Towards Optimal Enforcement

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Enforcing federal law seems simple enough. Federal agencies, which exist for exactly this purpose, enforce by identifying violations of a particular federal statutory scheme and accompanying regulations. But complications quickly arise. How should agencies enforce—by initiating judicial proceedings, by enacting rules or guidance to better define statutory proscriptions, by adjudicating matters within agencies, or by combining some or all of these powers? What role, if any, should federal courts have in adjudicating enforcement disputes or reviewing agency enforcement? Should only federal agencies be able to enforce federal law, or should state agencies or private parties also do so? And under what conditions?

In *Private Enforcement in Administrative Courts*, Professor Michael Sant'Ambrogio meticulously catalogues various dynamic considerations for enforcement design—such as competition among political values, the effects of political and political-economic conditions, and constraints on financial and investigatory resources—to begin answering these questions.[1] Of the many insights in his article, perhaps his most significant contribution is demonstrating that the very basic categories of how scholars typically envision enforcement schemes are incomplete. Courts, scholars, or both have discussed public and private enforcement in judicial proceedings and public enforcement.[2] Yet with empirical data in hand, Sant'Ambrogio demonstrates that *private*

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1. *See* Michael Sant'Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 425 (2019).

2. *See id.* at 7–27.

enforcement in administrative proceedings is a robust form of enforcement that, despite or because of its undertheorized state, comes in numerous varieties.[3]

Sant'Ambrogio argues that a hybrid private/public enforcement model in agency proceedings may provide the best hope of striking the proper balance among various values, considerations, and constraints to achieve optimal enforcement.[4] In other words, a blunderbuss approach of choosing public enforcement or private enforcement (whether in judicial or agency proceedings) is unlikely to prove ideal. Nuance is necessary. He identifies various tools—such as agencies' role in the review or initiation of proceedings,[5] or the use of class-wide proceedings[6]—that Congress or agencies can use to calibrate agency enforcement to its optimal design.

In a similar vein, my purpose is to consider three additional tools that may optimize enforcement goals with hybrid public and private enforcement, whether inside or outside of administrative proceedings. Those tools are:

(1) statutorily-mandated primary jurisdiction,

(2) enforcement in either judicial or agency proceedings by state authorities, and

(3) limits on federal preemption of concurrent state-law private causes of action.

The first tool helps Congress balance the roles of agencies and courts. The latter two divide power between competing sovereigns in public and private enforcement. All three help provide Congress a more sophisticated toolbox when attempting to achieve optimal enforcement over a statutory scheme's lifetime. Importantly, during that lifetime, the weight of competing values may shift based on politics, economic realities, or changing cultural mores, and these tools allow some dynamism in the enforcement design.

Of course, numerous other tools deserve consideration. Yet, due to space constraints, I shall consider three that may be overlooked because, as with primary jurisdiction, they have fallen out of use[7] or because, as with the latter two tools, they concern federalism, an often-overlooked doctrine in discussions of federal administrative law.[8]

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3. *See id.* at 23–27.

4. *See id.* at 5.

5. *See id.* at 23–27.

6. *See id.* at 56.

7. Richard J. Pierce, Jr., *Primary Jurisdiction: Another Victim of Reality*, 69 ADMIN. L. REV. 431, 437 (2017) (noting that "[j]udicial invocations of primary jurisdiction have become rare").

8. *See* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2026 (2008) (noting that "[f]ederalism and federal administrative law are an unfamiliar couple, particularly in Supreme Court precedent," and arguing for courts to use administrative law to further federalism values).

I. DIFFICULTIES OF DESIGNING ENFORCEMENT

As Sant'Ambrogio discusses in detail, designing enforcement regimes requires accounting for numerous competing considerations. Both public and private enforcement alone are often inadequate. Public enforcement alone is often insufficient because of limited agency resources to investigate and litigate all matters.[9] Private enforcement alone can interfere with agencies' ability to create a uniform, coherent approach to enforcement.[10]Likewise, judicial and administrative adjudication alone can prove unsatisfactory. Regardless of whether an enforcement regime relies on agencies or private parties, adjudication in judicial proceedings may inspire more confidence than in administrative proceedings because of judges' perceived impartiality and judicial proceedings' perceived fairness.[11] That confidence, however, may come at the cost of an agency's adjudicatory subject-matter expertise.[12] A marriage of private and public enforcement inside and outside of agencies can, if properly balanced, have the benefit of mitigating an agency's lack of resources, provide additional information to the agency, and buttress the legitimacy of the enforcement regime.[13]

Nonetheless, value balancing can prove especially difficult because of empirical questions over a particular value's significance. For instance, as Sant'Ambrogio recognizes, little empirical evidence supports the intuition that expertise promotes efficiency and better decisionmaking.[14] If anything, the limited empirical evidence cuts against the intuition.[15] And, of course, politicians or administrators may simply prefer one value—such as efficiency or adjudicatory

9. *See* Sant'Ambrogio, *supra* note 1, at 2, 5, 9–10.

10. *See id.* at 14–15.

11. *See id.* at 32–33. As I have discussed elsewhere, many administrative adjudicators have fewer protections from agency influence than judges or federal administrative law judges ("ALJs"). Depending on the particular group of non-ALJ adjudicators, an agency may allow ex parte contacts, performance reviews and performance bonuses, and combined functions within the agency. *See generally* Kent Barnett & Russell Wheeler *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1 (2019) (providing survey data on the hiring and oversight of non-ALJs); Kent Barnett *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016) (arguing that ALJs, based on their indicia of impartiality as compared to non-ALJs, are preferable). Indeed, the characteristics that influence a non-ALJ adjudicator's actual or perceived impartiality are often difficult to ascertain. *See generally* Kent Barnett *Some Kind of Hearing Officer*, 94 WASH. L. REV. (forthcoming 2019) (proposing that agencies provide and post a one-page disclosure concerning the characteristics that concern their various adjudicators' impartiality).

12. *See id.* at 34–37.

13. *See id.* at 9–10.

14. *See id.* at 35.

15. *See* Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, 1 J. ANTITRUST ENFORCEMENT 82 (2013) (finding that the decisions of generalist federal trial judges fare better than those of FTC administrative law judges on appeal).

independence—over another and thus have different conceptions of optimal enforcement.

Relatedly, it is often difficult to know how administrative tools can foster or hinder a particular value over time. Consider the goal of permitting accountable agencies to create coherent enforcement policies. Agencies lose some control if courts, as opposed to agencies, entertain and decide enforcement actions. But agencies still have other ways of coordinating enforcement strategy. For example, they can promulgate policy statements to guide agency-enforcement discretion,[16] substantive regulations to specify the underlying statute's requirements that have the force of law,[17] and interpretive or notice-and-comment rules to clarify ambiguous statutory provisions (which may be entitled to *Chevron* deference even after a court has interpreted that provision differently[18]).[19] Nevertheless, the quantum of control that these tools provide is neither susceptible to mathematical exactness nor fixed in intensity over the course of a statutory scheme. In short, Congress must necessarily weigh various considerations without perfect information and within a dynamic ecosystem of administrative options.

Even when Congress appropriately weighs these values and understands the effect of administrative tools, statutory schemes are not self-enforcing. The efficacy of enforcement depends on ever-changing factors. If regulated industry has "captured" the enforcing agency, the enforcing agency is less likely to initiate investigations or adjudications, or to seek meaningful remedies for violations.[20] Agency political appointees may also have different value judgments than the enacting Congress, leading to over- or under-enforcement, as compared to the enacting legislature's intent.[21] Finally, aside from political appointees' policy views, the agency bureaucracy may simply prove ossified and unable to respond nimbly to new practices that cause harms that the statutory scheme seeks to avoid.[22]

II. TOOLS FOR OPTIMAL ENFORCEMENT

Sant'Ambrogio moves the discussion over how to achieve optimal enforcement forward by conceptualizing enforcement models in four key ways: public enforcement in either judicial or administrative

16. *See* Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1012–13 (9th Cir. 1987).
17. *See* Warder v. Shalala, 149 F.3d 73, 79–81 (1st Cir. 1998).
18. *See* Nat'l Cable & Telecomm. Ass'n v. Brand-X Internet Servs., 545 U.S. 967 (2005).
19. *See id*.
20. *See, e.g.*, Sant'Ambrogio, *supra* note 1, at 11, 39–40.
21. *See id.* at 11.
22. *See id*.

proceedings, and private enforcement in either judicial or administrative proceedings. His significant contribution is considering how enforcement in agency proceedings is often hybrid in nature—permitting or requiring both public and private participation. Coming in different varieties, hybrid enforcement may have the most promise in creating optimal enforcement regimes. He also notes how different forms of hybrid enforcement can affect underlying values. For instance, permitting private parties to file complaints only with the agency's blessing can permit an agency to prevent enforcement yet provide the agency more control.[23]

My purpose here is to consider how additional tools—some that directly relate to hybrid enforcement in administrative proceedings and some that do not—may prove useful in achieving optimal enforcement.

A. Primary Jurisdiction

The first tool is statutorily mandated primary jurisdiction. Primary jurisdiction, in its most usual form, is a discretionary doctrine similar to abstention, where courts can stay litigation to permit an agency to choose to decide an issue first.[24] Although the Supreme Court has stated that "[n]o fixed formula exists for applying [primary jurisdiction],"[25] courts typically consider the relevance of agency expertise[26] and the need for uniformity.[27] Despite primary jurisdiction's prominence as a judicially crafted doctrine, statutes can mandate its use by requiring private parties to present an enforcement action to the relevant agency before proceeding in court. One flavor of statutory primary jurisdiction already governs Title VII claims. Private parties must first present their claims to the Equal Employment Opportunity Commission ("EEOC"). They can file a civil action in court only if the EEOC does not act within 180 days, declines to file its own civil action, or fails to reach a settlement agreement with the implicated parties.[28]

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23. *See id.* at 23–25, 53.

24. 2 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 14.1, 1161–62 (5th ed. 2010).

25. United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956).

26. *See id*.

27. Far E. Conference v. United States, 342 U.S. 570, 574–75 (1952) (quoted in Nader v. Allegheny Airlines Inc., 426 U.S. 290, 304–05 (1976)).

28. 42 U.S.C. § 2000e-5(f)(1) (2018) ("If a charge filed with the [Equal Employment Opportunity] Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . ."); *see also* PIERCE, *supra* note 24, § 14.1, at 1166 (discussing

Much like administrative adjudication, primary jurisdiction can come in numerous varieties. It may, as with Title VII, give agencies the chance to assert their own judicial action or attempt to settle the matter voluntarily with the parties.[29] But it could, as is common, permit agencies to decide matters in administrative adjudication.[30] The ability to hear matters in administrative adjudication permits agencies to decide to what degree they would like to provide, or scale back, adjudicatory resources or procedures for in-house determination based on the agency's priorities, enforcement strategy, or caseload volatility.

Primary jurisdiction is an extremely promising tool for recognizing the benefits of both public and private enforcement. Its raison d'être is to recognize the importance of agency expertise, uniformity, and coherent regulatory policy.[31] Because primary jurisdiction does not ordinarily require the agency to litigate the matter,[32] it also recognizes limitations on agencies' resources or preferences for particular enforcement vehicles. Even if agencies decline to decide the matter, they are still able to obtain information from private parties that agencies may not otherwise have learned. Agencies can also decide whether to expend some of their litigation resources in participating in some manner in judicial proceedings. Private parties can obtain a forum regardless of agencies' decisions, and private parties and their lawyers can provide additional, private resources to aid public enforcement. These private-party actions can also curb the effects of regulatory capture by providing additional enforcing parties and judicial oversight. At the same time, by giving the agency the ability to decide the matter or encourage settlement outside of court, primary jurisdiction and other similar pre-suit requirements promote judicial efficiency and provide a mechanism for limiting the number of private suits.[33]

Title VII's provisions as a rare statutory mandate for congressional requirement for primary jurisdiction).

29. Even if finding reasonable cause to support a discrimination claim, the EEOC is not required to file a civil claim. *See* Brandon Wheeler, Note, *Amending Title VII to Safeguard the Viability of Retaliation Claims*, 98 MINN. L. REV. 775, 780 n.39 (2013) (citing Civil Action By the Commission, 29 C.F.R. § 1601.27 (2018)).

30. *See, e.g.*, S. Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs, 425 U.S. 800, 806 (1976) (per curiam) (referring question of representational status for collective bargaining to the National Labor Relations Board); Golden Hill Paugussett Tribe v. Wicker, 39 F.3d 51 (2d Cir. 1994) (referring question of group's status as a tribe to the Bureau of Indian Affairs).

31. *See* Pierce, *supra* note 7, at 436; *see also* Sant'Ambrogio, *supra* note 1, at 42–47 (describing value of having agency implement coherent enforcement policy).

32. *See* Owner-Operator Ind. Drivers Ass'n v. New Prime, 192 F.3d 778, 785–86 (8th Cir. 1999).

33. *Cf.* Hallstrom v. Tillamook Cty., 493 U.S. 20, 29 (1989) ("[T]he legislative history indicates an intent [with 60-day pre-suit notice obligations under the Resource Conservation and Recovery Act of 1976] to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits.").

Despite its promise, primary jurisdiction does have some potential drawbacks. First, it slows down private enforcement by requiring time for agency consideration.[34] Prominent scholar Richard Pierce attributes concern over litigatory lethargy as the reason for courts' increasing reluctance to use the doctrine.[35] Second, private-party enforcement can hamper agencies' enforcement strategies by permitting actions to proceed that agencies have determined may create unhelpful law or cause over-enforcement as to relatively minor matters.[36] Yet, good statutory design can mitigate, even if not fully cure, these concerns. Time limitations, as with Title VII claims, on agency review, for example, can help keep litigation moving.[37] To combat disruption to agencies' regulatory agendas, agencies can intervene in judicial proceedings to ensure that courts are aware of their views, especially their disfavor of particular cases or novel legal interpretations.[38] Indeed, agencies can also turn to notice-and-comment regulations that have the force of law and can even overcome certain judicial legal interpretations.[39]

B. State and Federal Enforcement

Aside from using primary jurisdiction to allocate responsibility horizontally between federal courts and agencies, Congress can also allocate authority vertically among sovereigns. By permitting state-led public enforcement in either state agency or judicial proceedings (concurrent with federal public enforcement), Congress can mitigate two concerns over federal agency enforcement. First, the presence of other actors to enforce federal statutory schemes reduces the risks or

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Similar pre-suit notice requirements are fairly common in federal litigation. *See, e.g.*, Toxic Substances Claims Act, 15 U.S.C. § 2619(b)(1)(A)-(B) (2018); Endangered Species Act, 16 U.S.C. § 1540(g)(2)(A)(ii)-(iii) (2018); Federal Torts Claims Act, 28 U.S.C. § 2675 (2018); False Claims Act, 31 U.S.C. § 3730(b)(2) (2018); Clean Water Act, 33 U.S.C. § 1365(b)(1)(A)-(B) (2018).

34. *See* Pierce, *supra* note 7, at 436 ("Invocation of the primary jurisdiction doctrine has one major disadvantage: it has the potential to delay resolution of the dispute before the court.").

35. *See id.* at 436–37.

36. *See, e.g.*, Diana R. H. Winters, *Restoring the Primary Jurisdiction Doctrine*, 78 OHIO ST. L.J. 541, 594–95 (2017) (concluding that discretionary "referrals" to the agency under the doctrine of primary jurisdiction potentially infringe on agencies' domain of determining their own procedures).

37. Although mandated primary jurisdiction that requires agency review before judicial consideration does delay a party's access to court, it does so in a way that does not clog judicial dockets because the agency proceedings must conclude before a party can file a judicial action.

38. Indeed, Pierce notes that "[c]ourts routinely ask agencies to submit amicus briefs in which the agencies apprise courts of their interpretations of agency-administered statutes, rules, and tariffs." *See* Pierce, *supra* note 8, at 437.

39. *See supra* notes 17–19 and accompanying text.

reality of regulatory capture.[40] Even if regulated entities have created incentives for federal regulatory actors to eschew enforcement actions, state actors are able to fill the void. Second, state enforcement supplements resource-challenged federal agencies.

As Sant'Ambrogio discusses, the use of *private* enforcement can present its own problems. Private enforcement can undermine an agency's uniform policy and lead to over-enforcement. Private parties may have very different incentives than regulators. They may have stronger pecuniary interests in litigating or have an oversized sense of the importance of the regulated entity's alleged transgression than agencies that see numerous cases.[41]

Other *public* actors, however, may provide a better antidote to concerns over regulatory capture and limited resources than private parties. State regulators, like their federal counterparts, are politically accountable and thus provide some necessary democratic legitimacy in defining how to go about protecting the "public interest."[42] Indeed, depending on the state, those state regulators may have even more political accountability than federal regulators if the head of the enforcing agency is elected.[43] State enforcers, also like their federal counterparts, have the opportunity to learn of numerous alleged violations in their jurisdictions and prioritize their efforts accordingly. To be sure, state regulators, like federal regulators, may also be subject to regulatory capture, especially given state agencies' comparative lack of media and other civic oversight.[44] But a regulated industry's ability to capture fifty state agencies is a more complicated enterprise, requiring significant coordination and resources, than capturing one federal agency or key federal legislators, such as congressional committee chairs.

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40. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 56–58 (2010).

41. *See* Sant'Ambrogio, *supra* note 1, at 13–14.

42. *Cf. id.* at 13 (noting that private enforcement lacks political accountability that is focused on the "public interest").

43. *See* Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1399–1401 (2008) (comparing the nature of "unbundled executives"—through state-wide or local elections—in the states). Berry and Gersen challenge the perceived wisdom that plural executives are less politically accountable than a unitary executive. They argue that political accountability suffers with plural executives whose duties overlap because the electorate may be confused as to which executive was responsible for a particular policy. But when the plural executives have clear, separate authority, the electorate is better able to hold that official accountable for his or her actions. Indeed, voting for a unitary executive is a much cruder affair in which the electorate has to weigh its satisfaction with numerous, unrelated policies. *Id.* at 1403–05.

44. *See* Miriam Seifter, *Further From the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 148 (2018).

The states' role need not interfere with the federal agencies' regulatory priorities to a significant degree. Take state enforcement of federal financial law under Title 12 of the U.S. Code as a comprehensive example. Except in emergencies, state officials must notify relevant federal regulators of their intent to file a civil action or administrative proceeding and provide them with the to-be-filed complaint.[45] The notice must specifically include "whether there may be a need to coordinate the prosecution of the proceeding so as not to interfere with any action, including any rulemaking, undertaken by [federal regulators]."[46] The Consumer Financial Protection Bureau ("CFPB") can elect to intervene, meaning that it may be "heard on all matters arising in the action," remove the matter to federal court, and appeal any order or judgment as any other party might.[47] Finally, the CFPB has specific rulemaking authority over state-and-federal coordination.[48]

In addition, Congress limited the kinds of permissible state enforcement under Title 12 to account for federal policymaking. First, it limited the regulated entities subject to state-enforcement authorities: in short, state attorneys general alone can assert claims against *national* banking entities, while state regulators (along with state attorneys general) can do so only against *state* entities.[49] Second, Congress distinguished the kinds of claims that the state authorities can bring. In short, state authorities can assert claims under Title 12 *and* CFPB regulations promulgated under it against state entities,[50] but state attorneys general can assert claims against national entities for only violations of CFPB regulations, not standalone statutory violations.[51] These distinctions give states less enforcement authority over national entities—those in which the federal agencies have the most interest—in two ways. It requires higher profile state actors (state attorneys general, as compared to other state regulators) to sue. By having attorneys general enforce, Congress has chosen other salient political actors who are less likely to suffer from the tunnel vision that can lead to agency over-enforcement and that may undermine federal priorities.[52] Congress, perhaps more importantly, has limited the attorneys general from pushing novel legal interpretations by prohibiting them from suing national banks directly under the statute. Instead, the attorneys general may only enforce certain federal

45. 12 U.S.C. § 5552(b)(1)(A)-(B) (2018).
46. *See id.* § 5552(b)(1)(C)(iii).
47. *Id.* § 5552(b)(2).
48. *See id.* § 5552(c).
49. *See id.* § 5552(a)(1).
50. *See id*.
51. *See id.*; *id.* § 5552(a)(2).
52. *See* Sant'Ambrogio, *supra* note 1, at 49.

regulations under the statute, thereby cabining the litigation discretion and rendering it more likely that state enforcement will not undermine federal objectives.[53]

C. State-Law Causes of Action

As part of allocation authority among sovereigns, Congress can create a framework for encouraging state experimentation for private enforcement. To be sure, Congress can include private rights of enforcement directly in the federal statutory schemes that it creates. Federal private causes of action can allay the risk of agency capture and supplement federal litigation resources.[54] But recall that private enforcement may lead to over-enforcement or disruption to a reticulated regulatory agenda.[55] A middle ground exists between an all-or-nothing approach that either creates or prohibits a federal cause of action. Congress can give states and agencies space to fashion bespoke state-law causes of action that further federal objectives.

A prime example arises in the consumer-protection context. The Federal Trade Commission Act allows the Federal Trade Commission to enforce the act's prohibition on unfair and deceptive trade practices.[56] It does not create a private right of action for consumers harmed by deceptive or unfair trade practices.[57] But every state provides consumers private rights of action, although the predicates for the actions and the associated remedies vary widely among the jurisdictions.[58] Many of these statutes instruct courts to interpret the statute consistently with the Federal Trade Commission Act, creating more regulatory cohesion between federal and state law.[59] Without providing a federal cause of action, Congress has taken some pressure off federal dockets and allowed states to have a more significant role in enforcing consumer protections.

When Congress fears that regulatory interests have captured a federal agency, simply leaving state causes of action as an option may prove insufficient. A captured federal agency could seek to limit

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53. *See id.* at 13 (noting that private parties may assert novel legal interpretations that are contrary to an agency's interpretations or agenda).

54. *See id.* at 9–11.

55. *See id.* at 14, 63.

56. 15 U.S.C. § 45(a)(1) (2018) ("[U]nfair or deceptive acts or practices in or affecting commerce[] are hereby declared unlawful.").

57. Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973).

58. *See, e.g.*, DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW §§ 6:2, 6:10 (2018 ed. 2018).

59. *See, e.g.*, GA. CODE § 10-1-391(b) (West 2010) ("It is the intent of the General Assembly that this part be interpreted and construed consistently with interpretations given by the Federal Trade Commission in the federal courts . . . ."); *accord* TEX. BUS. & COM. CODE § 17.46(c)(1).

concurrent state action by preempting state laws by broadly determining that state law is inconsistent or otherwise an obstacle to federal law. Indeed, the Office of the Comptroller of the Currency ("OCC") did just that in response to potent consumer-finance state laws in the early 2000s.[60] In the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, Congress limited the OCC's ability to preempt certain laws.[61] Congress permitted the OCC to preempt certain consumer-finance state laws on a case-by-case basis only after satisfying numerous detailed statutory requirements and less-deferential-than-usual judicial review.[62] It even required the OCC to review its preemption decisions every five years and to notify relevant congressional committees of its review.[63] In a similar context with the CFPB, Congress has gone so far as to permit federal preemption based on the inconsistency of state and federal law while clarifying that inconsistency does not arise merely because state laws provide greater consumer protections than federal law.[64]

These examples from consumer-protection law demonstrate how private enforcement under state law can prove useful in mitigating concerns over capture and limited federal resources. It can do so while giving agencies some room to preempt state law that is inconsistent or is an obstacle to the federal law's purpose,[65] even if Congress requires the agency to satisfy various procedural hurdles to permit more transparency and easier monitoring. State-law private enforcement, accordingly, is another tool that Congress can permit in varying degrees to create an optimal enforcement regime.

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Sant'Ambrogio makes a valuable contribution in demonstrating that public and private enforcement occur in more ways than often appreciated. He has very helpfully identified numerous considerations that affect enforcement regimes and the kinds of enforcement-regime designs that favor one consideration over others. By doing so, he has provided a foundation for thinking more deeply about enforcement and administrative-adjudication design.

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60. *See* Kent Barnett, *Codifying* Chevmore, 90 N.Y.U. L. REV. 1, 22–26 (2015).

61. *Id.* at 26–30.

62. 12 U.S.C. § 25b (2018).

63. *Id.* § 25b(d).

64. *See, e.g.*, 12 U.S.C § 5551(a)(2) (concerning federal preemption by CFPB); *see also* Barkow, *supra* note 40, at 54 ("If the concern is that a federal agency will be captured by one-sided industry interests at the expense of the general public, there is value in making federal regulations a floor and allowing states to enact laws that are even more protective of the public.").

65. *See* 12 U.S.C. § 25b(1)(B) (expressly adopting the obstacle-preemption standard of Barnett Bank of Marion Cty., N.A. v. Nelson, 517 U.S. 25 (1996)).

Through this brief essay that identifies three enforcement tools, I have sought to further Sant'Ambrogio's work and provide additional nuance into how private and public enforcement can take different shapes, depending on Congress's concerns. When Congress trusts the enforcing agency, Congress can, for example, permit the agency to have the first opportunity to address the infraction at issue through primary jurisdiction. On the flip side, when Congress has less trust in an agency or concerns over the resources that it seeks to invest in the agency's enforcement, Congress can permit the states to assist through either public or private enforcement to add other enforcing actors and enforcement resources.

My discussion here is but a beginning. I look forward to Sant'Ambrogio's and others' identification of additional tools to craft effective enforcement regimes. But until then, I am appreciative of Sant'Ambrogio's efforts to provide a theoretical framework for thinking more deeply about the nature of agencies and enforcement.