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Articles

THE RENAISSANCE OF PRIVATE LAW

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ABSTRACT—Crisis is the new normal. Between global warming, the opioid epidemic, bursts of gun violence, and political instability fueled by fake news, it is hard to remember a time when we were not facing a major catastrophe. Still more troubling, there is a growing sense that our political and regulatory institutions are faltering in their ability to offer effective responses to the incoming crises. The rapid pace at which new problems emerge—together with growing political polarization—stymies regulatory and legislative action, resulting in an inability to address contemporary challenges.

Against this gloomy background, we posit an unlikely hero: private law. Recent bursts of social activism in private litigation have led to impressive legal victories and multibillion-dollar awards in areas ranging from gun control to climate change. These achievements go a long way towards fashioning better legal responses to contemporary crises where governmental regulation has failed to do so. These victories are doubly surprising considering the supposed dominance of public law and regulation over private law as the primary legal framework for promoting broad policy goals. Thus, in the age of regulation we now inhabit, one would expect private law to take a back seat as the regulatory machinery—now more elaborate, capacious, and fine-grained than ever—takes charge. In this Article, we show that the exact opposite has happened. Contrary to expectations, private law not only remains relevant but often emerges as the most effective response to deep contemporary problems.

To explain this seeming puzzle, we offer a comparative institutional analysis that highlights the multiple advantages of private law relative to regulation. The unique structural features of private law make it more flexible, adaptable, and responsive to rapid changes. Private law institutions, for various reasons, are also less susceptible to capture and can resist the effects of political polarization. Indeed, the rise in the importance of private law is due primarily to the decline of our political institutions. Not only does private law have various structural advantages over regulation, but it is also more democratic in that it provides a platform for a wealth of diverse preferences.

Drawing on these insights, we move to our normative mission. We propose a series of procedural and substantive reforms that would facilitate and enhance the use of private law doctrines as legal responses to contemporary crises. Specifically, we explain how improving class actions, qui tam suits, and the cy pres doctrine could empower individual agents of change. We also call for the relaxation and modification of doctrinal elements of causation and harm. Finally, we come full circle by advancing a comprehensive account of the interaction, synergies, and complementary effects between regulation and private law.

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INTRODUCTION

The twentieth century and the early part of this century have seen an unprecedented explosion of regulatory public law instruments; the scope and reach of the regulatory state are now greater than ever.[1] Within this new legal order, governments have increasingly relied on regulatory public law mechanisms to address all aspects of life and to respond to new social, economic, and technological challenges.[2] Through this trend of expansion, one would expect regulation to gradually supplant private law as the primary legal category and as a vehicle of effecting social change. On its face,

[1] *See* Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LITERATURE 401, 401 (2003).

[2] *See, e.g.*, Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705, 1706 (2016) ("The growth of the national government is perhaps the most significant feature of the past century."); *see also* Robert Baldwin & Julia Black, *Really Responsive Regulation*, 71 MOD. L. REV. 59, 61 (2008) (arguing that the solution to certain regulatory failures is more highly responsive forms of regulation).

regulation has built-in advantages over private law. Regulatory agencies often have superior resources and better information than private actors.[3] They possess expansive powers that allow them to enact new norms of behavior, impose severe sanctions on violators, and offer comprehensive legal frameworks for entire industries.[4] Private law, it seems, has remained frozen in time—operating primarily through the courts on a case-by-case basis. It has served the more modest and unglamorous role of resolving disputes among individuals and corporations via antiquated doctrines of contracts, torts, property, and unjust enrichment.[5]

Against this backdrop of public law expansion, we highlight a surprising legal phenomenon: the recent surge in the use of private law as a key instrument of social activism. Unexpectedly, private law causes of action have proven the most effective means of promoting environmental causes,[6] fighting the opioid epidemic,[7] curbing gun violence,[8] and controlling the risks associated with new products such as e-cigarettes.[9] To give but a few examples, private lawsuits are responsible for legal triumphs such as a

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[3] J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1180–81 (2012) (noting the conditions in which government agencies have superior information to private litigants).

[4] *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 1 (1990) (describing the wide impact of regulatory agencies in the United States on core aspects of "constitutional democracy"); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006) (emphasizing how the power of regulatory agencies has grown and even encroached upon the classic function of the judiciary: interpreting the law); HOWARD BEALES, JERRY BRITO, J. KENNERLY DAVIS JR., CHRISTOPHER DEMUTH, DONALD DEVINE, SUSAN DUDLEY, BRIAN MANNIX & JOHN O. MCGINNIS, REGUL. TRANSPARENCY PROJECT, GOVERNMENT REGULATION: THE GOOD, THE BAD, & THE UGLY 4 (2017), https://rtp.fedsoc.org/wp-content/uploads/RTP-Regulatory-Process-Working-Group-Paper.pdf [https://perma.cc/L5CJ-3UXT] ("Federal agencies issue and enforce standards ranging from environmental quality, to consumer protection, business and banking practices, nondiscrimination in employment, Internet privacy, labels and 'disclosure,' safe food, drugs, products, and workplaces.").

[5] Public law, by contrast, is traditionally understood to govern the relations between the citizens and the government, encompassing such areas as criminal law, administrative law, and regulation. *See generally* Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986) ("Public law subjects would include constitutional law, criminal procedure, taxation, administrative law, and at least part of criminal law—each of which seeks to regulate the internal workings of government or the relationship between government and citizens." (footnote omitted)).

[6] *Cf.* David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15, 36–37 (2012) (describing a limited set of climate change litigation cases based on private law "rights and liabilities" theories).

[7] *See* Abbe R. Gluck, Ashley Hall & Gregory Curfman, *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J.L. MED. & ETHICS 351, 351 (2018) (discussing the impact of the national opioid epidemic and the consequent lawsuits).

[8] *See* Patrick Luff, *Regulating Firearms Through Litigation*, 46 CONN. L. REV. 1581, 1596 (2014).

[9] *See generally* Sanah Shah, Note, *Whose Claim Is It?: A Look at Public Nuisance Claimants in E-Cigarette Litigation*, 33 S. CAL. INTERDISC. L.J. 571 (2023) (exploring how public nuisance doctrine is being utilized in e-cigarette litigation).

$73 million award against gun manufacturers in the Sandy Hook case,[10] a $462 million settlement against the leading manufacturer of e-cigarettes,[11] and a $13 billion settlement in opioid litigation.[12] Thus, while regulators have largely failed to act on these pressing issues, private law actions brought to courts by plaintiffs have generated billion-dollar monetary awards and sanctions, offering protection to victims and deterring actors whose conduct has caused deep social crises. As discussed below, in many cases, private law claims are the main legal response to the greatest problems our societies now face.

These surprising developments give rise to two interrelated puzzles: (1) why is it that private law succeeded in dealing with incoming crises where regulation failed, and (2) why has private law risen in importance *now*?

In this Article, we unveil and discuss the reasons for the recent renaissance of private law and explain why it may hold the key to a better future. We begin by demonstrating that although regulatory agencies appear omnipotent, they suffer from a long list of failures. Private law, as a more flexible and decentralized legal apparatus, avoids many of these pitfalls.

Private law is operationalized by individual plaintiffs and a multitude of semi-independent courts rather than central regulators.[13] This framework makes private law a more democratic, flexible, and heterogeneous arena relative to regulation. Private law gives a voice to individuals with a broad range of viewpoints about legal and social justice and does not depend on one central government agency. It grants individual advocates for social goals the power to promote them independently, without passing through cumbersome regulatory screens. Moreover, the constitutional constraints binding the government leave private actors unfettered. The Second Amendment, for example, prevents the government from outright banning the distribution and use of firearms. Private actors, unburdened by these constraints, have the freedom and right to challenge gun distribution that

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[10] Rick Rojas, Karen Zraick & Troy Closson, *Sandy Hook Families Settle with Gunmaker for $73 Million over Massacre*, N.Y. TIMES (Feb. 15, 2022), https://www.nytimes.com/2022/02/15/nyregion/sandy-hook-families-settlement.html [https://perma.cc/P6ST-3FUU].

[11] Christina Jewett & Julie Creswell, *Juul Reaches $462 Million Settlement with New York, California and Other States*, N.Y. TIMES (Apr. 12, 2023), https://www.nytimes.com/2023/04/12/health/juul-vaping-settlement-new-york-california.html [https://perma.cc/BH74-LQTB].

[12] Janice Hopkins Tanne, *US Pharmacy Chains Settle Opioid Lawsuits for $13bn*, BMJ, Nov. 08, 2022, at 1, 1; *see also* Rebecca L. Haffajee, *The Public Health Value of Opioid Litigation*, 48 J.L. MED. & ETHICS 279, 283–87 (2020) (discussing the evolving role of private tort litigation in addressing the opioid crisis).

[13] *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 10 (2d ed. 2019) (describing the "American way of law" as a system that emphasizes litigant participation and activism).

harms them. Furthermore, private law affords plaintiffs a wide range of jurisdictional options. Powerful industries can block suits against them in jurisdictions in which they carry disproportionate political power,[14] but they are unlikely to wield such power in all states. To win their case, private plaintiffs need only one jurisdiction, or even one court, that is not captured by the industry.

This brings us to the critical role of judges. Judges, unlike legislators and regulators, are far less susceptible to external financial pressure: they are not subject to the "revolving door" dynamic that allows today's regulators to become tomorrow's industry lobbyists.[15] Similarly, courts avoid the dynamism of decline that afflicts the operations of regulatory agencies as well as the problem of regulatory ossification.[16]

As for the timing question ("why now?"), we argue that the increasing reliance on private litigation in recent years is no coincidence. Technological advancements made over the last three decades have obliterated much of the informational advantage regulatory agencies once had over private individuals. The wealth of publicly available information and the speed at which it updates empower individual plaintiffs to react to problems faster than regulators and to present evidence that supports their claims. Most importantly, in light of the paralysis that has overtaken the political and regulatory system in recent years, private law has become the instrument of choice for individuals who are willing to catalyze social change. This, in turn, has created a virtuous cycle: as private lawsuits succeed where regulation fails, the relative attractiveness of private law increases, and new private lawsuits are filed by individual plaintiffs who serve as agents of social change. Through this iterative process, the reliance on private law increases over time, turning private law into the instrument of choice for

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[14] *See, e.g.*, Maytal Gilboa, Yotam Kaplan & Roee Sarel, *Climate Change as Unjust Enrichment*, 112 GEO. L.J. 1039, 1055–58 (2024) (describing the susceptibility of climate regulation to industry pressures).

[15] *See generally* Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265 (2015) (describing how regulators move back and forth from the private to the public sector through the so-called "revolving door"). *But see* Roy Strom, *Judges Start at the Beginning After Leaving Bench for Big Law*, BLOOMBERG L.: BIG L. BUS. (Feb. 29, 2024), http://www.lw.com/admin/upload/SiteAttachments/Judges-Start-at-the-Beginning-After-Leaving-Bench-for-Big-Law.pdf [https://perma.cc/65VR-MRFW] ("Presidents have been appointing judges at younger ages, and those who take the bench before age 45 resign before reaching senior status at a disproportionately high rate . . . . [M]any departing judges cite the discrepancy in pay between federal judges and law firm partners."); Roy A. Schotland, *Judges' Pay: A Chasm Far Worse than Realized, and Worsening*, 82 IND. L.J. 1273–83 (2007) ("[J]udges are leaving the bench in greater numbers now than ever before." (alteration in original) (quoting Chief Justice John G. Roberts Jr.)). This phenomenon remains much more common for regulators, however.

[16] *See generally* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (coining "ossification" to describe how the regulatory "process has become increasingly rigid and burdensome").

entrepreneurial private actors and, unexpectedly, a bellwether for regulatory agencies.

We propose a series of legal reforms that would facilitate and enhance the use of private law as a vehicle for the governance of broad societal problems. Our normative proposals combine procedural and substantive measures. Procedurally, we call for an expansion of class actions and qui tam suits to make it easier for private actors to initiate public interest litigation. Substantively, we advocate partial relaxation of the causation and harm requirements in order to expand the reach of private lawsuits.

The Article is structured as follows. In Part I, we discuss the institutional advantages of private law in comparison to regulation.[17] It is important to note that we do not argue that private law is generally superior to regulation. Rather, we aim to highlight the comparative institutional advantages that make private law a crucial legal mechanism to complement regulatory frameworks and serve as a valuable alternative in certain situations. In Part II, we focus on the temporal aspect of our argument. We explain that current economic, technological, political, and legal conditions have created a situation in which the institutional advantages of private law have become particularly pronounced. In light of these developments, private law has become a critical tool to effectuate legal change and provide appropriate legal responses to contemporary social crises and dilemmas. Part III offers policy recommendations and explores normative implications of our analysis. That Part details a menu of legal modifications that can assist in optimizing the operation of private law institutions. Part IV studies the interplay between private law and regulation and shows how the two frameworks can work together towards a common goal. This analysis answers several possible criticisms of our proposals. A short conclusion follows.

I. THE INSTITUTIONS OF PRIVATE LAW

Philosophers and political theorists maintain that the principal task of government is to protect the population from harm and to promote the public

[17] For the purposes of this work, and in keeping with Anglo-American legal tradition, we endorse an extensional rather than intensional definition of private law. Intensional definitions provide meaning to terms and categories by specifying necessary and sufficient general conditions for inclusion in the category (i.e., to be considered an independent political entity, a nation must have self-government and a territory); extensional definitions give meaning to terms and categories by specifying the objects that belong in said category (i.e., the independent political entities of the world can be defined through a comprehensive list including all such entities currently in existence). Accordingly, we focus our discussion on the realms that have traditionally been considered the core area of private law, namely torts, contracts, property, and restitution. For more on intensional versus extensional legal definitions, see João Marinotti, *The Private Law of Self-Help*, 58 U.C. DAVIS L. REV. 769, 791–94 (2024).

good.[18] Increasingly, the government has performed this task through its network of regulatory agencies. Regulatory agencies have unique powers and abundant resources, enabling them to collect and analyze vast amounts of information.[19] The government, together with its agencies, can promulgate new norms of behavior and enforce them against individual actors via administrative and penal sanctions.[20] In light of the state's expansive powers, one might assume that public law and regulation are the key players in promoting the social good; private law is only a sideshow, charged with the more minor task of resolving disputes between individuals, with little to no broad social impact. Yet, in recent years, we have witnessed the exact opposite dynamic. Surprisingly, plaintiffs are increasingly using private law to advance broad social causes. Furthermore, it appears to succeed where regulation has failed. In this Part, we employ comparative institutional analysis to pinpoint the unique characteristics of private law that allow it to outperform regulation. Our analysis reveals that the special virtues of private law are structural and irreproducible by the regulatory system.

A. Initiation of Legal Action

Within a regulatory framework, the initiation of legal action typically falls under the purview of a central regulator with the discretion to determine whether and how enforcement measures should be taken.[21] The regulator's decision-making process is influenced by their own set of incentives and motivations.[22] Ideally, these incentives align with a genuine commitment to advancing the social interest.[23] Yet oftentimes considerations relating

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[18] *See, e.g.*, ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 564, 590 (Elec. Classic Series 2005) (1776) (arguing that governments should be tasked with three main roles: supplying the military against external invasion, maintaining an impartial legal and judicial system, and "maintaining those public institutions and those public works, which . . . may be in the highest degree advantageous to a great society"); JOHN RAWLS, A THEORY OF JUSTICE 4 (rev. ed. 1999) (defining the political society as a "cooperative venture for mutual advantage"); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 98 (1971) ("The idea that the state provides a common benefit, or works for the general welfare goes back more than a century.").

[19] *See* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 369 (1984) ("[T]he regulatory authority . . . may enjoy a positive advantage relative to private parties.").

[20] Daniel P. Kessler, *Introduction* to REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 1, 1 (Daniel P. Kessler ed., 2011).

[21] *See, e.g.*, Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENV'T L. 1647, 1707–18 (1991) (describing how regulators charged with enforcing the Clean Air Act failed to adequately enforce the Act's provisions).

[22] Yuval Feldman & Yotam Kaplan, *Ethical Blind Spots & Regulatory Traps: On Distorted Regulatory Incentives, Behavioral Ethics & Legal Design*, *in* LAW AND ECONOMICS OF REGULATION 37, 44–48 (Klaus Mathis & Avishalom Tor eds., 2021) (discussing distortions to regulatory incentives).

[23] *See* Flavio M. Menezes & Christian Roessler, *Good and Bad Consistency in Regulatory Decisions*, 86 ECON. REC. 504, 505 (2010).

to future promotion, career opportunities, and workload guide regulators instead.[24] If these considerations closely align with the social interest, one can expect regulation to operate in a manner that promotes the well-being of society.[25] If, by contrast, the self-interests of regulators diverge from those of society, the regulatory process is unlikely to advance social goals.[26]

Supposedly, electoral pressure should mitigate this incentive problem because regulators are, at least theoretically, accountable to elected actors who in turn attempt to calibrate their decisions to what is socially optimal. Yet scholars have shown that such pressure rarely suffices to incentivize legislators and regulators to initiate legislative changes and enforcement actions in a socially beneficial manner.[27] As political scientist Mancur Olson has famously observed, concentrated groups have stronger influence over the political process due to the lower costs of cooperation in such groups.[28] This dynamic inherently advantages special interest groups over the general public in influencing regulatory policy.[29] Median voters have a very weak incentive to monitor the behavior of elected officials because they have little to gain from any specific regulatory outcome.[30] In contrast, special interest groups have a lot to gain from a specific regulatory outcome[31]—for example, whether the law would permit their plant to continue polluting—and thus invest much more in influencing legislation and regulation.[32] These "investments" could take many forms: donating to politicians to win their votes;[33] lobbying legislators and regulators to convince them that a particular

[24] *Id.*; *see also* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (suggesting that some view regulation as springing from "vulgar venality" such as a "congressman feathering his own nest").

[25] Menezes & Roessler, *supra* note 23, at 505.

[26] *Id.*

[27] OLSON, *supra* note 18, at 1–3.

[28] *Id.*

[29] *Id.* at 127–28.

[30] *Id.* at 132.

[31] Luigi Zingales, *Preventing Economists' Capture*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 124, 126 (Daniel Carpenter & David A. Moss eds., 2013).

[32] OLSON, *supra* note 18, at 132.

[33] Stephen G. Bronars & John R. Lott Jr., *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things that They Do?*, 40 J.L. & ECON. 317, 347 (1997) (noting that "contributors appear able to sort into office politicians who intrinsically value the same things that they do").

outcome is the most desirable;[34] offering bribes;[35] and providing other perks intended to "purchase" privately beneficial regulatory decisions. In many cases, politicians, policymakers, and regulators will try to maximize their payoff by adopting policies that offer minimal benefits to their voters and much more substantive benefits to special interest groups.[36]

While the problem of special interest groups' excessive influence applies to legislation and regulation in general, it is especially acute in preventing regulatory intervention. As noted above, median voters do not invest much time or effort in monitoring the behavior of elected officials and regulators.[37] Instead, median voters mostly monitor regulators on especially salient issues—reforms that cause an outcry.[38] Regulatory inaction is by nature much less politically salient, and thus private interest groups can rather easily influence politicians to abstain from intervening in certain issues.[39] As a result, the effect of special interest groups is pronounced in the context of preventing regulatory action.[40]

Conversely, in private law, legal action can be initiated by any plaintiff, chiefly private individuals.[41] A private plaintiff has an incentive to initiate legal action primarily because of the legal remedy they stand to receive.[42] In effect, the possibility of a monetary award provides median voters with a clear monetary incentive to monitor wrongdoers, thereby bypassing the problem of median voter apathy.[43]

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[34] Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 72–76 (2006) (finding that lobbying efforts do not need to change legislative views in order to be effective; instead, finding that lobbying efforts can promote the goals of the lobbying industry simply by providing assistance and support to legislators that already agree with industry-favorable views).

[35] *See generally* Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784 (1985) (offering a legal theory of bribery).

[36] Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENV'T L.J. 311, 360 (2007).

[37] *Id.*

[38] Anne Rasmussen, Brendan J. Carroll & David Lowery, *Representatives of the Public? Public Opinion and Interest Group Activity*, 53 EUR. J. POL. RSCH. 250, 251–52 (2014).

[39] Pablo T. Spiller, *Politicians, Interest Groups and Regulators: A Multiple-Principals Agency Theory of Regulation, or "Let Them Be Bribed,"* 33 J.L. & ECON. 65, 65–66 (1990).

[40] Livermore, *supra* note 36, at 360.

[41] *See* Gideon Parchomovsky & Alex Stein, *Empowering Individual Plaintiffs*, 102 CORNELL L. REV. 1319, 1320–21 (2017) (highlighting the importance of litigation initiated by individual plaintiffs to both efficiency and fairness).

[42] Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 578 (1997) (offering a formal model describing the private incentive to litigate).

[43] *Id.*

The prospect of receiving a monetary reward is not the only motivation of private plaintiffs.[44] Ideological motivations drive a growing number of private plaintiffs.[45] The paradigmatic example is nonprofit organizations, but many individuals also act out of their own strong ideological convictions.[46]

Moreover, it is virtually impossible to silence private plaintiffs. Bribing one or even several private plaintiffs is unlikely to stop lawsuits, as there will always be someone else to step in and take up the mantle. This stands in stark contrast to regulation, where the number of regulators is finite, and capturing a handful of regulators can completely stifle regulation of entire industries. Furthermore, given that private plaintiffs often act out of pure ideology, offering them money for silence may actually increase their motivation to pursue the cause of action. The dispersion of private plaintiffs and their varying motivations make it nearly impossible for defendants to completely silence lawsuits.

B. Accessibility

Regulatory frameworks are more amenable to special interest groups and more responsive to their needs than to those of the general population. Because members of regulatory agencies work closely with industry representatives, they tend to develop personal, social, and professional ties. Such relationships make regulators more susceptible to capture.[47] Economist David Martimort offers a theory of regulatory capture that focuses on the close connection between regulators and industries.[48] According to Martimort, regulatory capture develops over time, as the agency and the regulated industry obtain enough information about each other to exchange favors.[49]

Regulatory capture takes two different forms. The first is informational capture.[50] Because special interest groups spend more time with the regulator, they have their ear and use this advantage to furnish them with

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[44] *See, e.g.*, Lauren Aguiar, Anita Bandy & Tansy Woan, *Recent ESG Litigation and Regulatory Developments*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (July 25, 2022), http://corpgov.law.harvard.edu/2022/07/25/recent-esg-litigation-and-regulatory-developments/ [https://perma.cc/2PB8-6FFA] (noting the growing phenomenon of private litigation based on inaccurate ESG disclosure, the primary objective of which is to promote environmental and social goals).

[45] A recent example of a high-profile ESG private lawsuit is the Delta lawsuit, in which a customer sued Delta for its allegedly false claim that it is a "carbon-neutral" airline. *See* Class Action Complaint, Berrin v. Delta Air Lines Inc., No. 23-04150 (C.D. Cal. May 30, 2023).

[46] *Id.*

[47] *See* David Martimort, *The Life Cycle of Regulatory Agencies: Dynamic Capture and Transaction Costs*, 66 REV. ECON. STUD. 929, 930 (1999).

[48] *Id.*

[49] *Id.* at 930–31.

[50] *Id.* at 930.

information that is slanted in the group's favor.[51] The second form of capture is relational. Because regulators and regulated parties spend a great deal of time together, they develop a high level of familiarity. Over time, this often leads to personal friendships.[52] As a result, regulators are inclined to treat special interest groups more favorably, even without being consciously aware of this problem.

Private law is a very different terrain. Courts operationalize private lawsuits, which makes private law directly accessible to unorganized citizens in ways that critically distinguish it from regulation. Any citizen with a cause of action can approach a court with a private lawsuit. The basic function of the court system is to allow aggrieved parties to seek the state's protection. Accordingly, courts have detailed procedures designed to allow parties to bring their claims and to have an equal opportunity to be heard at length by a legal (and neutral) decision-maker. This model fundamentally differs from the core function of a regulatory agency. Regulatory agencies represent legal action by the *state* rather than legal action by private individuals. Even though regulatory frameworks incorporate public hearings and allow public input,[53] they are far less reliant on private citizens, who have limited access to the regulator.[54] In contrast, private law offers greater accessibility,

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[51] *Id.*

[52] For example, Kenneth Salazar, President Barack Obama's appointee for Secretary of the Interior, established warm ties with key actors in the energy sector. As Daniel Patterson, former member of the Arizona House of Representatives, pointed out, "It's no surprise oil and gas, mining, agribusiness and other polluting industries that have dominated Interior are supporting rancher Salazar[;] he's their friend." John M. Broder, *Environmentalists Wary of Obama's Interior Pick*, N.Y. TIMES (Dec. 17, 2008), http://www.nytimes.com/2008/12/18/us/politics/18salazarcnd.html [https://perma.cc/85QG-NQYZ]. An additional example is the Federal Aviation Administration's (FAA's) decision to allow Southwest Airlines to fly airplanes that were overdue for safety inspections. The decision came to light in 2008 after two whistleblowers from the FAA testified that their supervisors, who were friendly with the managers at Southwest, prevented attempts to ground the uninspected airplanes. Johanna Neuman, *FAA's 'Culture of Coziness' Targeted in Airline Safety Hearing*, L.A. TIMES (Apr. 4, 2008, 12:00 AM), https://www.latimes.com/travel/la-trw-airlines4apr04-story.html [https://perma.cc/KLD4-DRL9].

[53] *See, e.g.*, Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 34–35 (1982) (describing the regulatory mission of the Consumer Product Safety Commission: "In theory, the CPSA's public participation model seemed well designed to facilitate the Commission's legislative tasks, for it assured representation to both consumer and business interests. In practice, however, the model proved difficult to implement. From the beginning, delays plagued the Commission's efforts to use the new procedures, and contrary to widespread expectations, the Commission issued few mandatory standards. The Commission was harshly criticized from all quarters—Congress, consumer organizations, and business groups—for its implementation failures. The procedural experiments, begun eight years earlier, ended with enactment of the Consumer Product Safety Amendments of 1981. The amendments abolished the unique aspects of both the petitioning and standard-setting procedures." (footnotes omitted)).

[54] Frank N. Laird, *Learning Contested Lessons: Participation Equity and Electric Utility Regulation*, 25 REV. POL'Y RSCH. 429, 434 (2008) (providing an example from the public hearings of the Colorado Public Utilities Commission to demonstrate how public hearings are stacked in favor of big businesses).

enabling citizens to participate in shaping legal norms and making the legal system more responsive to their needs and wishes.[55] This procedural mechanism also allows ideological lawyers to help bridge the gap between the "haves" and "have-nots" in shaping public policy.[56]

C. Revolving Doors

The U.S. public service sector is characterized by the "revolving door" phenomenon, wherein public employees transition into the private sector after concluding their time in the government.[57] This trend is particularly prominent among top Washington, D.C. lobbyists, who often have prior experience working in the federal government.[58] While a former public servant may bring valuable expertise to lobbying firms, the revolving door phenomenon raises concerns about structural conflicts of interest on the regulatory level.[59] The promise of lucrative future employment within the regulated industry may incentivize regulatory agency employees to avoid taking current action that could hinder their future career prospects.[60] The revolving door dynamic raises doubts about regulators' willingness to take action against the industries they oversee.[61]

Unlike with regulators, the revolving door phenomenon almost never arises with respect to judges. Federal judges hold life tenure and have limited incentives to prioritize their future career prospects.[62] State court judges face reelection, meaning that they must answer directly to the public and need not seek favor from regulated industries because their future does not depend on their relationship with a single industry or party.[63] Thus, while judges operate under their own set of pressures and motivations, they are not part of the

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[55] Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. Rev. 827, 845–46 (underscoring the institutional strengths of the judiciary that constrain judges from being captured).

[56] *Cf.* AM. ACAD. OF ARTS & SCIS., CIVIL JUSTICE FOR ALL 15 (2020), http://www.amacad.org/publication/civil-justice-for-all [https://perma.cc/GGU5-K2JL] ("Lawyers remain the essential partners in any effort to improve civil justice.").

[57] Zheng, *supra* note 15, at 1267 ("The revolving door has long been considered an important mechanism of regulatory capture: in order to secure a post-government position in the private sector, the theory goes, regulators must bend the rules to curry favor with their prospective employers.").

[58] Jordi Blanes i Vidal, Mirko Draca & Christian Fons-Rosen, *Revolving Door Lobbyists*, 102 AM. ECON. REV. 3731, 3731 (2012); Kim Eisler, *Hired Guns: The City's 50 Top Lobbyists*, WASHINGTONIAN (June 1, 2007), https://www.washingtonian.com/2007/06/01/hired-guns-the-citys-50-top-lobbyists/ [https://perma.cc/89EW-YYR6].

[59] Blanes i Vidal et al., *supra* note 58, at 3731–32.

[60] Zheng, *supra* note 15, at 1268.

[61] *Id.*

[62] *See* Bradley A. Smith, *Symposium on Judicial Elections: Selecting Judges in the 21st Century*, 30 CAP. U. L. REV. 437, 437 (2002). *But see* Strom, *supra* note 15; Schotland, *supra* note 15, at 1273.

[63] Smith, *supra* note 62, at 437.

revolving door game. These institutional features of the judiciary, including prophylactic protections, are designed to assure judicial independence and shield judicial decision-making from interference by other state organs and business interests. As such, judges can serve as a critical safeguard against regulatory capture and can help ensure that industries are serving the public interest.

D. Specialized Regulators and Generalist Courts

Regulatory agencies are usually industry specific. Thus, the Food and Drug Administration (FDA) regulates pharmaceutical companies;[64] the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Office of the Comptroller of the Currency regulate banks;[65] and the Federal Communications Commission (FCC) regulates the communication industry.[66] Regulators know a lot about the challenges faced and created by the industries they oversee. Their industry-specific knowledge allows them to perform their tasks with accuracy and precision, but this specialization comes at the cost of a broader perspective that considers factors beyond the industry.[67] Additionally, specialization means that regulators work in proximity to representatives of a specific industry over long periods of time; this proximity naturally facilitates both informational[68] and relational[69] capture.

Courts and judges, by contrast, are typically generalists, and are not charged with the regulation of one specific industry.[70] A court may rule on a

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[64] Margaret A. Hamburg, *Innovation, Regulation, and the FDA*, 363 NEW ENG. J. MED. 2228, 2228 (2010) ("More than a century ago, Congress passed the 1906 Pure Food and Drugs Act, which transformed a small scientific bureau in the basement of the Department of Agriculture building into a federal regulatory agency charged with protecting the nation's supply of food and drugs. This regulatory agency would eventually become the Food and Drug Administration . . . .").

[65] Kenneth E. Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 STAN. L. REV. 687, 689 (1980) ("On the federal level, bank regulation is distributed among three different agencies: the Comptroller of the Currency (for national banks), the Board of Governors of the Federal Reserve System . . . , and the Federal Deposit Insurance Corporation (FDIC).").

[66] Peter DiCola, *Choosing Between the Necessity and Public Interest Standards in FCC Review of Media Ownership Rules*, 106 MICH. L. REV. 101, 103 (2007) (describing the evolving role of the FCC in media regulation).

[67] For a discussion of the disadvantages of regulatory fragmentation, see William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway and the Challenges of Regional Growth*, 21 J.L. & POL. 323, 349–50 (2005).

[68] Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 706, 708, 720 (2007).

[69] *See supra* note 52 and accompanying text.

[70] Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1755 (1997) ("Ask any federal judge—especially any relatively new federal judge—what impresses him or her about the job, and you are likely to hear something about the remarkable diversity of cases that come before the federal courts.").

pharmaceutical patent case one day, a medical malpractice and insurance case the next, and a case on platform responsibility for offensive speech the day after. This diversity in their dockets endows courts with a broad perspective that enables them to consider the ramifications of their rulings more generally.[71] In political theorist Isaiah Berlin's terminology, regulators can be analogized to hedgehogs, who "know[] one big thing," while judges can be likened to foxes who "know[] many things."[72] Both perspectives have value and can complement each other. The main takeaway for our purpose, though, is that judges are more open than regulators to diverse arguments and viewpoints.[73] Accordingly, claims that are likely to meet resistance in the regulatory sphere may be endorsed by the courts.

Furthermore, as judges do not exclusively encounter the representatives of one specific industry, they are less susceptible to industry capture. The longer tenure of judges compared to regulators enables judges to develop a deeper perspective that tracks social change over time.[74] Change is typically slow to come. Judges who occupy their positions for decades can appreciate and support long-term dynamics that regulators, owing to their shorter employment horizons, cannot fully observe or digest.

E. Decentralized Stability

Regulation is primarily administered through a centralized legal apparatus, often on the federal level, with a central agency serving as the decision-making hub for a particular regulatory field. This approach offers clear advantages, including, first and foremost, legal certainty and economies of scale.[75] However, this centralized approach also makes regulatory systems vulnerable. Like an Imperial Death Star, a centralized regulatory system can collapse following a focused attack directed at its active core.[76] If a central regulatory agency is paralyzed or becomes ineffective, the effect on regulation in this regulator's area can be devastating. Consider the recent landmark case of *West Virginia v. EPA* as an example. In this case, the Supreme Court's decision effectively stripped the Environmental Protection Agency (EPA) of one of its major tools for regulating carbon dioxide

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[71] *Id.* at 1767.

[72] ISAIAH BERLIN, THE HEDGEHOG AND THE FOX 1 (Henry Hardy ed., Princeton Univ. Press 2013) (1953).

[73] Wood, *supra* note 70, at 1767.

[74] *See* Epstein, *supra* note 55, at 834.

[75] Shavell, *supra* note 19, at 369.

[76] Emily Litvack, *Risk Analysis of the Death Star Thermal Exhaust Port Design*, U. OF ARIZ. RSCH. INNOVATION & IMPACT (July 21, 2016), https://research.arizona.edu/stories/death-star-thermal-exhaust-port-design [https://perma.cc/LAY8-LKT4].

emissions, striking a major blow to its efforts to address the climate crisis.[77] Such a move represents a devastating blow for an entire regulatory field.

In contrast, the court system represents a dispersed and decentralized network of legal institutions. Although various courts are connected through principles of stare decisis,[78] shared legal values and traditions,[79] and a commitment to legislative acts,[80] each court operates as an independent decision-maker.[81] Therefore, if one court commits an error or struggles to meet its workload, other courts can step in to provide alternative legal responses. If industry influence captures one court, many others remain open venues for plaintiffs; capturing *all* courts is virtually impossible.[82]

Private law offers a flexible and broadly distributed system that supports varied legal responses, contributing to the resilience of private law and making it a valuable addition to regulatory frameworks. So, while the decision in *West Virginia v. EPA* affected the ability of the EPA to address the climate crisis, private parties continue to bring their claims in courts across the country as an alternative to regulatory action.[83] Of course, not all courts are equally sympathetic to such claims. Yet private parties can use the diversity among courts to their advantage and bring their claims to courts that are perceived to be less affected by industry interests. The ability of private plaintiffs to file multiple lawsuits in various jurisdictions helps offset the financial advantage of commercial defendants.[84]

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[77] 142 S. Ct. 2587, 2614, 2616 (2022).

[78] Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 341 (2005).

[79] *See* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1693 (2004) (noting how stare decisis is part of "an important intellectual tradition").

[80] *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1019 (2003) (pointing to the strong presumption of stare decisis and its relationship to legislation—"that Congress's failure to amend a statute in response to a judicial interpretation of it reflects approval of that interpretation").

[81] *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 6 (1994) (arguing that even lower courts should operate as independent decision-makers "in order to best promote the values served by a hierarchical judiciary").

[82] This is evident from the significant interstate variance in the success of public interest lawsuits. *See, e.g.*, Conservation L. Found., Inc. v. Shell Oil Co., 628 F. Supp. 3d 416 (D. Conn. 2022) (holding that plaintiff's climate-related claim partially survived defendant's motion to dismiss); City of Hoboken v. Exxon Mobil Corp., 558 F. Supp. 3d 191 (D.N.J. 2021) (finding that plaintiff's climate-related claim should be remanded to state court), *aff'd sub nom.* City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022).

[83] *See, e.g.*, cases cited *supra* note 82.

[84] *See* Delaventura v. Columbia Acorn Tr., 417 F. Supp. 2d 147, 156 (D. Mass. 2006) ("Defendants generally want centralization; plaintiffs generally don't."). For a discussion on how to optimize multidistrict litigation, see generally Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

F. Information Production

In a regulatory framework, information is typically generated in a centralized, top-down manner. Regulators have the power to investigate and gather information about the regulated industry to devise appropriate policies.[85] In many cases, this approach to information production can yield satisfactory outcomes. Yet this process can fail to reveal private information held by relevant stakeholders.[86]

In contrast, private law generates information in a ground-up, continuous manner, as private parties approach the court to present evidence pertaining to a legal question. Individuals may possess information that is inaccessible or unverifiable to regulators, and they may not have sufficient incentives to invest effort in bringing this information to the attention of the regulatory agency. In a private law framework, individuals have an incentive to bring information forward because they typically seek a monetary award.[87] Regulators, as opposed to courts, primarily focus on imposing sanctions rather than providing remedies;[88] therefore, regulators do not necessarily provide the same incentives for private individuals to come forth with new information. Private law also incentivizes individuals to invest in information production through its relatively lenient burdens of proof. Thus, in the course of private litigation, plaintiffs are entitled to a remedy even if they cannot prove their case with absolute certainty: they need only convince the court by a preponderance of the evidence to prevail.[89] This standard means that even if individuals have private information that is not completely verifiable by outsiders, their information can lead to a litigation victory if the court finds the plaintiff reliable.

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[85] Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 384 (2016) (pointing to the ability of regulators to collect massive amounts of information, which may generate a new challenge in the information age of "cutting through the clutter").

[86] *See, e.g.*, Wagner, *supra* note 68, at 695 (highlighting the "debilitating limitations on information that reduce the competence and accountability of agency regulators").

[87] *See* Shavell, *supra* note 42, at 577.

[88] *See* Note, *Administrative Sanctions: Regulation and Adjudication*, 16 STAN. L. REV. 630, 631–33 (1964) (arguing that regulatory policy requires the imposition of sanctions by agencies, and that the "remedial" element of those sanctions is not their primary objective).

[89] Shavell, *supra* note 42, at 577; *see also* David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 7 AM. BAR FOUND. RSCH. J. 487, 508–13 (1982) (applying the preponderance of the evidence standard to specific cases); Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J. LEGAL STUD. 691, 721–25 (1990) (studying the possibility of improving the preponderance rule by using probabilistic recovery in cases of factual ambiguity). *See generally* Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2 (2012) (studying the possibility of probabilistic recovery based on aggregation of the established probability of the defendant's fault and the established probability of the causal link between this fault and the plaintiff's injury).

G. Enforcement Costs

Regulatory agencies face steep enforcement costs, which can be a significant hurdle in the effort to achieve regulatory goals. For example, the Consumer Product Safety Commission (CPSC) and the FDA are responsible for regulating product safety[90] and food safety,[91] respectively. To ensure regulatory compliance, these agencies must inspect products and work environments, verify that manufacturers comply with regulatory standards, and sanction violators.[92] Product safety regulation often involves sampling and quality assurance to verify the safety and quality of products as they come to market. All these tasks are cost intensive, requiring employment and training of regular staff and an elaborate organizational hierarchy.

Private law operates in an entirely different manner. Instead of inspecting the safety of products ex ante, private law mainly offers sanctions ex post—for instance, if a product is found to be harmful.[93] This often provides a significant cost advantage.[94] While it is beneficial to prevent unsafe products from reaching the market, doing so through regulation can be very costly. If the FDA were to check food products in advance and remove any that pose a potential risk, it would incur immense enforcement costs. An ex post response through private law can be more cost-effective.[95] If a product causes harm to a consumer, tort liability can provide a cheaper enforcement mechanism. Private plaintiffs will incur the costs of legal action only in the relatively rare cases in which they have suffered harm yet no source of law mandates the general regulatory actions of inspection and standard enforcement.[96] Assuming the sanction is sufficiently high, tort liability should provide an incentive for manufacturers to avoid sending harmful products to the market.[97]

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[90] Schwartz, *supra* note 53, at 34 (describing the regulatory mission of the CPSC).

[91] Hamburg, *supra* note 64, at 2228.

[92] *See About Us*, U.S. CONSUMER PROD. SAFETY COMM'N, https://www.cpsc.gov/About-CPSC [https://perma.cc/YB2F-ERRW] (explaining how the CPSC "works to save lives" by "[i]ssuing and enforcing mandatory standards" and "[r]esearching potential product hazards"); *see also Inspections, Compliance, Enforcement and Criminal Investigations*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations [https://perma.cc/C53Z-9SU7] (describing how the FDA keeps people safe by "[i]nspecting FDA-regulated facilities worldwide to ensure industry compliance with federal laws and rigorous quality standards").

[93] Steven Shavell, *A Fundamental Enforcement Cost Advantage of the Negligence Rule over Regulation*, 42 J. LEGAL STUD. 275, 275–76 (2013).

[94] *Id.*

[95] *Id.*

[96] *See id.*

[97] *See id.* at 285.

H. The Regulatory Life Cycle

Political scientist Marver Bernstein divides the "life cycle of regulatory commissions" into four stages: gestation, youth, maturity, and old age.[98] The gestation phase consists of the enactment of a regulatory statute after a period of "slowly mounting distress" over a social problem.[99] This phase is time-consuming due to conflicts among various interest groups, which may render the statute outdated by the time it is enacted.[100] After enactment, the youth phase kicks in, characterized by an "aggressive, crusading spirit."[101] In the next phase, the maturity phase, the groups that vied for the regulation tend to tire, and thus, regulated firms, without strong opposition, attack the agency through litigation and other means.[102] The agency seeks to create a status quo by conciliating the regulated industry.[103] Eventually, the agency surrenders to the regulated party and enters the old-age phase.[104]

Courts, unlike regulatory agencies and legislators, do not fall prey to similar "life cycle" dynamics. When a new problem emerges, legislators need not create a new court to contend with it. Private law judges are entrusted with the operation of traditional (yet flexible) legal tools—tools that they can easily adjust to apply to new circumstances. They are given broad authority and sufficient discretion to react to change. Private law thus offers rapid legal responses to new problems long before a new regulation is enacted and a new agency, dedicated to the specific issue, commences its operations. For instance, when a new technology of autonomous vehicles enters the market, courts can use existing principles of tort doctrine to tackle

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[98] MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 74 (1955). For a comprehensive analysis of the historical development of the concept of regulatory capture, see Richard A. Posner, *The Concept of Regulatory Capture: A Short, Inglorious History*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 49, 49–56 (Daniel Carpenter & David A. Moss eds., 2014).

[99] BERNSTEIN, *supra* note 98, at 74.

[100] *Id*. at 74–76.

[101] *Id.* at 80.

[102] *Id.* at 81.

[103] *Id.* at 87–88.

[104] *Id.* at 90–91. There are various objections to this description of the dynamic of regulators. It fails to account for the fact that many of the regulated industries are not necessarily industries which generate significant negative externalities (e.g., aviation). This indicates that the creation of regulatory agencies is not motivated by public interest considerations but by players within the regulated industry for whom the regulatory agencies are a means for market cartelization. *See* Stigler, *supra* note 24, at 5. To explore how economist George Stigler's theory of regulation undermines Bernstein's framework, see Posner, *supra* note 98, at 51–52. Judge Richard Posner argues that Bernstein's theory does not explain, for example, why the forces that eventually captured the agency did not also operate earlier at the agency's inception. *Id.* at 51.

the new challenge.[105] Of course, courts will respond to legislative action if and when it comes. But until it does, private law assures the immediate availability of legal responses.

I. Legal Development

Regulatory frameworks typically rely on broad policies that apply to entire categories of cases rather than specific instances.[106] While this method of legal norm setting has clear advantages, it can also be susceptible to problems of overgeneralization and overabstraction. Thus, it is usually easier to offer an appropriate solution to a specific case, from which a well-structured general rule often emerges.[107] This case-by-case method of private law adjudication keeps it grounded, promotes its gradual development, and aligns it with solid moral intuitions.[108] Overall, the more case-specific approach of private law may offer certain advantages in terms of ensuring fairness and achieving desirable outcomes.[109]

Private law operates on a case-by-case basis, addressing specific scenarios and problems as they arise. As a result, private law develops organically and gradually, responding to the unique circumstances of each case. For example, in tort law, courts will develop the required standard of behavior gradually through the concept of negligence, incorporating specific facts into the analysis based on the cases that arrive in court.[110] This form of

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[105] *See, e.g.*, Mark A. Geistfeld, *A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation*, 105 CALIF. L. REV. 1611, 1621 (2017) (arguing that established tort doctrines can be used to assuage the legal uncertainty surrounding the introduction of autonomous vehicles on the road); Kyle Colonna, Note, *Autonomous Cars and Tort Liability*, 4 CASE W. RSRV. J.L. TECH. & INTERNET 81, 86 (2012) (proposing a new insurance regime that works in tandem with tort law to govern liability for autonomous vehicles).

[106] Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, *in* REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW, *supra* note 20, at 11, 18 (explaining that regulations are generally based on rules and not standards, and that rules rest on a "narrower information base than standards").

[107] *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (offering the concept of judicial minimalism, by which judges develop the law gradually on a case-by-case basis).

[108] *See id.* at 4–5.

[109] This point maps onto the rules-versus-standards debate: that the generality of rules versus the case-by-case analysis that typically accompanies standards causes legal rules to be both underinclusive and overinclusive. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 591 (1992).

[110] *See* Lawrence E. Blume & Daniel L. Rubinfeld, *The Dynamics of the Legal Process*, 11 J. LEGAL STUD. 405, 406–07 (1982) ("The negligence rule in a framework of changing social conditions provides the basis for an analysis of the comparative dynamics of optimal adjustment paths. . . . The socially optimum legal rule is not a single negligence standard which minimizes static social costs. Rather, the objective is to choose a time path of legal rules, a changing set of negligence standards which minimize the expected discounted social costs of accidents.").

legal development means that despite its flexibility, private law includes mechanisms that ensure slow and methodical development of legal norms, while allowing for incorporation of a plurality of values into the law. To offer a very recent example, the COVID-19 pandemic necessitated legal responses to massive new challenges.[111] As the health crisis rendered many contracts obsolete, it raised immense problems regarding the status of these contracts and the underlying debt.[112] Eventually, these problems resolved, not wholesale through regulation, but on a gradual, case-by-case basis[113] through the contract law doctrines of impossibility,[114] impracticability,[115] and frustration.[116]

J. Ossification

The administrative state and regulatory agencies are perceived as powerful entities that can "command and control" industry sectors based on professional considerations. Scholars have observed, however, that in practice, regulatory agencies often exhibit a state of "ossification" wherein they fail to fulfill the expectations placed upon them and become stagnant in the exercise of their powers.[117] These agencies tend to work slowly, resulting in a relatively low rulemaking output and an inability to provide timely responses to rapid social, economic, and technological changes.[118] Despite

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[111] *See, e.g.*, Yehonatan Givati, Yotam Kaplan & Yair Listokin, *Excuse 2.0*, 109 CORNELL L. REV. 629, 631 (2024) (rethinking the excuse doctrine in the wake of COVID-19).

[112] *See, e.g.*, NetOne, Inc. v. Panache Destination Mgmt., Inc., No. 20-00150-WRP, 2020 WL 3037072, at *3 (D. Haw. June 5, 2020) (determining whether an event planner would have to return a deposit for an event cancelled due to COVID-19); JN Contemp. Art LLC v. Phillips Auctioneers LLC, 507 F. Supp. 3d 490, 497 (S.D.N.Y. 2020) (determining whether an agreement to sell a painting for a minimum price was still enforceable when the auction where it would have been sold was postponed due to COVID-19); Sanders v. Edison Ballroom LLC, No. 654992/2020, 2021 WL 1089938, at *1 (N.Y. Sup. Ct. Mar. 22, 2021) (determining whether a ballroom would have to return a deposit for an event postponed due to COVID-19).

[113] Givati et al., *supra* note 111, at 631.

[114] For a description of the doctrine of impossibility, see generally John D. Wladis, *Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law*, 75 GEO. L.J. 1575 (1987).

[115] On the history and judicial treatment of impracticability, see generally George Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 NOTRE DAME LAW. 203 (1979).

[116] On the judicial treatment of frustration of purpose, see generally T. Ward Chapman, Comment, *Contracts—Frustration of Purpose*, 59 MICH. L. REV. 98 (1960). *See also* Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEGAL ANALYSIS 207, 210–11 (2009) (offering a terminology for the different categories of excuse).

[117] Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REGUL. 257, 260–62 (1987); Livermore, *supra* note 36, at 313.

[118] *See* Livermore, *supra* note 36, at 313 (describing regulation in the United States as "awfully stagnant").

the appearance of relative independence, regulatory agencies face significant constraints from both the political and judicial spheres, which impede their ability to act.[119] In addition, they confront intragovernmental pressure from agencies such as the Office of Information and Regulatory Affairs (OIRA), which reviews regulations and exerts a chilling effect on regulatory agencies, causing "paralysis by analysis."[120]

Professor Isaac Ehrlich and Judge Richard Posner provide a functional account of the decline of regulatory agencies,[121] focusing on the duty of legislators to oversee agencies to ensure they advance the goals they are expected to promote.[122] The problem with this supervisory authority is that legislative action is characterized by extremely high production costs that rise sharply with increases in output.[123] Legislative "production" is a "process of negotiation" within a large group of elected representatives.[124] Such bargaining is a "costly process," and the cost rises with the number of bargainers.[125] Furthermore, the "legislature cannot respond efficiently to a growth in workload by increasing the number of its members."[126] Therefore, the legislature has to delegate more of its work to agencies and exercises progressively less control over agency actions.[127] Thus, regulatory agencies will suffer from lack of oversight as the economy grows in scale and complexity.[128]

An oft-discussed example of ossification is the National Highway Traffic Safety Administration. Professors Jerry Mashaw and David Harfst have demonstrated how its rulemaking activity gradually diminished

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[119] *See, e.g.*, Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 55–56 (describing political pressures on the EPA).

[120] Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 447 (2003); *see also* Celia Campbell-Mohn & John S. Applegate, *Learning from NEPA: Guidelines for Responsible Risk Legislation*, 23 HARV. ENV'T L. REV. 93, 126–27 (1999) (showing that risk assessments and impact analyses are expensive and delay agency decision-making); Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1523 (1996) (arguing that cost–benefit analysis, which almost all agencies engage in, can lead to paralysis); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1354 (2013) (noting that, according to scholarship, the main impact of OIRA is not curbing overzealous regulation but causing agencies to fail to timely address important social problems).

[121] Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 267–68 (1974).

[122] Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 339 (1974).

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 339–40.

[128] *Id.* at 340.

between the mid-1960s and the mid-1980s and then came to a near halt due to political pressures.[129] Similar "regulatory ossification" has developed in other areas. Professor Michael Livermore points out that environmental regulation virtually froze between the 1970s and 2000s.[130] A similar process has occurred for the Occupational Safety and Health Administration, diminishing its role in regulating the American workplace.[131] The lack of a regulatory intervention curtailing the use of asbestos also serves as an example of the ossification of regulatory agencies.[132]

The processes of ossification and "paralysis by analysis" seem to be worsening over time. In the late 1960s and 1970s, the courts (especially the D.C. courts) rewrote the statutory procedures for agency notice and comment.[133] The main transformation was in setting a new standard of review for examining whether a rule is arbitrary and therefore unlawful under section 706 of the Administrative Procedure Act (APA).[134] When the APA was first enacted in 1946, a plaintiff challenging a rule as arbitrary under section 706 had to demonstrate that no plausible or reasonable set of facts could be conceived to support the rule.[135] Under the modern "hard look" standard of review for arbitrariness,[136] an agency must establish that, at the time of its actions, it had a contemporaneous rationale sufficient to satisfy the requirements of reasoned decision-making.[137] Under this stricter standard of review, a post hoc rationale, no matter how sensible, cannot save the agency action from condemnation as arbitrary.[138] Thus, the agency has to establish the justifications for its rule, in a form that would pass the reasonableness test, before it actually adopts the rule.[139]

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[129] *See* Mashaw & Harfst, *supra* note 117, at 264–65; JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 10–11 (1990).

[130] Livermore, *supra* note 36, at 313.

[131] *Id.*

[132] *Id*. at 337 n.89.

[133] Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look*," 92 NOTRE DAME L. REV. 331, 332 (2016).

[134] *Id.* at 333; *see also* 5 U.S.C. § 706.

[135] Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185–86 (1935).

[136] Regarding the enhanced judicial review of regulatory rulemaking, see Shapiro & Murphy, *supra* note 133, at 333, which points to the reasonableness standard that courts apply to regulatory rulemaking in the pre-application phase as a source of much uncertainty among regulators.

[137] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) (approving hard look-style review of legislative rules). The hard look standard of review of regulatory rulemaking is rooted in the general principle that courts should determine whether to uphold an agency's discretionary action based on the actual reasons motivating the agency at the time that it adopted the new rule. *See* SEC v. Chenery Corp., 318 U.S. 80, 95 (1943).

[138] Shapiro & Murphy, *supra* note 133, at 333.

[139] *See id.*

The political sphere is also an important cause of regulatory ossification. Ossification is not a pure bureaucratic failure. The bureaucracy functions in a context created by legislators. Responsiveness to scientific or other developments may require a revision of the legal context in which the regulatory agency functions.[140] A supply-side analysis of political reforms demonstrates why necessary changes to existing regulatory frameworks are lacking: reforms to existing regulation yield a much smaller political payoff than establishing *new* regulatory schemes.[141]

The issue of ossification presents a lesser challenge for courts compared to regulatory agencies. Unlike regulatory agencies, courts do not require legislative approval of their actions. They possess broad powers, particularly in the realm of private law, and do not need new enabling legislation to exercise these powers. Courts can rely on established legal doctrines that have developed over time to address new problems.[142] Therefore, when faced with emerging social challenges or new technologies, courts can adjust existing relevant precedents to accommodate these developments. Moreover, courts possess equitable and discretionary powers that empower them to address present-day conflicts and ensure fair resolutions.[143] Courts can therefore readily adapt to evolving circumstances and apply flexible solutions to complex legal issues.

K. Constitutional Constraints

Constitutional constraints often limit the effectiveness of legislative and regulatory action in addressing pressing social problems. In such situations, private law becomes the primary mechanism for generating effective legal responses.

The troubling issue of gun violence exemplifies these constraints. Given the numerous tragic incidents of firearm assaults in schools and malls across the country, there is a growing chorus of public voices advocating for additional restrictions on both the sale and use of firearms.[144] Yet such

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[140] *See id.* at 335.

[141] Anders Gustafsson, *Busy Doing Nothing: Why Politicians Implement Inefficient Policies*, 30 CONST. POL. ECON. 282, 293 (2019).

[142] *See* Blume & Rubinfeld, *supra* note 110, at 407.

[143] *Cf.* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 173 (The Macmillan Co. 2d ed. 1921) (1909) (explaining that the function of courts is "not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present").

[144] *See, e.g.*, Shaila Dewan, *In Capitols and Courthouses, No End to National Divide over Gun Policy*, N.Y. TIMES (May 24, 2023), https://www.nytimes.com/2023/05/24/us/gun-control-laws-uvalde.html [https://perma.cc/M3TA-FNVE] ("Public opinion has long favored limiting access to guns,

measures are barred by the Second Amendment mandate that "the right of the people to keep and bear Arms[] shall not be infringed."[145] The Supreme Court has time and again stopped attempts by the states to impose regulation on firearms for infringing upon the Second Amendment. One prominent case illustrating this is *District of Columbia v. Heller*, where the Court invalidated a legislative effort by the District of Columbia to ban handguns.[146]

Private law offers four doctrinal avenues for restricting firearms marketing and use to circumvent Second Amendment limitations. The first relies on product liability law.[147] Courts can find gun manufacturers liable for failing to add safety features such as "chamber load indicators, trigger locks, or 'smart gun' technologies that would prevent guns from being used by people other than their owner."[148] Alternatively, they can find manufacturers liable simply for marketing some types of guns, such as assault weapons, that are so inherently dangerous that selling them would be considered negligent.[149] A second doctrinal route is that of public nuisance.[150] Gun manufacturers and dealers can face public nuisance lawsuits based on the argument that their actions contributed to the increased risk of firearms ending up in the wrong hands.[151] The third mechanism is negligent entrustment tort claims.[152] This claim entails holding a defendant liable for allowing a third party to use a chattel (in this case, a firearm) that the defendant knew or should have known could pose an unreasonable risk of harm to others.[153] This claim applies to a defendant who sold a firearm to a

with the share of Americans saying that 'laws covering the sale of firearms should be made more strict' rarely dipping below half, according to Gallup. After the Uvalde shooting, the share rose to two-thirds of Americans.").

[145] U.S. CONST. amend. II.

[146] 554 U.S. 570, 636 (2008).

[147] Luff, *supra* note 8, at 1583. For an example of such an attempt, see RICHARD C. MILLER, 4 LITIGATING TORT CASES § 51:40 (database updated Oct. 2024), Westlaw LITGTORT § 51:40, which describes a lawsuit against a major handgun manufacturer for design defect and failure to warn.

[148] Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S. CAL. L. REV. 945, 986 (2017).

[149] *See id*. (distinguishing between the two forms of argument on which such a product liability lawsuit can be based); *see also* Merrill v. Navegar, Inc., 28 P.3d 116, 119, 121, 130 (Cal. 2001) (rejecting a lawsuit where plaintiffs alleged negligence against a gun manufacturer because of a statutory bar on product liability lawsuits against gun manufacturers).

[150] Jacobs, *supra* note 148, at 990.

[151] *Id.* Similarly, a private nuisance claim can be brought against a gun range. This may not seem like a meaningful limitation on firearm use, but it can actually pose a serious impediment to it. Gun ranges are vital to firearm use, especially because many jurisdictions require range training as a prerequisite for maintaining a firearm license. For this reason, the court in *Ezell v. City of Chicago* included the right to practice in gun ranges under the protection of the Second Amendment. *See* 651 F.3d 684, 704–06, 708–09 (7th Cir. 2011) ("[T]he right to maintain proficiency in firearm use [is] an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.").

[152] Jacobs, *supra* note 148, at 992.

[153] *See* RESTATEMENT (SECOND) OF TORTS § 308 (AM. L. INST. 1965).

buyer who later caused harm with it when the defendant knew or should have known that the recipient would misuse the firearm.[154] Similarly, a plaintiff can bring a negligence claim against a defendant who failed to safely secure a firearm, allowing it to reach the hands of someone who would misuse it.[155] Fourth, it is possible to circumvent the constitutional limitations on gun control through property or contractual rights. In *GeorgiaCarry.org, Inc. v. Georgia*, the court determined that the constitutional right to carry arms does not override a private property owner's right to "exercise exclusive dominion and control over its land."[156] Such an exception to the right to bear arms can extend to whole communities, such as those established on private property that have restrictive covenants or homeowners' association rules prohibiting the possession of firearms.[157]

These legal routes are not merely theoretical. While the Constitution constrains regulatory and legislative action, private law settlements levy heavy sanctions against gun manufacturers. For instance, in 2022, the families of nine victims of the Sandy Hook school shooting reached a settlement of $73 million in their lawsuit against the manufacturer of the AR-15-style rifle used in that tragic event.[158] The families contended that Remington, the manufacturer of the firearm, actively encouraged the sale of a weapon that specifically appealed to troubled individuals facing personal challenges—much like the Sandy Hook assailant. The broad social goal of this litigation was evident: "These nine families have shared a single goal from the very beginning: to do whatever they could to help prevent the next Sandy Hook."[159]

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[154] *See, e.g.*, Shirley v. Glass, 308 P.3d 1, 3, 6, 9–10 (Kan. 2013) (enabling a plaintiff to proceed with a negligent entrustment action based on a seller's sale of a firearm to a convicted felon who used it to murder the plaintiff's son).

[155] Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189, 1214 n.193 (2000); Jacobs, *supra* note 148, at 992 & n.267 (discussing the basis for a negligent entrustment claim or a closely related but analytically distinct negligent storage claim).

[156] 687 F.3d 1244, 1265 (11th Cir. 2012).

[157] This exception is not trivial—it may be litigated. In *Marsh v. Alabama*, the fact that a certain area was a "company town" did not enable the residents to prevent a Jehovah's Witness from distributing literature. The Court ruled that even private facilities that are operated primarily to benefit the public are subject to state regulation. 326 U.S. 501, 509 (1946); *see also* Jacobs, *supra* note 148, at 283 (discussing the "Core Right Theory" as one of the major tests for determining whether private law should be permitted to undermine constitutional constraints). In *Marsh*, preventing the espousal of views in certain areas violates the core right to freedom of expression, while restrictions on carrying guns in areas where residents have agreed to such restrictions do not violate the core right of the Second Amendment, as long as people can move to places where they can own firearms.

[158] Rojas et al., *supra* note 10.

[159] *Id.*

The threat of civil sanction can induce firms to self-regulate, preventing misconduct where direct regulation fails to do so.[160] As our examples illustrate, to solve major societal problems, private law presents an attractive alternative to agency regulatory action with its flaws and drawbacks.

II. THE TIME FOR PRIVATE LAW

This Part demonstrates how the institutional advantages of private law, as described above, have become especially pronounced under current conditions. These conditions include rapid technological and social changes, unprecedented proliferation of information, and increasing political polarization. Under these conditions, the comparative advantages of private law, as outlined above, have become more pronounced than ever before.

A. Times of Change

The rapid pace of technological and social change in recent decades presents a significant challenge for regulatory agencies. Globalization and demographic shifts, together with the introduction of new technologies—from cryptocurrencies to AI—pose an extreme challenge for the slow-operating regulatory machine. Existing regulatory frameworks may not be sufficiently flexible to address new technologies and social phenomena. The slow regulatory "life cycle" renders agencies almost irrelevant: by the time a new regulatory statute is enacted, providing a new or existing agency with the tools and authority to regulate new technology, the world has already moved on.[161] Under these conditions, private law, with its relative flexibility and adaptability, has become crucial to the legal system. Generalist courts do not have to wait for new authorization; they have the innate authority, and duty, to confront new problems as they arise.

This issue is exemplified by the rise of e-cigarettes, a relatively new technology that allowed manufacturers to avoid some of the traditional regulatory restrictions that apply to other tobacco products. JUUL, one of the largest manufacturers and sellers of e-cigarettes, established its once-dominant market share through a large-scale social media advertising campaign.[162] This new form of dissemination circumvented many of the

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[160] On the deterrent effect of private lawsuits, see generally Yotam Kaplan, *Economic Theory of Tort Law*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 270 (Hanoch Dagan & Benjamin Zipursky eds., 2020).

[161] BERNSTEIN, *supra* note 98, at 74.

[162] Angelica Peebles, *Popular E-Cigarette JUUL's Sales Have Surged Almost 800 Percent over the Past Year*, CNBC (last updated Sept. 11, 2018, 2:24 PM), https://www.cnbc.com/2018/07/02/juul-e-cigarette-sales-have-surged-over-the-past-year.html [https://perma.cc/4WD6-3ER4]; *see also* Jewett & Creswell, *supra* note 11.

regulatory restrictions imposed on advertisements for tobacco products because JUUL products were primarily promoted by influencers and not directly by the company or its employees.[163] While such developments may hinder the ability of regulators to offer effective responses, private law doctrine can prove beneficial in holding companies accountable. JUUL, for example, faced major litigation over claims about the marketing of e-cigarettes to adolescents and had to pay $462 million to settle traditional private law causes of action in tort and unjust enrichment.[164]

The relatively swift legal response, rooted in private law doctrine, contrasts sharply with the sluggishness of regulatory action in similar areas, such as with regular cigarettes. Despite having scientific consensus on the dangers of smoking since at least the 1960s, Congress avoided regulating tobacco products at the federal level until 2009.[165] Earlier regulatory attempts by the FDA were successfully obstructed in the courts after decades of lobbying.[166]

The emergence of generative AI provides another salient example. AI technologies can now produce artistic content,[167] pass tests,[168] analyze complex problems,[169] and even invent new products and processes.[170] Artificial neural networks are expected to grow at a dizzying pace, along with the capabilities of AI generally.[171] One would expect a quick and decisive regulatory response to the rise of AI, but no such response is in the offing. Agencies have issued opinions on such matters as AI authorship, but

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[163] Michael Nedelman, Roni Selig & Arman Azad, *#JUUL: How Social Media Hyped Nicotine for a New Generation*, CNN HEALTH (last updated Dec. 19, 2018, 5:30 PM), https://www.cnn.com/2018/12/17/health/juul-social-media-influencers/index.html [https://perma.cc/EH2H-CRL].

[164] *See* Jewett & Creswell, *supra* note 11.

[165] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 5, 10, 15, and 21 U.S.C.).

[166] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

[167] Laurie Clarke, *When AI Can Make Art - What Does It Mean for Creativity?*, GUARDIAN (Nov. 12, 2022, 11:00 AM), https://www.theguardian.com/technology/2022/nov/12/when-ai-can-make-art-what-does-it-mean-for-creativity-dall-e-midjourney [https://perma.cc/KXV3-KE83].

[168] Libby Marks, *The Implications of Using AI to Generate Exam Answers*, TURNITIN (June 13, 2024), https://www.turnitin.com/blog/the-implications-of-using-ai-to-generate-exam-answers [https://perma.cc/4CQ8-KSAY].

[169] Hal Gregersen & Nicola Morini Bianzino, *AI Can Help You Ask Better Questions—and Solve Bigger Problems*, HARV. BUS. REV. (May 26, 2023), https://hbr.org/2023/05/ai-can-help-you-ask-better-questions-and-solve-bigger-problems [https://perma.cc/GX84-22TW].

[170] David Rotman, *AI Is Reinventing the Way We Invent*, MIT TECH. REV. (Feb. 15, 2019), https://www.technologyreview.com/2019/02/15/137023/ai-is-reinventing-the-way-we-invent/ [https://perma.cc/6WLZ-QMJV].

[171] *See* Alagar, *Exploring the Role of Neural Networks in the Future of Artificial Intelligence*, INT'L ASS'N OF BUS. ANALYTICS CERTIFICATION (last updated Dec. 4, 2024), https://iabac.org/blog/exploring-the-role-of-neural-networks-in-the-future-of-artificial-intelligence [https://perma.cc/A229-DJWR].

these are far from real attempts to address the risks that AI poses.[172] Private law, on the other hand, waits for no one. While agencies contemplate their first steps, private litigants are already filing AI-related lawsuits, and courts are reaching decisions.[173]

Another related example is the widespread use of fake news and information manipulation. The use of social media and search engines to affect individual behavior threatens the very foundation of our democracy, as became evident in the 2016 election.[174] Yet despite the broad consensus about the severity of the problem, it seems that no comprehensive regulatory agency response is coming.[175]

B. Proliferation of Information

The rise of big data, algorithmic analysis, and artificial intelligence has far-reaching implications. Chief among them is the wealth of information available to private citizens. In the past, governments and regulatory agencies had an immeasurable informational advantage over private citizens because data acquisition and analysis required massive resources and investigative authority to uncover hidden information. More recently, individual actors have gained unprecedented access to data, disrupting this traditional advantage of the state. Furthermore, cutting-edge AI technologies allow individuals to scour large amounts of data and analyze it rapidly.

This, in turn, greatly enhances the ability of individuals to influence complex national or even global issues through litigation. An entirely new industry has emerged to assist private litigators in coping with the often vast amount of data required by complex litigation.[176] Furthermore, AI-

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[172] Evan Gourvitz & S. Lara Ameri, *Can Works Created with AI Be Copyrighted? Copyright Office Issues Formal Guidance*, ROPES & GRAY (Mar. 17, 2023), https://www.ropesgray.com/en/newsroom/alerts/2023/03/can-works-created-with-ai-be-copyrighted-copyright-office-issues-formal-guidance [https://perma.cc/XK2X-4VPU].

[173] *See, e.g.*, Thaler v. Hirshfeld, 558 F. Supp. 3d 238, 241 (E.D. Va. 2021) (addressing whether an AI machine may be classified as an "inventor" under the Patent Act), *aff'd sub nom.* Thaler v. Vidal, 43 F.4th 1207 (Fed. Cir. 2022).

[174] Katie Rogers & Jonah Engel Bromwich, *The Hoaxes, Fake News and Misinformation We Saw on Election Day*, N.Y. TIMES (Nov. 8, 2016), https://www.nytimes.com/2016/11/09/us/politics/debunk-fake-news-election-day.html [https://perma.cc/99F4-HPBW].

[175] *See* Ayelet Gordon-Tapiero & Yotam Kaplan, *Unjust Enrichment by Algorithm*, 92 GEO. WASH. L. REV. 305, 312 (2024).

[176] *See, e.g.*, HARVEY AI, https://www.harvey.ai [https://perma.cc/NA7L-XVP6] ("Get answers to complex research questions across multiple domains in legal, regulatory, and tax with accurate citations."); Kate Rattray, *Harvey AI Explained (for Lawyers)*, CLIO: CLIO BLOG, https://www.clio.com/blog/harvey-ai-legal/ [https://perma.cc/4EJB-UFM4] ("Harvey AI assists with contract analysis, due diligence, litigation, and regulatory compliance and can help generate insights, recommendations, and predictions based on data. As a result, lawyers can deliver faster and more cost-effective solutions for

enabled legal-technology companies have developed effective claim-mining techniques that are sold to private lawyers.[177] These technologies make it possible to identify corporate and governmental wrongdoing that was traditionally hidden from the public eye.[178] The information these companies unveil gives private individuals the ability to bring wrongdoers to court faster and more effectively than regulatory agencies. Importantly, these companies also serve as market intermediaries, matching clients with lawyers, and use predictive algorithms to forecast the outcome of cases.[179] To be sure, law enforcement authorities have special privileges that private actors and companies lack, but the proliferation of information sources and search and analysis tools have gone a long way towards equalizing the ability of individuals and nonprofits to use the legal system to bring about social change.

C. The Power of Networks

Another change that empowers individual plaintiffs is the emergence of social media, which has created a networked environment. In the past, activists relied on traditional media outlets or their own investigative powers; now, there are multiple independent sources, enabling large-scale information sharing.[180] Every individual has become a potential source of information and can instantly share knowledge with others. Furthermore, the networked environment brought about by social media allows dispersed individuals to make small, independent contributions to the formation of a comprehensive evidential framework.[181]

More importantly, through social networks, individuals who use private law to promote broad social causes benefit from their peers' recognition and

client issues."); DARROW, https://www.darrow.ai [https://perma.cc/E9RB-27WH] ("[W]e envision a human-led, AI-enhanced justice system that empowers individuals to trust that every legal violation is swiftly discovered, precisely valued, and efficiently resolved.").

[177] *See, e.g.*, *How It Works*, DARROW, https://www.darrow.ai/how-it-works/ [https://perma.cc/QA4E-6RQM] ("Darrow's AI-powered Justice Intelligence Platform sifts through real world data and legal data to detect harmful events, determine the number of victims, predict the legislative outcome, and assess the financial value of a case.").

[178] *Id.*

[179] Besides Darrow, other companies also utilize AI in order to assess the expected outcomes from a specific claim. *See, e.g.*, TRELLIS RSCH., http://trellis.law/ [http://perma.cc/B9TT-7GSC]; LEX MACHINA, https://lexmachina.com/ [https://perma.cc/8LXR-KJX3] ("Anticipate the behavior of courts, judges, lawyers and parties with Legal Analytics.").

[180] *See generally* LEE RAINIE & BARRY WELLMAN, NETWORKED: THE NEW SOCIAL OPERATING SYSTEM (2012) (explaining that social networks allow people to connect, share information, and collaborate on an unprecedented scale and change the way people obtain information).

[181] CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 55–58 (2008) (discussing how social media removes the obstacles that traditionally characterized media and allows collective contributions by individuals).

admiration.[182] This form of nonmonetary reward often counts more heavily than any monetary recovery. In fact, this type of benefit exists even if a case eventually loses. Stewardship of social causes is rightfully deemed a laudable undertaking. Individuals who embark on the promotion of broadly shared values can become instantly famous.[183]

D. Political Polarization

In recent years, political polarization has become a prominent feature of many democracies around the world.[184] This trend is characterized by an increasing ideological distance between political parties, as well as a growing sense of hostility between people who hold different political views.[185]

The factors driving polarization are complex and multifaceted. One major source is the increasing influence of social media and digital technology, leading to a more fragmented media landscape and the proliferation of echo chambers.[186] People are frequently exposed only to viewpoints that reinforce their preexisting beliefs, triggering a deepening of political divisions.[187] Additionally, economic inequality and globalization have contributed to a sense of insecurity and anxiety among certain groups, which can lead to a desire for more extreme political solutions.[188] Finally, the erosion of trust in traditional institutions such as government, media, and academia has created a fertile ground for the rise of populist movements

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[182] *See* Hanoch Dagan, *The Challenges of Private Law: A Research Agenda for an Autonomy-Based Private Law*, 2019 ACTA JURIDICA 3 (discussing how private law can ensure interactions between free and equal individuals who respect one another as the persons they actually are).

[183] *See* Darya Kaviani & Niloufar Salehi, *Bridging Action Frames: Instagram Infographics in U.S. Ethnic Movements*, PROC. ACM ON HUM.-COMPUT. INTERACTION, Apr. 2022, at 6–7, 11 (finding that social media activism has gained a lot of popularity and listing a few movement activists).

[184] Jennifer McCoy, Tahmina Rahman & Murat Somer, *Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Polities*, 62 AM. BEHAV. SCIENTIST 16, 17–19 (2018) (defining polarization as "a process whereby the normal multiplicity of differences in a society increasingly align along a single dimension . . . and people increasingly perceive and describe politics and society in terms of 'Us' versus 'Them'").

[185] *Id.*; Andreas Schedler, *Rethinking Political Polarization*, 138 POL. SCI. Q. 335, 358 (2023).

[186] Matteo Cinelli, Gianmarco De Francisci Morales, Alessandro Galeazzi, Walter Quattrociocchi & Michele Starnini, *The Echo Chamber Effect on Social Media*, PNAS, Feb. 23, 2021, at 1, 1; David Lazer, Brian Rubineau, Carol Chetkovich, Nancy Katz & Michael Neblo, *The Coevolution of Networks and Political Attitudes*, 27 POL. COMMC'N 248, 248 (2010).

[187] *See* Lazer et al., *supra* note 186, at 249–51, 257.

[188] Hernan Winkler, *The Effect of Income Inequality on Political Polarization: Evidence from European Regions, 2002–2014*, 31 ECON. & POL. 137, 138 (2019).

that reject traditional political norms and seek to disrupt the status quo.[189] These various factors have contributed to the contemporary rise of political polarization and will likely continue to shape political discourse in the coming years.

Political polarization poses several dangers to democratic societies. First, it can lead to increased hostility and aggression between opposing groups, which can result in violence and social unrest.[190] It can also create an atmosphere of distrust and suspicion, undermining the ability of different groups to collaborate for the common good.[191] Second, political polarization can contribute to the erosion of trust in democratic institutions, which can further undermine the stability and legitimacy of the political system. Finally, polarization can lead to gridlock and dysfunction in government, as partisan divisions make it difficult to pass legislation and promote necessary policies. Political polarization represents a significant threat to democratic values and institutions and must be addressed to ensure the health and stability of democratic societies.[192]

In this new era of polarization, regulatory deadlock, political paralysis, and legislative impasses have become the norm.[193] Regulatory agencies will find it increasingly difficult to act effectively, and the regulatory system will continue to struggle to address pressing contemporary problems. Under such conditions, private law claims can offer an effective alternative to regulatory action. Private law claims do not depend on a political consensus and do not necessitate large-scale legislative or political action. On the contrary, private law, operating through the structure of adversarial litigation, is designed to function regardless of competing worldviews and conflicting moral and political positions.

Environmental law provides a stark illustration of the stagnating effects of political polarization on regulation. Environmental regulation generally, and the climate crisis specifically, have unfortunately become a partisan issue.[194] As such, political pressures have effectively paralyzed regulatory

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[189] Heidi Schulze, Marlene Mauk & Jonas Linde, *How Populism and Polarization Affect Europe's Liberal Democracies*, POL. & GOVERNANCE, July 17, 2020, at 1 (studying the connection between political polarization and the rise of populist movements).

[190] James A. Piazza, *Drivers of Political Violence in the United States*, 42 J. PUB. POL'Y & MKTG. 11, 11 (2023) ("[I]ncreased political polarization raised the probability by around 35% that a democracy experiences more widespread political violence.").

[191] *Id.*

[192] *Id.*

[193] Frances E. Lee, *How Party Polarization Affects Governance*, 18 ANN. REV. POL. SCI. 261, 274–75 (2015).

[194] Gilboa et al., *supra* note 14, at 1055–58 (describing the shortcomings of climate regulation).

action.[195] Political appointees have reportedly pressured EPA scientists to change scientific reports and have altered such reports themselves to obscure scientific evidence regarding global warming.[196]

The opioid epidemic also illustrates this dynamic. This widespread and devastating crisis stems from the misuse of and addiction to opioid drugs, including prescription painkillers like oxycodone and hydrocodone and synthetic opioids like fentanyl.[197] These drugs have created a major public health emergency, leading to a significant increase in overdose deaths, straining healthcare systems, and causing immense social and economic ramifications.[198]

From the outset of the crisis, the FDA failed to offer effective regulatory responses. The agency allowed manufacturers to make unsubstantiated claims about the reduced appeal of their products to drug abusers, allegedly due to the use of a delayed-release formula.[199] Between 2009 and 2015, the FDA faced criticism for approving twenty-seven new opioids through

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[195] Freeman & Vermeule, *supra* note 119, at 55–56 ("During 2002 and 2003, Philip Cooney, the Chief of Staff to President Bush's Council on Environmental Quality (and a former lobbyist for the American Petroleum Institute with no scientific training), rewrote or altered reports by federal agencies on various aspects of climate change, with the effect of introducing greater doubt and uncertainty into these reports than the science warranted. Scores of scientists in agencies such as the National Oceanic and Atmospheric Administration (NOAA) and EPA reported being pressured to delete references to climate change and global warming from official documents, including their communications with Congress." (footnote omitted)).

[196] *Id.*

[197] David Celentano, *The Worldwide Opioid Pandemic: Epidemiologic Perspectives*, 42 EPIDEMIOLOGIC REVS. 1, 1 (2020) ("Over the past 2 decades, there has been a resurgence in opioid use in the United States, an epidemic of opioid-related overdoses, and a steady increase in deaths attributed to opioid use. Human immunodeficiency virus, acquired immunodeficiency syndrome, and hepatitis C infection, along with other blood-borne infections, have ravaged injection drug users worldwide. There is ample evidence that, with little regard to issues related to dependence, prescription opiates have been given extensively to patients and that this practice has been encouraged by pharmaceutical manufacturers.").

[198] *Id.* at 1–2.

[199] Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused*, N.Y. TIMES (May 29, 2018), http://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html [https://perma.cc/XQ4S-9UUJ]. Reportedly, "[t]he F.D.A. decision [to approve OxyContin] was not based on findings from clinical trials, but a theory that drug abusers favored shorter-acting painkillers because the narcotic they contained was released faster and so produced a quicker 'hit.'" *Id.* This untested claim was not enough for Purdue. In 2007, the drugmaker admitted that it trained sales representatives to lie to doctors and say "that OxyContin was less addictive and prone to abuse than competing opioids," even when it had evidence to the contrary. *Id.* Furthermore, at least one 1998 Purdue promotional video falsely boasted that "the rate of addiction for opioid users treated by doctors is 'much less than 1%.'" Katherin Eban, *OxyContin: Purdue Pharma's Painful Medicine*, FORTUNE (Nov. 9, 2011, 9:00 AM), https://web.archive.org/web/20230619112012/https://fortune.com/2011/11/09/oxycontin-purdue-pharmas-painful-medicine/#expand.

a controversial process,[200] while simultaneously failing to ensure the effectiveness of a program aimed at curbing excessive opioid distribution.[201] The Drug Enforcement Agency (DEA) failed to monitor drug flows and diversion patterns,[202] neglected to conduct basic criminal background checks on applicants,[203] and inexplicably authorized a significant increase in oxycodone production from 2003 to 2013 as the crisis escalated.[204] In 2007, when the Department of Justice sought to bring felony charges against industry executives, political appointees overruled them, resulting in lenient consequences for the executives.[205] This cumulative failure of Executive Branch personnel has led to the catastrophic opioid crisis, unmatched in scale and severity.[206] The opioid epidemic stands as an archetypical example of regulatory failure.

At the same time, opioid litigation has recently generated a whopping $13 billion settlement sum.[207] While this outcome is, of course, far from

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[200] *See* Chris McGreal, *Opioid Crisis: FDA's Own Staff Demand Agency Halt Approval of New Painkillers*, GUARDIAN (Mar. 21, 2019, 4:59 PM), https://www.theguardian.com/us-news/2019/mar/21/fda-opioid-approvals-halt [https://perma.cc/RG48-CKE5].

[201] Abby Goodnough & Margot Sanger-Katz, *As Tens of Thousands Died, F.D.A. Failed to Police Opioid*s, N.Y. TIMES (last updated Dec. 31, 2019), https://www.nytimes.com/2019/12/30/health/FDA-opioids.html [https://perma.cc/JCJ4-TJLY]. The Risk Evaluation and Mitigation Strategy, or R.E.M.S., was founded in 2007 with the aim of "train[ing] physicians to safely prescribe certain dangerous drugs." *Id.*

[202] MAJORITY STAFF OF H. ENERGY & COM. COMM., 115TH CONG., RED FLAGS AND WARNING SIGNS IGNORED: OPIOID DISTRIBUTION AND ENFORCEMENT CONCERNS IN WEST VIRGINIA 8 (2018). The DEA had access to Automation of Reports and Consolidated Orders System (ARCOS) data describing prescription trends, which revealed the extent of the crisis. *Id.* Yet, per the 2018 House Report, "[a]t the time the opioid epidemic was worsening, . . . DEA did not proactively use ARCOS data to investigate diversion trends." *Id.*

[203] OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF THE DRUG ENFORCEMENT ADMINISTRATION'S REGULATORY AND ENFORCEMENT EFFORTS TO CONTROL THE DIVERSION OF OPIOIDS 15 (Sept. 2019).

[204] *Id.* at 13; *see also* Sari Horwitz & Scott Higham, *Could the DEA Have Stopped the Opioid Epidemic by Cutting Off the Supply?*, WASH. POST (Dec. 28, 2019, 11:24 AM), https://www.wapo.com/investigations/could-the-dea-have-stopped-the-opioid-epidemic-by-cutting-off-the-supply/2019/12/28/590ce050-1c61-11ea-8d58-5ac3600967a1_story.html [https://perma.cc/BM8Q-GA8C] (observing that the DEA could have exercised its quota authority to reduce oxycodone production but instead approved an increase).

[205] Barry Meier, *Why Drug Company Executives Haven't Really Seen Justice for Their Role in the Opioid Crisis*, TIME (June 15, 2018, 2:32 PM), https://time.com/5311359/purdue-pharma-oxycontin-lawsuit-opioid-crisis/ [https://perma.cc/Q2L2-YU75]; Meier, *supra* note 199.

[206] Press Release, U.S. Food & Drug Admin., Statement from FDA Commissioner Scott Gottlieb, M.D. on the Agency's 2019 Policy and Regulatory Agenda for Continued Action to Forcefully Address the Tragic Epidemic of Opioid Abuse (Feb. 26, 2019), https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-agencys-2019-policy-and-regulatory-agenda-continued [https://perma.cc/KG9C-74GW] ("[T]he scope of the epidemic reflects many past mistakes and many parties who missed opportunities to stem the crisis, including the FDA.").

[207] Tanne, *supra* note 12.

perfect and does not signify a complete solution or the end of the crisis, it illustrates the immense potential of private law tools where regulatory frameworks face paralysis.

* * *

Private law is responsive to change, adaptable, and resilient. It can operate under conditions of extreme political polarization and quickly develop solutions to new problems, with internal mechanisms that can gradually evolve and finetune existing legal norms. These structural features make private law uniquely suited to contemporary social, political, and legal conditions.

III. NORMATIVE IMPLICATIONS

Based on the analysis in Part II, this Part explores modifications to private law doctrines that may bolster its use as a mechanism for promoting broad social goals. The justification behind this normative move is simple: if private law is indeed a useful and powerful tool for effecting broad social change, then legal restrictions that undermine its effectiveness ought to be alleviated.

The modifications we propose come in two forms. First, we suggest a series of procedural enhancements that make private law institutions more efficient in aggregating private claims and allowing claims of a public nature to come to court. Second, we point out substantive adjustments to private law doctrine that can make it easier to use private law claims to pursue broad social change. Together, these proposals create a version of private law that benefits from the current advantages of our legal institutions but is also more compatible with the public goals this system now embodies. We demonstrate that our proposals are consistent with existing trends in private law doctrine and discuss advantages and possible limitations.

A. The Procedure of Social Interest Litigation

This Section recommends strengthening procedural avenues for public interest litigation. Private law claims can represent broad social interests when special procedural structures allow individuals to group their interests together. Additionally, private law allows individuals to sue in the name of public interest. These features are achievable through procedures such as class actions, qui tam suits, and cy pres remedies.

1. Class Actions

Class action lawsuits are a crucial tool for advancing social objectives through private law.[208] By allowing multiple individuals to pool their resources and pursue a lawsuit together, class actions make it financially feasible for plaintiffs to seek redress for injuries caused by corporate misconduct.[209] Without class actions, many types of wrongful and socially harmful behaviors would be unactionable when harms are dispersed among multiple victims.[210] In such cases, the costs of bringing an individual claim to court outweighs the monetary value of the claim, allowing certain wrongdoers to evade sanctions.[211] By aggregating individual claims, class actions make otherwise unactionable claims actionable, providing class representatives with an incentive to act as plaintiffs and bring the case to court. In turn, the threat of a large judgment or settlement induces companies to comply with the law and to avoid engaging in harmful behavior.[212] In addition, class actions can have a deterrent effect on other companies. News of a successful lawsuit can lead to increased scrutiny and public pressure for improved business practices. Overall, class action litigation serves as a valuable tool to hold companies accountable for their actions and to promote a more just and fair society.[213]

In their current form, however, class actions have serious limitations. For example, a central challenge for class actions is their multi-jurisdictional nature. Many class actions involve plaintiffs from different states with diverging laws regarding the substantive issues involved in a case. These differing substantive laws often lead judges to dismiss the action as unmanageable.[214] More generally, only highly specific types of claims

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[208] Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 441 (1996) (arguing that class actions are "important and useful, both to deter wrongful conduct and to provide compensation for injured plaintiffs").

[209] *See* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1383 (2000).

[210] *See* Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1926–27 (2000).

[211] Wolfman & Morrison, *supra* note 208, at 441.

[212] Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 49 (1975).

[213] *See* 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, 3 (2000) ("[C]lass actions offer a relatively fair and efficient mechanism for extending the benefits of government legal work to provide redress to injured citizens.").

[214] *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985) (holding that, in a nationwide class action, applying one state's law to every claim may be "arbitrary and unfair," especially when there are significant differences in relevant laws); *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015 (7th Cir. 2022) (explaining that class certification requires that "all litigants are governed by the

can be certified as class actions.[215] For instance, to be certified as a class action, a claim must present issues common to all class members.[216] This commonality requirement tends to bar many types of claims, such as mass torts claims or claims involving individualized damages to different group members.[217]

In recent years, the Supreme Court has decided a series of cases that has increasingly limited the scope of class action lawsuits,[218] particularly by imposing stricter interpretations of the commonality requirement. One notable case is *Wal-Mart Stores, Inc. v. Dukes*, where a lawsuit filed on behalf of approximately 1.5 million female Walmart employees alleged discriminatory practices that violated Title VII of the Civil Rights Act of 1964.[219] The plaintiffs contended that Walmart systematically underpaid women and denied them promotions at a disproportionate rate.[220] The Supreme Court ruled in favor of Walmart and decertified the class action,

same legal rules"). Another related constraint is the restriction of the plaintiff's ability to select a forum imposed by the Class Action Fairness Act of 2005, Pub. L. No. 109-2, sec. 4, § 1332, 119 Stat. 4, 9. *See* Arthur R. Miller, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQUIRIES L. 1, 26 (2018) ("The [Class Action Fairness Act] has effectively federalized class actions of any significant dimension.").

[215] To qualify as a class action, a claim must satisfy the four requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation), as well as all the elements of at least one subdivision of Rule 23(b)—(b)(1)(A), (b)(1)(B), (b)(2), or (b)(3). *See* ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 23–25 (4th ed. 2012).

[216] FED. R. CIV. P. 23(a)(2); *see also In re* Scotts EZ Seed Litig., 304 F.R.D. 397, 405 (S.D.N.Y. 2015) (holding that commonality is satisfied where a single issue of law or fact is common to the class and where the capacity of a class-wide proceeding to generate common answers is apt to drive the resolution).

[217] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352 (2011); *see also* Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70, 85 (2d Cir. 2015) (finding commonality is satisfied by identifying a central issue that, if resolved, addresses the validity of each claim "in one stroke" (quoting *Dukes*, 564 U.S. at 350)); Miller, *supra* note 214, at 17–18 (emphasizing how the imposition of a more stringent commonality requirement has hindered efforts to effectively address the asbestos problem).

[218] *See, e.g.*, Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (holding that "a bare procedural violation, divorced from any concrete harm," does not satisfy the requirement for Article III standing); Ortiz v. Fibreboard Corp., 527 U.S. 815, 852 & n.30 (1999) (explaining that courts must scrutinize class settlements closely due to the heightened risk that "[c]lass counsel . . . ha[s] great incentive to reach any agreement . . . rather than the best possible arrangement" for the class); John C. Coffee Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 436–39 (2000) (arguing that the Supreme Court's holdings in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), *Ortiz*, 527 U.S. 815, *Hansberry v. Lee*, 311 U.S. 32 (1940), and *Martin v. Wilks*, 490 U.S. 755 (1989), collectively endorse heightened requirements for representational adequacy); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v Concepcion, 79 U. CHI. L. REV. 623, 626–27 (2012) (contending that *AT&T v. Concepcion*, 563 U.S. 333 (2011), limits consumers' ability to pursue class actions by enabling corporations to use collective-litigation waiver clauses).

[219] 564 U.S at 357; *see also* Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 34 (2011).

[220] Malveaux, *supra* note 219, at 34.

stating that the plaintiffs did not share enough commonalities to constitute a cohesive group.[221] The Court clarified that for class certification, the plaintiffs needed to demonstrate that they were all subjected to the *same discriminatory policy* or faced discrimination from the same supervisor.[222] Despite presenting extensive evidence, including statistical disparities in pay, interviews with 120 employees revealing discriminatory practices, and expert testimony highlighting a discriminatory corporate culture at Walmart, the Court concluded that this evidence fell short of establishing a common discriminatory policy.[223] Critics of the decision argue that it effectively prohibits labor discrimination class action lawsuits.[224] They contend that the ruling sets an unreasonably high standard, making it virtually impossible to prove a discriminatory policy and meet the commonality requirement.[225] *Wal-Mart* is just one of a long list of decisions that have narrowed the scope of class actions.[226]

Other decisions have held that legal mechanisms such as arbitration clauses, for example, can obstruct class lawsuits.[227] Courts have imposed new procedural impediments, such as the requirement that each individual class member be ascertainable at the time the certification is sought.[228] Courts also turned to policy considerations to reject class actions, citing concerns

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[221] *Id.* at 37–38.

[222] *Id.* at 38–39.

[223] *Id.* at 39–40.

[224] *See id.*

[225] *Id.* ("Given the Court's analysis, it is hard to imagine what type and quantity of evidence would satisfy the new 'significant proof' standard for an employment discrimination case of this scope and magnitude.").

[226] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344, 352 (2011) (limiting the ability of courts to strike down class action waivers contained in contracts in favor of arbitration clauses); Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70, 85 (2d Cir. 2015); Castano v. Am. Tobacco Co., 84 F.3d 734, 737, 752 (5th Cir. 1996) (rejecting a nationwide class action on behalf of all "nicotine-dependent persons in the United States" and their families against tobacco companies). The commonality requirement has also led the Supreme Court to twice reject proposed class-wide settlements in the asbestos cases. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 830 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997); *see also* Miller, *supra* note 214, at 17–18 (describing the imposition of a more stringent commonality requirement); Arthur H. Bryant, *Viewpoint: Class Actions Not Dead After 'Concepcion,'* LAW.COM: THE RECORDER (June 24, 2011), https://www.law.com/therecorder/almID/1202498194365/ [https://perma.cc/NJ2D-YW6W] ("The U.S. Supreme Court's 5-4 decision in AT&T v. Concepcion is a disturbing example of judicial activism that makes it easier for corporations to enforce mandatory arbitration clauses banning class actions, cheat consumers and workers out of millions, and keep almost all of the money.").

[227] *See* Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 199 (2015) (arguing that the Supreme Court decisions which allow corporations to avoid class action liability through the use of arbitration clauses ultimately result in the elimination of class actions against businesses); Yotam Kaplan & Ittai Paldor, *Choosing Sides: On the Manipulation of Civil Litigation*, 77 VAND. L. REV. 1211, 1230 (2024) (discussing the effect of arbitration clauses on class action lawsuits).

[228] *See* Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354, 2357 (2015).

such as the assumed burdensomeness or disproportionate impact of the proposed remedy,[229] and fears of overcompensation or overdeterrence.[230] As a result, it is increasingly difficult to file class actions against corporations and even more difficult to win them.[231]

Our analysis in Part II calls for the decisive reversal of these trends and for the significant expansion of class actions in multiple areas of private law. Class actions are an important element of private law's ability to offer solutions to contemporary crises; they should be bolstered, not curtailed.

This outcome can be achieved through recognizing partial class actions, as some courts have recently suggested. Under this solution, courts can certify important single issues for common adjudication even if the entirety of the suit is not certified.[232] We argue that courts should adopt additional

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[229] *See, e.g.*, Jamie S. v. Milwaukee Pub. Schs., 668 F.3d 481, 486 (7th Cir. 2012) (finding it was "not possible to order final injunctive or corresponding declaratory relief on a class-wide basis"); Leysoto v. Mama Mia I., Inc., 255 F.R.D. 693, 695 (S.D. Fla. 2009) (describing the relevant statute as "silent as to the availability of class relief").

[230] *See, e.g.*, Rowden v. Pac. Parking Sys., Inc., 282 F.R.D. 581, 587 (C.D. Cal. 2012).

[231] Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 735 (2013) (arguing that courts have been systematically limiting plaintiffs' ability to bring class action lawsuits, thereby "undermin[ing] the compensation, deterrence, and efficiency functions of the class action device"); Gilles & Friedman, *supra* note 218, at 627 ("[T]he Supreme Court's ruling suggests that many—indeed, most—of the companies that touch consumers' day-to-day lives can and will now place themselves beyond the reach of aggregate litigation. These companies include telephone companies, internet service providers, credit card issuers, payday lenders, mortgage lenders, health clubs, nursing homes, retail banks, investment banks, mutual funds, and the sellers of all manner of goods and services. And that is just consumers. Employees, too, will find themselves unable to band together and seek legal redress." (footnote omitted)); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) ("The U.S. Supreme Court's five-to-four decision in *AT&T Mobility LLC v. Concepcion* is proving to be a tsunami that is wiping out existing and potential consumer and employment class actions." (footnote omitted)); Maureen A. Weston, *The Death of Class Arbitration After* Concepcion*?*, 60 U. KAN. L. REV. 767, 767 (2012) ("In *AT&T Mobility LLC v. Concepcion*, the Supreme Court potentially allowed for the evisceration of class arbitration, and indeed most class actions, in consumer and employment settings . . . ."); Editorial, *Gutting Class Action: The Five Conservatives of the Supreme Court Chose Corporations over Everyone Else*, N.Y. TIMES, May 12, 2011, at A26 ("The Supreme Court's 5-to-4 vote in AT&T Mobility v. Concepcion is a devastating blow to consumer rights."); Erwin Chemerinsky, Opinion, *Supreme Court: Class (Action) Dismissed*, L.A. TIMES (May 10, 2011, 12:00 AM), https://www.latimes.com/opinion/la-xpm-2011-may-10-la-oe-chemerinsky-class-action-20110510-story.html [https://perma.cc/FSX5-ZPX9] ("The effect of the Supreme Court's decision [in *Concepcion*] is to make it far less likely that corporations engaged in even massive fraud will be held accountable when many people lose a little."); David Schwartz, *Do-It-Yourself Tort Reform: How the Supreme Court Quietly Killed the Class Action*, SCOTUSBLOG (Sept. 16, 2011, 10:52 AM), https://www.scotusblog.com/2011/09/do-it-yourself-tort-reform-how-the-supreme-court-quietly-killed-the-class-action/ [https://perma.cc/95AD-8TBA] ("*Concepcion* is the culmination of twenty-five years of Supreme Court arbitration jurisprudence that has turned the FAA into a do-it-yourself tort reform statute.").

[232] See, for example, *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013), where, in a case regarding mold in washing machines, Judge Posner ruled that the liability questions of whether the

measures to facilitate class actions. For example, to overcome the multi-jurisdictional nature of many class actions, they could adopt a rule that the law of the state that pertains to the largest set of plaintiffs will govern and apply to all other group members.[233] A similar, but more modest, suggestion was made by Samuel Issacharoff, who argued for a default rule of applying the law of the defendant's home state in multi-state class actions.[234]

Our analysis also supports a more lenient approach to the commonality requirement: one that would allow aggregation of claims that represent a common issue even if they are not completely identical. Such an approach can offer significant improvement by allowing the aggregation of mass tort suits in a class action framework. *Wal-Mart* provides a simple illustration of our proposal. Under its current, highly strict, interpretation, the commonality requirement means that the plaintiffs in *Wal-Mart* would be entitled to a remedy only if they all suffered discrimination under the *same common policy*[235] (which is near-impossible to prove[236]); under our proposed version of the commonality requirement, plaintiffs need simply show they were all illegally discriminated against, as a group, by the employer.

2. Qui Tam

The doctrine of qui tam offers a private law route for the enforcement of public rights.[237] This doctrine empowers private individuals to bring lawsuits against those who have committed fraud against the federal or state

washing machines were defective could be determined on a class-wide basis, leaving the matter of damages to individual proceedings after liability had been established. *See also In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 861 (6th Cir. 2013) (ruling similarly in a case regarding mold in washing machines); *In re* IKO Roofing Shingle Prods. Liab. Litig., 757 F.3d 599, 603 (7th Cir. 2014) (rejecting a district court's conclusion that "commonality of damages" among class action members was "legally indispensable"); Miller, *supra* note 214, at 21 ("This 'single issue' class action, if it is accepted by more courts (and ultimately the Supreme Court) and survives overruling by Congress, holds great promise for the future of the class action." (footnote omitted)).

[233] This is a significant change to existing law but is not impossible to implement. For more detail on the implementation of this type of solution, see Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1867 (2006).

[234] *Id.*

[235] *Id.* at 350–51.

[236] *See* Malveaux, *supra* note 219, at 40 (describing the *Wal-Mart* Court's rejection of statistics, employee affidavits, and expert testimony as sufficient to establish commonality and questioning whether any type of evidence could satisfy its new standard).

[237] "Qui tam" denotes the Latin phrase "'*qui tam pro domino rege quam pro se ipso in hac parte sequitur*' which means he 'who pursues this action on our Lord the King's behalf as well as his own.'" Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 44 (2002) (quoting Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765 (2000)).

government. Such individuals, known as "relators," are given authority to act in the name of the government and enforce its rights in court.[238]

At the federal level, the False Claims Act (FCA) authorizes such litigation, enabling private individuals to file lawsuits in connection with fraudulent activities related to government programs and expenses.[239] Legislatures created qui tam provisions in federal and state legislation to address the government's inadequate incentives to enforce the law. Such insufficient incentives can result from lack of information, regulatory capture, conflicts of interests,[240] and regulatory ossification.[241] Qui tam cases have become a powerful enforcement tool over the past decades, generating greater recoveries than traditional mechanisms.[242] This is, in part, due to qui tam litigation procedure, which integrates financial incentives for third parties with safeguards that protect the interests of the government. If successful, the relator can receive a monetary award ranging from 15% to 30% of the recovered damages.[243] Importantly, the relator does not hold sole control over the case, as the government can choose whether to join the action or allow the relator to pursue the case independently. If the government decides to join the claim, both parties have procedural rights, preventing ill-motivated regulators from easily dropping the case against the relator's wishes.[244] Qui tam is widely considered an effective tool for deterring wrongdoing and compensating the government for its losses—striking a balance between unrestricted private enforcement and unchecked public enforcement.[245]

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[238] 31 U.S.C. §§ 3729–3730; Bucy, *supra* note 237, at 44–45. To qualify as relator, an individual must demonstrate that they have concrete information regarding fraud against the government. *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, 1709 (2013).

[239] 31 U.S.C. §§ 3729–3730.

[240] David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1272–73 (2012); Ehud Guttel, Alon Harel & Shay Lavie, *Torts for Nonvictims: The Case for Third-Party Litigation*, 2018 U. ILL. L. REV. 1049, 1059–60.

[241] David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1949 (2014).

[242] *See* Engstrom, *supra* note 240, at 1270–71 (describing the phenomenon of hundreds of qui tam lawsuits a year, generating billions of dollars for the U.S. government); Engstrom, *supra* note 238, at 1693 (stating that qui tam lawsuits lead to achievements "that rival, and even eclipse, those achieved by private enforcement efforts in other, much-analyzed areas of law such as securities and antitrust"); Guttel et al., *supra* note 240, at 1059.

[243] 31 U.S.C. § 3730(b)–(d); Guttel et al., *supra* note 240, at 1059.

[244] 31 U.S.C. § 3730(c)(2)(A); *see also id.* § 3730(c)(2)(B) (stating that the government can settle with the defendant despite the objections of the relator, but only after a public court hearing).

[245] J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 609–11 (2000) (arguing that "*qui tam* enforcement offers an obvious advantage" in deterrence of illegal conduct and that "a system of *qui tam* enforcement eliminates the personal and public protections afforded by prosecutorial discretion").

In line with our analysis in Part II, we argue that the logic of qui tam can and should be expanded beyond the specific issue of fraud against the government to include other types of private law claims. In that way, the doctrine of qui tam would represent a more general legal structure, namely a procedural gateway for private plaintiffs to bring private law claims to court in the name of the government. This is a highly useful legal institution, considering the common danger of insufficient incentives for regulators to initiate legal action. Such claims could include nuisance or negligence claims regarding environmental harms. Currently, a state can sue polluters for environmental harms, including harm to wildlife and natural resources.[246] In some cases, a state will exercise these powers; in others, it will not. A state is most likely to sue in response to major environmental disasters that receive prominent media coverage and public attention, such as oil spills. Such suits attract positive media attention and thus can be politically worthwhile for state actors to undertake. Yet in other cases, when media salience is low and the prospect of political gain is likewise less significant, state actors likely have less incentive to sue. In such cases, the ability of private plaintiffs to bring qui tam suits in the name of the government could prove helpful. Private plaintiffs are motivated by the prospect of financial rather than political gain; allowing private suits can therefore increase both the number and variety of cases being litigated.

3. Cy Pres

Under the cy pres doctrine (meaning "as close as possible"), courts can offer flexible modification to the remedy sought by class action plaintiffs.[247] Originating in the law of charitable trusts, the cy pres doctrine enabled the distribution of charitable gifts when the original recipient named by the settlor was no longer available.[248] In such cases, the doctrine allowed courts to order that the money be redirected to another charitable trust with a similar

[246] *See, e.g.*, Maine v. M/V Tamano, 357 F. Supp. 1097, 1099–102 (D. Me. 1973) (recognizing that a state may sue for natural resources damages in parens patriae but dismissing Maine's effort to do so here); Md. Dep't of Nat. Res. v. Amerada Hess Corp., 350 F. Supp. 1060, 1066–67 (D. Md. 1972) (holding that, because of the state's technical ownership of the state's waters, it may sue on behalf of the public); California v. S.S. Bournemouth, 307 F. Supp. 922, 929 (C.D. Cal. 1969) ("[G]overnmental agencies charged with protecting the public interest have a right of recourse in rem . . . ."); *see also* Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 670–72 (1st Cir. 1980) (upholding a statute allowing a state agency to recover).

[247] Lane v. Facebook, Inc., 696 F.3d 811, 821 (9th Cir. 2012) (approving a settlement agreement, including a cy pres award, even though the representative of the defendant company was in charge of cy pres distribution).

[248] *Id.*

purpose.[249] Over time, the doctrine has also been applied to the distribution of class action settlement awards.[250] When distribution is impracticable or inappropriate, as in cases where the class is too large or individual harms are too small, courts apply the cy pres doctrine as an alternative to effectively sanction defendant-wrongdoers.[251] Typically in those cases, cy pres is used to direct funds to a charitable purpose closely aligned with the issue of the class action.[252]

Courts have developed guidelines and standards for the use of cy pres in class action settlements.[253] These guidelines require that a cy pres recipient be closely aligned with the interests of the class and that a cy pres award be distributed in a manner consistent with the purposes of the underlying litigation.[254] Despite these safeguards, the use of cy pres in class actions remains a contentious issue. Proponents argue that cy pres allows for the distribution of funds to worthwhile causes that would otherwise go unused,[255] while opponents contend that it undermines the integrity of class action lawsuits and fails to provide meaningful relief to class members.[256]

In the context of environmental litigation, courts have used cy pres to provide relief to affected communities or to fund environmental conservation

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[249] Roger G. Sisson, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 641–46 (1988) (summarizing the development of the cy pres doctrine in the United States).

[250] Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 100 (2014) ("Cy pres remedies are an increasingly common feature in class action settlements.").

[251] Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 634 (2010).

[252] *Id.* ("In its current form as used in the federal courts, cy pres relief in class actions has involved the donation of a portion of the settlement or award fund to charitable uses which are in some loose manner connected to the substance of the case."). The use of cy pres as a class action remedy was pioneered in a 1972 student note. *See* Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 452 (1972).

[253] *See, e.g.*, *In re* Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 947 (9th Cir. 2011) ("[C]ourts . . . must be particularly vigilant . . . for more subtle signs that class counsel have allowed pursuit of their own self-interests . . . to infect the negotiations.").

[254] *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173, 178 (3d Cir. 2013) ("*Cy pres* distributions . . . present a potential conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class. . . . 'Arrangements such as [these] . . . decouple class counsel's financial incentives from those of the class . . . .'" (alteration in original) (quoting Int'l Precious Metals Corp. v. Waters, 530 U.S. 1223, 1224 (2000) (O'Connor, J., statement respecting denial of certiorari))).

[255] KEVIN M. LEWIS, CONG. RSCH. SERV., LSB10131, UPDATE: IS *CY PRES* A-OK? SUPREME COURT TO CONSIDER WHEN CLASS ACTION SETTLEMENTS CAN PAY A CHARITY INSTEAD OF CLASS MEMBERS 2 (last updated Mar. 20, 2019).

[256] *Id.* at 2–3.

and restoration efforts.[257] In these cases, courts grant cy pres awards to mitigate environmental harm caused by the defendant's actions, promote sustainable development, or support environmental organizations.[258] Using cy pres in environmental litigation is often seen as a creative solution to the challenges of quantifying and compensating for environmental harm.[259] However, the use of cy pres in environmental cases is often criticized—particularly when the cy pres recipients are not directly related to the harm suffered by the affected communities or when the cy pres award does not provide meaningful relief to those communities.[260] To address these concerns, courts have imposed stringent standards for the use of cy pres in environmental litigation, including requirements that the cy pres recipient be closely aligned with the interests of the affected communities and that the cy pres award be used to directly address the environmental harm caused by the defendant's actions.[261]

Our analysis in Part II supports the expansion of cy pres doctrine. Cy pres awards are ideal for encouraging private law actions that promote broad social interests. In many cases, harm is spread over many victims, making regular class action awards unfeasible. This can hinder effective legal action. For instance, in climate litigation, harms are often spread over the entire population, even affecting future generations.[262] In such cases, class actions may fail if the class cannot demonstrate a common harm unique to the class. Cy pres can overcome these difficulties. Using cy pres, private plaintiffs can sue on behalf of the public interest, seeking a remedy that will

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[257] *See In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., No. 2671 (JSC) (N.D. Cal. May 16, 2022) (order approving class plaintiffs' proposal to distribute remaining settlement funds for environmental remediation); Martina Barash, *VW Leftover Settlement Funds Released for Environmental Projects*, BLOOMBERG L. (May 17, 2022, 4:00 PM), https://news.bloomberglaw.com/product-liability-and-toxics-law/vw-leftover-settlement-funds-released-for-environment-projects [https://perma.cc/BV3P-SFLK] ("Funds . . . from Volkswagen AG's settlement of claims of emissions cheating in Audi diesel vehicles . . . may now be distributed to designated environmental mitigation projects and recipients . . . .").

[258] *See* Catharine Skipp, *$1 Million Cy Pres Award to Miami Law Will Support Environmental Law Efforts*, UNIV. OF MIAMI SCH. OF L. (Oct. 26, 2022), https://news.miami.edu/law/stories/2022/10/one-million-cy-pres-award.html [https://perma.cc/25CD-2GAU] ("The School of Law will use the funds to support the work of the Environmental Justice Clinic and the Environmental Law Program.").

[259] *See supra* note 257 and accompanying text.

[260] *See generally* Wasserman, *supra* note 250, at 101 ("In particular, the recipient charities often fail to serve the interests of the class or to address the concerns raised in their lawsuit.").

[261] Good v. W. Va.-Am. Water Co., No. 14-1374, 2021 WL 6197053, at *8 (S.D.W. Va. Dec. 30, 2021) ("While acknowledging the worthy and exceptional role of the community support groups recommended by the Parties, the court recognized that it was constrained to limit cy pres distribution to those organizations whose mission and interests reasonably approximate those being pursued by the Class in this case.").

[262] Jeffrey M. Gaba, *Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Virtue*, 24 COLUM. J. ENV'T L. 249, 251 (1999).

go to institutions that generally promote the relevant social interests related to the claim.

This approach dovetails with recent proposals by Professors Omri Ben-Shahar and Ariel Porat. Ben-Shahar and Porat powerfully argue that in cases of mass torts, direct compensation to victims may be less important, and that, in appropriate circumstances, it might be better to order wrongdoers to expend resources on restoring the underlying interest or goal affected by their illicit behavior.[263] Ben-Shahar and Porat use the Volkswagen Dieselgate scandal as an illustration. They argue that instead of forcing Volkswagen to pay relatively small compensation amounts to vehicle buyers, everyone (including the buyers) would fare better if a court ordered Volkswagen to invest the *total* amount owed in "environmental improvements offsetting the emissions that its breach caused."[264] We offer cy pres as a doctrinal hook for a similar proposal and argue that an expansive version of the cy pres remedy would endow courts with the discretion to direct the money to related environmental and social causes. Concretely, courts would have the power to order that money be allocated to other environmental goals that may not have been directly affected by the wrongdoing. Under this expansive vision, the court could have allocated funds collected from Volkswagen to saving endangered species, establishing new parks, and even researching new green technologies.

This perspective on cy pres also responds to current criticisms arguing in favor of limiting this practice. Indeed, it may be the case that cy pres awards do not provide optimal levels of compensation to the specific plaintiffs who brought the claim. But under the perspective we offer here, this possibility is not necessarily a problem and should not be considered a strong argument for limiting the use of cy pres awards. Rather, because private law claims are a crucial legal means for promoting the social interest, it is appropriate that cy pres remedies will reflect this logic and enable recourse at the societal level. This recourse will allow more types of suits to come forward, deter more wrongdoers, incentivize more representative plaintiffs to bring legal action, and provide much-needed financial resources to institutions working to promote important social goals.

B. Relaxing Doctrinal Requirements

Historically, private law doctrine has developed in the context of private disputes between individuals, rather than in that of broader social issues or

[263] Omri Ben-Shahar & Ariel Porat, *The Restoration Remedy in Private Law*, 118 COLUM. L. REV. 1901, 1904 (2018).

[264] *Id.*

public policy goals.[265] For example, contract law provides a framework for enforcing promises made between private parties and for addressing cases in which one party breaches their promise to the other. Tort law affords a mechanism for individuals to seek compensation for harms suffered at the hands of others in cases of accident or malpractice.[266] The focus of these doctrines has been on remedying *individual* wrongs, rather than addressing larger social issues.[267] Some doctrinal elements within private law claims reflect these historical origins. Thus, to establish liability, current doctrine emphasizes requirements such as harm to a particular individual, a duty of care toward that individual, and a causal connection between wrongful conduct and harm.[268]

In this Section, we argue that the time has come to modify some of these basic structures of private law, in light of historical developments and the more central role private law now plays in regulating broad social issues. Thus, if private law can indeed be used—and should be used more broadly—to promote social goals, it is important to consider whether harm *to an individual* must remain a prerequisite for suing. In principle, the harm requirement could be modified to include broader social harms of a more dispersed nature. Such modified private law claims, more attuned to the types of problems now facing private law litigation, can prove more effective in facing contemporary challenges, while also benefiting from the structural advantages of private law as described above. Importantly, our proposals in this Section are by no means completely foreign to contemporary private law doctrine. Instead, we merely call to reinforce trends that have already been taking place for decades.

1. Broad Social Harms

The existence of harm to the plaintiff is a central requirement for actionability in private tort law claims.[269] This means that wrongful, risky,

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[265] *See, e.g.*, David Ibbetson, *How the Romans Did for Us: Ancient Roots of the Tort of Negligence*, 26 U.N.S.W. L.J. 475, 478, 487–88 (2003) (tracing the history of the modern private civil suit back to the common law claim of trespass in thirteenth-century England).

[266] John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 519 (2003).

[267] *Id.*

[268] *See* Drum v. Miller, 47 S.E. 421, 423 (N.C. 1904) (explaining the centrality of these traditional requirements to tort doctrine); Galveston, H. & S.A. Ry. Co. v. Hennigan, 76 S.W. 452, 453 (Tex. Civ. App. 1903) (same).

[269] *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 198 (1992) ("At the core of tort law is a certain practice of holding people liable for . . . wrongful losses . . . ."); Kenneth S. Abraham, *What Is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172, 177 (1992) ("[T]ort liability is imposed only when the defendant's actions have caused physical harm to the plaintiff . . . ."); Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 964 (2003) ("In tort, there can be no damages if no one has been harmed . . . ."); Goldberg, *supra* note 266, at 516 ("[T]ort . . . provide[s] redress for[] injurious wrongs . . . .").

or potentially harmful conduct, by itself, is often not actionable. Similarly, it is more difficult to recover for social harms through private law action. As Professors David Hunter and James Salzman explain, private tort law doctrines usually focus on "relational" rather than general harms.[270] That is, private tort law claims often require a showing of "specific parties and specific harms," meaning that a harm caused to "the world at large" is less often recoverable.[271]

This modality of harm is appropriate for private law as a system designed to resolve personal disputes between individuals—if the plaintiff suffered no direct harm, then they have no real quarrel with the defendant, rendering any claim unnecessary and perhaps even spiteful.[272] Alternatively, if the harm is suffered by the public, then public law, rather than private law, is the appropriate legal venue.[273]

Yet from the perspective we advocate here, this understanding of harm seems less justified. If the goal is to use private law to promote socially desirable policies and tackle broad social problems—and not only solve private disputes—then the insistence on harm to a specific individual is unnecessarily cumbersome. If public law and regulation offer incomplete solutions, then private law should offer a useful complement, and there is no reason to artificially exclude it from dealing with issues of public policy.

Indeed, the harm requirement constitutes a significant limitation on the ability of private actors to sue in torts. Professors Ronen Perry and Yehuda Adar argue for the abolition of the harm requirement, suggesting that tort actions should be predicated on risk alone. In their view, any person who was exposed to a risk would have the right to sue the risk causer even if the risk did not materialize and no harm was suffered.[274] We believe that doing away with the harm requirement is too extreme. Harm serves as an important screening device in private law, and its abolition may lead to a flood of suits in courts, many of which could be quite tenuous. We acknowledge that the harm requirement, as it exists today, stands as a bar to meritorious suits. Therefore, we propose modifying private law doctrines to give stronger recognition to *social* and *public* harms, thus continuing the relaxation of the strict requirements of *individual* harm.

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[270] David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. PA. L. REV. 1741, 1747 (2007).

[271] *Id.*

[272] *Drum*, 47 S.E. at 423 (highlighting the connection between tort and harm).

[273] *See* Allen M. Linden, *Public Law and Private Law: The Frontier from the Perspective of a Tort Lawyer*, 17 LES CAHIERS DE DROIT 831, 832–33 (1976).

[274] Yehuda Adar & Ronen Perry, *Negligence Without Harm*, 111 GEO. L.J. 187 (2022).

Our proposal can prove especially helpful in the context of climate litigation. The harms of climate change are broad social harms that are not suffered solely by any specific individual or a group.[275] We argue that such harms should be actionable. Moreover, we suggest that our approach circumvents significant conceptual difficulties plaguing other reform proposals. For instance, scholars have long debated the possibility of recognizing the rights of nature[276] or the rights of future generations[277] as conceptual bases for a legal response to the climate crisis.[278] Without taking a position in those debates, we can recognize that such rights involve considerable conceptual hurdles—the concept of the rights of a mountain, or a river, or a person not yet born all seem to fundamentally challenge our existing conception of rights.[279] Our proposal, by comparison, is much more modest. It does not involve recognizing the rights of inanimate objects or unborn individuals; it simply makes the public interest actionable in private law through aggregated claims brought by private plaintiffs.

2. Inchoate Harms

In certain contexts, harm materializes right away. Immediate harm typically arises in the case of automobile accidents, fires, or massive oil spills. In these instances, it is sometimes difficult to assess the full magnitude of the harm, but it is certain that some level of harm has occurred, and legal action can be initiated. In other cases, however, harm accumulates over time through a process of accretion. Examples include harm from asbestos and smoking. In both contexts, the exposure to carcinogenic substances does not result in immediate harm. It is the continuous exposure over long periods of time that inflicts harms on individuals. By the time the harm became evident and lawsuits could be filed, it was too late for many victims: the damage awards were paid to surviving family members.[280]

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[275] *Cf.* Hunter & Salzman, *supra* note 270, at 1751 (describing potential plaintiffs in climate change tort actions).

[276] Raymond J. Kopp, *Why Existence Value Should Be Used in Cost–Benefit Analysis*, 11 J. POL'Y ANALYSIS & MGMT. 123, 124–25 (1992).

[277] Gaba, *supra* note 262, at 251.

[278] *See generally* Yael R. Lifshitz, Maytal Gilboa & Yotam Kaplan, *The Future of Property*, 44 CARDOZO L. REV. 1443 (2023) (arguing that property law should change to take account of intertemporal conflicts of interest).

[279] *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28 (1913) (explaining that the concept of right requires a right holder and a duty holder).

[280] *See* Edward F. Sherman, *The Evolution of Asbestos Litigation*, 88 TUL. L. REV. 1021, 1022–25 (2014); Victor E. Schwartz, *What Is New in Tobacco Liability Litigation?*, 17 AM. J. TRIAL ADVOC. 687, 688 (1994).

The tragic examples of exposure to asbestos and smoking represent the challenge of inchoate harms—harms that occur over time and that are initially too small to support a lawsuit. A more contemporary example is nanoplastics: tiny pieces of plastic debris now found in water, soil, and even the air.[281] Medical studies increasingly report significant levels of nanoplastics in the human body.[282] Based on current knowledge, doctors and scientists still do not know whether nanoplastics pose a health risk to humans.[283] There is no guarantee, however, that if the trend continues, we can remain confident in the population's uncompromised safety.[284] Nor is it possible to predict whether future studies will reveal risks associated with nanoplastics of which we are currently unaware.

We therefore suggest a new approach to inchoate harms that bolsters the ability of private law to deal with such challenges. Our proposal balances the potential risk to the public with the traditional structure of private law. We maintain that inchoate harms should be actionable, but in a limited sense. Inchoate harms should not entitle victims to a remedy for future harms that have not yet occurred; at the same time, victims should have the right to recover the cost of medical tests they undergo to assess the risk posed, for instance, by the growing levels of nanoplastics in their bodies. Such sums would be actionable only if plaintiffs can demonstrate that the tests they undergo are necessary to further current scientific knowledge. This threshold requirement also limits the potential number of plaintiffs. These private lawsuits would serve as a monitoring device that would provide information to litigants, courts, and even regulators about the magnitude of risk associated with nanoplastics. Regulatory agencies are likely to overlook inchoate harms due to lack of resources, but private actors, on account of their heterogeneity, can be trusted to address risks that fly under the regulator's radar.

The private lawsuits we envision would need to overcome the dual challenges of causation and cost-effectiveness. Of the two, causation is an especially meaningful obstacle. Given the large number of manufacturers of plastic products, plaintiffs will find it difficult to identify a specific defendant. In this case, even theories of market share liability that apportion

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[281] *See generally* Marta Llorca & Marinella Farré, *Current Insights into Potential Effects of Micro-Nanoplastics on Human Health by In-Vitro Tests*, FRONTIERS TOXICOLOGY, Sept. 2021, at 1 (describing research on nanoplastics).

[282] *Id.*

[283] *See generally* Christina J. Thiele & Malcolm D. Hudson, *Uncertainty About the Risks Associated with Microplastics Among Lay and Topic-Experienced Respondents*, SCI. REPS., Mar. 2021, at 1 (documenting concerns and uncertainty regarding the detrimental effects of nanoplastics).

[284] *Id.*

responsibility based on a manufacturer's share of the market may not work.[285] Accordingly, the right to sue should initially be reserved for individuals who were disproportionately exposed to the products of a particular manufacturer. As for the problem of cost-effectiveness, our proposed modifications to the class action mechanism will help plaintiffs overcome the challenge. The more flexible structure of class actions that we advocate for above will allow affected individuals to sue collectively and appoint a single representative to manage the case for all of them.

3. Causal Ambiguity

Private law doctrines typically include an element of causation—connecting a specific harm to the defendant's misconduct. The requirement is typically operationalized using a counterfactual "but-for" causation test, asking whether the harm to the plaintiff would have occurred "but-for" the defendant's misconduct. Courts have gradually relaxed the requirement of causation in multiple ways over the past decades.

The famous case *Sindell v. Abbott Laboratories* illustrates this trend.[286] In this landmark case, plaintiffs sued a number of pharmaceutical companies over the production and marketing of the drug diethylstilbestrol (DES).[287] DES was used experimentally on pregnant women in an attempt to reduce the risk of miscarriage.[288] Decades later, the daughters of women who used DES during pregnancy were diagnosed with adenocarcinoma, a particularly violent cancer. The plaintiffs proved both harm and wrongdoing by multiple DES manufacturers.[289] However, they failed to satisfy the strict requirements of causation. Because many years had passed between the time DES was marketed and the time its harms were discovered, and because the drug was sold generically, plaintiffs were unable to show which specific manufacturer was responsible for their illness.[290] In such a case, both harm and wrongful conduct are easy enough to prove, but it is difficult to connect specific harms to specific wrongs in the manner necessary under the requirements of causation.[291] This loophole allows injurers to unjustly escape liability.

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[285] *See generally* Sindell v. Abbott Lab'ys, 607 P.2d 924 (Cal. 1980) (permitting apportionment of liability against a set of defendants according to their respective market shares of sales of a harmful product).

[286] *See id.*

[287] *Id.* at 925.

[288] *Id.*

[289] *Id.*

[290] *Id.* at 926.

[291] *See* Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997) (denying compensation to plaintiffs in a mass tort case in which multiple children suffered limb deformities).

To avoid this unjust outcome, the court in *Sindell* developed a new doctrinal approach to causation in such cases: "market share liability."[292] Under this doctrine, each manufacturer is held liable for a portion of the harm based on its market share of the harmful product, even though no plaintiff can show that a specific manufacturer caused their harm in a "but-for" sense.[293] The market share liability doctrine is a key example of a new rule relaxing and modifying the traditional requirement of causation, allowing private law to address broad social harms that otherwise would go unremedied.

We therefore advocate a position supporting and further expanding rules like the one set forth in *Sindell.* Following *Sindell*, scholars have proposed multiple ways to relax or modify the causation requirement. Courts have adopted some of these proposals,[294] but broader adoption would further improve the overall judicial approach to causation. Defendants still often unjustly escape liability based on strict understanding of causation arguments. Recently, the city of Hoboken, New Jersey initiated a lawsuit against a consortium of oil and gas companies, including Exxon Mobil Corp.[295] The city demanded compensation for harms of rising sea levels caused by the consortium. The New Jersey District Court explained the issue of causation, declaring that "[a]lthough it is more than plausible that fossil

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[292] Robert A. Kors, Comment, *Refining Market Share Liability:* Sindell v. Abbott Laboratories, 33 STAN. L. REV. 937, 938–39 (1981) (discussing *Sindell* and the fundamental principles of the market share liability doctrine); ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 70–73, 193–95 (2001) (claiming that market share liability is a second-best solution because it both over- and undercompensates some plaintiffs and suggesting that courts should instead apply what they call the "evidential damage doctrine," which enables each plaintiff to sue for the damage inflicted to their autonomy as a result of being deprived of the information required to prove their suit or make an informed choice regarding their legal rights); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 867 (1984) (arguing that in mass exposure cases, courts should award each victim compensation in proportion to the likelihood that her injury was caused by the defendant's wrongful exposure).

[293] Kors, *supra* note 292, at 938–39.

[294] PORAT & STEIN, *supra* note 292, at 70–73, 181–82, 193–95 (studying the possibility of compensating tort victims who are unable to prove a causal link between their injury and a single injurer); Richard Delgado, *Beyond* Sindell*: Relaxation of Cause-In-Fact Rules for Indeterminate Plaintiffs*, 70 CALIF. L. REV. 881, 883–84 (1982) (suggesting relaxation of the requirement of causation in cases of indeterminate tort victims to permit recovery); Mario J. Rizzo & Frank S. Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L. REV. 1399, 1400 (1980) (developing the concept of relative causation based on probabilistic tools to discuss issues of liability apportionment in cases of joint tortfeasors). It should be noted that the probabilistic nature of this doctrine has been implemented by some courts in ways completely unrelated to ambiguity in causation. For example, in *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989), one of *Sindell*'s subsequent applications, the court decided that liability would be apportioned according to the amount of risk of injury. Thus, a defendant should not be absolved of liability even if they can prove they did not cause a particular plaintiff's injury.

[295] City of Hoboken v. Exxon Mobil Corp., 558 F. Supp. 3d 191, 196 (D.N.J. 2021), *aff'd sub nom.* City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022).

fuels . . . led to the effects of global warming that Hoboken is now facing, this does not amount to but-for causation."[296] This approach employs a strict understanding of causation. According to this view, it is insufficient to show that the defendant's activity was *generally* harmful; rather, the plaintiff must show a connection between specific actions and specific harms. These stringent requirements effectively bar successful environmental litigation, posing "daunting evidentiary problems for anyone who undertakes to prove . . . the degree to which the actions of any individual oil company, any individual chemical company, or the collective action of these corporations contribute . . . to global warming."[297] We suggest that such versions of the causation test are outdated and should be relaxed in favor of a more holistic view, recognizing the actionability of generally harmful conduct.

IV. THE INTERPLAY OF PRIVATE LAW, REGULATION, AND LEGISLATION

Some fear that using private litigation to promote social goals will entirely crowd out regulation.[298] This claim stems from the assumption that if the use of private law expands, then the use of regulation will necessarily shrink. We strongly disagree with this concern. First, there is no reason to assume that regulation and the public law machinery are inherently superior to private law. Per our discussion in Parts I and II, both presuppositions are contestable. We demonstrated that private law has many inherent advantages over regulation. Second, there is no reason to assume that private law and regulation are substitutes, and that the use of one would depress demand for the other. Rather, regulation and private law should be thought of as complements. Combining regulation and private law will unlock important synergies that can enhance society's ability to protect important social goals.

The effect of private law on the motivation of regulators is ultimately an empirical issue—one that has not been sufficiently studied. From a purely theoretical standpoint, the rise of private litigation might well have the opposite effect on regulators: it may spur them into action and provide them with extra motivation (and information) to perform their responsibilities faithfully. Regulatory agencies can be likened to monopolies. If we were to entrust enforcement to regulatory agencies alone, all the pitfalls associated

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[296] *Id.* at 196–97, 206.

[297] Comer v. Nationwide Mut. Ins. Co., No. 05-436-RHW, 2006 WL 1066645, at *4 (S.D. Miss. Feb. 23, 2006).

[298] *See* Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 501–02, 536–37, 541 (2019) (arguing that the notion of "information fiduciaries"—a private law solution carried out by big digital companies—cannibalizes regulatory efforts and reforms and represents "a premature abandonment of more robust visions of public regulation").

with market exclusivity would emerge. Private lawsuits provide competition for regulation. Private litigants, for all the reasons we detailed, compete with regulatory agencies over the promotion of the social good. Competition typically motivates actors, countering the claim that the rise of private law would cause regulators to become inert.

Our proposal, however, does *not* focus on apportioning credit between regulators and private actors. Rather, it is designed to secure a better future. The examination should thus focus on the *combined* effect of regulation and private actions.[299] This paradigm means that, in principle, if private actions slow regulatory action but are indeed more effective in promoting social goals, they should be encouraged if the *net effect* is positive. This takes us back to our analysis in Part II. The rise of private law is not slowing agencies down. Rather, regulatory agencies are held back by the current political environment and the resulting stalemate that afflicts regulatory innovation.

Indeed, if we keep private litigants at bay only to protect the power of regulatory agencies, society loses in all dimensions. Presently, regulatory agencies cannot perform at their full potential, even if they wanted to. Private law actions are necessary to fill the gap.[300] Without them, it may be too late for regulatory agencies to spring into action at some unknown point in the future. Irreversible harms are likely to occur before then.

Furthermore, under our view, which maintains that regulation and private law are complements, private law actions are not a threat but a welcome development.[301] Not only can private law actions protect important social values until the political climate changes, but they can also energize and catalyze regulatory authorities now.[302] Private lawsuits map challenges for regulatory agencies and do much of the footwork for them.[303] Successful private actions mark the frontier of legal feasibility for regulatory agencies, enabling the latter to pick up the most important and promising legal challenges brought by private litigants and promote them at a much lower

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[299] *See, e.g.*, Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL. POL'Y & L. 769, 798 (1999) (describing litigation as "a component of a broader, comprehensive approach to tobacco control policy making" and "a complement to the more traditional apparatus of policy making and implementation").

[300] *Id.* at 797–98.

[301] *Id.* at 788, 793–94, 798.

[302] *Id.*; *see also* Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 897–99, 936 (1998) (studying how anti-tobacco litigation helped shape government tobacco policy).

[303] David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 619 (2013) ("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.").

cost and with minimal risk.[304] In a world in which administrative agencies struggle with serious budget constraints, such cost savings are important. Therefore, private law actions blaze the trail and clear the path for administrative agencies.

Scholars have dubbed this dynamic "regulation through litigation."[305] This strategy was used in lawsuits that targeted "smoking-related illness, gun violence, and obesity."[306] As Professor Timothy Lytton explained, "Lawsuits can frame issues in new ways, give them greater prominence on the agendas of regulatory institutions, uncover policy-relevant information, and mobilize reform advocates."[307] A similar dynamic may be forming in the context of cryptocurrencies. Regulators have been slow to respond to the various challenges presented by the emergence of cryptocurrencies; private actions have been quicker to come, and their presence has raised public awareness on the issue, which in turn puts pressure on regulators to act.[308]

Admittedly, the increasing use of private law actions poses a threat in the form of excessive litigation.[309] As is always the case, even positive developments are good only to an extent. Some of the advantages of private litigation, especially access to the courts, can become a challenge if large numbers of lawsuits are filed.[310] We advance a three-pronged response to this concern. First, judges typically exercise self-restraint.[311] They do not rush to make sweeping changes in the law.[312] They operate in an incremental fashion.[313] Drastic legal changes that might flood the courts with new cases are therefore unlikely. Judges are also the first to be affected by a dramatic increase in litigation. Consequently, while implementation of our proposals will lead to an increase in litigation, it will not paralyze the courts. Second, if our proposals generate excessive litigation, legislators can always step in and reverse the trend. It did so with punitive damages. State legislators,

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304 Mather, *supra* note 302, at 897–99.

305 Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1837 (2008).

306 *Id.*

307 *Id.*

308 Moin A. Yahya & Nicole Pecharsky, *Crypto-Litigation: An Empirical Overview for 2020-Present*, 25 SMU SCI. & TECH. L. REV. 195, 195–99 (2022); Douglas J. Cumming, Sofia Johan & Anshum Pant, *Regulation of the Crypto-Economy: Managing Risks, Challenges, and Regulatory Uncertainty*, J. RISK & FIN. MGMT., Sept. 2019, at 1, 2.

309 Shavell, *supra* note 42, at 575–76.

310 *Id.* at 584.

311 Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 520–21 (2012).

312 *Id.*; SUNSTEIN, *supra* note 107, at 3–5.

313 SUNSTEIN, *supra* note 107, at 3–5.

unhappy with the punitive damages amounts awarded by the courts, imposed caps on the amounts of such damages.[314] The legislature can always intervene and enact laws and regulations to rein in litigation. Third, even if our proposals cause an overall increase in litigation, this is not necessarily a bad outcome. Contrary to common myth, courts are far from overwhelmed by the amount of litigation that reaches trial. In fact, many scholars lament declining trial rates.[315]

Scholars have also argued "that litigation can be inefficient and ineffective."[316] We do not dispute this observation. That said, regulation can be equally inefficient and ineffective. For example, consider the 2012 London Interbank Offered Rate (LIBOR) scandal, which involved all of the major banks. For years, the major banks colluded to keep the LIBOR artificially low or high based on their own interests, making astronomical amounts of money in the process. According to commentators, the fines levied on the banks by regulators were ineffective and, in fact, it was the subsequent private actions that forced the banks to change their ways.[317]

This point brings us full circle. We started the discussion by explaining how private law can be used to address regulatory imperfections. Of course, there is a two-way street between private law and regulation. Private law can promote social causes when regulators fail to do so adequately. At the same time, regulation and legislation can set new bounds for private law. It is through this dynamic interplay that we hope to shift the frontier outwards and create a richer menu of legal options.[318]

CONCLUSION

In this Article, we explored a surprising dynamic in the legal world: the rise of private law in the age of regulation. When citizens confront new challenges and risks, they typically rely on the government for help. The government possesses powers that far exceed those of private parties. Governments have abundant resources at their disposal and, in theory,

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[314] Mark K. Osbeck, *Damage Caps: Recent Trends in American Tort Law*, *in* 27 COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS 375, 379 (2005) (pointing out that some states began to scrutinize and impose caps on punitive damages in the 1980s).

[315] *See, e.g.*, Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 785 (2004).

[316] Lytton, *supra* note 305, at 1837 ("[C]ommentators have cautioned that regulation through litigation can be inefficient and ineffective.").

[317] *See, e.g.*, Christopher Matthews, *LIBOR Scandal: The Crime of the Century?*, TIME (July 9, 2012), https://business.time.com/2012/07/09/libor-scandal-the-crime-of-the-century/ [https://perma.cc/Y393-XXK9].

[318] *Cf., e.g.*, Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2053 (2000) (considering the interplay between regulation and tort law).

superior information relative to private plaintiffs. In light of the relative advantages of the government, one would expect private law to steadily decline in its importance, employed only to resolve small-scale individual conflicts. Yet, in recent years, the exact opposite has happened. Private law is increasingly used to address broad social challenges that the government continually fails to tackle. Private law's resurgence is not mere happenstance. Comprehensive institutional analysis reveals that private law has many underappreciated advantages that allow it to outpace regulation in many critical contexts. Private law avoids multiple political pitfalls that afflict regulation. It is also more democratic in that it gives individuals the power to become agents of social change. Importantly, private law's reliance on the courts allows for experimentation that often informs regulation.

After explicating the virtues of private law and demonstrating them in myriad contexts ranging from health risks to environmental harms, we proposed various changes to extant law with the goal of unlocking the full potential of private law to serve social causes. Private law and private litigation have an indispensable role in securing a better future for our society. They should not be thought of as a substitute for regulation, but rather as a critical complement, without which our future will solely depend on the political system and its many imperfections.