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Agencies as Litigation Gatekeepers

ABSTRACT. A central challenge in the modern regulatory state is rationalizing and coordinating multiple, overlapping, and interdependent public and private enforcement mechanisms. To that end, recent years have seen mounting calls to vest administrative agencies with litigation “gatekeeper” authority across a range of regulatory areas, from environmental protection and civil rights to antitrust and securities. Agencies, it is said, can use their expertise and synoptic perspective to weigh costs and benefits and determine whether private rights of action should lie at all. Alternatively, agencies might be given the power to evaluate lawsuits on a case-by-case basis, blocking bad cases, aiding good ones, and otherwise husbanding available private enforcement capacity in ways that conserve scarce public resources for other uses. Yet despite the proliferation of such calls, there exists strikingly little theory or evidence on how agency gatekeeper authority either should or would work in practice. This Article aims to fill that gap by offering a systematic account of this often-invoked but under-theorized role for agencies. Drawing on theories of agency behavior and empirical analysis of the gatekeeper regimes currently in existence, this Article sketches the case for and against vesting agencies with litigation gatekeeper authority across a range of regulatory contexts and elaborates some functional design principles that policymakers can use to weigh competing models or determine whether agency gatekeeping makes sense at all. There are other payoffs as well. Anatomizing agency gatekeeping allows us to reimagine the agency role in some of our most consequential regulatory regimes, among them a system of job discrimination regulation that seems especially ripe for revision following the Supreme Court’s decision in *Wal-Mart v. Dukes*. More broadly, this Article makes a novel contribution to the otherwise oceanic literature on “litigation reforms” and reorients scholarly debate around optimal regulatory design and the contours and purposes of the administrative state itself by exploring the increasingly blurred boundary between administration and litigation.

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INTRODUCTION

One of the most controversial developments in the American regulatory state in recent decades is a marked shift away from administrative regulation and enforcement and toward the use of private lawsuits as a regulatory tool.¹ Champions of that trend assert that deputizing “private attorneys general” to enforce legal mandates is desirable and even necessary: private enforcement leverages private information, expertise, and resources while serving to check “capture” of public enforcement agencies by regulated parties.² Critics, by contrast, cast private enforcement as overzealous, uncoordinated, and democratically unaccountable.³ Across a range of regulatory contexts, from environmental protection and civil rights to antitrust and securities, the resulting institutional design challenge is how to leverage private enforcement’s virtues while mitigating its vices. More broadly, how can we rationalize overlapping and interdependent public and private enforcement mechanisms?

In recent years, a growing chorus of commentators has offered an intriguing answer: vest administrative agencies with the power to oversee and manage private litigation efforts. Agencies, it is said, can use their expertise and synoptic perspective to weigh costs and benefits and determine whether private rights of action should lie at all.⁴ Alternatively, agencies might be given the

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1. See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 60 (2010) (noting the rise of “private enforcement regimes” as a regulatory mechanism beginning in the late 1960s); see also THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 11 (2002) (same); John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986) (“American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies.”).
 2. See *infra* note 35 and accompanying text.
 3. See *infra* Section I.B.
 4. See Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 95 (2005) (arguing for greater agency authority “to create and delimit private rights of action”); Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1 (1996) (advancing the same argument); see also Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983?: A Theoretical Approach*, 69 BROOK. L. REV. 163, 165 (2003) (advancing the same argument in the civil rights context); Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission’s Authority*, 107 HARV. L. REV. 961 (1994) (advancing the same argument in the context of securities litigation); James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF.

power to evaluate private lawsuits on a case-by-case basis, blocking bad cases, aiding good ones, and otherwise husbanding private enforcement capacity in ways that conserve scarce public enforcement resources for other uses.⁵ While the specific institutional designs vary, these proposals share a common aim: regulating private litigation efforts by granting agencies what I call litigation “gatekeeper” authority.⁶

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- L. REV. 115, 174-75 (2012) (same); Brianne J. Gorod, Case Comment, *The Sorcerer's Apprentice: Sandoval, Chevron, and Agency Power to Define Private Rights of Action*, 113 YALE L.J. 939, 944-46 (2004) (advancing the same argument in the civil rights context).
5. See Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487 (1996) (applying this theory to securities enforcement); Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 52-53, 72 (2002) (applying this theory to environmental protection and false claims); Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167 (1997) (applying this theory to environmental protection and securities); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000) (applying this theory to civil rights claims); Park, *supra* note 4, at 175 (discussing this theory in the context of securities litigation); Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 941 (2001) (applying this theory to antitrust); Geoffrey Christopher Rapp, *False Claims, Not Securities Fraud: Towards Corporate Governance by Whistleblowers*, 15 NEXUS: CHAPMAN'S J.L. & POL'Y 55 (2009) (applying this theory to securities); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5*, 108 COLUM. L. REV. 1301 (2008) (same); Heidi Mandanis Schooner, *Private Enforcement of Systemic Risk Regulation*, 43 CREIGHTON L. REV. 993, 1012-13 (2010) (same); Dennis J. Ventry, Jr., *Whistleblowers and Qui Tam for Tax*, 61 TAX LAW. 357 (2008) (applying this theory to tax); Jennifer Arlen, *Public Versus Private Enforcement of Securities Fraud* 46 (2007) (unpublished manuscript), <http://weblaw.usc.edu/assets/docs/Arlen.pdf> (applying this theory to securities enforcement).
 6. In addition to the specific gatekeeper calls referenced in notes 4-5 *supra*, commentators have made myriad other calls for a more expansive agency role in litigation regimes. See, e.g., RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 220-22 (2007) (framing mass tort settlements as a form of “governance” and proposing an agency-led negotiated-rulemaking mechanism for achieving such settlements); Tamar Frankel, *Let the Securities and Exchange Commission Outsource Enforcement by Litigation: A Proposal*, 11 J. BUS. & SEC. L. 111, 119-20 (2010) (proposing an auction/license model for coordinating public and private enforcement); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629 (2009) (arguing for a more assertive agency role to remedy the informational “aggregation deficit” in a regulatory regime built around private enforcement); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 115 (1991) (advancing an “auction” approach); A. Mitchell Polinsky & Steven Shavell, *Public Enforcement of Law*, in *CRIMINAL LAW AND ECONOMICS* 1, 55 (N. Garoupa ed., 2009) (asking whether the state should “regulate private litigation so as to better coordinate it with public enforcement”); David Rosenberg & James P. Sullivan, *Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law*, 2 J. COMPETITION L. & ECON. 159, 178 (2006) (advocating an “auction-buyback mechanism”).

Yet despite such calls, we lack a synthetic account of how agencies *should* or *would* exercise litigation gatekeeper powers and, by extension, how best to structure such authority.⁷ This is surprising. A number of federal and state agencies already wield gatekeeper powers, offering critical but mostly untapped opportunities for empirical assessment.⁸ Calls to grant agencies gatekeeper powers also raise significant but underexplored questions about whether agencies can or will deploy such powers in ways that serve rather than undermine the public good. Agencies may simply lack the capacity to accurately gauge case merits, or they may privilege pursuit of political rewards over welfare-maximizing regulation of private enforcement efforts. The latter possibility is especially concerning. Given that private enforcement is designed at least in part to counter possible agency capture, bringing agencies back into the picture risks returning the fox to the henhouse. Addressing these and other concerns is essential to any clear-eyed assessment of an expanded agency gatekeeper role. We cannot evaluate competing institutional designs—or, indeed, whether agencies should be given litigation gatekeeper authority at all—without doing so. And yet, existing scholarship offers strikingly little theory or evidence that might serve as a guide.

This Article aims to fill that gap by providing a systematic account of this under-theorized role for administrative agencies in the modern American regulatory state. My most basic aim is to develop a vocabulary for describing the many flavors of agency gatekeeping and, drawing on theory and empirical analysis of the agency gatekeeper regimes already in existence, to elaborate a set of functional design principles that policymakers working across a range of regulatory contexts can use to weigh competing approaches or assess whether granting gatekeeper authority makes sense at all. In so doing, I hope to place mounting calls to vest agencies with gatekeeper powers on a sounder analytic footing.

Anatomizing agency gatekeeping is also freeing. Armed with a better understanding of how gatekeeper authority could and would work, we can reimagine some of our most consequential regulatory regimes while recasting debate over some others in a fuller and more clarifying light. Thus, this Article provides a theoretical and empirical baseline against which to evaluate recurrent, but largely unanalyzed, calls to vest the Securities and Exchange

7. The closest to a synthetic treatment can be found in Stephenson, *supra* note 4. However, Stephenson’s insightful work focuses on what I label “wholesale” agency gatekeeping, *see infra* Subsection II.A.2, and then turns to mostly doctrinal concerns.

8. *See infra* Section II.A (categorizing existing gatekeeper designs at the federal and state levels).

Commission (SEC) with gatekeeper power over securities class actions.⁹ It also offers insights into what to do about job discrimination regulation, where the Supreme Court's recent decision in *Wal-Mart Stores. v. Dukes*¹⁰ has, by limiting the availability of class actions, rendered the regime's already dysfunctional mix of private enforcement and limited public oversight especially ripe for revision.¹¹ A final example is federal agency preemption of state-law causes of action, or "regulatory preemption." This growing practice has prompted several recent Supreme Court cases, as well as substantial scholarly commentary focused on the pros and cons of exclusively administrative regulation on the one hand and unbridled private enforcement on the other.¹² A systematic accounting of agency gatekeeping helps us to see these two choices 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.¹³

Beyond illuminating these more concrete issues of regulatory design, my account stands at the intersection of three broader scholarly literatures and makes a contribution to each. First, this Article contributes to the decades-long search for ways to heel litigation's excesses by bringing agency oversight mechanisms more squarely onto the menu of available litigation reforms. An oceanic literature identifies and evaluates a wide array of mechanisms for rationalizing litigation, from the usual suite of tort reforms (e.g., damages

9. See, e.g., Grundfest, *supra* note 4; Rose, *supra* note 5.

10. 131 S. Ct. 2541 (2011).

11. See *infra* Part IV (offering a case study in how to apply the gatekeeper idea to job discrimination regulation).

12. See, e.g., Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 480 (2008) (examining "common law liability versus safety regulation" as the main institutional design dimension in the regulatory preemption debate). For an overview of regulatory preemption law and policy, see generally THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* (2008). For recent Supreme Court decisions, see *Brueswitz v. Wyeth*, 131 S. Ct. 1068 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); and *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000). For an older debate about the "regulatory compliance" defense in tort law that takes a similarly binary agency-or-courts tack, compare Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985), which advocates ex ante administrative regulation as the primary and even exclusive approach to regulating certain risks, with Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990), which advocates an ex post court- and litigation-centered approach to regulating those same risks.

13. For a study pushing past analysis of regulatory preemption as a stark institutional choice, see Peter H. Schuck, *FDA Preemption of State Tort Law in Drug Regulation: Finding the Sweet Spot*, 13 ROGER WILLIAMS U. L. REV. 73 (2008).

caps) to heightened pleading and liability standards, reverse fee shifts, and other options.¹⁴ My analysis adds a new and often overlooked approach to this standard line-up of options and shows that, in many ways, agency gatekeeping is a more promising reform avenue.

Second, this Article aims to reorient a long and venerable literature on the choice between public and private enforcement of law.¹⁵ That literature, much of it coming out of the law and economics tradition, has generated a stream of valuable insights.¹⁶ But it has also grown increasingly divorced from regulatory reality. Indeed, many of our most consequential regulatory regimes have evolved in recent decades into hybrids of public and private enforcement in which multiple enforcers—including federal and state administrative agencies, private litigants, and state attorneys general—operate and interact within complex ecologies of enforcement.¹⁷ The institutional design challenge in this new regulatory landscape is not choosing between public and private enforcement. Rather, it is how to coordinate multiple, overlapping, and interdependent enforcement mechanisms. This Article thus joins the ranks of legal scholarship that has moved away from a binary conception of the choice between public and private enforcement and is instead exploring their intersections.¹⁸

14. See *infra* notes 84-93 and accompanying text.

15. Classic contributions include Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); and A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105, 120-21 (1980).

16. For further discussion, see *infra* notes 37-40 and accompanying text.

17. A number of legal scholars have remarked on the evolution of multienforcer regimes and begun to explore the legal and political forces that have fueled their rise. For a sampling, see BURKE, *supra* note 1; FARHANG, *supra* note 1; Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1 (2000); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012) [hereinafter Lemos, *Aggregate Litigation*]; Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011) [hereinafter Lemos, *State Enforcement*]; Reza Rajabiun, *Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States*, 8 J. COMPETITION L. & ECON. 187 (2012); and Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173 (2010).

18. See sources cited *supra* notes 4, 17. For an elegant argument challenging conventional distinctions between public and private enforcement, see Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. (forthcoming 2014). For rare efforts to construct formal models of public-private enforcer interactions, see Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT.

Finally, and relatedly, this analysis joins a growing scholarly literature that aims to re-think the contours and work of the administrative state by training attention on the increasingly blurred boundary between administration and litigation. As the American regulatory state has shifted away from pure administrative enforcement and toward private litigation as a regulatory tool, an increasing portion of agency action has come to operate in the shadow of private enforcement efforts or otherwise involve a subtle public-private coordinating role.¹⁹ Other tectonic shifts in the regulatory landscape have likewise moved agencies to take on new roles and develop novel regulatory tools. Thus, the “ossification” of rulemaking has moved agencies to use serial litigation rather than onerous rulemaking procedures to achieve regulatory ends—a trend critics have dubbed “regulation by litigation.”²⁰ Similarly, judicial constriction of class actions and punitive damages helps explain the rising use of so-called agency restitution actions, in which agencies litigate and secure large monetary judgments against regulatory targets and then distribute the proceeds to private individuals or entities who have suffered harm.²¹ Just as an earlier generation of administrative law scholars surfaced critically important trends in the privatization of administrative authority,²² this Article attempts to bring the administration-litigation nexus more fully into our conception of what the administrative state is and does.

The remainder of this Article proceeds in four parts. Part I frames the problem agency gatekeeping purports to solve. It first situates private enforcement’s rise in a broader legal, political, and policy context, and then reduces the vast debate about its merits and demerits to three core concerns: (i)

ECON. REV. 135, 145-51 (2006); and R. Preston McAfee et al., *Private v. Public Antitrust Enforcement: A Strategic Analysis*, 92 J. PUB. ECON. 1863, 1866-68 (2008).

19. For research exploring how the EEOC has worked with outside litigants to achieve regulatory goals, see Robert C. Lieberman, *Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement* (Mar. 18, 2005) (American Political Development Colloquium, Miller Center of Public Affairs, University of Virginia), http://web1.millercenter.org/apd/colloquia/pdf/col_2005_0318_lieberman.pdf.
20. See, e.g., REGULATION BY LITIGATION (Andrew P. Morriss et al. eds., 2009); W. Kip Viscusi, *Overview*, in REGULATION THROUGH LITIGATION 1 (W. Kip Viscusi ed., 2002).
21. See Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 542-43 (2011); see also Lemos & Minzner, *supra* note 18 (manuscript at 8) (noting the “growing recognition that public enforcement often serves a function traditionally associated with private litigation: compensating victims”).
22. See, e.g., PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007); GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

zealousness; (ii) coordination; and (iii) legislative fidelity. It closes by surveying existing litigation reform approaches, particularly *ex ante* legislative fixes along the “tort reform” model, and exposing their inherent limitations in addressing each of these core concerns.

Parts II and III, the Article’s analytic core, consider the case for and against vesting agencies with litigation gatekeeper authority as an alternative to the usual litigation reforms. Part II offers a typology of litigation gatekeeper powers by characterizing existing and proposed gatekeeper designs along multiple dimensions. This is key prefatory work, as one cannot evaluate any particular gatekeeper approach without first surveying the landscape of design options.

Part III then elaborates the basic case for and against agency gatekeeping. Section III.A begins by sketching a number of discrete gatekeeper tasks that, taken together, constitute an ideal model of how well designed agency gatekeeper authority could curb private enforcement’s excesses while at the same time alleviating problems of private *underenforcement* of socially valuable claims. Section III.B then uses a mix of theoretical and empirical insights drawn from the public bureaucracy literature and elsewhere to show how agencies vested with litigation gatekeeper powers are likely to deviate from that ideal. Along the way, I find much to recommend in agency gatekeeping. Well designed gatekeeper structures can mitigate many of the zealousness, coordination, and legislative fidelity concerns at the core of critiques of private litigation as a regulatory tool. And they add unique value in this regard, countering many of private enforcement’s pathologies in ways that standard “litigation reforms” cannot. Yet I also uncover some underappreciated challenges in the design of gatekeeper structures, including, among others, the difficulty of inducing politically sensitive agencies to make optimal use of their power to terminate private enforcement efforts and of countering agency capture concerns without distorting other aspects of the agency’s gatekeeper decision-making. Section III.C concludes the analysis by taking a comparative analytic tack: assuming that vesting agencies with litigation gatekeeper authority is desirable, how can policymakers choose among competing designs?

Lastly, Part IV concretizes the collected insights from the first three Parts by asking, albeit briefly, how gatekeeping might be usefully applied in rethinking one of the most maligned regimes in the modern American regulatory state: job discrimination regulation under Title VII and cognate federal antidiscrimination statutes. In particular, I propose a radical overhaul of the role of the Equal Employment Opportunity Commission (EEOC) by rendering its gatekeeper powers both more and less expansive than at present, dismantling the EEOC’s current system of charge processing but granting the agency substantial new gatekeeper power over class actions and other

“systemic” private lawsuits. My analysis thus offers a focused and empirically grounded illustration of how agency gatekeeping, while hardly a panacea, can add unique value in rationalizing and optimizing litigation regimes.

I. THE TROUBLE WITH PRIVATE ENFORCEMENT AND THE CHALLENGE OF REGULATORY DESIGN

Any evaluation of agency litigation gatekeeper authority must begin by defining the problem—or set of problems—such authority is designed to solve. To be sure, this is well tilled ground: a vast scholarly literature maps the choice between public and private enforcement of legal mandates and the merits and demerits of private enforcement in particular. Rarely, however, has a full treatment of the resulting institutional dynamics appeared in one place. Nor have scholars fully assimilated the insights of political science, economics, and more traditional legal scholarship in ways that attend to both the political-institutional origins of private enforcement’s relatively recent rise and the actual, on-the-ground design challenges facing regulatory architects.²³ The trouble with private enforcement, it turns out, is often invoked yet surprisingly underspecified.

This Part seeks to remedy these shortcomings and paves the way for the assessment of agency gatekeeping to come by: (i) describing the relatively recent rise of private enforcement, particularly as a means of enforcing statutory law; (ii) surveying the regulatory design challenges that attend the use of private litigation as a regulatory tool; and (iii) exposing the limits of common “litigation reforms” designed to mitigate private enforcement’s principal pathologies. Along the way, I sketch a broader and critically important point. The optimal structure of law enforcement cannot be determined by answering first-order questions about whether private enforcement is systematically more or less socially efficient than public enforcement. Nor, for that matter, is social efficiency the sole or even primary concern. Rather, private enforcement poses a mix of zealotry, coordination, and democratic accountability challenges that are only imperfectly subject to ex ante legislative fixes. Thus, as I take up in subsequent Parts, deployment of private enforcement as a regulatory tool presents a set of micro-level delegation

23. Partial exceptions include J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012); Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375 (2007); Reza Rajabiun, *Private Enforcement of Law*, in CRIMINAL LAW AND ECONOMICS, *supra* note 6, at 60; and Stephenson, *supra* note 4.

problems—problems that administrative agencies vested with gatekeeper powers may be ideally positioned to solve.

A. The Rise of the “Litigation State”

Litigation seems perennially under attack.²⁴ Yet the rise of private enforcement as a regulatory tool—particularly as a way to enforce *statutory* law—is a relatively recent phenomenon. Throughout much of the twentieth century, both before and after the New Deal, the archetypal enforcer, particularly in American public law, was a centralized bureaucratic apparatus.²⁵

Then something dramatic happened: across a range of regulatory areas, private enforcement took off. As Figure 1 reflects, government enforcement of federal statutes mostly outstripped private enforcement efforts between 1942 and the mid-1950s. Since the early 1960s, however, private enforcement efforts have come to dwarf government-initiated ones.²⁶ In 2011 alone, federal courts saw more than 40,000 new filings asserting claims under federal laws governing securities, antitrust, and job discrimination as well as the Fair Labor Standards Act, the Racketeer Influenced and Corrupt Organizations (RICO) Act, the False Claims Act (FCA), the Federal Debt Collection Practices Act, and Section 1983. In 1960, by contrast, private enforcement in most of these areas was either virtually or entirely unknown.²⁷

24. See generally BURKE, *supra* note 1 (examining American policies that encourage litigation as a method of dispute resolution, and the ensuing backlash against litigation).

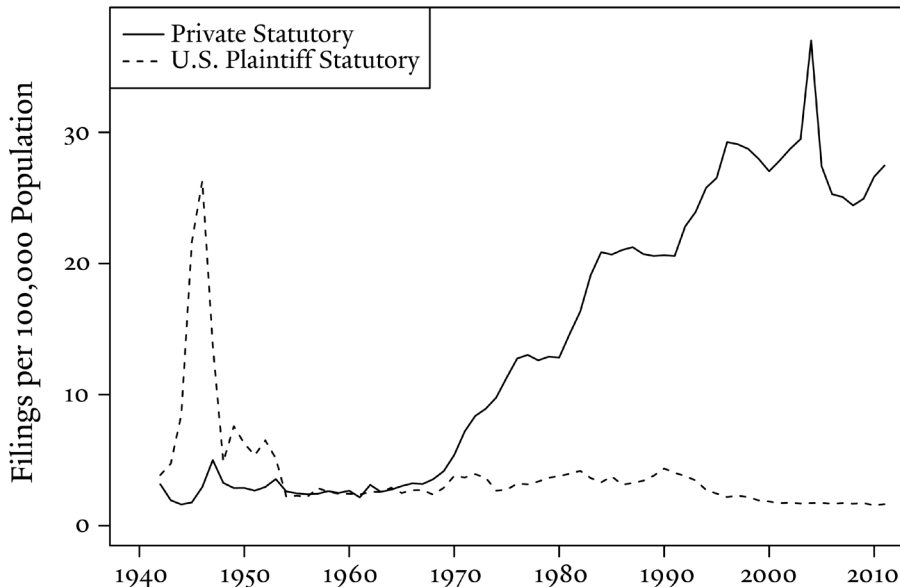
25. As just one example, state-level job discrimination regulation prior to Title VII of the Civil Rights Act of 1964—one of several present-day regulatory regimes most closely identified with private, court-centered enforcement—was an administrative regime in which agencies conducted investigations, held hearings, and issued injunctive orders. See David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1073-74, 1081-82 (2011).

26. Figure 1’s data come from ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C-2 (2012) (“U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit”) for each year, excluding deportation and prisoner petition cases. Thanks to Sean Farhang for sharing data up to 2005.

27. *Id.*

Figure 1.

PRIVATE AND U.S. PLAINTIFF STATUTORY LITIGATION RATES IN FEDERAL DISTRICT COURT, 1942-2011



To be sure, these statistics paint a stylized portrait of current regulatory realities. For instance, the trend from public to private enforcement has not always proceeded in straight-line fashion.²⁸ Nor do Figure 1's trendlines take account of purely administrative (i.e., "in-house") agency enforcement actions and adjudications;²⁹ litigation in state courts, where tort cases are concentrated

28. For example, federal antitrust regulation began in the late nineteenth century as a private enforcement regime with broad interpretive authority firmly lodged in federal courts. See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 461-69 (2008).

29. There are no reliable estimates of trends in agency adjudications in recent decades, at least in part because of the sprawling nature of the federal administrative state. However, it seems likely that total in-house enforcement actions have increased. As just one set of data points, the number of enforcement actions ("administrative penalty order complaints") brought by the EPA increased by roughly two thirds between 1991 and 2011. See *National Enforcement Trends* 2 (Oct. 2011), <http://www.epa.gov/compliance/resources/reports/nets/nets-e1-apocomplaints.pdf>.

and filing-trend debates have been most heated;³⁰ or differences across litigation types—e.g., big-ticket “structural reform” litigation or large-scale class actions as against smaller-bore lawsuits—despite their very different impact.³¹ And simple filing rates tell us little about *why* private enforcement has grown as a regulatory choice—a question that has attracted substantial academic commentary but admits of few determinate answers.³²

Most important for present purposes, bare filing statistics gloss over a critical part of the story: private enforcement has seen some of its most rapid growth in areas like securities, antitrust, and job discrimination, where public actors already possess substantial regulatory and enforcement authority. The result is a many-layered and distinctively American regulatory approach in which multiple public and private parties—including federal and state administrative agencies, private litigants, and state attorneys general—operate and interact within complex ecologies of enforcement.³³ The primary institutional design challenge in this pluralistic regulatory landscape is not choosing among enforcement modes or deciding which should be given primary or exclusive domain. Rather, it is optimal coordination of multiple, overlapping, and interdependent enforcement mechanisms—of which private enforcement is often the most important.

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30. Compare WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991) (claiming a marked shift in the quantity and character of litigation in the post-war period), with Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 985-95 (2003) (noting an intense debate around claims about a “litigation explosion” but reviewing evidence that such claims are exaggerated); NAT’L CTR. FOR STATE COURTS, *EXAMINING THE WORK OF STATE COURTS, 2001: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT* 26 (Brian J. Ostrom, Neal B. Kauder & Robert C. LaFountain eds., 2001), <http://bjs.gov/content/pub/pdf/ewsc01-npcsp.pdf> (examining statistics derived from multiple states and concluding that overall tort filings were stable from 1985 to 2000 and actually declined from 1991 to 2000).
31. See Viscusi, *supra* note 20, at 1 (noting that not all lawsuits are the same in scale and impact).
32. Scholarly explanations for private enforcement’s growth as a regulatory tool variously point to American political culture; increasingly dense legislative and regulatory mandates; the rise of rent-seeking plaintiffs’ lawyers and public interest groups distrustful of bureaucracy; a legislative desire to shift regulatory costs from public/on-budget to private/off-budget sources; and legislative efforts to end-run an uncooperative executive branch during divided government. See generally Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 823-28 (2008) (reviewing the debate and collecting signal contributions to the literature).
33. See *supra* note 17.

B. Refining the Critique of Private Enforcement

Is private enforcement's rise a good or a bad thing? An avalanche of scholarly work stakes out the poles of a rich debate. Private enforcement, we are told, taps private information, expertise, and resources.³⁴ It also operates, the argument continues, as a "failsafe" mode of enforcement when public agencies facing resource or political constraints are unable or unwilling to enforce.³⁵ But there are costs. Critics cast private enforcement as overzealous, uncoordinated, and democratically unaccountable.³⁶ A full understanding of the contours of each of these concerns is essential to any effort to gauge the merits and demerits of giving agencies an expansive litigation oversight role.

1. The Zealousness Critique

The zealousness critique of private enforcement takes many forms, but most versions proceed from a stylized comparison of profit-motivated private enforcers and idealized public enforcers. In theory, at least, public enforcement is a more efficient means of achieving optimal deterrence of undesirable conduct.³⁷ Public enforcers can exercise prosecutorial discretion, enforcing only where the social cost of doing so (e.g., transaction costs, including costs imposed on affected communities and judicial resources) is less than the social benefit (e.g., the value of deterred misconduct). In contrast, a private enforcer will litigate whenever her expected return exceeds her expected cost, even

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34. See generally Glover, *supra* note 23, at 1145-60 (discussing the rise and functions of private enforcement); Stephenson, *supra* note 4, at 107-13 (reviewing the advantages of private enforcement).
35. See FARHANG, *supra* note 1, at 20 ("Lawsuits provide a form of auto-pilot enforcement that will be difficult for bureaucrats or future legislative coalitions to subvert . . ."); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 227 (1983) (arguing that private enforcement "performs an important failsafe function by ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers"); Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 198 (1987) (noting that private enforcement "frees individuals from total dependence on collective bureaucratic remedies," and "provides a back-up guarantee of redress").
36. See Stephenson, *supra* note 4, at 114-20 (reviewing the disadvantages of private enforcement).
37. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 200 (1968) (offering the classic account of optimal deterrence in which sanctions are set equal to the net social cost of undesirable conduct divided by the probability of successful prosecution, such that a wrongdoer internalizes the full social cost of her action).

where the social cost of litigating outstrips all benefits.³⁸ Worse, private enforcers may in fact exploit litigation costs, filing *in terrorem* lawsuits—or, in the securities context, “strike” suits—that use the threat of massive discovery costs to extract settlements in cases where the social cost of adjudication would exceed any benefit, or even where culpability is entirely absent.³⁹ The result, the theory goes, is systematic overexpenditure of social resources and costly overdeterrence.⁴⁰

As a first-order generalization, there is much truth here. In other ways, however, the standard zealotry critique substantially overstates the case or simply misses key dimensions of the problem. Most significant is the failure to acknowledge the complex ways in which the socially optimal choice of enforcer will turn not just on the public and private propensity to enforce but also on the relative cost of competing enforcement modes.⁴¹ On one hand, private enforcement might be *more* costly: relative to decentralized private enforcement efforts, centralized public enforcement enjoys economies of scale, fewer

38. See Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997); see also Wendy Naysnerski & Tom Tietenberg, *Private Enforcement of Federal Environmental Law*, 68 LAND ECON. 28, 47 (1992) (“Private litigation priorities are established on the basis of private costs and benefits, not social costs and benefits.”).

39. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlement in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (describing the problem of “strike” suits in securities regulation); Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988) (offering a general theory of litigation costs and settlement behavior).

40. Another standard claim made on public enforcement’s behalf is that public enforcers can economize on enforcement costs by imposing maximally high sanctions on relatively few violators and exercising discretionary nonenforcement as to the rest, thus achieving desired deterrence at the least possible cost. By contrast, upping the payouts available to private enforcers in an effort to economize on enforcement costs induces ever greater private investment in enforcement as profit-motivated private enforcers pour resources into litigation efforts. See Becker & Stigler, *supra* note 15, at 13-16; Landes & Posner, *supra* note 15, at 9. As with other parts of the zealotry critique of private enforcement, this critique is true as far as it goes. But two problems limit its force. First, it is not always true that maximal sanctions are socially efficient, thus narrowing public enforcement’s advantage. See A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979) (complicating the analysis by noting that maximal sanctions promote efficiency only where regulatory targets are risk neutral). Second, and more important, there are real-world political and legal constraints on the assessment of maximal damages. See *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (holding that excessive damages multipliers violated the Due Process Clause); Mats Persson & Claes-Henric Siven, *The Becker Paradox and Type I Versus Type II Errors in the Economics of Crime*, 48 INT’L ECON. REV. 211 (2007) (noting political constraints on imposing large sanctions).

41. See Polinsky, *supra* note 15, at 120.

wasteful redundancies, and more efficient information processing across cases.⁴² But in many regulatory areas, the opposite is far more likely true: private enforcement is vastly cheaper than public, either because of greater organizational dexterity, or because private enforcers can tap individuals, particularly organizational “insiders,” to ferret out hidden information about misconduct.⁴³ This is a powerful point. In regulatory regimes where information about wrongdoing remains hidden—and so is prohibitively costly for public enforcers to discover or dislodge—there will be little or no enforcement at all unless private parties can be induced to surface information about wrongdoing.⁴⁴ To that extent, even overzealous private enforcement efforts may minimize social loss relative to a world in which harmful conduct is not controlled at all.

One could go on.⁴⁵ For now, the key point is that the zealousness critique of private enforcement is, at least in its full-throated form, overblown and indeterminate. Indeed, from a regulatory design perspective, the question is not whether private enforcement is systematically more or less socially efficient than public enforcement. Rather, socially efficient deployment of private enforcement presents regulatory architects with a far subtler set of second-order, micro-level calibration challenges.

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42. See A. Mitchell Polinsky & Steven Shavell, *Public Enforcement of Law*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS: CRIMINAL LAW AND ECONOMICS 1 (Nuno Garoupa ed., 2d ed. 2009); see also Glover, *supra* note 23, at 1179–80 (noting the potential informational advantages of public enforcers); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 369 (1984) (same).
 43. See Bucy, *supra* note 5, at 5 (“Private justice can supply the resource of inside information.”); Coffee, *supra* note 35, at 226 (“[P]rivate enforcement may be able to mobilize and reallocate its resources more quickly than the public enforcer”); Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 168 (1985) (“[P]rivate firms are generally more efficiently operated than public agencies.”); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1298 (1982) (noting that centralized public agencies often suffer from “diseconomies of scale, given multiple layers of decision and review”).
 44. Note that there are ways to induce private actors to surface information about misconduct short of vesting those actors with a private right of action. In the securities and tax context, for instance, Congress has created what we might call “pure bounty” regimes in which private individuals receive a cash bounty for information that leads to a successful public enforcement action but enjoy no independent enforcement authority. See David Freeman Engstrom, *Whither Whistleblowing?*, 15 THEORETICAL INQUIRIES L. (forthcoming 2014) (comparing these two types of regimes).
 45. For instance, public enforcement’s alleged efficiency advantages depend on the exercise of prosecutorial discretion. Yet selective enforcement also creates incentives for bribery—or, short of that, agency capture. I return to capture theory and its implications for agency gatekeeping *infra* Subsection III.B.2.

One such challenge arises from the fact that private enforcers vary, often substantially, in their motives and means. This complicates efforts to set payouts across the full enforcer pool to achieve desired enforcement levels.⁴⁶ As a concrete example, critics have long argued that antitrust law overdeters socially valuable business activity because certain plaintiff types (e.g., business competitors) are already well incentivized to detect and prosecute violations compared to others (e.g., end consumers) and yet still reap statutory treble damages.⁴⁷

A second calibration challenge stems from what might be labeled “scaling” problems. Private enforcement may be suboptimal where the targeted harm is large and so exceeds the malefactor’s ability to pay out fines or damages,⁴⁸ or where especially well resourced regulatory targets (e.g., Fortune 500 companies) are able and willing to mount a vigorous defense.⁴⁹ Scaling problems complicate optimal calibration at the other end of the harm spectrum as well: profit-minded private enforcers may not enforce at all where the cost of initiating enforcement is high and the harm (and, thus, the expected payout) is low, even if enforcement would improve social welfare.⁵⁰ All of this turns the standard zealousness critique on its head: the problem is not that profit-obsessed private enforcers will target only large-scale harms in search of big payouts or overdeter small-scale harms that do not warrant expenditure of social resources. Rather, private enforcement may not deter either type of harm *enough*.

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46. See David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1256 (2012).
47. See McAfee et al., *supra* note 18, at 1864 (noting private enforcers’ incentives “to use the laws to win in the courts what they were unable to win in honest competition with their rivals”).
48. See Naysnerski & Tietenberg, *supra* note 38, at 42 (“Civil sanctions have a serious defect when the assets of the firm are limited relative to its obligations.”); Polinsky, *supra* note 15, at 113-14 (noting the superiority of public enforcement where defendants have insufficient wealth to compensate private enforcers for their effort).
49. See Rajabiun, *supra* note 17, at 202 (noting that “risk-averse plaintiffs” might be “reluctant to file cases against resourceful enterprises”).
50. This may occur where private enforcers will suffer high psycho-emotional costs from taking action (e.g., where an organizational insider must decide whether to blow the whistle on colleagues or otherwise engage in “organizational dissent”). See Engstrom, *supra* note 46, at 1295; see also James D. Cox & Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 743-44 (2003) (noting scaling issues in the securities context); Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433 (2009) (noting the problem of organizational dissent); Polinsky, *supra* note 15, at 119-20 (modeling scaling problems).

To be sure, these calibration challenges may not be insuperable. One can imagine an endlessly variegated statutory schedule of payouts pegged to particular enforcer or claim types that raise or lower enforcement activity to desired levels.⁵¹ Legislators can also specify the types of enforcers who have standing to sue or denominate certain claims as eligible or ineligible for private enforcement.⁵² But *ex ante* calibration is also informationally demanding: legislators must know who within the pool of would-be enforcers will initiate enforcement actions and of what types—and must continually monitor the situation.⁵³ As a result, legislative calibration efforts will necessarily be a blunt instrument of control. Despite legislators' best efforts, a substantial number of bad cases will enter the system, and a substantial number of good cases will not.

2. *The Coordination Critique*

Coordination problems are no less vexing for regulatory designers. The standard version of the coordination critique takes one of two forms. First, profit-chasing private enforcers will yield wasteful duplication of effort and socially costly overdeterrence by “piggybacking” on public enforcement efforts and also on each other.⁵⁴ Second, the piecemeal and unyielding nature of profit-motivated private enforcement will deprive regulatory regimes of needed “coherence” by, among other things, disrupting the subtle cooperative relationships that arise between regulators and regulatory targets.⁵⁵

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51. See Engstrom, *supra* note 46 (noting examples from the FCA, Private Securities Litigation Reform Act (PSLRA), and antitrust contexts).
 52. See, e.g., William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 237 (1998) (advocating delimiting “categories of conduct that *qui tam* relators can attack”).
 53. See McAfee et al., *supra* note 18, at 1865, 1872 (noting the higher informational demands of optimizing private enforcement).
 54. In the latter case, this might mean multiple enforcers chasing the same government-provided bounty (where government deputizes private enforcers to collect fines for it) or multiple plaintiffs seeking compensation for the same injuries via separate lawsuits. Note that some scholars remain skeptical about the volume and effect of private-on-public piggyback actions. See, e.g., Maria Correia & Michael Klausner, *Are Securities Class Actions “Supplemental” to SEC Enforcement? An Empirical Analysis* (Univ. of Cal. Law & Econ. Workshop, 2012) (finding only weak evidence that piggybacking is a problem).
 55. See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1117 (1990) (defining regulatory “coherence” as a statutory scheme that “reflect[s] a unitary vision” rather than merely an absence of contradictory rules); Mark Seidenfeld & Janna Satz Nugent, “*The Friendship of the People*”: *Citizen Participation in*

As with the zealousness critique, there is substantial truth here.⁵⁶ Yet in other ways, the standard coordination critique, like its zealousness cousin, simply misses key dimensions of the problem. For instance, legislators who opt to establish hybrid public-private enforcement regimes are hardly without tools for eliminating costly piggyback actions. They can legislatively bar private actions that mirror an earlier-filed private suit or government enforcement effort.⁵⁷ Or, as noted previously, they can denominate certain claim types as eligible or ineligible for private enforcement, thus constructing a clear public-private division of labor.⁵⁸ But these approaches come at a substantial cost, exposing once again the limits of *ex ante* legislative fixes. “First-to-file” provisions create perverse incentives for private enforcers to file premature claims in the race to the courthouse door.⁵⁹ More importantly, categorically barring piggyback suits deprives public enforcers of the ability to craft a flexible enforcement strategy that optimally leverages available public and private enforcement capacity.⁶⁰ The problem, then, is not piggyback actions *per se*.⁶¹ Rather, it is that legislators cannot know beforehand which piggyback actions are part of a coherent regulatory strategy and which are not.

Environmental Enforcement, 73 GEO. WASH. L. REV. 269, 293-96 (2005) (laying out cooperative-relationship concerns); Stephenson, *supra* note 4, at 117-18 (same).

56. More generally, the central preoccupation of litigation scholars in recent decades—how best to achieve consent and closure in aggregated and consolidated proceedings—is at bottom a coordination problem. See Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1106 (2010) (noting the need for a “centralizing mechanism” beyond the class action device to solve problems of consent and closure in aggregated and consolidated proceedings).
57. The FCA provides examples of both types of provisions. See 31 U.S.C. § 3730(b)(5) (2006) (“When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”); *id.* § 3730(e)(3) (“In no event may a person bring an action . . . which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.”).
58. See *supra* text accompanying note 52.
59. See Engstrom, *supra* note 46, at 1283-84.
60. See, e.g., Coffee, *supra* note 35, at 225 & n.21; Erichson, *supra* note 17, at 41-43; Rose, *supra* note 5, at 1356; Stephenson, *supra* note 4, at 127-28. For a classic case illustrating some of the complexities of the piggybacking phenomenon in the securities context, see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).
61. See Coffee, *supra* note 35, at 225 (“[A]lthough some have characterized such ‘tag along’ private enforcement actions as ‘parasitic,’ it may be more accurate to describe the relationship between public and private enforcer as symbiotic.” (footnote omitted)).

Worse, the standard version of the coordination critique, with its overriding focus on regulatory coherence and duplicative litigation efforts, tends to obscure a host of significant but smaller-scale coordination challenges. One type of coordination problem occurs when distortions in the market for the retention and referral of legal services yield mismatches in plaintiff- and defense-side resources and sophistication. This may result from so-called “queuing” effects, in which the best counsel sit atop referral networks and take the very best cases, thus matching themselves with the cases to which they add the least value.⁶² Alternatively, plaintiffs’ counsel at the top of the queue may erroneously pass on a high-quality case, leaving it to lower-order counsel, and the defendant, with full information about the extent of illegality, may respond by investing heavily in defense.⁶³ Whatever the cause, the resulting “adversarial asymmetries” can impair the system’s ability to fully vindicate the public interest by permitting lawyer skill and resources, not underlying case merit, to drive litigation outcomes.

Another type of micro-level coordination problem arises from repeat-play dynamics. It is well known that repeat litigants enjoy advantages because they can “play for rules,” settling bad cases and pursuing only good ones at trial or on appeal, thus bending doctrine—and, more importantly, judicial solicitude⁶⁴—in their favor.⁶⁵ In a regime with only public enforcement, government is the ultimate repeat player. Inclusion of a private enforcement mechanism, however, adds one-shotters to the mix who, lacking a strategic perspective beyond the case at hand, can generate bad precedent which hamstrings public and private enforcers alike.⁶⁶

62. See David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689, 1699 (2013) (noting the efficiency costs of the “adversarial asymmetries” resulting from this phenomenon); see also John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 280 (2006) (describing this “queuing” dynamic).

63. See Engstrom, *supra* note 62, at 1699.

64. See Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 823 (2010) (noting the risk of judicial “backlash” against private enforcement of federal statutes if too many marginal cases are brought).

65. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 100 (1974) (discussing repeat players “play[ing] for rules”).

66. See, e.g., Bucy, *supra* note 5, at 66 (“[I]ncompetent, overworked, or inexperienced private counsel, whose interests may diverge from the public interest, may be generating case precedent that restricts government regulators.”).

A final coordination problem is unique to the situation where a government pays private enforcers a bounty to collect fines on the government's behalf⁶⁷ – say, as a sanction for violations of environmental law or fraud in connection with government contracting. One version of the problem has been well articulated elsewhere: regulatory designers who seek to reduce private enforcement levels by constraining private enforcers to earn only a portion of any fine collected will incentivize the litigants to negotiate collusive settlements for an amount that is greater than the expected bounty but less than the full sanction, thus eroding deterrence value.⁶⁸ A broader, but often overlooked, version of the problem extends from preclusion principles: because a private enforcer collecting regulatory fines stands in the government's shoes and sues on its behalf, any judgment will have preclusive effect on the government's later assertion of transactionally related claims. This creates powerful incentives for private enforcers and regulatory targets to trade a larger settlement pot for an unduly wide liability release, compromising future enforcement efforts, whether public or private.⁶⁹

One could continue in this vein. For now, however, a unifying point can once more be ventured: many of the most pressing coordination problems that afflict private enforcement – from piggybacking and adversarial asymmetries to repeat-play dynamics and collusive settlements – are either imperfectly remediable by way of ex ante legislative fixes or, worse, entirely immune from them. As with the calibration challenges that extend from the zealousness critique, there are hard limits on legislators' ability to solve coordination problems from afar.

3. *The Legislative Fidelity Critique*

If the zealousness and coordination critiques rest on assumptions about private profit motivation, then a third and final critique of private enforcement

67. Examples include: (i) the qui tam provisions of the FCA, 31 U.S.C. §§ 3730, 3733 (2006), whereby private enforcers pocket a portion of any money returned to the federal treasury; (ii) California's Labor Code Private Attorneys General Act, which permits private litigants to receive twenty-five percent of civil penalties for labor violations, CAL. LAB. CODE § 2699(i) (Deering 2013); and (iii) California's Proposition 65, which authorizes payment of a portion of penalties imposed in actions for failure to label dangerous chemicals, CAL. HEALTH & SAFETY CODE § 25192(a) (West 2012).

68. See Landes & Posner, *supra* note 15, at 27 n.54; Polinsky, *supra* note 15, at 123.

69. See, e.g., Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997) (noting the "danger that a relator [in a qui tam action asserting contractor fraud on the government] can boost the value of settlement by bargaining away claims on behalf of the United States").

proceeds from a more basic pair of observations: public enforcers are politically accountable actors. Private enforcers are not.

The resulting legislative fidelity critique roughly tracks zealousness concerns: if profit-motivated private enforcers initiate suit whenever the expected value of doing so exceeds expected cost, they may develop and press novel applications of legal mandates that public enforcers, exercising sound prosecutorial discretion, would forgo as inconsistent with the original legislative design.⁷⁰ Relentless pursuit of profit thus yields a form of statutory drift and mission creep as private enforcers drive law enforcement efforts in new and democratically unaccountable directions.⁷¹

To be sure, it is not hard to see possible limits to this logic. Recall that deployment of private enforcement is a legislative *choice*. To that extent, one can argue that regulatory drift will already have been factored into the legislative decision to delegate enforcement authority to private litigants rather than or in addition to public prosecutors in the first place, conferring democratic legitimacy, though at a higher level of generality, on any and all deviations that result.⁷² More importantly, the simple legislative fidelity

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70. See David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation* (Apr. 10, 2013) (unpublished manuscript) (on file with author); see also Park, *supra* note 4, at 159 (noting the general view that entrepreneurial private enforcers are more likely than public enforcers to “invest resources in pursuing innovative theories of wrongdoing”). A similar assumption that profit-motivated private litigants generate a “demand” for the production of legal rules underpins the older debate over the efficiency of the common law. See, e.g., Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977) (offering the seminal theory of legal change in these terms).
71. See Stephenson, *supra* note 4, at 119 (noting that private enforcers are not “subject to electoral discipline”); Stewart & Sunstein, *supra* note 43, at 1292 (arguing that private enforcement can “undermin[e] the advantages of political accountability . . . that administrative regulation was designed to provide”).
72. More concretely, a legislature might choose private over public enforcement based on its determination that deputizing private enforcers to enforce legal mandates will yield less overall drift over time than a purely public enforcement regime, particularly where the executive branch—and, thus, the relevant administrative agency or prosecutor’s office—is controlled by an opposing political party. It follows that rational legislators might choose private enforcement as a way to achieve *greater* overall legislative fidelity than might obtain if enforcement were left in purely public hands and also greater overall “stability” of legal norms. See, e.g., FARHANG, *supra* note 17 (noting that a leading explanation for private enforcement’s rise as a regulatory tool in recent decades is a legislative desire to insulate enforcement efforts from political control, particularly where ideologically different public enforcers cannot be trusted to faithfully implement the statute); Coffee, *supra* note 35, at 227 (listing “stability of legal norms” as a benefit of private enforcement); Lemos, *State Enforcement*, *supra* note 17, at 707 (indicating that private enforcers cannot be “captured by industry or controlled by politicians” and hence function “as a failsafe mechanism by reducing the risk that entire classes of violations will go unremediated”); cf. Matthew C.

critique assumes that courts will be unable to police deviations from legislative purposes, or that a sitting legislature or administrative agency vested with rulemaking authority cannot amend legal mandates whenever private enforcement efforts stray beyond legislative preferences.⁷³ Why can't these institutional actors, one might ask, solve the problem via rigorous judicial enforcement of the legislative bargain or via statutory and regulatory amendments when private enforcement efforts stray beyond their legislative warrant?

While these objections carry some force, theory and evidence suggest that legislative fidelity concerns remain substantial. As to the former concern, legislative awareness of the possibility of statutory drift, or even a determination that delegation to private rather than public enforcers will produce less of it, hardly forecloses fidelity concerns. Ample room remains for institutional designs that can further mitigate the problem. As to the latter concern, solutions predicated on judicial enforcement of the legislative bargain seem particularly vulnerable on simple institutional capacity grounds. Courts may lack not just the will—judges may, after all, have policy preferences of their own—but also expertise and an encompassing view of the enforcement landscape, sharply limiting their ability to gauge how a novel liability theory maps onto legislative purposes.⁷⁴

More fundamentally, even where private enforcers are brought to heel by legislators, agencies, or courts, the process is not costless. Indeed, private enforcement efforts can impose substantial *transitional* costs in the meantime, before a legislative, administrative, or judicial fix is in place. Regulatory targets must still defend against private enforcement actions and, because fixes cannot

Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006) (modeling the legislative choice between agencies and courts—and, implicitly, the choice between public and private enforcement—as a tradeoff between the greater temporal stability of court adjudication and the greater cross-issue stability of agency adjudication).

73. Here, policing private enforcement efforts would resemble the standard separation-of-powers model in administrative law in which the House, Senate, and President, each with their own veto point, can nonetheless coordinate to keep agency action within certain bounds. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 536–38 (1992).
74. See, e.g., Frederick Schauer & Richard Zeckhauser, *The Trouble with Cases*, in REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 45, 47 (Daniel P. Kessler ed., 2011) (“[T]he policy that emerges from litigation [will] be systematically based on an imperfect picture of the terrain that the policy is designed to regulate.”).

be made retroactive, may suffer costly adverse judgments despite subsequent amendment or override.⁷⁵

There are also reasons to believe that these transitional costs will be large in many regulatory contexts. First, profit-motivated private enforcers will, in response to adaptation by regulatory targets, drive enforcement efforts into the interstices of legal mandates in their effort to exploit interpretive gaps left by legislators and regulators.⁷⁶ This is important: interstitial private enforcement efforts are far less likely to draw swift political correction or override, as the interest-group cleavages that produced interpretive gaps are often no more easily bridged later than they were initially.⁷⁷

Second, modern governance is largely *administrative* in form, with legislatures enacting broad and even deliberately ambiguous statutes where issues are too complex or politically fractious to resolve and then delegating to administrative agencies the task of filling in the messy details using cumbersome administrative procedures.⁷⁸ Onerous procedures help reduce the “democratic deficit” when unelected bureaucrats make policy.⁷⁹ But they also ensure that bubble periods, during which regulatory mandates remain unsettled and transitional costs accrue, will often be protracted.

Beyond the problem of transitional costs, a final reason to credit legislative fidelity concerns is that privately driven deviations from legislative purposes will be *incremental* in ways that can frustrate democratic control efforts. Legal innovations are not just the end products of litigation struggles; they can also

75. As an example, securities plaintiffs’ efforts to extend class action liability to secondary “aiders and abettors” of fraud were thwarted, *see Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), but not before several defendants had inked multi-billion dollar settlements, *see In re Enron Corp. Sec.*, 2008 WL 4178151, at *10-11 (S.D. Tex. Sept. 8, 2008).
76. *See Engstrom, supra* note 70 (manuscript at 6-7) (laying out this theory); *see also* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 640-41 (2002) (reviewing the reasons that legislators leave interpretive gaps); Donald C. Langevoort & Robert B. Thompson, “Publicness” in *Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 342 (2013) (noting the tendency of private enforcers to fill “unregulated . . . space” before the SEC can meaningfully respond); Naysnerski & Tietenberg, *supra* note 38, at 43 (noting that “[s]uccessful . . . suits ultimately undermine the very reason for their existence”).
77. *See Engstrom, supra* note 70 (manuscript at 7, 16).
78. *See, e.g.*, Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 355 (2012) (“The age of statutes has given way to an era of regulations . . .”).
79. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 106 (1998) (discussing how administrative procedures facilitate agency accountability).

reshape the identities, interests, and capacities of potential political actors.⁸⁰ Thus, large paydays arm the plaintiffs' bar with a war chest with which to protect its hard-fought litigation gains through the political process.⁸¹ At the same time, a final judgment against a large industry actor may insulate that actor from further legal attack, either because the judgment has preclusive effect or because it leads the entity to alter its organizational routines to avoid further legal entanglement in ways that are not easily reversed.⁸² This can dampen the actor's incentives to join industry lobbying efforts to reverse a given legal innovation – and, indeed, may create contrary incentives to actively *disrupt* such opposition as a way to narrow the competitive advantages of industry actors who have not yet faced litigation. By incrementally remaking the political landscape, privately driven legal innovations may, in the jargon of political science, produce feedback effects and path dependencies that render them more robust than one might predict *ex ante*.⁸³ Over time, private enforcement may thus drive legal mandates in very different directions than we might expect if enforcement authority remained in purely public hands.

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80. The thinking here draws from the political science literature on policy durability and retrenchment. See PAUL PIERSON, *DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT* 40 (1994) (noting the difficulty of obtaining retrenchment created when beneficiaries “mobilize in favor of programmatic maintenance or expansion”); Eric M. Patashnik, *Why Some Reforms Last and Others Collapse: The Tax Reform Act of 1986 Versus Airline Deregulation*, in *LIVING LEGISLATION: DURABILITY, CHANGE, AND THE POLITICS OF AMERICAN LAWMAKING* 146, 151 (Jeffery A. Jenkins & Eric M. Patashnik eds., 2012) (noting how policy enactments can alter the interest group environment in ways that make policy repeal unlikely).
81. See Sean Farhang, *Litigation and Reform*, in *THE POLITICS OF MAJOR POLICY REFORM IN POSTWAR AMERICA* (Jeffery A. Jenkins & Sidney M. Milkis eds., forthcoming) (“As private enforcement regimes have diffused across the American regulatory state, the interests formed around them have become more widely spread and deeply rooted, increasing the political capacity of the coalition to defend the private enforcement infrastructure from retrenchment.”).
82. See Engstrom, *supra* note 70 (manuscript at 24); see also Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 *AM. J. SOC.* 1531, 1531–35 (1992) (offering a classic account of the organizational response to civil rights enforcement).
83. See generally PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* (2004) (advancing a theory of the temporal dimensions of political processes, including path dependency and feedback effects).

C. *The False Promise of “Litigation Reforms”*

Given litigation’s centrality in the American regulatory state and the multiple zealotry, coordination, and legislative fidelity concerns that it raises, how might regulatory designers seek to constrain or otherwise rationalize private enforcement efforts?

A number of common “litigation reforms” have already received passing mention above. First, legislators can manipulate litigant incentives by raising or lowering payouts (as with multiple or punitive damages, attorney fee-shifts, or damages caps) to achieve desired enforcement levels, or they can erect procedural and remedial barriers, such as limits on discovery, heightened pleading standards, or modification or elimination of joint-and-several-liability rules.⁸⁴ State-level tort reform efforts in recent decades showcase many of these possibilities,⁸⁵ and some have surfaced at the federal level as well.⁸⁶ Second, legislators can shape private enforcement efforts by activating or deactivating certain enforcer or claim types, or by barring “piggyback” or second-filed actions.⁸⁷ A third family of options seeks to reform litigation from within by empowering trial judges to exercise greater “managerial” control over the litigation process or by vesting them with greater pretrial adjudicatory authority.⁸⁸ The Supreme Court’s recent and controversial decisions in *Twombly*⁸⁹ and *Iqbal*,⁹⁰ which arm trial judges with a more exacting pleading standard, offer an apt and highly controversial example.⁹¹

84. Engstrom, *supra* note 46, at 1254-55.

85. See F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 483-524 (2006) (providing an overview of state tort reform efforts).

86. For example, the PSLRA responded to concern about securities “strike” suits by, among other things, raising the pleading standard, 15 U.S.C. § 78u-4(b)(1)-(2) (2012), and eliminating joint and several liability unless “the trier of fact specifically determines that such covered person knowingly committed a violation of the securities laws,” *id.* §§ 77k(f), 78u-4(f). See also Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 386 (2007) (cataloguing federal anti-litigation legislation).

87. See Engstrom, *supra* note 46, at 1297-98 (demonstrating how the FCA and federal securities and antitrust law shape the eligible pool of private enforcers).

88. See Miller, *supra* note 30, at 1013-15 (recounting repeated overhauls of Rule 26 to effect “greater judicial control over the discovery process”); see also Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (offering the classic account of “managerial judging”).

89. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

90. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

91. The Prison Litigation Reform Act (PLRA), compelling pre-docketing review of claims for legal sufficiency, offers a legislatively specified example. 28 U.S.C. § 1915A(a) (2006). On

Many of these litigation reforms have been deeply controversial, sparking heated debate about the extent to which they reduce litigation levels or costs;⁹² disproportionately impact particular claim⁹³ or plaintiff⁹⁴ types; or achieve various regime-specific goals, such as, in the medical malpractice area, reducing health care costs or improving health care quality.⁹⁵

Yet viewing this standard menu of litigation reforms through the lens of the zealousness, coordination, and legislative fidelity critiques reveals far larger problems as well. In particular, most existing reforms are blunt calibration devices. Indeed, reducing payouts to plaintiffs or their counsel or raising pleading requirements impairs the “remedial machinery”⁹⁶ across the board and so risks screening out meritorious and unmeritorious claims alike.⁹⁷ Worse, the usual litigation reforms do even less to facilitate better coordination of public and private enforcement efforts, whether by limiting duplicative enforcement efforts, narrowing adversarial asymmetries, policing collusive and overbroad private settlements, or leveling a litigation playing field sloped by repeat players preying upon one-shot enforcers. And they do little or nothing to police private enforcement efforts that drift beyond legislative purposes or to mitigate the transitional costs that accrue when such efforts are only belatedly subject to legislative or administrative override. Indeed, the usual menu of litigation reforms is distressingly orthogonal to many or most such concerns.

controversy relating to *Twombly* and *Iqbal*, see David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013).

92. See Resnik, *supra* note 88, at 380 (expressing skepticism that managerial judging reduces litigation costs).
93. See, e.g., Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519-20 (2010) (speculating that *Twombly*'s heightened pleading standard has disproportionately impacted plaintiffs in civil rights cases).
94. See, e.g., Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1313 (2004) (claiming that tort reforms disadvantage plaintiffs without labor force attachment, including women, children, and the elderly).
95. See, e.g., Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q.J. ECON. 353, 354-55 (1996) (exploring the connection between tort liability and health care costs).
96. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185-86.
97. See, e.g., Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 598 (2006) (finding that a substantial number of non-nuisance cases lacking pre-filing indicia of fraud would not have been brought post-PSLRA); Steven C. Salop & Lawrence J. White, *Treble Damages Reform: Implications of the Georgetown Project*, 55 ANTITRUST L.J. 73, 88 (1986) (noting that “detrabling” damages under federal antitrust law “could deter the desirable cases as well”).

What, then, might prove the better reform avenue? The balance of this Article pushes past the current state of play by identifying and assessing an alternative approach to mitigating the zealotry, coordination, and legislative fidelity problems that afflict private litigation when used as a regulatory tool: vesting administrative agencies with litigation “gatekeeper” powers.

II. THE GATEKEEPER ALTERNATIVE: FLAVORS OF AGENCY GATEKEEPING

Part I traced private enforcement’s rise as a regulatory tool, sketched three types of problems—zealotry, coordination, and legislative fidelity—that afflict private enforcement regimes, and trained a skeptical eye on the standard suite of “litigation reforms” that purport to solve those problems. This Part and the next develop the case for and against an alternative approach to rationalizing and optimizing regulatory regimes that deploy private lawsuits as an enforcement tool: vesting administrative agencies with litigation “gatekeeper” powers. The first step in that process is to construct a taxonomy that identifies and categorizes the rich diversity of gatekeeper designs that populate the present-day administrative landscape. This is important, as it is not possible to perform a rigorous assessment of the merits and demerits of granting agencies gatekeeper powers—Part III’s task—without first understanding the various institutional forms agency gatekeeper authority might take and the precise regulatory tasks each entails.

A. *Taxonomy: Agency Gatekeeping in Five Dimensions*

If legislators wanted to vest an agency with litigation gatekeeper authority, what would it look like? Tables 1 and 2 offer an initial cut at a taxonomy of agency gatekeeping. Table 1 begins by characterizing gatekeeper designs, both real and proposed, along five dimensions: (i) whether the agency wields affirmative or residual litigation oversight authority; (ii) whether agency gatekeeper authority is retail or wholesale in its reach; (iii) whether the agency’s gatekeeper decisions are legally binding or merely advisory; (iv) whether the agency passively occupies a “gate,” allowing litigation to proceed or not, or whether it instead exercises its gatekeeper authority only by actively displacing litigation via intervention or by initiating a public enforcement action of its own; and (v) whether an agency’s gatekeeper decisions operate as a “veto” or a “license.” Table 2 provides further shape and order by clustering design choices into six distinct gatekeeper types and mapping each type to one or more real-world examples.

Table 1.
TAXONOMY (I): AGENCY GATEKEEPER DESIGN DIMENSIONS

Design Dimension	Design Choice	
Nature of Agency Authority	Affirmative	Residual
Reach of Agency Authority	Wholesale	Retail
Legal Effect of Agency Decision	Advisory	Binding
“Gate” Type/Required Agency Action	Passive Gate	Active Displacement + Control Rights
Decision Type/Default Private Enforcement Availability	Veto	License

Table 2.
TAXONOMY (II): CLASSIFICATION OF EXISTING AGENCY GATEKEEPER REGIMES

Type	Affirmative/ Residual	Retail/ Wholesale	Advisory/ Binding	Passive Gate/ Active Displacement + Control Rights	Veto/ License	Real-World Examples
I	Residual	Retail	Advisory	N/A	N/A	FRCP 24 intervention/ FRAP 29 amicus participation
II	Affirmative	Retail	Advisory	Passive Gate	N/A	EEOC “cause” findings under Title VII, ADA, Age Discrimination in Employment Act (“ADEA”); state medical malpractice screening panels
III	Affirmative	Retail	Binding	Active Displacement + Weak (or No) Control Rights	Veto	EEOC intervention under Title VII, ADA
IV	Affirmative	Retail	Binding	Active Displacement + Strong Control Rights	Veto	EPA under “citizen suit” provisions of federal environmental law; EEOC under ADEA; DOL under Fair Labor Standards Act (FLSA); DOJ under False Claims Act (intervention authority); California labor agencies under Labor Code Private Attorneys General Act
V	Affirmative	Retail	Binding	Passive Gate	Veto	DOJ under False Claims Act (termination authority)
VI	Affirmative	Wholesale	Binding	Passive Gate	Veto	Regulatory preemption

While many of the design dimensions and components presented in Tables 1 and 2 are self-explanatory, some are not. The remainder of this Section briefly steps through each design dimension and offers relevant elaboration of each to anchor the discussion to come.

1. *Affirmative/Residual*

As reflected in Tables 1 and 2, a regulatory designer who wishes to vest an agency with litigation gatekeeper authority must first decide if the agency will wield *affirmative* authority to control or terminate private enforcement efforts via statutory authorization. Importantly, a regulatory architect who declines to grant the agency formal gatekeeper powers does not thereby deprive the agency of any ability to shape private enforcement efforts. Most agencies possess *residual* oversight powers within the regulatory regimes they administer via the procedural rights accorded them under the Federal Rules of Civil and Appellate Procedure to intervene in cases as an interested party or to submit amicus briefs presenting the government's position.⁹⁸ Note, however, that these residual oversight powers are generally quite limited: agency intervenors or amici shape private enforcement efforts only to the extent they can convince the judge of the rightness of their position. They cannot subject private litigants to prefiling review, control the course of litigation, or deprive the real parties in interest of procedural or other rights. To that extent, and looking ahead to other parts of the typology, an agency's residual oversight powers under the federal rules tend to be advisory rather than legally binding.

2. *Retail/Wholesale*

Assuming an agency is to be vested with affirmative gatekeeper powers, a second and critically important design decision is whether those powers will be exercised at a *retail* or *wholesale* level. Retail gatekeeper authority entails case-by-case agency oversight of private enforcement efforts. Real-world examples include: (i) the authority given the Department of Justice under the False

98. See FED. R. APP. P. 29(a) ("The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court."); FED. R. CIV. P. 24(b)(2)(A) (granting permissive intervention authority to a "federal or state governmental officer or agency" where a claim or defense at issue "is based on . . . a statute . . . administered by the officer or agency"). See generally Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 ARIZ. ST. L.J. 853, 882-983 (1989) (cataloguing governmental "forms of participation" in civil litigation).

Claims Act (FCA) to oversee individual qui tam actions;⁹⁹ (ii) the authority granted to the EPA to oversee individual lawsuits brought under the various “citizen suit” provisions in federal environmental statutes; and (iii) the state medical malpractice review boards and screening panels that over thirty states put into place as a component of tort-reform efforts throughout the 1970s, 1980s, and 1990s to provide merits-screening of individual medical malpractice tort cases.¹⁰⁰

Wholesale gatekeeper authority, by contrast, empowers an agency to create or destroy private rights of action across the board as to one or more denominated claims. Importantly, the agency’s ability to initiate its own enforcement actions asserting those claims remains unaffected, thus distinguishing wholesale gatekeeper authority from the more general authority enjoyed by many agencies to promulgate legislative rules that are applicable to public and private enforcement efforts alike.¹⁰¹ As Table 2 reflects, a real-world example is so-called regulatory preemption, in which agencies such as the Food and Drug Administration promulgate rules that purport to displace state tort law entirely.¹⁰² Beyond its use in the regulatory preemption context, wholesale gatekeeper authority has also been the subject of myriad scholarly proposals. Thus, some have called for granting the Securities and Exchange Commission the power to “disimply” private rights of action under the Securities and Exchange Act.¹⁰³ Others have suggested that the DOJ should be granted the authority to “denominate” certain types of FCA claims as eligible or ineligible for qui tam enforcement across the board.¹⁰⁴

99. For the uninitiated, the FCA prohibits submission of false money claims to the government in connection with federal programs or expenditures, and its qui tam provisions authorize private individuals, dubbed “relators,” to sue for fraud on behalf of the United States and earn a “bounty” equal to a portion of any money returned to the federal fisc. See 31 U.S.C. §§ 3729-3733 (2006).

100. See CATHERINE T. STRUVE, PEW PROJECT ON MED. LIAB., EXPERTISE IN MEDICAL MALPRACTICE LITIGATION: SPECIAL COURTS, SCREENING PANELS, AND OTHER OPTIONS 57 (2003) (listing thirty-one states that had or have screening panels).

101. See, e.g., Grundfest, *supra* note 4, at 966 (“The decision would instead reallocate enforcement authority so that private rights of action would not necessarily reach as far as the Commission’s own enforcement authority.”).

102. See Sharkey, *supra* note 12.

103. See Grundfest, *supra* note 4.

104. See Kovacic, *supra* note 52, at 237. For a trans-substantive version of the argument, see Stephenson, *supra* note 4.

3. *Advisory/Binding*

A third core design choice concerns whether an agency's gatekeeper decisions are merely advisory or fully binding in their legal effect. On the former, consider the powers given to the EEOC to oversee job discrimination claims brought under Title VII of the Civil Rights Act of 1964. Title VII requires that all claims first be filed with and processed by the EEOC; a claimant can mount a private enforcement effort in court only once she has obtained a "right to sue" letter from the agency.¹⁰⁵ But the EEOC possesses only nonbinding gatekeeper authority in such cases. As explained in more detail in Part IV's case study, the EEOC may not decline to provide a "right to sue" letter, and its "cause" determination, though often admissible into evidence in an eventual civil action, lacks legal effect apart from its persuasive power before judge or jury.¹⁰⁶

Compare this to the DOJ's gatekeeper powers under the FCA, which vests the Attorney General—and, by further delegation, the DOJ's Civil Fraud Division—with binding authority to oversee and control private qui tam litigation.¹⁰⁷ Indeed, the DOJ may dismiss or settle a qui tam case out from under a private qui tam relator entirely, subject only to a basic fairness hearing.¹⁰⁸ It also possesses the statutory right to veto private dismissals or settlements in cases it has not joined.¹⁰⁹ Finally, the FCA grants the DOJ the authority to intervene in and take "primary" control over the litigation,

^{105.} 42 U.S.C. § 2000e-5(f)(1) (2006).

^{106.} The strong majority position among circuit courts is that EEOC cause determinations are admissible, either as a per se matter or on a case-by-case basis applying the balancing test set forth in FED. R. EVID. 403. *See, e.g.,* *Smith v. Mass. Inst. of Tech.*, 877 F.2d 1106, 1113 (1st Cir. 1989) (rejecting a per se rule regarding the admissibility of EEOC investigative materials in favor of a case-by-case approach); *Plummer v. W. Int'l Hotels Co.*, 656 F.2d 502 (9th Cir. 1981) (establishing a per se admissibility rule).

^{107.} For a brief overview of the FCA, see *supra* note 99.

^{108.} 31 U.S.C. § 3730(c)(2)(B) (2006) ("The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances."). Most courts interpret this language to require that the DOJ show only a "rational relation" between the dismissal grounds and a government purpose. *See, e.g.,* *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (applying such a standard).

^{109.} 31 U.S.C. § 3730(b)(1) (2006) ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.").

including depriving the relator of any further procedural rights where her participation is seen as impairing the government's prosecution of the case.¹¹⁰

Occupying a space somewhere in the middle are state medical malpractice screening panels. Conventionally understood, these administrative bodies wield only *advisory* authority, holding on the merits of a case and sending a nonbinding merits signal to litigants and courts without entering judgment.¹¹¹ Some liken the resulting gatekeeper role to early neutral evaluation or mediation.¹¹² Some states, however, have vested review boards with harder-edged powers by imposing sanctions upon parties who proceed to trial and lose following an unfavorable board screening decision.¹¹³ In such states, board decisions are not legally binding but nevertheless exert a powerful effect on the parties' litigation calculus.

4. *Passive Gate/Active Displacement + Control Rights*

A fourth key design decision concerns the action an agency must take in order to exercise gatekeeper power. Some gatekeeper designs permit the agency to exercise its gatekeeper authority *passively*, by simply expressing its determination that a private enforcement action should or should not proceed. The FCA once more provides a real-world example: as noted previously, the DOJ may at any stage in the proceedings move to dismiss or settle a case out from under a private plaintiff-relator, subject only to a basic fairness hearing.¹¹⁴ To accomplish this, the DOJ need do no more than register its view with the court and request dismissal.

Alternatively, legislative designers might mandate a more *active* agency role in which the agency may terminate a private enforcement effort only by taking

110. *Id.* § 3730(c)(1) ("If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action"); *id.* § 3730(c)(2)(C) (authorizing courts to "impose limitations on [a relator's] participation" upon a government showing that "unrestricted participation during the course of the litigation . . . would interfere with or unduly delay the Government's prosecution of the case").

111. See MICHELLE M. MELLO & ALLEN KACHALIA, *MEDICARE PAYMENT ADVISORY COMM'N, EVALUATION OF OPTIONS FOR MEDICAL MALPRACTICE SYSTEM REFORM* 7 (2010).

112. See, e.g., Thomas B. Metzloff, *Alternative Dispute Resolution Strategies in Medical Malpractice*, 9 ALASKA L. REV. 429, 441-42 (1992).

113. See MELLO & KACHALIA, *supra* note 111, at 8 (noting that in several states a plaintiff whose claim has been found non-meritorious must "post a bond or in some other way provide an up-front payment that is forfeited to the defendant if the plaintiff does not prevail in the litigation").

114. See *supra* note 108.

over control of the private enforcement action or displacing it with a public enforcement proceeding of its own. An example is found in the “citizen suit” provisions contained in most major federal environmental statutes authorizing the EPA to veto a private enforcement effort only by initiating a public enforcement action in its stead.¹¹⁵ Similarly, California’s Labor Code Private Attorney General Act (“LCPAGA”) bars private enforcement actions only where the relevant labor enforcement agency¹¹⁶ decides, after investigation of a violation raised by a would-be private enforcer, to cite the violator.¹¹⁷ As with EPA oversight of “citizen suits,” the agency can displace private enforcement only by bringing an enforcement action itself. As a final example, and at risk of confusing matters, the FCA grants the DOJ the authority—in addition to the power to dismiss cases outright—to intervene in and take control of private qui tam enforcement efforts.¹¹⁸ The FCA thus gives the DOJ two distinct gatekeeper options: passive dismissal (via the DOJ’s termination authority) and active displacement (via the DOJ’s intervention authority).

Importantly, existing gatekeeper designs also vary substantially in the extent of the control rights that accompany an agency’s decision to displace or otherwise take over control of a private enforcement action. For instance, Title VII formally empowers the EEOC to displace private job discrimination claims by initiating its own civil action, giving it what amounts to a right of first refusal in initiating litigation.¹¹⁹ But the resulting “displacement” is nominal, as the statute specifically grants the claimant full and unconditional intervention

115. See, e.g., Clean Air Act, 42 U.S.C. § 7604(b)(1) (2006); Clean Water Act, 33 U.S.C. § 1365(b)(1) (2006); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(b)(1) (2006); Comprehensive Environmental Response, Compensation, and Liability Act, *id.* § 9659(d)(2); Toxic Substances Control Act, 15 U.S.C. § 2619(b)(1) (2012). The sole major federal environmental statute that lacks a citizen suit provision is the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (2012). See Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 416-20 & n.77 (2004) (cataloguing citizen suit provisions across federal environmental statutes).

116. The public agencies that the LCPAGA vests with gatekeeping powers include the California Labor & Workforce Development Agency and the California Division of Occupational Safety and Health. CAL. LAB. CODE § 2699(3)(a)(1), (b)(1) (West 2013).

117. *Id.* § 2699.3(a)(2)(B).

118. See *supra* note 110.

119. See 42 U.S.C. § 2000e-5(f)(1) (2006) (granting the EEOC the right to file a civil action within thirty days of a claimant’s filing of a charge if the agency’s conciliation efforts have failed).

rights, limiting the EEOC's ability to control the litigation.¹²⁰ More importantly, even where the EEOC files and successfully settles its own enforcement action, the claimant retains the right to sue for further remediation not achieved in the public-side enforcement action.¹²¹

Things look different, however, elsewhere within federal employment and labor law. Thus, the Age Discrimination in Employment Act (ADEA) grants the EEOC a fuller set of control rights than it enjoys in the Title VII context: an EEOC-filed action under the ADEA formally terminates the private claimant's right to bring a subsequent private action, and the ADEA also precludes a claimant from intervening in a public action brought on her behalf.¹²² The Fair Labor Standards Act offers a similarly potent set of exclusion and control

120. *Id.* (“The person or persons aggrieved shall have the right to intervene in a civil action brought by the [EEOC] . . .”). An aggrieved person has a similar right of intervention in cases brought by the Attorney General against a government or government entity. *Id.*
121. *See* Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 326 (1980) (“Under § 706(f)(1), the aggrieved person may bring his own action at the expiration of the 180-day period of exclusive EEOC administrative jurisdiction if the agency has failed to move the case along to the party’s satisfaction, has reached a determination not to sue, or has reached a conciliation or settlement agreement with the respondent that the party finds unsatisfactory.”) (emphasis added). *See generally* Lemos, *Aggregate Litigation*, *supra* note 17, at 538 & n.240 (reviewing this and related case law).
122. *See* 29 U.S.C. § 626(c)(1) (2006) (“Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.”); EEOC v. Pan Am. World Airways, Inc., 622 F. Supp. 633, 641 (N.D. Cal. 1985) (“[U]nlike Title VII, the ADEA does not explicitly provide for intervention by private parties in litigation by the EEOC.”). Note that nearly all courts to consider the issue hold that the ADEA’s preclusion provision applies only to subsequently filed actions. *Compare* EEOC v. E. Airlines, Inc., 736 F.2d 635, 639-41 (11th Cir. 1984) (interpreting the word “bring” in section 626(c)(1) of the ADEA to preclude a private plaintiff’s subsequent filing of suit but not a previously filed suit); *Burns v. Equitable Life Assurance Soc’y*, 696 F.2d 21, 23-24 (2d Cir. 1982) (same); *Donovan v. Univ. of Tex. at El Paso*, 643 F.2d 1201, 1207 (5th Cir. May 1981) (same); *Dreith v. Nat’l Football League*, 777 F. Supp. 832, 836 (D. Colo. 1991) (collecting cases and holding “that a private ADEA action is not extinguished by a later commenced EEOC action that asserts, in whole or in part, the private plaintiff’s claims”), *with* *Jones v. Janesville*, 488 F. Supp. 795, 797 (W.D. Wis. 1980) (construing “bring” in the relevant ADEA provision to mean “bring or maintain,” thus finding that even subsequently filed EEOC actions preclude earlier filed private actions). As a result, the EEOC can reliably exercise gatekeeper power and displace a private enforcer who would prefer to bring her own action only by filing a public enforcement action within the sixty-day waiting period the ADEA mandates between a would-be plaintiff’s filing of a charge with the EEOC and her bringing a civil action in court. 29 U.S.C. § 626(d) (2006) (precluding a private civil action “until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]”).

rights, with a DOL action terminating an employee’s right to initiate her own suit following the DOL’s filing or serve as a “party plaintiff” in the government’s case.¹²³ So long as either agency files its public enforcement action before the private plaintiff does so, the government retains near-total control over the conduct of enforcement efforts. Finally, the EPA and the DOJ possess strong, and even absolute, control rights regarding citizen suits and qui tam suits, respectively. A citizen suit plaintiff can intervene as a matter of right in a government enforcement proceeding that has displaced her.¹²⁴ But she wields separate enforcement authority—whether as an intervenor or as a plaintiff in a subsequently filed action—only if she can convince a court that the government’s action is or was not “diligent[.]” in its prosecution of the matter, a difficult burden absent an obviously deficient public enforcement effort or evident collusion between the enforcement agency and a regulatory target.¹²⁵ Similarly, and as noted previously, where the DOJ elects to intervene in a qui tam lawsuit, it exercises “primary” control over the litigation.¹²⁶ To that end, the FCA instructs the courts to “impose limitations on [a relator-plaintiff’s]

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123. See 29 U.S.C. § 216(b) (2006) (“The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title”); see also *EEOC v. Wackenhut Corp.*, 939 F.2d 241, 242 (5th Cir. 1991) (“The FLSA clearly states that when the government initiates suits on behalf of an employee, either for damages or for injunctive relief, the employee’s right to subsequently bring suit to enforce the same rights shall be terminated.”).
124. See, e.g., Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) (2006) (granting “any person” intervention as a matter of right in a public enforcement action that has displaced a citizen suit plaintiff); see also *supra* note 115 (listing citizen suit provisions in other federal environmental statutes containing the same or similar language).
125. See Miller, *supra* note 115, at 465-69 (reviewing case law and noting strong judicial deference to prosecutorial decision-making and even a presumption of diligence in decisions interpreting statutory preclusion provisions). For a classic case in which the lower court found that the state enforcement proceeding was not sufficiently diligent to trigger the statutory preclusion provision, see *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 178 n.1 (2000) (noting a lower court finding that the citizen suit defendant and state enforcement agency had entered into a collusive civil action and settlement in order to trigger the Clean Water Act’s preclusion provision). For an example of the wording of the diligent prosecution requirement in citizen suit provisions in various federal environmental statutes, see 33 U.S.C. § 1365(b)(1)(B) (2006) (barring private suit if the government “has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance”); see also *supra* note 115 (listing citizen suit provisions in other federal environmental statutes containing the same or similar language).
126. See *supra* notes 107-110 and accompanying text; see also 31 U.S.C. § 3730(c)(1) (2006) (noting that, when the government intervenes in a case, it “shall not be bound by an act of the person bringing the action”).

participation” where necessary to safeguard “the Government’s prosecution of the case,”¹²⁷ and any government settlement has preclusive effect on further private enforcement efforts.¹²⁸ As in the citizen suit context, a qui tam relator enjoys little in the way of control rights even if she remains fully active in the case.

5. *Veto/License*

Fifth and finally, affirmative and binding agency gatekeeper authority can take the form of a *veto* or a *license*.¹²⁹ Where an agency is vested with veto authority, as in the FCA context, its failure to terminate or take control of a private enforcement action does not prevent the private enforcer from proceeding alone. Rather, a veto-based scheme instantiates what some would call a “French” rule: private enforcement actions not specifically vetoed by the agency are permitted. By contrast, an agency with licensing gatekeeper authority makes its decision against a background assumption that private rights of action will not lie unless the agency joins the case or otherwise offers its stamp of approval. Here, the gatekeeper structure instantiates a “German” rule: private enforcement efforts not specifically licensed by the agency are forbidden.¹³⁰

Note that none of Table 2’s gatekeeper “types” deploys a license approach, reflecting the fact that no real-world gatekeeper regime of which I am aware incorporates such an option. Even so, it is noteworthy that some of the more

127. 31 U.S.C. § 3730(c)(2)(C).

128. The preclusive effect of a government enforcement effort on a qui tam action is part statutory. See *supra* note 57 (noting FCA provisions jurisdictionally barring actions “based on the facts underlying the pending action” or “based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party”). Courts also apply standard *res judicata* principles to subsequent qui tam actions, barring claims that were or could have been brought in an earlier action. See, e.g., *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909-10 (9th Cir. 1998) (giving full *res judicata* effect to the dismissal of an intervened qui tam action in dismissing a subsequent qui tam action asserting a different fraud theory but involving the same invoices that were the subject of the earlier action). Finally, note that preclusion can operate in the other direction, binding the government to actions taken by a relator in an uninvolved action. See, e.g., *In re Schimmels*, 127 F.3d 875, 884 (9th Cir. 1997) (giving full *res judicata* effect to a default judgment entered against the relator in an uninvolved case).

129. See Stephenson, *supra* note 4, at 123-24 (drawing this distinction).

130. Thanks to my colleague George Fisher for introducing me to this French-versus-German-rule conceptualization.

fervent calls for reform of the DOJ's oversight of qui tam litigation under the FCA, for instance, would preclude plaintiff-relators from pursuing a case in the absence of DOJ intervention, thus transforming the current regime into a license approach.¹³¹

B. Using the Taxonomy and the Road Ahead

The above survey offers an initial glimpse of the myriad forms agency gatekeeper authority can take. But it is hardly comprehensive. Tables 1 and 2 are silent regarding the structure of the agency itself, including whether gatekeeper powers are vested in already-existing, "standing" agencies (e.g., the SEC or EEOC), or instead in ad hoc, purpose-built administrative bodies specifically convened to wield gatekeeper powers. Omitting this design feature avoids cluttered exposition, as the only real-world gatekeeper examples that take the latter, ad hoc form are the state medical malpractice review panels.¹³² Also unmentioned in Tables 1 and 2 are the procedures that govern agency gatekeeper decision-making, from the relatively thick procedure requirements that govern rulemaking and adjudication under the Administrative Procedure Act (APA) to a range of far thinner ones that Congress or another legislature could specify instead.¹³³ These procedural options, while an important component of gatekeeper designs, are better left to Part III's discussion of the ways regulatory architects can shape agency incentives or counter bureaucratic inertia in their performance of core gatekeeper tasks.¹³⁴ Future work may reveal

131. See, e.g., J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 638-40 (2000). Other scholarly proposals also advance a license approach. See, e.g., Gilles, *supra* note 5, at 1417 (advancing a gatekeeper proposal requiring DOJ approval in order to go forward with a civil rights suit).

132. For a representative state statute providing for the ad hoc formation of a medical malpractice screening panel, see MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2013) (prescribing the creation of a tribunal consisting of a state trial judge, physician, and attorney). See generally Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181, 188-97 (1990) (cataloguing medical malpractice panel personnel provisions).

133. While Congress could specify thinner procedures than the APA prescribes, in no event could the procedural bundle fall below the due process floor established in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and its progeny.

134. See *infra* notes 232-238 and accompanying text. As a final example, the above rubric does not capture provisions that, while not conferring gatekeeper powers themselves, are designed to facilitate agency gatekeeping action. For instance, the Class Action Fairness Act of 2005 requires that defendants to a class action within the statute's purview provide notice of any settlement to "relevant" federal and state officials within ten days of its filing in court, with the ostensible purpose of allowing government officials to challenge the settlement during a

still other design dimensions that are salient to regulatory architects and should be included in any comprehensive survey.

Yet Table 2 in particular offers more than just a taxonomic overview. The gatekeeper types presented therein are also arguably organized from least to most interventionist. To that extent, the typology is designed to be a useful tool, as regulatory designers who desire relatively greater or lesser agency control over private litigation efforts can simply move up or down the taxonomic ladder. The next Part begins the process of sketching an analytic framework that can guide regulatory designers as they do so—or as they decide whether to install gatekeeper powers at all.

III. THE OPTIMAL DESIGN OF AGENCY GATEKEEPER REGIMES

Having defined terms and surveyed a range of possible gatekeeper approaches, this Part turns to an evaluation of the merits and demerits of competing designs and the wisdom of vesting agencies with gatekeeper authority in the first place. The analysis proceeds in three discrete steps. Section III.A takes the form of a thought exercise: how would an *ideal* agency exercising a full complement of wholesale or retail gatekeeper powers use its authority to mitigate the zealotry, coordination, and legislative fidelity costs outlined in Part I? Section III.B stays (mostly) in the domain of theory but moves from the ideal to the positive, offering a more skeptical view as to how agencies wielding gatekeeper authority in the real world are likely to deviate from Section III.A's normative ideal. Section III.C then steps back and, comparing leading gatekeeper designs, identifies a set of functional design principles and tradeoffs that can help guide policymakers in choosing among competing models. The resulting analysis is necessarily abstract and far from the last word on the matter. Nor, it should be noted, is the goal to generate a trans-substantive, all-things-considered judgment as to the merits of agency gatekeeping in general. To the contrary, an important theme in what follows is that optimal gatekeeper design is likely to be highly contextual and grounded in the realities of a given regulatory regime. To that extent, the more limited aim in what follows is to map some preliminary lines of analysis and offer some mid-level generalizations about optimal gatekeeper design that can guide institutional designers working within discrete regulatory areas, while setting

subsequent Rule 23(e) fairness hearing, 28 U.S.C. § 1715 (2006). See generally Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971 (2008) (discussing the provision's purposes and effects).

the stage for Part IV's case study of job discrimination regulation as a concrete application of the gatekeeper idea.

A. *The Ideal Gatekeeper Role*

One way to begin to take the measure of agency gatekeeping is to ask what tasks an ideal agency armed with a full complement of gatekeeper powers would perform. Put another way, if an ideal agency were vested with the power to delimit, terminate, or control private litigation efforts, what would it do?

1. *The Ideal Wholesale Gatekeeper*

For agencies vested with wholesale gatekeeper authority (e.g., Type VI from Table 2), that inquiry is straightforward. First and foremost, such an agency will use its expertise and global perspective to weigh aggregate costs and benefits and determine whether whole categories of private enforcement efforts are, on balance, welfare-maximizing and so should be allowed at all. In performing this inquiry, an ideal agency will also consider whether a particular claim or set of claims advancing a novel statutory or regulatory interpretation strays beyond the core legislative design by, for instance, imposing liability for conduct that does not arguably fall within legislative purposes.¹³⁵ As a concrete example, the SEC might determine after study that the social costs of frivolous “strike” suits have come to outstrip the social benefits of meritorious cases, or that private lawsuits targeting a particular alleged violation of proxy rules lack fidelity to the congressional design. When the agency makes such a determination, it will flip its gatekeeper switch, terminating private rights of action as to the offending claim types.¹³⁶

135. Notice here that my stylized model toggles between two distinct systemic values that an “ideal” gatekeeper agency vested with gatekeeper powers will maximize: social welfare and democratic legitimacy. Of course, where Congress’s legislative mandate is itself welfare-maximizing, the two maximands will align in any agency gatekeeper decision delimiting, terminating, or steering private enforcement efforts. But where an agency oversees private enforcement efforts implementing a clearly drafted but socially inefficient law, the two maximands will necessarily diverge, generating conflict as to what constitutes the ideal gatekeeper-agency response. In what follows, I ignore the tensions that agency pursuit of both maximands will sometimes create. For now, it is sufficient to flag the tension and note that a legislature that vests an agency with gatekeeper powers might wish that agency to pursue one or the other maximand or a mix of the two.

136. In the securities context, a wholesale agency gatekeeper decision terminating all private enforcement efforts would, to use Grundfest’s term, “disimply” some or all of the private

Second, an ideal agency wielding wholesale gatekeeper authority can use its powers to solve certain coordination challenges in hybrid public-private enforcement regimes by establishing an optimal division of labor between public and private enforcement efforts. For instance, an agency vested with wholesale powers can switch private enforcement “on” as to some claims and “off” as to others, carving up enforcement duties on either side of the public-private divide in ways that reflect the comparative advantages of each type of enforcer.¹³⁷ By doing so, an agency can also actively husband private enforcement capacity by signaling to private enforcers, particularly plaintiff-side law firms, where they should invest in regime-specific expertise and enforcement infrastructure.¹³⁸

Finally, recall from Part I’s discussion that a principal concern raised by the legislative fidelity critique is that, even when private enforcement efforts that stray beyond legislative purposes are ultimately brought to heel, they can impose substantial “transitional” costs in the interim, before a definitive legislative or administrative interpretation of an ambiguous legal mandate is in place. Here, too, an ideal agency vested with wholesale gatekeeper authority can offer a salve to good-faith regulatory targets who find themselves in the crosshairs of novel applications of a statute or regulation by holding in abeyance all private enforcement actions asserting the claims in question, pending legislative or administrative clarification of the liability standard.¹³⁹ Importantly, an ideal agency might choose abeyance even if it is likely to go on to endorse the new liability theory. Indeed, securities law scholars have long advocated agency-controlled “phase-in” periods during which private enforcers are precluded from bringing suits alleging fraud under new disclosure

rights of action that the Supreme Court implied from the Securities and Exchange Act in *J.I. Case Co. v. Borak*, 377 U.S. 426, 432-35 (1964). See Grundfest, *supra* note 4, at 991 n.133.

137. Many commentators have noted that public and private enforcers have informally reached an equilibrium in this regard, with public enforcers taking the lead in some areas and private enforcers in others. See Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 580 (1981) (noting that “the SEC has largely left the field to private enforcers . . . in enforcement of proxy rules”); Rajabian, *supra* note 17, at 187 (asserting that mixed enforcement regimes allow for specialization, with public antitrust enforcers tending to target monopolists and private enforcers tending to target anti-competitive contractual relations). Wholesale gatekeeper authority allows public enforcement agencies to formalize such understandings.

138. See Engstrom, *supra* note 46, at 1323-25 (noting some of the dynamics that govern private investment in enforcement capacity in private enforcement regimes).

139. See Rose, *supra* note 5, at 1355.

requirements until the agency determines that compliance standards are sufficiently clear to warrant exposure to private liability.¹⁴⁰

2. *The Ideal Retail Gatekeeper*

Turning from the wholesale to the retail gatekeeper context requires us first to revisit some of the wholesale gatekeeper tasks described above. Indeed, as Table 3's first entry reflects, an ideal agency vested with a full complement of retail gatekeeper powers (e.g., Types IV and V from Table 2) can just as easily achieve the same ends as an agency with only wholesale gatekeeper powers. Thus, an agency could use its retail oversight powers to serially terminate *all* private enforcement efforts asserting particular claims in order to give effect to its policy judgment that such claims are on net socially costly or stray beyond legislative purposes, or to establish and maintain an optimal public-private division of labor. Similarly, an ideal agency with a full slate of retail gatekeeper powers could use those powers to mitigate transitional costs, taking control of all cases asserting a novel claim pending legislative or administrative action and either relinquishing that control or terminating those actions once it (or the legislature) has installed a definitive statutory or regulatory interpretation. In each of these ways, retail gatekeeper efforts merely retread the ideal wholesale gatekeeper role.

140. See Grundfest, *supra* note 4, at 1015. Of course, one might point out that a “phase-in” period can impose costs of its own where it prevents private enforcement actions that are later found to be socially beneficial. One answer here is that the concept of “transitional costs” presupposes that regulatory targets aim to comply with legal mandates in good-faith ways. If true, then enforcement of shifting legal mandates without a “phase-in” period will lead to costly over-deterrence by chilling productive behavior in the shadow of possible legal liability arising from legally ambiguous injunctions.

Table 3.
IDEAL RETAIL LITIGATION GATEKEEPER TASKS

Agency Gatekeeper Action/Task	Description
Terminate or Suspend <i>All</i> Private Enforcement Efforts	Agency serially terminates <i>all</i> private actions asserting particular claims deemed socially inefficient or beyond legislative purposes, or holds them in abeyance pending a definitive legislative or administrative interpretation.
Terminate or Control <i>Particular</i> Private Enforcement Efforts	Agency terminates or controls <i>specific</i> private enforcement efforts asserting particular claims when their social costs exceed their benefits or they inefficiently piggyback on public enforcement initiatives. By neither terminating nor joining an action, the agency also signals uncertainty about case value or merit, thus highlighting the need for careful judicial scrutiny and case management.
Anti-Queuing: Leverage Under-Resourced or Overmatched Private Enforcers	Agency intervenes in <i>specific</i> private enforcement efforts that possess substantial merit but where private enforcers – whether plaintiffs or counsel – lack sufficient resources or expertise to fully vindicate the public interest.
Anti-Scaling: Induce (and Pursue) Low- and High-Value Claims	Agency invites and then intervenes in <i>specific</i> private enforcement efforts targeting low- and high-value claims that private enforcers would not otherwise see as marketable.
Anti-Collusion: Police Collusive and/or Overbroad Private Settlements	Agency monitors private enforcement efforts and uses intervention or other veto authority to block collusive or over-broad private settlements.

Yet retail gatekeeping powers can also be put to a variety of uses beyond across-the-board elimination or abeyance of private enforcement efforts. The remainder of Table 3 sets forth four additional optimization tasks that a gatekeeper agency armed with retail gatekeeper powers will perform in an effort to mitigate the more micro-level calibration, coordination, and legislative fidelity problems associated with private enforcement detailed in Part I.

First, an ideal agency will use its retail gatekeeper authority to cull or cabin *specific* private enforcement efforts asserting a particular kind of claim because their social costs outweigh their social benefits, while permitting similar, but welfare-enhancing, claims to proceed. As noted previously, private enforcers may bring socially undesirable actions for any number of reasons, such as indifference to social cost, erroneous calculation of case merit, pursuit of noneconomic litigation goals, or opportunistic piggybacking on public enforcement actions.¹⁴¹ Where such cases arise, an ideal agency armed with retail gatekeeper powers will terminate them before substantial costs have accrued, or take control over those cases and steer them in more public-interested directions. An agency can likewise use its case-specific termination or control authority to remove from contestation private actions that will make especially poor appellate vehicles and thus will advantage repeat-player regulated entities seeking to “play for rules.”¹⁴² Finally, even when a gatekeeper agency neither terminates nor joins a private enforcement action, it can still play a valuable epistemic role. Indeed, an ideal retail gatekeeper in such a situation serves a gatekeeping function of sorts by signaling to courts that its case assessment is less certain, thus highlighting the need for closer judicial scrutiny and more careful case management.

The next pair of Table 3’s ideal tasks for retail gatekeepers is more subtle. In general, an ideal agency vested with retail gatekeeper powers will maximally rely on fully competent and well incentivized private enforcers to perform enforcement tasks, conserving scarce public enforcement resources for other uses.¹⁴³ Yet, as Part I noted, private enforcement efforts may sometimes prove

141. See *supra* Section I.B.

142. See *supra* notes 65-66 and accompanying text.

143. Cf. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 879 (1985) (proposing that the EPA “cede[] control over routine penalty actions to private enforcers, and concentrate[] its efforts on the novel, difficult and expensive areas of enforcement”); Naysnerski & Tietenberg, *supra* note 38, at 46 (“The very existence of private enforcement allows the public sector greater flexibility in targeting its limited enforcement resources.”); Stephenson, *supra* note 4, at 109 (noting that agencies can “economize” on scarce resources by relying upon private enforcement where it makes sense to do so).

deficient. For instance, failures in the market for the retention and referral of legal services can generate disparities in plaintiff- and defense-side resources or sophistication that render enforcement suboptimal. Where private enforcement efforts are impaired by “adversarial asymmetries,” as Part I termed them,¹⁴⁴ an ideal gatekeeper agency focused on optimal deterrence will join and leverage the enforcement efforts of overmatched private enforcers who will not otherwise fully vindicate the public interest. Here, retail gatekeeper efforts can solve coordination problems resulting from what amounts to suboptimal matching of private enforcers with regulatory targets.

The other main reason private enforcement efforts may prove deficient is, to use Part I’s terminology, “scaling” problems.¹⁴⁵ As noted above, private enforcers may suboptimally enforce against low-harm misconduct where the private cost of initiating enforcement (whether psycho-emotional or otherwise) is high, even where the social benefit of enforcement would clearly exceed its cost.¹⁴⁶ High-harm misconduct may likewise attract suboptimal private enforcement efforts, either because regulatory targets are judgment-proof (e.g., damages are so large they exceed the target’s ability to pay), or because they possess substantial resources and so are seen as able and likely to mount a vigorous defense.¹⁴⁷ Here, the ideal gatekeeper role is to secure optimal deterrence across the full spectrum of misconduct by committing to assist such claims, thus inducing skittish or reluctant private enforcers with privately held information about misconduct to come forward.¹⁴⁸

Table 3’s final ideal gatekeeper task is unique to the situation in which private enforcers are deputized to collect fines on the government’s behalf rather than damages. As Part I noted, when the bounty a plaintiff-enforcer earns is less than the full fine, she and the regulatory target will face powerful incentives to enter into collusive settlements for an amount greater than the bounty but less than the full fine.¹⁴⁹ Enforcers and targets will likewise face powerful incentives to swap an overbroad liability release for a somewhat larger settlement pot, thus preventing future regulators (or other private enforcers) from forcing full internalization of the costs of misconduct.¹⁵⁰ Because of the threat of either type of collusion, an ideal gatekeeper agency will

144. See *supra* note 62 and accompanying text.

145. See *supra* notes 48-50 and accompanying text.

146. See *supra* note 50 and accompanying text.

147. See *supra* notes 48-49 and accompanying text.

148. See generally Depoorter & De Mot, *supra* note 18 (describing a similar dynamic).

149. See *supra* note 68 and accompanying text.

150. See *supra* note 69 and accompanying text.

continually monitor private settlements and thwart those that threaten to dilute deterrence or are otherwise inconsistent with government goals.

B. Deviations from the Gatekeeper Ideal

The analysis above paints a rosy portrait of the myriad ways an ideal agency vested with a full set of wholesale or retail gatekeeper powers can rationalize and optimize private enforcement efforts. But there is also good reason to be skeptical about the ability or willingness of agencies to perform these tasks. Consider three broad classes of problems that may generate deviations from the ideal gatekeeper role.

1. Institutional Competence and Capacity

A threshold question raised by calls to vest agencies with expansive gatekeeper powers is whether agencies have the technical competence and capacity to regulate private enforcement efforts in welfare-maximizing ways.

Turning first to the wholesale gatekeeper context helps lay bare a key aspect of the inquiry: any assessment of the institutional competence and capacity of agencies to perform gatekeeper tasks will necessarily be comparative.¹⁵¹ The question is not whether agencies can make socially optimal decisions about, say, whether private rights of action should lie at all. In fact, one should be skeptical about the ability of *any* institutional actor to generate a perfectly accurate bottom-line social-welfare accounting of competing modes of enforcement in a complex regulatory regime. Instead, the question is whether agencies can by and large make *better* judgments along those lines, or do so more quickly or cheaply, than other institutional actors.¹⁵²

Framed this way, the question in the *wholesale* gatekeeper context is an easy one, as there is little reason to believe that agencies are *less* capable or efficient than legislators or courts at making regime-wide judgments about the optimal scope of private enforcement—and plenty of reason to believe they are *more* so. Part of this flows from the usual observations about the superior expertise,

151. See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (arguing in favor of comparative forms of institutional analysis).

152. See Stephenson, *supra* note 4, at 126 (noting the importance of considering agency capacity “not in comparison to a hypothetical ideal decisionmaker, but in comparison to the primary institutional alternatives, Congress and the courts”).

synopticism, and fact-finding capacity of agencies.¹⁵³ Along these dimensions, agencies plainly dominate generalist courts passively adjudicating a stream of atomized and often idiosyncratic disputes.¹⁵⁴

The same is likely true of legislatures as well, though the proliferation of legislative committees at the federal and state levels makes the institutional comparison a closer one.¹⁵⁵ In particular, wholesale gatekeeper decision-making will often involve an interconnected mix of ground-level factual questions about the enforcement landscape and higher-level, synthetic questions about the overall “coherence” of the regulatory regime. How costly is private enforcement relative to public enforcement? Do private enforcers tend to target misconduct that public enforcers miss, or are they more likely to piggyback on public enforcement initiatives? What combination of enforcement modes will best achieve long-term regulatory goals by, for instance, facilitating collaborative problem-solving between regulators and regulated? Agencies operating within their assigned regulatory bailiwicks are not just likely to have defter command of these high- and low-level issues than legislators. They will also be better suited to perform ongoing monitoring, ensuring timelier updating of prior wholesale gatekeeper decisions about whether and which claims should be private-enforcement-eligible.¹⁵⁶

While the superior competence and capacity of agencies are thus mostly settled in the wholesale context, this is plainly less true in the retail context. The difference lies in the nature of retail gatekeeping: the principal retail-level gatekeeper task is not forming broad-scale, “legislative” judgments about the net social costs or benefits of competing regulatory approaches but rather a far more quotidian, “adjudicative” sorting of more and less meritorious cases. One implication is that the nature of retail gatekeeping shifts the primary institutional comparison to be performed. The competence and capacity inquiry in the wholesale gatekeeper context mostly distills to a comparison of agencies and legislatures. In the retail context, however, the primary comparison is between agencies and courts.

153. *See id.* at 129-43.

154. *See supra* note 74 and accompanying text (summarizing the view that judicial case processing necessarily lacks the synopticism necessary to form valid generalizations about policy benefits).

155. *See* Eric Shickler, *Institutional Development of Congress*, in *THE LEGISLATIVE BRANCH* 35, 37-41 (Paul J. Quirk & Sarah A. Binder eds., 2005) (noting the steady enhancement of legislatures’ fact-finding and analytic capacities via the committee system).

156. Similar points have been made in the long literature on regulatory preemption. *See* sources cited *supra* note 12.

A second implication is that our judgment as to which of these institutions—agencies or courts—is better situated to assess case merit will turn, at least in part, on how merit is conceptualized in the first instance. American legal culture trades in at least three distinct conceptions of case merit. The first is probabilistic and comparative: a case is more meritorious than another if the defendant is more likely to be held liable for some remedy.¹⁵⁷ A second is pegged to social value: a case is meritorious if its successful prosecution would, on balance, enhance social welfare.¹⁵⁸ A third is legalistic: a case has merit if it is true that the defendant has violated a valid legal injunction.¹⁵⁹

At one level, this menu of options offers little analytic traction. After all, a gatekeeper agency will likely make judgments tracking all three merit conceptions in performing the full slate of ideal retail gatekeeper tasks. As concrete examples, an ideal retail gatekeeper agency might terminate a case based on its determination that the social cost of enforcement would outstrip its social benefit (the second conception) or, alternatively, that the plaintiff's factual allegations, even if true, do not add up to a violation of a legal prohibition or injunction (the third conception). Similarly, an ideal retail gatekeeper agency deciding whether to allocate scarce public enforcement

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157. See Warren F. Schwartz & C. Frederick Beckner III, *Toward a Theory of the “Meritorious Case”*: *Legal Uncertainty as a Social Choice Problem*, 6 GEO. MASON L. REV. 801, 803 (1998) (noting the “widely accepted” assumption in American legal culture that “[t]he merit of a case varies systematically with the probability that it will succeed”). This conception of merit also tracks the foundational legal realist assumption, going back to at least Holmes, that a case in which a plaintiff prevails is by definition meritorious. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (defining “the law” as “prophecies of what the courts will do in fact”).
158. See Schwartz & Beckner, *supra* note 157, at 803 (noting the further assumption within legal culture that links a case’s merit to whether it is “socially desirable that it be maintained”). Social welfare as a key metric in gauging case merit is also implicit in much of the law and economics literature on litigation behavior. See, e.g., Shavell, *supra* note 38 (noting the divergence between the private and the social incentive to litigate a case).
159. Of course, this third conception of merit is question-begging, for it assumes an externally constructed standard that can supply a “right” judgment of legality that may or may not deviate from what a judge or jury will provide. See Schwartz & Beckner, *supra* note 157, at 805. Here again, this conception of merit is implicit in much of the law and economics literature on litigation behavior, which frequently models the likelihood that an adjudicator will err in the plaintiff’s or defendant’s favor. See, e.g., Lucian Arye Bebchuk & Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL STUD. 371, 374-75 (1996). For an illuminating discussion that partakes of the above conceptions of merit, but does so in an effort to define “frivolous” rather than “meritorious,” see Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 529-33 (1997).

resources toward a case that features an under-resourced or overmatched private enforcer will almost certainly consider both the case's social value (the second conception) and also its probability of success with and without the benefit of government participation (the first conception). Judges, too, make similar assessments in adjudicating pretrial motions.¹⁶⁰

Given that agencies and courts will deploy multiple and competing conceptions of merit in making gatekeeper decisions, it does not make sense to commit to one or another conception in rendering a comparative judgment about institutional capacity. Even so, it should be clear that systematic judgments about the relative competence and capacity of agencies and courts to perform retail gatekeeping will heavily depend on the weight accorded to particular gatekeeper tasks. Thus, where an agency is mainly using its retail, case-by-case gatekeeper powers to implement broad-scale judgments about which types of cases are welfare-enhancing and which welfare-decreasing, or where the agency is using those same powers to solve coordination problems or police fidelity to legislative purpose, its panoramic view of the regulatory landscape confers a clear advantage in the same way it does in the wholesale

160. For instance, a judge deciding a summary judgment motion under Rule 56 can be thought to be implementing a version of the first (probabilistic) conception of merit insofar as she asks whether a reasonable jury could find in the non-movant's favor. See FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (setting forth this standard). Similarly, a court deciding a motion to dismiss under Rule 12(b)(6) can be thought to be implementing the first (probabilistic) or second (welfarist) conception of merit, depending on one's understanding of what the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), instruct trial judges to do. One view is that those decisions' installation of a "plausibility" pleading standard requires courts to gauge the likely factual sufficiency of the allegations and thus to apply a probability screen in deciding Rule 12(b)(6) motions to dismiss, despite the Court's own claim to the contrary. See *Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012) (employing a probabilistic conception of the plausibility standard). Another view is that the Court's *Twombly* and *Iqbal* decisions instantiate the second (welfarist) conception of merit by requiring trial courts to weigh both the likelihood discovery will reveal inculpatory facts and also the likely litigation and other costs that will be incurred in getting there. See Engstrom, *supra* note 91; Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1256-58 (2013). Finally, a court that decides a motion to dismiss under Rule 12(b)(6) by finding that the plaintiff has failed to state a valid legal claim even under the prior "no set of facts" standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) — for instance, because the relevant statute does not apply extraterritorially — would clearly be implementing the third (legalistic) conception of merit.

gatekeeper context.¹⁶¹ But this advantage narrows and may even disappear entirely when the task at hand is merits-screening of the narrow, probabilistic sort. Indeed, both institutional actors have at their disposal substantial evidentiary tools—subpoenas and civil investigative demands on the one hand and civil discovery tools, as wielded by litigant-adversaries, on the other—that are unlikely to differ substantially in their probability-estimating utility.¹⁶² As a

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161. See, e.g., Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 928 (2003) (asserting that “agencies are likely to be in a better position to decide whether departures from the text actually make sense” or “whether departures from the text will seriously diminish predictability or otherwise unsettle the statutory scheme”). That agencies possess greater technical expertise and privileged access to legislative purpose relative to courts is also a core tenet of the *Chevron* doctrine. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (basing deference to agency interpretation of statutes on, among other factors, the fact that “the regulatory regime is technical and complex”); see also Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2101 (1990) (noting that *Chevron*’s deference principle is rooted, at least in part, in assumptions about “the comparative advantages of the agency in administering complex statutes”).
162. Legal scholars have long debated the comparative advantages of judicial versus administrative adjudicators in particular, and generalist versus specialist adjudicators more broadly, in interpreting statutes. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 254-57 (1996) (focusing on whether generalist or specialist courts will be more faithful to the “current” or the “original goals of a statutory program”); Revesz, *supra* note 55, at 1117 (examining whether specialized courts can better “promote the coherence of a statutory scheme” or manage legal complexity). Comparatively few analyses, however, consider the comparative capacity of adjudicator types in performing the more pedestrian task of gauging a claim’s factual sufficiency. A standard claim is that specialized/administrative adjudication may prove more accurate in highly technical areas because of superior experience and expertise. See, e.g., Hemphill, *supra* note 6, at 670-84 (making this claim in the antitrust context); Sunstein & Vermeule, *supra* note 161, at 927-28, 943 (making a more general version of the claim and expressing doubt whether generalist judges, with limited time and information, “can form even a plausible view of the relevant complexities” across a range of regulatory areas in adjudicating claims). Others, however, assert just the opposite, arguing that immersion and insularity can in fact render specialists’ decisions inferior to generalists’, and suggesting that a gatekeeper agency would be demonstrably *worse* than courts at gauging case merit or evaluating the factual sufficiency of claims. See, e.g., LAWRENCE BAUM, *SPECIALIZING THE COURTS* 31-34 (2011) (reviewing this debate). Nor has empirical work made much progress on the question, at least in part because of the impossibility of establishing an objective measure of case “merit.” For instance, a recent empirical effort to gauge the relative decisional quality of agencies and courts in the antitrust context by comparing appellate reversal rates in cases adjudicated at the Federal Trade Commission and in federal district courts fails not just because the standard of appellate review is different as to the two types of decisions but also because the study, by using decisions of appellate-level judicial generalists as a baseline measure of merit, begs the question as to whether the adjudicatory capacities of generalist judges and expert administrators systematically vary. See Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade*

result, there is little reason to believe that agencies wielding gatekeeper powers or courts will systematically vary in their capacity to judge a claim's factual sufficiency based on collected evidence or the weight to be accorded specific evidentiary showings, except perhaps in the most technical of areas.¹⁶³

The inquiry's comparative nature and the contingency introduced by competing definitions of merit are not just important for deciding who decides in the retail context; they also expose critical tensions in the gatekeeper idea itself. If "merit" is understood in narrow probabilistic terms as the likelihood that a court will find liability, then retail gatekeeper authority will merely duplicate—though possibly more efficiently—the outcomes the judicial system would produce absent gatekeeper intervention. Here, the ideal agency gatekeeper is at best an efficiency-enhancing, adjudicatory "adjunct" to the courts that is not so different in concept from the "specialized" courts that dot the American regulatory landscape.¹⁶⁴ If, however, "merit" is understood more broadly to include a social welfare or legislative fidelity component, then agency gatekeeping takes on a fundamentally different and more "regulatory" character. Rather than serving as an adjudicatory adjunct, the agency is interposed between private enforcers and the courts to implement a conception of merit that is *different* from what judges or juries would otherwise deliver.¹⁶⁵

Given these complexities, rigorous empirical evidence on agencies' merits-screening capacities is hard to come by. One approach would be to isolate a particular type of regulatory regime and compare all litigation outcomes—including voluntary dismissals, litigated judgments, and settlements—before and after a jurisdiction installed a gatekeeper regime to those same outcomes in

Commission, 1 J. ANTITRUST ENFORCEMENT 82, 91-94 (2013). For analysis of the few empirical studies trained more narrowly on the merits-screening capacities of gatekeeper agencies, see *infra* notes 224-227 and accompanying text.

163. One commentator has taken a contrary position in a recent analysis, suggesting that vesting the SEC with gatekeeper powers would not be effective because "at the screening stage before discovery, the facts are undeveloped," and it is "unclear why the SEC would be much better in assessing cases at the pre-discovery stage than courts." Park, *supra* note 4, at 175. But this view seems founded on an unduly narrow conception of the agency gatekeeper role, as there is no reason why an agency armed with gatekeeper powers cannot use its various investigatory tools to flesh out the merits of a case before rendering a gatekeeper decision. To that extent, the comparative institutional analysis reduces, as noted above, to whether agencies or courts wield substantially more or less efficient or effective evidentiary tools or differ in their capacity to weigh evidence once collected.
164. See generally BAUM, *supra* note 162 (offering an overview of "specialized" courts within the American legal system).
165. This would also raise a host of further questions about how, precisely, agency decisions would differ from those of judges or juries. For further discussion of judge-jury dynamics, see *infra* note 182.

a second, similarly situated jurisdiction that lacked gatekeeper structures throughout the study period.¹⁶⁶ The resulting “differences-in-differences” estimate would meaningfully isolate the systemic effect of an agency’s gatekeeper actions on the volume and character of litigation efforts by washing (or “differencing”) out other possible explanations for observed variance along these measures.¹⁶⁷

However, even this ideal research design would fall considerably short of establishing agencies’ superior merits-screening capacity. It could not, for instance, tell us how much of any observed change in litigation outcomes was attributable to *actual* agency gatekeeper decisions (and, thus, to an agency’s *actual* ability to screen cases on merit grounds) as against litigants’ perceptions (accurate or not) about the agency’s merits-screening capacity or proclivity to use it.¹⁶⁸ Nor could such an approach tell us much about whether agencies can arrive at merits decisions more efficiently—that is, more quickly or while consuming fewer resources—than courts, at least not without large quantities of data about the parties’ litigation costs and the resources consumed by agencies and courts in rendering their dispositions. Finally, even a sophisticated research design such as the above would be stymied where a gatekeeper agency possesses the power to intervene in and take control of, rather than merely terminate, private enforcement actions. Here, the government’s decision to enter a case operates as both a selection and treatment effect in ways that are famously difficult to pry apart empirically.¹⁶⁹

What little empirical evidence from actual gatekeeper regimes that exists well illustrates these methodological challenges. For example, numerous studies have evaluated the decisional output of state-level medical malpractice screening panels, with most finding few statistically meaningful differences across states with and without panels in the frequency, severity, timeliness, or cost of claims.¹⁷⁰ But a few scattered studies have painted a more discouraging

166. See JOSHUA D. ANGRIST & JORN-STEFFEN PISCHKE, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST’S COMPANION* 227-43 (2009) (describing the “differences in differences” approach).

167. *Id.*

168. See Engstrom, *supra* note 91 (noting a similar difficulty in assessing the effect of the Supreme Court’s *Twombly* and *Iqbal* decisions on motion-to-dismiss rates in light of dynamic litigant responses to the decisions).

169. See Engstrom, *supra* note 62, at 1737-38 (noting the difficulty of prying apart selection and treatment effects in measuring gatekeeper effects).

170. See MELLO & KACHALIA, *supra* note 111, at 8 (“No controlled studies have identified statistically significant effects on claim frequency or payouts, while 7 have found no association.”); Frederick J. White III et al., *Medical Malpractice Review Panels and Medical*

portrait for panel advocates, finding an overall *increase* in litigation volume and time-to-resolution in states with mandatory screening panels relative to those without.¹⁷¹ One possible interpretation of the finding that panels increase claim frequency is that plaintiffs are more willing to litigate claims despite adverse panel decisions because they view those decisions as biased or unreliable.¹⁷² This would suggest that the panels lack merits-screening capacity. But a more likely explanation is that the panels operate to subsidize claims by offering a low-cost expert opinion that is fully admissible in subsequent litigation in most states, thus reducing plaintiff-side litigation costs and inducing plaintiffs to bring claims they otherwise would not.¹⁷³ Importantly, some (though not all) of these newly filed cases will be at least as “meritorious” as the average case in the nonpanel case pool in the sense of the probability of achieving a positive litigation outcome.¹⁷⁴ But without an objective measure of the underlying likelihood of success, we cannot know how many of these new cases are stronger and how many weaker than before, frustrating firm inferences about the panels’ merits-screening capacity or their overall effect on the litigation regime.¹⁷⁵

Perhaps the two best empirical efforts to date avoid these difficulties but offer conflicting findings and also reveal interpretive problems of their own.

Liability System Cost, Timeliness, and Efficiency: A Cross-Sectional Study, 5 J. EMPIRICAL LEGAL STUD. 375, 375 (2008) (evaluating the association “between the medical malpractice panel status of a state . . . and measures of cost, timeliness, and efficiency of . . . claims resolution for the year 2002”).

171. See Roger Hanson et al., *What Is the Role of State Doctrine in Understanding Tort Litigation?*, 1 MICH. L. & POL’Y REV. 43, 70 tbl.5 (1996) (finding *higher* rates of litigation in states with screening panels); Stephen Shmanske & Tina Stevens, *The Performance of Medical Malpractice Review Panels*, 11 J. HEALTH POL. POL’Y & L. 525 (1986) (same); see also MELLO & KACHALIA, *supra* note 111, at 9 (noting studies showing longer time-to-resolution in panel states and speculating that this is a simple artifact of adding a step to the litigation process).
172. MELLO & KACHALIA, *supra* note 111, at 8.
173. See, e.g., Hanson et al., *supra* note 171, at 71 (“Another possibility is that plaintiffs will use these panels as a low cost—yet effective—means to get a clear reading on the odds of winning.”). Here, my analysis tracks the standard law and economics model of the decision to litigate as a calculation of the expected value, net of costs, of filing suit. See FARHANG, *supra* note 1, at 22 (summarizing this approach).
174. This is because a case’s expected value is a function of both the amount in controversy and the probability of success. As a result, even cases with high probability (but low damages) may not have had positive expected value without the cost savings the panels provide.
175. Even the basic finding that panels are associated with higher litigation rates may be a non-starter because of a causal direction problem: mandatory screening panels may not cause higher litigation rates so much as high litigation rates cause states to adopt mandatory screening panels. STRUVE, *supra* note 100, at 60.

First, a recent large-scale study of job discrimination litigation found that the EEOC staff's internal, nonpublic triage characterizations of case merit as well as its formal, public "cause" determinations bore little or no relationship to subsequent litigation outcomes.¹⁷⁶ This suggests (but does not prove) that EEOC merit judgments, if transformed into fully binding case-termination decisions, would not offer a more efficient, preemptive alternative to judicial resolution.¹⁷⁷

Here again, however, we run up against a critical tension in the gatekeeper idea as to whether gatekeeper agencies should serve as an efficiency-enhancing, adjudicatory adjunct to the courts, or whether they should serve a more "regulatory" role, implementing a conception of merit that departs from merely predicting what a judge or jury would do. If the EEOC is viewed as an adjudicatory "adjunct" to the courts whose principal task is to filter out cases using a probabilistic conception of merit, then the divergence of EEOC triage decisions from subsequent litigation outcomes should give pause to regulatory architects considering gatekeeper designs. If, however, the EEOC's gatekeeper role is defined more broadly to include a social welfare or legislative fidelity component, then the apparent disconnect between EEOC triage decisions and ultimate litigation outcomes might be grounds for cautious optimism rather than concern.¹⁷⁸

176. See Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 181, 184, 187, 191 (2010) (examining 1,600 suits across seven regionally diverse district courts during the period from 1988 to 2003 and finding that "EEOC priority codes and merit determinations have little explanatory effect" in terms of predicting the likelihood that a filed case will proceed to the next stage of litigation). For a full tour of the EEOC triage and charge processing system, see *infra* notes 258-261 and accompanying text.

177. Note that the study also found no association between formal EEOC "cause" findings and litigation outcomes. Nielsen et al., *supra* note 176, at 191. But this offers a less attractive empirical test of agency merits-screening capacity, as the agency's "cause" determination is disclosed to judge and jury in many jurisdictions, introducing substantial endogeneity into the analysis. A larger problem with both findings is that, by focusing on *filed* job discrimination cases, the study examined only a relatively small subset (roughly one-quarter during the study period) of charges that the EEOC had evaluated, whether at the initial triage stage or the "cause"-determination stage. As a result, we cannot draw clear inferences about the EEOC's merits-screening capacity because we cannot gauge the accuracy of its determinations in the full case population, including those that did and did not proceed to litigation. Still, the study *does* permit us to conclude that, during the 1988 to 2003 interval, EEOC gatekeeping via charge processing offered little merits-signaling value to courts adjudicating subsequently filed claims.

178. As noted previously, this raises substantial questions about how, precisely, EEOC staff decisions would differ from those of a judge or jury. For further discussion of judge-jury dynamics, see *infra* note 182.

The other rigorous gatekeeper study, this one examining DOJ decisions to intervene in *qui tam* suits under the FCA, offers a pointed contrast to the EEOC study, finding that the DOJ possesses at least some merits-screening capacity in the sense of predicting judicial outcomes.¹⁷⁹ Yet even this finding does not answer the key comparative question as to whether the DOJ reached those decisions more efficiently than would courts adjudicating those same cases in a counterfactual world without any DOJ gatekeeper role. More importantly, the FCA regime hardly offers a conservative test. *Qui tam* cases are famously technical, and agencies are likely to enjoy an advantage over generalist courts in more complex regulatory contexts.¹⁸⁰ In addition, because private *qui tam* relators assert claims for fraud on behalf of the government in connection with federal programs or expenditures, the DOJ enjoys privileged access to information about case merits, as it can work directly with the agency allegedly defrauded to develop necessary evidence. By contrast, EPA gatekeeper decisions about whether to displace environmental “citizen suits” require investigation well beyond government boundaries in determining whether, say, a regulatory target has unlawfully released pollutants. In nontechnical cases involving subject matter that is largely divorced from governmental activity, the agency’s advantage may narrow or even vanish.¹⁸¹

179. See Engstrom, *supra* note 46, at 1272 n.93 (using a differences-in-differences approach that leverages a unique doctrinal change in the Ninth Circuit limiting the DOJ’s power to veto relator-defendant settlements to establish that the DOJ has at least *some* merits-screening capacity).

180. Many *qui tam* cases, for instance, involve the Federal Acquisition Regulations, a byzantine set of rules regarding government contracting that currently runs to nearly 2,000 pages, or the equally voluminous and complex Medicare and Medicaid reimbursement regulations. See Federal Acquisition Regulations, 48 C.F.R. ch. 1 (2005); Medicare, CENTERS FOR MEDICARE & MEDICAID SERVICES, <http://www.cms.gov/Medicare/Medicare.html> (last visited Oct. 3, 2013); see also Engstrom, *supra* note 46, at 1271 (showing the high prevalence of *qui tam* cases asserting health care fraud under Medicaid and Medicare programs). For two recent examples of *qui tam* suits predicated on FAR violations, see *United States ex rel. Dyer v. Raytheon Co.*, No. 08-10831-DPW, 2013 WL 5348571 (D. Mass. Sept. 13, 2013) (describing FCA claim based on FAR rules on incentive compensation within federal contracts); and *United States v. Lockheed Martin Corp.*, 927 F. Supp. 2d 1338, 1344 (N.D. Ga. 2013) (noting relator claims regarding contractor billing systems predicated on FAR violations).

181. Similarly, and as I elaborate in Part IV *infra*, agencies may enjoy less of a comparative advantage in the job discrimination context, where the principal fact question is frequently a defendant’s subjective intent.

To be sure, the above rehearsal of theory and evidence is stylized and incomplete.¹⁸² For now, however, one can hazard some general conclusions about the relative competence and capacity of agencies to perform litigation gatekeeper tasks. The first is that the competence and capacity advantages agencies enjoy over courts are probably narrower in the retail gatekeeper context than in the wholesale context. Second, and more specifically, the comparative advantage of agencies in the retail gatekeeper context, if any, will likely turn on context- and regime-specific factors, including the degree of technicality of a given regulatory area, the presence or absence of jury decision-making, and the extent to which the agency enjoys preferred access to evidentiary materials on which to base merits judgments.

Together, these two observations add up to a third: many commentators who have made calls to vest agencies with expansive gatekeeper powers see retail-level merits screening and case termination as the *sine qua non* of the ideal agency gatekeeper role.¹⁸³ And yet, the above analysis suggests that case termination is the gatekeeper task where the competence and capacity gap between agencies and courts is likely to be *narrowest*. By contrast, the agency advantage would seem to be widest when used to steer private enforcement actions in more public-interested directions, promote cooperation with regulated industry, enhance the consistency and coherence of regulatory implementation, or police fidelity to the legislative design.¹⁸⁴ To that extent, the justification for vesting agencies with retail gatekeeper powers in many regulatory contexts is unlikely to be founded solely on an agency's ability to cull meritless cases.

182. By focusing narrowly on merits-screening capacity, the analysis has pushed past the standard problem of managerial control within agencies—a topic that fits more naturally with Subsection III.B.3's discussion of the ways bureaucratic behavioral tendencies can distort agency gatekeeper decisions. Moreover, and as alluded to at various points above, the analysis has mostly ducked the myriad ways judges, jurors, and bureaucrats are likely to vary in assessing case "merit," at least in part because such differences are likely to be highly context-specific. Future research focused on particular substantive regulatory areas can usefully engage with the likely proclivities and biases of each of these decision-makers in making fact determinations regarding negligence, market power, discriminatory or fraudulent intent, and the like. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 35-37 (1993) (reviewing the literature on expert and lay perceptions of risk); W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107 (2001) (using experimental design to explore judge and juror intuitions about risk).

183. See, e.g., Rose, *supra* note 5, at 1306 (discussing case termination as the sole gatekeeper task).

184. See *supra* notes 141-150 and accompanying text (cataloguing some possible uses of retail gatekeeper authority, including serial use of such authority to achieve many of the same ends as wholesale gatekeeper powers).

2. Regulatory “Capture”

Even if agencies have the *capacity* to perform gatekeeping tasks in welfare-maximizing ways, they may lack the *will* to do so. An influential line of analysis holds that administrative agencies suffer from a range of bureaucratic pathologies, particularly in their susceptibility to regulatory “capture.”¹⁸⁵ In its standard form, capture theory predicts that certain groups will systematically win out over other groups in the regulatory process, both because they face more concentrated benefits or costs and so have greater incentive to invest in information or lobbying efforts, and also because they can better solve the collective action problems that often stymie group-based political action.¹⁸⁶ Applying these ideas to the gatekeeper context, we might thus worry that regulated parties will exert disproportionate influence over agency gatekeepers, systematically bending gatekeeping decisions in their favor and thus compromising the agency’s stewardship of zealotry, coordination, and legislative fidelity within the regime.

Yet capture arguments quickly run into well known problems. As an initial matter, whether agencies can be “captured” at all is a contestable issue, both theoretically and empirically.¹⁸⁷ More fundamentally, assessing capture—like

185. For recent and comprehensive treatments of the capture concept, see STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 26–52 (2008); and *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* (Daniel Carpenter & David A. Moss eds., 2013).

186. See CROLEY, *supra* note 185, at 27. The classic accounts of the collective action problems and asymmetric stakes that underpin “capture” theory are MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); and JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* 332–37 (1973).

187. See Steven P. Croley, *Public Interested Regulation*, 28 *FLA. ST. U. L. REV.* 7, 7–8 (2000) (reviewing studies and finding little consistent support for capture theories); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 *VA. L. REV.* 199, 236–68 (1988) (offering an earlier canvass of existing studies and arriving at the same conclusion); see also Daniel Carpenter, *Detecting and Measuring Capture*, in *PREVENTING REGULATORY CAPTURE*, *supra* note 185, at 57, 67–68 (setting forth an agenda for how scholars might subject capture theories to better empirical testing). A further conceptual problem is that capture’s regulatory valence is not always clear, frustrating firm predictions about its likely effects. The currently ascendant version of the theory holds that capture is deregulatory (or “corrosive”) in favoring regulatory targets. See Daniel Carpenter, *Corrosive Capture? The Dueling Forces of Autonomy and Industry Influence in FDA Pharmaceutical Regulation*, in *PREVENTING REGULATORY CAPTURE*, *supra* note 185, at 152, 153–55. But in the gatekeeper context, the opposite might also be true: an increasingly well organized plaintiffs’ bar might be every bit as capable of “capturing” an agency, particularly where a steadily turning “revolving door” moves lawyers between the

assessing institutional competence and capacity—is necessarily comparative. And here, public law scholars offer a musical-chairs of arguments about which institutions, if any, are more or less vulnerable. One view is that agencies might be *less* susceptible to patterns of political control than institutional alternatives, particularly legislatures, because of their ability to carve out a sphere of “bureaucratic autonomy” from the pull and haul of politics.¹⁸⁸ Far better, the argument goes, to have expert agencies—as opposed to legislatures and, more specifically, legislative committees—make wholesale gatekeeper judgments about the optimal reach of private enforcement.¹⁸⁹ A second view concludes just the opposite: because agencies operate in close proximity to regulated parties, they are uniquely susceptible to political influence compared to legislatures or Article III courts.¹⁹⁰ Still another view rejects both positions and holds that, when it comes to the asymmetric stakes and collective action problems at capture theory’s core, legislatures, agencies, and courts tend to “move together.”¹⁹¹ Thus, regulated entities might capture the gatekeeper agencies *directly*, using their superior organizational capacity and resource endowments to bend gatekeeper decisions in their favor, or they might accomplish those same ends *indirectly* by capturing political overseers (whether legislative or executive) or courts (via the litigation process).

The obvious problem with these starkly different views is that it is hard to know whether we should be concerned about gatekeeper capture at all. One possibility is that interposing agencies into the litigation process will be neutral or even positive with respect to capture effects. Indeed, gatekeeping may merely reproduce capture dynamics that already exist elsewhere within the

agency and the ranks of private enforcers. See Engstrom, *supra* note 46, at 1257–62, 1285 n.149.

188. See DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928*, at 25, 32–33 (2001) (noting how agencies can achieve autonomy by maneuvering among multiple principals or building coalitions with outside groups that cut across lines of political control).
189. See J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1444 (2003) (noting that “committee members sometimes defy majority preferences rather than reinforce them”). *But see* KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 191-200*, 232–34 (1998) (exploring, but mostly rejecting, the notion that committee members have outlier policy preferences).
190. On the relative susceptibility of agencies and courts to capture, see M. Elizabeth Magill, *Courts and Regulatory Capture*, in *PREVENTING REGULATORY CAPTURE*, *supra* note 185, at 397, 408–10 (assessing whether lawsuits invoking judicial review of agency action are subject to the same resource, collective action, and other dynamics that lead to capture in the political sphere).
191. See KOMESAR, *supra* note 151, at 23. *But see* Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959, 973–74 (1998) (critiquing this view).

system, but many of gatekeeping's benefits—decisions grounded in a more technocratic and comprehensive command of the regulatory landscape, or more accurate and efficient filtering of meritless cases—will remain fully intact. A more pessimistic possibility, however, is that interposing agencies as gatekeepers will make capture dynamics far worse. On this view, gatekeeper regimes will *multiply* sites for unfair political influence, empowering interested groups to use their organizational and resource-based advantages to turn regulatory outcomes to their advantage even beyond what they might achieve in the legislative and judicial process.

Unfortunately, available empirical evidence does little to adjudicate between these very different scenarios. Thus, the long empirical literature on political control of bureaucracy confirms that the political pressures that can distort agency enforcement decisions operate through multiple channels, particularly legislative committees.¹⁹² That same literature also surveys the conditions under which an agency may be more or less resistant to external pressures, including the agency's degree of budgetary independence,¹⁹³ the breadth of the agency's jurisdiction,¹⁹⁴ the agency's internal structure,¹⁹⁵ or the degree of legislative and executive control over appointment and removal of agency heads.¹⁹⁶ And yet, this literature permits few bottom-line conclusions about whether agency gatekeeping will exacerbate or mitigate capture concerns across the run of possible applications. As with institutional competence and

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192. For classic studies, see Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094 (1985); and Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 792 (1983).
193. See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010) (noting funding sources as a potential element of agency independence); see also Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283, 284-87 (1996) (discussing more formal models of budgetary control of agencies); Michael M. Ting, *The "Power of the Purse" and Its Implications for Bureaucratic Policy-Making*, 106 PUB. CHOICE 243, 244-47 (2001) (same).
194. See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 99-100, 104 (1992) (arguing that agencies are more vulnerable to capture where they regulate fewer interests).
195. See, e.g., Andrew B. Whitford, *Decentralization and Political Control of the Bureaucracy*, 14 J. THEORETICAL POL. 167, 173 (2002) (noting that political control of a bureaucracy turns heavily on its organizational structure).
196. See generally Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1 (2013) (reviewing the literature on appointment and removal as mechanisms of political control of the bureaucracy).

capacity concerns, the degree to which capture dynamics drive deviations from the gatekeeper ideal articulated in Section III.A will be highly contextual.

The few empirical studies that focus on actual gatekeeper regimes are no more conclusive and once more underscore the extent to which gatekeeper regimes must be assessed through close, case-by-case analysis rather than general rules. For instance, recent studies examining the DOJ's use of its power to commandeer qui tam suits brought under the FCA reveal a trio of troubling regularities: the DOJ is *more* likely to join cases brought by former DOJ attorneys now serving as plaintiff-relator's counsel;¹⁹⁷ the DOJ is *less* likely to join cases brought against Fortune 100 companies or top defense contractors;¹⁹⁸ and qui tam cases relating to controversial war efforts in Iraq and Afghanistan remained under DOJ investigation longer than other defense-related cases during the George W. Bush Administration and then were quickly acted upon during the Obama Administration, suggesting a partisan pattern of delay.¹⁹⁹

Yet these findings once more expose the ambiguities at capture theory's core. As an initial matter, it is hard to know whether the DOJ's seeming soft-pedaling of defense cases results from overly cozy relationships between the Department of Defense and the "old generals" network within the defense contractor establishment, simple overhead political control (e.g., the Administration's desire to deflect attention from unpopular war efforts), or a combination of both. This is important, for one cannot insulate agencies from capture dynamics without first identifying their source. Indeed, greater bureaucratic autonomy might mitigate capture resulting from political control transmitted via the White House or congressional committees, but it may at the same time exacerbate "revolving door" forms of capture.

More importantly, these empirical findings hardly provide ironclad proof of something we can call capture. To be sure, lower DOJ intervention rates against large defendant companies and defense contractors might well reflect agency timidity in the face of those entities' political influence or litigation

197. See Engstrom, *supra* note 46, at 1306-07 (finding that the DOJ is more likely to intervene in qui tam suits in which former DOJ attorneys are serving as plaintiff-relator's counsel, despite the fact that those same suits also produce *lower* average recoveries than suits brought by attorneys without a DOJ connection).

198. See Engstrom, *supra* note 62, at 1735 (finding that the DOJ is substantially less likely to use its power to intervene in cases brought against Fortune 100 companies or top defense contractors).

199. See *id.* at 1745 (reporting findings).

resources.²⁰⁰ Large defense contractors may also be uniquely unattractive enforcement targets because they are too important to debar from future government work, substantially reducing the government's litigation leverage.²⁰¹ It is just as possible, however, that larger companies draw more marginal qui tam complaints because they are perceived by private plaintiff-relators as having deeper pockets or being more sensitive to public relations concerns.²⁰² As with perennial claims in other regulatory contexts that this or the other agency has been captured or is otherwise engaged in covert transfers, the empirical evidence here is equivocal.²⁰³

Nonetheless, consideration of the DOJ's gatekeeper activities in the FCA context helps us to carve out some more general observations from the conceptual and empirical morass. First, it seems clear that capture, to the extent it exists at all, will be far more likely to rear its head in the retail than in the wholesale gatekeeper context. Part of this is practical: it will often be difficult for legislative overseers to detect capture-related distortions across a large body of individual agency decisions. This is particularly true of qui tam lawsuits, some of which remain under seal even after the DOJ renders a gatekeeper decision.²⁰⁴

Yet the greater susceptibility of retail gatekeeper agencies to capture has a deeper, theoretical basis as well. Traditionally understood, capture results from asymmetric stakes and the logic of collective action, but it also requires a "rationally ignorant" public.²⁰⁵ This is important, for a long literature with theoretical and empirical components suggests that agency adjudication is more likely than rulemaking to facilitate capture because adjudication is less visible and less salient to the general public.²⁰⁶ Applied to the gatekeeper

200. See *id.* at 1735; see also Rajabiun, *supra* note 23, at 81 ("Even without regulatory capture, economizing practices by public enforcers reveal the presence of incentives to divert resources to actions against firms less likely to be able to defend themselves.").

201. See Engstrom, *supra* note 62, at 1735.

202. *Id.*

203. See *supra* notes 192-196 and accompanying text. The finding that the DOJ is more likely to intervene in cases brought by former DOJ insiders is likewise subject to alternative explanations. One possibility is that former DOJ insiders are systematically more risk-averse than other counsel and so prefer cases that are smaller but more likely to generate a recovery.

204. See Engstrom, *supra* note 46, at 1287.

205. See generally ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) (offering the seminal account of "rational ignorance" in public choice theory).

206. See Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 117-18; see also Richard J. Pierce, Jr., *Seven Ways to*

context, the greater opacity of retail gatekeeper decisions means that they are less likely, in political science argot, to transform “latent” publics into “concerned” and fully “mobilized” publics.²⁰⁷ Here, then, is yet another reason to be skeptical about the ability of agencies to perform retail gatekeeping tasks in particular. Just as Subsection III.B.1 found that the competence and capacity advantages of agencies were likely narrowest in the retail gatekeeper context, we might also harbor reasonable concern that agencies exercising retail gatekeeper powers will be more susceptible to capture than those vested with wholesale powers.

Second, concrete examination of the DOJ’s oversight activities in the FCA context highlights some of the acute challenges regulatory architects will face in insulating gatekeeper agencies from capture. One aspect of this has already been noted: regulatory designers cannot insulate agencies from corrupting external pressures unless they can distinguish among capture dynamics issuing from the White House, congressional committees, or a revolving door with industry.²⁰⁸ The fact that decision-distorting political pressures operate through multiple channels can thus present regulatory designers with something of a Catch-22. In the FCA context, for instance, one could insulate DOJ gatekeeper decisions from legislative pressures that may be skewing them in favor of Fortune 100 companies or defense contractors by rendering DOJ enforcement efforts self-funding, or by granting agency officials charged with gatekeeper duties greater protection from removal. But shielding the DOJ from political oversight in this way will also grant the agency freer rein to dispense regulatory favors to former DOJ insiders. In other words, one cannot mitigate one type of capture without facilitating another.

A range of other, more specific mechanisms designed to mitigate capture concerns likewise entail substantial costs. Thus, regulatory designers concerned about capture could, rather than granting agency heads greater budgetary control or removal protection, instead tweak the agency’s various gatekeeper powers directly. Among other things, one might fortify the procedures that govern agency gatekeeper decision-making beyond those required under the APA; grant the agency a “veto” rather than a “license” gate, thus empowering

Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59, 59-60 (1995) (including greater transparency and democratic accountability among the benefits of rulemaking relative to adjudication). *But cf.* CROLEY, *supra* note 185, at 146 (conceding that adjudication’s “exclusivity” raises concerns about “special access” and “regulatory favoritism,” but arguing that other aspects of the process—such as ALJ “semi-independence”—renders adjudication an “unwieldy” mechanism for dispensing regulatory favors).

207. See OLSON, *supra* note 186, at 51 (coining these terms).

208. See *supra* notes 192-203 and accompanying text.

private enforcers to go it alone and potentially force the agency's hand; or, relatedly, install a "tiered" bounty system that grants private enforcers a higher pay-out where the agency has refused to join the action in order to incentivize solo and possibly agency-forcing private enforcement efforts. However, and as discussed in greater detail in Section III.C below, each of these options imposes critical design tradeoffs that regulatory architects must take account of in choosing among gatekeeper designs.

3. *Political Oversight and Bureaucratic Behavior*

The possibility that gatekeeper agencies might be susceptible to deterrence-diluting capture does not exhaust the ways politics or other external pressures can drive deviations from Section III.A's gatekeeper ideal. A subtly different but potentially more important set of concerns arises from two influential claims about bureaucratic behavior that have co-existed, sometimes awkwardly, alongside the scholarly preoccupation with agency capture. The first is that agencies and agency personnel exhibit tendencies toward self-aggrandizement, allocating resources with an eye to collecting political and personal rewards and ensuring the continued flow of resources to the agency.²⁰⁹ The second is that agencies tend to be overly cautious concerning risks within their regulatory bailiwicks.²¹⁰ The result is a final cluster of concerns that regulatory architects should carefully consider before vesting agencies with gatekeeper powers.

Perhaps the best place to bring into focus the ways bureaucratic behavior can distort gatekeeper decision-making is to explore a retail gatekeeper agency's power to intervene in and take over control of private enforcement actions. As noted in Section III.A, an ideal agency with full retail gatekeeper powers will maximally rely on well-incentivized, well-resourced private

209. This is often called the "self-aggrandizement" or "agency expansion" hypothesis. See WILLIAM A. NISKANEN JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 38-42 (1971) (offering the classic account); see also Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (offering an updated and more skeptical view).

210. Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080 (1986) (noting the "excessively cautious" nature of regulators); see also Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1296-1300 (2006) (reviewing literature suggesting agencies will exhibit "excessive regulatory caution").

enforcers to perform enforcement tasks, thus conserving scarce agency resources for other welfare-maximizing tasks.²¹¹

Yet the self-aggrandizement hypothesis suggests that a gatekeeper agency armed with intervention authority may instead deploy its power in pursuit of a very different set of regulatory outputs. For instance, we might expect that a gatekeeper agency whose resources depend on winning the favor of political overseers will seek to maximize objective and observable measures of enforcement success, such as total monetary recoveries, over harder-to-quantify and empirically contestable goals such as total illegal activity deterred or aggregate welfare gains.²¹² Interestingly, the gatekeeper decisions of an agency that seeks to maximize total recoveries will yield an overall enforcement strategy that is little different from that of unregulated profit-seeking private enforcers.²¹³ To that extent, a gatekeeper agency focused on maximizing recoveries may reinforce, rather than mitigate, the problem of socially costly overdeterrence.

Other possible agency maximands can yield even more substantial deviations from the gatekeeper ideal. For instance, an agency might join cases with an eye to maximizing its win/loss ratio.²¹⁴ By cherry-picking strong cases and creating a substantial spread between win rates in cases it joins and those it does not, it can signal its pivotal role to political overseers. A win-maximizing agency might thus focus scarce public enforcement resources on smaller, easier-to-win cases, leaving more consequential misconduct undeterred.²¹⁵ Worse, such an agency might seek to maximize recoveries in which public

211. See *supra* text accompanying note 141.

212. See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 161 (1989) (noting agencies' tendency to pursue certain observable bureaucratic outputs over others); Lemos & Minzner, *supra* note 18 (manuscript at 18) (asserting that "agencies seeking to build reputations as effective enforcers will tend to emphasize easily measurable accomplishments rather than more amorphous forms of success"). While this idea is intuitive, a sophisticated analogy can be found in the economics literature on "high-powered incentives." See, e.g., Daron Acemoglu, Michael Kremer & Atif Mian, *Incentives in Markets, Firms, and Governments*, 24 J.L. ECON. & ORG. 273 (2007) (theorizing that "high-powered incentives" linked to agent performance can generate "unproductive signaling effort" in certain cases).

213. On the enforcement strategies of private enforcers, see Nuno Garoupa & Daniel Klerman, *Optimal Law Enforcement with a Rent-Seeking Government*, 4 AM. L. & ECON. REV. 116 (2002); and Polinsky, *supra* note 15.

214. See Engstrom, *supra* note 62, at 1703.

215. See Frankel, *supra* note 6, at 113 ("[I]f success for the Enforcement division is measured by the number of cases, convictions, or settlements, incentives would lead [it] to avoid the large costly complicated cases and focus on the small ones.").

enforcers actively participate.²¹⁶ The motive here should be obvious: another agency win may generate better press than a mix of public and private successes.²¹⁷ Both scenarios run directly contrary to the gatekeeper ideal in which public enforcers carefully husband private enforcement capacity, delegating enforcement duties to competent and trustworthy private enforcers and thus freeing up scarce public resources for other enforcement and gatekeeper tasks.²¹⁸

The above dynamics have a further, and critically important, implication: a retail gatekeeper agency focused on maintaining access to resources will be unlikely to make optimal use of its authority to terminate inefficient private enforcement efforts. Part of this is a continuation of the logic of a self-aggrandizing agency: a politically conscious gatekeeper agency focused on maintaining access to needed resources will steer its efforts toward readily observable measures of enforcement success, such as recovery counts and amounts, rather than purely reactive case terminations. In addition, the self-aggrandizement and excessive-caution hypotheses, when read together, suggest that a typical agency, even an “expansionist” or “empire-building” one, will be “defensive” and “scandal-minimizing.”²¹⁹ Applying these ideas to the gatekeeper context, we might therefore expect that agency officials will not block private enforcement efforts where subsequent events may turn up evidence of wrongdoing, thus embarrassing the agency, or where the actual and reputational costs of terminating bad lawsuits can be reliably shifted to the

216. See Engstrom, *supra* note 62, at 1703.

217. *Id.*

218. Importantly, agency pursuit of an objective function other than maximizing social welfare will not just impose opportunity costs and waste scarce public enforcement resources. Self-aggrandizement distortions will also imperil the agency’s ability to play an “anti-scaling” role. See *supra* tbl.3 and accompanying text. Recall here that one of the principal tasks an ideal agency wielding retail gatekeeper powers will perform is to induce private enforcers to come forward with certain claims, particularly low- and high-value ones, which may be socially optimal to prosecute but will not attract profit-oriented private enforcers without support from public enforcers. By committing to aid those claims, the agency can induce private enforcers to come forward who otherwise would not, thus plugging enforcement gaps left by the necessarily coarse calibration of payouts. Yet the possibility that a gatekeeper agency will strategically seek to maximize regulatory outputs other than social welfare creates a version of a hold-up problem. Because the gatekeeper agency cannot perfectly assure private enforcers it will not renege in the face of other opportunities, private enforcers rightly worried about being left holding the bag will not surface the claims in the first place. See Engstrom, *supra* note 62, at 1705-06; see also Depoorter & De Mot, *supra* note 18, at 152-53 (modeling this dynamic).

219. James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 378 (James Q. Wilson ed., 1980).

judiciary.²²⁰ Worse, politically motivated agencies may in fact use their intervention authority to *aid* socially inefficient private enforcement efforts, since they will add to recovery tallies or the agency's win rate.²²¹

A final potential concern flowing from a version of the self-aggrandizement theory is that, even when an agency's leadership is firmly committed to playing a welfare-maximizing role, it may be stymied in those efforts by the careerist incentives of agency personnel and problems of internal managerial control. For agencies exercising retail gatekeeper authority, the substantial and difficult task of assessing the merits of private enforcement actions will typically fall to line-level attorneys and their mid-level managers, each with their own personal and often career-oriented goals.²²² These personnel "may bias agency decisions toward larger and more consequential cases, smaller and potentially more winnable cases, or cases brought by more sophisticated private enforcers deemed to be better litigation partners, all in search of résumé-burnishing successes."²²³ Pursuit of any of these alternative goals may cause agency

220. See, e.g., Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 282 (2007) (framing the "effects that the availability of private enforcement have [sic] on the Government's incentives" as a moral hazard problem, and arguing that the availability of private enforcement "causes public prosecutors to reduce the care that typically controls their exercise of prosecutorial discretion" (emphasis omitted)). A useful analogy here is the "bailout effect" that legal scholars and political scientists have noted in the context of judicial review. See Justin Fox & Matthew C. Stephenson, *Judicial Review as a Response to Political Posturing*, 105 AM. POL. SCI. REV. 397, 397 (2011) (describing the "bailout effect" in the constitutional law context whereby "judicial review may rescue elected officials from the consequences of ill-advised policies"); see also MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57-58 (1999) (arguing that "judicial overhang" can distort legislative behavior); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 261 (2006) (offering a similar account that likens judicial review to an "insurance policy against erroneous legislative determinations," thus creating a moral hazard problem for legislative behavior). Still another analogy can be found in the concern that public regulators are systematically biased against the more tangible harms that flow from Type II errors (i.e., "false negatives" in the form of an erroneous conclusion that a dangerous product is safe) and in favor of less observable Type I errors (i.e., "false positives" in the form of an erroneous conclusion that a safe product is dangerous). For discussion, see MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* 359 (2009).

221. Engstrom, *supra* note 62, at 1705.

222. See CARPENTER, *supra* note 188, at 21-22 (noting the unique power "mezzo level" managers wield in bureaucratic environments).

223. Engstrom, *supra* note 62, at 1705; see also Lemos & Minzner, *supra* note 18 (manuscript at 25-31) (reviewing the extensive literature on the individual-level incentives of enforcement agency personnel); Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1115-16 (1995) (noting

gatekeeper decisions, and enforcement efforts more generally, to deviate from the social optimum.

The above collection of bureaucratic behavioral pathologies presents a formidable challenge to Section III.A's gatekeeper ideal. But to what extent do they find empirical support? As with capacity- and capture-based objections to agency gatekeeping, empirical evidence is scarce and inconclusive. Thus, securities scholars have long contended that the SEC tends to pursue relatively small cases in an effort to pad its success rate and win favor with political overseers rather than allocating scarce enforcement resources with an eye to optimizing deterrence and thus maximizing social welfare.²²⁴ Similarly, EEOC critics assert that civil rights prosecutors initiate small and politically inoffensive cases, leaving more ambitious enforcement efforts to private enforcers.²²⁵

By contrast, empirical analysis of an actual gatekeeper regime—once more drawn from DOJ oversight of *qui tam* litigation—finds mixed evidence in support of bureaucratic behavioral concerns. On the one hand, examination of more than twenty years' worth of DOJ intervention decisions yields little evidence that DOJ gatekeeper decisions are skewed toward either low-value (and perhaps more winnable) cases or larger, marquee cases.²²⁶ On the other hand, the evidence squarely establishes that DOJ rarely uses its termination authority to dismiss cases out from under private plaintiff-relators.²²⁷ This further fuels the notion that, while case termination is the most commonly articulated justification for vesting agencies with gatekeeper authority, it is also where agencies may be least reliable.

“government attorneys’ proclivity to . . . engage in career-building”); McAfee et al., *supra* note 18, at 1872 (“[S]ome government actors are likely to be partly motivated by factors other than efficiency, including career concerns . . .”).

224. See, e.g., Cox & Thomas, *supra* note 50, at 778 (arguing that the SEC may have “preferred weak opponents”); Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL’Y 639, 646 (2010) (“The focus is on the number of cases brought by the Division, and, to a lesser extent, on the size of the fines collected by the SEC. . . . In light of this metric of success, it is not surprising that the SEC focuses on low-hanging fruit.”); John C. Coffee, Jr., *Is the SEC’s Bark Worse than Its Bite?*, NAT’L L.J., July 9, 2012 (noting the tendency of the SEC to pursue many relatively small actions, rather than focusing on a few big ones, in order to avoid the embarrassment of having any defendants “escape scot-free”).

225. See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1444-45 (1998) (noting the tendency of civil rights prosecutors to bring relatively small and politically uncontroversial cases).

226. See Engstrom, *supra* note 62, at 1727.

227. *Id.* at 1717-18.

C. *Synthesis: Choosing Among Gatekeeper Designs and Tweaking Gatekeeper Performance*

Armed with the above insights, we can begin to draw some broad conclusions about when to vest agencies with gatekeeper powers at all and, assuming doing so is worth the candle, how to choose among available designs.

First and foremost, wholesale gatekeeper authority is plainly a less flexible regulatory instrument than retail gatekeeper authority. To be sure, agencies wielding wholesale gatekeeper powers can make technically sound broad-scale judgments about the optimal reach of private enforcement, and will likely outperform legislatures in doing so. And wholesale gatekeeper agencies can achieve other valuable ends as well, switching private enforcement on and off to carve out a division of labor between public and private enforcement and minimize the transitional costs that accrue while legal mandates are in flux. However, wholesale gatekeeper powers, like *ex ante* legislative efforts, are blunt regulatory mechanisms. Unlike agencies wielding retail gatekeeper powers, wholesale gatekeeper agencies cannot terminate socially costly or duplicative private litigation efforts on a case-by-case basis, block collusive settlements, or leverage the litigation efforts of overmatched or reluctant private enforcers.

Yet if retail gatekeeping is a more flexible regulatory instrument, it is also potentially far more problematic. As noted at turns above, agencies wielding retail gatekeeper powers are likely more susceptible to capture and bureaucratic behavioral tendencies that warp their decision-making. They may also enjoy little comparative advantage over courts in performing the basic retail gatekeeper task of culling undesirable cases. Taken together, these observations offer critical perspective on calls to vest agencies such as the SEC with retail gatekeeper powers. While many such calls cast merits-screening as the heart of the ideal agency gatekeeper role,²²⁸ theory and evidence suggest that agencies may be least able and willing to perform such a function.

Of course, this does not undermine all argument in favor of vesting agencies with retail gatekeeper powers. Retail gatekeeping may still add significant value where agencies have privileged access to merits-related information, as in the FCA context, or in especially complex regulatory areas, where returns to agency expertise are likely to be higher.²²⁹ It is also important

228. See, e.g., Rose, *supra* note 5, at 1306-07 (discussing case termination as the sole gatekeeper task).

229. See *supra* note 180 and accompanying text.

to note that case termination is not the only way retail gatekeeper agencies can rationalize litigation regimes. Indeed, certain retail gatekeeping tasks—such as leveraging overmatched private enforcers or using intervention or termination authority to steer the elaboration of legal mandates or counter the repeat-player advantages of regulated entities—may prove especially valuable early in the life of a litigation regime when plaintiff-side referral networks are immature and legal mandates are still being fleshed out via administrative and judicial interpretation.

Nor are regulatory designers without tools to mitigate agencies' worst bureaucratic tendencies by shaping agency incentives. For instance, regulatory designers concerned that a gatekeeper agency is under-utilizing its termination authority can subject the agency to liability for a prevailing defendant's fees and expenses in cases it does not join.²³⁰ And where an agency is pursuing larger-scale, marquee cases to the detriment of smaller-scale cases that might not otherwise attract sufficient private enforcement efforts, legislators could specify a minimum recovery and require that the agency pay the difference if a non-terminated, unintervened action recovers less.²³¹ Judicious use of such measures can tweak gatekeeper performance and bring it closer to Section III.A's gatekeeper ideal.²³²

However, other design mechanisms that regulatory architects might use to counter agency capture or lassitude spotlight the difficult tradeoffs that inhere in choices among gatekeeper designs. For instance, one could fortify the procedures that govern gatekeeper decisions by, say, requiring an agency that invokes its wholesale gatekeeper powers to follow the full notice-and-comment

230. See Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1275-76 (2008).

231. See David Kwok, *Coordinated Private and Public Enforcement of Law: Deterrence Under Qui Tam 17-18* (Feb. 18, 2010) (unpublished manuscript) (on file with author).

232. A possible objection to the use of budget-based penalties as a constraint on gatekeeper agency action is that legislative oversight committees tend to exercise near-plenary control over agency budget flows, thus muting the mechanistic workings of fee shifts of the sort envisioned above. As a concrete example, the incentive-shaping effect of fee shifts will be particularly weak where the resulting hits to the agency's budget divert it away from tasks elsewhere within its regulatory bailiwick, creating cross-pressures on other, separate regulatory programs favored by legislative overseers. In such an instance, we might expect that the legislative committee will merely gross up the agency's budget to offset the budgetary shortfall created by the fee shifts. As a result, a mechanistic fee shift may not, in the end, prove any different from the usual agency appropriations process except where the agency is self- (or independently) funded. For examples of independent agency funding, see Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 44 (2010).

procedures prescribed by the APA or provide a reasoned accounting of its retail-level decisions akin to what the APA requires in the formal adjudication context.²³³ Greater transparency, some have claimed, will increase the visibility of low-salience administrative decisions and render agency gatekeepers “more readily subject to monitoring and discipline.”²³⁴ But fuller ventilation of agency gatekeeper decisions can also render a gatekeeper agency more vulnerable to the predations of legislative committees, aggravating capture concerns.²³⁵ More importantly, transparency can exacerbate an agency’s pursuit of political rewards, making it more inclined to privilege observable bureaucratic outputs, such as win-loss ratios or recoveries in agency-joined cases, over more public-interested goals.²³⁶ In the end, fortified procedures designed to increase transparency may impair, rather than enhance, agency gatekeeper performance.

Other measures designed to combat agency capture or lethargy likewise risk distorting a gatekeeper agency’s decision-making. As noted previously, regulatory architects might enlist private enforcers to play an anti-capture or agency-forcing role by vesting the agency with “veto” rather than “license” gatekeeper authority and, in addition, by paying higher (“tiered”) bounties to private enforcers who persevere in cases that a captured or lackadaisical agency refuses to join.²³⁷ However, tiered bounties will also raise the opportunity

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233. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 541-44 (2003) (describing the APA’s notice-and-comment rulemaking procedures and their transparency benefits). The requirement that a gatekeeper agency provide a “reasoned accounting” of its decision would thus track the APA’s requirement that parties to a proceeding receive a reasonable opportunity to submit proposed findings of fact and conclusions of law as well as an on-the-record accounting of the agency’s ruling on each proposed finding or conclusion. See 5 U.S.C. § 557(c) (2012).
234. Rosenberg & Sullivan, *supra* note 6, at 166 (noting that procedural requirements can combat “self-serving” enforcement decisions and render the agency’s “prosecutorial choices . . . politically transparent and therefore more readily subject to monitoring and discipline”).
235. Cf. DeShazo & Freeman, *supra* note 189, at 1444 (noting possibility that legislative committee preferences concerning oversight of administrative agencies will not map onto those of the legislative majority).
236. See *supra* notes 185-186 and accompanying text (noting various “bureaucratic pathologies” that extend from political control of bureaucracy). For a recent and innovative argument that increased transparency may exacerbate agency vulnerability to so-called “accountability pathologies,” see Jacob E. Gersen & Matthew C. Stephenson, *Accountability Pathologies in Public Law: Diagnosis and Treatment* (Harvard Law Sch., Ctr. for Law, Econ. & Bus. Working Paper, 2013). For a more technical working out of similar ideas, see Justin Fox, *Government Transparency and Policymaking*, 131 PUB. CHOICE 23 (2007); and Andrea Prat, *The Wrong Kind of Transparency*, 95 AM. ECON. REV. 862 (2005).
237. As an example, the FCA provides that the private qui tam relator’s bounty percentage is lower where the DOJ intervenes in and takes over control of the case and higher where the

cost—i.e., the “price”—that a gatekeeper agency focused on maximizing returns to the federal fisc pays when it fully delegates enforcement authority to capable private enforcers. As a result, tiered bounties may tempt a good-faith but politically conscious agency to make overly aggressive use of its power to commandeer private actions, confounding sound management of available enforcement capacity and reducing private incentives to invest in such capacity in the first place.²³⁸

Finally, surveying the universe of possible gatekeeper structures alongside the problems that can afflict each suggests some designs to be avoided. Most notable in this regard is vesting agencies with non-binding (or, in Part II’s terms, “advisory”) retail gatekeeper authority. Indeed, available evidence on the performance of the medical malpractice screening panels, though subject to the usual concerns about generalizability, suggests that advisory gatekeeper authority, by offering a low-cost evaluation of case merit, incentivizes more and more time-consuming litigation while providing little benefit.²³⁹ Of course, one could always spin this outcome as promoting access to justice by rendering certain claims privately marketable that would not otherwise be brought. But medical malpractice screening panels were devised with the *opposite* aim. And, even if expanding access is a laudable goal, one wonders why regulatory architects could not achieve that same end by simply adjusting the payouts available to private enforcers as a way to draw additional claims into the system.

DOJ declines to become involved. 31 U.S.C. § 3730(d) (2006). For other examples of government control of bounties, see *supra* notes 107-109 and accompanying text.

238. See, e.g., Rose, *supra* note 5, at 1357 (noting that gatekeeper authority “might dissuade some private enforcers from participating in the system, thus reducing the amount of private resources available to supplement the [SEC’s] enforcement efforts”). Still another example of an anti-capture device that imposes clear tradeoffs in the gatekeeper context is delegating gatekeeper authority to multiple agencies simultaneously, thus preventing any single interest group from controlling bureaucratic action. See Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 214 (describing the use of “overlapping jurisdiction” among regulatory agencies as an anti-capture device); A.C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073, 1099-1101 (2005) (advocating the transfer of agency enforcement duties to the executive branch as an anticapture device). Applied to the gatekeeper context, one could parcel out gatekeeper powers to a second agency, such as the DOJ, with a wider portfolio of regulatory responsibilities. Yet it is not hard to see that doing so risks diluting the expertise advantage gatekeeper agencies enjoy, potentially exacerbating competence concerns and, at the extreme, creating a gatekeeper regime that is little different from leaving adjudication to generalist courts in the first place.

239. See *supra* notes 170-175 and accompanying text.

IV. AGENCY GATEKEEPING IN ACTION: REIMAGINING JOB DISCRIMINATION REGULATION

To this point, we have explored a large body of theory and evidence to identify and assess the problems that afflict use of private litigation as a regulatory tool, reviewed the possible merits and demerits of vesting agencies with gatekeeper powers as a way to ameliorate those problems, and considered some of the tradeoffs that arise in choosing among gatekeeper designs. This final Part rounds out the analysis with a closer case study of how agency gatekeeping might be usefully deployed in a single, discrete context: job discrimination regulation under Title VII of the Civil Rights Act of 1964 and cognate federal antidiscrimination statutes.²⁴⁰ Part of my aim is methodological: to model how policymakers might ask and answer questions about whether or how to choose gatekeeper structures in any given regulatory context. Yet my choice of job discrimination regulation is also substantively deliberate. As elaborated below, the Supreme Court's recent blockbuster decision in *Wal-Mart Stores v. Dukes*²⁴¹ was a watershed moment in the regime's history, capping a decades-long debate about how best to regulate job discrimination and rendering the regime uniquely ripe for revision. To that end, this Part asks how the above design principles and related insights regarding agency gatekeeping might be deployed in refashioning American job discrimination regulation.

A. *The Challenge of Job Discrimination Regulation After Wal-Mart Stores v. Dukes*

Few regulatory areas have generated more heated debate in recent decades than job discrimination. Part of the reason is the regime's sheer scale: as Figure 2 reflects, Title VII and related federal antidiscrimination statutes are the 800-pound gorilla of the American litigation state, currently generating nearly 100,000 formal "charges" filed with the EEOC each year, of which roughly 15,000 yield lawsuits in federal district court.²⁴² Part of it, too, is that the

240. For the main text of Title VII, see 42 U.S.C. §§ 2000e-1 to e-9 (2006). Cognate job discrimination laws include the Americans with Disabilities Act, *id.* §§ 12101-12213, the Pregnancy Discrimination Act, *id.* § 2000e(k), the Equal Pay Act, 29 U.S.C. § 206(d) (2006), and the Age Discrimination in Employment Act, *id.* §§ 621-634.

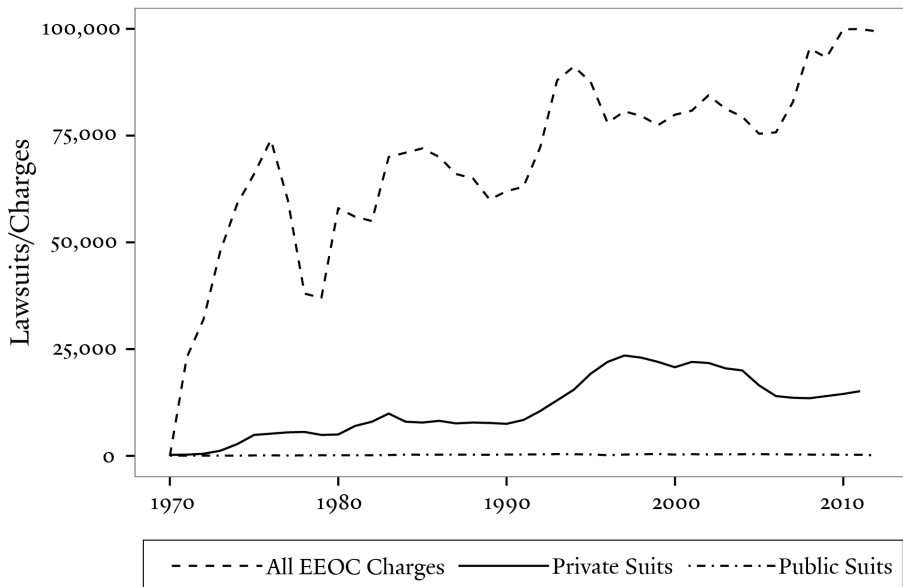
241. 131 S. Ct. 2541 (2011).

242. These charge and litigation numbers are drawn from Stephen B. Burbank et al., *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)* 60-72 (Univ. Pa. Law Sch. Pub. Law & Legal Theory Research Paper No. 11-08,

regime's sprawling and byzantine character—with its mix of public enforcement efforts by the EEOC and Attorney General, private lawsuits by claimants, and an EEOC administrative review process that private claimants must submit to before filing suit²⁴³—has provided endless fodder for argument about the nature of discrimination and how best to structure regulatory institutions to attack it.

Figure 2.

FEDERAL JOB DISCRIMINATION SUITS AND EEOC CHARGES, 1970-2012



2011), <http://ssrn.com/abstract=1781047>; Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts*, U.S. COURTS 129 tbl.C-2A (2012), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf> (“U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2007 Through 2011”); and *Charge Statistics, FY 1997 Through FY 2012*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>. Notice that the purely public enforcement side of the regime has generally been inconsequential relative to the private enforcement side, as the EEOC generally initiates (or intervenes in) lawsuits in no more than a few hundred cases per year. See *EEOC Litigation Statistics, FY 1997 through FY 2012*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

243. In the interest of space, I assume a working knowledge of the current regime. For a comprehensive overview, see Burbank et al., *supra* note 242.

That debate recently reached a fever pitch in response to the Supreme Court's 2011 decision in *Wal-Mart Stores v. Dukes*.²⁴⁴ In that case, the Court rejected a mammoth class action lawsuit brought on behalf of 1.6 million current and former Wal-Mart employees alleging that a corporate culture permitting bias against women, when combined with a managerial structure delegating substantial job-related decision-making authority to local store managers, constituted actionable discrimination under Title VII.²⁴⁵ Of course, the holding in the case—that a system of delegated decision-making that produces large statistical disparities in job outcomes cannot furnish the requisite commonality to support a class action under Rule 23—was technical and fact-intensive and has generated predictable debate about its applicability to future cases, whether in the job discrimination context or beyond.²⁴⁶ Still, and wholly apart from the decision's on-the-ground effect, *Wal-Mart* was plainly a watershed moment in the regime's history, generating a reckoning of sorts about where the job discrimination regime has been and where it is going. Indeed, out of the heated debate both before and after *Wal-Mart*, one can glimpse an emerging consensus about the challenges of regulating job discrimination in the twenty-first century, with important implications for thinking about how the regime might be refashioned going forward.

The centerpiece of this rough consensus is that the nature of discrimination and the organization of the American workplace have both undergone a fundamental shift in recent decades. The first part of this view, as usefully summarized by Samuel Bagenstos, is that “modern-day employment discrimination is characterized less by overt, intentional discrimination than by

244. 131 S. Ct. 2541.

245. *Id.* at 2542.

246. While most agree that the decision will plainly lead to fewer job discrimination class actions, the size of the effect is open to debate. Compare Gerald L. Maatman, Jr., *Annual Workplace Class Action Litigation Report*, SEYFARTH SHAW LLP 1-2 (2013), http://www.seyfarth.com/dir_docs/publications/CAR2013preview.pdf (noting the “wide-ranging impact” of *Wal-Mart*, as evidenced by, among other things, the lowest monetary total for the top ten largest employment discrimination class action settlements since 2006), with Elizabeth Tippet, *Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 473-75 (2012) (arguing that class actions challenging “subjective” employment decision-making à la *Wal-Mart* were, and will remain, rare). See generally Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace 1-2 & nn.3-4* (Aug. 13, 2013) (U. Mich. Pub. L. & Legal Theory Research Paper Series) (collecting scholarly commentary and recent case law relating to *Wal-Mart*'s effects on class certification proceedings in private job discrimination actions).

unconscious or subtle biases.”²⁴⁷ Second, and just as important, the American workplace has grown flatter and more collaborative, rendering job discrimination “less a problem of discrete, harmful management decisions and more a problem arising from workplace interactions among workers at all levels of an occupational hierarchy.”²⁴⁸ A prescription follows from this diagnosis: if job discrimination regulation is to achieve further substantial labor market gains for protected workers, it must adopt a “structural” approach to the problem that targets the systemic effects of the implicit biases and subtle stereotypes embedded in individual and collective judgment.²⁴⁹

This view of the changing nature of job discrimination carries three significant implications for thinking about the optimal structure of the regime going forward. First, individualized, tort-like lawsuits are unlikely to achieve substantial further improvements in labor market outcomes for protected workers. Importantly, this is *not* because damages suits cannot generate an organizational response: it is well established that Title VII lawsuits during the regime’s early life had both general and specific deterrence effects that helped move protected workers into employment ranks.²⁵⁰ Rather, the reason is more practical. The nature of discrimination in the present-day workplace is less

247. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 5 (2006). For two of the seminal contributions Bagenstos is summarizing, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); and Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

248. Bagenstos, *supra* note 247, at 5.

249. To be sure, not everyone agrees with every part of this view. A sizable body of academic opinion suggests that much of the difference in labor market outcomes across groups is attributable to variation in human capital or worker preferences rather than illegal discrimination, particularly in the gender context. See, e.g., James J. Heckman, *Detecting Discrimination*, 12 J. ECON. PERSP. 101, 107–11 (1998); Jacob Mincer & Haim Ofek, *Interrupted Work Careers: Depreciation and Restoration of Human Capital*, 17 J. HUM. RESOURCES 3 (1982). Moreover, even commentators who share a conviction about the structural diagnosis do not agree on what precise regulatory response is indicated, with some advocating a non-adversarial, non-litigative approach. See Sturm, *supra* note 247, at 527–30; see also Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* 1 (Lester M. Salamon ed., 2002) (arguing in favor of more flexible and decentralized “new governance” regulatory approaches as the optimal way to combat job discrimination).

250. See, e.g., Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 LAW & SOC. INQUIRY 855, 890 (2006); Sean Farhang, *Private Lawsuits, General Deterrence, and State Capacity: Evidence from Job Discrimination Litigation* (2012) (unpublished manuscript) (on file with author).

overt and explicit, and it provides ever fewer discrete decision-making nodes against which traditional legal-evidentiary tools can be directed. Indeed, as workplace hierarchies have flattened and overt, explicit forms of discrimination have receded, winning individualized job discrimination lawsuits has become increasingly difficult.²⁵¹

A second, and closely related, implication is that regulatory efforts that successfully implement the structural approach will tend to be large-scale and systemic in nature and will also rely upon aggregate forms of proof as a way to reveal discriminatory decision-making structures. The *Wal-Mart* case, of course, is the ultimate exemplar: the *Wal-Mart* plaintiffs adduced highly aggregated statistical evidence showing marked disparities between male and female Wal-Mart employees in pay and promotion and also substantial qualitative evidence of gender bias via several dozen affidavits, though they could not explicitly connect the two.²⁵²

A third and final implication is cautionary regarding the second. In the best of circumstances, regulatory efforts implementing a structural approach will be deeply contested and will raise difficult questions about where to locate the wrong of discrimination. For critics, the structural theory of liability that plaintiffs pursued in *Wal-Mart* is problematic because it holds private employers responsible for broader societal forces.²⁵³ Defenders, by contrast, take the view that private employers can and should be held liable for the costs associated with broader, unconscious discrimination where they “facilitate” the ground-level impact of such discrimination.²⁵⁴ Structural enforcement efforts

251. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 441 (2004) (noting the low and declining fortunes of job discrimination plaintiffs); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1584 (1989) (same).

252. Those disparities were substantial, with compensation paid to women totaling 5% to 15% less than compensation paid to similarly situated men. Similarly, while roughly 65% of Wal-Mart’s hourly employees during the class period were women, only 33% of management employees were women. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 146, 156 (N.D. Cal. 2004).

253. See, e.g., Bagenstos, *supra* note 247, at 40 (noting that “many of the problems that lead to workplace inequalities are problems of society-wide scope for which many legal actors will find it difficult to attribute blame to any particular employer,” and suggesting that “we may be asking antidiscrimination law to do too much of the work of responding to society’s inequalities”).

254. See, e.g., Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 851-54 (2007) (arguing that employers who “facilitate” discriminatory workplace decisionmaking, even if rooted in broader societal influences, should be subject to liability under antidiscrimination laws).

will thus require difficult and contentious line-drawings about the bounds of actionable discrimination.²⁵⁵

Yet in the current system, these lines are drawn not by politically accountable actors – and, indeed, not even as part of a merits determination by judges. Rather, they are drawn at the class certification stage using the clunky, facially procedural machinery of Rule 23. As many commentators have noted, when it comes to structural enforcement efforts, the procedural question – whether geographic dispersion or other differences across plaintiffs defeats certification under Rule 23’s strictures – almost entirely merges with the question of whether, to use *Wal-Mart* as an example, a common policy of unguided discretion can be conceptualized as actionable discrimination at all.²⁵⁶ As a result, structural enforcement efforts, while raising deep questions about the bounds of actionable discrimination, raise equally difficult questions about how – and, as elaborated below, where and by whom – adjudicatory decisions should be made.

255. See Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 157–58 (2009) (summarizing the debate about where to locate the wrong of discrimination and likening the core legal question raised to that of “enabling torts” in terms of how to adjudicate liability of a defendant accused of facilitating the wrongful injuring of the plaintiff by a third party).

256. See *id.* at 153 (noting that the debate over class certification in the job discrimination context “is, at bottom, a debate over an implicit reconceptualization of discrimination under Title VII”). The merger of procedure and substance in the job discrimination context has both a formal doctrinal and a practical basis. On the former, and as the *Wal-Mart* Court squarely held, a trial court must “probe behind the pleadings,” including the “factual and legal issues comprising the plaintiff’s cause of action,” and the resulting analysis will “entail some overlap with the merits of the plaintiff’s underlying claim.” 131 S. Ct. 2541, 2551–52 (2011) (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982)). As to the latter (practical) basis, it is well accepted that successful class certification, whether in the job discrimination context or elsewhere, often generates a rapid settlement because of the threat of substantial liability a defendant faces. Indeed, much of the amicus practice in *Wal-Mart* centered on the possibility of “blackmail settlements” either just before or after class certification. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (noting that certification creates “insurmountable pressure on defendants to settle”); Brief for the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner, *Wal-Mart*, 131 S. Ct. 2541 (No. 10–277), 2011 WL 2889000, at *21–22 (noting that class certification dramatically raises the stakes in litigation for defendants, often creating “intense pressure to settle” even weak claims in ways tantamount to “judicial blackmail” (quoting *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995))). But see Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1360 (2003) (identifying but dismissing this claim).

B. Proposal: Reforming the Regime by Remaking the EEOC's Gatekeeper Role

With a better sense of the challenges posed by job discrimination regulation and also Part III's insights regarding optimal gatekeeper design, we can begin to reimagine the regime. Two core revisions promise to better align the existing system with contemporary workplace realities while mitigating the system's more evident flaws.

1. Dismantling EEOC Charge Processing

First, the EEOC's administrative charge resolution process, which private claimants must submit to before filing suit, adds strikingly little gatekeeper value and should be dismantled. As reflected in Figure 3 (and as described in passing in Part II's overview of gatekeeper designs), that time-consuming and resource-intensive process begins with an initial "triage" characterization of case merit by EEOC staff in order to allocate the case to one of three bureaucratic pathways.²⁵⁷ The most meritorious tranche of cases (comprising roughly 15-20% of cases and receiving an internal "A" label) are investigated by the EEOC. When agency staff find the plaintiff's allegations supported by "reasonable cause," they attempt to "conciliate" the dispute by moving the parties to a voluntary resolution.²⁵⁸ Cases of middling merit (roughly 55-60% of cases, labeled "B" cases) are recommended for the EEOC's voluntary mediation program.²⁵⁹ For the remainder of the cases (roughly 20-30%, labeled "C" cases)—and also those "A" and "B" cases that have failed to resolve via conciliation and mediation efforts—the EEOC issues a "right to sue" letter

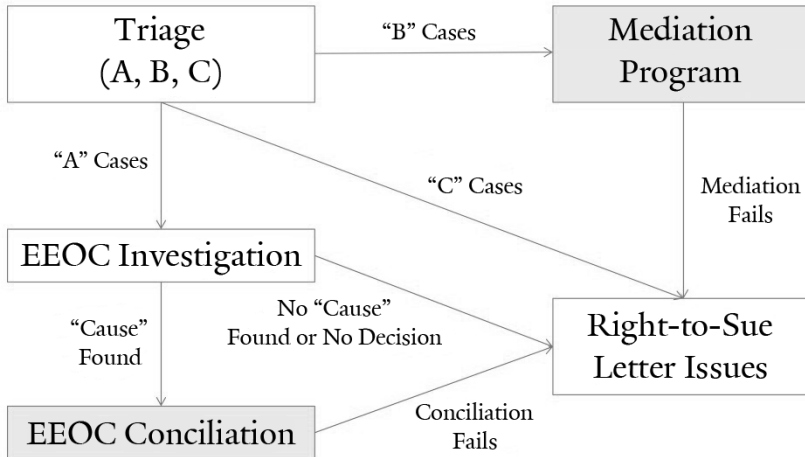
257. For a comprehensive overview of EEOC charge processing, see C. Elizabeth Hirsh, *Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes*, 42 LAW & SOC'Y REV. 239 (2008).

258. For statistics on how many cases receive the "A" label (and also "B" and "C" labels, as noted in the discussion that follows), see *id.* at 243; and Michael D. Ullman et al., *The EEOC Charge Priority Policy and Claimants with Psychiatric Disabilities*, 52 PSYCHIATRIC SERVS. 644, 647 tbl.2 (2001) (using data from 1995 to 1998). Importantly, both the mediation and conciliation processes are entirely voluntary in the sense that the EEOC cannot impose a binding settlement. See *supra* notes 105-106 and accompanying text.

259. See Robert E. Talbot, *A Practical Guide to Representing Parties in EEOC Mediations*, 37 U.S.F. L. REV. 627, 629 (2003) (describing the EEOC mediation program); Matthew A. Swendiman, Note, *The EEOC Mediation Program: Panacea or Panicked Reaction?*, 16 OHIO ST. J. ON DISP. RESOL. 391, 400-02 (2001) (same).

authorizing the claimant to file a lawsuit in court.²⁶⁰ Note that, because substantial EEOC investigation occurs only for cases falling into the most meritorious (“A”) case group, the EEOC’s issuance of right-to-sue letters is, in the vast majority of cases, a ministerial act that comes at the end of the statutory 180-day period with little or no agency engagement.²⁶¹

Figure 3.
EEOC CHARGE RESOLUTION PROCESS



260. By statute, after 180 days the complainant can request—and the EEOC must issue—a right-to-sue notice, cutting off continued mediation, investigation, or conciliation. 42 U.S.C. § 2000e-5(f)(1) (2006).

261. See LAURA BETH NIELSEN ET AL., AM. BAR FOUND., CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987-2003, at 14 (2008) (examining a large sample of job discrimination suits between 1987 and 2003 and finding that the EEOC fails to make any finding in 77% of cases); Hirsh, *supra* note 257, at 245 (noting that many EEOC investigative reports do little more than record the employer’s position on the claim); Nielsen et al., *supra* note 176, at 177 (noting a consensus among plaintiffs’ counsel that “most often the EEOC process results in considerable delay without producing meaningful investigation or conciliation”); Ullman et al., *supra* note 258, at 646 (finding that “only category A cases tend to receive a full investigation”).

Examining further details of the system reveals other problems, especially as to cases the EEOC initially determines to have the most merit. Past studies suggest that only five to ten percent of total charges, including those classed as “A” cases, receive a “reasonable cause” finding and proceed to conciliation at all, and less than one-third of those (roughly 3,000 cases) are successfully resolved—a vanishingly small proportion of total system throughput.²⁶² By comparison, roughly three-quarters of the 11,000 charges among the “B” cases that the parties are willing to mediate are successfully resolved.²⁶³ The EEOC, in other words, achieves poorer results in the cases in which it invests far more of its limited resources.²⁶⁴ And while it appears that successful conciliations typically generate larger recoveries than mediations—an average of \$45,000 as against \$17,000 in 2012²⁶⁵—this may in fact *strengthen* the case for abolishing the conciliation process entirely, for it suggests that some, possibly many, cases within the current pool of conciliated claims would be attractive to plaintiffs’ lawyers, paid via contingency fee, who would presumably take some of these cases even in the absence of EEOC assistance.²⁶⁶

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262. Hirsh, *supra* note 257, at 246; *see also* NIELSEN ET AL., *supra* note 261, at 14 figs.2.17, 2.18 (finding that the EEOC makes a formal cause determination in only twenty-three percent of cases and finds “cause” in just one in five of those); EEOC Enforcement & Litigation Statistics, All Statutes, FY 1997 - FY 2012 (2013), <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (reporting that roughly one-third of cases the agency found supported by “reasonable cause” produced “successful conciliations” over the 1997-2012 interval).
263. *See Fiscal Year 2012 Performance and Accountability Report*, U.S. EQUAL EMP. OPPORTUNITY COMM’N 26 (Nov. 15, 2012) [hereinafter EEOC 2012 PERFORMANCE], http://www.eeoc.gov/eeoc/plan/upload/2012par_1.pdf (noting a total of 8,714 successful mediations out of 11,380 attempted).
264. For instance, for FY 2012, the mediation program accounted for only \$25.9 million of the EEOC’s \$385.5 million total budget request, while administrative charge processing accounted for \$197.0 million. *See Fiscal Year 2012 Congressional Budget Justification*, U.S. EQUAL EMP. OPPORTUNITY COMM’N 10 (Feb. 2011), <http://www.eeoc.gov/eeoc/plan/upload/2012budget.pdf>; *see also* Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1249 (2010) (examining EEOC budget reports and concluding that the EEOC’s dollar-for-dollar return on its mediation program is much higher than the return on charge processing and litigation efforts).
265. These averages are calculated from the EEOC’s published performance statistics for 2012 by dividing the approximate total monetary benefits achieved in mediated resolutions (\$153.2 million) by the total number of such resolutions (8,714) and also the total monetary benefits achieved in conciliations (\$71 million) divided by the total number of such resolutions (1,591). *See* EEOC 2012 PERFORMANCE, *supra* note 263, at 26-27; EEOC, Monetary Benefits by Types of Resolutions FY 2009 Through FY 2013 (Nov. 19, 2013) (on file with author).
266. *See* William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.-Dec. 1995, at 40, 44 (reporting survey results finding that the plaintiffs’ employment bar will not generally accept cases

More broadly, the EEOC charge resolution process, as with the medical malpractice screening panels examined in Parts II and III, almost certainly incentivizes more, and more marginal, claims by offering a low-cost initial evaluation of case merit, particularly in jurisdictions where EEOC “cause” findings are admissible in litigation.²⁶⁷ And yet, the EEOC’s charge resolution process appears to provide precious little gatekeeper value. As Part III showed, the only rigorous empirical study of EEOC gatekeeper activities to date found that neither EEOC triage categorizations nor the agency’s “reasonable cause” determinations bore any statistically meaningful relationship to subsequent litigation outcomes among the subset of cases that emerged from the EEOC’s process and generated lawsuits.²⁶⁸ Thus, although the EEOC’s charge resolution process may provide at least some merits-signaling value to the parties—perhaps facilitating settlements among the “A” cases subject to actual investigation—that process does not appear to provide reliable merits signals to courts once full-scale litigation has begun. This raises doubts about the competence and capacity of the EEOC to engage in merits-screening, or do so more efficiently, relative to courts.

with less than \$60,000 in provable damages). Studies reporting win rates and damages awards in job discrimination suits that advanced to trial are consistent with this result. See GARY BLASI & JOSEPH W. DOHERTY, UCLA-RAND CTR. FOR L. & PUB. POL’Y, CALIFORNIA EMPLOYMENT DISCRIMINATION LAW AND ITS ENFORCEMENT: THE FAIR EMPLOYMENT AND HOUSING ACT AT 50, at 61 (2010) (examining job discrimination cases tried in California state court in 2007-2008 and reporting a roughly 50 percent plaintiff win rate and median plaintiff verdict of \$205,000); see also Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003-Jan. 2004, at 44, 48, 50 (reporting a 36.4% plaintiff win rate and a mean recovery of approximately \$336,000 in federal court job discrimination actions terminating in 1996). I further explore the role of the plaintiffs’ employment bar in the proposed restructuring of the EEOC below. See *infra* notes 300-301 and accompanying text.

267. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 44 (1996) (“[M]any attorneys prefer to routinely refer cases to the EEOC where the agency will conduct an investigation at the public’s expense.”); see also *supra* notes 173-174 and accompanying text (showing how gatekeeper mechanisms, especially non-binding ones, can operate to subsidize undesirable claims). One study goes further and argues that EEOC charge processing generates a type of adverse selection problem in which claimants with nonmeritorious claims are most likely to engage the EEOC process. Alberto Dávila & Alok K. Bohara, *Equal Employment Opportunity Across States: The EEOC 1979-1989*, 80 PUB. CHOICE 223 (1994). For debate over whether trial judges have discretion to exclude EEOC “cause” determinations from jury consideration, see Leslie Abbott, Comment, *Out of Balance: Excluding EEOC Determinations Under Federal Rule of Evidence 403*, 24 LOY. L.A. L. REV. 707 (1991).

268. See *supra* notes 176-177 and accompanying text.

The above facts make it easy to conclude, as others have, that the EEOC's charge processing system is not working.²⁶⁹ And, in some ways, this should not be surprising. After all, the inclusion of EEOC conciliation at the dawn of the regime arose out of the then-prevailing view that discrimination was simply the "fruit of ignorance" or purely irrational prejudice that demanded a regulatory response focused on education, not legal coercion.²⁷⁰ Put another way, conciliation was never intended to serve as a retail gatekeeper device within the conceptualization of Parts II and III.

The more difficult question is how to fix the regulatory scheme. One possibility is to abolish the investigation-conciliation process entirely, but to retain the EEOC triage process in order to route certain cases to an expanded or even mandatory mediation program.²⁷¹ Note, however, that the success of such a program would not be assured. As it currently operates, the mediation program may benefit from selection bias wherein the parties who are most likely to agree to it are also those most likely to reach a resolution. Furthermore, if, as may be the case, the triage process does not accurately sort cases by merit in the first place, it is dubious that the EEOC can efficiently channel worthy cases into the current mediation program, let alone an expanded version of it. This may counsel in favor of abolishing both conciliation *and* mediation—and thus putting the EEOC out of the business of processing individual disputes entirely.

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269. See, e.g., Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 275-79 (1995) (proposing that the EEOC abandon all efforts to resolve individual claims in favor of more systemic enforcement efforts); Selmi, *supra* note 267 (arguing that the agency should either be eliminated or reorganized to devote almost all of its resources to cases that are not lucrative enough for private attorneys). For rare arguments in support of EEOC charge processing, see Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 704 (2005) (arguing that EEOC charge processing still plays a "critical" role); and Joseph Prud'homme, *Federal Employment Law: Current Problems and a Call for Reform*, 1 J. RACE, GENDER & ETHNICITY 51 (2006) (arguing in favor of greater EEOC empowerment).
270. See Engstrom, *supra* note 25, at 1086 (quoting REPORT OF THE NEW YORK STATE TEMPORARY COMMISSION AGAINST DISCRIMINATION 48 (1945)) (tracing the origins of conciliation as a regulatory device at the state and federal levels); see also Selmi, *supra* note 267, at 2 (noting that "the purpose of resolving claims through conciliation has long since been lost").
271. For analyses supporting the EEOC's mediation program, see Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305 (2001); Talbot, *supra* note 259; and Swendiman, *supra* note 259.

2. A New “Systemic” Action and Robust EEOC Gatekeeping

The above analysis calls for fundamentally reshaping or even eliminating the EEOC’s current role in processing individual disputes, thus sharply contracting its gatekeeper role. A second vital revision to the current regime would do just the opposite, vesting the EEOC with sweeping gatekeeper powers over all class action and “systemic” job discrimination suits—with the latter term defined (paralleling the EEOC’s current definition)²⁷² as any case with twenty or more joined plaintiffs.²⁷³

Expanded EEOC gatekeeper power over class and systemic suits should have at least three critical components. First and foremost, the EEOC should be given (in Part II’s terminology) “license” gatekeeper powers over class and systemic cases, with the agency’s determination to allow a putative class action to proceed substituting for class certification under Rule 23.²⁷⁴ Second, the EEOC should be given full intervention authority (in Part II’s terms, displacement power with strong control rights) akin to what the DOJ wields in the FCA context.²⁷⁵ This intervention authority would allow the EEOC to take the helm in large-scale actions, whether from the outset or in cases it licensed initially but which have since moved in directions that ill serve the public interest. Finally, and to guard against the moral hazard problem of a risk-

272. See EEOC 2012 PERFORMANCE, *supra* note 263, at 27 (defining “multiple-victim suits” as suits “with fewer than 20 victims” and distinguishing them from “individual” and “systemic” suits).

273. It is not clear how many private actions would meet these criteria, as neither the EEOC nor the Administrative Office of the U.S. Courts regularly reports such data. However, a comprehensive study of job discrimination litigation over the period 1987-2003 using a random sample of nearly 2,000 suits from 6 different district courts found that class actions accounted for between 2% and 3% of the total (with only 1% ultimately winning certification). See NIELSEN ET AL., *supra* note 261, at 13; see also DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 53 (2000) (reporting roughly 150 reported judicial decisions in employment class actions during 1995-1996); Melissa M. Mulkey, *Class Dismissed: Defending and Preventing Employment Class Actions in Your Workplace*, HR ADVISOR: LEGAL & PRAC. GUIDANCE, July-Aug. 2006, at 1 (noting the filing of 222 federal employment-related class action suits in 2001, and 349 such suits in 2004). Extrapolating from the Nielsen sample to the current total case tally of roughly 15,000 federal job discrimination suits per year would imply roughly 300 to 450 putative employment class actions filed annually.

274. This would take large-scale employment discrimination actions outside Rule 23’s ambit entirely. Note that a passive “veto” approach would be less ideal here, despite its agency-forcing and anti-capture qualities. The principal advantage of the license approach is that it requires affirmative action by the agency, which is necessary if the agency’s decision to allow the case to go forward is to double as class certification.

275. See *supra* notes 107-110 and accompanying text.

averse EEOC that is too reticent to terminate cases – that is, an EEOC that too liberally licenses cases it reviews – the EEOC should be subjected to liability for a prevailing defendant’s fees and costs in licensed, but unintervened, cases. As noted previously, such a fix can mute the “bailout effect” by countering the bureaucratic incentive to over-license private actions because of the agency’s ability to shift termination costs, both actual and reputational, to the courts.²⁷⁶

This new suite of EEOC gatekeeper powers over larger-scale job discrimination suits would serve several salutary purposes. First, a strong EEOC gatekeeper role would inject a degree of public accountability into the normatively contestable question of which subjective employment practices constitute actionable discrimination. It would do so by transferring principal authority for determining the conceptual bounds of actionable discrimination from decentralized trial court judges deploying the spare procedural dictates of Rule 23 to a single, expert, and politically accountable agency. When combined with the curtailment of the EEOC’s gatekeeper authority over small-scale actions, a more expansive EEOC gatekeeper role with respect to larger-scale actions would also effect a critical shift in emphasis within the regime by moving the focus of EEOC enforcement efforts away from individualized actions and toward more systemic ones, thus better aligning the system with a more structural approach.²⁷⁷

In addition to effecting a basic shift in emphasis, granting the EEOC expansive authority to intervene in and take control of large-scale job discrimination actions would allow the agency to play several of the more micro-level, litigation-rationalizing roles detailed in Part III. In particular, an EEOC armed with robust gatekeeper powers over class and systemic suits could settle, terminate, or steer cases in order to (i) prevent duplicative, piggyback litigation efforts;²⁷⁸ (ii) counteract the repeat-player advantage that

276. See *supra* note 220 and accompanying text.

277. Scholars have frequently called for a similar shift in emphasis within the regime but have not generally paired those calls with proposals that alter bureaucratic incentives in ways designed to achieve the shift. See, e.g., Modesitt, *supra* note 264, at 1263, 1270-74 (advocating that the EEOC shift toward “investigating and litigating significant claims” and proposing that the EEOC recover fees and fines, but failing to explain how this will move the agency toward more systemic cases); Munroe, *supra* note 269, at 275-79 (proposing the dismantlement of the EEOC charge processing system and a re-allocation of EEOC resources toward litigating larger claims without specifying why a newly unburdened EEOC would do so). Of the roughly three hundred cases on the EEOC’s docket at the end of FY 2012, fewer than half involved multiple aggrieved parties, and still fewer – twenty percent – were “systemic” lawsuits involving twenty or more aggrieved parties. See EEOC 2012 PERFORMANCE, *supra* note 263, at 27.

278. See *supra* notes 54-63 and accompanying text.

defendants might otherwise enjoy;²⁷⁹ (iii) police cheap or collusive settlements by private class counsel;²⁸⁰ and (iv) shield employers from transitional costs where plaintiffs advance a new theory of liability that may only belatedly be subject to legislative or appellate override.²⁸¹

Perhaps most important of all, remaking the regime around an EEOC gatekeeper role that is both less and more expansive than at present may be a politically saleable compromise. Champions of the regime who favor a more structural approach to regulating job discrimination will surely applaud the effort to partially override the Court's decision in *Wal-Mart* and restore the vitality of larger-scale class actions. At the same time, some critics of the current regime will take succor from the outright abolition of the administrative charge resolution process and the likely decline in overall case filings that will result.²⁸² More importantly, some employers will applaud the EEOC's termination (via nonlicensing) of meritless large-scale actions that might otherwise proceed to costly and protracted class certification proceedings. They may derive comfort from what amounts to a reverse fee-shift via the EEOC's exposure to liability for a prevailing defendant's fees in licensed but unintervened cases. And they may well prefer a more expansive EEOC gatekeeper role because of its greater predictability relative to a system in which certification decisions depend, at least in part, on which district judge hears the case based on a spin of the wheel in the court clerk's office.²⁸³

279. See *supra* notes 64-66 and accompanying text.

280. See *supra* notes 67-69 and accompanying text.

281. See *supra* notes 75-79 and accompanying text.

282. For further explanation of why this will be the case, see *infra* notes 295-299 and accompanying text.

283. Whatever the political saleability of my proposal, it is plainly no less saleable than competing proposals. For instance, the sole congressional proposal that has arisen post-*Wal-Mart* would allow plaintiffs to maintain a "group action" under federal job discrimination laws subject to what appear to be softened versions of Rule 23's usual numerosity, commonality, typicality, and adequacy requirements, thus reversing *Wal-Mart* at least in part, but would not alter any other aspect of the regime, thus offering no concession to employers. See Equal Employment Opportunity Restoration Act, H.R. 5978, 112th Cong. § 3 (2012); S. 3317, 112th Cong. § 3 (2012). Another standard proposal advanced in *Wal-Mart*'s wake is for the EEOC to take on a more active enforcement role by initiating and prosecuting more "pattern or practice" lawsuits under its current statutory authority. See, e.g., Joseph A. Seiner, *Weathering Wal-Mart*, 89 NOTRE DAME L. REV. (forthcoming 2014). As noted previously, however, such proposals are unlikely to succeed without altering the current agency's incentives. See *supra* note 276 and accompanying text. Note two further problems with such proposals. One is that the EEOC is acutely resource-constrained, and so it seems unlikely that even a Congress that is sympathetic to a more robust EEOC enforcement role will fund a significant expansion of the EEOC's litigation capacity in the

3. *Countering Likely Objections*

The above overhaul of job discrimination regulation will surely draw objections, many of them derived from the core concerns with gatekeeper designs—competence, capture, and bureaucratic behavior—spotlighted in Part III. Some of these objections have already been anticipated and addressed, such as subjecting the EEOC to a reverse fee shift in order to guard against the bailout effect and overly liberal licensing of class and systemic suits by a risk-averse agency.²⁸⁴ Other possible objections arising out of Part III’s analysis, however, have not.

The first likely objection arising from Part III’s catalog of concerns questions the EEOC’s competence and capacity to exercise gatekeeper authority over class actions compared to courts adjudicating class certification motions. One version of the concern would ask why the EEOC should be granted substantial gatekeeper powers that depend, at least in part, on its capacity to engage in case-by-case merits-screening given evidence suggesting the agency possesses uncertain merits-screening prowess within the current charge-processing regime.²⁸⁵ However, we should be wary of inferring anything about EEOC’s ability to oversee class and systemic suits from its recent record of charge processing decisions. The many thousands of decisions the agency currently makes each year are distributed among hundreds of line-level staff in

current era of fiscal austerity. This, incidentally, would also seem to rule out a number of pre-*Wal-Mart* proposals for an enhanced EEOC enforcement role in non-systemic cases as well. Particularly unrealistic in the current fiscal climate is a proposal to vest the EEOC with cease-and-desist powers along the lines of those held by the Federal Trade Commission or National Labor Relations Board—an administrative approach to job discrimination regulation that the early civil rights movement favored until the late 1960s. See Julie Chi-Hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 472-73 (advancing such a proposal as a way to remake the present-day regime); see also Engstrom, *supra* note 25, at 1081 (recounting the early civil rights movement’s advocacy of a similar agency-centered approach to regulating job discrimination); *supra* note 268 (collecting other, pre-*Wal-Mart* proposals to expand the EEOC enforcement role by expanding or intensifying the individual charge processing portion of the regime). A second concern is the competency of the EEOC to take on an expanded litigation role in systemic actions. These concerns—resource constraints, competence, and capacity—suggest that a more promising approach is a hybrid public-private approach of the sort advanced herein, which would allow the EEOC to leverage private resources and legal talent in the prosecution of systemic actions. For more discussion of the advantages of a hybrid approach—including an analogy to the FCA’s *qui tam* regime—see *infra* notes 287-289 and accompanying text.

284. See *supra* note 276 and accompanying text.

285. See *supra* notes 179-180 and accompanying text.

multiple district, field, and local offices.²⁸⁶ By contrast, one would expect that EEOC gatekeeper decisions regarding the far more tractable number of class and systemic suits would be made far higher up in the agency's managerial hierarchy and only after thorough investigation and assessment by legal and non-legal staff. To that extent, the EEOC's exercise of gatekeeper powers over only class and systemic cases would almost certainly make better and more focused use of resident agency expertise.

A further version of the competence and capacity objection might note that the EEOC has in recent years sought to move toward heavier involvement in more systemic enforcement efforts,²⁸⁷ and the results have not been pretty: several judges entered significant sanctions against the EEOC in 2012, and the agency suffered substantial defeats in a number of other cases that drew judicial comment about the agency's subpar case preparation and litigation capacity.²⁸⁸ Yet even here, an expanded *gatekeeper* role should not be cause for substantial concern. This is because an ideal EEOC will maximally rely on well resourced and well incentivized private enforcers, stepping in only to terminate or take over enforcement efforts that have deviated from public purposes or to leverage under-resourced or overmatched enforcement efforts.²⁸⁹ To that extent, the above proposal envisions a fully "hybrid" public-private enforcement model along the lines of the current *qui tam* regime under the FCA, making the EEOC's capacity to conduct full-scale systemic litigation on its own less relevant.

286. See *The Commission*, EEOC, <http://www.eeoc.gov/eeoc/legislative/commission.cfm> (last visited Sept. 1, 2013).

287. The EEOC announced in April 2006 that it would pursue more systemic discrimination cases affecting large number of workers, and it has recently reiterated its focus in that regard. See, e.g., Press Release, EEOC, EEOC Makes Fight Against Systemic Discrimination a Top Priority (Apr. 4, 2006), <http://www.eeoc.gov/eeoc/newsroom/release/4-4-06.cfm> (announcing intent to strengthen approaches to investigating and litigating systemic cases); EQUAL OPPORTUNITY EMP'T COMM'N, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013-2016 (Dec. 17, 2012), <http://www.eeoc.gov/eeoc/plan/sep.cfm> (announcing an agency-wide shift away from small individual lawsuits toward larger-scale pattern or practice lawsuits).

288. See Maatman, *supra* note 246, at 5 (noting several cases in which district court judges leveled sanctions against the EEOC in pattern and practice cases deemed to lack merit); see also EEOC v. CRST Van Expedited, Inc., No. 07-CV-95-LRR, 2010 WL 520564 (N.D. Iowa Feb. 9, 2010) (ordering EEOC to pay \$4.46 million in fees and costs for performing an inadequate pre-filing inquiry); Jenna Greene, *Trucker Case Crashes for EEOC*, NAT'L L.J., May 11, 2012 (recounting the same sexual harassment case and quoting the judge as saying she had "never had a case brought by a government agency that was such a mess").

289. See *supra* notes 141-144 and accompanying text.

A second broad objection grounded in Part III's rendition of core concerns is that the above proposal, by injecting a degree of political accountability into the class certification question, might also permit employers with political clout to duck enforcement efforts via capture-like channels of influence. Political capture of the EEOC's gatekeeper apparatus, the argument goes, would erode deterrence and deprive some plaintiffs of recourse for no reason beyond their having sought employment at a politically influential company. But this, too, seems to be less of a concern. As noted previously, a gatekeeper agency's vulnerability to capture dynamics will likely turn on the scope, and thus the political salience, of the particular gatekeeper decisions it makes.²⁹⁰ And in salience terms, we might think of EEOC gatekeeper decisions on large-scale class actions and systemic suits as occupying a middle ground between the numerous retail-level gatekeeper decisions the DOJ makes in the FCA context regarding individual and often small-scale *qui tam* suits and the wholesale gatekeeper decisions federal agencies make in the regulatory preemption context in deciding whether private rights of action should lie at all. The high salience of EEOC decisions as to the few hundred class and systemic actions filed annually may make dispensing regulatory favors without detection difficult, thus allaying capture concerns.

The remaining objections extend beyond the core concerns highlighted in Part III but nonetheless help bring into relief some of the tradeoffs inherent in the agency gatekeeper approach. One is that the abolition of EEOC charge processing will leave claimants with legitimate but smaller-scale grievances without legal recourse because of their inability to obtain counsel.²⁹¹ But this should be less concerning given the realities of the current regime. As noted previously, even cases that receive the EEOC's "A" triage label are unlikely to receive a "cause" determination after the agency's investigation,²⁹² raising questions about the overall merit of the vast majority of charges in the pool. The brutal reality is that the social cost of processing and adjudicating the tens

290. See *supra* notes 205-208 and accompanying text.

291. See Selmi, *supra* note 267, at 33-34 (noting that the current charge processing system serves as a forum for low-value claims, especially those asserting discrimination on the basis of race, gender, or national origin). Empirical support for this concern comes from the claim, noted previously, that plaintiff-side employment lawyers will typically not accept cases with provable damages below roughly \$60,000. See *supra* note 266. Still more evidence comes from the previously noted RAND study of California job discrimination claims, which found that smaller claims and claims brought by particular claimant types (laborers, racial minorities) are relegated to the administrative adjudication side of the state-level regime while larger claims and claims brought by other claimant types (professionals, men) attract counsel and flow into the state court system. BLASI & DOHERTY, *supra* note 266, at 40, 53-54.

292. See *supra* notes 262-264 and accompanying text.

of thousands of small-scale, individual disputes that currently dominate the system may exceed their social benefit.

More importantly, the above proposal should lead to an uptick in “structural” enforcement efforts (at least compared to the current post-*Wal-Mart* status quo) and these actions will, whether through specific or general deterrence channels, also benefit workers who might have otherwise filed smaller-scale, individual claims.²⁹³ Here again, this is not to deny that the proposal, by shifting enforcement emphasis within the regime from individual to class and systemic suits, will have distributive consequences in terms of who benefits and who does not. As just noted, the current charge processing system plainly serves as a forum for low-value claims, and these claims are also systematically more likely to involve lower-income, minority, and female claimants.²⁹⁴ Rather, the point is that those consequences need not be zero-sum as between particular plaintiff or claim types. In the end, many plaintiffs, including some who can only pursue individual actions in the current, post-*Wal-Mart* state of the world, may do *better* under the above-proposed resuscitation of class and systemic actions than they do now.

A second concern is that the abolition of charge processing will strain already-crowded district court dockets if cases that currently resolve via conciliation and mediation (or otherwise reach settlement during EEOC processing efforts) were to flow directly into federal courts.²⁹⁵ Yet as noted previously, the total number of successful conciliations and mediations is small—ten percent of total charges²⁹⁶—and it is a plausible assumption that many of these cases would be amicably resolved prior to litigation even without EEOC involvement.²⁹⁷ Moreover, it was just noted that, much like medical

293. See Farhang, *supra* note 250, at 5 (explicating the concepts of general and specific deterrence in the job discrimination context (citing Albert Reiss, *Selecting Strategies of Social Control of Organizational Life*, in ENFORCING REGULATION 23 (Keith Hawkins & John M. Thomas eds., 1984))).

294. See *supra* note 291.

295. Note that this is a concern from a systemic efficiency standpoint, but it is likewise concerning if we think that rising filings may generate a “backlash” among district judges. See Lemos, *supra* note 64, at 817; see also Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 931 n.15 (2006) (collecting federal judges’ complaints about employment discrimination cases burdening their dockets).

296. See EEOC 2012 PERFORMANCE, *supra* note 263, at 25–27 (noting that roughly 10,000 of the nearly 100,000 charges filed with the EEOC annually are successfully conciliated or mediated).

297. See Selmi, *supra* note 267, at 3 (noting that some cases would be “settled favorably for the plaintiffs” without litigation even in the absence of agency involvement). A puzzle here is why EEOC charge processing and conciliation facilitates settlement at all given that the

malpractice screening panels, EEOC charge processing likely acts as a claimant-subsidizing magnet, drawing some claims into the system that might not surface otherwise, some of which then go on to yield lawsuits.²⁹⁸ As a result, the abolition of EEOC charge resolution will place at least some downward, and possibly offsetting, pressure on district court filings.²⁹⁹ As a final note here, it bears emphasis that abolishing EEOC charge processing does not scrub the system of all merits-based gatekeeping. Rather, it shifts that responsibility to the plaintiffs' employment bar. At the dawn of the Title VII regime, this was unthinkable, as the number of plaintiff-side employment lawyers (or other lawyers, especially African-Americans with links to civil rights groups, able and willing to serve in that role) was quite limited, particularly in the South.³⁰⁰ But

EEOC lacks a credible threat of joining or independently pursuing more than a trivial number of enforcement actions.

298. See *supra* notes 173-174, 268-269 and accompanying text.

299. See Selmi, *supra* note 267, at 53 (noting that not all charges filed in the current regime "would be transformed into lawsuits" upon the abolition of EEOC charge processing).

300. A precise accounting of the state of the black and plaintiff-side employment bar at the time of Title VII's enactment is hard to come by. But the immaturity of the plaintiffs' employment bar seems certain given the prevalence of at-will employment in American law at the time and the fact that those states that enacted state-level fair employment laws between 1945 and 1964 mostly created administrative regimes to enforce them, thus offering only limited litigation opportunities around which entrepreneurial plaintiffs' counsel could gather. See Elletta Sangrey Callahan, *The Public Policy Exception to the Employment at Will Rule Comes of Age: A Proposed Framework for Analysis*, 29 AM. BUS. L.J. 481, 483-84 (1991) (noting the prevalence of the strict at-will doctrine in most states until the 1970s or 1980s); Engstrom, *supra* note 25, at 1081-82 (noting the administrative enforcement approach of most state fair-employment laws passed in the pre-Title-VII period). One can also infer a lack of private counsel willing to bring suits at the dawn of Title VII implementation—whether among black lawyers or the plaintiffs' bar—from the fact that much of the first wave of Title VII suits came from civil rights groups, particularly the NAACP (whether its national office or local branches) or its legal arm, the Legal Defense Fund. See JACK GREENBERG, *CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT* 443-62 (2004) (offering a detailed overview of early Title VII implementation and the centrality of the LDF in bringing it); see also JUDITH STEIN, *RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM* 169-77 (1998) (describing the centrality of the NAACP and LDF in wide-scale litigation efforts against the steel industry in the late 1960s and early 1970s). To be sure, this state of affairs would quickly change. By 1966, the leadership of the Associated Trial Lawyers of America had recognized that civil rights suits could provide large paydays and was urging the organization's members to bring at least one civil rights suit. See Engstrom, *supra* note 25, at 1143. And the period following Title VII's passage saw steady growth in case filings, from fewer than 350 in 1970 to some 9,000 by 1983, suggesting the rapid expansion among the ranks of private lawyers willing to bring such claims. See PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* 83, 88 (2008); John J. Donohue & Peter Siegelman, *The Changing Nature of Employment*

today, the plaintiffs' employment bar is well-capitalized financially and intellectually, and already serves a critical case-screening function separate from EEOC charge processing.³⁰¹

Discrimination Litigation, 43 STAN. L. REV. 983, 985-86 (1991). But taken together, the above evidence makes it safe to conclude that the private plaintiff-side employment bar was, at the time of Title VII's enactment, at best embryonic.

301. To be sure, some commentators have suggested that Title VII implementation has been hampered by the lack of a well-developed plaintiffs' employment bar. See, e.g., Stephen C. Yeazell, Brown, *the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1991-99 (2004) (suggesting, though without accompanying empirical support, that federal law "has not yet produced a robust plaintiffs' bar in employment discrimination"). And that bar may have suffered something of a contraction in the 1980s as a result of narrowing judicial interpretations of Title VII's attorney's fees provision in particular, leading some commentators to declare it an "endangered species." Ray Terry, *Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearian Tragedy*, 5 LAB. L. 63, 63 (1989); see also FARHANG, *supra* note 1, at 191-92, 191 n.115 (noting repeatedly articulated concerns during congressional debate over the Civil Rights Act of 1991 regarding the "dearth of competent counsel willing to represent victims of discrimination despite many meritorious suits" and the need to shore up the "civil rights market" in order to facilitate litigation of meritorious claims) (quoting S. REP. NO. 315, at 33 (1989)). However, the best evidence suggests that the present-day plaintiffs' employment bar is sufficiently robust to play a substantial screening role. In particular, it is clear that the Civil Rights Act of 1991, by making available limited punitive damages and jury trials, generated a surge of Title VII enforcement activity and concomitant growth of the plaintiffs' employment bar. See Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 200 (2007) (noting the general view that the Civil Rights Act of 1991 made Title VII claims "far more attractive to the plaintiffs' bar"); see also Sturm, *supra* note 247, at 551 n.342 (citing a sitting EEOC commissioner for the proposition that the 1991 Civil Rights Act, by providing for punitive damages and jury trials, fueled "the creation of a plaintiffs' employment bar"); Sean Farhang & Douglas Spencer, *Economic Incentives for Attorney Representation in Civil Rights Litigation 16-17 & 47 fig.1* (2012) (unpublished manuscript), <http://ssrn.com/abstract=1882245> (finding an increase in plaintiffs able to secure representation following the Civil Rights Act of 1991). Today, the National Employment Lawyers Association, the principal plaintiff-side employment lawyer organization, boasts more than 3,000 members. See *Membership: About NELA*, NAT'L EMP'T LAWYERS ASS'N, <http://www.nela.org/NELA/index.cfm?event=showPage&pg=about> (last visited Sept. 1, 2013). It is likewise clear that lawyers play a substantial case-screening role within the current system. See BLASI & DOHERTY, *supra* note 266, at 50 (examining patterns in the characteristics of the job discrimination claims brought in California state court by plaintiffs represented by counsel and claims brought by unrepresented plaintiffs that remain in the state's administrative enforcement regime and finding that the former tend to be higher-value and more likely to win); Dunlop Commission on the Future of Worker-Management Relations: Statement on Alternative Dispute Resolution Before the Department of Labor (Apr. 6, 1994) (testimony of Paul Tobias, head of the National Employment Lawyers Association) (stating that plaintiff-side employment lawyers turn down 95 percent of cases that come to them); see also Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 143 (2009) (analyzing job discrimination litigation outcomes and concluding that "[i]t is

Third, critics of the above proposal may object not to the capture risk that comes with the EEOC's greater political accountability relative to courts, but rather to the politicization of job discrimination regulation itself. One version of this critique takes a functionalist form. Thus, one might worry that vesting the EEOC with expansive gatekeeper powers will cause enforcement levels to lurch from one extreme to another in tandem with changeovers in partisan political control, thus defeating private enforcement's salutary role, according to its champions, as a stable, "failsafe" mode of enforcement.³⁰² This, the argument would go, should be of particular concern because the above proposal, by effectively transferring the class certification determination to the EEOC, vests the agency with something akin to soft rulemaking authority in defining which employer practices constitute actionable discrimination. A further version of the politicization critique sweeps far more broadly and objects to the above proposal's prioritization of a politics-based model of administration over a rights-based model of litigation, either because civil rights is somehow different from other regulatory areas³⁰³ or because the permissible degree of political control over private litigation is (or should be) shaped by due process or other constitutional values.³⁰⁴

Neither concern, however, makes much headway. To begin, while it is clear that vesting the EEOC with gatekeeper authority over class and systemic suits

unlikely that employment attorneys fail to substantially screen their cases on the merits"). On the financial and intellectual capitalization of the broader plaintiffs' bar over the post-war period, see Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 216 (2001).

302. See Coffee, *supra* note 35, at 227 (advancing the "failsafe" argument); Stephenson, *supra* note 72, at 1038 (noting that the delegation of enforcement and adjudicatory authority to agencies is likely to produce greater temporal instability than delegation to courts); see also Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (explaining how a moderate amount of "bureaucratic insulation creates . . . inertia" that is preferred by the majority of voters).
303. A version of the civil rights exceptionalist view is implicit in the argument that antidiscrimination rights should not be subject to any cost-based defense. See, e.g., Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 320 (1987) (rejecting any cost-based defense, even in disparate impact cases, in favor of an uncircumscribed antidiscrimination right). But see Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 834 (2001) (critiquing this view); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857-58 (1999) (critiquing a similar tendency to identify "pure" constitutional values apart from the remedial apparatus that imports cost balancing and gives them real-world effect).
304. This choice between a politics-based model of administration and a rights-based model of litigation inheres in much public law scholarship but is rarely addressed head-on. For a recent analysis that views *parens patriae* actions by state attorneys general through a due process lens, see Lemos, *Aggregate Litigation*, *supra* note 17, at 532-35.

will inject a partisan political cast into job discrimination regulation,³⁰⁵ it is less clear why political variability in job discrimination regulation should not be seen as a welcome improvement over the current state of affairs. As noted previously, frontier regulatory questions about which subjective employment practices constitute actionable job discrimination are deeply normatively contested.³⁰⁶ Given this, it is not obvious why regulation of such practices should be more politically insulated than, say, occupational safety, environmental protection, or—perhaps most analogous of all—labor policy, where regulatory stringency clearly, if not entirely uncontroversially, varies across patterns of party control.³⁰⁷ In any event, those who hold a civil rights exceptionalist view or otherwise believe that, unlike other regulatory areas, job discrimination regulation should not vary with patterns of political control can take comfort in the fact that the above proposal will leave adjudication of *individual* claims, as against class and systemic claims, fully in judicial hands, without even EEOC charge processing to interfere with a claimant's day in court.

Further, and though a full rejoinder to the constitutional version of the politicization critique is beyond the scope of this Article, a preliminary analysis suggests that the Constitution presents no barriers to vesting agencies with gatekeeper powers of the sort proposed here. So long as Congress characterizes—or, in the case of already-existing statutes, *recharacterizes*—the underlying right as contingent on agency action, vesting an agency with

305. Past empirical studies of the effect of party control on EEOC outputs leave little doubt on this score. See, e.g., B. Dan Wood, *Does Politics Make a Difference at the EEOC?*, 34 AM. J. POL. SCI. 503 (1990) (documenting significant effects of the party holding the presidency on the percentage of charges resolved and the number of settlements reached by the EEOC).

306. See *supra* notes 247–249 and accompanying text.

307. See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2015 (2009) (“[The NLRB] has oscillated between extremes with every change of controlling political party”); Moe, *supra* note 192, at 1108 (finding that a statistically significant amount of the variance in decisions of the National Labor Relations Board over time can be explained by political conditions); cf. Edelman, *supra* note 82 (surveying the sociology literature on the organizational response to civil rights laws). Similarly, an EEOC that falls into deregulatory partisan hands will degrade enforcement vigor even after the agency returns to pro-regulatory partisan hands by reducing the overall investment the plaintiffs’ employment bar makes in regime-specific enforcement capacity, including litigation expertise and an infrastructure for identifying and retaining clients. See Engstrom, *supra* note 46, at 1252. Either dynamic will narrow regulatory variation across partisan changeovers, thereby attenuating the degree of political accountability that is achieved.

gatekeeper powers does not appear to run afoul of the Due Process Clause, Article III, or the Seventh Amendment.³⁰⁸

CONCLUSION

This Article has sought to open up new ways of seeing the role of administration in the modern American regulatory state by mapping a range of ways policymakers can vest agencies with litigation “gatekeeper” powers over private lawsuits in order to rationalize and optimize litigation regimes. The principal goal has been to provide a common nomenclature and a generalized set of evaluative tools that are as applicable to environmental protection and civil rights as they are to antitrust and securities. The analysis has also sought to bring agency gatekeeping more squarely onto the menu of available “litigation reforms” and show that gatekeeping may prove a more promising

308. To begin, an agency’s exercise of wholesale gatekeeper powers will not trigger due process concerns at all. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). The same result obtains in the retail gatekeeper context, so long as Congress structures the right to be enforced so as to avoid constitutional problems. More concretely, while a cause of action can be a protectable property interest sufficient to trigger due process, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), the Court’s other due process jurisprudence leaves ample room for Congress to insulate an agency’s exercise of retail gatekeeper authority from constitutional attack by defining (or re-defining, in the case of already-existing regimes) the right to be enforced to make clear that a private right of action terminates upon agency takeover of the litigation, *see Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); *Bd. of Regents v. Roth*, 408 U.S. 564, 576-78 (1972). Indeed, Congress’s use of such an approach in the ADEA context, as noted previously, passed muster in the only case to hear a due process challenge to an agency’s exercise of gatekeeper powers over statutory causes of action. *See EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1506-07 (9th Cir. 1990); *see also supra* note 122 and accompanying text (reproducing ADEA provisions regarding EEOC gatekeeper powers). Congress can similarly (re-)structure the right to be enforced to avoid Article III’s prohibition on vesting an agency with judicial powers. (Note that Article III concerns are only implicated where a gatekeeper agency *terminates* a private enforcement action, since a gatekeeper agency’s *takeover* of a private enforcement action will still result in adjudication before an Article III court.) In particular, where Congress makes clear that a would-be plaintiff’s right of action is contingent upon an agency’s discretionary preemption or termination, then an agency’s exercise of its gatekeeper authority is unlikely to be viewed as an improper transfer of the “essential attributes of judicial power” or an adjudication of a “private” right under the Court’s public/private rights rubric. *See Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848-50 (1986); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68-69 (1982). Finally, the Court has long held that the constraints imposed by the Seventh Amendment analysis are coterminous with those imposed by Article III, *see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989), suggesting that jury rights will play no independent role in the above analysis.

reform avenue than conventional tort-reform-like measures centered around damages caps, attorney fee shifts, or pleading standards. A final aim has been to model how gatekeeping might be deployed in specific regulatory contexts by using gatekeeper ideas to rethink and refashion American job discrimination regulation.

Going forward, two types of inquiry are in order, one theoretical and the other empirical. On the theoretical side, we need better theories to understand what the ideal agency gatekeeper role should be in a world of coordinated public-private enforcement, and also how particular institutional designs might best facilitate that role. On the empirical side, we need more micro-institutional analyses targeting specific regulatory contexts that can help us gauge how and when agency gatekeeping works, or does not work, on the ground. Offering a synthetic accounting of the agency gatekeeper concept, this Article can hopefully stimulate scholarly work in both directions.