harms. The framework presented here is preferable to one-size-fits-all, abstract approaches that are frequently ill-suited to effectuating regulatory goals with more nuanced approaches aimed at aligning private regulation with the needs of various regulatory schemes. Judges and legislatures should use this framework as a guide for designing mechanisms that enable private regulation to serve well its structural role in the American regulatory state.