

# Adminization: Gatekeeping Consumer Contracts

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*Large companies and debt collectors frequently file unmeritorious claims against consumers. Recent high-profile actions brought by the Consumer Financial Protection Bureau against J.P. Morgan, Citibank, and other large debt collectors illustrate the breadth and importance of this phenomenon. Due to the limited financial power of individuals, consumers often do not defend against such baseless claims, which results in the entry of millions of default judgments every year. To combat this problem, policymakers and scholars have explored a variety of court-based solutions that would make it easier for consumers to defend in court, but these prove ineffectual.*

*To solve the problem of unmeritorious claiming, this Article proposes a budget-friendly solution called “Adminization.” This novel approach uses an administrative agency as a gatekeeper to civil litigation that is tasked with detecting and sanctioning the filing of baseless claims. The agency samples cases, using statistical methods and potentially deep-learning algorithms, and then investigates selected cases using agency auditors. When the auditors find wrongdoing, they are instructed to levy large fines against wrongdoers. Unlike the current system, Adminization subjects every plaintiff to the risk of thorough investigation and large fines, thus undercutting the financial incentive to engage in wrongful behavior. The importance of Adminization lies in its cost-effectiveness, practicality, and political feasibility relative to the court-based approaches that dominate the discussion today.*

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## INTRODUCTION

When Margaret Donnelly, an eighty-five-year-old widow suffering from a congestive heart disease, woke up that morning, she did not realize she was hours away from facing a warrant for her arrest.<sup>1</sup> But that was the message the county sheriff had for her. He explained to her that a lawsuit was filed against her for a debt of \$1,471 in the local court.<sup>2</sup> He also informed her that because she failed to appear in court, the judge entered a default judgment against her, which she now had to pay from her meager income. This news caught Ms. Donnelly by surprise—she never heard about the lawsuit.

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1. Beth Healy, *Dignity Faces a Steamroller*, BOS. GLOBE (July 31, 2006), <https://www.bostonglobe.com/metro/2006/07/31/dignity-faces-steamroller/SoK0TBVHzOzjLEpNqNrVYN/story.html> [<https://perma.cc/7MW9-AWX4>].

2. *Id.*

Admittedly, even if she had, there was little she could do, as hiring a lawyer would overextend her budget. This is despite the fact that the case had no merit whatsoever: the debt was paid in full many years ago and, in any event, no evidence was brought to support the claim.<sup>3</sup> Worryingly, the lawsuit was part of a pattern of abusive lawsuits filed by a local law firm that targeted over one hundred thousand consumers, a practice facilitated by the difficulty consumers like Ms. Donnelley face in accessing the courts and challenging these unmeritorious lawsuits.<sup>4</sup> A large body of evidence shows that millions of others in the courts also face “a silent, shameful crisis that inflicts suffering and costs the nation money, legitimacy, and decency.”<sup>5</sup>

Open doors, they say, may tempt the saints. Every year, about eight million debt claims are filed by large companies and debt buyers against consumers.<sup>6</sup> Of those, over six million lawsuits turn into default judgments, with little, if any, judicial oversight.<sup>7</sup> One in three consumers is estimated to be at risk of facing such a lawsuit.<sup>8</sup> As with Ms. Donnelly’s case, many of these debt claims lack merit and involve debts that are resolved, expired, inflated, and in some cases, outright fraudulent.<sup>9</sup> A recent study found, for example, that debt buyers knowingly purchase debts that are well beyond the statute of limitations, with at least twelve percent of the debt portfolio of large debt buyers consisting of stale debt.<sup>10</sup> In 2016, Citibank and two of its

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3. *Id.*

4. The case is known to have lacked merit because of its unusual circumstances: Ms. Donnelley decided to represent herself in court against this lawsuit. This required her to litigate the case for over a year and travel twice to the courthouse—not an easy task for a person in her circumstances—but finally the judge was convinced that the case lacked merit. *Id.* The same law firm that unsuccessfully sued her had successfully sued thousands of others “by demanding money they had no right to collect and on the basis of debts they could not prove.” See Press Release, Attorney Gen. Maura Healey, AG Healey Sues Major Debt Collection Law Firm Over Widespread Consumer Abuses (Dec. 23, 2015), <http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-12-23-debt-collection-lawsuit.html> [<https://perma.cc/23KS-R82L>].

5. Martha Minow, Opinion, *We Must Ensure Everyone Has Access to Equal Justice*, BOS. GLOBE (Oct. 23, 2014), <https://www.bostonglobe.com/opinion/2014/10/23/must-ensure-everyone-has-access-equal-justice/pZxzjHhR0G189o0IZTnhP/story.html> [<https://perma.cc/U79G-VK34>]. Dean Minow is the vice chair of the Legal Services Corporation (“LSC”), an independent nonprofit established by Congress to provide financial support for civil legal aid. See LEGAL SERVS. CORP., <https://www.lsc.gov/> (last visited Oct. 22, 2017) [<https://perma.cc/AS3N-BXJD>].

6. This estimate is based on data on the overall volume of civil litigation and estimates taken from different studies regarding the number of consumer debt cases on the docket. See *infra* note 42.

7. See *infra* notes 92–95 and accompanying text.

8. See *infra* note 42.

9. See *infra* Section I.A.

10. See FED. TRADE COMM’N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY T-12 (2013), <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf> [<https://perma.cc/S8YY-Z479>] [hereinafter FTC DEBT

affiliates were ordered to pay \$11 million and forego the collection of \$34 million in consumer debt for the filing of false affidavits which misstated both the size of the debt and its age.<sup>11</sup> J.P. Morgan Chase reached a \$136 million settlement for its role in selling debts that were legally uncollectable to debt buyers.<sup>12</sup> The Consumer Financial Protection Bureau (“CFPB”) also recently took action against a large debt buyer who was ordered to pay over \$2.5 million for its attempt to knowingly collect on “fraudulent debts, debts that consumers had paid or settled, and debts that were so old that they could no longer be legally collected.”<sup>13</sup> The regulator itself concluded that “[t]he system for resolving disputes about consumer debts is broken.”<sup>14</sup>

To solve the problem of such unmeritorious claiming, this Article proposes the “Adminization” of civil litigation. Adminization places a gatekeeper administrative agency between consumers and debt collectors, which is tasked with autonomously investigating and finding bad cases before they reach court. After filing and before litigation, a sample of cases will be audited by an administrative agency, and where fraud is found, large fines can be issued against the offender. Both economic analysis and psychology suggest that the mere prospect of detection can deter wrongful behavior, and much more so when it is coupled with severe fines.<sup>15</sup> Using samples, audits, and fines, Adminization will provide a fresh and cost-effective solution to consumer credit contracts litigation—the most common form of all civil litigation.

A few different institutional arrangements could support Adminization, such as federal agency review through one of the existing

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INDUSTRY REPORT) (reporting that 9.2 million cases, or 12.1 percent of the debts in portfolios purchased by six large debt buyers, involved debts that are six years and older).

11. See Citibank, N.A., CFPB No. 2016-CFPB-0004 (Feb. 22, 2016).

12. See Press Release, Consumer Fin. Prot. Bureau, CFPB, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents (July 8, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/> [<https://perma.cc/HL2U-EFHR>].

13. Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against Debt Collector for Pursuing Disputed and Unverified Cellphone Debts (Dec. 7, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-debt-collector-for-pursuing-disputed-and-unverified-cellphone-debts/> [<https://perma.cc/ER3N-N55G>]; see CFPB v. Collecto, Inc., No 1:15-cv-14024 (D. Mass. Dec. 8, 2015).

14. FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION, at i (2010), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf> [<https://perma.cc/FP8S-T2GD>] [hereinafter FTC PROTECTING CONSUMERS REPORT].

15. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968) (developing the foundations for the theory of optimal fines given limited enforcement resources).

consumer protection agencies (the Federal Trade Commission (“FTC”) or the CFPB); state attorney general offices and state level consumer agencies; or some combination thereof.<sup>16</sup> More important than the institutional locus is the process itself. In a nutshell, the agency would be notified of every incoming lawsuit.<sup>17</sup> Using its administrative powers, the agency will select claims to be audited by competent agency investigators; where wrongdoing and abuse are found, the agency will use its statutory powers to levy fines against wrongdoers.<sup>18</sup> To manage the millions of cases that are filed every year, the agency will select for audit only a small fraction of the cases, similar to the Internal Revenue Service (“IRS”).<sup>19</sup> The selection of cases will be random—to expose every creditor to a potential risk of detection—although the Article also explains how machine learning and algorithmic analysis could be used to improve the accuracy of the selection process by focusing the auditors’ attention on the cases that are *statistically* most likely to involve

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16. For the CFPB’s powers, see Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of title 12 of the United States Code), and in particular 12 U.S.C. § 5511 (2012) (authorizing the CFPB to “seek to implement and, where applicable, enforce Federal consumer financial law,” and assigning it the function of “collecting, investigating, and responding to consumer complaints.” The provisions codified at 12 U.S.C. §§ 5562–65 provide the agency with the requisite regulatory powers to “engage in investigations and request information from covered persons, issue subpoenas or civil investigative demands, conduct hearings and adjudication proceedings, and commence civil actions in federal court seeking any appropriate or equitable relief against any person that violates a federal consumer financial law.”). For the FTC’s powers, see the Fair Debt Collection Practices Act, 15 U.S.C. § 1692l (2012), which also provides federal protection from unlawful debt collection activity in *state* courts, as expounded in numerous cases. *See, e.g.*, *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013) (suing for state debt in a state court is an “unfair” debt collection practice); *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480 (D. Ala. 1987) (same); *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994) (filing a writ of garnishment can itself be unlawful); *Morgan v. Credit Adjustment Bd.*, 999 F. Supp. 803 (E.D. Va. 1998) (threatening to sue, without such an intention, is unlawful). It should be noted that at the time of writing, there is a growing uncertainty over the future of the CFPB and the Dodd-Frank Act, but nothing in what follows depends specifically on the CFPB itself. *See Excerpts from the Times’s Interview with Trump*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/19/us/politics/trump-interview-transcript.html?mcubz=3> [<https://perma.cc/A2W7-MZ24>] (reporting President Trump’s remark that “Dodd-Frank is going to be, you know, modified, and again, I want rules and regulations. But you don’t want to choke, right?”).

17. For a chart illustrating the process, see *infra* Section IIA. A similar system exists in employment discrimination cases, where plaintiffs (employees) file their claims first with an administrative agency. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(d) (2012); Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (2012); Americans with Disabilities Act of 1990, 42 U.S.C. § 12117(a) (2012).

18. *See* 12 U.S.C. § 5565 (outlining the CFPB’s statutory powers). On the magnitude of fines, see *infra* note 116. Between 2012 and 2016, the CFPB issued over \$5 billion in penalties. Doug Johnson, *Total CFPB Penalties Top \$5B*, INSIDEARM (Mar. 24, 2016, 8:18 AM), <https://www.insidearm.com/news/00041798-total-cfpb-penalties-top-5b/> [<https://perma.cc/CH6F-FWGP>].

19. The IRS audits only 0.8 percent of all individual filings. *See infra* note 112.

wrongdoing. Fraud detection analysis is used extensively and fruitfully by credit card companies to detect real-time fraud, and these techniques hold great promise for application to Adminization. Until such algorithms are proven in practice, however, Adminization can fully depend on random selection.

Adminization employs an administrative agency to gatekeep civil litigation, thus departing from traditional approaches focused on finding solutions within the court system. Ultimately, these approaches fail because the adversarial model requires information sourced and presented by the parties.<sup>20</sup> However, getting consumers to participate in the process is an elusive problem of immense proportions.<sup>21</sup> This Article criticizes the pretension of participation-based solutions to meaningfully solve the problems at hand by relying on a pure litigation model. To affect real change, participation-based solutions would require prohibitively costly reforms,<sup>22</sup> a dramatic expansion of the legal system, and the creation of impossible delays to all other civil matters.<sup>23</sup> To illustrate, recall that there are eight million cases filed every year, with about 6.4 million resulting in a default judgment.<sup>24</sup> Any change that would lead to the screening of even half of these 6.4 million cases would require state courts—which are already clogged—to handle an additional 3.2 million cases *every year*.

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20. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 117 (2003) (“[A]dversarial legalism often transforms the civil justice system into an engine of injustice . . . .”); *infra* Part I.

21. See, e.g., ACCESS TO JUSTICE INITIATIVE, U.S. DEP’T OF JUSTICE, *FOUR-YEAR ANNIVERSARY ACCOMPLISHMENTS* (2014) <https://www.justice.gov/sites/default/files/atj/legacy/2014/03/14/accomplishments.pdf> [<https://perma.cc/H49U-JXDK>] (“[T]he current deficiencies in . . . legal services for the poor and middle class constitute not just a problem, but a crisis. And this crisis appears as difficult and intransigent as any now before us.” (internal quotation marks omitted) (quoting Eric Holder, Attorney Gen., Remarks at the Shriver Center Awards Dinner (Oct. 14, 2010))); The Obama White House, *The White House Forum on Increasing Access to Justice*, YOUTUBE (Apr. 19, 2016), <https://www.youtube.com/watch?v=162foSVT2Uk> [<https://perma.cc/T5W9-HN5M>] (recording conference at the White House with leading politicians, jurists, and businesspeople, aimed to explore avenues of increasing access to justice, emphasizing the need for innovation); see also *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting) (choosing the contractual interpretation that would promote access to justice); Memorandum on Establishment of the White House Legal Aid Interagency Roundtable, 2015 DAILY COMP. PRES. DOC. 643 (Sept. 24, 2015) <https://obamawhitehouse.archives.gov/the-press-office/2015/09/24/presidential-memorandum-establishment-white-house-legal-aid-interagency> [<https://perma.cc/G3PR-S36Y>] (ordering the establishment of a large interagency work group designed to “enhance access to justice in our communities”).

22. Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 *LOY. L.A. L. REV.* 869, 869 (2009) (“[D]espite [the] efforts [of legal professionals], an estimated four-fifths of the individual legal needs of the poor, and a majority of the needs of middle-income Americans, remain unmet.”).

23. For a discussion and critique of participation-oriented solutions and their limitations, see *infra* Part III.

24. See *infra* note 42.

The Trump Administration is placing tremendous pressure on the legal aid project as a whole, as most clearly demonstrated by a recent budget proposal that seeks to eliminate funding to the Legal Services Corporation—the nonprofit organization tasked with supporting legal aid.<sup>25</sup> In contrast to the traditional legal aid model, Adminization avoids the need to subsidize consumer participation or to review millions of cases, thus presenting the most economically and politically appealing solution. The use of sampling techniques for case audits—techniques used extensively by agencies but almost never by courts—allows the managing of cases on a large scale with a limited budget. With the potential for large fines, Adminization will deter the initial filing of wrongful suits, thus reducing the volume of claims overall and offsetting its operational costs. Synergistically, the reduction in case volume will free up the courts to screen more closely the cases that do come before them, further bolstering the effectiveness of the process. The existence of long-standing federal agencies, such as the FTC, the cost-effectiveness of Adminization, and the direct control Congress can exert on the budget dedicated to Adminization (compared with court budgets, which are harder to control), promises a real potential for bipartisan appeal.<sup>26</sup>

This Article's contribution may be understood on four levels of abstraction. First, Adminization presents a normatively attractive and politically feasible solution to the pressing problem of unmeritorious claiming in the context of consumer litigation. Second, Adminization provides a model for reducing abusive claiming in other areas of civil litigation that suffer from systemic power asymmetries, such as housing, social benefits, elder law, and employee rights. Third, the Article explores a particularly promising implementation of artificial intelligence that is well within our current technological abilities: case selection. Machine learning algorithms have made significant strides over the last decade, with the latest among many previously unfathomable advances being the triumph of software in the intractable

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25. Charles Toutant, *Legal Services Worried That Trump Will Take Ax to Agency*, LAW.COM (Jan. 25, 2017), <http://www.law.com/sites/almstaff/2017/01/25/legal-services-worried-that-trump-will-take-ax-to-agency/?sreturn=20170109141618> [<https://perma.cc/34YH-TUR7>] (also available at <http://www.njlawjournal.com/id=1202777693184/Legal-Services-Worried-That-Trump-Will-Take-Ax-to-Agency?sreturn=20170814123738> [<https://perma.cc/XLA8-PKAW>]); Debra Cassens Weiss, *Trump Budget Eliminates Legal Services Corp. Funding*, A.B.A. J. (Mar. 16, 2017, 8:45 AM), [http://www.abajournal.com/news/article/trump\\_budget\\_eliminating\\_funding\\_for\\_legal\\_services\\_corp/](http://www.abajournal.com/news/article/trump_budget_eliminating_funding_for_legal_services_corp/) [<https://perma.cc/47QS-K537>].

26. Dave Boyer, *Consumer Financial Protection Bureau in Jeopardy Under Donald Trump*, WASH. TIMES (Nov. 29, 2016), <http://www.washingtontimes.com/news/2016/nov/29/consumer-financial-protection-bureau-in-jeopardy-u/> [<https://perma.cc/6C37-BCCF>].

game of Go.<sup>27</sup> Concurrently, there is a growing strain on judicial resources,<sup>28</sup> and full civil trials are becoming nearly extinct.<sup>29</sup> These two trends suggest the need, and promise, of utilizing algorithmic decisionmaking within the legal process.<sup>30</sup> Fourth, drawing on David Engstrom's recent Litigation Gatekeeper theory,<sup>31</sup> business and startup theory,<sup>32</sup> and institutional economics, Adminization creates a new model of regulation and demonstrates the important, yet unexplored, complementarities between courts and agencies. This is in contrast to a pervasive view, prominent in the writings of Jerry Mashaw for example,<sup>33</sup> that administration and civil litigation are somehow inconsistent with each other.<sup>34</sup> By looking past this illusory dichotomy,

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27. See *Artificial Intelligence: Google's AlphaGo Beats Go Master Lee Se-dol*, BBC (Mar. 12, 2016), <http://www.bbc.com/news/technology-35785875> [<https://perma.cc/AS5C-ZF3Z>] (describing a computer program's defeat of a master Go player). On recent applications of artificial intelligence to the law, see JUDICIAL APPLICATIONS OF ARTIFICIAL INTELLIGENCE (Giovanni Sartor & Luther Branting eds., 2013).

28. See I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 221 (2013) (comparing methods of distributing access to legal assistance); Matthew J.B. Lawrence, *Procedural Triage*, 84 FORDHAM L. REV. 79, 82 (2015) (considering a method of distributing access to hearings).

29. See *infra* note 92.

30. See RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* 128 (2016) (“[T]here is a new generation of machines in action now, and these are systems . . . that can replace parts of, and sometimes all of, certain kinds of professional work.”).

31. See David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013) (developing a theory of the functions agencies can play in husbanding litigation). Importantly, Engstrom's focus is not participation problems, but how agencies can address inefficiencies in private enforcement that would tend to result in *excessive* litigation. In an important sense, his perspective is plaintiff-centric and not, as in here, defendant-centric. Despite these differences, his view of the symbiotic relationships between agencies and courts in private litigation and his core typology provide a foundation for the proposal outlined here.

32. See ERIC RIES, *THE LEAN STARTUP: HOW TODAY'S ENTREPRENEURS USE CONTINUOUS INNOVATION TO CREATE RADICALLY SUCCESSFUL BUSINESSES* 4 (2011) (presenting a new “lean startup” approach to business). Recently, various government officials have started experimenting with methods inspired by the lean startup model. See Justine Brown, *Governments Take a Lean Startup Approach*, GOV'T TECH. (Aug. 23, 2012), <http://www.govtech.com/pcio/Governments-Take-a-Lean-Startup-Approach.html> [<https://perma.cc/PTD3-K33H>] (describing Ries's work with United States Chief Technology Officer Aneesh Chopra).

33. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 222 (1983) (concluding that societal ideals represented by courts and legislatures contradict bureaucratic rationality).

34. See, e.g., KAGAN, *supra* note 20, at 125 (arguing, critically, that the persistence of the adversarial system is due to a tradition of suspicion toward “any alternative that smacks of hierarchically organized bureaucratic legalism or expert judgment”). Furthermore, Lon Fuller argued that the morality of adjudication itself depends on procedural passiveness and on not considering any evidence not presented by the parties themselves. LON FULLER, *THE PROBLEMS OF JURISPRUDENCE* 706–07 (1949). This is inconsistent with the active role of agencies, as shall be elaborated. More recently, David Engstrom noted a tendency in recent scholarship to place “exclusively administrative regulation on the one hand and unbridled private enforcement on the other.” Engstrom, *supra* note 31, at 622.



it is possible to conceive of solutions that will better serve both our individualistic and democratic ideals of justice.<sup>35</sup>

The design of Adminization is calculated to avoid some of the major legal and economic hurdles that threaten alternative proposed solutions. By using already existing regulatory agencies to support the platforms, most legal and constitutional concerns are assuaged, as these agencies already investigate fraud and have enforcement powers. Admittedly, the audit process is costly, but the use of case selection minimizes the costs, and, perhaps even more significantly, the expected benefit of Adminization—detering the filing of unmeritorious claims—could completely offset those costs. That Adminization is budget friendly is especially important in light of the costs involved in the alternatives, which are almost prohibitively high. Regulatory capture is always a concern with agencies, but here, the concern is minimized because Adminization diversifies regulatory activity between the court and the agency. Diversifying our modes of regulation has the benefit of requiring lobbyists to spread their efforts thin, thus reducing the effectiveness of their investments. Finally, certain aspects of Adminization are designed to appeal to creditors, thus promising the possibility of building a large supporting coalition. Creditors, at least those with a long-term view of the market, would find value in a system that garners greater consumer confidence and legitimacy in the credit market, as such attitudes are linked to a higher propensity to borrow and repay debts. Compared to both the participation-based solutions and the status quo, Adminization prevails in terms of effectiveness, cost, and most importantly, justice.

The Article unfolds in four main parts. Part I describes the problem of abuse in consumer credit litigation. Part II lays out the Adminization framework, outlines its general principles, and applies it to consumer credit litigation. Part III explains why participation-based solutions are unlikely to solve the problem at hand. Part IV examines some of the main challenges to Adminization. The Article concludes by reflecting on the contribution of Adminization to civil litigation and considering some future applications.

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35. See Engstrom, *supra* note 31, at 622 (proposing that civil litigation and administration are not “either/or options, but rather the outer poles of a rich continuum”). For other leading examples of the view that litigation is the exclusive domain for private disputes, see ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 10 (1st rev. ed. 2012) (arguing that the harms individuals suffer must be resolved within private law institutions, and that deviating from that would be “fundamentally at odds with the nature of the entire [private law] enterprise”); and Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1078–82 (1984) (rejecting out-of-court settlement of disputes on the grounds that they fail to respect procedural rights).

## I. ABUSE AND FRAUD IN CONSUMER CREDIT CONTRACTS

Consumer credit contracts are the result of the ubiquitous and valuable agreements made between consumers and businesses that allow consumers to pay in the future for services or products tendered today, which typically involve credit cards, hospital bills, and utilities.<sup>36</sup> If a consumer fails to pay (“defaults”), creditors will often engage in some type of informal collection methods before they file a claim, consisting of dunning letters,<sup>37</sup> phone calls, and quite rarely, face-to-face collection attempts.<sup>38</sup> The main leverages used at this stage are credit reporting,<sup>39</sup> psychological pressure, and social and peer pressure.<sup>40</sup> While not all uncollected debts result in a lawsuit, many do.<sup>41</sup> In fact, most civil litigation consists of these lawsuits, with eight

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36. The most common sources of consumer debt are motor vehicle loans and credit card, student, and medical debts. *See, e.g.,* Marina Vornovytskyy et al., *Household Debt in the U.S.: 2000 to 2011*, U.S. CENSUS BUREAU 2–3 (2013), <https://www.census.gov/content/dam/Census/library/working-papers/2011/demo/debt-highlights-2011.pdf> [<https://perma.cc/3U99-27U3>] (reporting the composition of secured debt, which includes motor vehicle loans, and unsecured debt, which includes credit card, student, and medical debts). The average consumer owes mostly mortgage debt and then student loans, auto loans, and credit card debts. *See* FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 3 (May 2013), [https://www.newyorkfed.org/medialibrary/Interactives/householdcredit/data/pdf/DistrictReport\\_Q12013](https://www.newyorkfed.org/medialibrary/Interactives/householdcredit/data/pdf/DistrictReport_Q12013) [<https://perma.cc/YSG2-S89B>].

37. To dun is “[t]o demand payment from (a delinquent debtor).” *Dun*, BLACK’S LAW DICTIONARY (10th ed. 2014).

38. As early as 1968, it was observed: “Debt-collection involves the very minimum of face-to-face contact.” P.E. Rock, *Observations on Debt Collection*, 19 BRIT. J. SOC. 176, 178 (1968).

39. The cost of a bad credit score can be substantial. To give an example, a thirty-year-old consumer with a car loan of \$18,000, \$5,000 in credit card debt, and a \$400,000 mortgage will pay \$250,000 more in interest if she has the worst credit score relative to a consumer with the best credit score. *See* Kathy Kristof, *An Easy Way to Figure the Cost of Bad Credit*, CBS NEWS (Oct. 22, 2014, 5:20 AM), <http://www.cbsnews.com/news/new-tool-calculates-the-cost-of-bad-credit/> [<https://perma.cc/Y7JY-7TTY>].

40. The collection of debt is fraught with difficulty, because even when consumers have assets, they may choose to hide and shield them from collection. *See generally* Yonathan A. Arbel, *Shielding of Assets and Lending Contracts*, 48 INT’L REV. L. & ECON. 26 (2016) (surveying asset-shielding techniques and proposing a theory of consumer behavior). Creditors, on the other hand, often attempt to collect debt using abusive and potentially illegal techniques, as evidenced by the large volume of consumer complaints. *See Consumer Complaint Database*, CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/data-research/consumer-complaints/> (last visited Oct. 22, 2017) [<https://perma.cc/U9DJ-YTKJ>] (recording thousands of consumer complaints submitted weekly). There is some mixed evidence to suggest that the stigma associated with the inability to pay one’s debt is on the decline. *See* David B. Gross & Nicholas S. Souleles, *An Empirical Analysis of Personal Bankruptcy and Delinquency*, 15 REV. FIN. STUD. 319, 345 (2002) (finding evidence suggestive of a decline in stigma). *But see* Kartik Athreya, *Shame as It Ever Was: Stigma and Personal Bankruptcy*, FED. RES. BANK RICHMOND ECON. Q., Spring 2004, at 1, 3 (arguing that the decline in stigma is not supported by an expected rise in interest rates).

41. Payday lending is an industry that specializes in low-stakes, low-duration, high-risk loans to consumers without access to more formal credit. In this industry, where consumers are frequently underfunded and the stakes are low, about ten percent of the cases go to litigation. *See* Amanda E. Dawsey et al., *Non-Judicial Debt Collection and the Consumer’s Choice Among*

million filings a year, and one in three Americans facing a potential lawsuit.<sup>42</sup>

Consumer credit litigation is handled by an adversarial system that espouses the “sporting theory of justice,”<sup>43</sup> the idea that truthful information will emerge from the clash of self-interested participation by the parties. The adversarial system imagines a judge who “views the case from a peak of Olympian ignorance,” and “[t]he ignorance and

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*Repayment, Bankruptcy and Informal Bankruptcy*, 87 AM. BANKR. L.J. 1, 4 n.12 (2013) (finding that, in Virginia in 2008, only 11,717 of 104,832 uncollectable checks resulted in consumers being sued for nonpayment); see also Richard M. Hynes, *Broke but Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 21–24 (2008) (arguing that civil lawsuit filings have been stable despite an increase in borrowing); Robert A. Kagan, *The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts*, 18 LAW & SOC’Y REV. 323, 325–26 (1984) (showing a decline in debt collection litigation in various state supreme courts).

42. In 2010, about fifteen million lawsuits were filed in U.S. civil courts, with 1.8 million in small claims courts alone. See *Small Claims Fall Sharply in Last Two Years*, CT. STAT. PROJECT, <http://www.courtstatistics.org/Civil/2012W5CIVIL.aspx> (last visited Oct. 22, 2017) [<https://perma.cc/NG6X-N9TX>]. The most common claims were for consumer credit, accounting for forty to sixty percent of the docket. Hynes, *supra* note 41, at 49 (reporting rates of at least sixty percent in Virginia); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 273 (2011) (finding similar rates in Texas); Healy, *supra* note 1 (finding sixty percent); see also URBAN JUSTICE CTR., DEBT WEIGHT: THE CONSUMER CREDIT CRISIS IN NEW YORK CITY AND ITS IMPACT ON THE WORKING POOR 8 (2007), [https://cdp.urbanjustice.org/sites/default/files/CDP\\_Debt\\_Weight.pdf](https://cdp.urbanjustice.org/sites/default/files/CDP_Debt_Weight.pdf) [<https://perma.cc/25B4-CFBZ>] [hereinafter DEBT WEIGHT] (reporting that over fifty percent of total filings in New York City were for consumer credit transactions); *Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Credit Cases*, APPLESEED 1 (2010), <https://www.appleseednetwork.org/wp-content/uploads/2012/05/Due-Process-and-Consumer-Debt.pdf> [<https://perma.cc/G5YS-JVDJ>] [hereinafter *Due Process and Consumer Debt*] (“Hundreds of thousands of consumer credit cases are filed and adjudicated each year in the five boroughs of New York City alone . . .”). This rate amounts, in New York City alone, to at least 300,000 lawsuits annually. DEBT WEIGHT, *supra*, at 1 (reporting 320,000 cases annually in five New York City boroughs); Conor P. Duffy, *A Sum Uncertain: Preserving Due Process and Preventing Default Judgments in Consumer Debt Buyer Lawsuits in New York*, 40 FORDHAM URB. L.J. 1147, 1148 (2013) (finding a range of 100,000 to 300,000 lawsuits by debt buyers); Michael Virtanen, *New Rules Established for NY Debt Collection Cases*, WASH. TIMES (Sept. 16, 2014), <http://www.washingtontimes.com/news/2014/sep/16/new-rules-established-for-ny-debt-collection-cases/> [<https://perma.cc/9L2S-S857>] (estimating 160,000 annual lawsuits in New York City in 2013). For context, the total amount of consumer debt in 2015 was \$3.4 trillion, which suggests the overall economic significance of this field of law. *Federal Reserve Statistical Release: Consumer Credit July 2017*, FED. RES. 1 (Sept. 8, 2017), <http://www.federalreserve.gov/releases/g19/current/g19.pdf> [<https://perma.cc/GA89-NEYX>]. Additionally, one in three Americans has an account in collections and one in twenty has a credit obligation that is thirty days past due. See FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT, at i (May 2016), [https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC\\_2016Q1.pdf](https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2016Q1.pdf) [<https://perma.cc/JD7F-TCHC>] (reporting five percent of debts in delinquency, accounting for \$613 billion); Caroline Ratcliffe et al., *Delinquent Debt in America*, URB. INST. 4, 9 (July 30, 2014), <https://www.urban.org/sites/default/files/publication/22811/413191-delinquent-debt-in-america.pdf> [<https://perma.cc/WJR8-K9LJ>] (using data from Transunion).

43. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738 (1906).

unpreparedness of the judge are intended axioms of the system,”<sup>44</sup> because the parties are supposed to be the source of all information.<sup>45</sup> However, when consumers systematically underparticipate—as is the case with consumer credit litigation—this entire edifice crumbles, inviting fraud, abuse, and overall nonmeritorious claiming.

### *A. Abuse and Procedural Violations*

The general view among specialists and practitioners in the field of consumer credit litigation is that abuse is pervasive, with multiple pieces of evidence showing both procedural and substantive violations.<sup>46</sup> First, regulators consistently find banks and debt buyers filing abusive and nonmeritorious lawsuits on a mass scale, forging affidavits, inflating amounts owed, pursuing debt claims whose veracity they themselves have reason to doubt, and filing questionable lawsuits that have long passed the statute of limitations.<sup>47</sup> These regulatory findings often translate to fines in the tens of millions of dollars, and they reveal broad practices. For example, the FTC found that twelve percent of all the debts handled by large debt buyers lie beyond the statute of limitations, which often also implies that neither the debt buyer nor the consumer have a clear sense of whether the debt is real.<sup>48</sup>

Second, and highly revealing, is the number and nature of consumer complaints about debt collection practices.<sup>49</sup> Before debt

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44. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1042 (1975).

45. See, e.g., William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1874 (2002) (noting that in adversarial adjudication, equal participation is “important . . . because it is thought to contribute to accurate and acceptable dispute resolution”).

46. See Judith Fox, *Rush to Judgment: How the Fair Debt Collection Practices Act Fails to Protect Consumers in Judicial Debt Collection*, 13 FLA. ST. U. BUS. REV. 37, 37 (2014) (“The shoddy evidence commonly presented to Indiana courts . . . is at the very least deceptive, and is often abusive.”); Sam Glover, *Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans’ Due Process Rights?*, 35 WM. MITCHELL L. REV. 1115, 1117 (2009) (“Forty-one percent of the total default judgments . . . were filed by debt buyers who probably could not prevail on the merits in most, if not all, of those lawsuits.”); Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 741–45 (2006) (arguing that lower standards in small claims courts “offer collection lawyers a swift sword of judgment against debtors and give lawyers leeway to file cases that would not survive in general civil court”); Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 198–203 (2014) (reviewing the literature).

47. See *supra* notes 11–13 and accompanying text. Another recent example includes an action against two law firms that turned a large volume of unverified lawsuits into default judgments. See New Century Fin. Servs., Inc., CFPB No. 2016-CFPB-0010 (Apr. 25, 2016).

48. See FTC DEBT INDUSTRY REPORT, *supra* note 10, at iv–v, T-12 (finding that twelve percent of debts are over six years old and that most states imposed three- to six-year statutes of limitations).

49. Fred Williams, FIGHT BACK AGAINST UNFAIR DEBT COLLECTION PRACTICES 5 (Jeanne Glasser et. al eds., 2011) (“The number-one complaint is that collectors are demanding money that

claims become lawsuits they undergo a debt collection process, and consumers can file a complaint to the regulator if their debt is unfairly handled. In 2014, hundreds of thousands of complaints were filed with the FTC,<sup>50</sup> and an additional eighty-five thousand with the CFPB.<sup>51</sup> In terms of substance, the bulk of these complaints concern allegedly invalid or unverified debts, abusive communications, and illegal threats.<sup>52</sup> This conforms with the view of experts that the debt collection process is rife with abuse, fraud, and unfair practices,<sup>53</sup> and the results of a financial survey where thirty-seven percent of respondents reported being overcharged or deceived by a financial institution.<sup>54</sup> Worryingly, weak demographics, such as the elderly, are reported to be targeted specifically.<sup>55</sup>

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people do not even owe . . .”). *But see* Letter from Donald S. Clark, Sec’y, Fin. Trade Comm’n, to Richard Cordray, Dir., Consumer Fin. Prot. Bureau (Feb. 21, 2014), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-enforcement-fair-debt-collection-practices-act-report-consumer-financial/140305debtcollectionletter.pdf> [<https://perma.cc/CD95-6E35>] (reporting that in 2013, misrepresentation of debt is second most common to repeated calls by debt collectors).

50. The FTC reports 280,998 complaints in 2014. Press Release, Fed. Trade Comm’n, Identity Theft Tops FTC’s Consumer Complaint Categories Again in 2014 (Feb. 27, 2015), <https://www.ftc.gov/news-events/press-releases/2015/02/identity-theft-tops-ftcs-consumer-complaint-categories-again-2014> [<https://perma.cc/ZU7N-K8DS>]. There have been some doubts raised as to the accuracy of the FTC reports, because they are unverified and may include multiple complaints made by the same debtor. Michael Klozotsky, *The Facts Behind the Fantasies About Debt Collection Complaints*, FORBES (June 22, 2012, 11:26 AM), <http://www.forbes.com/sites/insidearm/2012/06/22/the-facts-behind-the-fantasies-about-debt-collection-complaints/print/> [<https://perma.cc/EJ3K-VBK5>].

51. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 26 (2015), [http://files.consumerfinance.gov/f/201506\\_cfpb\\_semi-annual-report-spring-2015.pdf](http://files.consumerfinance.gov/f/201506_cfpb_semi-annual-report-spring-2015.pdf) [<https://perma.cc/F42B-MDJS>]. The CFPB database lists 39,148 complaints in 2014 regarding debt collection. *Consumer Complaint Database*, *supra* note 40 (click “View complaint data” then filter the “Data received” to be between Jan. 1, 2014 and Dec. 31, 2014, and filter the product column to “Debt collection”).

52. *See* FED. TRADE COMM’N, CONSUMER SENTINEL NETWORK DATA BOOK FOR JANUARY–DECEMBER 2014, at 77 (2015), <https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2014/sentinel-cy2014-1.pdf> [<https://perma.cc/9U86-T9GW>].

53. *See* Goldberg, *supra* note 46, at 713 (“[C]orruption is running rampant in the collection industry and federal collection law is ill-equipped to stop it.”); Justin P. Nichols, *Dumping the Fair Debt Collection Practices Act*, 16 J. CONSUMER & COM. L. 26, 26 (2012) (noting the corruption in the debt collection industry); Note, *Improving Relief from Abusive Debt Collection Practices*, 127 HARV. L. REV. 1447, 1447 (2014) [hereinafter *Improving Relief*] (arguing that millions of Americans have been subject to predatory litigation techniques).

54. *Telephone Survey of Likely Voters*, AMS. FOR FIN. REFORM & CTR. FOR RESPONSIBLE LENDING 27 (2013), <http://www.responsiblelending.org/sites/default/files/uploads/2013-crl-afr-full-poll-results-toplines-july-12.pdf> [<https://perma.cc/Z5UE-5SQ3>].

55. *See* Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA Is Failing America’s Elderly Debtors*, 16 ELDER L.J. 135, 151–56 (2008) (detailing the targeted abuse of the elderly); *see also* Goldberg, *supra* note 46, at 736–39 (describing targeted debt collection based on sex, age, and income).

The third piece of evidence of the level of abuse comes, ironically, from the lack of evidence in a large fraction of all lawsuits.<sup>56</sup> One judge estimated that plaintiffs lack necessary evidence in ninety percent of the cases,<sup>57</sup> and another judge mused that many claims “lack a nano of a modicum of a scintilla of a prima facie case so as to be entitled to a judgment whether it be by default or otherwise.”<sup>58</sup> An empirical study found no evidence at all in forty-six percent of cases,<sup>59</sup> and a recent study showed that many debt buyers do not bother to acquire evidence in the first place, buying debts that they have never verified themselves.<sup>60</sup> When evidence is produced, its quality tends to be very poor. One study found a breakdown of the claimed debt to its principal, interest, and other charges in only five percent of the cases. Information regarding payment history and the date of default were likewise missing.<sup>61</sup> Moreover, much (arguably most) of the evidence that is brought is “facially invalid,” as a study of six hundred cases found.<sup>62</sup> This is congruent with the (potentially illegal) practice of “robo-signing,” namely the automated signing of mass volumes of documents without actual review, which many view as a major concern.<sup>63</sup> Of

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56. The lack of evidence is part of a broad industry practice of not producing evidence to support debts. See Duffy, *supra* note 42, at 1162 (“Portfolios often lack essential collection information . . .”).

57. See Holland, *supra* note 46, at 184 (citing Jessica Silver-Greenberg, *Problems Riddle Moves to Collect Credit Card Debt*, N.Y. TIMES: DEALBOOK (Aug. 12, 2012, 9:09 PM), <https://dealbook.nytimes.com/2012/08/12/problems-riddle-moves-to-collect-credit-card-debt/> [<https://perma.cc/LTX8-HX42>], which quotes Noach Dear, a civil court judge in Brooklyn). This should not be read as saying that ninety percent of cases are fraudulent, only that creditors do not find it cost-effective to produce evidence in light of the low rates of defendants’ appearances.

58. Am. Express Bank, FSB v. Dalbis, No. 300082/10, 2011 WL 873512, at \*12 (N.Y. Civ. Ct. Mar. 14, 2011) (internal quotation marks omitted).

59. Fox, *supra* note 46, at 45–46. Fox further notes that in the remaining cases, evidence was sometimes completely fabricated. *Id.* at 46.

60. CONSUMER FIN. PROT. BUREAU, STUDY OF THIRD-PARTY DEBT COLLECTION OPERATIONS 22 (2016), [http://files.consumerfinance.gov/f/documents/20160727\\_cfbp\\_Third\\_Party\\_Debt\\_Collection\\_Operations\\_Study.pdf](http://files.consumerfinance.gov/f/documents/20160727_cfbp_Third_Party_Debt_Collection_Operations_Study.pdf) [<https://perma.cc/3UWJ-VVG8>] (finding in a survey of debt buyers that evidence beyond that required to identify the debtor is often not acquired); see also Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 262 (2011) (discussing lack of evidence); Rachel Terp & Lauren Bowne, *Past Due: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now*, CONSUMERS UNION 4–5 (Jan. 2011), [http://consumersunion.org/pdf/Past\\_Due\\_Report\\_2011.pdf](http://consumersunion.org/pdf/Past_Due_Report_2011.pdf) [<https://perma.cc/C3CS-WMEF>] (same).

61. Spector, *supra* note 42, at 291. Even attorney fees were explicitly itemized in only thirty percent of the cases. *Id.* at 292.

62. DEBT WEIGHT, *supra* note 42, at 7, 9 (reporting that in “99.0% of the cases where default judgments were entered, the materials underlying those applications constituted inadmissible hearsay”). The main fault in most cases was affidavits signed by people with no personal knowledge of the underlying debt. *Id.* at 20.

63. See 1 ROBERT J. HOBBS ET AL., NAT’L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.5.2.13.4 (7th ed. 2011 & Supp. 2013) (noting that courts are split on whether robo-signing

course, absence of evidence is not evidence of absence.<sup>64</sup> After all, evidence is costly to produce, and so it may not pay to produce it if cases are not scrutinized.<sup>65</sup> Nonetheless, the reality is that a great deal of debt is owned by parties who did not take part in the original transaction and have no knowledge that the debt is real but at the same time have strong financial incentive to try to collect it. The lack of evidence is thus strongly suggestive of nonmeritorious lawsuits.

Finally, there is strong evidence of abuse in the process of notifying consumers of lawsuits. As a rule, plaintiffs are required to notify consumers of the lawsuit by serving them with a court summons.<sup>66</sup> Unfortunately, this rule engenders perverse incentives: if the consumer fails to attend the hearing, the plaintiff is almost assured to win the case. The result of this badly designed system of incentives is manifested in the phenomenon of “sewer service”: the practice among debt collectors of figuratively dumping the summons in the sewer while signing an affidavit that alleges actual service. While it is hard to gather evidence on the scope of this phenomenon,<sup>67</sup> the evidence that does exist points at a broad problem. For example, the New York Bar estimates that each year sewer service affects “tens of thousands” of New Yorkers,<sup>68</sup> and a New York judge said that, in his view, an

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violates the FDCPA); Matthew J. Petrozziello, Note, *Who Can Enforce? The Murky World of Robo-signed Mortgages*, 67 RUTGERS U. L. REV. 1061, 1082 (2015) (finding limited judicial acceptance of robo-signing as a serious violation of FDCPA); see also *Improving Relief*, *supra* note 53, at 1450 (“Robosigning represents a particularly significant threat to consumers . . .”); Press Release, Consumer Fin. Prot. Bureau, *supra* note 12 (reporting on banks allegedly involved in robo-signing).

64. However, lack of evidence may be *suggestive* of lack of merit and is obviously consistent with it. For similar reasoning, see, for example, DEBT WEIGHT, *supra* note 42, at 7 (“[T]he debt buyers’ consistent failure to provide relevant evidence in support of their claims suggests that they do not possess such evidence.”). But this conclusion is too strong; evidence is costly to produce and if most consumers do not contest cases, it is not worthwhile to produce it, even for cases with merit.

65. From an economic standpoint, evidence is only valuable instrumentally as measured by its ability to influence outcomes. Because evidence is costly to produce, when we require evidence from the parties, we face a trade-off between greater accuracy and greater costs. See Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 STAN. L. REV. 1303 (2015) (arguing that overall consequences of judicial decisions, not the pursuit of truth, should be the primary goal of the legal system).

66. FED. R. CIV. P. 4(c)(1) (“The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.”). Notice is an essential part of due process. See Administrative Procedure Act, 5 U.S.C. §§ 554, 556–557 (2012) (requiring notice to parties to an agency hearing of the time, place, and nature of the hearing; legal authority under which the hearing is held; and matters of fact and law asserted); *Goldberg v. Kelly*, 397 U.S. 254, 266–70 (1970) (holding that procedural due process requires adequate notice before terminating public welfare program).

67. Spector, *supra* note 42, at 287 (“Little information regarding non-service exists . . .”). Consumers may have an incentive to exaggerate claims of service failures.

68. N.Y.C. BAR ASS’N, OUT OF SERVICE: A CALL TO FIX THE BROKEN PROCESS SERVICE INDUSTRY 11–12 (2010), <http://www.nycbar.org/pdf/report/uploads/ProcessServiceReport4-10.pdf> [<https://perma.cc/76KJ-G3P4>] [hereinafter OUT OF SERVICE].

“astonishing” amount of default judgments are the result of faulty service.<sup>69</sup> Indeed, a recent class action alleging sewer service in New York recently settled for \$59 million.<sup>70</sup> More systematic studies found similar indications. In one study of 350 consumers, none were properly served.<sup>71</sup> Another found service in only twelve percent of the cases,<sup>72</sup> and a larger one found that faulty service was a cause for dismissal in about twenty-one percent of the cases studied.<sup>73</sup> This problem is hardly new; a report from 1968 made by the U.S. Attorney’s Office for the Southern District of New York claims that at least half of all default judgments entered in the Civil Court for the County of New York were supported by false affidavits of service.<sup>74</sup> Even when service takes place, it is poorly done. One study finds in a sample of ninety-one cases that almost no summonses were served in person. Instead, the vast majority of summonses were served either by “nail and mail” (i.e., affixing the summons to the defendant’s door) or by delivery to a different individual in the household.<sup>75</sup> These methods were designed as last resorts, but apparently some servers practice them frequently. This study showed that while two law firms did not serve any debtor in person, another—which presumably tried harder—successfully served eighteen percent of its sample cases personally.<sup>76</sup>

Taken together, this evidence suggests a serious problem. Skeptics, however, may worry that some of the evidence is only anecdotal, that some of the violations are only formal, and that some of the research is subject to methodological problems. Primarily, the absence of evidence, and even sewer service, is not definite proof that the underlying claim is unmeritorious. These concerns are not without merit individually, but a broader look may assuage them. The

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69. *Due Process and Consumer Debt*, *supra* note 42, at 12.

70. Benjamin Mueller, *Victims of Debt Collection Scheme in New York Win \$59 Million in Settlement*, N.Y. TIMES (Nov. 13, 2015), <https://www.nytimes.com/2015/11/14/nyregion/victims-of-debt-collection-scheme-in-new-york-win-59-million-in-settlement.html> [https://perma.cc/S8D4-QKV2]. The relevant class action is *Sykes v. Mel S. Harris & Associates LLC*, 780 F.3d 70 (2d Cir. 2015).

71. *Justice Disserved*, MFY LEGAL SERVS. 2 (2008), [http://mobilizationforjustice.org/wp-content/uploads/reports/Justice\\_Disserved.pdf](http://mobilizationforjustice.org/wp-content/uploads/reports/Justice_Disserved.pdf) [https://perma.cc/Q4C3-T4AN]. Another study found that four out of fifteen surveyed consumers were not served. Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357, 370 (1990).

72. Spector, *supra* note 42, at 287 (studying a sample of 507 cases).

73. Holland, *supra* note 46, at 210 (finding dismissal for lack of service in 925 out of 4,400 sampled cases).

74. Frank M. Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847, 849 (1972).

75. *Justice Disserved*, *supra* note 71, at 5.

76. *Id.* The study also indicates that creditors vary considerably in their service method, whether in person or by “nail and mail.” *Id.*



consistency of the evidence across studies, cases, and even anecdotes, coupled with the experience of industry insiders and regulators, all point toward the conclusion that fraud and abuse in consumer credit litigation is a serious problem. The absence of contrary studies is not strong evidence, but it is also relevant. And perhaps strongest of all, on simple theoretical grounds of moral hazard, we would expect the existence of financial incentives combined with weak consumer and judicial supervision to breed significant abuse. It is with this in mind that I now turn my attention to the role of consumers and judges in providing adequate monitoring of creditor behavior.

### *B. Justice, Inaccessible*

Consumers often find the courts inaccessible, resulting in low levels of response to claims, appearance in court, and legal representation. Even the most basic step of responding to lawsuits is rarely taken: consumers respond to only five to twenty-three percent of lawsuits<sup>77</sup> (compared to seventy-two percent in tort cases<sup>78</sup>). Similarly, consumers appear in only seven to twenty percent of cases.<sup>79</sup> Representation rates stand at a much lower rate of only two to 8.7 percent overall (but forty-three percent of cases where the defendant

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77. The defendant normally has three weeks to file an answer. *See* FED. R. CIV. P. 12(a)(1) (twenty-one days); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 757 (2002) (noting a common twenty-day period in Federal Maritime Commission administrative proceedings). This is viewed as an important right. *See* Nelson v. Adams USA, Inc., 529 U.S. 460, 466 (2000) (“[The] opportunity to respond, fundamental to due process, is the echo of the opportunity to respond to original pleadings secured by Rule 12.”). On answer rates, see Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355, 377 (2012) (3.6 percent); Holland, *supra* note 46, at 186 (less than twenty percent); Spector, *supra* note 42, at 288 (22.87 percent); *Due Process and Consumer Debt*, *supra* note 42, at 2 (0.8 to 7.2 percent). In arbitration, consumers answer in roughly seventy percent of the cases. *See* CAROL J. DEFRAANCES & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, CONTRACT CASES IN LARGE COUNTIES 6 (1995), <https://www.bjs.gov/content/pub/pdf/ccilc.pdf> [<https://perma.cc/LT4U-RYS2>].

78. STEVEN K. SMITH ET AL., U.S. DEP'T OF JUSTICE, TORT CASES IN LARGE COUNTIES 1 (1995), <https://www.bjs.gov/content/pub/pdf/TCILC.PDF> [<https://perma.cc/Z9TL-ZXZT>].

79. *See* Holland, *supra* note 46, at 208 (ten percent); Spector, *supra* note 42, at 288 (twenty percent); *see also* SUSAN SHIN & CLAUDIA WILNER, NEW ECON. PROJECT, THE DEBT COLLECTION RACKET IN NEW YORK: HOW THE INDUSTRY VIOLATES DUE PROCESS AND PERPETUATES ECONOMIC INEQUALITY 14 (2013), <http://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf> [<https://perma.cc/CBF4-KZZV>] (noting that eighteen percent of consumers sued in New York City appeared in court and only seven percent of consumers sued outside of New York City appeared in court); Sterling & Schrag, *supra* note 71, at 361 (finding twenty-two percent appearance rate). *But see* Mary Spector & Ann Baddour, *Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts*, 67 HASTINGS L.J. 1427, 1462 (2016) (finding in Texas courts appearance in fifty-two percent of the cases).

chose to appear).<sup>80</sup> For a sense of magnitude, in the state of New York alone, 1.8 million litigants proceeded pro se in 2014.<sup>81</sup> At the same time, creditors are almost always represented, an advantage that carries over to settlement agreements.<sup>82</sup> For example, Jeff Cook, an unemployed plumber, signed off \$651 out of his (legally protected and uncollectable) unemployment benefits due to ignorance of his legal rights and pressure from the creditor.<sup>83</sup> Moreover, pro se debtors also impose costs on the system, as the court has to deal with motions and requests which often deviate from the standard of filings common among lawyers.<sup>84</sup> Even the more informal small claims courts present access problems, as they relax traditional procedural safeguards, such as the rule prohibiting hearsay, while allowing the plaintiff legal representation.<sup>85</sup>

There are several complementary explanations for participation gaps: the lack of resources, sophistication, and legal knowledge;<sup>86</sup>

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80. DEBT WEIGHT, *supra* note 42, at 16 (two out of 600 cases); Holland, *supra* note 46, at 187 (less than two percent); Spector, *supra* note 42, at 289 (8.68 percent, but 43.14 percent of those who appeared).

81. PERMANENT COMM'N ON ACCESS TO JUSTICE, STATE OF N.Y. UNIFIED COURT SYS., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 3, 24 (2015), <http://nylawyer.nylj.com/adgifs/decisions15/122915report.pdf> [<https://perma.cc/JV5C-FVQQ>] [hereinafter N.Y. ACCESS TO JUSTICE REPORT].

82. See DEBT WEIGHT, *supra* note 42, at 16 (“[One hundred percent] of plaintiffs initiating consumer credit transaction cases reviewed in our study were represented by counsel . . .”); Duffy, *supra* note 42, at 1175 (noting that in New York courts, “100% of debt collector plaintiffs are represented by counsel”). On abuse in settlements, see Jessica Silver-Greenberg, *In Debt Collecting, Location Matters*, WALL ST. J. (July 18, 2011), <https://www.wsj.com/articles/SB10001424052702303365804576433763597389214> [<https://perma.cc/6FXR-295D>] (describing a debtor having an unsupervised meeting with the creditor’s attorney, leading to the debtor letting the creditor tap into his unemployment benefits); *Due Process and Consumer Debt*, *supra* note 42, at 18 (observing that “[p]laintiffs’ counsel may pressure unrepresented defendants into unfavorable settlements”). See also Fiss, *supra* note 35, at 1078–82, for a criticism of settlements in civil trials generally, partly on the ground of imbalance of powers between the parties.

83. See Silver-Greenberg, *supra* note 82.

84. See MASS. PROB. & FAMILY COURT DEP’T, PRO SE LITIGANTS: THE CHALLENGE OF THE FUTURE 12–16 (1997), <http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/prosefinalreport.pdf> [<https://perma.cc/BR7A-6K6M>] (discussing problems with pro se litigants).

85. See Holland, *supra* note 60, at 263. In most states, plaintiffs may be represented by a lawyer even in a small claims court, and while defendants may also be represented, this is infrequent. See NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, SMALL CLAIMS COURT REFORM 6 (1983), <https://www.ncjrs.gov/pdffiles1/Digitization/93351NCJRS.pdf> [<https://perma.cc/8LUV-BF9J>] (noting the power asymmetry between plaintiffs and pro se defendants in small claims courts).

86. See KAGAN, *supra* note 20, at 122–24 (analyzing asymmetries in knowledge, wealth, and sophistication); Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707, 711 (2008) (arguing that the current adversarial system exacerbates power imbalances between represented creditors and unrepresented debtors); David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEGAL ANALYSIS 305 (2014) (analyzing stake asymmetry and its distortive effects). See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9

problems with service;<sup>87</sup> psychological barriers and biases;<sup>88</sup> and power asymmetries. But beyond this, perhaps the deepest reason for consumer apathy to the legal process is that such apathy is often *rational*. That is, the costs of full participation often exceed the potential benefits. A first obstacle for most Americans is time. Appearing in court involves taking a day off work, which spells a potential loss of \$136 to the median American, assuming she can obtain her employer's permission. Besides this cost, individuals must pay for travel, preparation, and most significantly, representation. The average hourly cost of a consumer law attorney is \$361.<sup>89</sup> Even assuming one finds a cheaper attorney with a rate of, say, \$200 per hour, handling a standard case will often take four to eight hours, thus leading to a total cost of \$800–\$1,600 for an average case. This cost is very close to the value of the case itself—a typical case involves a debt of \$3,000 (\$820 in a small claims court).<sup>90</sup> And because lawyers do not guarantee a win, but must be paid in advance, their value to consumers is quite doubtful, especially when one takes into account risk aversion and liquidity constraints. Overall, then, participation is a very costly and doubtful endeavor for many. Proceeding *pro se* may save costs—and indeed, many consumers choose this option—but it is still an involved and stressful experience that presents consumers with many potential pitfalls.

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LAW & SOC'Y REV. 95 (1974) (arguing that litigation gives a systematic advantage to sophisticated players).

87. See *supra* notes 66–75 and accompanying text.

88. Sterling and Schrag tell of a case where a default judgment was entered despite the debtor being present in court: when her name was called, the debtor got too nervous and preferred to stay quiet. See Sterling & Schrag, *supra* note 71, at 369. One dominant psychological bias which may be of relevance here is the tendency to overly discount future outcomes. See David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443, 445–46 (1997).

89. RONALD L. BURDGE, UNITED STATES CONSUMER LAW ATTORNEY FEE SURVEY REPORT 2013–2014, at 11 (2015), <http://burdgelaw.com/NACA/US-Consumer-Law-Attorney-Fee-Survey-Report-2015.pdf> [<https://perma.cc/Z7UV-XRV7>]. The typical fee charged by an attorney “can range from \$500 to negotiate a simple credit card debt to more than \$5,000 for more complex negotiations.” Baran Bulkat, *How Much Will a Lawyer Charge to Negotiate with My Creditors?*, NOLO, <http://www.nolo.com/legal-encyclopedia/how-much-will-lawyer-charge-negotiate-with-my-creditors.html> (last visited Oct. 22, 2017) [<https://perma.cc/D85K-U44M>].

90. See Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 510 (1990) (\$820 in small claims, CPI adjusted); Holland, *supra* note 46, at 206 (\$2,993.17). The average value of debts in collection is \$1,387. Ctr. for Microeconomic Data, *Data Bank*, FED. RES. BANK N.Y., <https://www.newyorkfed.org/microeconomics/databank.html> (last visited Oct. 22, 2017) [<https://perma.cc/4UAB-YKYK>] (under the “Credit Cards” section, click on “Delinquencies,” then click on the first link, “Quarterly Report on Household Debt and Credit,” which will open an Excel spreadsheet, then go to page 18 of the spreadsheet).

### C. Lack of Judicial Oversight

In the current system, the main safeguard against the filing of abusive claims is judicial screening, but most cases are reduced to default judgments with little judicial oversight.<sup>91</sup> Civil trials are on the verge of extinction, with full trials taking place in less than two percent of cases,<sup>92</sup> and judges doubting the need for factual examinations in cases of consumer credit.<sup>93</sup> Even more rudimentary examinations are rare, and while the rates of default judgment vary considerably, it is common to find that eighty percent of cases result in default judgments.<sup>94</sup> If multiplied by all relevant cases, this implies that 6.4 million cases of consumer credit *every year* turn into default judgments with little judicial scrutiny.<sup>95</sup> The minority of cases that are heard do not follow any clear pattern, and it is unclear whether those are the most deserving ones or simply ones where the consumer had sufficient resources, grit, or conviction to appear. This leads to highly limited judicial oversight.

Three factors contribute to limited oversight: First, the adversarial nature of the process limits judges' investigative authority, thus exacerbating the informational problems resulting from consumer

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91. Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1015–16 (2010) (considering the role of accuracy and procedural participation rights under various theories of procedure).

92. On the “vanishing trial” phenomenon in civil litigation, see generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). See also John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 551–53 (2012) (noting the trend and claiming pretrial procedure has made trials obsolete). Since the publication of Galanter's work, the rate of civil trials has declined from 0.6 percent in state courts to around 0.27 percent. See Court Statistics Project, *Court Statistics Project Data Viewer*, NAT'L CTR. ST. CTS., [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro) (last visited Oct. 22, 2017) [<https://perma.cc/SYJ6-PFAU>]. In the consumer credit context, see SHIN & WILNER, *supra* note 79 (0 out of 200,000 cases); Fox, *supra* note 46, at 44 (0 out of 1,000 cases); Holland, *supra* note 46, at 213 (21 out of 2,947 cases); Spector, *supra* note 42, at 297 (1 out of 446 cases); *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers*, LEGAL AID SOC'Y ET AL. 8 (May 2010), <http://mobilizationforjustice.org/wp-content/uploads/reports/DEBT-DECEPTION.pdf> [<https://perma.cc/LY2Z-HRE4>] [hereinafter *Debt Deception*] (0 cases in a sample of 336 cases in New York courts). Taken together, this amounts to 22 out of 204,729 cases where a trial was conducted.

93. See FTC PROTECTING CONSUMERS REPORT, *supra* note 14, at 7 & n.18 (estimated default judgment rate of sixty to ninety-five percent); DEBT WEIGHT, *supra* note 42, at 9 (eighty percent default judgment rate); Spector & Baddour, *supra* note 79, at 1449 (31.6 percent default judgment rate in Texas). Most remaining cases are dismissed (commonly without prejudice), transferred, or settled.

94. See *supra* note 93.

95. See *supra* note 42.

inexperience, rational apathy, and psychological barriers.<sup>96</sup> Second, creditors are repeat players and can more effectively scale their experience and engage in forum shopping.<sup>97</sup> Third, the overload of civil courts' dockets makes it difficult for judges to spend sufficient time scrutinizing cases.<sup>98</sup> All of these structural issues contribute to a low level of judicial scrutiny.

On the outskirts of the judicial process are private settlements in the courthouse. Troublingly, these often produce *worse* results for consumers than they could expect under the law.<sup>99</sup> Plaintiffs' attorneys are reported to often play a negative role in such settlements, misinforming debtors of their rights and applying pressure.<sup>100</sup> Judges rarely scrutinize the resulting agreements and often rubberstamp them, turning them into enforceable agreements.<sup>101</sup>

Overall, the system of handling consumer debt is an incubator of abuse. Consumers are largely apathetic to the process and do not respond to lawsuits or show up to hearings. Creditors routinely bring nonmeritorious lawsuits that are neither verified nor supported by evidence, and judges do not try cases or provide judicial oversight of cases. The few cases that do receive scrutiny are haphazardly chosen with no rationale or logic. This provides companies and debt collectors with incentive to inflate their claims and bring bogus charges, and the evidence we have suggests that this happens on a large scale. The system affects millions of consumers and yet is deeply and inexcusably

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96. See Haneman, *supra* note 86, at 720–21 (exploring how the adversarial system harms unrepresented consumers); see also Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1183–87 (2005) (tracing the origins of the adversarial procedure in American law).

97. See, e.g., Glover, *supra* note 46, at 1125 (“In Hennepin County, 76% of the total filings were by original creditors or debt buyers who filed twenty-five or more lawsuits as of August 2008.”). On repeat players, see Galanter, *supra* note 86, at 97–104 (explaining that repeat players enjoy advantages in litigation and have a systematic advantage over one-shotters); Leslie G. Kosmin, *The Small Claims Court Dilemma*, 13 HOUS. L. REV. 934, 942–43 (1976) (explaining that, even in small claims courts, unsophisticated debtors face a disadvantage). *But see* Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685, 689–90 (2005) (proposing consolidation of defendants to increase the incentive to defend them).

98. See Suein Hwang, *Once-Ignored Consumer Debts Are Focus of Booming Industry*, WALL ST. J. (Oct. 25, 2004, 11:59 PM), <https://www.wsj.com/articles/SB109865776922954118> [<https://perma.cc/Z6W3-P6K>].

99. See *supra* note 42.

100. See Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 82 (1997) (reviewing attorneys' roles in improper negotiations with poor debtors).

101. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2019–20 (1999).

flawed. As the FTC recognized: “[N]either litigation nor arbitration currently provides adequate protection for consumers.”<sup>102</sup>

## II. ADMINIZATION

Adminization is a model of civil litigation that is designed to cost-effectively add oversight to the system. Section A lays out the main principles of Adminization, Section B explores its main features, and Section C applies it to consumer credit litigation.

### *A. Adminization: High-Level Outline*

Parallel to civil litigation, we have an administrative system that does not depend on user participation for its operation and acquisition of information. When the police, the IRS, the Securities and Exchange Commission (“SEC”), or the United States Department of Agriculture—to give but a few examples—engage in their regulatory activities, they do so on their own initiative, harnessing their expertise and investigative powers.<sup>103</sup> They do not wait for the regulated entities to “participate”; rather, they independently seek and gather relevant information. These agencies do not even need a complaint to start their process; it is the agency itself that chooses when to intervene. Because administrative agencies do not depend on participation to identify and screen bad cases, they offer great promise for a system that suffers from a participation problem.

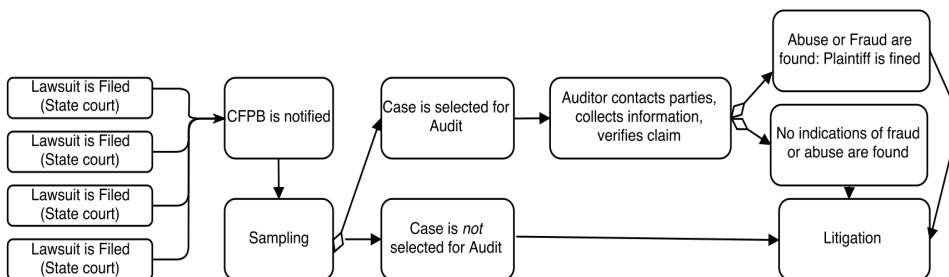
The core idea underlying Adminization is that by tapping into the powers of agencies, it will be possible to provide a threshold level of consumer protection that is *independent* of consumer participation. Adminization consists of a gatekeeper agency that uses its administrative powers—most notably sampling, audits, and fines—to investigate cases and sanction plaintiffs who file baseless claims. This, in a nutshell, protects consumers and reduces the volume of unwanted litigation. The following figure illustrates the operation of the agency in the context of consumer credit litigation, with each of the steps and features explained in detail later in this Part.

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102. Holland, *supra* note 46, at 188 (quoting FTC PROTECTING CONSUMERS REPORT, *supra* note 14).

103. See, e.g., *How Criminal Investigations Are Initiated*, INTERNAL REVENUE SERV., <https://www.irs.gov/uac/how-criminal-investigations-are-initiated> (last visited Oct. 22, 2017) [<https://perma.cc/5678-6SBN>] (explaining the process for initiating criminal investigations).

FIGURE 1: THE ADMINIZATION WORKFLOW



Before moving to cover the details, it is worth considering Adminization from a jurisprudential perspective. The idea of Adminization challenges the traditional view that posits a tension between the “individualized justice” of civil litigation and the generic and less equitable “bureaucratic management” by agencies.<sup>104</sup> Under this view, administration and litigation are understood as multidimensional polar opposites, each on the other side of *ex ante* vs. *ex post* regulation, proactive vs. reactive, rule-driven vs. standard-driven, specialized vs. generalist judgment, public vs. private enforcement, and government vs. individual disputes.<sup>105</sup> However, this emphasis on tensions hides much that is complementary between the two systems. Recently, David Engstrom developed a theory of agencies as litigation gatekeepers, which is focused on the productive coexistence of courts and agencies.<sup>106</sup> There are many instances of such peaceful

104. See MASHAW, *supra* note 33, at 222; see also JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS* 310 (7th ed. 2014).

105. Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, in *REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW* 11, 13 (Daniel P. Kessler ed., 2011); see also Steven Shavell, *A Fundamental Enforcement Cost Advantage of the Negligence Rule over Regulation*, 42 *J. LEGAL STUD.* 275, 275–76 (2013) (“Under regulation, compliance with standards tends to be assessed before, or independently of, the occurrence of harm . . . . Under the negligence rule, in contrast, compliance with standards is examined only on the condition that harm transpires . . . .”). Administrative law scholars do not generally focus on adjudicative processes. Michael Asimow, *Five Models of Administrative Adjudication*, 63 *AM. J. COMP. L.* 3, 5 (2015) (“[A]djudication is not the glamor area of contemporary administrative law . . . . Adjudication is administrative law at the retail rather than the wholesale level.”). When they do, they mostly focus on individuals protecting themselves from the wrongdoings of government agencies, legitimacy, judicial independence from agency heads, separation of powers, and congressional ability to implement policies. While Adminization touches on these issues, its focus is on the optimal design of institutions that promote due process, efficiency, and justice.

106. Engstrom, *supra* note 31, at 622 (“A systematic accounting of agency gatekeeping helps us to see [the choice between private enforcement and regulation] not as either/or options, but rather the outer poles of a rich continuum of institutional designs that tap agencies’ unique position and capacity to engage with and rationalize private litigation efforts.”). Notably, Engstrom is largely critical of “retail” (i.e., case-by-case) administrative processes. Additionally, he generally

cooperation, such as administrative adjudication (workers' compensation, social security, and asbestos claims tribunals<sup>107</sup>) and specialized courts (drug, mental health, and domestic violence courts). These examples are useful, especially in assuaging constitutional concerns, but it should be noted that they do not fully capture the goal of Adminization—to enhance civil litigation by augmenting it with agency functions.<sup>108</sup>

### *B. Main Features of Adminization*

Adminization involves three central features run by a central agency: audits and fines, sampling, and third-party communications.

#### 1. Audits and Fines

To overcome the participation gap in civil litigation, a core feature of Adminization is agency-run audits and fines. The agency takes claims and, by its own initiative, investigates the case, collects evidence, interviews witnesses, gathers documents, and locates relevant industry standards. An auditor reaches out to the parties, asks them about the case, asks for evidence such as receipts and credit card charges, and presents them with questions. The goal of the agency's investigations is to assess the validity and reasonableness of the claim, and the process is akin to that of audits run by other agencies. One close analogy is the Equal Employment Opportunity Commission ("EEOC"). When employees file charges of discrimination in the workplace, the EEOC is empowered to conduct investigations on behalf of the employee.<sup>109</sup> Like consumer credit litigation, these cases also involve

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abstracts from participation problems and grounds most of the critique on the assumption that the adversarial process itself is functional. *Id.* at 667, 685.

107. See JOSEPH W. LITTLE ET AL., WORKERS' COMPENSATION: CASES AND MATERIALS 544–45 (7th ed. 2014) (describing some of the benefits of Adminization of workers' claims); Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 CARDOZO L. REV. 1891, 1892 (1992) (arguing that the processing of asbestos claims should be rendered by an administrative agency rather than the tort system). There are also calls now to create administrative health courts. See Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1633–35 (2015). In the context of tort law, some have proposed a move to a no-fault system. See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 558–59 (1985). Finally, consumer arbitration may suggest yet another solution, an issue addressed separately *infra* Section III.D.

108. See, e.g., Arthur L. Shipe, *Private Litigation Before the Commodity Futures Trading Commission*, 33 ADMIN. L. REV. 153 (1981) (considering the constitutionality and desirability of administrative adjudication of private rights in "complex cases" such as futures trading). On the constitutional challenges, see *infra* Part IV.A.

109. 42 U.S.C. § 2000e-8(a) (2012); see also EEOC v. Shell Oil Co., 466 U.S. 54, 68–70 (1984) (discussing the limits of the EEOC's investigative powers).



private information. But the EEOC, through its broad investigatory powers, including the subpoena power, is still able to acquire considerable information. The EEOC handles close to one hundred thousand charges every year.<sup>110</sup> And while the EEOC audits cases on behalf of plaintiffs and not defendants, it shares the objective of increasing participation.<sup>111</sup> Similarly, the IRS conducts about 1.2 million audits annually,<sup>112</sup> the Department of Justice often takes over private qui tam lawsuits under the False Claims Act using its own investigatory powers,<sup>113</sup> and the CFPB has extensive experience in investigating consumer complaints.<sup>114</sup>

At first blush, it may seem wasteful to have the agency collect information that the parties naturally possess. On closer inspection, however, such an approach is highly attractive. First and foremost, we have already seen that consumers are not always able to use their information effectively, nor are they always aware of what information is most relevant to their case. An agent collecting information would be able to direct the parties to the most pertinent evidence. Especially for the weaker party, it is an entirely different experience to produce evidence for trial and to answer leading questions from an experienced investigator, who can ask the consumers questions such as “Do you have a bank statement from November, 2005, so that we can see if you indeed paid off your debt?” Secondly, the agency, being part of the government, can have access to information that may not be available to other parties, such as agency records—a treasure trove of information on past behavior and industry practices. Moreover, through its investigatory powers, the agency can access information that is in the hands of third parties. Overall, putting the agency at the front of the process, in charge of initiating actions and using its expertise to

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110. See Press Release, Equal Emp’t Opportunity Comm’n, EEOC Releases Fiscal Year 2015 Enforcement and Litigation Data (Nov. 2, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/2-11-16.cfm> [<https://perma.cc/9Y33-KMF8>] (reporting 92,000 claims in 2015).

111. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 3 (1996) (analyzing critically whether the EEOC mitigates participation problems).

112. INTERNAL REVENUE SERV., DATA BOOK 2015, at 9 (2016), <https://www.irs.gov/pub/irs-soi/15dataabk.pdf> [<https://perma.cc/KV9F-VYLV>] [hereinafter IRS DATA BOOK] (reporting about 147 million individual income tax returns and audits of 0.8 percent of those).

113. See Marc S. Raspant & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23, 38–40 (1998) (describing the government’s role in qui tam actions under the False Claims Act).

114. The CFPB recently proposed a program under which it would examine the practices of covered entities, which comprise approximately sixty percent of the market. See CONSUMER FIN. PROT. BUREAU, EXAMINATION PROCEDURES: DEBT COLLECTION 28, [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201210\\_cfpb\\_debt-collection-examination-procedures.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201210_cfpb_debt-collection-examination-procedures.pdf) (last updated Oct. 24, 2012) [<https://perma.cc/A726-VFB9>].

gather and analyze information, relieves critical pressure from the consumer.

A complementary feature of audits is the use of fines against baseless claims. Where a case is found to involve abuse or fraud, the agency will issue a fine. The goal is not to conduct a “mini-trial,” but rather to inspect the case for plausibility and signs of abuse or fraud—the use of false evidence, the processing of unverified debts, or the claiming of nonexistent charges, to give but a few examples.<sup>115</sup> The size of the fine may be influenced by various considerations, and economic theory provides a guidepost: the magnitude of fines should reflect, among other considerations, the probability of evading detection.<sup>116</sup> The agency should calibrate the level of fines according to the perceived accuracy and frequency of its audits. Like audits, the use of fines is commonplace among agencies, which use them as a means of sanctioning noncompliant behavior. Fines give “teeth” to the audit process and guarantee that fraudulent claims will be met with a sanction even in cases of underparticipation by the defendant. The fines are then paid to the public coffer and can be used for various social purposes (including financing the agency, although this may raise conflicts of interests).

Taken together, the use of audits and fines that are initiated by the agency would provide a bulwark against abuse for those cases where underparticipation is a problem. An outstanding issue is the costliness of such audits, as it will clearly be prohibitively costly to audit all incoming cases. We now move to consider another feature of Administration that accounts for this highly relevant concern.

## 2. Sampling, Artificial Intelligence, and Resource Management

Both the judicial process and audits are resource-intensive processes. Marginalist economic theory teaches that, given budgetary constraints, it is desirable to allocate resources such that they have the

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115. On the plausibility standard, see FED. R. CIV. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678–89 (2009) (“Only a complaint that states a plausible claim for relief survives a motion to dismiss.”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (setting a plausibility test for the filings of civil actions). See also Raymond H. Brescia & Edward J. Ohanian, *The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation Under the New Plausibility Standard*, 47 AKRON L. REV. 329, 334–51 (2014) (reviewing the evolution of the standard and its critique). On Rule 11, see FED. R. CIV. P. 11.

116. See Becker, *supra* note 15 (developing the foundations for the theory of optimal fines in law enforcement). There is rich literature that examines the constraints on the use of fines to supplement imperfect enforcement. The key reasons developed there—risk aversion and wealth constraints—apply only weakly in the context of consumer credit litigation. See generally A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 403, 405 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

greatest marginal productivity. This would often imply that different cases should receive varying amounts of attention.<sup>117</sup> However, civil litigation handles attention allocation relatively poorly. Judges are not free to dismiss cases simply because they want to devote more time to hear other cases which are more deserving of judicial attention.<sup>118</sup> A judge is expected to give some attention to all the cases that come before her, and lack of public interest is not a general reason for refusing to hear cases. In contrast, agencies frequently allocate and prioritize attention and resources based on priorities, with a clear example being the IRS, which chooses only about one percent of all cases for in-depth review.

Sampling is the process by which agencies choose the cases they would like to prioritize and examine. There are a few approaches to sampling, and the most straightforward and well-known one is random sampling. This is the approach used, partially, by the IRS and the TSA.<sup>119</sup> A random sampling implies that each case has an equal chance of being chosen for audit, thus imposing an equal risk of examination on all participants. This approach has many upsides, with simplicity being a main one. This approach also has a very clear drawback, in that meritorious cases have an equal chance of being chosen for audit, thus wasting resources. Another approach is to choose cases based on criteria that are suggestive of risk. For example, the police may monitor known sex offenders more closely than other citizens, and an insurance company may only investigate claims of high value. This has the drawback that if the criteria used to sample cases are known in advance, then the system may be gamed.<sup>120</sup> Moreover, prescreening the cases that would be sampled can itself be resource-intensive, thus reducing the benefit of using samples.

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117. There are many advantages to the focusing of attention and there are even potential economic gains from focusing enforcement efforts on arbitrary subgroups, like auditing more closely the tax returns of people whose last name begins with *A* than those whose last name begins with *B*. See Henrik Lando & Steven Shavell, *The Advantage of Focusing Law Enforcement Effort*, 24 INT'L REV. L. & ECON. 209, 209–10 (2004).

118. Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 70–81 (2009) (exploring the role of randomization in adjudication and defending the use of case randomization). The literature considers, to some extent, the role of managerial judges in managing resources. See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982).

119. The samples are not purely random, and profiling (racial and other) is common. See Robin Shepard Engel & Jennifer M. Calnon, *Examining the Influence of Drivers' Characteristics During Traffic Stops with Police: Results from a National Survey*, 21 JUST. Q. 49, 69–77 (2006) (finding strong evidence of racial profiling in traffic police stops).

120. See Lando & Shavell, *supra* note 117, at 215 (arguing that a known enforcement focus may increase crime if offenders can freely move to offend in unenforced areas).

A promising sampling approach that can be used fruitfully in Adminization is smart sampling—the use of Big Data and artificial intelligence (“AI”) to profile risky cases using complex models. To be clear at the outset, although I believe smart sampling to be highly feasible and relatively inexpensive to develop, nothing in Adminization depends directly on such sophisticated methods, and the system could work on the basis of random sampling until smart sampling algorithms prove workable. With this caveat in mind, smart sampling consists of using machine learning algorithms to identify cases that are statistically most likely to involve fraud based on the past resolution of similar cases. Poring over the vast history of past cases, AI software can identify those characteristics of a case that are most likely to correlate with its eventual dismissal. Each of these characteristics is assigned a risk weight. Based on a complex risk model, the software can decide the probability with which a given case will be sampled. Smart sampling can be done with great speed, at almost zero marginal cost, and potentially with great accuracy. Unlike traditional criteria-based sampling, smart sampling is not open to gaming by market participants. The complexity of AI algorithms—which, ironically, is a frequent criticism levied against them—presents a black box to those who would seek to game the system.<sup>121</sup> It is not surprising that the private market is replete with AI-assisted fraud detection algorithms.<sup>122</sup> In the same spirit, agencies are starting to realize the potential for machine learning for complaint handling. Today, the SEC is developing an automated system that flags cases for review. The system is based on an automated anomaly detection model that would flag submissions for human review on the basis of statistical deviations from the common filings.<sup>123</sup>

It may seem ambitious to develop a fraud-detecting software, given the great diversity of cases and the complexity involved. And while there is nothing simple about this task, it should be evaluated in light of AI’s proven capabilities, especially bearing in mind the recent

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121. See VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK* 178 (2014) (“The basis of an algorithm’s predictions may often be far too intricate for most people to understand.”); see also David Sussillo & Omri Barak, *Opening the Black Box: Low-Dimensional Dynamics in High-Dimensional Recurrent Neural Networks*, 25 *NEURAL COMPUTATION* 626, 627–29 (2013) (noting how a recurrent neural network is viewed as a black box in terms of its implementation of its target functions).

122. See, e.g., Clifton Phua et al., *A Comprehensive Survey of Data Mining-based Fraud Detection Research*, <https://arxiv.org/pdf/1009.6119.pdf> (last visited Dec. 19, 2017) [<https://perma.cc/E28Z-BWK2>].

123. The model is called the “Automatic Quality Model” and is based, at least in part, on a Jones Model: measuring the difference between a company’s discretionary accruals and those of peer companies in the industry. See Douglas M. Boyle et al., *Insights into the SEC’s Accounting Quality Model*, CPA J., May 2015, at 16, 18.

victory of AI over grandmaster Lee Sedol at the game of Go—a game so rich in possibilities that it was considered to be impossibly stacked against machines and in favor of human intuition.<sup>124</sup> The closest example of a working AI technology in fraud detection comes from the credit card industry.<sup>125</sup> Despite a daily volume of millions of transactions,<sup>126</sup> credit card companies effectively flag fraudulent transactions, alerting human investigators of potential fraud.<sup>127</sup> These algorithms run in real time and evaluate each transaction against a model of the specific consumer, placing alerts in the case of any significant deviation from model-predicted behavior. Sifting through the large dataset of past purchases, the consumer model is able to detect when purchases are made in unexpected locations, times, or amounts. Importantly, these algorithms, which run on an almost incomprehensible volume of data with little to no human intervention, manage to detect suspicious transactions with a relatively low level of either false negatives or false positives. Another telling example is that of spam filters. Until very recently, it seemed nearly impossible for a computer to overcome the problem of spam identification, as the range of richness of human communication is so vast. In 2002, for example, Slate ran an article that pessimistically stated, “It’s time to give up . . . spam has won. Spam is killing e-mail.”<sup>128</sup> Pew predicted in 2002—based on a large consensus—a rate of spam growth that would imply today hundreds if not thousands of spam messages every day.<sup>129</sup> Yet email

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124. See Adrian Cho, “Huge leap forward”: Computer That Mimics Human Brain Beats Professional at Game of Go, SCI. (Jan. 27, 2016, 1:00 PM), <http://www.sciencemag.org/news/2016/01/huge-leap-forward-computer-mimics-human-brain-beats-professional-game-go> [<https://perma.cc/N3M6-K2EU>] (“[F]or many years people have tried to sell the notion of Go as a game in which computers can never beat humans.”); Cade Metz, *Google’s AI Takes Historic Match Against Go Champ with Third Straight Win*, WIRED (Mar. 12, 2016, 3:21 AM), <https://www.wired.com/2016/03/third-straight-win-googles-ai-claims-victory-historic-match-go-champ/> [<https://perma.cc/9EQQ-KXKU>].

125. See generally Richard J. Bolton & David J. Hand, *Statistical Fraud Detection: A Review*, 17 STAT. SCI. 235 (2002).

126. See VISA, ANNUAL REPORT 2013 (2013), [https://s1.q4cdn.com/050606653/files/doc\\_downloads/annual%20meeting/Visa%20Annual%20Report%202013%20final%20website.pdf](https://s1.q4cdn.com/050606653/files/doc_downloads/annual%20meeting/Visa%20Annual%20Report%202013%20final%20website.pdf) [<https://perma.cc/SC7Q-3BXY>] (reporting a daily volume of 160 million transactions).

127. Some of the methods include genetic algorithms, Bayesian classifiers, a hidden Markov model, and, more recently, neural networks. See generally Krishna Kumar Tripathi & Mahesh A. Pavaskar, *Survey on Credit Card Fraud Detection Methods*, 2 INT’L J. EMERGING TECH. & ADVANCED ENGINEERING 721 (2012).

128. Kevin Werbach, *Death by Spam*, SLATE (Nov. 18, 2002, 10:35 AM), [http://www.slate.com/articles/technology/webhead/2002/11/death\\_by\\_spam.html](http://www.slate.com/articles/technology/webhead/2002/11/death_by_spam.html) [<https://perma.cc/D38A-54LZ>].

129. Deborah Fallows, *Email at Work: Few Feel Overwhelmed and Most Are Pleased with the Way Email Helps Them Do Their Jobs*, PEW RES. CTR. 5 (Dec. 8, 2002), <http://www.pewinternet.org/2002/12/08/email-at-work/> [<https://perma.cc/K62R-HTGP>] (citing sources predicting a doubling of spam load every six months and a rate of growth from 2001 to 2006 of approximately six hundred percent).

survived. Google reports that its email service, Gmail, filters ninety-nine percent of all spam while only having a one percent rate of false positives.<sup>130</sup> Stated differently, Google reports that less than 0.1 percent of email in the average inbox is spam while less than 0.05 percent of wanted messages are in the spam folder.<sup>131</sup>

Another example illustrates the power of statistical fraud-detection algorithms. Benford's law is a decision rule that meets a seemingly impossible challenge: How can one detect fraud in accounting books without actually analyzing them? The astronomer Simon Newcomb postulated in 1881—and later the physicist Frank Benford proved—that one could identify potential fraud by simply looking at the numbers reported in these ledgers, and more specifically, at the digits themselves.<sup>132</sup> If we count the frequency with which each digit appears in financial accounts, a pattern emerges with surprising regularity. In thirty percent of cases, the first digit of any number is one, but there is only a 4.5 percent chance of it being a nine. For a variety of reasons, naturally occurring numbers have greater likelihood of starting with certain digits than others. Knowing this rule, we can count all the digits that appear in a given account book. If much more than 4.5 percent of the numbers start with nine, or much less than thirty percent of the numbers start with one, then we have good reason to suspect that the book was tampered with.<sup>133</sup> Cooking the books will often leave a footprint in the form of unnatural distribution of digits, and simply counting the frequency of digits—without any real understanding of the business—will indicate cases with suspected wrongdoing. Rules like Benford's law were developed by humans. Software would probably use much more nuanced and sophisticated rules, taking account of every facet of the case—from the identity of the parties through the amounts indicated, and perhaps even seemingly irrelevant features like the font used or the time of filing. However, the core ideas remain the same.

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130. Cade Metz, *Google Says Its AI Catches 99.9 Percent of Gmail Spam*, WIRED (July 9, 2015, 2:00 PM), <http://www.wired.com/2015/07/google-says-ai-catches-99-9-percent-gmail-spam/> [<https://perma.cc/QD4U-3DU5>].

131. Emil Protalinski, *Google Now Uses an Artificial Neural Network to Fight Spam, Debuts Gmail Postmaster Tools to Cut False Positives*, VENTUREBEAT (July 9, 2015, 11:35 AM), <https://venturebeat.com/2015/07/09/google-launches-gmail-postmaster-tools-to-help-companies-ensure-their-emails-arent-marked-as-spam/> [<https://perma.cc/LUJ3-7UYE>].

132. See Simon Newcomb, *Note on the Frequency and Use of the Different Digits in Natural Numbers*, 4 AM. J. MATHEMATICS 39 (1881); Frank Benford, *The Law of Anomalous Numbers*, 78 PROC. AM. PHILOS. SOC'Y 551 (1938).

133. Cindy Durtschi et al., *The Effective Use of Benford's Law to Assist in Detecting Fraud in Accounting Data*, 5 J. FORENSIC ACCT. 17, 18–19 (2004).

To develop such sophisticated rules, we would need a large body of training data.<sup>134</sup> Ideally, the data will be “labeled,” i.e., each case will be identified as either being with merit or without merit. Without such data, machine learning cannot produce accurate predictions. Luckily, this type of “big data” is readily available.<sup>135</sup> As Andrew Crespo recently noted, a by-product of the judicial process is a large body of unutilized “systemic facts,” which are records of cases, claims, and resolutions.<sup>136</sup> These present an almost perfect type of training data—the software can scan the filings and all relevant facts of the case and then see how it was decided. Of course, some of the data will have to be filtered, as many cases are decided not on the merits. Yet, there is such a wealth of data on all the millions of claims that are filed every year that even after filtering, there will be a very large body of data. Moreover, Adminization constantly produces new data. As part of the process, cases are chosen for audit and are then subject to review—an information producing process. Importantly, not only flagged cases will be chosen, but also a few nonflagged cases. The results of the audit will then be fed into the machine learning algorithm. If a flagged case is proved to involve fraud, this will reinforce the rules used by the software. If there was no fraud in a flagged case, this will prompt the software to modify its decision rules—and the converse applies to nonflagged cases. Over time, the system will self-modify based on the results of the audit process, thus promising continuous improvement and adaptation to changing circumstances.

### 3. Third-Party Communications

As previously discussed, the expectation that plaintiffs, who stand to gain from consumer underparticipation, will effectively serve

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134. A general view among computer scientists is that having a large dataset is at least as important as good machine learning models to the development of effective algorithms. Google’s Research Director, Peter Norvig, famously stated on Google’s success in this area: “We don’t have better algorithms. We just have more data.” See Xavier Amatriain, *Mining Large Streams of User Data for Personalized Recommendations*, ACM SIGKDD EXPLORATIONS, Dec. 2012, at 37, 43 (quoting Norvig in discussion on power of data); see also Pedro Domingos, *A Few Useful Things to Know About Machine Learning*, 55 COMM. ACM, Oct. 2012, at 78 (explaining that simple algorithms with large amounts of data are superior to sophisticated algorithms with modest amounts of data).

135. On big data and the law, see Daniel Martin Katz, *Quantitative Legal Prediction—Or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L.J. 909, 913–22 (2013).

136. Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2065–66 (2016). Crespo’s argument is couched in the context of the criminal law system; however, the spirit of his argument applies to civil litigation.

consumers with court documents is highly unrealistic and will result in many instances of sewer service.<sup>137</sup>

Under Adminization, the agency serves process, as well as all other communications, thereby informing defendants of their rights. This simple design feature will directly solve this structural problem, which is wholly an artifact of a design that is incompatible with private incentives. Indeed, pilot programs with third-party service by the court were successful, which suggests even greater potential effectiveness if done at scale by an agency.<sup>138</sup> And while it may be possible to adapt courts to provide services, agencies are naturally better designed to provide such “outgoing” services, which involve reaching out to individuals, locating them, and handling the necessary administrative aspects. It will also allow courts to develop a more independent approach to evaluating the quality of service if they are not implicated in the process. In terms of finance, the service may still be funded as it is today—by the plaintiff through fees. Moreover, taking advantage of its disinterested role, the agency can also provide defendants with educational materials to inform them of their rights, a function agencies rarely perform today.<sup>139</sup> With its communications, the agency could provide informative, plain-language explanations of defendants’ rights and duties, using simple illustrations, flowcharts, frequently asked questions, and visual guides. In contrast, entrusting plaintiffs with this task would again engender a moral hazard problem.

### *C. Adminization of Consumer Credit Litigation*

The application of Adminization to consumer credit litigation starts with the agency. The administrative overlay in the context of consumer credit can be the CFPB, with its broad regulatory powers under the Dodd-Frank Act.<sup>140</sup> Indeed, it is possible to implement Adminization using state or even local agencies; nothing here depends critically on the use of federal agencies. Yet the advantages of scale, as well as the broad existing powers of the CFPB, are very appealing, and

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137. See *supra* Section I.A.

138. N.Y. COMP. CODES R. & REGS. tit. 22, § 208.6(h) (2017); OUT OF SERVICE, *supra* note 68, at 11–12 (showing that sending court summons in addition to plaintiff summons resulted in an increase in consumer participation, and that consumers often reported receiving only the court’s summons).

139. See *Thomas v. Law Firm of Simpson & Cybak*, 354 F.3d 696, 699 (7th Cir. 2004) (“Nothing in the FDCPA suggests that Congress intended creditors’ unilateral actions to obligate debt collectors to inform debtors of their rights . . .”), *vacated*, 358 F.3d 446 (7th Cir. 2004), and *opinion substituted*, 392 F.3d 914 (7th Cir. 2004). Consumer education is at least partially a problem with lack of incentive to learn. Since Adminization makes it easier to contest claims, learning information becomes more attractive.

140. See *infra* Section IV.A.



so I will focus on this agency. The CFPB's powers include the power to investigate claims related to debt collection, the power to summon witnesses, and the ability to issue fines.<sup>141</sup> The existence of the CFPB's platform, its broad legislative powers, and its subject-matter expertise, promise a smooth implementation at a relatively low marginal cost.

The process starts by filing a claim with the agency. A claim could be initiated by the original creditor, or if the state permits, a debt buyer. The claimant would be required to furnish rudimentary information regarding the claim: the identity of the debtor and her last known address, an estimate of the breakdown of the debt to its principal and other fees, the origin of the claim, and the name of the original creditor. The standard by which the quality of information is judged is whether it provides a sufficient basis for a reasonable but unsophisticated consumer to decide if the debt is real and accurate.<sup>142</sup> The claimant would acknowledge, on pain of financial sanctions, that it holds supporting evidence, although the current rules requiring an affidavit may be relaxed.<sup>143</sup>

The agency will check the claim via an automatic machine learning system that would screen and flag cases. The algorithms will check, for example, whether the debt is time barred, whether the interest rate exceeds statutorily allowed levels, and whether another identical claim against the same debtor was filed by a different creditor. If violations of bright line rules are identified, the claim will be automatically rejected without prejudice and a notice will be sent to the creditor, explaining the flaw. This will be beneficial to consumers in that it will filter out empty claims that are currently filed against them; specifically, this will solve the problem of "zombie debts," which are

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141. See *infra* Section IV.A.

142. A similar requirement exists under German law. See Sigmund A. Cohn, *A Streamlined Debt Collection Procedure in the Federal Republic of Germany*, 2 B.C. INT'L & COMP. L. REV. 69, 71–79 (1978); European Consumer Ctr. Ger., *The German Judicial System*, EUR. CONSUMER CTR. NETWORK 12–15 (Dec. 2010), [https://www.evz.de/fileadmin/user\\_upload/eu-verbraucher/PDF\\_Englisch/Brochures/Legal\\_sytem\\_Germany.pdf](https://www.evz.de/fileadmin/user_upload/eu-verbraucher/PDF_Englisch/Brochures/Legal_sytem_Germany.pdf) [<https://perma.cc/PK3R-XFQ6>]; Grozdana Šijanski & Jimmy Barber, *The German Order for Payment Procedure (Mahnverfahren)*, GERMAN L. ARCHIVE (2006), <http://germanlawarchive.iuscomp.org/?p=343> [<https://perma.cc/U7SA-J5A9>].

143. The insistence on signed affidavits in the legal system resulted in a large industry of robo-signing. See generally Holland, *supra* note 60. Courts treat robo-signing with disdain. See, e.g., *Intervale Ave Assoc v. Donlad*, No. L & T 60527/12, 2013 WL 540153, at \*4 (N.Y. Civ. Ct. Feb. 7, 2013) (“The courts have consistently demonstrated an intolerance for ‘robo-signing.’”). But the problem of robo-signing is artificial because what should matter is the existence of evidence, not the form of signature, and requiring personal knowledge for hundreds of thousands of debt claims is grossly inefficient. If creditors can reliably present claims (at the pain of large financial sanctions), this could achieve the same goals but at a lower cost.

time barred actions that attempt to exploit consumer ignorance and judicial passiveness.<sup>144</sup>

Besides the automatic screening of cases, the system will also employ “smart sampling” to identify the cases which are most likely to involve fraud. The exact algorithms will depend on implementation, but, as a general matter, the learning system will synthesize statistical information regarding the identity of the original creditor, the identity and demographics of the debtor, the sums involved, the type of debt involved, time of filings, and other case characteristics. If certain creditors are known to engage in wrongdoing, this will increase the likelihood that the case will be chosen for audit. If certain demographics are targeted more frequently for abusive lawsuits—e.g., the elderly, minorities, or the uneducated—then their cases will be flagged for audit more frequently than other cases.

Flagged cases will be transferred to the agency’s auditors, who will use their investigative powers to demand proof of the evidence claimed by the creditor. The investigators will check if the evidence is consistent, whether the case presents a cause, and, most importantly, if there are any indications of fraud or abuse. In some cases, there will be a need to acquire information from consumers. In these cases, the investigators will approach consumers and ask for information. The consumer will not be under any obligation to cooperate, but it should be explained that an investigation can only advance the consumer’s case. A friendly conversation could greatly advance the consumer’s interests, as the auditor could lead with simple questions that would avoid the need to present a legal case—“Do you have a receipt?”; “Do you have a document showing that you were elsewhere on the date the alleged purchase was made?”; “Did you file a complaint against identity theft?”; etc.

If the audit reveals wrongdoing, the plaintiff will be issued a fine. The findings of the investigation will be evaluated by the professional staff at the agency, and where they find indications of fraud, abuse, or other illegal practices, they can use their legal powers to levy fines.<sup>145</sup> The magnitude of the fine should reflect both the severity of the offense and the likelihood of evasion. In general, large fines would be required to deter companies from bringing abusive lawsuits, since only a sample of cases are audited. As an administrative action, such fines will be subject to appeal. This fine will be paid to

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144. See Young Walgenkim, *Killing “Zombie Debt” Through Clarity and Consistency in the Fair Debt Collection Practices Act*, 24 LOY. CONSUMER L. REV. 65, 65 (2011) (discussing the problem of debt collectors attempting to “revive stale, paid-off, otherwise uncollectable debt”).

145. 12 U.S.C. § 5565 (2012).

either the agency or the government by the creditor, and these funds may be used to finance the agency, although it will be prudent to avoid potential conflicts of interest by not creating a direct link between fines and agency funds.

The use of audits and fines will provide consumers with a basic level of consumer protection. It will do so not by increasing participation but rather by eroding the harsh consequences of underparticipation. By using audits and fines, there will be an effective sanction against the filing of fraudulent or unsupported claims, thus making participation less critical and saving considerable resources. The use of audits and fines also conforms to the prevalent but misguided expectation among consumers today that by filing an answer the court will handle the issue *sua sponte*.<sup>146</sup>

All the cases will then proceed to a “Communication” stage. Unlike the current system, it is not the plaintiff but the agency that would be responsible for contacting the consumer. The agency will use its own databases, as well as information provided by the creditor, to locate the consumer and communicate with them by email, mail, or phone. This will address the root cause of the “sewer service” problem.<sup>147</sup> Here and throughout, the quality of communications should be emphasized. Freed from the chains of legal language and procedure, the communications should be made simple, friendly, easy to follow, and graphic.<sup>148</sup>

All consumers will be sent a simple form. It will clearly inform them of the fact of a claim made against them and its potential implications. It should ask the consumer if she recalls making the purchase from the original creditor and whether the principal and charges seem correct.<sup>149</sup> On this basis, the form will provide three options: admitting the claim, contesting it, or ignoring it.<sup>150</sup> Admitting

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146. *Due Process and Consumer Debt*, *supra* note 42, at 18 (“Many defendants believe that once they answer, the court will review their allegations and defenses *sua sponte*.”).

147. *See supra* Section I.A.

148. *See* D. James Greiner & Andrea J. Matthews, The Problem of Default, Part I (June 24, 2015) (unpublished), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2622140](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622140) [<https://perma.cc/8BW2-VAET>] (studying interventions that improve consumer participation).

149. This addresses a common problem today of the so-called “alphabet soup” of creditors, where debtors receive debt claims from organizations with a name like ABC, which bears little resemblance to the consumer’s experience of the origination of the debt (e.g., Best Buy). *See Roundtable on Data Integrity in Debt Collection: Life of a Debt*, FED. TRADE COMMISSION & CONSUMER FIN. PROTECTION BUREAU (2013), [https://www.ftc.gov/system/files/documents/public\\_events/71120/life-debt-roundtable-transcript.pdf](https://www.ftc.gov/system/files/documents/public_events/71120/life-debt-roundtable-transcript.pdf) [<https://perma.cc/9XM5-L6AY>]. For a similar (although more onerous) recommendation, see FTC PROTECTING CONSUMERS REPORT, *supra* note 14, at 16–17.

150. How to most clearly encourage consumer response is a question best left to communications experts, who are frequently and regrettably missing from the design of most governmental communications.

will invite the consumer to make payments and, perhaps, financial incentives (such as interest reduction) may be offered to fast-paying consumers. If the consumer pays off the debt, the agency will provide a confirmation letter that immunizes the consumer from any future action based on this debt. The agency will then process the payment and transfer it to the creditor. Alternatively, the consumer could offer a settlement by proposing an affordable installment plan, which the creditor may accept or reject.<sup>151</sup> Many creditors should be willing to accept reasonable payment plans, which offer greater recovery than enforcement.

If the consumer contests the claim, the form will contain a few sample checkboxes, which can be used later in litigation instead of a more formal consumer response. Five checkboxes should be provided: “I do not recognize the person to whom the debt is owed,” “I already paid off this debt,” “the amount is wrong,” “another person owes this debt,” and “other.” An open comment field should be available where the putative debtor could write why the debt is wrong. Listing supporting evidence should also be made easy but not mandatory. Contested cases will be transferred to litigation, and only for those cases will the creditor be required to provide a full body of evidence. The chief benefit of only asking for evidence in contested cases is that it saves creditors the immense costs of providing full evidence in all cases. This feature will greatly increase the political appeal of this system to creditors.

Ignoring the claim will trigger a reassessment of the consumer’s address: the agency should invest reasonable effort into searching for the debtor using both its own resources and information procured from the creditor. If the agency concludes that reasonable effort has been taken, the communication should be deemed ignored and moved to litigation, alongside all other contested cases.

Contested and ignored cases will be litigated, and the outcomes of the process will be “fed” to the machine learning algorithms for future improvements. These outcomes include the agency’s findings, consumer’s response, and the court’s ruling. On this basis, the agency will also be able to manage an internal score of creditor reputation, with every finding of fraud lowering the creditor’s score. Low score creditors will be chosen for audit more often—as the algorithm will take account of their identity—whereas high score creditors will be subject to fewer investigations.<sup>152</sup> Creditor reputation could also be made public, thus

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151. The consumer’s choice to admit the debt has important legal ramifications, and these ramifications should be clearly explained.

152. For obvious reasons, the odds of being selected for audit, even for a creditor with the highest level of reputation, must never be zero.

informing future consumers before they engage with a specific provider of credit. This reputation system will provide greater compliance incentives, especially since most debt collection lawsuits are brought by a limited number of creditors.<sup>153</sup>

Adminization does not supplant litigation; rather, it complements it. The continued use of litigation may raise some concern, given its imperfections discussed above, yet the process will carry significant advantages over the current system. First, and perhaps most importantly, Adminization will significantly curtail the filing of unmeritorious claims. Once plaintiffs internalize the risk associated with filing frivolous claims—due to the real potential for fines—they will be less inclined to file them. Second, and as a result, Adminization provides important cost savings for the judicial system. The reduced volume of filing (due to lesser incentive to file unmeritorious claims), will lead to fewer cases on the docket. This will save considerable resources for the courts, freeing them up to scrutinize other debt cases more closely, thus further deterring the filing of unmeritorious lawsuits. Third, Adminization is also highly beneficial for creditors. By increasing the reliability and legitimacy of consumer credit contracts, and by simplifying the process of producing judgments for uncontested cases, there will be significant savings in the cost of providing credit—savings that would be expected to be partially passed on to consumers. From the consumer side, this will make the use of credit a safer option, thus increasing the utilization of safe credit. This has important implications, especially for people in poverty, for whom access to credit is a persistent obstacle.<sup>154</sup> No doubt, Adminization also involves certain costs, but as I endeavor to show below, the costs are unlikely to be prohibitively high and will mostly be offset by a reduction in the volume of litigation. Perhaps more importantly, these costs pale in comparison to any of the other alternatives currently considered, a topic to which I now turn.<sup>155</sup>

### III. THE FAILURE OF PARTICIPATION-BASED SOLUTIONS

In evaluating the desirability and effectiveness of Adminization, it is important to be cognizant of the alternatives. The various

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153. See DEBT WEIGHT, *supra* note 42, at 14 (finding that over fifty-eight percent of the cases in the sample were brought by three debt buyers).

154. See, e.g., Dean Karlan & Jonathan Morduch, *Access to Finance*, in 5 HANDBOOK OF DEVELOPMENT ECONOMICS 4702, 4703 (Dani Rodrik & Mark Rosenzweig eds., 2009) (“Expanding access to financial services holds the promise to help reduce poverty and spur economic development.”).

155. See *infra* Section IV.D.

alternative solutions currently considered can be effectively grouped under the general heading of participation-based solutions. The common core idea, explored below, is that incentivizing and subsidizing consumer participation would allow judges to have the information they need to scrutinize cases.<sup>156</sup> A thorough analysis of these proposed solutions reveals, as I will show in this Part, that participation-based solutions involve immense costs but marginal benefits, and that the costs of Adminization pale in comparison to the costs and risks of participation-based approaches.<sup>157</sup> With this in mind, Adminization and participation are not mutually exclusive, and a well-functioning system should employ some degree of both approaches. My main contention is not that participation solutions are without merit in some absolute sense, but rather that—on the margin—there is much greater need for, and a much higher return on, investments in administrative review as a screening mechanism than greater and greater investments in more traditional court-based solutions.

### A. *Lawyering Up*

The most prominent call to solve the problem of abuse in civil litigation has been to expand legal access through public subsidies of legal services. Under this view, if consumers received subsidized access to legal representation, they would more often stand up against wrongs, assert their rights in court, and contest fraudulent claims.<sup>158</sup> On this view, the resulting rise in consumer participation will provide judges with the information they need to screen out bad cases and prevent

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156. On the dominant role of participation-based approaches in state legislatures, see, for example, N.Y. ACCESS TO JUSTICE REPORT, *supra* note 81, at 3 (requesting \$30 million in public funding for legal assistance to “close the justice gap”); STATE BAR OF CAL., CIVIL JUSTICE STRATEGIES TASK FORCE, REPORT & RECOMMENDATIONS 19 (2015), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000013003.pdf> [<https://perma.cc/9W3Q-XF66>] (recommending “that the State Bar support efforts to secure universal representation”); *Mission & Goals*, TEX. ACCESS TO JUST. COMMISSION, <http://www.texasatj.org/mission-goals> (last visited Oct. 23, 2017) [<https://perma.cc/QQ34-WPFV>] (reporting their central goal of “reduc[ing] barriers to our judicial system”).

157. Proposals that primarily affect the debt collection industry, such as licensing requirements, are excluded. Perhaps this type of ex ante regulation of debt collection is helpful, but the New York experience—where licensing is employed—casts doubt. See N.Y.C., N.Y., ADMINISTRATIVE CODE § 20-490 (2017).

158. There are many reasons why consumers underparticipate in legal proceedings, leading to potentially significant divergence between the social interest in the existence of lawsuits for wrongful behavior and private incentives not to sue. See, e.g., Yonathan A. Arbel & Yotam Kaplan, *Tort Reform Through the Back Door: A Critique of Law and Apologies*, 90 S. CAL. L. REV. 1199 (2017) (showing evidence that the simple tender of apology can cause consumers to avoid filing lawsuits for meritorious claims of malpractice).

plaintiffs from taking advantage of consumers.<sup>159</sup> This type of proposal, often called a “civil *Gideon*” right, mirrors the right of indigent defendants in criminal proceedings to an attorney.<sup>160</sup> While this is proposed as a primary solution to the problem, it is unworkable, prohibitively costly, and of marginal effectiveness.

First, the sheer number of people who would be eligible for this subsidy is staggering. The former president of the American Bar Association (“ABA”) claimed that “one in five Americans now qualifies for legal assistance,”<sup>161</sup> and even that, he thought, was an understatement: “[I]t’s not just the poor [who need assistance] . . . Too many low- and moderate-income people cannot access legal representation.”<sup>162</sup> Yet, even his more conservative estimate implies that sixty-four million people nationwide will be eligible for this subsidy. And while not all of these people have legal issues, a significant majority do, and those that do often have more than one. A recent study found that about half of all low-income New Yorkers have experienced legal issues in the course of a year, with about a third of them facing three or more legal issues.<sup>163</sup> Based on these estimates, which are admittedly rough, we would expect there to be about thirty-two million people who are both eligible for a subsidy and have a legal issue, ten million of whom would have three or more such issues.

The cost of providing subsidies on such a scale is immense. The ABA, which may have a reason to downplay the costs of legal aid,<sup>164</sup> estimates the costs of expanding legal access at about \$1.7 billion every year.<sup>165</sup> This is unlikely, as this amount is not much larger than the

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159. See, e.g., DEBT WEIGHT, *supra* note 42, at 21 (calling on the state of New York to “[f]und legal services for low-income and working poor individuals sued on alleged debts” and “[f]und the provision of assistance, information and resources for pro se defendants”); Fox, *supra* note 46, at 75 (“Consumers need to be provided the legal assistance necessary to defend themselves in civil debt litigation.”).

160. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

161. PERMANENT COMM’N ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK—APPENDICES app. 7 at 41 (2015), [https://www.nycourts.gov/accesstojusticecommission/PDF/2015\\_Access\\_to\\_Justice-Appendices.pdf](https://www.nycourts.gov/accesstojusticecommission/PDF/2015_Access_to_Justice-Appendices.pdf) [<https://perma.cc/T2GG-ER4D>].

162. *Id.*

163. N.Y. ACCESS TO JUSTICE REPORT, *supra* note 81, at 9.

164. Lawyers’ incentives exert considerable pressure on the choice of legal procedure. See, e.g., Yonathan A. Arbel, *Contract Remedies in Action: Specific Performance*, 118 W. VA. L. REV. 370, 388–89 (2015) (finding that lawyers tend to steer clients to opt for remedies that would facilitate the collection of attorney’s fees).

165. The ABA finds an even lower amount—\$1.7 billion, but this is based on the very strong assumption that \$100 worth of legal services will suffice for the common consumer. This rate is the equivalent of less than an hour of work per case, which seems highly ambitious. The ABA also notes that the United Kingdom spends \$1.36 billion on legal services for the poor, which would imply a U.S. cost of \$8.16 billion (population weighted). TASK FORCE ON ACCESS TO CIVIL JUSTICE ET AL., AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES 14 (2006),

current cost of legal aid, estimated at \$1.3 billion annually.<sup>166</sup> More realistically, Jessica Steinberg estimates that the costs would be three times the ABA's estimate: around \$5.4 billion every year.<sup>167</sup> My analysis suggests that if we discard projections and instead look at the actual costs of running the institutions that are currently assisting those in need, we will find costs that are higher by at least an order of magnitude. In New York, the Interest on Lawyer Account (“IOLA”) fund reports that in 2013, a large group of supported organizations closed 296,621 cases with an overall budget totaling \$266.6 million.<sup>168</sup> This implies a per-case cost of \$897, which is the equivalent of 7.7 hours of paralegal work per case at the national average rate of \$116, or 2.5 attorney hours at the average rate of \$361.<sup>169</sup> Now, if indeed around thirty-two million Americans would be eligible for assistance,<sup>170</sup> then the annual cost would amount to \$28.7 billion—about seventeen times more than the already expensive \$1.7 billion estimate, which—to emphasize—is the *annual* cost of running this system, not its overall cost.

Admittedly, it is possible to cut some of the costs of legal aid, primarily through domain restriction or through the use of means or merit testing.<sup>171</sup> Most clearly, the numbers given here include all issues

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[https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lsc\\_laid\\_resolution\\_06a112a.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lsc_laid_resolution_06a112a.authcheckdam.pdf) [<https://perma.cc/Q7YZ-H8Z2>].

166. ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2013, at 5 (2013), <http://www.clasp.org/resources-and-publications/publication-1/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-3.pdf> [<https://perma.cc/573D-S4SB>]. According to the report, the LSC is the largest provider of such services, providing legal aid in eleven percent of the cases it handles.

167. See Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 771 n.167 (2015). Steinberg extrapolates from an analysis made in Maryland, finding that the national costs would be \$5.4 billion. *Id.* However, this estimate is also conservative. It assumes low payments to lawyers (\$80 per hour), only four hours of work per case, and no overhead and administrative costs, and also that pro bono services will not contract (a phenomenon known as “crowding out”), that the rate of litigation will not increase, and that all those currently represented will continue to hire a lawyer despite free legal services. See MD. ACCESS TO JUSTICE COMM'N, *Implementing a Civil Right to Counsel in Maryland*, in ANNUAL REPORT 2010 app. 6 at 10 (2010), <http://mdcourts.gov/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf> [<https://perma.cc/L8HD-JWSK>] [hereinafter *Right to Counsel in Maryland*]. Accounting for these considerations would dramatically increase the costs involved.

168. INTEREST ON LAWYER ACCOUNT FUND OF THE STATE OF N.Y., ANNUAL REPORT 2014, at 2 (2014), [https://www.iola.org/board/Grantee%20Annual%20Report%202014-15/Annual%20Report%202014\(final\).pdf](https://www.iola.org/board/Grantee%20Annual%20Report%202014-15/Annual%20Report%202014(final).pdf) [<https://perma.cc/F8GZ-TYUH>].

169. See BURDGE, *supra* note 89, at 12.

170. To confirm this from another perspective, in Maryland, an average state in terms of economy and inequality, one-sixth of the population qualifies for legal representation. See *Right to Counsel in Maryland*, *supra* note 167, at 9 (reporting that approximately one million Marylanders qualify for legal assistance from organizations funded by the Maryland Legal Services Corporation). This would suggest a potential pool of at least fifty million eligible Americans nationally.

171. *Id.* at 4.



where people might seek legal assistance, not only consumer litigation. Restricting legal assistance to only the cases involving consumer credit would be expected to reduce the overall costs of legal aid and make this reform appear somewhat more realistic. While the cost reduction is indeed likely, it is unlikely to be dramatic enough. As a preliminary matter, someone would need to classify incoming complaints, and this classification is costly and open to mistakes. More importantly, it is necessary to recall the volume of consumer credit litigation—with over eight million filings every year. Many of the people involved in such litigation are likely to be in need of legal assistance, so that even by itself, this category of cases is substantial.

A more promising avenue for cost reduction is means or merit testing. Assistance could be made conditional on the financial needs of consumers or the strength of the underlying case. By denying assistance to people with means above a certain threshold, or to people with weak cases, the costs of providing legal aid can be substantially reduced. Both means and merit testing are indeed capable of cutting costs, but they present their own issues. If the means threshold is high (i.e., only people with low means are eligible), very few people will be able to benefit from legal aid, which makes such reform unlikely to be transformative enough. But if the threshold is set sufficiently low, the whole point of means testing would be missed. Merit testing is likewise difficult in this setting, because the consumers that are capable of demonstrating the merits of their case to an administrator are those who are least likely to need legal assistance in the first place, as they could presumably also present their case to a judge. With respect to both types of testing, it is also important to remember the administrative infrastructure that would be required to support the administration of testing, as well as the costs of both types of mistakes—denying aid to deserving applicants and permitting aid to irrelevant claims or claimants.<sup>172</sup> From the consumer standpoint, such testing often involves applicant-side costs and stigma,<sup>173</sup> thus deterring

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172. See Amartya Sen, *The Political Economy of Targeting*, in PUBLIC SPENDING AND THE POOR 11, 12–13 (Dominique van de Walle & Kimberly Nead eds., 1995); Wim van Oorschot, *Targeting Welfare: On the Functions and Dysfunctions of Means Testing in Social Policy*, in WORLD POVERTY: NEW POLICIES TO DEFEAT AN OLD ENEMY 171, 176 (Peter Townsend & David Gordon eds., 2002).

173. See Sen, *supra* note 172, at 13 (“Any system of subsidy that requires people to be identified as poor and that is seen as a special benefaction for those who cannot fend for themselves would tend to have some effects on their self-respect as well as on the respect accorded them by others.”); Jennifer Stuber & Mark Schlesinger, *Sources of Stigma for Means-Tested Government Programs*, 63 SOC. SCI. & MED. 933, 944–45 (2006) (conducting empirical examination of the sources of stigma); see also Bo Rothstein, *The Universal Welfare State as a Social Dilemma*, 13 RATIONALITY & SOC’Y 213, 222–23 (2001) (explaining that in order to achieve sufficient support for such measures, citizens must regard it as valuable and believe their fellow citizens are contributing).

the neediest from seeking it.<sup>174</sup> Overall, the discussed cost reduction methods must make a difficult compromise: either set a low bar that reduces the effectiveness of testing, or set a high bar but risk limiting aid in a way that would mostly retain the status quo.<sup>175</sup> While legal aid can complement Adminization, it does not appear to be an appealing substitute.

Not only are the costs of legal aid in this context extremely high, the benefits are quite limited. Most cases are not genuinely disputed,<sup>176</sup> and getting more consumers to court could drown the signal (valid consumer defenses) in the flood of noise. Put formally, free representation reduces Type I errors (enforcing unmeritorious claims) but increases Type II errors (failing to enforce legitimate debts). Whether one effect will be greater than the other is an open empirical question, but even if the net effect is positive, the overall benefits will be significantly limited by these costs. Moreover, the benefits will likely be further diluted by rational creditor responses to such reforms, which will likely consist of investing more in legal services to retain some of their original advantage.<sup>177</sup> This is even without taking into account creditors' market power and ability to influence the consumer contract in ways that would mitigate the effects of legal access. At best, then, the benefits will be modest but the costs will be immense. Equally worrying, the costs are likely to expand over time, with little ability to control them, as more and more people may claim eligibility.

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174. Sen, *supra* note 172, at 13; van Oorschot, *supra* note 172, at 176; Dimitri Gugushvili & Donald Hirsch, *Means-Tested and Universal Approaches to Poverty: International Evidence and How the UK Compares* 2–3 (Ctr. for Research in Soc. Policy, Working Paper No. 640, 2014) (empirical evidence); Thandika Mkandawire, *Targeting and Universalism in Poverty Reduction* 15–16 (Soc. Policy and Dev., United Nations Research Inst. for Soc. Dev., Working Paper No. 23, 2005).

175. These are not the only cost-cutting mechanisms. It is possible to offer a menu of more limited services (such as a hotline for pro se claimants), and it is even possible to co-opt some of the mechanisms developed in this paper, such as algorithmic screening of applicants and audit review. Such proposals require sustained development and evaluation before they can be compared to the alternatives considered here.

176. *See infra* notes 185–189.

177. Economic theory predicts that increasing one party's investment in litigation (which is similar to the effect of representation) can lead to an arms race that will greatly increase spending but will not necessarily increase overall judicial accuracy. *See Avery Katz, Judicial Decisionmaking and Litigation Expenditure*, 8 INT'L REV. L. & ECON. 127, 138–39 (1988). The overall effect will be a reduction in the volume of litigation (as it is costlier to litigate) but an increase in the intensity of litigation (because both parties "fight" harder). The net result requires a more robust empirical analysis.

*B. Throwing Judges into the Fray*

Another common proposal is to have judges play a more active role in litigation to level the playing field between the parties.<sup>178</sup> Under this view, judges should be more forgiving of consumers' procedural mistakes, allow more flexible deadlines, and furnish opportunities to amend or correct what may be either mistakes or suboptimal litigation tactics. According to more expansive versions, the judge would even conduct examinations and seek settlements where possible.

This proposal is equally problematic. First, we do not know whether inquisitorial systems produce systematically better results, with a lingering concern that judges who produce their own evidence are more prone to confirmation bias.<sup>179</sup> Second, from an institutional perspective, training judges to conduct inquisitorial functions requires fundamental changes to the way legal education and training is provided. But perhaps most troubling are the costs of these proposals.<sup>180</sup> The more we ask judges to perform the activities of lawyers, the closer we are to the first type of proposals, with public subsidies for private lawyers. Discounting overhead and judicial staff, the median annual salary of a judge is \$132,500,<sup>181</sup> compared with the median salary of a

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178. See Steinberg, *supra* note 167, at 800 (“[J]udges should be active, frame legal issues, and question parties and witnesses in order to develop legal claims.”); see also Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1274 (2005).

179. See Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30, 40 (Harold J. Berman ed., 1961) (“An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.”); Kathryn E. Spier, *Litigation*, in 1 HANDBOOK OF LAW AND ECONOMICS, *supra* note 116, at 313–16 (presenting mixed theoretical accounts of the implications of an inquisitorial system); John Thibaut et al., Comment, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 389–90 (1972) (noting that interested parties may vet evidence more thoroughly than a judge). *But see* E. Allan Lind et al., Comment, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129, 1143 (1973) (arguing that bias in evidence production will bias outcomes). On the empirical side, see Michael K. Block et al., *An Experimental Comparison of Adversarial Versus Inquisitorial Procedural Regimes*, 2 AM. L. ECON. REV. 170, 177–78 (2000) (finding that inquisitorial investigations fared better than adversarial ones, but only if parties have no access or knowledge of the other party’s information and evidence).

180. See Resnik, *supra* note 118, at 380 (doubting that managerial judging reduces litigation costs).

181. *Survey of Judicial Salaries*, NAT’L CTR. FOR ST. CTS. (2012), <http://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/Judicial%20Salary/judicialsalaries.ashx> [<https://perma.cc/9AHV-WZMV>]. The median salary for federal district court judges is even higher, at \$174,000 (both values are current to 2012). *Judicial Compensation*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-compensation> (last visited Oct. 23, 2017) [<https://perma.cc/GZ5Z-A5ME>].

public interest attorney of \$45,000–\$75,000.<sup>182</sup> The natural question is: Would it not be cheaper to simply subsidize lawyers outright?

### C. Modifying the Legal Process

The third type of reforms involve changes to legal procedure. For example, to mitigate evidentiary problems, many propose that plaintiffs should assert detailed knowledge of the claim, its origin, and of all other evidence.<sup>183</sup> Consequently, some states have imposed heavier evidentiary burdens on creditors.<sup>184</sup> Setting high evidentiary burdens for the sake of controlling litigation may seem appealing, but it is a poor solution to the problem at hand. Perhaps the most obvious point is that in the absence of meaningful scrutiny, the mere production of evidence cannot improve outcomes—similar to the problem of sewer service, how can judges authenticate and verify the veracity of evidence? Moreover, this proposal is extremely wasteful. Evidence production involves some complex operations, as even discerning the amount of charges, principal, and interest is not straightforward.<sup>185</sup> Admittedly, the costs per case are not high, but given the large volume of cases, these costs quickly become a significant burden. Additionally, evidentiary bars are

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182. Press Release, Nat'l Ass'n for Law Placement, New Public Interest and Public Sector Salary Figures from NALP Show Little Growth Since 2004 (Oct. 18, 2012), [http://www.nalp.org/uploads/PressReleases/2012PISALPressRelease\\_Rev.pdf](http://www.nalp.org/uploads/PressReleases/2012PISALPressRelease_Rev.pdf) [<https://perma.cc/LEN7-N7BN>]. For comparison, a lawyer's median salary in 2012 was \$113,530, which is eighty-six percent of the salary of a state judge and sixty-five percent of the salary of a federal district court judge. Bureau of Labor Statistics, *May 2014 National Occupational Employment and Wage Estimates: United States*, U.S. DEPT. LAB., [https://www.bls.gov/oes/2012/may/oes\\_nat.htm#23-0000](https://www.bls.gov/oes/2012/may/oes_nat.htm#23-0000) (last modified Mar. 25, 2015) [<https://perma.cc/B56N-S7X7>]; *see also* sources cited *supra* note 181.

183. *See* Eric Y. Wu, Note, *Vigilante Justice: Ensuring that Consumer Credit Plaintiffs Are Not Above the Law in Collins Financial Services v. Vigilante*, 60 AM. U. L. REV. 1561, 1563 (2011) (advocating increased documentation requirements for default judgment); *see also* Fox, *supra* note 46, at 40 (documenting regulatory action aimed at increasing evidentiary standards); Glover, *supra* note 46, at 1133 (“[A]t a bare minimum, courts should require the plaintiff to produce a valid contract between the original creditor and the debtor.”); Goldberg, *supra* note 46, at 748 (proposing that lawyers in small claims court be required to plead specific information about the debtor and debt agreement); *Debt Deception*, *supra* note 92, at 2 (arguing in favor of “[p]rohibit[ing] debt buyers from filing lawsuits without evidence”).

184. N.C. GEN. STAT. § 58-70-150 (2017) (requiring evidence of the original contract); *see also*; MD. R. CIV. P. 3-306(d) (establishing additional requirements for affidavits filed by a plaintiff who is not the original creditor); MASS. UNIF. SMALL CLAIMS R. 7(d) (outlining the circumstances that impact whether further inquiry is needed in the event that a defendant does not appear for trial); MINN. STAT. § 548.101 (2017) (proscribing requirements for assigned consumer debt default judgments); Administrative Directive of the Chief Judge of the Court of Common Pleas for the State of Delaware, No. 2012-2 (Aug. 22, 2012), <http://courts.delaware.gov/CommonPleas/docs/AD2012-2.pdf> [<https://perma.cc/TJ8Y-X5N7>] (establishing pleading requirements in consumer debt collection actions).

185. Duffy, *supra* note 42, at 1195 (“The amount due, however, is typically the result of complicated, and often dynamic, contract terms . . .”).

a “blunt calibration device[ ] . . . [that] risks screening out meritorious and unmeritorious claims alike.”<sup>186</sup> The concern that evidentiary bars will deter the filing of meritorious lawsuits is heightened by the fact that most cases are not even disputed. Evidence shows that in only 3.2 percent of debt collection cases by debt buyers did debtors *informally* bother to dispute the debt.<sup>187</sup> A qualitative in-depth (but small sample) study found that only twenty percent of the cases were contested, although perhaps half of them had some good faith defense of which they were unaware.<sup>188</sup> Some debtors, presumably those with the best cases, do decide to go to court, but even those debtors fail about fifty percent of the time.<sup>189</sup> Even if we suppose that the rate of disputes stands at the inflated rate of thirty percent, these reforms would require the redundant production of evidence in all remaining cases (seventy percent).<sup>190</sup>

Clearly, having robust evidence is also beneficial. Allowing court judgments in the absence of evidence is a recipe for disaster. However, the benefit of evidence only accrues if a sufficient number of cases are scrutinized, which is hardly the case today.<sup>191</sup> Additionally, there is also an evidence requirement today, so one should consider whether the *marginal* benefits that could result justify the requirement of high evidentiary bars in all cases. Recall that Adminization is not meant as a substitute, and setting evidentiary bars is recognized to be important. The main contention here is that *on the margin* it would be more productive to invest in administrative audits than to categorically

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186. Engstrom, *supra* note 31, at 643.

187. FTC DEBT INDUSTRY REPORT, *supra* note 10, at 38. Admittedly, there are certain recording issues involved, especially regarding verbal disputes. However, of the cases recorded, only about fifty percent could be later verified, making the scope of genuine disputes much smaller. *Id.* at 40. The FTC acknowledges that verbal disputes may not be properly recorded. *Id.* at 38; see also Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation* 14–15 (George Mason Univ. Law & Econ. Research Paper Series, Paper No. 15-33, 2015), [https://www.law.gmu.edu/assets/files/publications/working\\_papers/LS1517.pdf](https://www.law.gmu.edu/assets/files/publications/working_papers/LS1517.pdf) [<https://perma.cc/6M8L-4HN2>].

188. See Sterling & Schrag, *supra* note 71, at 366 (studying claims against fifteen debtors). Note, however, that the authors believe, based on interviews, that eight of the fifteen interviewees had good-faith defenses of which they were personally unaware due to legal ignorance. *Id.* at 384.

189. See Holland, *supra* note 46, at 210 (finding that pro se debtors had at least some success in fifty-three percent of the cases, although they only won trials in about one percent of the cases. The represented debtors had favorable outcomes in about eighty-five percent of cases, but this only applied to eight cases out of a sample of 4,400 cases). *Id.* Of course, trial outcomes are only suggestive.

190. Means and merit testing would increase the benefit of evidence requirements, but would introduce other types of errors and problems (e.g., debtors would “attorney-shop” for lenient attorneys) and involve administrative costs. Most importantly, however, letting private attorneys screen cases amounts to a de facto privatization of the process and, as such, should be evaluated independently of the current system.

191. See Healy, *supra* note 1.

require a higher bar of evidence in all eight million consumer credit cases.

Other types of proposals offer conflicting recommendations on the choice of venue. While in the past small claims courts have been proposed as a solution, today some call for the transfer of cases to the general civil courts, where a higher standard of proof might deter creditors from filing.<sup>192</sup> But this is similar to requiring more evidence, and, as just argued, more evidence is unlikely to be the solution to the problem. Others suggest that federal courts will provide a better solution, due to their fee-shifting rules.<sup>193</sup> Yet others suggest simply narrowing creditors' access to *any* court. Because litigation tends to be lopsided, they reason, it will be best to allow litigation only after creditors have exhausted informal collection efforts.<sup>194</sup> However, since informal collection is tainted with widespread abuse, it is hard to see how such a proposal could improve the consumer's situation.<sup>195</sup>

The last type of procedural reform tries to directly regulate plaintiff behavior. For example, these proposals would require plaintiffs to sign affidavits that they have taken due effort to locate the debtor,<sup>196</sup> prove the timeliness of the claim,<sup>197</sup> document service by means of GPS technology, or educate the debtor of her rights.<sup>198</sup> The problem with these proposals, even setting aside their cost, is that they critically depend on creditors with misaligned incentives. Financial incentives exert a strong power, and as long as creditors stand to gain from

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192. See, e.g., Goldberg, *supra* note 46, at 747–48.

193. See, e.g., *Improving Relief*, *supra* note 53, at 1464 (proposing a doctrine of “equitable remand,” allowing federal courts to issue a vacatur of a state court judgment). This involves reforming the *Rooker-Feldman* doctrine that limits federal courts' power to intervene in state courts' judgments. See D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); *Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923).

194. See Goldberg, *supra* note 46, at 748 (“[T]o ensure that small-claims courts are truly a last resort . . . lawyers should be required to inform the court of all prior communications with the debtor and any extrajudicial collection efforts.”). In September of 2013, Minnesota passed a law requiring creditors to provide advance notice of at least fourteen days to debtors of their intention to file for a default judgment. MINN. STAT. § 548.101(a)(7) (2017); see also Glover, *supra* note 46, at 1132 (advocating filing fees).

195. The authors of such proposals also seem aware of this inherent difficulty: “One possible weakness . . . is that it may result in more aggressive extrajudicial collection pursuits and consequently more violations of FDCPA.” Goldberg, *supra* note 46, at 749.

196. In Massachusetts, creditors in small claims courts are required to file a “Verification of Defendant’s Address form, certifying that he or she has verified the defendant’s mailing address in the manner set forth therein.” MASS. UNIF. SMALL CLAIMS R. 2(b).

197. See, e.g., Haneman, *supra* note 86, at 735–37.

198. See, e.g., FTC PROTECTING CONSUMERS REPORT, *supra* note 14, at 10 (“[J]urisdictions should also consider amending service of process rules to require greater verification.”); OUT OF SERVICE, *supra* note 68, at 3.

debtors' failure to appear, they are bound to find loopholes and shortcuts.<sup>199</sup>

#### *D. Arbitration and Class-Defense*

Two very different types of solutions include arbitration and class litigation. Consumer arbitration is a growing trend.<sup>200</sup> In theory, it has various appealing characteristics that are relevant to some of the problems Adminization addresses, most notably, arbitration's ability to overcome byzantine procedures and cut costs.<sup>201</sup> Despite these benefits (which many find empirically contestable<sup>202</sup>), arbitration does not solve the structural issues that Adminization does. This is especially clear in the case of consumer credit litigation where the FTC itself concluded that arbitration fails to adequately protect consumers.<sup>203</sup> The primary reason for this failure is that arbitration is ultimately a contractual instrument. As such, it tends to replicate the same market dynamics that often lead to abuse in litigation. For example, creditors draft most consumer agreements and affect the choice of arbitrators; as a result, those cherry-picked arbitrators are often structurally impeded from

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199. "[L]ife finds a way." MICHAEL CRICHTON, *JURASSIC PARK* 160 (1990).

200. See *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011) (finding that the Federal Arbitration Act preempted a California unconscionability rule for arbitration clauses, thereby expanding the scope of such clauses in contracts related to class actions); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 *GEO. L.J.* 57, 70–76 (2015) (detailing the rise of consumer arbitration).

201. Arbitration allows consumers to avoid litigation costs, as emphasized by the industry. See Letter from Am. Bankers Assoc. et al., to the Honorable Richard Cordray, Chairman, Bureau of Consumer Fin. Prot. (July 13, 2015), <http://www.aba.com/Advocacy/commentletters/Documents/cl-jointArbitration2015.pdf> [<https://perma.cc/A5FB-LGMC>]. Reducing costs for creditors could also reduce the costs of consumer goods. See Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 *J. DISP. RESOL.* 89, 91–93 (noting that the passing of cost savings is an overlooked advantage for consumers of arbitration).

202. See JOHN O'DONNELL, *PUB. CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS* 43 (2007), <https://www.citizen.org/sites/default/files/arbitrationtrap.pdf> [<https://perma.cc/W5A5-74T6>] (highlighting the costs of arbitration to consumers as a barrier). *But see* PETER B. RUTLEDGE, *U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION—A GOOD DEAL FOR CONSUMERS: A RESPONSE TO PUBLIC CITIZEN 10–12* (2008), <http://stmedia.startribune.com/documents/docload.pdf> [<https://perma.cc/3UEC-ZEKE>] (critiquing O'Donnell's analysis); SEARLE CIVIL JUSTICE INST., *NORTHWESTERN UNIV. SCH. OF LAW, CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION* 67–68 (2009), [https://www.adr.org/sites/default/files/document\\_repository/Searle%20Civil%20Justice%20Institute%20Report%20on%20Consumer%20Arbitration.pdf](https://www.adr.org/sites/default/files/document_repository/Searle%20Civil%20Justice%20Institute%20Report%20on%20Consumer%20Arbitration.pdf) [<https://perma.cc/C9AF-GTDW>] (reviewing the empirical literature and finding mostly positive effects of arbitration for consumers). Additionally, there is empirical doubt as to what extent consumers understand and consent to arbitration clauses. See Jeff Sovern et al., *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 *MD. L. REV.* 1, 62–63 (2015) (finding broad consumer misunderstanding of arbitration clauses in contracts).

203. See *FTC PROTECTING CONSUMERS REPORT*, *supra* note 14, at i.

detering fraud.<sup>204</sup> Moreover, even well-intentioned arbitrators cannot meaningfully investigate and audit cases where consumers do not appear, and access to arbitration is still considered “prohibitively expensive for consumers with relatively small claims.”<sup>205</sup> A large study of thirty-four thousand arbitration cases revealed statistics that are similar to those of litigation, with ninety-four percent of arbitrations being resolved in favor of creditors.<sup>206</sup> The study also details evidence of arbitrator shopping where pro-plaintiff arbitrators are sought more often than prodefendant arbitrators.<sup>207</sup> As a result, many are disillusioned today with arbitration as a means of improving consumer protection and remedying market flaws.<sup>208</sup>

Another alternative is the idea of class defense.<sup>209</sup> Developed by Assaf Hamdani and Alon Klement, the class defense mechanism is a mirror image of the class action, only that it consolidates dispersed defendants (rather than plaintiffs). When multiple defendants are sued by a single plaintiff, the class defense mechanism would allow them to be sued as a class, binding them all to the outcomes of litigation. The aggregation of claims makes it more worthwhile to defend them, as the joint stakes are large enough to pay a lawyer.<sup>210</sup> Class defense has much greater potential than the other proposals surveyed, primarily because of its cost-effectiveness. Nonetheless, class defense is unlikely to fully resolve the problems identified here. By their nature, class actions apply only to cases meeting narrow criteria, and many consumer credit

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204. See Richard M. Alderman, *Pre-dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1256 (2001) (discussing the significant bias that favors repeat players in the arbitration process); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60–61 (noting that corporate defendants may prefer arbitration over litigation due to a belief that they will receive either sympathy or outright favorable bias from the arbitrator); Nancy A. Welsh, *Mandatory Pre-dispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 197 (2013) (noting that pre-dispute arbitration is a “system that is beset by structural bias”).

205. Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 466 (2011).

206. See O’DONNELL, *supra* note 202, at 2 (examining approximately nineteen thousand cases in which the arbitrator was appointed by the National Arbitration Forum).

207. *Id.* at 16–17 (exploring the incentives that exist for arbitrators to overwhelmingly side against consumers). On the other hand, the Searle Civil Justice Institute found only weak evidence of repeat-player effects in its review of the literature. See SEARLE CIVIL JUSTICE INST., *supra* note 202, at xiii.

208. See Cole, *supra* note 205, at 458–59 (detailing consumer concerns and attempted policy responses to the growth in consumer arbitration agreements). *But see* SEARLE CIVIL JUSTICE INST., *supra* note 202, at 109–11 (reviewing the empirical evidence and discussing costs, due process, speed, outcomes, and fairness considerations, and finding mostly positive effects).

209. See Hamdani & Klement, *supra* note 97, at 709–10 (proposing the mechanism of class defense).

210. Class defense depends on fee shifting, so that if the class prevails, the representing attorney can recover her fees from the plaintiff. *Id.* at 715–17.



cases would not meet those criteria. In this context, the most notable issue is the requirement of commonality among the class members. The Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes* means that class members must share a very high degree of commonality, and such degree of commonality is rare in civil litigation generally, and especially in consumer credit contracts.<sup>211</sup> Having said that, if implemented, a class defense mechanism could complement the institution of Adminization.

### *E. A Pyrrhic Victory*

Suppose, contrary to all of the foregoing, that these reforms could work, and that they would bring a large portion of all consumers to court. These consumers would plead and argue their cases and fight against unfair charges, lack of evidence, fraud and abuse, or even more technical issues, such as proper venue or setoffs and fees. Emboldened and empowered, consumers would also appeal wrong decisions, and all would have their day(s) in court. Consequently, reformers hope, the accuracy of legal determination will rise and the scope of fraud and consumer abuse will fall.

This optimistic view requires that the legal system will be able to support this significant increase in litigation. The volume of civil litigation is about fifteen million cases annually, and, as noted, it is estimated that about eight million are consumer credit related.<sup>212</sup> Today, in the vast majority of cases, consumers either do not appear or do not respond. For example, the civil courts of the City of New York saw 9,295 defendants out of 122,166 cases filed by nine large creditors in 2008—this is about seven percent.<sup>213</sup> Getting even one-third of all New York consumers to appear means that the number of cases that would be heard will rise from 9,295 to thirty-one thousand cases, and an additional 4,340 appeals would be filed.<sup>214</sup> Hence, any moderately successful reform would then encumber the courts with a few million new cases each year. This would increase the caseload of the same courts that are currently criticized for being clogged and “overwhelmed”

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211. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–360 (2011) (declining to certify a class action due to lack of commonality among plaintiffs).

212. See *supra* note 42.

213. See *Justice Disserved*, *supra* note 71, at 4 (accounting for the volume of debt claims filed by nine large creditors).

214. See Court Statistics Project, *Caseload Highlights*, NAT'L CTR. FOR ST. CTS. (Mar. 2007), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/Vol14Num1CivilTrialsonAppeal1.ashx> [<https://perma.cc/S6L9-KNA6>] (finding a fourteen percent rate of appeal in all civil matters).

by consumer credit cases.<sup>215</sup> To accommodate these cases, the system would have to quadruple its capacity or else introduce impossibly long queues to resolve disputes.<sup>216</sup> Sending more cases to arbitration, it was noted, is unlikely to be effective. Can we sustainably double, triple, or even quadruple or more the national expense of the civil legal system?<sup>217</sup>

This cost is “that which is seen,” but what about the cost “which is not seen”?<sup>218</sup> The less salient and more removed costs would be those created by the response of creditors and debtors to such a change. Debtors would be much more inclined to defend cases which have less merit, hoping to win them through luck or through the attrition of the creditor. Creditors will have to spend more resources on litigation to win cases. Therefore, some creditors will not find it worthwhile to pursue small claims, either because the case lacks merit or because the costs exceed the value of the expected judgment. This will lead many to

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215. See OUT OF SERVICE, *supra* note 68, at 11.

216. Not all of civil litigation is debt claims, so doubling the number of cases would lead to less than double the resources. Nonetheless, debt claims are the majority of civil litigation, so the necessary increase in resources in response to doubling the debt claims will be large. See *supra* note 42. Also, some of the costs of litigation are fixed, so that more cases would not entail necessarily more courtrooms. However, as we consider here, a very large increase in the volume of cases would create a need for new infrastructure. The alternative to infrastructure, queueing, has important costs well beyond the direct costs of waiting longer for cases to resolve; if the filing of a lawsuit delays enforcement by a few years, this will provide a much stronger incentive to borrow irresponsibly in the first place.

217. We do not know what the full cost of the legal system is, mainly because funding is fragmented between local, state, and federal governments, as well as between user fees, fines, charges, etc. Telephone Interview with William Raftery, Senior Knowledge & Info. Servs. Analyst, Nat'l Ctr. for State Courts (Sept. 14, 2015). On the structure of funding, see RON MALEGA & THOMAS H. COHEN, DEP'T OF JUSTICE, STATE COURT ORGANIZATION, 2011, at 8 (2013), <https://www.bjs.gov/content/pub/pdf/sco11.pdf> [<https://perma.cc/JNV8-HFF7>]. For comparison, the cost of the New York court system is \$2 billion a year, and the cost of the Pennsylvania system is \$0.5 billion. *Budget: Fiscal Year 2015-2016*, N.Y. ST. UNIFIED CT. SYS., at v (2014), <https://www.nycourts.gov/admin/financialops/BGT15-16/2015-16-UCS-BUDGET.pdf> [<https://perma.cc/PR29-DSMW>]; *Proposed Budget of the Unified Judicial System, Fiscal Year 2015-2016*, SUP. CT. PA. (2015), <http://www.pacourts.us/assets/files/setting-4778/file-4372.pdf?cb=7127c2> [<https://perma.cc/P6PC-QQZM>] (noting that overall state contributions amount to \$11 billion a year); see also NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES: SPRING 2012 (2012), <https://www.nga.org/files/live/sites/NGA/files/pdf/FSS1206.PDF> [<https://perma.cc/KT83-3QKL>]; *Preparation and Submission of the Judicial Branch Budget*, NAT'L CTR. ST. CTS., <http://data.nesc.org/QvAJAZZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikvewis&anonymous=true&bookmark=Document\BM09> (last visited Oct. 23, 2017) [<https://perma.cc/8PSQ-ZFXW>] (outlining the various budget proposal processes across multiple states).

218. See 1 CLAUDE FRÉDÉRIC BASTIAT, *That Which is Seen, and That Which is Not Seen*, in THE BASTIAT COLLECTION 1, 1 (Ludwig von Mises Inst. ed., 2d ed. 2007) (1850). (“In the economy, an act, a habit, an institution, a law, gives birth not only to an effect, but to a series of effects. Of these effects, the first only is immediate; it manifests itself simultaneously with its cause—it is seen. The others unfold in succession—they are not seen.” (emphasis added)).

invest more in informal debt collection<sup>219</sup>—an area that is hard to police and is rife with abuse<sup>220</sup>—and others will altogether abandon small consumer loans, an outcome undesirable for both creditors and debtors.

Indeed, there may be some important benefits to all of these reform proposals: more legal accuracy, less fraud, and greater due process and consumer participation. Adminization does not mean that these routes should be abandoned; rather, we should diversify our approach by using multiple institutions to address a multicausal problem, thus improving outcomes and reducing costs. Adminization, recall, is a complement, not a substitute, to litigation. Working in tandem, litigation and Adminization pack a punch.

#### IV. CHALLENGES

##### *A. Legal Authority*

Adminization requires an agency infrastructure, and the use of agencies to review consumer cases in state courts may introduce some legal and constitutional issues. But such concerns are surmountable, since Adminization relies on preexisting and legally proven infrastructure such as the FTC, the CFPB, and state attorney general offices.

At the federal level, both the FTC and the CFPB are already legally empowered to oversee Adminization, although with certain limits. For the CFPB, the primary source of authority is the Consumer Financial Protection Act,<sup>221</sup> enacted as Title X of the Dodd-Frank Act, which established the CFPB and tasked it with implementing and enforcing federal consumer protection law to ensure that “markets for consumer financial products and services are fair, transparent, and competitive.”<sup>222</sup> A central objective is to protect consumers “from unfair, deceptive, or abusive acts and practices.”<sup>223</sup> To achieve these goals, the law provides the CFPB with broad powers to conduct investigations, request information from covered entities, issue subpoenas and civil

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219. See Oren Gazal-Ayal & Limor Riza, *Plea-Bargaining and Prosecution*, in CRIMINAL LAW AND ECONOMICS 145, 149 (Nuno Garoupa ed., 2009) (explaining that trial complexities lead to greater frequency of plea bargains); Sergio G. Lazzarini et al., *Order with Some Law: Complementarity Versus Substitution of Formal and Informal Arrangements*, 20 J.L. ECON. & ORG. 261, 262 (2004) (exploring substitution and complementarity between formal and informal norms).

220. See *supra* Section I.A; see also *supra* note 195 (explaining that advocates preferring informal debt collection practices over litigation recognize inherent widespread abuse of such practices).

221. Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act § 1011(a), 12 U.S.C. § 5491 (2012).

222. 12 U.S.C. § 5511(a).

223. 12 U.S.C. § 5511(b)(2).

investigative demands, hold hearings, bring lawsuits, and, importantly, levy fines.<sup>224</sup> The second relevant legislative authority is the Fair Debt Collection Practices Act (“FDCPA”), which provides enforcement powers to both the FTC and the CFPB.<sup>225</sup> These powers are intended to curb abusive debt collection practices and encourage fair debt collection practices.<sup>226</sup> The jurisdiction of both the FTC and the CFPB is sufficiently broad, and their enforcement powers encompass any provider of consumer financial services or its affiliates engaging in “unfair, deceptive, or abusive acts or practices.”<sup>227</sup> Moreover, the CFPB has supervisory powers over large banks and certain “non-banks,” for example, providers of credit such as payday lenders, auto lenders, mortgage originators, and more recently, debt collectors with annual earnings over \$10 million, which is not a very high bar.<sup>228</sup> In addition, the FDCPA also empowers the FTC and the CFPB to investigate and pursue actions against debt collectors.<sup>229</sup> Using these broad powers, these agencies regularly engage in enforcement activity that covers a broad array of regulated entities, including banks, law firms that file debt collection lawsuits with insufficient evidence, debt collectors, and even individuals.<sup>230</sup> As a consequence of these powers, both the CFPB and the FTC have the necessary authority to support Adminization of consumer debt litigation, allowing them to investigate and take enforcement actions against those engaged in unfair, deceptive, or abusive acts. Beyond the federal level, state attorney general offices are generally equally empowered to investigate and prosecute consumer abuse, although they are naturally limited to the jurisdiction of their own states.<sup>231</sup>

A second related issue concerns the power of the federal agencies to regulate consumer activity at the state level. This concern is directly addressed by the FDCPA, which explicitly states that “[e]ven where abusive debt collection practices are purely intrastate in character, they

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224. 12 U.S.C. §§ 5562–65.

225. 15 U.S.C. § 1692l(a) (2012).

226. 15 U.S.C. § 1692(e).

227. 12 U.S.C. § 5531. For the definition of covered persons, see 12 U.S.C. § 1002(6).

228. 12 U.S.C. § 5514(a). Large debt collectors are considered “larger participants” under 12 U.S.C. § 5514(a)(1)(B), according to 12 C.F.R. § 1090.105(b) (2017).

229. 15 U.S.C. § 1692a(6).

230. *See, e.g., In re Pressler & Pressler, LLP*, CFPB No. 2016-CFPB-0009 (2016) (issuing consent order regarding debt collection practices of a law firm); David Eghbali, CFPB No. 2016-CFPB-0011 (2016) (issuing consent order regarding illegal mortgage-loan transaction manipulations by a bank employee).

231. For example, the Consumer Interest Division at the Office of the Attorney General of the State of Alabama is described as one of the Attorney General’s “most important responsibilities.” *Consumer Interest Division*, ST. ALA. OFF. ATT’Y GEN., <http://www.go.state.al.us/Page-Consumer-Protection> (last visited Oct. 23, 2017) [<https://perma.cc/AYZ3-7U8J>].

nevertheless directly affect interstate commerce.”<sup>232</sup> The Supreme Court shared Congress’s view, holding that “commercial lending . . . [has broad impact] on the national economy.”<sup>233</sup> A large body of case law affirmed this view.<sup>234</sup> It is also worth mentioning that the CFPB has recently emerged largely intact from a constitutional challenge that sought to dismantle it.<sup>235</sup> Whether the CFPB will continue to exist in the current political climate is an open question, but such an issue does not arise with respect to the other potential institutional arrangements.

### *B. Feasibility of Adminization & Political Economy*

The success of regulatory reform does not depend solely on its merits, but also on its political appeal. Would Adminization receive sufficient political support? While predicting any sort of political trajectory is difficult, I will note a few reasons why Adminization may appeal to a variety of diverse interests that wield political power. First, on the consumer side, this system of Adminization provides a robust and meaningful form of protection that addresses some of the key concerns of consumer associations today. Implementing Adminization on a broad scale can improve the lives of millions of consumers over a relatively short period. Consumer advocates and politicians seeking to enhance the welfare of the middle and lower classes can mark a quick victory with relatively little investment. It is equally important that Adminization would also be appealing to creditors. As noted, they stand to gain from a streamlined process, greater consumer confidence in the credit market, and greater legitimacy of the debt collection process. After all, there is reason to believe that greater legitimacy will translate to greater consumer propensity to repay debts.<sup>236</sup> Indeed, some

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232. 15 U.S.C. § 1692(d).

233. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003); *see also* *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980) (“[B]anking and related financial activities are of profound local concern. . . . Nonetheless, it does not follow that these same activities lack important interstate attributes.”); *Perez v. United States*, 402 U.S. 146, 154 (1971) (“Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce.”).

234. *See supra* note 16.

235. *See* *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 33 (D.C. Cir. 2016), *reh’g en banc granted, order vacated* (Feb. 16, 2017). Note that while the D.C. Circuit panel decision holding the CFPB unconstitutional was vacated and rehearing en banc granted, the court has not yet issued its en banc opinion at the time of this writing. Thus there is still some uncertainty regarding the CFPB’s future.

236. *See, e.g.*, Jonathan Jackson et al., *Why Do People Comply with the Law?*, 52 *BRIT. J. CRIMINOLOGY* 1051, 1059 (2012) (finding higher compliance from those who believe in the legitimacy of the law); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 *ANN. REV. PSYCHOL.* 375, 377 (2006) (explaining legitimacy as the belief that the law should be obeyed).

creditors would object to Adminization, precisely because of its effectiveness in deterring creditor fraud. But the opposition by creditors will likely be much stronger to any of the other alternatives discussed above, which tend to impose costs on all creditors, independently of the nature of their claims. If not in absolute terms, then at least in relative terms, Adminization should garner greater creditor support.

These mutual advantages to debtors and creditors promise a real political possibility of implementation. As a case study, in Israel, where a reform that streamlined the collection of small judgments was proposed, an unlikely coalition emerged.<sup>237</sup> Both creditors and consumers joined hands in support of the reform; the creditors were drawn to the streamlined process and the debtors to the greater transparency and simplicity of the process as well as the concomitant reduction in interest and fees.<sup>238</sup> The only opponent was the Israel Bar Association, which expressed concerns that the reform would make parties less likely to retain the services of lawyers.<sup>239</sup> Ultimately, the Bar lost.<sup>240</sup> It would seem that overall, Adminization offers a great promise to both plaintiffs and defendants, and should be highly feasible from a political-economy standpoint.

### *C. Regulatory Capture*

In administrative law, there is a general concern with regulatory capture.<sup>241</sup> Here, one might worry that creditors will be able to lobby the relevant agency, causing the agency to capitulate to their interests. Without denying the potential dangers of regulatory capture in some

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237. The initiative was not identical to Adminization; Israel already relies heavily on administrative agencies to enforce small claims, and the reform proposal sought to create an administrative process where lawyers would not be needed. In contrast, Adminization is meant to supplement litigation.

238. See *Protocol No. 661*, LAW & JUST. COMMITTEE (July 24, 2012), <http://www.knesset.gov.il/protocols/data/rtf/huka/2012-07-24-02.rtf> [<https://perma.cc/EF32-V5VY>]; see also *Protocol No. 7*, LAW & JUST. COMMITTEE (June 16, 2015), [http://www.nevo.co.il/law\\_html/law103/20\\_ptv\\_309355.htm](http://www.nevo.co.il/law_html/law103/20_ptv_309355.htm) [<https://perma.cc/H9X8-H3TM>] (endorsement of the process by a consumer NGO).

239. These concerns were expressed (and criticized by the court) in HCJ 6804/12 Israel Bar v. Minister of Justice, unpublished (2013) (Isr.), <http://elyon1.court.gov.il/files/12/040/068/o10/12068040.o10.pdf> [<https://perma.cc/XK37-ZL9Y>].

240. In the interest of disclosure, the author was a paid advisor for one of the commercial companies supporting the reform.

241. See, e.g., STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 26–52 (2008) (noting that public choice theory is “an abbreviation for analysis of how or why narrow regulatory interests routinely prevail over others . . . [and] accounts for much academic skepticism toward public-law regulation”); Posner, *supra* note 105, at 19 (“Agencies are subject to far more intense interest-group pressures than courts.”).

cases,<sup>242</sup> the concern in the abstract is unconvincing.<sup>243</sup> Many government agencies already operate in the world, and they are not all hopelessly captured, despite a great variety of lobbyist groups.<sup>244</sup> This seems especially true of the CFPB, which has taken a hard line against creditors during its years of operation. Additionally, consumers also mobilize politically, as evidenced by the support garnered by politicians such as Senators Elizabeth Warren and Bernie Sanders and political movements such as Occupy Wall Street.<sup>245</sup> Also, consumers are already at a disadvantage in the courts today, as creditors are repeat players, with more resources and greater ability to forum shop. Hence, neither forum is immune to special interests.<sup>246</sup> Ultimately, this challenge does not appear especially worrying. The agency does not replace court proceedings; it only adds an additional layer. Hence, the benefit to a plaintiff of “capturing” the regulator is much diminished. Given the great benefits that Adminization could provide and the low concrete threat of regulatory capture, it would be misguided to let abstract regulatory concerns inhibit meaningful reform.

#### D. Costs and Incidence

A final challenge relates to the cost of running the agency. This concern may relate to the costs themselves or their “incidence,” i.e., the idea that the public should bear the cost of Adminization. On reflection, however, this challenge does not prove critical. Using the existing platform of the CFPB means that set-up costs will be low. The most

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242. See Daniel Carpenter & David A. Moss, *Introduction to PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 3* (Daniel Carpenter & David A. Moss eds., 2014) (“[O]bservers are quick to see capture as the explanation for almost any regulatory problem . . . . At the same time, there appears to be a great deal of fatalism . . . about the impossibility of ameliorating or preventing capture.”).

243. For general critique, see Engstrom, *supra* note 31, at 674–78. Engstrom argues, however, that there is greater concern with capture when agencies conduct case-by-case adjudication. *Id.* at 678. His reasoning in this context seems to rely on a different model, where the agency substitutes legal supervision rather than complements it—as Adminization does.

244. For a list of the most concentrated lobbyist groups, see *Top Interest Groups Giving to Members of Congress, 2018 Cycle*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/mems.php> (last visited Oct. 23, 2017) [<https://perma.cc/P7YQ-BKKA>] (select “2016” from the drop-down list).

245. See Stephen Collinson, *Does Elizabeth Warren Regret Not Running for President?*, CNN (Aug. 26, 2015), <http://www.cnn.com/2015/08/25/politics/elizabeth-warren-joe-biden-elections-2016/> [<https://perma.cc/5DXH-PX4G>] (predicting high potential for both Elizabeth Warren and Bernie Sanders); *2016 Democratic Popular Vote*, REALCLEARPOLITICS, [https://www.realclearpolitics.com/epolls/2016/president/democratic\\_vote\\_count.html](https://www.realclearpolitics.com/epolls/2016/president/democratic_vote_count.html) (last visited Oct. 23, 2017) [<https://perma.cc/7Y6A-3XZ7>] (noting twelve million votes in favor of Bernie Sanders).

246. *Cf.* Posner, *supra* note 105, at 20 (“Courts are relatively immune to interest-group pressures.”).

significant cost is that of the audits, but the agency (and Congress) has control over the frequency of audits, thus guaranteeing budgetary control. For comparison, the IRS handles about 1.2 million audits every year, which amounts to an audit rate of 0.8 percent of all its cases.<sup>247</sup> To achieve similar rates, Adminization would only require the auditing of sixty-four thousand cases.<sup>248</sup>

Estimating the cost of audits is difficult; luckily, in situations like these, Fermi Estimate often provides useful approximations (within an order of magnitude).<sup>249</sup> Collecting evidence in a case, analyzing it, and contacting all the relevant parties should probably take no more than ten hours on average for a skilled auditor. The median annual salary of an IRS auditor is about \$70,000,<sup>250</sup> which, using the standard divisor of 2,087 working hours per year, implies a per-hour-cost of \$33.50. To this we should add overhead, inefficiencies, and some margin, so it is probably within a reasonable range to assume that for every hour of work, an hour of similar cost should be added. This means that the per-hour cost of audit is (again, using a very rough estimate) about \$70, giving us \$700 per audited case, or a cost of \$44.8 million. To verify, this estimate is consistent with the IRS estimate that a case audit costs about \$600.<sup>251</sup> Even doubling this estimate, we are still two orders of magnitude less than the cost of the leading alternative. In fact, this cost is so low that there is reason to believe that if Adminization reduces filings, it will be cheaper than the status quo, where courts have to handle many cases that should not have been filed.

Another source of cost comes from the development of algorithms. However, this cost would be largely a one-off expenditure on development. Perhaps even more importantly from a policy

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247. IRS DATA BOOK, *supra* note 112, at 21.

248. This is done under the assumption of eight million filings every year, of which 0.8 percent would be audited. *See supra* note 42.

249. *See Fermi Problem*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Fermi\\_problem](https://en.wikipedia.org/wiki/Fermi_problem) (last updated June 8, 2017) [<https://perma.cc/U7EH-WD2R>] (“Fermi estimates generally work because the estimations of the individual terms are often close to correct, and overestimates and underestimates help cancel each other out.”).

250. *See Average Salary for Tax Examiner, Collector, or Revenue Agent at U.S. Internal Revenue Service (IRS)*, Payscale, [http://www.payscale.com/research/US/Employer=U.S.\\_Internal\\_Revenue\\_Service\\_\(IRS\)/Salary/Job/Tax-Examiner%2c-Collector%2c-or-Revenue-Agent](http://www.payscale.com/research/US/Employer=U.S._Internal_Revenue_Service_(IRS)/Salary/Job/Tax-Examiner%2c-Collector%2c-or-Revenue-Agent) (last visited Oct. 23, 2017) [<https://perma.cc/3K5P-9BLR>].

251. To verify, the IRS estimates that a \$55 million budget increase will allow it to deal with five hundred thousand additional cases (including individual audits, employment tax exams, and collection matters). This implies a per-case cost of \$574, which—despite the differences between audited cases and the costs of handling the other types of cases—is still suggestive that the analysis here is in the right order of magnitude. *See IRS OVERSIGHT BD., FY2015 IRS BUDGET RECOMMENDATION SPECIAL REPORT 1, 6* (2014), <https://www.treasury.gov/IRSOB/reports/Documents/IRSOB%20FY2015%20Budget%20Report-FINAL.pdf> [<https://perma.cc/J4FM-QV55>].



perspective, Adminization can begin *without these algorithms* and simply choose cases at random, similar to the IRS's process.

The incidence objection holds that it should not be the public purse that pays the costs of setting up an agency that delivers services relating to purely private financial matters. While such objections may have some merit in certain contexts, it is also of little relevance to the case made here. This is because there are already large government subsidies in place, namely the costs of running the courts, paying judges' and staff salaries, administrative processes, provision of legal aid, etc. Court fees account for only twenty to thirty percent of the overall cost of running the court itself, with the remainder being a subsidy.<sup>252</sup> Moreover, all the current reform proposals will involve a much greater degree of subsidies. The question at this point is how to best allocate those existing subsidies.

Overall, whatever costs Adminization entails and whatever their incidence is, it is important to measure them in relation to both the (impossibly) high costs of the alternatives and the benefits of improving the system.

## CONCLUSION

An old joke tells of a customer who dines in a restaurant and, after finishing his meal, asks for the check, which the waiter promptly brings him. The customer then decides to review the check in detail, and discovers that, among the various items on the list, there is an unrecognized item called "success." Having no recollection of ordering such a dish, the customer asks the waiter about the meaning of this charge. "It is actually quite simple," responds the waiter, "if the customer pays, then it is a success."

The success method is the calculated, strategic filing of unmeritorious claims in the presence of lax screening mechanisms. This Article demonstrates that civil litigation is systematically lacking in its ability to screen unmeritorious claims in consumer credit litigation. The review of the evidence shows problems of predatory debt collection practices, sewer service, consumer underparticipation, lack of legal representation, faulty and sometimes fraudulent evidence, and a lack of supervision by judges. This results in a large system that invites the use of the "success method."

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252. See GEOFFREY MCGOVERN & MICHAEL D. GREENBERG, WHO PAYS FOR JUSTICE?: PERSPECTIVES ON STATE COURT SYSTEM FINANCING AND GOVERNANCE 17–18 (2014) (reporting findings from Massachusetts and Utah, while noting, however, that in Florida the court system seems to be profitable on net).

The proposed solution to this problem is the use of a new mode of regulation, in between courts and agencies, called Adminization: the use of a gatekeeper agency to provide oversight when participation is systematically lacking. It also offers a robust protection of due process rights as a matter of both procedure and substance. This results in a lean, cost-effective institution that could garner broad political support, much more so than most of the other reform proposals currently advocated. Consumers would enjoy greater access to justice at lower costs and much broader protection of their rights. Creditors would benefit from having greater consumer confidence in the credit market.

Future work will explore other applications of Adminization; some prominent examples include housing, insurance and social benefits fraud, employment law (suits against employees), civil rights, and civil forfeitures. Each unique context brings its own nuance and sensibilities, and the framework presented here can be usefully adapted to meet these considerations. With the advance of algorithmic decisionmaking, the growing budgetary pressures on courts, and the pressure to improve outcomes for consumers of the legal system, Adminization offers a glimpse into the future of our systems of regulation.