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Private Enforcement in Administrative Courts

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Scholars debating the relative merits of public and private enforcement have long trained their attention on the federal courts. For some, laws giving private litigants rights to vindicate important policies generate unaccountable "private attorneys general" who interfere with public enforcement goals. For others, private lawsuits save cash-strapped government lawyers money, time, and resources by encouraging private parties to police misconduct on their own. Yet largely overlooked in the debate is enforcement inside agency adjudication, which often is depicted as just another form of public enforcement, only in a friendlier forum.

This Article challenges the prevailing conception of administrative enforcement. Based on a comprehensive examination of over eighty administrative courts, I find that agencies rarely enforce on their own. Among other things, private parties may have procedural rights to file regulatory complaints, trigger agency investigations,

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demand evidentiary hearings, join public enforcement actions as parties, and even pursue claims without the involvement of the agency's enforcement arm. Although some administrative enforcement is virtually indistinguishable from either public or private enforcement in federal court, more often administrative schemes employ attributes of both.

Combining public and private enforcement furthers the goals of agency adjudication while mitigating some of the dangers posed by transferring cases from generalist courts to specialized policymaking bodies with less formal procedures. Public enforcement offers greater political accountability and more coherent implementation of policy. Private enforcement supplements agency expertise with the situated knowledge of regulatory beneficiaries and enhances their access to legal remedies. And diversifying enforcement inputs reduces the risk of political or interest group capture of administrative schemes. These tools are especially valuable today, as presidential administrations increasingly use control over public enforcement to roll back statutory mandates they cannot repeal through the legislative process. Enhanced procedural rights for private parties can reduce capture of statutory mandates, highlight undue influence, and facilitate judicial review of policy changes implemented through agency nonenforcement.

INTRODUCTION

The end of the twentieth century witnessed a dramatic increase in the number of private enforcement actions in federal court: Congress wrote scores of statutes with express private rights of action; for a time, courts regularly interpreted statutes to include implied private rights of action; and to this day, private parties continue to use them. As one rough proxy of the relative importance of private enforcement, last year the United States was a plaintiff in only 3,298 of the 179,308 complaints asserting statutory claims filed in federal district courts.[1] Thus, enforcement in federal court is dominated by private plaintiffs.

The situation is very different in agency adjudication, where the government is ubiquitous. Administrative law struggles with separation of powers issues that arise when the same agency that drafts regulations also enforces them and adjudicates disputes over enforcement.[2] Critics of the administrative state argue that executive enforcement in executive courts violates the Constitution and long-standing principles of Anglo-American law.[3] Thus, the picture of enforcement in administrative courts[4] that emerges from the

1. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2 (June 30, 2018), https://www.uscourts.gov/file/24702/download [https://perma.cc/BC8N-B2HQ] [hereinafter JUDICIAL CASELOAD STATISTICS (June 30, 2018)].

2. The major administrative law casebooks devote significant real estate to how agencies separate their executive and judicial functions. *See, e.g.*, MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 124–37, 154–55 (4th ed. 2014); STEPHEN G. BREYER ET. AL, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 711–741 (7th ed. 2011); RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 668–76 (7th ed. 2016); WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 220–21 (5th ed. 2014); GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 290–300 (7th ed. 2016).

3. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 228 (2014) (criticizing the executive's use of administrative courts to pursue enforcement actions against private parties); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1246–47 (1994) (distinguishing between constitutional agency adjudications of "mere privilege[s]" and unconstitutional agency adjudications of claims related to deprivations of "life, liberty, or property").

4. This Article uses the term "administrative court" to mean a body within a federal agency that adjudicates cases or claims. Thus, "administrative courts" and "agency adjudication" are often used interchangeably.

literature could not be more different than private enforcement in federal court: administrative enforcement is just another form of public enforcement, only in a friendlier forum.[5]

Or is it?

It is true that Congress nearly always creates a role for public enforcers when it creates an administrative scheme.[6] Yet a closer examination of administrative enforcement reveals that agencies are rarely the only parties involved in enforcement. Private parties also typically play a significant role.[7] Across the administrative state, private parties have rights to file regulatory complaints, to trigger agency investigations, to call for evidentiary hearings, to intervene in public enforcement actions, and even to pursue enforcement actions with or without the involvement of the agency's enforcement arm.[8]

The expansion of private rights of action in federal court gave rise to a robust debate regarding the relative merits of public versus private enforcement of public policy. Advocates of "private attorneys general"[9] claim that private enforcement supplements the limited resources of public enforcers, harnesses the knowledge of private parties regarding regulatory violations, and reduces the costs of agency inaction due to regulatory capture, political constraints, or bureaucratic ossification.[10] Yet others worry that private enforcement undermines the political accountability of public policy, risks overdeterrence and inconsistent regulation, and threatens a public enforcer's carefully calibrated enforcement policy.[11] Consequently, some scholars call for greater agency control over private enforcement actions brought in federal court.[12]

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5. *See* sources cited *infra* note 13.

6. *See infra* Section II.B.

7. *See infra* Section II.C.

8. *See infra* Section II.C and Appendix A.

9. The term was coined by Judge Jerome Frank in *Associated Industries of New York State, Inc. v. Ickes*. *See* 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943) ("Such persons, so authorized, are, so to speak, private Attorney Generals.").

10. *See infra* Section I.B.

11. *See infra* Section I.C.

12. *See, e.g.*, Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1181 (2016) (suggesting agencies "devise the appropriate scope of private rights of action" in federal court to prevent them from upsetting agency enforcement policies); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013) (analyzing gatekeeping of private enforcement in federal court); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 97 (2005) (arguing that Congress should "delegate the authority to create private rights of action to the executive agencies charged with administering the relevant statutes").

Largely overlooked in this debate is private enforcement in agency adjudication. While scholars have focused on the choice between a public and private enforcer in federal court, they have said little about the same choice in agency adjudication or why policymakers might incorporate aspects of both public and private enforcement in administrative courts. When the literature does discuss administrative enforcement, it generally assumes an agency will pursue enforcement and distinguishes that enforcement from private enforcement regimes.[13]

Perhaps this oversight should not be surprising. Agency adjudication has received less attention in recent years than rulemaking or enforcement in federal court.[14] Just as Congress and the courts were opening the federal courthouse to private enforcement actions, scholars were preoccupied with "the rise of rulemaking" by federal agencies.[15] Meanwhile, for many years, the Supreme Court struggled with the constitutional limits of Congress's power to delegate disputes between private parties to non–Article III tribunals. Some Justices even suggested that only cases with the government on one side of the "v" qualified as "public rights" cases that could be adjudicated outside of Article III.[16] In addition, much of the

13. *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 8 (2010) ("When . . . the Department of Labor undertakes enforcement action under the Fair Labor Standards Act, it constitutes the archetypal exercise of state capacity."); *id.* at 33 ("[P]rivate enforcement regimes . . . use the judiciary as an infrastructure for implementation of their agenda."); HAMBURGER, *supra* note 3, at 228 (criticizing public enforcement actions against private parties); Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK. L. REV. 637, 641 (2013) (recognizing private enforcement in foreign administrative tribunals but not in the United States); Lawson, *supra* note 3, at 1248 ("Consider the typical enforcement activities of a typical federal agency—for example, of the Federal Trade Commission."). *But see* 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 5:31 (3d ed. 2010) (explaining that in "[m]any administrative adjudications . . . someone outside of government instigates administrative action by taking advantage of an opportunity, exercising a right, or raising an important issue"); Michael Sant'Ambrogio, Theories of Agency Adjudication (unpublished manuscript) (on file with author) (describing three models of agency adjudication and distinguishing between public and private enforcement actions).

14. *But see* Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3 (2015) (proposing a methodology for classifying different types of agency adjudication); Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634 (2017); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2015).

15. Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1140 (2001) ("Although rulemaking had been around for decades, it was only at the end of the 1960s that agencies turned to it as the primary staple of administrative action.").

16. Stern v. Marshall, 564 U.S. 462, 503 (2011) (Scalia, J., concurring) ("I adhere to my view, however, that—our contrary precedents notwithstanding—'a matter of public rights . . . must at a minimum arise between the government and others.'" (quoting

scholarship on agency adjudication has focused on government benefits, which continue to comprise the bulk of cases decided by agencies.[17]

The Court resolved at least some of its ambivalence concerning agency adjudication of disputes between private parties in *Stern v. Marshall*.[18] Even as the Court limited the circumstances in which non–Article III courts may decide common law claims,[19] it seemed to approve agency adjudication of claims arising under regulatory statutes, regardless of the parties involved, and rejected a public rights doctrine limiting non–Article III courts to actions involving the government as a party.[20] And just this year, in *Oil States Energy Services v. Greene's Energy Group*, the Court rejected Article III and Seventh Amendment challenges to the authority of the Patent Trial and Appeal Board ("PTAB") to adjudicate the validity of patents in disputes between private parties.[21] Beyond the constitutional questions raised in *Stern* and *Oil States*, however, few have examined the relationship between public and private enforcement in agency adjudication. Thus, the time is ripe for a deeper examination of the role of private parties in administrative enforcement.

This Article begins that project. First, on a descriptive level, the Article challenges the perception of regulatory enforcement in agency adjudication as merely an administrative form of public enforcement.[22] Based on a comprehensive review of the Federal Administrative Adjudication Database, a joint project of the Administrative Conference of the United States ("ACUS") and

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Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 65 (1989) (Scalia, J., concurring in part and concurring in judgment))).

17. *See infra* notes 83–88 and accompanying text.

18. 564 U.S. 462.

19. *Id.* at 484 ("[W]e have long recognized that, in general, Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.' " (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855))).

20. *Id.* at 490–91:

> The Court has continued . . . to limit the [public rights] exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right "public" rather than private is that the right is integrally related to particular Federal Government action.;

see also Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015) (affirming *Stern* and permitting adjudication by the Bankruptcy Court of even "*Stern* claims" with the consent of the parties).

21. 138 S. Ct. 1365 (2018).

22. *See* sources cited *supra* note 13.

Stanford Law School,[23] and dozens of agency rules of practice and procedure, the Article maps the rights of public and private parties across a broad universe of administrative enforcement schemes. It finds that many administrative schemes combine attributes of both public and private enforcement.

Second, on a theoretical level, the Article explores the function of hybrid enforcement, opening up new lines of inquiry about how Congress should balance public and private interests in agency adjudication. Agency adjudication seeks to achieve three main goals: (1) greater access to legal remedies for parties facing obstacles in court, (2) more accurate and expeditious decisionmaking informed by specialized expertise, and (3) implementation of more coherent and politically accountable regulatory policies. But the tools used to achieve these goals—informal procedures, specialized decisionmakers, and political supervision—pose risks to the legitimacy of administrative courts. Combining elements of public and private enforcement can facilitate the goals of agency adjudication while allaying some of the concerns raised by these tools.

Indeed, the legitimacy of agency adjudication may depend on its ability to maintain a delicate balance between its public and private character. Tilting agency adjudication too far in the direction of a pure public enforcement scheme may undermine its legitimacy as a dispute resolution mechanism outside federal court. At the same time, tilting too far in the direction of private enforcement fails to take advantage of the ability of public enforcement to implement a more coherent, coordinated, and politically accountable policy. Agency designers must strike the appropriate balance in each administrative scheme based on the types of claims the agency hears.

The Article proceeds in four parts. Part I lays out the respective roles, benefits, and costs of public and private enforcement in federal court. Based on a review of the organic statutes and rules of practice and procedure of eighty-seven agencies included in the ACUS-Stanford Adjudication Database, Part II then maps the attributes of public and private enforcement in a broad universe of regulatory schemes. Administrative enforcement includes a wide-ranging mix of public and private enforcement tools. Some administrative schemes resemble public enforcement in federal court; others approximate private enforcement actions. But much administrative enforcement falls somewhere between these two poles.

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23. *Federal Administrative Adjudication*, ADJUDICATION RES., https://acus.law.stanford.edu (last visited Oct. 15, 2018) [https://perma.cc/W7SP-B5K2].

Part III analyzes the function of hybrid enforcement—that is, the combination of elements of both public and private enforcement schemes—in agency adjudication. Public enforcement offers greater political accountability and more coherent implementation of policy. Private enforcement supplements agency expertise with the situated knowledge of regulatory beneficiaries and enhances their access to legal remedies.[24] Diversifying enforcement inputs reduces the risk of political or interest group capture of agency enforcement. Although not without its own risks, hybrid enforcement can further the goals of agency adjudication while mitigating some of the dangers posed by transferring cases from generalist courts to specialized policymaking bodies.

Finally, Part IV compares the merits of private enforcement in administrative and judicial forums and uses several case studies from the current administration to explore how enhancing private rights might check political capture.[25] In this way, Part IV contributes to recent literature seeking to develop standards and tools for restraining executive branch enforcement discretion.[26] Scholars have long grappled with the ability of agencies to use enforcement discretion to shield changes in policy from judicial review.[27] Private

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24. *See* Cynthia R. Farina et al., *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1187, 1197 (2012) (describing how stakeholders have important "situated knowledge" about the regulatory environments in which they live).

25. The Trump administration is not unique in exerting control over the regulatory state to pursue its policy goals. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (arguing that President Clinton "increasingly made the regulatory activity of the executive branch agencies into an extension of his own policy and political agenda"); *see also* Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for "Deconstruction of the Administrative State,"* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/DY4F-ZBR6] ("The reclusive mastermind behind President Trump's nationalist ideology and combative tactics . . . declar[ed] that the new administration is in an unending battle for 'deconstruction of the administrative state.' "); *see also* examples discussed *infra* Section IV.B.

26. *See, e.g.*, Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1124 (2013) (examining "what more formal and transparent presidential enforcement could look like"); Barkow, *supra* note 12 (suggesting ways to improve agency enforcement oversight); Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 105 (2017) (recommending judges "play a role in encouraging executive branch actors to make improved" decisions.).

27. *See, e.g.*, Barkow, *supra* note 12, at 1169 ("[T]o have real judicial oversight of what agencies are doing with their enforcement powers, a new framework of limited judicial review of these settlements may be required."); Michael Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1435 (2011) (proposing "a new framework for judicial review of agency delays"); Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369 (2009) (addressing the chronic problem of nonenforcement decisions).

rights of action, paired with a requirement that agencies explain their adjudicatory decisions, should make such changes more transparent, subject to judicial review, and accountable to the electorate.

Agency adjudication continues to play an important role in delivering access to justice and a more coherent and politically accountable public policy. Far from being merely a cheap version of federal court or a second-best alternative to rulemaking, agency adjudication is essential to the goals of the regulatory state. But to legitimately serve these goals, administrative schemes must be carefully designed with an understanding of the dynamics of hybrid enforcement. Moreover, beyond the question of regulatory design, the complexity of administrative enforcement suggests that the Supreme Court was correct in *Stern* and *Oil States* to abandon a public rights doctrine based on the identity of the parties. Regardless of the formal parties involved, much administrative enforcement implicates public rights and private rights in ways that are difficult to untangle.

I. PUBLIC AND PRIVATE ENFORCEMENT IN FEDERAL COURT

Private parties play a critical role in the enforcement of U.S. regulatory law, filing the vast majority of statutory actions in federal court. Scholars argue that "private attorneys general" supplement the resources of public enforcers, address regulatory violations that escape the notice of public officials, and mitigate the risks of government inaction due to regulatory capture, political constraints, or bureaucratic ossification. Yet private enforcement may also interfere with carefully calibrated public enforcement policies, thus undermining their political accountability and resulting in overdeterrence and inconsistent regulatory requirements.

A. The Importance of Private Enforcement in Federal Court

Private parties play a more important role in enforcing regulatory law in the U.S. legal system than in other advanced economies.[28] Although private actions arising under federal statutes

28. For accounts of the rise of private enforcement of regulatory regimes during the postwar period, see STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); FARHANG, *supra* note 13; John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986) ("American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies."); and Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401 (1968) ("When the Civil Rights Act of

have a long history, scholars noted a significant increase during the latter half of the twentieth century. Between 1974 and 1998 alone, Congress created 474 new causes of action.[29] Indeed, "every major environmental law passed since 1970 now includes a citizen suit provision (with the anomalous exception of the Federal Insecticide, Fungicide, and Rodenticide Act)."[30] In addition, for about fifteen years following the Supreme Court's 1964 decision in *J.I. Case Co. v. Borak*, federal courts liberally construed many federal statutes to recognize implied private rights of action.[31]

Consider that 179,308 of the 281,202 civil actions filed in federal district courts in the twelve-month period ending June 30, 2018 were statutory claims.[32] But the United States was a plaintiff in only 3,298 of these cases, or less than two percent.[33] Private plaintiffs, by contrast, filed more than 80,000 claims under antitrust, banking, civil rights, environmental, labor, intellectual property, securities, and consumer protection laws.[34] During the eight years of the Obama administration, suits by the United States never comprised more than 3.4 percent, and averaged about 2.6 percent, of the statutory actions filed in district courts.[35]

1964 was passed, it was evident that . . . the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.").

29. Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 649 (2002) (citing ADMIN. OFFICE OF THE U.S. COURTS, REVISION OF LIST OF STATUTES ENLARGING FEDERAL COURT WORKLOAD (Sept. 18, 1998)) ("New legislative enactments, both civil and criminal, ranged from consumer and environmental rights to workers' protection and civil rights.").

30. Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 192.

31. Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1196 (1982) (explaining that federal courts increasingly recognized private rights of action under regulatory statutes during the 1960s and 1970s). The Court has since retreated from its willingness to find implied causes of action, however. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 67 n.3 (2001) ("Since our decision in *Borak*, we have retreated from our previous willingness to imply a cause of action where Congress has not provided one.").

32. JUDICIAL CASELOAD STATISTICS (June 30, 2018), *supra* note 1.

33. *Id.*

34. *Id.*

35. *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2 (Dec. 31, 2016), https://www.uscourts.gov/sites/default/files/data_tables/stfj_c2_1231.2016.pdf [https://perma.cc/6A4K-4EJQ]; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2 (Dec. 31, 2015), https://www.uscourts.gov/sites/default/files/data_tables/stfj_c2_1231.2015.pdf [https://perma.cc/W7D3-RT5S]; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2 (Dec. 31, 2014), https://www.uscourts.gov/sites/default/files/c02dec14_0.pdf [https://perma.cc/6HWS-FVS9]; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2 (Dec. 31, 2013), https://www.uscourts.gov/sites/default/files/statistics_import_dir/C02Dec13.pdf [https://perma.cc/

Two areas in which private enforcement is particularly robust are civil rights and labor policy. In the twelve-month period ending June 30, 2018, private plaintiffs filed 40,134 civil actions under civil rights statutes and 17,514 civil actions under labor laws, dwarfing the 237 and 266 civil actions, respectively, filed by the United States.[36] Even in what might be described as "core regulatory areas," private actions in federal courts exceeded the number of public actions dramatically: 1,599 to 97 in environmental cases; 10,848 to 6 in consumer cases; 605 to 14 in antitrust cases; 1,306 to 229 in cases involving securities, commodities, and exchanges; and 644 to 1 in the heavily regulated areas of cable and satellite TV.[37]

To be sure, the sheer number of private statutory actions cannot tell the whole story. Some cases may have little or no regulatory impact, while others may have significant repercussions.[38] Public enforcers likely select cases with the most bang for the buck, helping large numbers of individuals with fewer actions. But private class action attorneys also file cases on behalf of large groups of people. Moreover, tort and contract actions, which are not included in the count of statutory claims, are regulatory in nature.[39] They are not created by Congress, of course, but they are part of the regulatory background against which Congress legislates.

A3HE-83EF]; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2 (Dec. 31, 2012), https://www.uscourts.gov/sites/default/files/statistics_import_dir/C02Dec12.pdf [https://perma.cc/LYL7-SXDA]; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2 (Dec. 31, 2011), https://www.uscourts.gov/sites/default/files/statistics_import_dir/C02Dec11.pdf [https://perma.cc/28A7-2HC2]; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2 (Dec. 31, 2010), [https://www.uscourts.gov/sites/default/files/statistics_import_dir/C02Dec10.pdf [https://perma.cc/55NZ-RTJS]; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2 (Dec. 31, 2009), https://www.uscourts.gov/sites/default/files/statistics_import_dir/C02Dec09.pdf [https://perma.cc/ALW7-K8SP].

During the first full year of the Trump administration reflected in the Federal Judicial Caseload Statistics (twelve-month period ending March 31, 2018), the United States filed 3,294 (less than two percent) of the 178,549 statutory claims filed. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2 (Mar. 31, 2018), https://www.uscourts.gov/file/24436/download [https://perma.cc/L4YT-5JUL].

36. JUDICIAL CASELOAD STATISTICS (June 30, 2018), *supra* note 1.

37. *Id.*

38. *See* William B. Rubenstein, *On What A "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129 (2004) (explaining that although most suits by private parties under regulatory statutes serve both public and private functions, the mix varies across suits).

39. *See, e.g.*, Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward A Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 391 (1995) ("[T]he common law itself was merely a regulatory regime in which the government chose to prefer some interests over others . . . .").

Thus, although it is difficult to measure precisely the relative importance of public and private parties to regulatory enforcement in federal court, it is clear that private parties play a critical, if not dominant, role in the U.S. legal system.

B. The Benefits of Private Enforcement of Public Law

Scholars have identified a number of advantages to using private rights of action in aid of public enforcement. First, "private attorneys general" bring significant additional resources to the task of enforcing public law.[40] Both state and federal agencies are chronically underresourced and overworked.[41] Private enforcement regimes enable policymakers to utilize private resources to subsidize the pursuit of public goods.[42] They may also provide remedies to regulatory beneficiaries who are not sufficiently well organized or numerous enough to secure the attention of public enforcers or whose injuries are simply not high priorities in light of scarce public resources.[43] Moreover, the additional resources of private enforcement may allow agencies to devote more of their own resources to activities that private parties cannot perform, such as rulemaking,

40. *See* Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 850–51 (2016) ("Effective enforcement of civil-rights laws depends on private litigation . . . ."); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 218 (1983) ("The conventional theory of the private attorney general stresses that the role of private litigation is not simply to secure compensation for victims, but is at least equally to generate deterrence, principally by multiplying the total resources committed to the detection and prosecution of the prohibited behavior."); Stephenson, *supra* note 12, at 107 ("[P]rivate enforcement can provide more enforcement resources and facilitate more efficient allocation of public resources.").

41. *See* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1410 (2000) (describing the resource constraints of the Department of Justice ("DOJ")); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 221 (1992) (noting that Congress frequently gives agencies "difficult or even impossible tasks," sets unrealistic deadlines for actions, and then "appropriates inadequate resources" for the job); Thompson, *supra* note 30, at 191 ("[T]he enforcement wings of both federal and state environmental agencies are often woefully understaffed and underfunded.").

42. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (finding an implied private right of action in part because the Securities Exchange Commission ("SEC") does not have time to investigate all potential violations of the securities laws).

43. Stewart & Sunstein, *supra* note 31, at 1294 ("[A]dministrative bureaucracies sometimes tend to sacrifice the diffused interests of widely scattered beneficiaries in favor of the interests of more cohesive and better-organized groups, such as regulated firms and the bureaucrats themselves . . . .").

investigations, and prosecutions of difficult cases, creating an efficient public/private division of labor.[44]

Second, private parties supplement the information resources of public enforcers and may have better information about certain types of regulatory violations.[45] It is impossible for public enforcers to monitor and detect every potential violation of law.[46] Moreover, in many cases injured parties have the most detailed and immediate information about regulatory violations.[47] For example, employees, workers, and consumers will likely be the first to know of violations of civil rights, workplace health and safety regulations, or consumer protection laws.[48] In addition, private enforcement may give rise to a specialized bar that provides economies of scale, particularly where class actions are available, and accomplishes some of the same systemic reform sought through public enforcement.[49]

Third, private parties can bring enforcement actions when an agency otherwise would not because of regulatory capture, political constraints, or bureaucratic ossification.[50] Thus, private litigation can serve as an agency-forcing measure, or "safety valve," when public enforcers and the political branches are either reluctant or unable to

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44. *See, e.g.*, Coffee, *supra* note 40, at 224–25 ("[I]t often may be more efficient for public agencies to concentrate on detection (an area where they have the comparative advantage because of their superior investigative resources) and leave the actual litigation of the case to private enforcers, who are frequently more experienced in litigation tactics.").

45. *See* Burbank et al., *supra* note 13, at 663–64; Gilles, *supra* note 41, at 1429 ("[T]he federal government routinely looks to private citizens or entities to aid in the enforcement of laws, often on the theory that the most likely initial source of information about wrongdoing is the citizenry, whose millions of 'eyes on the ground' see far more than federal investigators ever could . . . .").

46. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969) ("The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments . . . .").

47. *See* Gilles, *supra* note 41, at 1429 ("[T]he most likely initial source of information about wrongdoing is the citizenry . . . ."); *cf.* Stewart & Sunstein, *supra* note 31, at 1298 (valuating the relative costs of public and private enforcement). *But see* Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 579–80 (1981) (questioning whether private parties are more likely to detect certain violations of the securities laws without the incentives of large sanctions, which may skew enforcement).

48. *See also* Thompson, *supra* note 30, at 192 ("Citizen . . . [i]nformants often may be the only source of information concerning midnight dumping, equipment tampering, the capture of endangered species, and other covert violations.").

49. *See* Stewart & Sunstein, *supra* note 31, at 1298 (discussing "the relative costs of private and public enforcement").

50. *See* Burbank et al., *supra* note 13, at 664–65 (noting the tendency of public regulators to underenforce due to capture or ideological preferences); Stewart & Sunstein, *supra* note 31, at 1226, 1298 (addressing capture and diseconomies of scale).

enforce statutory mandates.[51] In this way, private enforcement regimes can enhance democratic accountability by promoting "fidelity to statutory purpose."[52] Finally, centralized public enforcement is prone to "diseconomies of scale," resulting in bureaucratic ossification due to "multiple layers of decision and review and the temptation to adopt overly rigid norms in order to reduce administrative costs."[53] Private plaintiffs avoid these bureaucratic constraints.

Fourth, private parties can push agencies to interpret their mandates in new, socially beneficial ways.[54] Even when agencies are not captured by a regulated industry, private attorneys may be more adventuresome and forward-looking than public enforcers in the types of cases they bring and the legal claims they pursue.[55] Moreover, enforcing and shaping regulatory policy through civil actions may constitute a form of participatory government.[56] Through private litigation, the judiciary provides a channel for individuals and nonmajoritarian interests to be heard on important policy choices and public commitments.[57]

In sum, private enforcement supplements the financial and information resources of public enforcers, mitigates the effects of capture and other constraints on agency action, and contributes to the evolution of the law in socially useful directions.

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51. *See* Coffee, *supra* note 40, at 227 ("[P]rivate enforcement also performs an important failsafe function by ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers . . . ."); Stewart & Sunstein, *supra* note 31, at 1295 ("Private rights of action . . . give power to judges and self-selected private litigants to determine whether enforcement is desirable in particular cases.")

52. Stewart & Sunstein, *supra* note 31, at 1200.

53. *Id.* at 1298.

54. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 16 (2001) ("Adversarial legalism makes the judiciary and lawyers . . . more fully democratic in character."); Burbank et al., *supra* note 13, at 664 ("Private enforcement regimes encourage legal innovation.").

55. *See* Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1404 (1998) (finding private plaintiffs have generally brought the most "cutting edge" cases under antidiscrimination laws). Professor Selmi also notes how private plaintiffs first made use of testers to provide evidentiary support for housing discrimination claims, a practice later adopted by government agencies. *Id.* at 1426.

56. *See* Burbank et al., *supra* note 13, at 666 (explaining that this type of participation is a potential advantage of private enforcement and contributes to a broader democratic regime).

57. *See id.*; Maya Sen, *Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 312–15 (2013) (describing how legal theorists position courts within a deliberative democracy).

C. The Risks of Private Enforcement of Public Law

The core critique of private enforcement is that it shifts control over regulatory policy from politically accountable public officials to politically unaccountable private litigants and thousands of unelected federal judges. In the process, private enforcement may upset carefully calibrated public enforcement policies.[58]

The political branches exercise significant control over public enforcement. The president appoints the key executive branch officials overseeing federal enforcement, supervises them, and generally may replace those who disappoint him. Although some public enforcers have for-cause removal protections, they too seem to align themselves more closely with the president's preferences than with courts and private plaintiffs.[59] Despite some debate concerning the extent of Congress's control over executive agencies,[60] it too possesses powerful tools to shape public enforcement. In addition to its legislative authority, Congress can initiate investigations, hold oversight hearings, and flex its power over the federal budget.[61] More generally,

58. *See* Engstrom, *supra* note 12, at 630–41 (exploring arguments that private enforcement is "overzealous, uncoordinated, and democratically unaccountable"); Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 961, 968–71 (1994) (arguing that private litigation is not an appropriate enforcement mechanism because private securities class action litigants often have divergent incentives from those at the SEC and are not subject to the same congressional oversight); Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 569–82 (2016) (evaluating ways in which privatization both distorts and empowers public litigation); Richard J. Pierce, Jr., *Agency Authority To Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 7–10 (1996) (suggesting that private litigation has the potential to eliminate the advantages of agency-administered statutes by requiring the judiciary to particularize the meaning of terms in a broadly worded statute); Stephenson, *supra* note 12, at 95 (arguing that Congress should delegate the power to create private rights of action to the appropriate executive department or agency).

59. *See* Terry Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 220–21 (1982) (suggesting that presidential policy changes can affect the conditions in which agencies operate, such as the economy, thus affecting how agencies' behavior correlates with different presidential administrations); Ryan C. Black, Adam Candeub & Eric Hunnicutt, *Political Control of Independent Agency Voting* (unpublished manuscript) (on file with author).

60. *Cf., e.g.*, Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2150 (2002) (suggesting that independent agencies are "more responsive to congressional preferences" than the president's); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1696 n.128 (1975) (questioning congressional control of agency action); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 767 (1983) (advocating "congressional dominance").

61. *See* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006) (examining the complex and changing relationship between Congress and the administrative state); Stewart & Sunstein, *supra* note 31, at 1227–28 (suggesting that Congress's tools for supervising the regulatory process might be preferred to relying on judges and private litigants).

agency heads charged with implementing statutory mandates are embedded within a national policy environment far removed from most private plaintiffs and secondary to the work of federal judges.

Political accountability is valued in enforcement because the statutory standards enacted by Congress are often broad and overinclusive. Therefore, even absent resource constraints, public enforcers are expected to prioritize the most egregious legal violations and avoid actions that might be within the letter but not the spirit of the law. Such enforcement decisions are ultimately judgments about congressional intent (real or imagined) and the "public interest." Consequently, some level of political accountability is essential.[62] Even when private parties are driven by their good-faith understandings of the "public interest," there is no check from democratic institutions over how they define this inherently contested concept.

Moreover, private parties are likely to choose enforcement actions based on short-term financial incentives—i.e., expected recovery—rather than their conception of the public interest, policy goals, or other public-regarding values.[63] If the financial incentives are sufficiently alluring, private parties may bring cases that a public enforcer would not based on the exercise of prosecutorial discretion or a different understanding of the law's objectives. Thus, private parties may take advantage of statutory ambiguities to advance novel claims inconsistent with an agency's own interpretation of the law or its policymaking agenda.[64] They may also bring cases establishing bad precedents that a public enforcer with an eye toward developing the law would not.[65] Even worse, private plaintiffs may bring "strike suits"—nonmeritorious cases brought in the hopes that the defendant

62. *See* Burbank et al., *supra* note 13, at 670 ("Critics of private enforcement litigation complain that it can be deeply undemocratic, unsuited to a political community committed to representative democracy, electoral accountability, and legislative supremacy."); Stewart & Sunstein, *supra* note 31, at 1227 ("Electoral representation is the traditional mechanisms for pooling collective interests.").

63. *See* Burbank et al., *supra* note 13, at 671 ("[P]rivately prosecuted litigation is guided by private (often economic) interests that may be in conflict with the public interest."). *But see* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853 (2014) (questioning the traditional view of public and private enforcement objectives).

64. Engstrom, *supra* note 12, at 637–41.

65. Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 69 (1989) ("[D]ecisions in citizen suits may create adverse precedents for future government enforcement. Such a result could compromise all future enforcement, by government and citizens alike."); Engstrom, *supra* note 12, at 637–41.

will settle rather than face the cost and bad publicity of protracted litigation.[66]

Private enforcement also runs the risk of overdeterrence—i.e., enforcement actions in which the costs of enforcement and compliance exceed the benefits of the remedy.[67] To be sure, this concern is often mitigated by the economic costs of litigation. Private parties are unlikely to bring suit unless the benefits of enforcement are worth the costs to the plaintiffs.[68] But class actions can overcome this constraint and result in damage awards that "exceed social costs and that do not equal wealth forcibly transferred from the plaintiffs to the defendants."[69] Such actions may weaken public support for the law and regulatory enforcement generally, thereby undermining the goals Congress sought to achieve. Moreover, even when a public enforcer does bring suit, private parties may merely duplicate the public action without adding any independent value.[70] Conversely, private enforcement alone may result in underdeterrence of certain types of regulatory harms if the litigation costs are greater than the expected recovery.

Finally, private enforcement is decentralized in ways that impede the implementation of a consistent and coherent regulatory policy. Thousands of "private attorneys general" may file suits without coordinating their actions. Filings in district courts spread across multiple circuits may result in inconsistent opinions in similar cases due to the infrequency of Supreme Court review.[71] Consequently, regulated parties may face different legal requirements in different parts of the country.[72] Public enforcement also struggles with consistency across the federal judiciary. But public enforcers can facilitate more uniform enforcement through centralized control over decisions to institute enforcement actions. In addition, agencies enjoy greater deference from the courts on judicial review than litigants

66. Burbank et al., *supra* note 13, at 669; Grundfest, *supra* note 58, at 970–71; Stephenson, *supra* note 12, at 116.

67. Stewart & Sunstein, *supra* note 31, at 1297.

68. *Id.* at 1290.

69. *Id.* at 1304.

70. There is some debate over whether private plaintiffs do in fact mostly "piggy-back" on public enforcement actions. *See* Stephenson, *supra* note 12, at 128 n.117 (collecting literature on the question).

71. Burbank et al., *supra* note 13, at 719; Stewart & Sunstein, *supra* note 31, at 1292–93.

72. Pierce, *supra* note 58, at 8–9 (using "[t]he many inconsistent judicial opinions purporting to define 'owner or operator,' as that term is used in [the Comprehensive Environmental Response, Compensation, and Liability Act, to] illustrate the problems that are potentially created by private rights of action" and noting that "[t]he judicial opinions are massively inconsistent and incoherent").

pursuing private actions in federal court.[73] Finally, agencies can refuse to "acquiesce" in circuit case law in certain circumstances and have better recourse to Congress in the face of adverse judicial decisions.[74]

In sum, critics charge that private enforcement is politically unaccountable, potentially wasteful, and risks creating inconsistent regulatory policy driven by private parties and judicial preferences. Missing from this debate, however, is any consideration of how private enforcement operates in agency adjudication.

II. PUBLIC AND PRIVATE ENFORCEMENT IN AGENCY ADJUDICATION

The relationship between public and private enforcement in agency adjudication is different than in federal court. While the government is involved in only a fraction of cases brought in federal court, it is ubiquitous in agency adjudication. Yet most administrative schemes are also designed to give private parties important roles in enforcement. Indeed, many administrative schemes are best described as hybrid forms of public and private enforcement, falling somewhere on a continuum between the two.

A. The Scope and Breadth of Agency Adjudication

The number of agency actions potentially qualifying as adjudication is enormous, even using the definition provided by the Administrative Procedure Act ("APA"). The APA defines "adjudication" to mean an "agency process for the formulation of an order."[75] An order, in turn, is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing."[76] As Professor Ed Rubin suggests,

> Every time an agency plans its future actions or evaluates its prior ones, allocates its resources, gives advice, makes a promise, issues a threat, negotiates, conducts an

73. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that courts must give deference to agency statutory interpretation so long as the interpretation is reasonable).

74. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989).

75. 5 U.S.C. § 551(7) (2012).

76. 5 U.S.C. § 551(6).

> investigation, and most of the time it denies an application or makes an exception, it is at least arguably engaged in informal adjudication.[77]

The APA provides special procedural requirements for so-called "formal adjudication" if a separate statute requires the agency to decide the matter "on the record after opportunity for an agency hearing."[78] Everything else is considered "informal adjudication." Yet Professor Michael Asimow has shown that much of the so-called "informal adjudication" is actually quite "formal," using many of the same procedural requirements as adjudication conducted under Sections 554, 556, and 557 of the APA.[79] At the same time, a vast swath of informal adjudication might be "more accurately described as executive action, or some similar term . . . . Most of the innumerable administrative actions that fall within this category are unrelated to adjudication, as that term is generally conceived."[80]

Although defining the precise contours of agency adjudication is difficult, this Article uses a definition borrowed in part from Professor Asimow: *an administrative process in which a federal official uses an evidentiary hearing to resolve a claim or dispute involving at least two parties (one of which may be the government)*.[81] The federal decisionmaker may be the head of an agency, an administrative law judge ("ALJ"), an administrative judge, or another agency official.[82]

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77. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 107–08 (2003).

78. 5 U.S.C. § 554 (2012); *see also* 5 U.S.C. §§ 556–57 (2012) (detailing the procedures of administrative hearings).

79. Professor Asimow has identified eighty-seven agencies that conduct administrative adjudications involving an evidentiary hearing. This includes both "formal" adjudication and "informal" adjudication, as they are traditionally known, although Asimow's study problematizes this nomenclature. *See* MICHAEL ASIMOW, EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURES ACT 3 (Nov. 10, 2016), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf [https://perma.cc/8P4U-ZN73] [hereinafter ASIMOW REPORT] ("[Some so-called informal adjudication] is even *more* formal than the familiar trial-type adjudication procedure prescribed by the APA. In contrast, some [formal] adjudication (such as the inquisitorial Security Disability program) is *less* formal than many [informal adjudication] schemes."); *Federal Administrative Adjudication*, *supra* note 23 (collecting a comprehensive picture of agency adjudicatory schemes, different types of adjudication, and empirical data about administrative agencies). Professor Asimow argues that "[t]he term 'informal adjudication' should be reserved for Type C adjudication which lacks legally required evidentiary hearings." ASIMOW REPORT, *supra*, at 3.

80. Rubin, *supra* note 77, at 109.

81. This comprises what Professor Asimow describes as Type A and Type B adjudications and excludes Type C adjudications, which do not involve evidentiary hearings. ASIMOW REPORT, *supra* note 79, at 3–5.

82. ALJs conduct adjudicatory hearings under Sections 554, 556, and 557 of the APA and are entitled to certain job protections and insulation from agency pressure. *See, e.g.*, 5 U.S.C. § 554(d) (prohibiting ex parte communications and supervision by agency personnel involved in investigation and prosecution); 5 U.S.C. § 7521 (2012) (ALJs may only be removed "for good

Defined as such, agencies adjudicate more cases each year than the entire federal judiciary. The majority of these cases involve disputes between the government and beneficiaries of social welfare programs, federal employees, and government contractors.[83] Congress turned to government agencies to resolve such cases early in the Republic's history, as the needs of a growing nation outstripped the ability of congressional committees to handle petitions for pensions by invalid Revolutionary War veterans,[84] relief from taxes and customs duties,[85] and claims to public lands.[86] Just like today, Congress simply did not have time or expertise to adjudicate all claims by citizens for relief. Therefore, although Congress continued to use private bills to handle some petitions, it increasingly turned to the executive and judicial branches to adjudicate the bulk of individual claims upon the government for relief.[87] Today, the Social Security Administration alone houses the largest adjudicatory system in the world, hearing roughly twice the number of cases as the entire federal judiciary.[88]

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cause established . . . on the record after opportunity for hearing."). Administrative Judges ("AJ") are not entitled to the same protections under the APA, but frequently enjoy similar protections under their organic statutes or the agencies' own rules of practice and procedure. The "functional independence accorded to AJs varies with the particular agency and type of adjudication . . . ." The Federal Administrative Judiciary (ACUS Recommendation No. 92-7), 57 Fed. Reg. 61,760 (Dec. 29, 1992). But many AJs perceive themselves as similarly insulated from sanctions by agency policymakers. *See* Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 278–81 (1994) (contrasting ALJ and AJ attitudes about judicial independence). Today, there are far more non-ALJ adjudicators than ALJs in the administrative state. *See* KENT BARNETT ET AL., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL 8, 17 (Feb. 14, 2018), https://www.acus.gov/sites/default/files/documents/Non-ALJ Draft Report_2.pdf [https://perma.cc/5SYE-2C4H] (reporting 10,831 non-ALJs and 1,931 ALJs). This Article refers to ALJs, AJs, and other agency officials who preside over agency adjudication, collectively, as administrative judges or adjudicators.

83. OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 40 (2003).

84. THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 105 (1995).

85. MICHELE LANDIS DAUBER, THE SYMPATHETIC STATE 17 (2013).

86. *Id.*

87. *See id.* at 18 (describing congressional use of commissions as early as 1794 to adjudicate claims arising from lost property during the Revolutionary War and distillery duties paid during a drought); *see also* Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792) (describing an administrative system for handling Revolutionary War veterans' pensions). Professor Maggie McKinley suggests that "the administrative state [was] an outgrowth of the . . . congressional petitioning [process] from the Founding into the twentieth century." Maggie McKinley, Petitioning and the Making of the Administrative State, at *6 (unpublished manuscript) (on file with author). Early petitions were typically addressed to Congress rather than the executive because, unlike in Europe, the executive was not thought to exercise sovereign powers. *See* FRANK J. GOODNOW, 2 COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS, NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY 136 (1897).

88. FISS & RESNIK, *supra* note 17, at 40.

Since the nineteenth century, Congress has also turned to government agencies to adjudicate regulatory cases—actions brought to compel a private party to comply with a legal requirement or remedy an injury to another party.[89] In these cases, agencies exercise the sovereign interest of the government in seeing that the law is obeyed and in protecting the "health and well-being" of its citizens.[90]

When establishing an administrative forum for regulatory cases, Congress often cites the need to provide relief to private parties facing obstacles to recovery in federal court. This has been true since the establishment of the Interstate Commerce Commission ("ICC") in 1887, right up to the creation of inter partes review in the PTAB in 2011. Congress established the ICC primarily to help those shipping goods, in many cases farmers, whom neither the courts nor the states would relieve from unreasonable and discriminatory pricing by the railroads.[91] Congress gave the ICC the power to hear discrimination charges against the railroads, order monetary relief, and set maximum shipping rates.[92] Similarly, Congress turned to agency adjudication to assist groups facing difficulty protecting their rights in the courts when it enacted the Packers and Stockyards Act of 1921,[93] the Longshore and Harbor Workers' Compensation Act of 1927,[94] the Perishable Agricultural Commodities Act of 1930,[95] the National

89. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012) (discussing, inter alia, agency adjudication of land disputes and steamboat safety); *see also infra* notes 91–99 and accompanying text.

90. Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. 585, 595, 601 (2015) (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601, 607 (1982)) (discussing public rights).

91. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 253 (1982) (noting the view of the courts as the "archenemy of the forces of populism").

92. *Id.* at 257.

93. J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 MERCER L. REV. 763, 775 (1993) ("The reparation procedure is . . . designed to give a quicker remedy for the injured party than litigation.").

94. 33 U.S.C. §§ 901–50 (2012); Kathleen Krail Charvet et al., *Gilding the Lily: The Genesis of the Longshoremen's and Harbor Workers' Compensation Act in 1927, the 1972 Amendments, the 1984 Amendments, and the Extension Acts*, 91 TUL. L. REV. 881, 882 (2017) ("[The Act and its amendments] reflect legislation designed to address judicial decisions wherein the Courts have been presented with jurisdictional challenges . . . .").

95. Congress enacted the Perishable Agricultural Commodities Act "primarily for the protection of the producers of perishable agricultural products - most of whom must entrust their products to a buyer . . . who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing." H.R. REP. NO. 1196, 84th Cong., 1st Sess. 2 (1955), *reprinted in* 1956 U.S.C.C.A.N. 3701; *see also* Nicole Leonard, *The Unsuspecting Fiduciary: The Curious Case of PACA and Personal Liability*, 25 AM. BANKR. INST. J. 32, 32 (2006) ("[T]he goal of Congress has been to protect the more vulnerable players in a vital area of commerce . . . ."). "The

Labor Relations Act of 1935,[96] the Commodity Futures Trading Commission Act of 1974,[97] the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,[98] and the Leahy-Smith America Invents Act of 2011.[99]

Appendix A lists thirty-four federal administrative courts that adjudicate regulatory enforcement actions. Appendix A was compiled based on a review of the statutory authority and rules of practice and procedure of eighty-seven administrative offices listed in the Federal Administrative Adjudication Database as having at least one case opened or filed in 2013.[100] The line between regulatory and benefits

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statute was amended in 1984 to create a statutory trust for the benefit of unpaid produce suppliers." Consumers Produce Co. v. Volante Wholesale Produce, Inc., 16 F.3d 1374, 1378 (3d Cir. 1994).

96. The National Labor Relations Act of 1935, or Wagner Act, sought to address "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." National Labor Relations Act, Pub. L. No. 74-198, § 1, 49 Stat. 449, 449 (1935) (codified as amended at 29 U.S.C. § 151 (2012)); *see also* Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2035–36 (2009) (noting how "[t]he Wagner Act declared employers' militant refusal to recognize unions as the major cause of industrial unrest, and the abuse of employer economic power as the major obstacle to improved labor standards"). Professors Catherine Fisk and Deborah Malamud note, however, that the Taft-Hartley Act of 1947 curtailed these gains. Fisk & Malamud, *supra*, at 2034.

97. Pub. L. No. 93-463, 88 Stat. 1389. "Concern over the inefficiency of remedies for participants in the commodity markets led to a proposal to create a specialized forum for the adjudication of disputes in commodity futures transactions." Jerry W. Markham, *The Seventh Amendment and CFTC Reparations Proceedings*, 68 IOWA L. REV. 87, 96 (1982) (citing H.R. REP. NO. 975, 93d Cong., 2d Sess. 52 (1974)). A new section was added to the Act "providing for administrative reparation proceedings before the Commission by any person against persons registered as futures commission merchants, floor brokers, persons associated with futures commission merchants or with agents thereof, commodity trading advisors, or commodity pool operators." S. REP. 93-1131, at 96–97 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5868.

98. In her essay proposing a consumer financial protection agency, then-Professor Elizabeth Warren noted the success with which creditors shielded themselves from legal liability to consumers. Elizabeth Warren, *Unsafe at Any Rate: If It's Good Enough for Microwaves, It's Good Enough for Mortgages: Why We Need a Consumer Financial Product Safety Commission*, DEMOCRACY (Summer 2007), https://democracyjournal.org/magazine/5/unsafe-at-any-rate/ [https://perma.cc/YD6C-9HTY].

99. The America Invents Act expanded the U.S. Patent and Trademark Office's ("USPTO") authority to review the patentability of claims post patent issuance in order to "establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs" in response to "a growing sense that questionable patents are too easily obtained and are too difficult to challenge." H.R. REP. No. 98–112, pt. 1, at 39–40 (2011); *see also* Rochelle Cooper Dreyfuss, *Giving the Federal Circuit a Run for Its Money: Challenging Patents in the PTAB*, 91 NOTRE DAME L. REV. 235, 237–39 (2015) (discussing problems with relying on federal district courts to adjudicate challenges to invalid patents).

100. The database is available at https://acus.law.stanford.edu [http://perma.cc/W7SP-B5K2]. It includes only caseloads verified by the agencies themselves. Two agencies are notably absent from Appendix A because they did not participate in the Survey: the SEC, which adjudicates a significant number of enforcement actions each year, *see, e.g.*, Urska Velikonj, *Reporting Agency*

cases is occasionally fuzzy, some agencies adjudicate both kinds of cases,[101] and reasonable minds may differ over whether to include a particular agency.[102] Nevertheless, Appendix A offers a broad universe of agency adjudication from which we can begin to identify the range of public and private rights included in administrative enforcement schemes.

B. Public Enforcement in Agency Adjudication

When Congress turns to agency adjudication, it usually also gives the agency a role in enforcement rather than simply moving private enforcement into a non–Article III tribunal. Although the government does not track enforcement actions by party in federal administrative courts, agency rules of practice and procedure reveal the ubiquity of public enforcement in agency design.

All thirty-four administrative courts listed in Appendix A hear cases in which an agency is given enforcement responsibilities.[103] These responsibilities may resemble conventional public enforcement duties in which the agency inspects, investigates, and pursues enforcement actions directly against regulated entities.[104] Twenty-

Performance: Behind the SEC's Enforcement Statistics, 101 CORNELL L. REV. 901, 923 tbl.1 (2016) (noting 610 administrative actions in 2014), and the USPTO, which adjudicates thousands of disputes over intellectual property. *See* U.S. PATENT & TRADEMARK OFFICE, PTAB TRIAL STATISTICS: IPR, PGR, CBM 3 (Oct. 2017), https://www.uspto.gov/sites/default/files/documents/trial_statistics_october_2017.pdf [https://perma.cc/C43E-WPME] [hereinafter USPTO, TRIAL STATISTICS] (reporting 7,074 inter partes review petitions by private parties in approximately five years). Thus, Appendix A likely understates the number of administrative courts that adjudicate regulatory enforcement actions.

101. I did not include agencies that adjudicate enforcement actions solely aimed at rooting out fraud or corruption in a benefits program. *See, e.g.*, Sant'Ambrogio & Zimmerman, *supra* note 14, at 1676 (discussing Medicaid postpayment audit programs).

102. Nevertheless, the literature generally recognizes a distinction between agencies charged with the administration of benefits and regulatory agencies. *See, e.g.*, Estreicher & Revesz, *supra* note 74, at 748–49; Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 ADMIN. L. REV. 1, 52–53 (1997) (recognizing distinction between agency adjudication of public benefits and economic regulation); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 659 (2004).

103. *See infra* Appendix A, col. A. The agency may not have enforcement responsibilities in every type of case heard by the administrative court, however. In most of these cases, the same agency that adjudicates the cases also has enforcement responsibilities, although separation of functions rules often limit the communications between the two different parts of the agency.

104. The SEC and Federal Trade Commission ("FTC") are good examples. Although the SEC maintains an online form for filing "complaints/tips," it does not "disclose the existence or non-existence of an investigation and any information gathered unless made a matter of public record in proceedings brought before the SEC or in the courts." *SEC Center for Complaints and Enforcement Tips*, U.S. SEC. & EXCH. COMM'N (Mar. 4, 2011), https://www.sec.gov/reportspubs/investor-publications/complaintshtml.html [https://perma.cc/WTN4-C7LN]. This is similar to

eight of the thirty-four administrative courts in Appendix A hear claims in which the government is the only party that may pursue an enforcement matter requiring an evidentiary hearing.[105] But even when the government does not have exclusive enforcement authority, it may have responsibility for reviewing, investigating, and attempting to settle complaints filed by private parties;[106] acting as a gatekeeper for private actions;[107] or intervening in actions brought by private parties to represent the government.[108]

These findings are consistent with the perception of administrative enforcement as another form of public enforcement. Nevertheless, there are two important differences from enforcement in federal court. First, Congress not only adds a public enforcer when it creates an administrative court, it also nearly always changes the identity of the public enforcer. Agencies must rely on the Department of Justice ("DOJ") to bring most enforcement actions in federal court, but Congress usually gives public enforcement authority to an agency

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how the DOJ acts in civil and criminal cases. "The [FTC] acts only in the public interest and does not initiate an investigation or take other action when the alleged violation of law is merely a matter of private controversy and does not tend adversely to affect the public." 16 C.F.R. § 2.3 (2018). Nevertheless, the FTC also invites private parties to file complaints or otherwise request FTC action regarding commercial practices that violate the acts it is charged with administering. 16 C.F.R. § 2.2 (2018).

105. *See infra* Appendix A, col. B. Note that administrative courts frequently hear more than one type of claim and may be structured differently across agencies. For example, an agency may have exclusive enforcement authority for most claims, but private parties may be able to pursue others on their own.

106. For example, the Department of Energy's Office of Hearings and Appeals investigates and reports on certain whistleblower complaints, 10 C.F.R. §§ 708.1, 708.2 (2018); the Assistant Secretary of Housing and Urban Development conducts investigations of and seeks to conciliate complaints filed under the Fair Housing Act, 24 C.F.R. §§ 103.215, 103.300 (2018); the Secretary of Labor investigates complaints of discrimination under the Federal Mine Safety and Health Act, 29 C.F.R. § 2700.40 (2018); the Surface Transportation Board may institute investigations on its on motion although it mostly hears private complaints; and the United States International Trade Commission investigates complaints under the Tariff Act, 19 C.F.R. § 210.9 (2018).

107. The Secretary of Labor, for example, is directed to file a complaint under the Federal Mine Safety and Health Act if she determines after investigating a complaint that a violation has occurred. 29 C.F.R. § 2700.40. The complainant "may present additional evidence on his own behalf" during any subsequent evidentiary hearing. 29 C.F.R. § 2700.4 (2018). Similarly, the Department of Housing and Urban Development issues a charge under the Fair Housing Act when it determines that reasonable cause exists to believe a violation has occurred. 24 C.F.R. §§ 103.15, 103.400 (2018). "An aggrieved person is not a party but may file a motion to intervene." 24 C.F.R. § 180.310 (2018).

108. The Secretary of Labor, for example, is directed to file a complaint under the Federal Mine Safety and Health Act if she determines after investigating a complaint that a violation has occurred. 29 C.F.R. § 2700.40. The complainant "may present additional evidence on his own behalf" during any subsequent evidentiary hearing. 29 C.F.R. § 2700.

other than the DOJ in administrative proceedings.[109] The separation of powers issues raised by combining enforcement, adjudication, and rulemaking in agencies has been well tilled.[110]

Second, and less well understood, private parties play a more important role in administrative enforcement than public enforcement in federal court. As the next Section explains, private parties are nearly as ubiquitous as the government in administrative enforcement.

C. The Role of Private Parties in Administrative Enforcement

Private parties play an underappreciated role in administrative enforcement.[111] To begin, parties can initiate enforcement actions in many administrative schemes by filing a complaint. Twenty-five of the administrative courts listed in Appendix A hear cases in which private parties have a right to file complaints concerning certain regulatory violations.[112] Like complaints filed in federal court, these administrative complaints trigger a process that may ultimately lead to an evidentiary hearing in which the agency adjudicates the claims in the complaint. Unlike federal court, however, where the road to trial follows a well-trodden path laid out in the Federal Rules of Civil Procedure,[113] the road to an evidentiary hearing in administrative enforcement may take several different paths.

Twenty-two administrative courts hear claims arising from private complaints after some kind of investigation required by the

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4 (2018). Similarly, the Department of Housing and Urban Development issues a charge under the Fair Housing Act when it determines that reasonable cause exists to believe a violation has occurred. 24 C.F.R. §§ 103.15, 103.400 (2018). "An aggrieved person is not a party but may file a motion to intervene." 24 C.F.R. § 180.310 (2018).

d in court)."); *see also* 28 U.S.C. § 516 (2012) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or an officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General."). Professors Herz and Devins suggest that agencies with access to administrative forums and without independent litigating authority in federal court will tilt their enforcement programs to the administrative tribunal in order to avoid relying upon the DOJ. Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1369–71 (2000). This raises interesting questions about how the DOJ—a generalist enforcer—might impact an agency's enforcement scheme. *See* Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113, 2115–16 (2015) (challenging the claim that specialization is always superior to general enforcement expertise).

110. *See supra* notes 13 & 109.

111. *See supra* notes 14–21 and accompanying text.

112. *See infra* Appendix A, col. C.

113. Although, most cases brought in federal court now settle somewhere along the way.

agency's regulations.[114] Others conduct investigations without any regulatory requirement. These investigations serve different functions depending on the type of claim. In some cases, the agency acts as a gatekeeper, deciding whether the private party is entitled to an evidentiary hearing, with or without the agency's participation.[115] In others, the agency uses the investigation to decide whether the agency should file a formal complaint and pursue an enforcement action.[116] It may be in the agency's discretion whether to pursue the complaint, even if it finds a regulatory violation,[117] or the agency may be required to pursue an enforcement action if it finds reason to believe the complaint has merit.[118]

Moreover, twenty-five administrative courts hear claims in which regulatory beneficiaries or other private parties besides the respondents may participate in the enforcement action.[119] Although the specific procedural rights of parties vary by administrative scheme, they may include the ability to submit briefs and evidence, call and examine witnesses, participate in oral arguments, appeal administrative decisions to a higher authority in the agency, and

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114. *See infra* Appendix A, col. D; *see also* examples cited *supra* note 106.

115. For example, the Department of Energy may dismiss whistleblower complaints for lack of jurisdiction or other good cause as defined in the regulations. 10 C.F.R. § 708.17 (2018). Otherwise, if the agency is unable to resolve the matter informally, the complainant may request an evidentiary hearing conducted by the Office of Hearings and Appeals. 10 C.F.R. § 708.21 (2018); *see also* examples cited *supra* note 107.

116. This is a common design. *See, e.g.*, 24 C.F.R. §§ 103.15, 103.400 (2018) (prescribing that the Department of Housing and Urban Development should issue a charge under the Fair Housing Act when it determines that reasonable cause exists to believe a violation has occurred); 29 C.F.R. § 102.15 (2018) ("After a charge has been filed, if it appears to the [National Labor Relations Board ("NLRB")] Regional Director that formal proceedings may be instituted, the Director will issue and serve on all parties a formal complaint in the Board's name . . . ."); 29 C.F.R. § 2700.40 (2018) (prescribing that the Secretary of Labor shall file a complaint under the Federal Mine Safety and Health Act if she determines after investigating a complaint that a violation has occurred).

117. *See, e.g.*, FED. ELECTION COMM'N, GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS 12 (May 2012), https://transition.fec.gov/em/respondent_guide.pdf [https://perma.cc/YZ54-UB8P]:

> Pursuant to an exercise of its prosecutorial discretion, the Commission may dismiss a matter when, in the opinion of at least four Commissioners, the matter does not merit further use of Commission resources. The Commission may take into account factors such as the small dollar amount at issue, the insignificance of the alleged violation, the vagueness or weakness of the evidence, or the merits of the response.

118. *See, e.g.*, *Investigate Charges*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/what-we-do/investigate-charges (last visited Sept. 30, 2018) [https://perma.cc/XS32-ZYMF] (describing how the NLRB pursues meritorious complaints when it is unable to facilitate a settlement between the parties).

119. *See infra* Appendix A, col. E; *see also, e.g.*, 29 C.F.R. § 2200.20 (2018) (granting employees, their representatives, and employers party status in disputes over abatement periods set by Occupational Safety and Health Administration ("OSHA") for employers).

ultimately seek judicial review.[120] Finally, fifteen administrative courts hear claims in which private parties may pursue enforcement actions with or without the agency's participation.[121] Such cases most closely resemble private enforcement in federal court.

Thus, administrative enforcement is often hybrid in nature, falling somewhere on a continuum between public and private enforcement. At either end are administrative schemes virtually indistinguishable from public or private enforcement in federal court. But much agency adjudication falls somewhere in between, with attributes of both. At the public end, an agency may have sole discretion whether to pursue an enforcement action or even respond to a public complaint.[122] At the private end, private parties may have the authority to pursue enforcement actions with or without the agency.[123] Between these ends, the agency may generally retain control over whether to institute enforcement actions but be required to institute such actions when it finds reason to believe a violation has occurred.[124] Alternatively, private parties may be permitted to intervene in agency enforcement actions to protect their interests.[125] Table 1 lists some attributes of public and private enforcement found in the administrative schemes included in Appendix A.

120. *See, e.g.*, 5 U.S.C. §§ 554, 702 (2012).

121. *See infra* Appendix A, col. F. For example, the Department of Labor's Benefits Review Board hears claims by miners arising from black lung disease, but the Secretary of Labor may participate in the cases. *See, e.g.*, 20 C.F.R. § 725.360 (2018). It is common for administrative schemes to allow private parties to pursue whistleblower complaints even when the agency otherwise has primary enforcement responsibility.

122. *See, e.g.*, *infra* Appendix A (FTC).

123. *See, e.g.*, *infra* Appendix A (DOL Benefits Review Board).

124. *See, e.g.*, *infra* Appendix A (NLRB).

125. *See, e.g.*, *infra* Appendix A (OSHRC).

TABLE 1: ENFORCEMENT ATTRIBUTES

Attributes of Public Enforcement	**Attributes of Private Enforcement**
Agency reviews private complaints	Procedures for private complaints
Agency investigates complaints	Right to investigation
Agency attempts to settle	Right to decision on complaint
Agency acts as gatekeeper to private action	Right to evidentiary hearing
Agency may join private actions	Right to appeal agency decision
Agency has nonexclusive right of action	Agency action on complaint nondiscretionary
Agency has exclusive public right of action	Private parties may join public actions
Public enforcement is discretionary	Nonexclusive private right of action
	Exclusive private right of action

Table 2 illustrates where some administrative schemes fall on the public-private enforcement continuum based on their design.

TABLE 2: CONTINUUM OF PUBLIC AND PRIVATE ENFORCEMENT[126]

	Agency	**Public Enforcement**	**Private Enforcement**
Public ↑	**SEC**	Exclusive, independent, and discretionary public enforcement	
	FTC	Exclusive and discretionary public enforcement	Procedures for private complaints; certain parties may intervene in certain cases
	NLRB	Agency investigates and attempts to settle private complaints; exclusive public right of action	Agency action on meritorious complaint is nondiscretionary; complaints may be withdrawn; certain parties may participate in public enforcement
	STB	Nonexclusive public right of action (rarely used)	Nonexclusive private right of action (largely private enforcement)
↓ **Private**	**DOL, BRB**	Agency may intervene	Exclusive private right of action (largely private enforcement)

126. For a full list of agencies and their rules of practice and procedure, see *infra* Appendix A.

To be sure, some attributes of private enforcement listed in Table 1 may seem too trivial, without more, to justify characterizing the administrative scheme as anything other than public enforcement. The right to file a complaint with an agency is not all that different from the ability of a citizen to report a violation of law to a public prosecutor. The ability to trigger an agency investigation provides citizens with more leverage, but not much. Unless private parties have the right to a reasoned decision on their complaint by an independent adjudicator based on the record of an evidentiary hearing, they are highly dependent on public enforcers for remedies. Courts generally grant agencies substantial discretion whether to investigate a charge or file a complaint based on that charge.[127]

Nevertheless, even very limited procedural rights for private parties assist agencies in their pursuit of public goals consistent with theories of private enforcement. As discussed more fully in Part III, an institutionalized process for reviewing complaints, particularly if it triggers an investigation and a written decision by the agency, augments the capacity of public enforcers to monitor the regulatory landscape and highlights violations that may have escaped their attention. Although such rights, without more, may not ultimately provide a remedy if the agency is adamantly opposed to enforcement, agencies do not always seek to underenforce. When agencies are committed to their missions, information from private parties is vital to the agency's enforcement arm.[128]

The right to file a complaint or pursue an action does not necessarily mean parties use it, of course. Our understanding of administrative enforcement would certainly benefit from better tracking of cases by party. Nevertheless, the availability of remedies creates incentives for private parties to pursue them. In addition, the available data confirms that both agencies and private parties do use these procedural rights.[129] Thus, private parties are deeply embedded in agency adjudication.

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127. *See* Barkow, *supra* note 12, at 1132 ("Courts tend to steer clear of second-guessing an agency's selection of which actors to target and which to ignore. The judiciary takes a similarly hands-off approach to reviewing an agency's broader plans for how it will proceed with enforcement."); Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 901 (2009) ("[A]n agency has a great deal of discretion about which violators it will pursue.").

128. *See infra* notes 176–177 and accompanying text.

129. *See, e.g.*, Velikonj, *supra* note 100, at 923, tbl.1 (reporting 610 public enforcement actions in 2014); CONSUMER FIN. PROT. BUREAU, CONSUMER RESPONSE: COMPLAINTS BY THE NUMBERS (2015), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201503_cfpb_complaints-by-the-numbers.pdf [https://perma.cc/37W5-8B5M] [hereinafter CONSUMER

III. THE FUNCTION OF HYBRID ENFORCEMENT IN AGENCY ADJUDICATION

The literature comparing public and private enforcement has largely ignored administrative enforcement.[130] Thus, there has been no attempt to theorize the function of hybrid enforcement in administrative courts. This Part begins to fill this gap by examining how different attributes of public and private enforcement further the goals of agency adjudication while mitigating some of its risks.[131]

As discussed more fully in the following Sections, agency adjudication seeks to achieve three main goals: greater legal access to remedies for private parties;[132] more accurate, expeditious, and consistent decisions informed by specialized expertise;[133] and increased coherence and political accountability in public policy.[134] Yet the pursuit of these goals raises new concerns. Expanding legal access for regulatory beneficiaries through informal and less costly procedures puts pressure on the accuracy and legitimacy of agency decisions.[135] Increasing the specialization and expertise of adjudicators increases the danger of narrow-minded decisions, agency capture, and backlogs caused by caseload volatility.[136] The coordination of adjudication, enforcement, and rulemaking by a political appointee may compromise the rights of parties to individualized decisions and result in over- or underdeterrence, with political swings from

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RESPONSE] (reporting more than 558,800 consumer complaints filed with the Consumer Financial Protection Bureau ("CFPB") during its first three and a half years); U.S. PATENT & TRADEMARK OFFICE, TRIAL STATISTICS, *supra* note 100 (reporting 7,074 private actions in approximately five years); *Board Decisions Issued*, NAT'L LAB. REL. BD., https://www.nlrb.gov/news-outreach/graphs-data/decisions/board-decisions-issued (last visited Sept. 30, 2018) [https://perma.cc/T82R-6MVQ] (reporting several hundred cases decided each year triggered by private complaints).

130. *See supra* notes 14–21 and accompanying text.

131. Part III examines the goals that have been offered as justification for the use of agencies rather than courts to adjudicate certain disputes. There may also be other, less normatively attractive reasons why Congress delegates decisions to agencies. *See, e.g.*, Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139, 144 (2015) (arguing that the desire to obtain campaign contributions from industry participants contributed to the political support for the creation of the ICC "rather than reliance on the courts for enforcement").

132. *See infra* Section III.A.

133. *See infra* Section III.B.

134. *See infra* Section III.C.

135. *See infra* Section III.A.

136. *See infra* Section III.B.

administration to administration.[137] Hybrid enforcement can further the goals of adjudication while mitigating some of its risks.

A. Enhancing Access to Justice

Agency adjudication seeks to enhance access to justice by providing a more informal and less expensive forum than federal court for the adjudication of disputes that impact private parties.[138] When Congress creates administrative courts for private parties, it almost always cites challenges faced by regulatory beneficiaries in federal court.[139] Furthering legal access is consistent with one of the normative goals of the administrative process generally—greater public participation in government policymaking.[140]

Expanding legal access through more informal and less costly procedures, however, puts pressure on the accuracy and legitimacy of agency decisions. This raises due process concerns when there is a private party on the other side of the "v." Hybrid enforcement in administrative courts helps address these concerns and allows agencies to protect the due process interests of private respondents while enhancing access to legal remedies for regulatory beneficiaries.

1. A More Informal and Less Expensive Forum

Agencies offer a more informal and potentially more expeditious forum for the resolution of claims than federal court. The

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137. *See infra* Section III.C.

138. Legal access is particularly important to the adjudication of government benefits, which is often designed to be particularly protective of potential beneficiaries. *See, e.g.*, Veterans' Judicial Review Act, Pub. L. 100-687, § 3007, 102 Stat. 4105, 4107 (1988) (instructing the Veterans' Administration (now the Department of Veterans Affairs) to give claimants "the benefit of the doubt" when "there is an approximate balance of positive and negative evidence regarding the merits of an issue"); Frank S. Bloch et al., *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 6 n.17 (2003) (noting resistance to providing the government with a legal representative or closing the evidentiary record in social security disability proceedings). But informal procedures are also helpful to private parties that seek to pursue enforcement claims in administrative courts. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 855 (1986) (noting Congress's goal in creating the Commodity Futures Trading Commission to provide "an inexpensive and expeditious alternative forum" to federal court); SKOWRONEK, *supra* note 91, at 146 (reporting that congressional advocates of a strong ICC claimed "it would be able to arbitrate disputes quickly and at low cost").

139. *See supra* Section II.A.

140. *See, e.g.*, STEVE P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2008) (arguing that regulatory agencies are more accessible to less powerful groups than legislatures); Stewart, *supra* note 60, at 1748–55 (describing the expansion of participation rights pushed by the courts).

APA imposes few procedural requirements on adjudication not subject to the requirements of Section 554.[141] But even formal adjudication under the APA does not include the full panoply of evidentiary tools regularly used in federal court. Prehearing discovery is usually quite limited, the Federal Rules of Evidence and Federal Rules of Civil Procedure are rarely controlling (albeit often invoked), and the use of juries is unknown.[142] Many agency procedures impose strict timelines, limit discovery, and provide for paper rather than in-person hearings.[143]

Due process limits the informality of adjudication when it might deprive individuals of property or liberty interests.[144] Nevertheless, although the process due varies given the issues and interests at stake, no court has held that due process requires agency adjudication to include all the procedures of a civil action in federal court.[145] Absent due process constraints, agencies typically enjoy broad discretion to tailor their procedures to the particular cases they hear.[146] The Supreme Court has reasoned that agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[147]

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141. Pension Benefit Guar. Corp. v. The LTV Corp., 496 U.S. 633, 655 (1990) ("[T]he minimal requirements for [informal adjudication] are set forth in the APA, 5 U.S.C. § 555."); Ronald J. Krotoszynski, Jr., *Taming the Tail that Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN. L. REV. 1057, 1059–60 (2004) ("[T]he APA does not provide any specific and dedicated procedural requirements applicable to informal adjudications, and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (*Vermont Yankee*) effectively precludes reviewing courts from imposing procedures on federal administrative agencies.").

142. Even formal adjudications conducted by the SEC with significant sums at stake are not bound by the Federal Rules of Evidence.

143. *See, e.g.*, Dreyfuss, *supra* note 99, 242–43 (describing procedures for challenging patents in the USPTO).

144. Withrow v. Larkin, 421 U.S. 35, 46–47 (1975) (citing Gibson v. Berryhill, 411 U.S. 564, 579 (1973)) (holding that due process "applies to administrative agencies which adjudicate as well as to courts").

145. Krotoszynski, *supra* note 141, at 1061–62 ("Procedural due process requires, at a minimum, notice, a hearing with some sort of opportunity to be heard, and the communication of a decision."); *see also* Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976) (establishing how courts should determine how much process is due before the government deprives an individual of property or liberty); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975) (reasoning that "if an agency chooses to go further than is constitutionally demanded with respect to one [element of a fair hearing], this may afford good reason for diminishing or even eliminating another").

146. Sant'Ambrogio & Zimmerman, *supra* note 14, at 1653.

147. FCC v. Pottsville Broad. Co., 309 U.S. 134, 143 (1940); *see also* Adoption of Recommendations, 81 Fed. Reg. 40,259, 40,260 (June 21, 2016) ("Federal agencies often enjoy

Given their relative informality, administrative proceedings are generally less costly and more expeditious forums for relief than federal court.[148] To be sure, some agency adjudication looks remarkably similar to its judicial counterpart.[149] Nevertheless, when direct comparisons can be made, agency proceedings tend to be shorter and more streamlined than civil litigation.[150] Congress can also reduce the costs of enforcement actions by imposing caps on attorney's fees or prohibiting legal representation for either the private party or the government.[151]

2. Threats of Informality to Accuracy and Legitimacy

Streamlining agency procedures may impede the ability of parties to present their cases, increase the risk of errors by decisionmakers, and undermine the legitimacy of agency

broad discretion . . . to craft procedures they deem 'necessary and appropriate' to adjudicate the cases and claims that come before them.").

148. Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 504 (2003).

149. *See, e.g.*, Joseph P. Sirbak II, *Procedures for Litigating SOX Whistleblower Complaints*, 2016 WL 3476536, at *4 (2016) (describing the discovery tools in whistleblower disputes, which permit "discovery . . . regarding any non-privileged matter that is relevant to a party's claim or defense"). To be sure, significant delays in agency adjudication, particularly in large benefits programs, are notorious and persistent. *See* Sant'Ambrogio, *supra* note 27, at 1381 ("Agency delays in decisionmaking and action have been widely acknowledged as a fundamental impediment to the effective functioning of federal agencies . . . ."); Michael Sant'Ambrogio & Adam Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 1994–97 (2012) (suggesting that parties be "able to aggregate their claims before" agencies to make adjudication more efficient). But these delays are usually due to the time spent waiting for adjudication, rather than the time it takes to adjudicate the claims. Veterans for Common Sense v. Shinseki, 644 F.3d 845, 877–78 (9th Cir. 2011) (citing delays in veterans programs); Erik Eckholm, *Disability Claims Last Longer as Backload Rises*, N.Y. TIMES, Dec. 10, 2007, at A1 (citing five-hundred-day waiting periods for social security disability claims).

150. When comparing administrative and judicial resolution of the same kind of enforcement action, SEC Director of Enforcement Andrew Ceresney noted:

> [A]dministrative actions produce prompt decisions. An ALJ normally has 300 days from when a matter is instituted to issue an initial decision. That deadline can be extended in certain cases, but the hearings are still held promptly. For cases we file in district court, we can often go 300 days and still be just at the motion to dismiss stage or part of the way through discovery, with any trial still far down the road.

Andrew Ceresney, Dir., SEC Div. of Enf't, Remarks to the Am. Bar Ass'n's Bus. Law Section Fall Meeting (Nov. 21, 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370543515297 [https://perma.cc/CRL5-7XCE].

151. Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1716 (2015) (noting the National Vaccine Injury Compensation Program's ("NVICP") limits on payments to counsel resulting in fourteen percent of benefits being paid to counsel as compared to fifty percent in the tort liability system).

proceedings.[152] For example, the Vaccine Court was originally envisioned as being informal enough for injured parties to file their own claims for vaccine-related injuries without the assistance of counsel, but it quickly became apparent that representation by experienced counsel was necessary for claimants to succeed.[153]

More often, however, complaints come from respondents on the other side of the "v." While agency adjudication of government benefits is often structured to be especially solicitous of beneficiaries asserting claims against the government,[154] regulatory enforcement cases involve nongovernmental respondents. Thus, the agency must grapple not only with legal access for statutory beneficiaries but also with concerns over accuracy and legitimacy on the part of private respondents. Whereas due process is irrelevant to the procedural protections afforded to government respondents in benefits cases, it requires protections for private respondents in enforcement cases.

Put differently, we do not generally worry about providing public enforcers with greater access to an adjudicatory forum. Congress can provide them with the necessary resources to bring enforcement actions in federal court. Thus, advocates (and critics) of agency adjudication speak not in terms of informality and expeditiousness of administrative enforcement but in terms of its efficiency—i.e., the efficiency of prosecuting enforcement actions in an agency rather than a court.[155] This justification is generally not

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152. *See, e.g.*, Bloch, *supra* note 138, at 55 (noting problems in the development of the record in social security disability proceedings due to their informality); Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 107 (1995) ("To be accepted as courts, tribunals—whether specialized or generalist—must look and act like courts.").

153. Engstrom, *supra* note 151, at 1713 (quoting Representative Patsy Mink).

154. For example, the government is not represented as a party in disputes over social security disability benefits. *See* FRANK BLOCH, JEFFREY LUBBERS & PAUL VERKUIL, INTRODUCING NONADVERSARIAL GOVERNMENT REPRESENTATIVES TO IMPROVE THE RECORD FOR DECISION IN SOCIAL SECURITY DISABILITY ADJUDICATIONS 3 (2003), https://www.ssab.gov/Portals/0/our_work/reports to the board/RTB-Bloch-Lubbers-Verkuil_Nonadversarial_Representatives_2003.pdf [https://perma.cc/6NE6-JQQK] ("[Social Security Administration ("SSA")] hearings are one of the few such proceedings where the agency is, as a rule, unrepresented and where the record is left open throughout the administrative appeals process to ensure the claimant's file is complete."); *see also* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 321–22 (1985) (discussing Congress's decision to avoid the use of lawyers in the adjudication of veterans benefits out of a desire to create a low-cost forum for veterans).

155. *See, e.g.*, Jason D. Nichols, T*owards Reviving the Efficacy of Administrative Compliance Orders: Balancing Due Process Concerns and the Need for Enforcement Flexibility in Environmental Law*, 57 ADMIN. L. REV. 193, 222–23 (2005) (noting how "pre-enforcement adjudication within the agency furthers efficiency interests and avoids civil litigation costs"); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 294 (1978) (noting that fairness and satisfaction for respondents may be more important than efficiency when an agency imposes sanctions).

considered as compelling as helping private parties advance claims that would be difficult to pursue in federal court. Moreover, less formal and expedited proceedings have limited upside for respondents in enforcement actions, particularly if the stakes are high and the respondents are well resourced.[156] They would generally prefer the full panoply of procedural protections available in federal court. Not surprisingly, then, the efficiency rationale is the bête noire of critics of agency adjudication of public enforcement actions.[157]

Agencies have struggled over process protections for respondents in public enforcement actions for many years. For example, beginning in the 1960s, the Federal Trade Commission ("FTC") began adopting many of the procedures of federal litigation in its own proceedings in response to the concerns expressed by respondents over the legitimacy of the proceedings.[158] More recently, respondents in Securities and Exchange Commission ("SEC") enforcement actions have complained about the compressed timeline and limited discovery available in cases heard by SEC ALJs. The SEC has responded to these complaints by slowing down the pace of the proceedings and affording respondents more discovery tools borrowed from federal court.[159] These experiences suggest that administrative enforcement schemes are unlikely to eliminate adversarialism.[160]

As the foregoing discussion illustrates, enhancing legal access in agency proceedings requires a careful balancing of the desire for an informal and expeditious forum and the need for fair and accurate decisionmaking.[161]

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156. There may be benefits to injured persons not party to the proceedings, however.

157. *See, e.g.*, HAMBURGER, *supra* note 3, at 274–75 (criticizing the necessity and efficiency justifications).

158. D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L.J. 319, 321 (2003).

159. Amendments to the Commission's Rules of Practice, 50 Fed. Reg. 60,091 (Oct. 24, 2015). In addition to relaxing certain deadlines, the SEC proposed permitting depositions and subpoenas under certain conditions.

160. THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 39 (2002) (noting creeping adversarialism in workers' compensation systems); Elinor P. Schroeder, *Legislative and Judicial Responses to the Inadequacy of Compensation for Occupational Diseases*, LAW & CONTEMP. PROBS., Autumn 1986, at 151, 157–58 (noting that adjudication of workers' compensation claims for occupational diseases has "taken on many of the trappings of common law litigation—retention of lawyers, delays, cost, and compromise"—unlike most accident claims).

161. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1309 (2012) (arguing that "adapting the demands of due process to new facts and circumstances is faithful to constitutional doctrine and necessary to ensure that existing procedures continue to provide due process of law").

3. Using Hybrid Enforcement to Enhance Legal Access While Protecting Legitimacy

Hybrid enforcement in agency adjudication addresses the tension between enhancing legal access and maintaining the legitimacy of adjudicatory decisions. Procedural rights to file complaints with an agency, often without the same formalities required of pleadings in federal court, improve the ability of private parties to bring regulatory violations to the agency's attention. Agency review, investigation of complaints, and assistance in pursuing enforcement actions further enhance access to regulatory benefits. Of course, a private right to a decision on a complaint based on the record of an evidentiary hearing may provide the surest access to relief. But this is only true if the party has the resources to pursue such a complaint on its own. If not, giving a public enforcer responsibility for pursuing private complaints offers beneficiaries a valuable "assist" in enforcing their claims.

At the same time, placing primary responsibility for enforcement on public officials allows administrative courts to provide process protections for respondents without impeding access to justice by beneficiaries. Congress can provide agencies with the resources they need to prosecute cases in administrative courts that use judicialized procedures to ensure the legitimacy of their decisions. The agency can still give beneficiaries a voice in regulatory enforcement by pursuing their complaints and allowing private parties to intervene or otherwise participate in public actions. But the beneficiaries themselves do not need to navigate judicialized procedures designed to protect respondents.

Thus, public enforcement allows agencies to maintain due process protections for private respondents while facilitating access for private beneficiaries. In this way, hybrid enforcement enhances the legitimacy of agency adjudication.

B. Decisionmaking Informed by Specialized Expertise

One of the most commonly cited reasons for delegating decisions to agencies rather than courts is the need for specialized expertise.[162] Hybrid enforcement furthers this goal by encouraging

162. *See* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 135 (2000) ("[A] commonly cited and crucial reason for the delegation to agencies is the desire to have decisions made by public officials with expertise and extensive information-gathering capabilities.").

private parties to supplement the information resources of federal agencies. At the same time, the use of specialized decisionmakers creates new risks: agency "decision mills," caseload volatility causing backlogs, and "agency capture" by regulated industries. Hybrid enforcement mitigates the risks of decision mills and agency capture by diversifying enforcement inputs, while public control over enforcement reduces caseload volatility by filtering cases docketed for hearings.

1. Deploying Agency Expertise in Adjudication

Agencies are generally able to hire personnel with specialized expertise.[163] Advocates of agency expertise claim that specialization enables decisionmakers to make decisions more quickly because they need less time to familiarize themselves with complex issues or obscure areas of regulation.[164] In addition, specialization enables more accurate decisionmaking because the adjudicator is better able to assess technical evidence and the relative merits of similar, yet distinct claims.[165]

Despite the intuitive appeal of these claims, there is scant quantitative empirical evidence available to either prove or disprove them.[166] The significant delays experienced in several adjudicatory programs[167] and persistent inconsistencies in agency decisions[168]

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163. Although the ability of agencies to deploy their expertise is somewhat different in adjudication than rulemaking, the need for expert decisionmakers remains an important justification of agency adjudication. *See, e.g.*, 35 U.S.C. § 6(a) (2012) ("[P]atent judges shall be persons of competent legal knowledge and scientific ability . . . .").

164. *See* LAWRENCE BAUM, SPECIALIZING THE COURTS 3233 (2011) (discussing perceived efficiency advantages); Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 FORDHAM INT'L L.J. 788, 794 (2013):

> The ability early on to spot a gap in either a party's economic reasoning or its factual allegations is surely improved by frequent exposure to recurring economic issues. The learning curve may be fairly steep, even for antitrust cases, but the generalist judge who sees one antitrust case every year or two would surely be slower to progress down that curve than would the judge who sees such cases weekly.

165. *See* Ginsburg & Wright, *supra* note 164, at 797–98.

166. *See* Engstrom, *supra* note 151, at 1640.

167. *See, e.g.*, Sant'Ambrogio & Zimmerman, *supra* note 14, at 1675–76.

168. *See, e.g.*, JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 6 (2009) (citing wide disparities in the outcomes of similar asylum applications); Engstrom, *supra* note 151, at 1677 (citing DIVISION OF VACCINE INJURY COMPENSATION, NATIONAL VACCINE INJURY COMPENSATION PROGRAM STRATEGIC PLAN, app. H at 25 (2006)) (noting inconsistencies in the Vaccine Court decisions); James D. Ridgway, Barton F. Stichman & Rory E. Riley, *"Not Reasonably Debatable": The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 3 (2016) (surveying inconsistencies in decisions by the Court of Appeals for Veterans Claims). *But see*

suggest a healthy dose of skepticism, particularly in agencies with large caseloads. Moreover, the value of expertise and specialization will vary with the complexity of the evidence relevant to the claims heard by administrative courts. When the issues are not particularly difficult, specialization may not add much in the way of more accurate decisionmaking.[169] By contrast, when cases involve technical issues, specialized knowledge, and complex areas of regulation, experienced decisionmakers should be able to reach accurate decisions more quickly than generalist judges.

The informational advantage of agencies over courts and legislators is at its greatest in rulemaking, where agencies have numerous tools and few limits on their ability to obtain the expertise and information they need. The situation is somewhat different for adjudication. First, the ALJs who make many decisions may initially have little specialized knowledge or experience in the area in which they adjudicate due to the hiring criteria used by the Office of Personnel Management ("OPM").[170] Second, once hired, prohibitions on ex parte communications and separation of functions limit whom many administrative judges may and may not consult.[171] If agencies are not required to use an ALJ, they may require their adjudicators to have certain experience or expertise.[172] But it is not clear how many agencies do so. In addition, the agency's organic statute or its own regulations may further limit the expertise available to non–Article III adjudicators, even when they are not subject to the prohibitions

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Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 415–16 (2007) (remarking that "[t]here are times when we simply have to learn to live with unequal justice because the alternatives are worse" and citing the costs of eroding "decisional independence" in particular).

169. Cass Sunstein calls "the choice of an administrative law judge to award or withhold disability benefits under the standards set out by the Social Security Act" a "legalistic decision" that could just as easily be decided by "state or federal judges." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 445 (1987).

170. *See* Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1009 (2004) ("The process allows little room for judgment and discretion, and affords agencies virtually no choice in which ALJs to hire. It does not take account of whether a new ALJ has specialized experience in the regulatory or beneficiary scheme administered by the agency."). This is likely to change, however, in the wake of *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (holding that ALJs are officers of the United States who must be appointed under the Appointments Clause by the president or the "Heads of Departments"), and the Executive Order Excepting Administrative Law Judges from the Competitive Service, 83 Fed. Reg. 32,755 (July 10, 2018) (excepting ALJs from the competitive hiring rules and examinations of the OPM).

171. *See supra* note 82 (discussing rules regarding ex parte communications and separation of functions applicable to ALJs and AJs).

172. *See* Emily S. Bremer, *Designing the Decider*, 16 GEO. J.L. & PUB. POL'Y 67, 79 (describing three examples of such employment requirements).

applicable to ALJs under the APA.[173] Protecting the independence and neutrality of administrative judges is essential to ensuring the legitimacy of agency adjudication in light of its overt policymaking goals. But it also limits the ability of agencies to apply their institutional knowledge most efficiently.

Nevertheless, many administrative judges become highly experienced in their regulatory areas over time. Unlike courts, which have a broad range of cases on their dockets, agency adjudicators typically hear very similar cases day after day. As Andrew Ceresney, the former director of the SEC Division of Enforcement, described it,

> [A]dministrative proceedings have the benefit of specialized factfinders. The ALJs are focused on hearing and deciding securities cases, year after year. They develop expert knowledge of the securities laws, and the types of entities, instruments, and practices that frequently appear in our cases. Many of our cases involve somewhat technical provisions of the securities laws, and ALJs become knowledgeable about these provisions.[174]

Moreover, the agency heads typically authorized to make final agency decisions usually have access to all the agency's staff, much like in rulemaking.[175] Thus, compared to most federal judges, agency decisionmakers tend to possess greater familiarity with the relevant facts, issues, and law in the narrower range of cases they hear.

2. Bolstering Agency Expertise Through Hybrid Enforcement

Hybrid enforcement bolsters the information resources of agency adjudication. First, if the agency is a party to the dispute, it can provide the administrative judge with specialized expertise developed through its experience in the regulatory area. As repeat players, public enforcers should be skilled at presenting the agency's knowledge and expertise in their cases.

Second, the participation of private parties in enforcement supplements the information resources of the agency by bringing their situated knowledge of violations to the attention of regulators.[176] Indeed, private parties may supplement public enforcement efforts

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173. *See, e.g.*, Fisk & Malamud, *supra* note 96, at 2048 (noting a statutory limit on the NLRB's adjudicative staff's ability to employ the economic analysis of the Board's Division of Economic Research).

174. Ceresney, *supra* note 150.

175. The APA does not place the same limits on internal communications involving the head(s) of the agency as it does on the initial agency adjudicators, 5 U.S.C. § 554(d) (2012), although restrictions on ex parte communications with interested parties outside the agency still apply, 5 U.S.C. § 557(d)(1) (2012).

176. Stewart & Sunstein, *supra* note 31, at 1290; Thompson, *supra* note 30, at 192.

more effectively in agencies than in courts. Not only does private enforcement uncover violations that may have escaped a public enforcer's attention, as in federal court, it also broadens and deepens the knowledge and expertise of public officials responsible for coordinating enforcement, adjudication, and rulemaking. Thus, the information derived from private complaints can be used by the agency not only in its own enforcement actions but also in rulemaking and other regulatory activities. For example, the Consumer Financial Protection Bureau ("CFPB") "uses consumer complaints to inform its work in making prices and risks clearer, protecting consumers of financial products and services, and encouraging financial markets to operate fairly and competitively . . . [and] its thinking on credit cards, mortgages, bank products and services, vehicle and consumer loans, and private student loans."[177]

Thus, hybrid enforcement in administrative courts maximizes the information resources and expertise brought to bear in regulatory enforcement actions and enriches the expertise of the agency more generally.

3. The Risks of Specialized Decisionmakers

As agencies leverage their expertise, however, specialized decisionmakers create risks less present in generalist courts. These include the risk of "decision mills" in which adjudicators prejudge cases based on past experience and the need to process large numbers of claims, the risk of "agency capture" by regulated industries that repeatedly appear before the agency, and the risk of recurring backlogs caused by caseload volatility.

a. Decision Mills

Increased specialization creates a danger that agency adjudicators repeatedly presiding over the same types of cases and claims will fall victim to tunnel vision.[178] This can occur both at the

177. Eric J. Mogilnicki & Melissa S. Malpass, *The First Year of the Consumer Financial Protection Bureau: An Overview*, 68 BUS. LAW. 557, 568 (2013) (quoting CONSUMER RESPONSE, *supra* note 129).

178. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 11 (1993) (describing the phenomenon of tunnel vision); Stephanie Russell-Kraft, *Rakoff Hopes SEC Will "Think Twice" About Using Admin Court*, LAW360 (Mar. 3, 2015), https://www.law360.com/newyork/articles/627028 [https://perma.cc/PW5F-QFPQ] (reporting Judge Rakoff's remarks on agency tunnel vision at a panel hosted by the New York City Bar Association). Justice Stephen Breyer describes the problem as the "single-minded pursuit of a

level of individual employees—such as adjudicators, who focus on one narrow task—and of the agency as a whole, which focuses on one category of problems. As the old adage puts it, "When you're a hammer, everything looks like a nail." Agency adjudicators may begin to make assumptions about the merits of individual claims based on the cases they typically hear, become overly sympathetic to legal interpretations that further their core mission without regard to countervailing concerns, and impose harsher penalties without regard to equitable considerations.[179] Alternatively, they may become so jaded that they have a hard time seeing meritorious cases. Either way, the danger is that the agency becomes a decision mill.

Agencies have several tools to address the risk of decision mills. First, most agencies employ multiple levels of review to check errors.[180] Second, agencies sometimes sort cases based on whether they are routine, raise novel questions, or are likely to impact a large number of people. They may dispose of routine cases using a single adjudicator, nonprecedential decisions, or summary review, while funneling more complex cases to multijudge panels, more rigorous review, and precedential decisions to guide similar cases in the future.[181]

Nevertheless, multiple layers of review, particularly when combined with subsequent judicial review, may delay final resolution of the matter, thus undermining the goal of access to justice. In addition, early sorting of cases may exacerbate tunnel vision by increasing the likelihood of adjudicators prejudging the merits of cases. Thus, the problem of decision mills is not always easy to solve.

b. Agency Capture

Specialized decisionmakers may also start to favor the industry they are meant to regulate. If adjudicators are chosen for their experience and expertise, there is a good chance they gained that

single goal too far, to the point where it brings about more harm than good." BREYER, *supra,* at 11.

179. *See* David Zaring, *Enforcement Discretion at the SEC,* 94 TEX. L. REV. 1155 (2016) (arguing the SEC has fallen prey to these issues).

180. *See* Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 253–70 (1996) (examining the appellate structures used in various federal agencies).

181. For example, "routine" cases brought in front of the Pension Benefit Guaranty Corporation Appeals Board and the Veterans Court are decided by individual Board members or Veteran Court judges, whereas novel or significant matters that impact a large number of parties are decided by three-judge panels. *See* 29 C.F.R. § 4003.61 (2018).

experience working for regulated parties, possibly even appearing before the agency in administrative proceedings. Thus, they may come to the agency with preconceived notions about how cases should be resolved.

There is a long literature on agency capture and the danger is not peculiar to adjudication.[182] In some ways, ALJs are less susceptible to regulatory capture than other agency officials. ALJs have the kind of job protections and long-term tenure that are incompatible with the economic theory of agency capture.[183] In addition, they are probably less susceptible to the more subtle version of the theory, which posits that agencies are systematically biased toward regulated entities because they need good relationships with industry to get information.[184] ALJs are not dependent on industry in this way, even when they come from industry before joining the agency.

Still, critics of specialized courts argue they are susceptible to capture by repeat players in administrative proceedings, particularly if those parties are cohesive, well-resourced, and unopposed by countervailing interest groups.[185] The same concerns may be relevant to administrative judges who preside over similar cases involving repeat players day after day. Unlike legislative courts, however, administrative agencies are supervised by political appointees who review the initial adjudicators' decisions.[186] Thus, it seems more likely that agency adjudicators will tack toward agency leadership than

182. The concept of agency capture first appeared in the public choice literature arguing that the political process is driven by economic rather than ideological interests. *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971). For a classic study of capture in four agencies, see PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES (1981). *See also* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (1990) (reviewing agency capture literature); Stewart, *supra* note 60, at 1685 & nn.75–76.

183. The primary mechanism of capture traditionally has been assumed to be the prospect of future employment in the regulated industry. *See* QUIRK, *supra* note 182, at 143–74.

184. *See, e.g.*, Stewart, *supra* note 60, at 1684–87 (describing why agencies are predisposed to favor interests of regulated industry).

185. *See* David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 72 (1975) (collecting claims of bias against legislative and administrative courts); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 29 (1989) ("Where adversaries are imbalanced . . . judges may become more easily swayed by those who appear before them frequently, and by the policy arguments that they hear most often."); *see also* Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1456–57 (2012) (describing the influence of industry and the patent bar in the creation of the Federal Circuit).

186. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III,* 101 HARV. L. REV. 915, (1988) (discussing the tension between this reality and the demands of Article III); Weaver, *supra* note 180, at 252.

toward the regulated industry.[187] If the agency leadership is committed, they may be able to disrupt the capture of lower-level decisionmakers, although agency heads sometimes have difficulty controlling independent administrative judges.[188] But if the agency leadership itself comes from industry, they may only exacerbate capture.

c. Caseload Volatility

Finally, specialization exposes administrative courts to acute challenges with volatile caseloads. As Judge Richard Posner notes, "[T]he federal appellate caseload as a whole changes less from year to year than the components of that caseload."[189] Thus, even as dramatic growth in appeals from the Board of Immigration Appeals ("BIA") stretched the capacity of the circuit courts, the reduction in other components of their dockets offered some relief.[190] Because agencies are typically dealing with a specific subject area, however, they are at greater risk of dramatic increases in their caseloads without any compensating decrease.[191] This inevitably creates delays and backlogs as the agency scrambles to hire more adjudicators or find other ways to streamline its decisionmaking process, none of which may be realistic.[192] Such delays and backlogs are worst when an agency is adjudicating claims drawn from a large pool of potential beneficiaries with changing demographics. But even agencies with smaller dockets may experience this problem unless they are able to borrow

187. Of course, the agency leadership may in some cases come from the regulated industry. *See, e.g.*, Danielle Ivory & Robert Faturechi, *The Deep Industry Ties of Trump's Deregulation Teams*, N.Y. TIMES, (July 11, 2017), https://nyti.ms/2v6AHAb [https://perma.cc/7YPC-4RN7]. Section III.C addresses what this Article describes as "political capture," which occurs when the political branches seek to undermine an agency's statutory mandate. The line between "political capture" and "regulatory capture" is not always clear, but generally understood, the traditional form of agency capture is driven by the structural relationship between an agency and its regulated industry, while political capture is driven by the political appointees at the top of the agency.

188. Social Security Administration ALJs are a well-known example of initial decisionmakers that an agency has had difficulty controlling.

189. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 259–60 (1999).

190. *Federal Judicial Caseload Statistics 2018*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 (last visited Jan. 19, 2019) [https://perma.cc/M6MN-F9DK] ("BIA appeals accounted for 81 percent of administrative agency appeals and constituted the largest category of administrative agency appeals filed in each circuit except the DC Circuit.").

191. *See* Engstrom, *supra* note 151, at 1689–90 (citing examples of volatile caseloads at the Vaccine Court, Department of Veterans Affairs, and other specialized tribunals).

192. Ginsburg & Wright, *supra* note 164, at 805.

adjudicators from other agencies. Thus, specialization may threaten some of the expeditiousness sought by administrative courts.

4. Mitigating the Risks of Specialization Through Hybrid Enforcement

Hybrid enforcement can mitigate some of the risks of specialization. First, the involvement of both private parties and agency officials in administrative proceedings exposes agencies to multiple enforcement inputs. Agreements among public and private enforcers may signal strong cases, while disagreements may encourage adjudicators to scrutinize the facts of individual cases more closely, thus disrupting decision mills.

Second, hybrid enforcement mitigates the risks of agency capture. The right of private parties to file complaints in agency proceedings, trigger investigations, and obtain reasoned decisions on their claims ensures that regulatory beneficiaries are heard. The more robust the private rights, the louder their voices. Moreover, when an agency cozies up to a regulated industry, the shift will be more transparent if the agency is required to give reasons for ruling against claimants.[193] These benefits of private enforcement will be at their greatest when private parties are entitled to decisions based on the record of an evidentiary hearing.

The bifurcated decisionmaking of agency adjudication also reduces the risk of capture because administrative judges and political appointees who make final agency decisions have different perspectives and relationships to the regulatory and political environments. It should be more difficult for industry to capture both sets of decisionmakers. Differences between them in deciding cases will also make capture more transparent if each decisionmaker must issue reasoned decisions on the record.

Finally, public enforcement can help agencies control caseload volatility.[194] Agency investigations and mediation efforts help resolve cases before they proceed to evidentiary hearings. If the agency possesses exclusive authority to pursue complaints or acts as gatekeeper to private complaints, it need only advance enforcement

193. *See* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1281 (2009) ("[R]eason-giving promotes accountability by facilitating transparency in government.").

194. Jonathan B. Rosenblum, *A New Look at the General Counsel's Unreviewable Discretion Not to Issue a Complaint Under the NLRA*, 86 YALE L.J. 1349, 1357 & n.32 (1977) ("Only [the NLRB's] centralized control over enforcement proceedings could prevent the agency from being inundated with routine work and free it to stake out the major parameters of the Wagner Act.").

actions that can be adjudicated in a timely manner. Not surprisingly, the worst backlogs in agency adjudication occur in large benefits programs in which private parties have autonomy over whether to pursue their claims and the procedures are designed to make it easy for them to do so.[195] Agency control over which complaints are docketed for an evidentiary hearing, however, may limit the ability of private parties to serve as a strong check on agency capture.

Thus, agency designers can employ different attributes of public and private enforcement to enhance agency expertise and mitigate the dangers of decision mills, agency capture, and caseload volatility. But no single combination will address all the risks associated with specialized decisionmakers. Strong private rights of action can address the problem of decision mills and capture, but at the same time it risks caseload volatility by decreasing agency control over enforcement.

C. Implementing Coherent and Politically Accountable Public Policy

Another common justification for delegating decisions to agencies is their ability to implement a more coherent national policy with greater accountability to the political branches.[196] Public enforcement in administrative courts enhances agencies' power to make uniform national policy; facilitates the coordination of policymaking across enforcement, adjudication, and rulemaking;[197]

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195. *See, e.g.*, BD. OF VETERANS' APPEALS, FISCAL YEAR 2008 REPORT OF THE CHAIRMAN 3 (2009), http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf [https://perma.cc/495P-GKQ6] (describing a year in which each "Veterans Law Judge" adjudicated 729 benefits cases); Eckholm, *supra* note 149 (describing waiting periods of over five hundred days for social security disability claims); Nancy J. Griswold, *Appellant Forum – Update from OMHA*, OFF. MEDICARE HEARINGS & APPEALS (June 25, 2015), https://www.hhs.gov/sites/default/files/omha/OMHA Medicare Appellant Forum/presentations_june_25_2015.pdf [https://perma.cc/2L5L-N2DY] (describing exploding backlog and growing processing times for claims adjudicated by the Office of Medicare Hearing and Appeals).

196. It is of course true, notwithstanding the disavowals of nominees to the Supreme Court, that courts make policy. But policymaking by courts, at least outside the constitutional context, has less legitimacy than policymaking by politically accountable institutions. For this reason, courts frequently try to minimize or hide their policymaking.

197. An important exception is the split enforcement regime, in which one agency makes the final decisions in adjudication and another agency is responsible for rulemaking. For example, the Occupational Safety and Health Act gives rulemaking and enforcement power to the Secretary of Labor, 29 U.S.C. § 665 (2012), but delegates the adjudication of enforcement actions to the Occupational Safety and Health Commission, 29 U.S.C. § 651(b)(3) (2012). Similarly, under the Federal Mine Safety and Health Act, the Federal Mine Safety and Health Review Commission adjudicates enforcement actions brought by the Department of Labor. 30 U.S.C. §§ 815, 823 (2012).

and gives agencies greater flexibility to adapt over time. At the same time, however, adjudication by politically accountable policymakers risks over- and underdeterrence and threatens the right of private respondents to receive individualized decisions. Agencies address these concerns in different ways. On the one hand, the bifurcation of agency decisionmaking and judicial review addresses the danger of overzealous enforcement. On the other hand, private enforcement rights mitigate the danger of agency capture by political principals, or at least make such capture more transparent.

1. Using Public Enforcement to Implement Policy

Public enforcement in agency adjudication enhances the power of agencies to implement regulatory statutes in light of their policy goals. Congress inevitably leaves gaps and ambiguities in its statutory commands. How such gaps are filled and ambiguities resolved often has important policy implications.[198] Agencies approach these gaps and ambiguities differently than courts.[199] Courts generally strive to reach what they consider to be the best understanding of the law using all the tools of statutory interpretation. Agencies use many of the same tools, but often use them differently.[200] For example, whereas some courts disavow legislative history, agencies tend to emphasize it.[201] More importantly, agency interpretations of law are shaped by their regulatory agendas and subject-matter expertise. Agencies openly consider the policy implications of their

198. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (noting that "the meaning or reach of a statute" often requires "a full understanding of the force of the statutory policy in the given situation").

199. There is a rich body of literature comparing the different approaches of courts and agencies to interpreting the law. *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, 366 (2010) ("[T]he choice of delegate may be every bit as important as the choice to delegate."); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1038 (2006) (discussing the characteristics of agencies and courts "that might influence whether a rational legislator would prefer to delegate authority to interpret an ambiguous statute" to one over the other).

200. *See generally* Glen Staszewski, *Introduction to Symposium on Administrative Statutory Interpretation*, 2009 MICH. ST. L. REV. 1, 2–4 (introducing symposium articles "explor[ing] the nature of statutory interpretation by administrative agencies in the modern regulatory state").

201. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 929 (2013) (finding that Congress drafts "both text and history . . . with agency implementation in mind and often with agencies at the table"); *id.* at 972 (claiming that drafters frequently "single[ ] out agencies as a key audience for legislative history").

interpretations,[202] whereas courts may ignore, avoid, or not entirely understand those implications. Agencies may also consider nonlegal values, such as paternalism, bureaucratic rationality, and distinct professional norms.[203] Finally, agencies are likely to treat "different interpretive questions in an ideologically consistent manner," whereas courts are less able to see across diverse interpretive questions within a given regulatory area.[204]

Agencies are also influenced by their understanding of congressional and White House preferences because they are highly dependent on the approval of the political branches.[205] Federal judges, by contrast, are largely insulated from politics. Although judges are nominated and confirmed by the Senate, it is usually impossible to know the specific cases that any federal judge is likely to hear. Aside from a few hot-button issues, the Senate avoids focusing on the policy perspectives of judicial nominees. In contrast, the issues heard by an agency are clearly delineated and the political branches focus on the policy perspectives of executive branch nominees. Moreover, once appointed, judges are not subject to White House review or removal, unlike agency leadership. Finally, it is exceedingly difficult for Congress to influence specific judicial interpretations ex post through appropriations or correcting legislation. Thus, even independent multimember commissions with appointees drawn from both parties are more dependent on Congress and aligned with the president who nominated them than federal judges.

a. Uniformity and Flexibility

Public enforcement in agency adjudication allows agencies to implement more uniform national policies while retaining greater flexibility to change their policies over time. By bringing enforcement actions in an administrative rather than a judicial forum, the claims are resolved using the agency's understanding of the statute in light of

202. *See* Aaron J. Saiger, *Agencies' Obligation to Interpret the Statute*, 69 VAND. L. REV. 1231, 1293–94 (2016) (arguing that agencies should instead seek the best interpretation of a statute rather than a reasonable interpretation that aligns with their policymaking agenda); *see also* Evan J. Criddle, *The Constitution of Agency Statutory Interpretation*, 69 VAND. L. REV. EN BANC 325 (2016) (responding to Professor Saiger's arguments).

203. *See, e.g.*, JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 23–34 (1983).

204. Stephenson, *supra* note 199, at 1047.

205. *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 887–88 (1974) (describing agencies as "eager[ ] to serve the current legislature"). Most agency leadership is appointed by and may be removed by the president or one of the heads of the departments.

its policy goals, rather than the views of any one of the 2,758 federal district judges. Moreover, federal courts may offer conflicting interpretations of the law until the Supreme Court resolves the relevant question.[206] Although judicial review of agency adjudication can also create inconsistencies in regulation, this risk is moderated by judicial deference to agency interpretations,[207] the concentration of administrative review in the Court of Appeals for the D.C. Circuit,[208] and the ability of agencies to "nonacquiesce" in certain judicial opinions.[209]

At the same time, agencies have more flexibility to change their positions over time by bringing enforcement actions in administrative courts. Agency adjudication is not typically bound by stare decisis, while courts are bound by "super-strong" stare decisis when interpreting statutory provisions.[210] Thus, agencies may adjust their legal interpretations in response to changes in their regulatory environments or shifts in the political winds.[211] Courts, by contrast, are more likely to bring stability to the interpretation of the law over time, shifting course incrementally as stare decisis permits. This can be a virtue or a vice depending on the comparative value of flexibility versus stability in a given context.[212]

b. Guidance to Nonparties

Agencies can provide more guidance to nonparties than courts. While courts are prohibited from issuing advisory opinions, agencies

206. *See, e.g.*, Lemos, *supra* note 199, at 428–29 (noting the "substantial time lag" before the Supreme Court is typically able to resolve lower courts' misinterpretations).

207. United States v. Mead Corp., 533 U.S. 218, 234 (2001) (recognizing a level of deference for formal adjudication); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844–45 (1984) (recognizing a higher level of deference for reasonable agency interpretations of statutory ambiguity).

208. *See* Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 232 (1996).

209. *See* Estreicher & Revesz, *supra* note 74, at 694–99, 706–10, 713–14 (discussing the NLRB's and IRS's nonacquiescence policies); Joshua I. Schwartz, *Nonacquiescence,* Crowell v. Benson*, and Administrative Adjudication*, 77 GEO. L.J. 1815, 1825 (1989) ("Justice Rehnquist has suggested that any judicially imposed restraint on agency nonacquiescence usurps the authority of the political branches of the government.").

210. Stephenson, *supra* note 199, at 1047 (citing William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988)).

211. *Id.* at 1047 & n.51, 1048 & n.52 (citing examples).

212. *See* Michael Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 392 (2014) (noting how presidential control over agency decisionmaking can undermine the stability of government policy). Professor Stephenson suggests that the stability of courts across time may be more valuable when reliance interests are at stake. *See* Stephenson, *supra* note 199, at 1058–59.

are encouraged to do so. While courts are institutionally adverse to deciding more than is necessary, nothing prevents agencies from doing so.[213] While it is accepted that civil judgments will have retroactive effect, administrative law attempts to limit the unfair surprise of new agency policies that might upset settled reliance interests.[214] Agencies remain forward-looking in their decisions, seeking to guide those not party to the proceeding. Public enforcement in agency adjudication allows agencies to offer such guidance without relying on the federal courts, which may be unwilling to provide it.

c. Coordination Across Policymaking Forms

Administrative enforcement also helps the head of the agency coordinate policy across enforcement, adjudication, and rulemaking. Public enforcement authority allows the agency to decide whether to use rulemaking or adjudication to implement policy without waiting for a private party to file the right case. If the agency also adjudicates private enforcement actions, the agency can decide these cases consistent with its own enforcement priorities and policy goals. In addition, agency staff responsible for different functions may benefit from the exchange of knowledge and experience made possible by the integration of these activities in a single institution.[215] For example, the CFPB has included enforcement attorneys in its examinations of regulated entities to "detect[ ] and assess[ ] risks to consumers and to markets for consumer financial products and services."[216] According to former director Richard Cordray, such coordination helps "the supervision teams to understand where enforcement works, and why

213. *See, e.g.*, Emily S. Bremer, *The Agency Declaratory Judgment*, 78 OHIO ST. L.J. 1169, 1178 (2017) (discussing agencies' ability to issue "binding rulings capable of providing clear and certain guidance to regulated parties without requiring those parties first act on peril of sanction").

214. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (requiring agencies to "provide a more detailed justification . . . when . . . its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account"); NLRB. v. Bell Aerospace Co. Div. of Textron, 416 U.S. 267, 295 (1974) (limiting agencies' ability to change policy in adjudication when "new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements").

215. *See, e.g.*, Weaver, *supra* note 180, at 289 (noting how integration facilitates "awareness of how a regulatory system is functioning").

216. 12 U.S.C. §§ 5514(b)(1)(C), 5515(b)(1)(C) (2012).

and how," and helps "the enforcement team to understand how supervision and examinations work."[217]

Finally, because the head of the agency typically makes the final decision in all modes of decisionmaking, she can coordinate these activities and refer issues that arise in adjudicatory proceedings to the staff involved in rulemaking.[218] Adjudication allows agencies to address new issues unanticipated by their rules. But it also allows them to identify issues that arise in multiple cases and therefore may be appropriate for rulemaking.[219] Furthermore, the agency's adjudicators can provide a thoughtful first crack at a general rule by personnel who see the cases that a rule might resolve more efficiently, consistently, and fairly.[220]

2. The Risks of Overdeterrence and Underdeterrence

The overt policymaking character of agencies carries similar risks to specialization. On the one hand, agencies may become overzealous in their enforcement. They may become too focused on narrow policy goals and overly aggressive in how they pursue and decide cases.[221] Respondents in SEC administrative proceedings, for example, have complained that SEC ALJs reflect the "mind-set" of the

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217. Dave Clarke, *U.S. Consumer Cop Says Not Bullying Banks,* REUTERS (Mar. 29, 2012), http://www.reuters.com/article/2012/03/29/financial-regulation-cfpb-idUSL2E8ET7XL20120329 [https://perma.cc/W3L3-FZDB].

218. *See, e.g.*, Weaver, *supra* note 180, at 289 ("A decision writer in one agency stated that during meetings regarding the content of an adjudicative opinion, she has seen the agency head tell subordinates to change a regulatory scheme."). The 1981 Model State Administrative Procedure Act ("MSAPA") contained a provision that "as soon as feasible, and to the extent practicable, [agencies must] adopt rules . . . embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers." MODEL STATE ADMIN. PROCEDURE ACT § 2-104(3) (amended 2010), 14 U.L.A. 73 (1981). This was abandoned in the 2010 MSAPA. Nevertheless, some states have adopted similar requirements favoring rulemaking whenever practicable. *See* FLA. STAT. § 120.54(1)(a) (2018); IOWA CODE § 17A.3(1)(c) (2018); UTAH CODE ANN. § 63G-3-201(2)–(4) (West 2018).

219. For example, after an experienced adjudicator at the NVICP found a causal link between the rubella vaccine and chronic arthritis, the Secretary of Health and Human Services modified the Vaccine Injury Table to include "chronic arthritis" as an injury associated with the rubella vaccine. *See* National Vaccine Injury Compensation Program Revision of the Vaccine Injury Table, 60 Fed. Reg. 7,678, 7,692 (Feb. 8, 1995), *revised by* National Vaccine Injury Compensation Program: Revisions and Additions to the Vaccine Injury Table—2, 62 Fed. Reg. 7,685, 7,688 (Feb. 20, 1997). Similarly, the SSA's medical-vocational guidelines were promulgated in response to hearing many similar claims in adjudicatory proceedings. *See* Heckler v. Campbell, 461 U.S. 458, 461 n.2 (1983).

220. Sant'Ambrogio & Zimmerman, *supra* note 14, at 1688–89; *see also* Weaver, *supra* note 180, at 289 ("Those who decide cases arising from a regulatory program have a unique perspective on the functioning of that program.").

221. *See* Zaring, *supra* note 179, at 1217–18.

agency's enforcement agenda.[222] Furthermore, coordination of enforcement actions with other agency functions raises concerns that the agency is not adjudicating cases based on their individual merit but in pursuit of broader policy goals.[223]

On the other hand, greater agency control over enforcement risks "political capture." If the agency's political principals oppose the agency's underlying statutory goals, they may block regulatory enforcement in part or in whole. Agency control over enforcement makes it possible for an administration to undermine the statutory mandate and prevent private parties and the public writ large from obtaining remedies for regulatory violations.[224]

Consequently, enhanced political control over enforcement may result in large swings in enforcement, upsetting the reliance interests of private parties and undermining the rule of law.[225] Therefore, agency designers must guard against over- and underenforcement and the destabilization of government policy from administration to administration.

3. Checks on Overzealous Enforcement

The procedures intended to make agencies more like courts create checks on overzealous enforcement.[226] Prohibitions on ex parte communications and separation of functions restrain the agency's ability to implement policy without regard to the private interests at

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222. *Id.* at 1214 (citing complaints reported in the news).

223. *See also* Clarke, *supra* note 217 (noting complaint by regulated entities that "the presence of enforcement staff during routine inspection visits to banks [constituted] an intimidation technique"). *See generally* Mogilnicki & Malpass, *supra* note 177, at 557.

224. *See* Engstrom, *supra* note 12, at 621 ("Given that private enforcement is designed at least in part to counter possible agency capture, bringing agencies back into the picture risks returning the fox to the henhouse.").

225. In *The Morality of Law*, Lon Fuller identifies "frequent changes in rules that the subject cannot orient his action by them" as one of eight ways in which a legal system may "misfire." LON FULLER, THE MORALITY OF LAW 39 (1969); *see also* Minzner, *supra* note 109, at 2116 (explaining that specialists are particularly vulnerable to political pressure and "[f]ollowing major enforcement failures . . . the political salience of enforcement switches and overenforcement can result"); Sant'Ambrogio, *supra* note 212, at 392 ("[T]he difficulty of changing the legal background regime allows parties to order their affairs with greater certainty about the future. This in turn makes them more willing to invest in the future, increasing the productive activity of society.").

226. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1265–66 (1986) ("When an agency adjudicates it is required to assume a different posture from its rulemaking mode. It must proceed roughly as a court would in determining the merits of an individual claim.").

stake.[227] "Once hired, an ALJ has virtual lifetime tenure without any probationary period. . . . This set of provisions guarantees ALJ independence" and challenges political control over adjudication.[228] Although other administrative judges have less independence, they still tend to have some—sometimes a lot—and view themselves as judges.[229] The relative independence of these decisionmakers is meant to serve as a check on the risks created by the strong public character of enforcement in agency adjudication. Independent administrative judges encourage agencies to articulate the standards under which public enforcement actions are judged and enhance the transparency of changes in agency policy.[230]

Of course, final agency decisions are usually in the hands of political appointees. Political appointees approach adjudication from a different perspective than administrative judges and seek to implement administration policy. Consequently, agency leadership may serve as an additional check on overzealous enforcement or may be a cause of it. Some argue that political appointees check the tunnel vision of civil service employees because they come to their jobs with a fresh perspective and more political accountability.[231] But political appointees may also seek to push the agency to be more aggressive in its enforcement. It depends on the policy goals of the administration.

Finally, and most importantly, judicial review serves as a check on overzealous enforcement based on legal interpretations that are not reasonable. Giving private parties aggrieved by agency action the right to judicial review of final agency action inconsistent with its

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227. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1075 (2011) (explaining that the APA and Due Process Clause provide agency adjudicators with "some level of independence" and "[p]olicymakers . . . have sometimes found adjudicators frustrating precisely because of" how independence impacts "adjudication's inefficiency and inconsistency as a policymaking instrument"); Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1354 (1992) (describing "the continuing saga of the SSA's attempts to place productivity and quality-control standards on the ALJs who decide its disability cases"); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1473 (2012) ("[A]dministrative law judges . . . enjoy some measure of decisional independence from other agency staff, including from senior policymakers.").

228. Asimow, *supra* note 170, at 1009.

229. *See* Koch, *supra* note 82, at 278–81.

230. The role that independent ALJs play in balancing the policymaking agenda of agencies supports calls for more, not less, independence. *Cf.* Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023 (2016) (arguing that non-ALJ adjudication of disputes between agencies and nongovernmental parties violates due process).

231. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1858 (2015); Jonathan R. Siegel, *The Reins Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 185 (2013).

organic statute allows Congress to leverage private resources to monitor and police agency drift.[232] Thus, to the extent that bifurcated decisionmaking fails to restrain overzealous enforcement or the political leadership pushes the agency to overreach, federal courts serve as a final check on agency action beyond its statutory authority.

4. Private Enforcement as a Check on Political Capture

The tools that check overzealous enforcement are not as effective at checking underenforcement. While agency action provides a focus for adjudication by independent decisionmakers, administrative judges never decide cases not brought.[233] Although the APA gives courts the power to compel "agency action unlawfully withheld or unreasonably delayed,"[234] the Supreme Court has generally shielded an agency's decision not to bring an enforcement action from judicial review.[235] The main hurdle is the presumption against the reviewability of enforcement decisions under the APA announced by the Supreme Court in *Heckler v. Chaney*.[236] There are exceptions to the presumption and some debate about whether it applies to enforcement policies or only individual enforcement decisions.[237] Nevertheless, the presumption gives agencies significant latitude in their enforcement choices.[238] Moreover, sometimes it is difficult even to know whether an agency has adopted an explicit enforcement policy against bringing certain types of cases.[239]

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232. Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 271–73 (1987).

233. *See* Staszewski, *supra* note 27 (proposing the establishment of a "Federal Inaction Commission" to address the chronic problem of nonenforcement decisions and other regulatory inaction).

234. 5 U.S.C. § 706(1) (2012).

235. Heckler v. Chaney, 470 U.S. 821, 832–33 (1985).

236. *Id.*

237. *See* Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 176–77 (1996) (describing debate); Sant'Ambrogio, *supra* note 27, at 1406 n.115 (discussing exceptions).

238. This is not to say that determined lower courts can never find a way around the presumption. As an example, the lower courts did check the Obama administration's use of enforcement discretion to change immigration policy. But the Supreme Court deadlocked in the case and never provided a reasoned opinion. United States v. Texas, 136 S. Ct. 2271 (2016).

239. Andrias, *supra* note 26, at 1043 (noting that changes in agency enforcement policies typically do not require procedures to enhance transparency). For example, during President George W. Bush's first term, the Employment Litigation Section of the DOJ did not file a single lawsuit alleging a pattern or practice of discrimination against African Americans and the number of individual cases challenging racial discrimination fell dramatically. CITIZENS' COMM'N ON CIVIL RIGHTS & CTR. FOR AM. PROGRESS, THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION 29 (William L. Taylor et al. eds., 2007), https://cdn.americanprogress.org/wp-content/uploads/issues/2007/03/pdf/civil_rights_report.pdf

Private enforcement mechanisms mitigate the dangers of political capture of agency enforcement, or at least increase its transparency. Private parties with procedural rights in administrative schemes are not completely dependent on public enforcers. If agencies must respond to the complaints of private parties and provide reasons for not pursuing enforcement actions, the agency's decisionmaking will be more transparent. If private parties have an independent right to demand evidentiary hearings on their claims, they need not wait on agency enforcement at all. But even where public enforcement is exclusive and private parties are only entitled to agency review of their complaints, if the enforcement decision is subject to clear standards, administrative appeal, and judicial review, the private parties will likely have quicker and potentially more effective recourse than in a pure public enforcement scheme where citizens must challenge agency inaction. In addition, the agency may be less likely to take legally indefensible positions when subject to public, political, and judicial scrutiny. Finally, increased transparency facilitates congressional oversight and affords citizens the opportunity to respond at the ballot box.

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In sum, combining elements of public and private enforcement in administrative courts facilitates the goals of agency adjudication while mitigating some of the risks it poses to legitimate decisionmaking. Public enforcers assist private parties seeking regulatory benefits, thus allowing agency adjudication to provide greater legal access to remedies while maintaining greater procedural protections for regulated parties. The procedural rights of regulatory beneficiaries encourage them to supplement the information resources of public regulators at the same time as specialized decisionmakers avail themselves of the experience acquired through hearing many similar cases in a discrete area of law. Public enforcement allows agencies to pursue consistent policies across different modes of

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[https://perma.cc/Z8S8-ZKWB]. But the DOJ did not completely abandon race discrimination claims, even as it shifted resources to "reverse discrimination" claims on behalf of white Americans, religious discrimination claims, and human trafficking. *Id.*; Charlie Savage, *Justice Department to Recharge Civil Rights Enforcement*, N.Y. TIMES (Aug. 31, 2009), https://www.nytimes.com/2009/09/01/us/politics/01rights.html [https://perma.cc/F3NW-VY9N] ("Under the Bush administration, the agency shifted away from its traditional core focus on accusations of racial discrimination, channeling resources into areas like religious discrimination and human trafficking."). There was no final agency action memorializing the shift in policy that a party could challenge in court.

decisionmaking, while the procedural rights of private parties mitigate the risks of political capture, or at least make it more transparent.

Table 3 summarizes the goals of agency adjudication, the tools used to achieve them, the risks they create, and the functions of public and private enforcement.

TABLE 3: GOALS AND RISKS OF AGENCY ADJUDICATION

	Goal		
	Legal access	**Decisionmaking Informed by Expertise**	**Coherent and Accountable Policy**
Tools	Informal and tailored procedures	Specialized decisionmakers; agency expertise	Political appointees; agency forum
Risks	Inaccurate and illegitimate decisions	"Decision mills"; "agency capture"; caseload volatility	Illegitimate decisions; "political capture"
Public Enforcement	Assists regulatory beneficiaries; maintains process for respondents	Reduces caseload volatility; checks decision mills and certain capture	Enables policymaking using enforcement; enhances coordination and political accountability
Private Enforcement	Furthers legal access	Supplements agency information; checks agency capture	Checks political capture; enhances transparency

IV. STRUCTURING HYBRID ENFORCEMENT IN AGENCY ADJUDICATION

Agencies use attributes of public and private enforcement in various combinations. Yet many administrative schemes cluster on the public side of the enforcement continuum.[240] Part IV explains this tendency and suggests factors for policymakers to consider when designing administrative enforcement.

A. Comparing Private Enforcement in Two Forums

Private enforcement in administrative and judicial forums share many similarities. But there are also important differences. These differences may explain why agency designers often leverage the information resources of private parties without giving them independent enforcement authority.

1. Comparing the Benefits in Each Forum

Private parties supplement public enforcement in both judicial and administrative forums. Public enforcers face the same resource constraints in administrative courts as they do in federal court, even if administrative enforcement is less expensive.[241] Thus, regardless of the forum, private parties allow Congress to leverage private resources in pursuit of public goods.

Private parties do a particularly good job supplementing the information resources of agencies in administrative enforcement. Even when agencies have exclusive enforcement authority, public actions often originate in the complaints and investigations triggered by private parties.[242] Moreover, unlike private enforcement in federal court, the knowledge of private parties is fed directly into the agency's administrative process and considered by the agency leadership. As a result, the information derived from private complaints improves the agency's understanding of its regulatory environment and informs rulemaking and other activities beyond enforcement and adjudication.[243]

The success of private enforcement at checking or providing an alternative to agency capture, as it does in federal court, has been more limited, however. Without the power to obtain decisions on

240. *See supra* Part III and *infra* Appendix A.

241. SKOWRONEK, *supra* note 91, at 146; Verkuil, *supra* note 227, at 1344.

242. *See, e.g.*, KOCH, *supra* note 13, § 5:31.

243. *See supra* notes 215–218 and accompanying text.

complaints based on the record of an evidentiary hearing, private enforcement in administrative courts cannot provide the same alternative to public enforcement as private rights of action in federal court. Procedural rights to file complaints alone will do little to check an agency that is opposed to enforcement due to the presumption against the reviewability of enforcement decisions announced in *Heckler v. Chaney*.[244] Even the power to trigger an investigation and the right to an agency decision on whether to proceed with enforcement are unlikely to move an agency that is determined not to act given highly deferential judicial review, even if a written decision will enhance the transparency of public policy. Private parties can only serve as a check on captured enforcement, however, when they have enforcement rights analogous to private rights of action in federal court—i.e., the right to a reasoned decision from the agency based on the record of an evidentiary hearing.

But even private rights of action comparable to those in federal court will not have the same impact as private enforcement in administrative courts if the agency is committed to a more conservative enforcement policy. Because of judicial deference to agency decisions in formal adjudication, courts are unlikely to second-guess an agency's refusal to adopt a novel interpretation of law in response to a private complaint. Private parties in court, by contrast, may find a judge they can persuade to push the law in a new direction.

2. Comparing the Costs in Each Forum

The core objection to private enforcement in federal court is that it upsets carefully calibrated public enforcement schemes.[245] This objection is not as salient in administrative courts. Because the agency generally makes the final decision in agency adjudication and its interpretations are granted deference from reviewing courts, there is less risk that private parties will upset regulatory policy by bringing novel, adventuresome claims inconsistent with the agency's understanding of its statutory mandate. Agencies can reject such claims and the federal courts will generally defer to the agency on review, so long as the agency's interpretation is reasonable. Thus, agencies are better equipped to protect their enforcement policies from private enforcement in agency adjudication than in federal court.

244. 470 U.S. 821, 832–33 (1985).

245. *See supra* note 58 and accompanying text.

There is also less danger that private enforcement in administrative courts will be driven by short-term financial incentives rather than the public interest.[246] This critique is largely aimed at tort actions that yield large monetary awards, such as federal damage class actions.[247] There are fewer monetary awards available to private parties in agency adjudication and those that do exist are generally smaller than in federal court.[248] This might change if agencies adopt class actions in private enforcement schemes with monetary remedies rather than injunctive relief. But to date, administrative class actions have largely been used to resolve claims against the government.[249] The relative absence of large monetary awards to private parties in agency adjudication cuts against concerns that private enforcement in administrative courts will result in overdeterrence.[250]

Nevertheless, enhancing private rights of action and eliminating exclusive agency control over enforcement would likely increase the number of administrative proceedings before the agency.[251] If the agency must review a large number of adjudicatory decisions, it will face difficulty bringing consistency to its interpretation of the law, undermining a coherent and consistent national policy.[252] Thus, there is a danger in oversupplementing the resources of public enforcers in administrative courts. The more cases on the agency's docket, the more likely the agency will struggle to maintain control over the meaning and application of the law. Unless a class action or other aggregate device is available to ensure consistent outcomes in similar cases,[253] some of the potential benefits of agency adjudication will be lost.[254]

In addition, if agency adjudicators have a proregulatory bias, enhanced private rights may exacerbate the risk of overzealous enforcement. Without the resource constraints that limit public

246. *See supra* notes 63–65 and accompanying text.

247. *See* Carroll, *supra* note 40, at 864–65.

248. *See* William Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Administrative Penalties*, 24 SETON HALL L. REV. 1, 16–19 (1993).

249. *See* Sant'Ambrogio & Zimmerman, *supra* note 14, at 1696.

250. But as noted above, overdeterrence is possible when the agency itself is committed to overdeterrence and leverages the resources of private parties.

251. *See* Stewart & Sunstein, *supra* note 31, at 1206 ("[P]rivate initiation rights may raise serious problems for regulatory administration. Successful suits could squander agency resources on isolated, minor controversies, thereby diverting energy from larger patterns of misconduct.").

252. *See, e.g.*, Legomsky, *supra* note 168, at 415 ("There are times when we simply have to learn to live with unequal justice because the alternatives are worse.").

253. Sant'Ambrogio & Zimmerman, *supra* note 14, at 1682.

254. Although rulemaking can help an agency streamline its docket prospectively, it is often too little, too late to handle spikes in claims. *Id.* at 1693–95.

enforcement, large numbers of private actions, and possibly even settlements outside of administrative proceedings, may result in overregulation. Thus, overdeterrence may pose a greater risk during some administrations than it does during others due to centralized control over the adjudication of enforcement actions.

These concerns may explain why the private rights in many administrative schemes do not include full independent enforcement authority. It also suggests that it is better to enhance private enforcement in administrative schemes that leverage the informational advantages of private parties rather than their sheer numbers. In addition, Congress may want to require agency approval of private settlements to ensure they do not result in regulation without political accountability.

3. Agency Tools for Mitigating the Risks of Private Enforcement

Agencies have tools unavailable to courts to check claims that are duplicative, wasteful, or inconsistent with the exercise of reasonable enforcement discretion. Unlike federal courts, agencies are generally not bound by the Rules Enabling Act, which prohibits Article III courts from "prescrib[ing] general rules of practice and procedure" that "abridge, enlarge or modify any substantive right."[255] Therefore, agencies may preclude private actions that advance technically valid legal claims yet are duplicative or wasteful in light of the agency's overall enforcement policy.

The danger with giving agencies the power to block private suits, of course, is that it threatens to obstruct private enforcement if the agency is captured. Moreover, suits based on novel legal theories are not always socially undesirable. Private parties often push the law in new directions that eventually come to enjoy broad public support. Therefore, an agency "veto" over private enforcement is preferable to agency "licensing,"[256] as it will make capture more transparent. In addition, agencies should provide good reasons for blocking arguably meritorious suits on the grounds that they are inconsistent with the agency's enforcement priorities.

That said, blocking duplicative suits raises fewer concerns with capture because the agency is bringing its own enforcement action. Thus, if Congress provides private parties robust enforcement rights, it should also consider giving agencies the power to check redundant

255. 28 U.S.C. § 2072 (2012).

256. Engstrom, *supra* note 12, at 679–80.

private actions when the agency is, in fact, enforcing. The agency could then require private parties to participate in similar public actions or create an aggregate proceeding in which the agency pursues the action on behalf of a class of beneficiaries.[257] If the agency takes up the complaint, the private party would have the option of joining the agency's enforcement action. If the agency declines to pursue the claim, the private party would have the option of pursuing nonduplicative enforcement actions.[258]

Giving private parties greater enforcement rights in administrative proceedings may inevitably decrease agency control over their caseloads. Whether the benefits are worth the costs depends on whether inaction due to capture is an acute problem in the particular administrative scheme. In some cases, more limited private rights to file complaints, trigger investigations, or join public actions will provide enough benefits of private enforcement without a stronger check on capture. Even a requirement that agencies respond to complaints in writing will increase the transparency of agency policy. But the pervasive use of enforcement discretion to underenforce may call for enhancing private enforcement in some contexts.

B. Enhancing Private Rights to Check Agency Inaction

Private enforcement is an additional tool agency designers can use to address political or interest group capture of agency enforcement. But it is not costless. Moving from theory to practice, this Section considers several recent cases of nonenforcement and weighs the advantages and disadvantages of enhancing private rights of action.

1. The Challenge of Political Nonenforcement

The growth over the last several decades of what then-Professor Elena Kagan called "presidential administration" has put increasing pressure on the ability of agencies to implement their statutory mandates.[259] The power of the executive to "course correct"

257. *See* Sant'Ambrogio & Zimmerman, *supra* note 149, at 2003–06, 2035–36.

258. Several environmental statutes, for example, allow the Environmental Protection Agency to displace private enforcement actions in federal court only if it brings its own public enforcement action. *See* Engstrom, *supra* note 12, at 650–51, 651 n.115 (listing major federal environmental statutes, such as the Clean Air Act and Clean Water Act, that have "citizen suit" provisions).

259. Kagan, *supra* note 25.

within broad statutory parameters without awaiting congressional action can have significant normative benefits.[260] But presidents of both parties are frequently tempted to use the levers of government to thwart mandates they cannot repeal through the legislative process.[261] This often takes the form of presidential appointees adopting either nonenforcement or particularly selective enforcement policies at the agencies they lead.[262]

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260. *See, e.g.*, *id.* at 2331–39 (explaining that presidential control over administration promotes accountability by enhancing transparency and establishing an "electoral link between the public and the bureaucracy"); Sant'Ambrogio, *supra* note 212, at 381–85 (identifying the disadvantages of generally applicable laws but still recognizing that it is "more efficient for the Executive to define categories of cases that represent poor fits with the law than to repeatedly adjudicate common issues in each individual case"). The legislative process is often slow, laborious, and particularly ill-suited to making incremental changes in policy when there is little consensus around broader policy objectives. *See* Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 435–40 (1989) (modeling the structural difficulties Congress faces when seeking to respond to agency action); *see also* McCubbins et al., *supra* note 232 (using the principal-agent framework to analyze congressional control of the administrative state).

261. *See* Kagan, *supra* note 25, at 2347 (noting how "presidential administration might displace the preferences of a prior (rather than of the contemporaneous) Congress by interpreting statutes inconsistently with their drafters' objectives"). For example, the Obama administration instituted the Deferred Action for Childhood Arrivals ("DACA") program after the Development, Relief, and Education for Alien Minors ("DREAM") Act died in the 112th Congress. *See* Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 16, 2012, at A1; Memorandum from Janet Napolitano, Sec'y of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/MSQ5-RDCC]. Additionally, the Trump administration stepped up efforts to undermine the Affordable Care Act through executive action after repeal efforts failed in Congress. *See* Peter Sullivan & Rachel Roubein, *Critics See Trump Sabotage on ObamaCare*, HILL (Oct. 7, 2017), https://thehill.com/policy/healthcare/354308-trump-sabotage-seen-on-obamacare [https://perma.cc/9JT6-D6GA] (describing how the Trump administration undermined enrollment, cut subsidies, and limited coverage).

262. For a collection of examples of nonenforcement from the Reagan, Bush, and Obama administrations, see Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1125–36 (2015). Such political capture of agency adjudication may worsen in the wake of the Supreme Court's opinion last term in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), which held that ALJs are officers of the United States who must be appointed under the Appointments Clause by the president or the heads of the departments. *See also* Exec. Order No. 13843, 83 Fed Reg. 32,755 (July 10, 2018) (excepting ALJs from the competitive hiring rules and examinations of the OPM). Classifying ALJs as "inferior officers" for purposes of appointment might also result in them being removable at will. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010) (holding that more than one layer of for-cause removal protections violates the Vesting and Take Care Clauses of Article II). *But see id.* at 507 n.10 (suggesting that ALJs may be distinguishable from Public Company Accounting Oversight Board members due to their adjudicative functions). Although the relationship between ALJ independence and the Appointments Clause is beyond the scope of this Article, independent decisionmakers are important to controlling overzealous public enforcement and enabling meaningful private enforcement in agency adjudication.

Congressional enacting coalitions rely heavily on judicial review initiated by private parties to keep agencies in line with their statutory mandates.[263] To date, judicial review has done a decent job checking the use of rulemaking and enforcement actions to push agencies beyond what the law allows.[264] Due to the presumption against the reviewability of enforcement decisions,[265] however, judicial review is less effective at checking agency decisions not to enforce.[266]

This weakness in judicial review has profound implications for agency adjudication. When agency adjudication relies heavily on public enforcement, with few private rights, the agency has broad discretion regarding which complaints to pursue.[267] Placing control of enforcement in the hands of an agency virtually eliminates the ability of courts to check agency inaction.[268] Inasmuch as Congress uses agency adjudication to provide parties with relief unavailable in court,[269] such inaction is generally inconsistent with the agency's underlying statutory mandate.

2. Inside Agency Nonenforcement

Increased presidential control over the administrative state and the use of nonenforcement to obstruct statutory mandates raises the question of whether agency designers should enhance private rights in administrative programs. Consider the following recent examples of agency nonenforcement:

- After the Trump administration took office, the Department of Education ("DOE") stopped pursuing enforcement actions

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263. McCubbins et al., *supra* note 232, at 271–74.

264. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (vacating a rule that undermined the statutory goal of improving motor vehicle safety); Barkow, *supra* note 12, at 1139 n.37 ("[C]urrent doctrine does a better job checking affirmative agency action than addressing 'excessive agency inaction.' " (quoting Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1646 (2011))).

265. Heckler v. Chaney, 470 U.S. 821, 832–33 (1985).

266. Barkow, *supra* note 12, at 1131–34; Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1646 (2011); Sant'Ambrogio, *supra* note 27, at 1405; Stewart & Sunstein, *supra* note 31, at 1205–06.

267. Stewart & Sunstein, *supra* note 31, at 1205–06 (discussing deferential review of agency decisions not to enforce).

268. *See supra* notes 89–99 and accompanying text. Even the CFPB under former director Richard Cordray, which was known for its vigorous pursuit of consumer protection and public responsiveness, was accused of ignoring certain complaints filed by consumers. *See* Matthew Goldstein & Stacy Cowley, *Casting Wall Street as Victim, Trump Leads Charge on Deregulation*, N.Y. TIMES, Nov. 27, 2017, at B1 (describing criticism of the CFPB's complaint process as "a portal to nowhere").

269. *See supra* Section II.A.

against schools accused of misrepresentation or fraud by student borrowers.[270] Student borrowers may seek relief from repayment of their federal loans from the Department, but DOE's Student Aid Enforcement Unit has exclusive authority to initiate administrative proceedings against the schools to recoup the money.[271] For nearly a year, DOE did not adjudicate a single borrower defense claim by students defrauded by their schools and the backlog of claims grew to more than eighty-seven thousand.[272] In the meantime, student borrowers are forced to make payments on loans they assert they do not owe, attempt to negotiate a deferment or forbearance to temporarily relieve them of the obligation of making payments or default on their loans and become subject to coercive collection mechanisms, including wage garnishment and tax offsets.[273] The Department began offering partial relief to the student borrowers in December 2017, but to date the Trump administration has

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270. Letter from Acting Under Sec'y James Manning to Senator Richard J. Durbin (July 7, 2017) https://www.durbin.senate.gov/imo/media/doc/17-010570%20Durbin%20Outgoing.pdf [https://perma.cc/YDF9-8F5P]; Yan Cao & Tariq Habash, *College Complaints Unmasked: 99 Percent of Student Fraud Claims Concern For-Profit Colleges*, CENTURY FOUND. (Nov. 8, 2017), https://tcf.org/content/report/college-complaints-unmasked [https://perma.cc/7NSQ-FAPA]; Danielle Douglas-Gabrielle, *Trump Administration is Sitting on Tens of Thousands of Student Debt Forgiveness Claims*, WASH. POST (July 27, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/07/27/trump-administration-is-sitting-on-tens-of-thousands-of-student-debt-forgiveness-claims [https://perma.cc/H6LC-ZCEL]. Under the Higher Education Act of 1965, student borrowers may seek discharge of certain federal student loans based on any "act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law." 34 C.F.R. § 685.206(c)(1) (2018). Congress directed the Secretary of Education in 1993 to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of" certain federal loans. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (2012) (codified at 20 U.S.C. § 1087e(h) (2012)). The Secretary promulgated the regulations the following year. William D. Ford Federal Direct Loan Program, 59 Fed. Reg. 61,664 (Dec. 1, 1994) (codified at 34 C.F.R. § 685.100). In 2016, the Secretary amended the regulations to provide more efficient, consistent, and fair procedures for resolving student-borrower applications for relief. Amended William D. Ford Federal Direct Loan Program, 81 Fed. Reg. 75,926 (Nov. 1, 2016). But after a change in administration, the new Secretary of Education suspended the new regulations, William D. Ford Federal Direct Loan Program, 82 Fed. Reg. 49,114 (Oct. 24, 2017), and stopped processing existing applications for loan discharges.

271. 81 Fed. Reg. at 75,926 ("Individual claims will be decided in a non-adversarial process managed by a Department official, and group claims would be brought by the Department against the school, not by students.").

272. *See* Cao & Habash, *supra* note 270, at fig.2, n.53.

273. *See* Complaint for Declaratory Relief & Demand for Jury Trial at 6, 118–22, Carr v. Devos (S.D.N.Y. 2017) (No. 17-cv-8790) (providing an example of a student borrower whose student loans had been placed in forbearance by the Department of Education's loan servicer after the student had asserted complete defenses to the repayment of her loans).

not pursued any actions against the schools accused of misrepresentations or fraud.[274]

- Barely forty-eight hours after President Trump named Mick Mulvaney Acting Director of the CFPB in November 2017, its lawyers began pulling back the agency's enforcement efforts.[275] The CFPB is responsible for enforcing prohibitions on unfair, deceptive, or abusive acts and practices in connection with consumer financial products and services.[276] Under the previous director, the agency had used consumer complaints to inform its investigations, enforcement actions, and rulemaking. But the CFPB has exclusive authority to pursue administrative enforcement actions before an ALJ.[277] Although it is too early to assess the full scope of the rollback, Mr. Mulvaney announced, "This place will be different, under my leadership and under whoever follows me." Mr. Mulvaney had previously denounced the agency he now leads as a " 'sad, sick' example of bureaucracy gone amok."[278]

In each case, imbuing the administrative scheme with private rights of action, paired with a requirement that agencies give reasoned explanations for changes in policy,[279] would reduce political capture or at least make it more transparent. If student borrowers had the right to file complaints directly against schools that defrauded them and to receive a decision from an administrative judge on the record of an evidentiary hearing, the regulatory scheme would continue to function when the DOE was not pursuing its own enforcement actions. The administrative judge would follow existing policy until changed by a new administration through rulemaking or adjudication. If the Secretary of Education wished to preclude these claims she would have to offer reasons on the record. The Secretary would be more likely to refrain from such action unless she had good

274. *See* Cao & Habash, *supra* note 270. It has not gone unnoticed that both the President and the Secretary of Education presiding over the shutdown have had stakes in for-profit schools, which constitute virtually all of the complaints in the backlog.

275. Jessica Silver-Greenberg & Stacy Cowley, *Trump Appointee Moves to Yank Out a Consumer Watchdog's Teeth*, N.Y. TIMES, Dec. 6, 2017, at B1.

276. 12 U.S.C. § 5511(b)(2) (2012).

277. 12 C.F.R. § 1081.200 (2018).

278. Silver-Greenberg & Cowley, *supra* note 275.

279. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (stating that the agency must give good reasons for the changed policy); Staszewski, *supra* note 193, at 1281 ("The practice of reason-giving further limits the scope of available discretion over time . . . .").

reasons to pursue them. And if the Secretary changed policy using either rulemaking or adjudication, the private claimant could seek judicial review in federal court. Student borrowers would not have to clear the hurdle of *Heckler v. Chaney* when faced with DOE inaction.[280]

Similarly, if consumers had the right to pursue enforcement actions against financial institutions in the CFPB, the Director of the CFPB would have to provide reasons for rejecting their claims, perhaps explaining why a favorable ALJ's decision under the old policy was inconsistent with his understanding of the relief afforded under the law.

Of course, it would be only a matter of time before a new administration determined to roll back enforcement implemented a narrower interpretation of the law, either through rulemaking or adjudication. It is reasonable for administrations to choose different enforcement priorities and interpret legal ambiguities in light of their policy goals. But instead of simply sitting on complaints, the agency would need to use rulemaking or adjudication to explain why the private parties should not prevail. This, after all, is the heart of adjudication: a decision based on reasoned proofs.[281]

Moreover, changes in policy through rulemaking or adjudication would allow judicial review to serve as a check on new policies inconsistent with any reasonable understanding of the statute.[282] Thus, private rights of action can enhance the transparency of changes in policy and facilitate judicial review as a check on changes that undermine the statutory goals.

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280. The case of student borrowers also suggests that agencies respond to even weak procedural rights of private parties. Although the DOE sat on student-borrower defense claims for nearly a year, it eventually adjudicated their claims. Nevertheless, the information they provided the agency concerning violations by for-profit schools did not compel the agency to bring its own enforcement actions. Moreover, the DOE's unwillingness to discharge the full amount of the student borrower's loans may have stemmed from the fact that the DOE would not recoup the taxpayer's money from the schools in enforcement actions.

281. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364–65 (1978).

282. Greater private enforcement rights would also help mitigate the related problem of regulatory capture, which may be a more acute risk in specialized public enforcement. Minzner, *supra* note 109, at 2139–40.

Consider a third example from the current administration:

- After a change in political control of the National Labor Relations Board ("NLRB") in December 2017, the Board rapidly changed its position on "several Obama-era NLRB rulings that made it easier for workers to unionize and defend against employer labor law violations."[283] The Board issued lengthy opinions explaining its reversals in three pending cases.[284]

Unlike the prior examples, the Board's decisions not to grant relief are subject to judicial review.[285] Thus, aggrieved parties can make their case to a federal court that the agency's changes in policy are arbitrary and capricious. Meanwhile, the Board will continue to grant relief in cases that have merit based on its interpretation of law. This is not to suggest the NLRB is a model administrative agency. It has been criticized for many reasons.[286] Moreover, the Board issued these decisions in cases brought by the Board's prior general counsel. The new general counsel could adopt a policy of non- or selective nonenforcement with highly deferential review.[287] But the decisions illustrate the benefits of agencies ruling against complaints in

283. *Trump NLRB Majority Moves Fast to Reverse Obama-era Decisions*, NWLABORPRESS (Jan. 3, 2018), https://nwlaborpress.org/2018/01/trump-nlrb-majority-moves-fast-to-reverse-obama-era-decisions [https://perma.cc/992A-LPJ6] (describing three reversals in December 2017).

284. *See, e.g.*, Hy-Brand Indus. Contractors, Ltd., 365 N.L.R.B. 156 (2017) (thirty-five-page opinion overruling *Browning-Ferris* and "return[ing] to the principles governing joint-employer status that existed prior to that decision," along with a twelve-page dissent); Boeing Co., 365 N.L.R.B. 154 (2017) (twenty-three-page opinion creating a new test for evaluating employers' work rules, along with twenty-one pages of dissenting opinions). The ALJ decisions contrary to the Board's decisions are also part of the record before the court on review. Universal Camera Corp. v. NLRB, 340 U.S. 474, 492 (1951).

285. 29 U.S.C. § 160(f) (2012):

> Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . . .

But see Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 404 (1995) (arguing that "the agency's practice of hiding behind multifactored tests instead of acknowledging well-defined rules of decision makes judicial review of its policymaking much more difficult").

286. *See, e.g.*, Fisk & Malamud, *supra* note 96, at 2019 (criticizing the Board's lack of access to social science data and analysis developed by its own staff, resulting in "a formalistic style of adjudicatory reasoning that packages questions of policy as questions of law").

287. Magill & Vermeule, *supra* note 227, at 1059 n.74 (citing Rosenblum, *supra* note 194); *see also* Kevin Freking, *Senate Confirms General Counsel for Labor Board*, U.S. NEWS (Nov. 8, 2017), https://www.usnews.com/news/politics/articles/2017-11-08/senate-confirms-general-counsel-for-labor-board [https://perma.cc/BZC2-S53S].

adjudication rather than blocking them using nonenforcement. Changes in policy through adjudication enhance the transparency of public policy and facilitate judicial review. Without strong private rights of action, injured parties are left to challenge nonenforcement as an abdication of enforcement responsibility or an unreasonable delay under the APA, which are notoriously difficult claims to win.[288]

Nevertheless, enhancing private rights to check nonenforcement has costs. If the agency must adjudicate a large number of private complaints, it may have difficulty implementing a consistent policy and struggle with caseload volatility. In addition, a proregulatory agency may leverage private resources to overenforce. These risks suggest that enhanced private rights might be more appropriate for student-borrower claims against schools charged with misrepresentations than consumer claims against businesses charged with unfair, deceptive, or abusive acts and practices in connection with consumer financial products and services. Although the number of student borrowers is quite large, it is dwarfed by the pool of potential complaints regarding consumer financial products and services.[289] In addition, while Americans typically take out educational loans at a distinct time in their lives, they engage in consumer financial transactions nearly every day over the course of their entire lives. Given the CFPB's broad mandate to protect consumers "from unfair, deceptive, or abusive acts and practices and from discrimination,"[290] one can imagine a massive number of private enforcement actions if the agency provided an inexpensive and informal forum for these claims.[291] Student-borrower complaints, by contrast, are more focused: 98.6 percent of the complaints received by DOE through 2017 involved for-profit colleges and three-fourths of all claims were against schools owned by a for-profit entity.[292] Thus, increased private enforcement for student-borrower claims should be easier for the agency to manage than private rights of action against

288. Sant'Ambrogio, *supra* note 27, at 1448 & n.15.

289. Forty-four million Americans currently have student loan debt as compared to 80 million mortgages, 106 million auto loans, and 192 million credit card holders. In its first three years alone, the CFPB handled more than 558,800 consumer complaints regarding mortgages, debt collection practices, credit reporting, credit cards, consumer loans, student loans, and other such unfair, deceptive, or abusive acts and practices. CONSUMER RESPONSE, *supra* note 129. The DOE received just under 100,000 student complaints during roughly the same period. Cao & Habash, *supra* note 270.

290. 12 U.S.C. § 5511(b)(2) (2012).

291. *See supra* note 289.

292. Cao & Habash, *supra* note 270.

financial institutions for unfair, deceptive, or abusive acts and practices.

The question of manageability may also explain the greater role of private parties in enforcement by the NLRB, which hears a narrower category of cases than either the DOE or the CFPB.[293] The NLRB falls along the middle of the public-private enforcement continuum.[294] But enhancing private rights in the NLRB should be manageable if Congress chose to highlight changes in policy using nonenforcement and subject them to greater judicial review.

C. Choosing a Forum for Private Enforcement

The role of private enforcement in agency adjudication opens up new lines of inquiry regarding the choice of forum for private rights of action. Although deserving of greater study than possible in this Article, this Section offers some preliminary thoughts.

Procedural rights in administrative courts encourage private parties to supplement the information resources of agencies in enforcement, adjudication, and rulemaking more directly than private enforcement in federal court. Thus, some minimum procedural rights to file complaints, trigger investigations, and obtain reasoned (even if informal) decisions will likely be appropriate in many administrative schemes.

When deciding whether to create private rights in an agency, federal court, or both, Congress should consider the importance of access to an informal and inexpensive forum for dispute resolution. Private rights are less important for checking capture in agency adjudication when private enforcement is available in federal court. Nevertheless, if the costs and formalities of federal court are an impediment to private enforcement, Congress may want to utilize an agency forum. Congress often creates administrative schemes because of perceived difficulties of achieving its goals using the courts.[295]

In addition, Congress should consider the importance of uniformity, regulatory coherence, and political accountability in implementing policy. Placing private rights in agency adjudication mitigates the central critique of private enforcement in federal court—that private parties will disrupt a carefully calibrated, politically accountable public enforcement scheme. Uniformity and coherence in

293. *See supra* note 289.

294. *See supra* Table 2.

295. *See supra* Section II.A.

adjudication are important when enforcement is one piece of an integrated regulatory program. This weighs in favor of DOE adjudication of student-borrower complaints against schools because the DOE is responsible for disbursing and discharging the student borrowers' federal loans.

Agency adjudication of private actions also facilitates a uniform national interpretation of the law accountable to the political branches, while federal courts allow issues to percolate over time. Political accountability may be more important when Congress legislates broad statutory commands subject to diverse interpretations or is uncertain about the direction of policy and less important when Congress legislates with specificity. But even with broad statutory mandates, Congress may want the greater long-term stability afforded by federal courts if it is concerned with how changes in administration will impact reliance interests.[296]

Finally, Congress should be cautious of supplementing agency resources with private rights where there are large pools of potential claimants who might overwhelm the agency's docket and increase the risk of backlogs, inconsistent decisionmaking, or overenforcement. If Congress is concerned that robust private enforcement will threaten the consistency and accountability of agency adjudication, then it may make more sense to place private rights of action in federal court and accept some risk of conflict between public and private enforcement regimes.

CONCLUSION

This Article begins a conversation regarding the relationship between public and private enforcement in agency adjudication. It shows that administrative enforcement is not merely another form of public enforcement, only in a friendlier forum. Contrary to the prevailing perception, private enforcement is deeply embedded in the design of federal regulatory programs. In addition, this Article provides a framework for thinking about how best to structure administrative enforcement schemes to leverage the resources of private parties in support of public policy.

Private enforcement in agency adjudication has important implications for our understanding of the relationship between public and private enforcement regimes more generally. Private enforcement is often thought of as a way to avoid the use of a strong state

296. Stephenson, *supra* note 199, at 1058–59.

bureaucracy in a political culture distrustful of "big government."[297] Under this view, each mode of enforcement generally proceeds in federal court on its own track. Yet private enforcement in agency adjudication challenges this view. Beyond simply providing a nongovernmental enforcement mechanism, private enforcement is critical to agencies' ability to accomplish their missions. Private enforcement facilitates access to regulatory remedies, enhances the information of government regulators, and holds them accountable to their statutory mandates.

Progressive and New Deal advocates of the regulatory state feared that judicialization would hobble the administrative process.[298] With the passage of the APA, judicialized procedures became well established in formal adjudication and for a time made significant inroads into rulemaking. But there has been a turn away from judicialized procedures in recent decades as agencies, courts, and scholars have made greater use of rulemaking and informal guidance, finding judicial-like procedures burdensome, time consuming, and ineffective. Yet far from hobbling the administrative process, judicialized procedural rights for private parties may in some cases be essential to protecting the goals Congress seeks to achieve with regulatory agencies. Indeed, private rights in agency adjudication may be especially important today, as presidents increasingly use enforcement policies to roll back or amend statutory mandates outside the legislative process.

297. KAGAN, *supra* note 54, at 15–16.

298. *See* 86 CONG. REC. 13,943 (1940) (message of the President accompanying a veto of an early version of the Administrative Procedure Act, in which agency procedure was highly judicialized); Roscoe Pound, *The Causes of Popular Dissatisfication with the Administration of Justice*, 40 AM. L. REV. 729 (1906) (identifying the shortcomings of judicial administration characterized by an adversarial process).

APPENDIX A

PUBLIC AND PRIVATE ENFORCEMENT RIGHTS IN ADMINISTRATIVE COURTS

Administrative Court	A. Agency Enforcement[299]	B. Exclusive Agency Enforcement[300]	C. Private Complaints[301]	D. Agency Investigation[302]	E. Private Parties to Enforcement[303]	F. Private Right of Action[304]	G. Rules of Practice and Procedure
Commodity Futures Trading Commission—Office of Proceedings	X	X	X		X	X	17 C.F.R. Part 10
Consumer Financial Protection Bureau—Office of Administrative Adjudication	X	X					12 C.F.R. Part 1081
Department of Commerce—Office of the Assistant Secretary for Export Administration	X	X	X				15 C.F.R. Part 766

299. The applicable administrative court hears cases in which the relevant agency has enforcement responsibilities. The agency's enforcement responsibilities might include one or more of the following: reviewing and investigating complaints, attempting to settle disputes between the parties, acting as a gatekeeper for private complaints, or exercising exclusive control over enforcement actions adjudicated by the agency.

300. The administrative court hears claims in which the agency has exclusive authority whether to pursue an enforcement action requiring an evidentiary hearing. However, other nongovernmental parties besides the respondent may be able to obtain formal party status in such cases.

301. The regulatory scheme provides private parties with the right to file complaints and requires the agency to review the complaints in at least some case types. The agency's review may or may not include an independent investigation of the charges in the complaint.

302. The regulatory scheme provides for an agency investigation of the merits of some types of complaints.

303. The regulatory scheme allows private parties other than respondents to participate in some types of enforcement actions.

304. The regulatory scheme allows private parties to pursue some claims with or without the participation of the agency.

Administrative Court	A. Agency Enforcement[299]	B. Exclusive Agency Enforcement[300]	C. Private Complaints[301]	D. Agency Investigation[302]	E. Private Parties to Enforcement[303]	F. Private Right of Action[304]	G. Rules of Practice and Procedure
Department of Commerce—U.S. Coast Guard Office of Administration	X	X	X				15 C.F.R. Part 766
Department of Energy—Office of Hearings and Appeals	X	X	X	X	X	X	10 C.F.R. Part 1003
Department of Energy—Office of the Secretary	X	X	X	X	X	X	10 C.F.R. Part 708
Department of Health and Human Services—Departmental Appeals Board	X	X					21 C.F.R. Part 17
Department of Housing and Urban Development—Office of the Secretary	X	X	X	X			24 C.F.R. Part 26
Department of Justice—Office of the Chief Administrative Hearing Officer	X	X	X	X	X		28 C.F.R. Part 68
Department of Justice—Office of the Chief Immigration Judge	X	X					8 C.F.R. Part 1003, subpart C
Department of Labor—Administrative Review Board	X	X	X	X	X	X	29 C.F.R. Part 7
Department of Labor—Benefits Review Board	X		X	X	X	X	20 C.F.R. Part 802

Administrative Court	A. Agency Enforcement[299]	B. Exclusive Agency Enforcement[300]	C. Private Complaints[301]	D. Agency Investigation[302]	E. Private Parties to Enforcement[303]	F. Private Right of Action[304]	G. Rules of Practice and Procedure
Department of Labor—Board of Alien Labor Certification Appeals	X	X					20 C.F.R. Part 656
Department of Labor—Office of Administrative Law Judges	X	X	X	X	X	X	29 C.F.R. Part 18
Department of Treasury—Office of Administrative Law Judges	X	X					27 C.F.R. Part 71
Equal Employment Opportunity Commission—Office of Federal Operations	X		X	X	X	X	29 C.F.R. Part 1603
Environmental Protection Agency—Environmental Appeals Board	X	X	X	X	X	X	40 C.F.R. Part 22
Environmental Protection Agency—Office of Administrative Law Judges	X	X	X	X	X	X	40 C.F.R. Part 22
Federal Election Commission	X	X	X	X			11 C.F.R. Part 111
Federal Maritime Commission—Office of Administrative Law Judges	X		X	X	X	X	46 C.F.R. Part 502
Federal Mine Safety and Health Review Commission	X	X	X	X	X	X	29 C.F.R. Part 2700

Administrative Court	A. Agency Enforcement[299]	B. Exclusive Agency Enforcement[300]	C. Private Complaints[301]	D. Agency Investigation[302]	E. Private Parties to Enforcement[303]	F. Private Right of Action[304]	G. Rules of Practice and Procedure
Federal Mine Safety and Health Review Commission—Office of Administrative Law Judges	X	X	X	X	X	X	29 C.F.R. Part 2700
Federal Trade Commission	X	X	X	X	X		16 C.F.R. Part 3
Federal Trade Commission—Office of Administrative Law Judges	X	X	X	X	X		16 C.F.R. Part 3
National Labor Relations Board	X	X	X	X	X		29 C.F.R. Part 102
National Labor Relations Board—Division of Judges	X	X	X	X	X		29 C.F.R. Part 102
National Labor Relations Board—Regional Offices	X	X	X	X	X		29 C.F.R. Part 102
National Transportation Safety Board	X	X			X		49 C.F.R. Part 821
National Transportation Safety Board—Office of ALJs	X	X			X		49 C.F.R. Part 821
Occupational Safety and Health Review Commission	X	X			X		29 C.F.R. Part 2200
Occupational Safety and Health Review Commission—Office of the Chief	X	X			X		29 C.F.R. Part 2200

Administrative Court	A. Agency Enforcement[299]	B. Exclusive Agency Enforcement[300]	C. Private Complaints[301]	D. Agency Investigation[302]	E. Private Parties to Enforcement[303]	F. Private Right of Action[304]	G. Rules of Practice and Procedure
Surface Transportation Board	X		X	X	X	X	49 C.F.R. Parts 1111 & 1122
United States International Trade Commission	X		X	X	X	X	19 C.F.R. Part 210
United States International Trade Commission—Office of Administrative Law Judges	X		X	X	X	X	19 C.F.R. Part 210
Totals	34	28	25	22	25	15	