PUBLIC REGULATION OF PRIVATE ENFORCEMENT: THE CASE FOR EXPANDING THE ROLE OF ADMINISTRATIVE AGENCIES

Matthew C. Stephenson[*]

[*] Assistant Professor, Harvard Law School. Email: mstephen@law.harvard.edu. Many thanks to Rachel Barkow, Lucian Bebchuk, Einer Elhauge, Bill Eskridge, Dick Fallon, Katherine Franke, Danielle Gray, Dan Ho, Darrin Hurwitz, Howell Jackson, Matt Jones, Elena Kagan, Louis Kaplow, Larry Lee, Daryl Levinson, Debra Livingston, Dan Meltzer, Martha Minow, John Pfaff, Matthew Price, Ricky Revesz, B.J. Sanford, Fred Schauer, Shirin Sinnar, Bill Stuntz, Cass Sunstein, Larry Tribe, and Judge Stephen Williams, as well as participants in the faculty workshops at Chicago, Columbia, Harvard, NYU, Stanford, and Yale law schools, for extremely helpful comments on earlier drafts.

INTRODUCTION

THE judicial and scholarly discussion concerning private rights of action to enforce federal statutes has focused almost exclusively on Congress and the federal courts. Most of this discussion has centered on two issues: First, when and how Congress should exercise its power to authorize private actions to enforce the substantive provisions of federal statutes; and second, under what conditions, if any, courts should be willing to imply a private right of action under a federal statute when Congress has not explicitly provided for one. With respect to each of these questions, lawyers, judges, and legal scholars have debated the comparative institutional competence of and constitutional limits on Congress and the judiciary. Surprisingly little attention, however, has been paid to the appropriate role of the executive branch in determining the availability and scope of private actions to enforce federal law.

This neglect of the executive is an important oversight and one that this Article seeks to correct.[1] It would seem self-evident that executive branch agencies have both a particular expertise and a particular interest in the impact that private actions have on the administration of public laws. Private enforcement suits are in many ways more closely related to the executive's prerogatives and duties than to those of either Congress or the judiciary. Indeed, the common characterization of citizen plaintiffs in enforcement suits as "private attorneys general"[2] suggests the quintessentially executive function that such actions often fulfill. Even statutory rights of action that are closely associated with private plaintiffs' individual economic interests—such as those available under the antitrust or securities laws—are often justified by their importance in advancing the public interest by deterring violations of federal law.[3]

I argue that the executive branch should have substantially more control over the existence and scope of private enforcement actions, instead of being relegated to the sidelines while Congress and the judiciary determine whether and under what conditions private parties may sue to enforce the statutes that the executive branch is charged with administering. Though Congress does and should retain ultimate authority to mandate or preclude private rights of action, Congress's best course of action often will be delegation to the appropriate executive department or agency of the power to create and delimit private rights of action.

Furthermore, when a court confronts statutory language that is ambiguous as to whether Congress intended to authorize a private cause of action,[4] the court should presume that Congress intended

[1] There are some important exceptions to the general tendency to ignore the role of the executive in shaping private enforcement schemes. See infra note 100.

[2] This now-common term was first used (ungrammatically) by Judge Jerome Frank in *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) ("[T]here is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.").

[3] See infra notes 12–19, 28–30 and accompanying text.

[4] The notion of "congressional intent," though prevalent in the commentary and case law relating both to inferred congressional delegation to administrative agencies, see Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–44 (1984), and to implied rights of action under federal statutes, see Alexander v. Sandoval, 532 U.S. 275, 286–93 (2001), is deeply problematic. Many scholars have gone so far as to

the responsible executive agency to decide whether such an action should exist and to determine the form it should take. That is, courts should follow the approach taken in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* in implied right of action cases, treating ambiguous statutory language as an implicit delegation to administrative agencies of the authority to interpret that language and thereby determine what form of private action, if any, would best advance the statute's purposes. This proposal, though grounded in well-established administrative law principles, rejects the Supreme Court's apparent preference for a clear statement rule under which ambiguous statutory language is presumed to reflect a congressional rejection of private enforcement.[5]

Before proceeding, I note two important limitations on the scope of the prodelegation argument I advance in this Article. First, my focus is on the role of private lawsuits in deterring, detecting, and correcting socially harmful violations of the law, rather than on the private compensatory purpose that private rights of action also sometimes serve.[6] Although the private compensatory function and public law enforcement function of private lawsuits are often intertwined, this Article considers primarily the latter function, and the arguments developed here would not necessarily apply directly to

conclude that the notion of "intent," when applied to a collective decisionmaking body such as Congress, is incoherent and therefore unhelpful. See, e.g., Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 547–48 (1983); Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 870–72 (1930); Kenneth A. Shepsle, Congress Is a "They," Not an "It": Legislative Intent as Oxymoron, 12 Int'l Rev. L. & Econ. 239 (1992). Other scholars have undertaken creative salvage operations, reframing the concept of "legislative intent" in terms of "codify[ing] the agreement of the enacting coalition," McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80 Geo. L.J. 705, 706, 736 (1992), or "maximizing [the] political satisfaction" of the legislators' "enactable preferences," rather than discerning a single "intent" of the collective body, Einer Elhauge, Preference-Estimating Statutory Default Rules, 102 Colum. L. Rev. 2027, 2036, 2061–65 (2002). I do not take a position here on these conceptual debates. Rather, I continue to use the language of congressional intent in the same way that courts seem to use it, while at the same time acknowledging that the concept of congressional "intent" is itself a kind of legal fiction, especially when applied to ambiguous statutes. See also infra note 39 and accompanying text (noting that the rhetoric of discerning congressional intent often masks prudential judicial policy choices).

[5] See Brian D. Galle, Can Federal Agencies Authorize Private Suits Under Section 1983?, 69 Brook. L. Rev. 163, 165 (2003) (describing the Supreme Court's current approach to implied rights of action as a clear statement rule).

[6] See Pamela H. Bucy, Private Justice, 76 S. Cal. L. Rev. 1, 15–17 (2002).

private remedies with primarily compensatory purposes.[7] The second limitation on the scope of my analysis is that I focus exclusively on enforcement suits in which a private plaintiff sues to compel a private defendant to comply with the law, make restitution, and perhaps pay damages or civil fines.[8] "Agency-forcing suits"—actions brought against a government agency by a private plaintiff who claims that the agency is neglecting some nondiscretionary legal duty[9]—are not considered.[10]

The remainder of this Article proceeds as follows. Part I summarizes the current legal landscape, discussing the two main types of private enforcement rights—those that are expressly authorized by Congress and those that are inferred by courts—and the most salient debates surrounding each. Part II lays out the advantages and disadvantages of using private rights of action to enforce the substantive guarantees of federal law. This analysis makes clear that an assessment of the net social benefits of private enforcement entails complex, contingent, and context-specific policy judgments, and that principles of optimal institutional design therefore suggest conferring power on decisionmakers best able to make, and properly act on, such a complex assessment. In Part III, I propose that Congress, instead of making these difficult policy determinations itself, often should delegate the authority to create private rights of action to the executive agencies charged with administering the relevant statutes. Such delegation is normatively desirable both because the executive has superior information about the effects of private suits on overall enforcement strategy and because the executive can alter its policy more easily as information and circumstances change. I further demonstrate that such a delegation is consistent with the Constitution's separation of powers principles. Part

[7] Though one might initially suppose that most private rights of action are primarily or exclusively compensatory, in fact many of the most important private statutory rights of action have an unmistakable public, deterrence-oriented purpose. See infra notes 12–19, 28–30 and accompanying text.

[8] See Frank B. Cross, Rethinking Environmental Citizen Suits, 8 Temp. Envtl. L. & Tech. J. 55, 55 (1989).

[9] See id.

[10] For reasons that should be obvious, it would be problematic, if not absurd, to delegate agencies power over private agency-forcing suits. In practice, agency-forcing suits appear to be less important than enforcement suits. See id. at 56 (noting that the overwhelming majority of citizen-suit cases under environmental statutes are enforcement suits rather than agency-forcing suits).

IV takes this prodelegation argument one step further, contending that courts should be willing to infer from ambiguous statutory language an implicit congressional delegation to agencies of the discretion to determine the nature and scope of private enforcement rights under the federal statute in question. In other words, I argue that *Chevron* doctrine ought to apply to the availability of private enforcement rights to the same extent, and for the same reasons, that this presumption applies to other statutory interpretation questions.

I. PRIVATE ENFORCEMENT UNDER CURRENT LAW

A. Express Private Remedies and Citizen Suits

Many federal statutes expressly authorize private remedies for statutory violations. While the motivation for creating many of these rights of action has been compensatory,[11] private suits by the victims of statutory violations often serve an important public function as well, in that the threat of private enforcement can deter potential violators.[12] In fact, a number of important statutory private action provisions emphasize deterrence goals rather than simple compensation. Perhaps the clearest examples are the civil suit and treble damages provisions of the antitrust laws[13] and the Racketeer

[11] See Bucy, supra note 6, at 15–16 (claiming that many of the "victim" private actions available to plaintiffs directly injured by a defendant's conduct were created with "almost no mention of vindicating the public's rights, supplementing public regulatory efforts, or other similar expressions of serving the common good").

[12] See Gary S. Becker & George J. Stigler, Law Enforcement, Malfeasance, and Compensation of Enforcers, 3 J. Legal Stud. 1 (1974); Steven Shavell, The Fundamental Divergence between the Private and the Social Motive to Use the Legal System, 26 J. Legal Stud. 575 (1997).

[13] See 15 U.S.C. §§ 15, 26 (2000); see also Krent Roach & Michael J. Trebilcock, Private Enforcement of Competition Laws, 34 Osgoode Hall L.J. 461, 465 (1996) (observing that the lack of any congressional appropriations for government antitrust enforcement at the time of the Sherman Act's passage may be evidence that Congress initially viewed private actions as the primary device for deterring antitrust violations). The use of private enforcement in the antitrust context has been described as the archetype of the private attorney general model. See John C. Coffee, Jr., Rescuing the Private Attorney General: Why The Model Of The Lawyer As Bounty Hunter Is Not Working, 42 Md. L. Rev. 215, 216 (1983). But see Cross, supra note 8, at 71 (claiming that, because private antitrust plaintiffs can only sue to vindicate private harms, the Federal Trade Commission ("FTC") and Department of Justice ("DOJ") remain primarily responsible for vindicating the broader public purposes of the antitrust laws).

Influenced and Corrupt Organizations ("RICO") Act,[14] provisions intended "to serve the common good by deterring future violations through large judgments."[15] Similarly, the "citizen suit" clauses found in almost every major federal environmental statute passed since 1970[16] were explicitly justified as a mechanism that would deputize "private attorneys general" to assist the Environmental Protection Agency ("EPA") and other federal agencies in the enforcement of environmental regulations.[17] Yet another type of private enforcement action oriented toward public law enforcement is the so-called "qui tam" suit, in which a private party, known as a "relator," brings suit against a private defendant on behalf of the government to redress some public wrong.[18] Like the environ-

[14] 18 U.S.C.A. §§ 1961–1968 (West 2000 & Supp. 2004). Congress's stated purpose in including private civil remedies under RICO was to compensate for limited governmental resources by allowing "private attorneys general" to supplement governmental efforts. See Bucy, supra note 6, at 19–20.

[15] See Bucy, supra note 6, at 17.

[16] The modern environmental citizen suit was pioneered in the 1970 Clean Air Act. See 42 U.S.C. § 7604(a) (2000); Robert F. Blomquist, Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values, 22 Ga. L. Rev. 337, 366–67 (1988). The most widely-used of the modern American environmental citizen-suit provisions is the one found in the Clean Water Act ("CWA"). See 33 U.S.C. § 1365 (2000). The citizen-suit provision of the CWA is employed more than all the other environmental citizen-suit provisions combined. See Cross, supra note 8, at 58. The only major modern American environmental statutes that lack citizen-suit provisions are the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (2000), and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 (2000). However, courts have recognized the propriety of private suits under the Administrative Procedure Act ("APA") for failure to comply with NEPA. See 5 U.S.C. § 702 (citizen-suit provision); Pub. Citizen v. Office of the U.S. Trade Representatives, 970 F.2d 916, 918 (D.C. Cir. 1992); see also Bradley C. Karkkainen, Environmental Lawyering in the Age of Collaboration, 2002 Wis. L. Rev. 555, 556 n.9 (2002).

[17] See, e.g., Blomquist, supra note 16, at 368. But see Stephen M. Johnson, Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits, 49 U. Kan. L. Rev. 383, 409 (2001) (arguing that the characterization of environmental citizen-suit plaintiffs as "private attorneys general" is inaccurate, given that such plaintiffs sue to redress an individuated injury). Johnson's objection appears to relate more to a semantic point about the definition of a private attorney general; he does not dispute that environmental citizen suits are intended to improve the overall enforcement of the environmental laws and deter violations.

[18] See Cass R. Sunstein, What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 175–76 (1992). "Qui tam" is short for "qui tam pro domino rege quam pro se ipso in hac parte sequitur" (he "who pursues this action on our Lord the King's behalf as well as his own"). Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 768 n.1 (2000). Qui tam actions have his-

mental citizen suit, the qui tam action seeks to strengthen the enforcement of federal law by, in effect, deputizing private parties to aid government enforcement efforts.[19]

The power of Congress to authorize private lawsuits by plaintiffs who are clearly injured by a defendant's statutory violation is generally unquestioned.[20] Citizen-suit provisions may be more constitu-

torically been employed in a number of different statutes, several of which remain on the books. See, e.g., 25 U.S.C. § 201 (2000) (qui tam action against violators of Indian protection laws); 35 U.S.C. § 292(b) (2000) (qui tam action against those who falsely mark patented goods). Similarly, some "informer" statutes, though not expressly authorizing a private party to bring suit, entitle private parties who instigate a prosecution to a share of the government's recovery. See 18 U.S.C. § 962 (2000) (forfeiture to informers of a share of private armed vessels hostile to friendly nations); 46 U.S.C. app. § 723 (2000) (forfeiture to informers of a share of private vessels removing sunken treasure from the Florida coast for foreign nations). The most important modern qui tam provision is found in the federal False Claims Act ("FCA"), 31 U.S.C. § 3730(b)(1) (2000). The FCA is used to detect and punish fraud by government contractors. See Bucy, supra note 6, at 43–44. Though qui tam actions to enforce the FCA fell into disuse in the twentieth century, they were revived by 1986 amendments to the FCA that made it easier and potentially more lucrative to bring these actions. See id. at 45–48. Under the FCA's qui tam provision, the private relator must deliver a complaint alleging a violation of the FCA, along with supporting evidence, to the DOJ. 31 U.S.C. § 3730(b)(2) (2000). The government then has sixty days to decide whether to intervene in the case. Id. If the government intervenes, then the DOJ assumes primary responsibility for prosecuting the defendant, 31 U.S.C. § 3730(c)(1) (2000), but the relator retains substantial input into and rights concerning the conduct of the litigation, 31 U.S.C. § 3730 (c)(2)–(5) (2000). If the DOJ chooses not to prosecute, then the relator can bring her own action against the defendant. 31 U.S.C. § 3730(b)(4) (2000). In either case, the relator in a successful prosecution is entitled to a substantial percentage of any judgment or settlement, as well as to attorneys' fees. 31 U.S.C. § 3730(d)(1)–(2) (2000). Pamela Bucy, observing that this "dual plaintiff" structure gives the government a useful and powerful mechanism for monitoring the conduct of private plaintiffs, has advocated its adoption in other citizen-suit provisions as well. See Bucy, supra note 6, at 52–53; see also Myriam E. Gilles, Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights, 100 Colum. L. Rev. 1384 (2000).

[19] See Jill E. Fisch, Class Action Reform, *Qui Tam*, and the Role of the Plaintiff, 60 Law & Contemp. Probs. 167 (1997); Valerie R. Park, The False Claims Act, *Qui Tam* Relators, and the Government: Which Is the Real Party to the Action?, 43 Stan. L. Rev. 1061, 1071–72 (1991).

[20] The wisdom of such authorization is another matter. See infra Section II.B. Some commentators have pointed out that the generally accepted legitimacy of this sort of private enforcement presents difficulties for advocates of the position that the Constitution mandates a strong unitary executive, with no allowance for law enforcement by officials not under the President's direct supervision. See, e.g., Evan Caminker, The Unitary Executive and State Administration of Federal Law, 45 U. Kan. L. Rev. 1075, 1083 n.50 (1997).

tionally problematic when there is a question whether the citizen plaintiffs have suffered a sufficiently individualized injury to meet the standing requirements of Article III. On the one hand, the Supreme Court held in *Lujan v. Defenders of Wildlife* that extending environmental citizen-suit provisions to plaintiffs with nothing more than a general ideological interest in environmental protection would be unconstitutional.[21] Though this holding is grounded primarily in the case or controversy requirement of Article III, the *Lujan* opinion and much of the scholarly commentary critiquing the constitutionality of environmental citizen suits suggests the importance of separation of powers concerns, particularly the need to protect the executive's prerogatives against congressional and judicial encroachment.[22] On the other hand, the Court upheld the qui

[21] 504 U.S. 555, 573–74 (1992). The *Lujan* opinion attracted considerable controversy. See, e.g., Harold J. Krent & Ethan G. Shenkman, Of Citizen Suits and Citizen Sunstein, 91 Mich. L. Rev. 1793, 1808 (1993); Sunstein, supra note 18, at 221. Another salient limitation on citizen suits derived from the Court's Article III jurisprudence is the principle that a private plaintiff cannot bring suit to compel a defendant to pay civil fines to the U.S. Treasury if the defendant had ceased violating the statute by the time the plaintiff initiated the action. Such a suit would fail to satisfy the "redressability" prong of the standing inquiry. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106–07 (1998). However, a plaintiff may maintain a suit to compel a defendant to pay civil fines to the U.S. Treasury if the violation was ongoing at the time the plaintiff initiated the suit, and furthermore the suit does not become moot even if the defendant ceases violating the statute after the plaintiff initiates the lawsuit. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 187–94 (2000). *Laidlaw*'s explanation that "the civil penalties sought by [Friends of the Earth] carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [its] injuries by abating current violations and preventing future ones," id. at 187, appears to be in considerable tension with *Steel Co.*'s conclusion that "[i]n requesting [civil penalties payable to the U.S. Treasury] . . . respondent seeks not remediation of its own injury . . . but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of [the statute]. This does not suffice." 523 U.S. at 106 (quoting *Lujan*, 504 U.S. at 577) (internal citations omitted); see also *Laidlaw*, 528 U.S. at 202–05 (Scalia, J., dissenting). It appears, then, that *Laidlaw* overruled sub silentio *Steel Co.*'s rationale if not its conclusion, and under current law private plaintiffs can sue to compel defendants to pay civil fines so long as the violation has not been cured at the moment the plaintiff files the suit. I thank Rachel Barkow for alerting me to the potential *Steel Co.* limitation on private enforcement actions.

[22] See *Lujan*, 504 U.S. at 577 ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II § 3."); see also Krent & Shenkman, supra note

tam provision in the False Claims Act ("FCA") as constitutional, despite the fact that a private party bringing a qui tam action need not have suffered any personal injury from the defendant's fraudulent conduct.[23] The persuasiveness of the Court's attempt to reconcile these opinions is a difficult question that need not be addressed here. The important point is that, even if constitutional standing requirements impose limits on Congress's power to allow *any* citizen to enforce a statute by bringing a lawsuit against a private defendant, Congress's power to deputize at least *some* citizens to do so is generally acknowledged. Most of the debates surrounding express private actions therefore center on the social desirability of private enforcement rather than the constitutional limitations on Congress's power to authorize such enforcement.

B. Judicially Implied Private Causes of Action

Not all private rights of action under federal statutes derive from clear textual commands. Rather, many private rights of action have been "implied" by the judiciary from statutes that do not explicitly discuss private enforcement. Among the most important judicially implied private rights of action are those that have been recognized under the securities regulation and investor protection laws,[24] and

21, at 1808. But see Cass R. Sunstein, Article II Revisionism, 92 Mich. L. Rev. 131 (1993) (disputing the notion that Article II concerns have any bearing on the standing question); Sunstein, supra note 18, at 212–13 (same).

[23] See Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 778 (2000). The Supreme Court refused to consider a separation of powers challenge to the FCA's qui tam provision by limiting the scope of its certiorari grant in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 941–42 (1997).

[24] See Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286 (1993) (finding implied right to contribution action by 1934 Securities Exchange Act ("SEA") § 10(b) defendants against other responsible parties); Merrill Lynch v. Curran, 456 U.S. 353 (1982) (implying private right of action under Commodities Exchange Act, 7 U.S.C. §§ 1-27 (2000); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971) (ratifying longstanding lower court position that there is an implied right of action under § 10(b) of the SEA); J. I. Case Co. v. Borak, 377 U.S. 426 (1964) (implying a private cause of action under § 14(a) of the SEA). But see Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) (no implied cause of action under § 10(b) against aiders and abettors); Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979) (finding no implied private action for damages for violations of Investment Advisers Act, 15 U.S.C. § 80 (2000), though recognizing implied private actions to void investment contracts that are illegal under the Act); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (no implied right of action for

those that enforce various provisions of the civil rights laws.[25] Although the implication of private statutory causes of action was originally seen as an exercise of the federal courts' common law power to supply an appropriate remedy for every statutorily conferred right,[26] the modern rationale for judicial implication of private rights of action envisions the practice as an exercise in statutory interpretation: The courts, applying the traditional tools of statutory construction, may sometimes discern a congressional purpose to create a private right of action even when Congress has not made its intention explicit in the text.[27]

While many of the decisions implying private rights of action emphasize compensation, courts often consider "the positive role private justice actions can play in supplementing governmental regulatory resources [and] deterring wrongful conduct" as a critical factor in the analysis.[28] Many scholars have concluded that deterrence, rather than the need for private redress, has been the Court's primary rationale for recognizing private causes of action

violations of § 17(a) of the SEA); Piper v. Chris-Craft Indus., 430 U.S. 1 (1977) (unsuccessful tender offeror has no implied private right to damages under § 14(e) of the SEA); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (imposing a scienter requirement for implied § 10(b) actions); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (limiting § 10(b) implied right of action to plaintiffs who actually purchased or sold securities).

[25] See Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (finding implied cause of action could exist under Title IX, 20 U.S.C. §§ 1681–1688 (2000), for school's deliberate indifference to sexual harassment by another student); Morse v. Republican Party of Va., 517 U.S. 186 (1996) (finding implied cause of action to enforce § 10 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973(h) (2000)); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (holding that implied right of action under Title IX encompasses claims for money damages); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (finding implied right of action to enforce sex discrimination prohibitions of Title IX); Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (finding implied cause of action to enforce § 5 of the VRA). But see Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (rejecting implied right of action to enforce disparate impact prohibitions of Title VI); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (no implied right to damages under Title IX against school for sexual harassment by teacher absent actual notice or deliberate indifference).

[26] See Tamar Frankel, Implied Rights of Action, 67 Va. L. Rev. 553, 562 (1981); Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1196, 1199, 1300–01 (1982).

[27] See Frankel, supra note 26, at 562; Susan J. Stabile, The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action, 71 Notre Dame L. Rev. 861, 864–71 (1996).

[28] Bucy, supra note 6, at 17.

under the securities and investor protection laws; private plaintiffs in these cases are seen by courts not so much as "victims" in need of compensation but rather as private attorneys general.[29] Even in the context of the civil rights statutes, implied private rights of action are meant not only to compensate the victims of unfair discrimination, but also to improve the overall enforcement of these statutes.[30]

The standards used by courts to determine whether to imply a private right of action have changed substantially in the last thirty years. Beginning in the early twentieth century and lasting until the 1970s, federal courts implied private rights of action rather freely, believing it to be their duty to use their common lawmaking powers to supply a private remedy for every private statutory right.[31] Though that view had fallen out of favor by the 1970s, the Court continued for a time to treat the implication of private rights of action as an exercise of the judiciary's prerogative to supply appropriate remedies. In the 1975 case *Cort v. Ash*,[32] the Court summarized its view of the proper scope of the implied right of action inquiry, directing consideration of four factors: (1) whether the plaintiff is a member of a special class for whose benefit the statutory provision was enacted; (2) whether there is any explicit or implicit indication of congressional intent to create or to deny a private right of action; (3) whether a private cause of action would be consistent with the underlying purposes of the statute; and (4) whether the cause of action in question is one traditionally relegated to state law.[33]

Subsequent opinions made clear that the *Cort* factors did not have equal weight and that the second factor, congressional intent, was the most important. The other *Cort* factors are merely tools that may be used to ascertain that intent if the text is not suffi-

[29] Frankel, supra note 26, at 556–57; see also Coffee, supra note 13, at 218.

[30] See *Cannon*, 441 U.S. at 705–06 ("The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of [Title IX].").

[31] See Donald H. Zeigler, Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts, 38 Hastings L.J. 665, 671–77 (1987). The seminal case is generally considered to be *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33 (1916). See also supra notes 24–25.

[32] 422 U.S. 66 (1975).

[33] Id. at 78.

ciently clear.[34] The view that judicial "implication" of private rights of action should be viewed as an exercise in statutory construction rather than common lawmaking was driven home in the recent *Alexander v. Sandoval* opinion,[35] which emphasized that "private rights of action to enforce federal law must be created by Congress," and that the "judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."[36] Without such "statutory intent," the *Sandoval* opinion continued, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."[37] Thus, the Supreme Court has indicated that it will no longer consider policy arguments such as the need to compensate injured parties or the useful role that these parties could play as private attorneys general when deciding whether or not to imply a private right of action. Rather, congressional intent alone is supposed to govern. The *Sandoval* Court thus seems to have adopted Justice Powell's view that the multifactor *Cort* analysis "too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement."[38]

The Court cannot entirely escape these sorts of policy judgments, however. The intent of Congress is frequently unclear. How the Court chooses to resolve statutory ambiguity—whether it reverts to the other three *Cort* factors or adopts a default principle

[34] See Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (refusing to imply a cause of action under § 17(a) of the SEA and noting that the inquiry into the existence of a private right of action "is limited solely to determining whether Congress intended to create the private right of action asserted"); *Cannon*, 441 U.S. at 688 (finding an implied right of action, but making clear that the implication is a matter of "statutory construction" and that the four *Cort* factors are meant to be indicative as to whether "Congress intended to make a remedy available"); see also Transamerica Mortgage Advisors v. Lewis, 44 U.S. 11, 15–16 (1979).

[35] 532 U.S. 275, 286, 288 (2001). Justice Scalia's majority opinion in *Sandoval* was foreshadowed by his concurrence in *Thompson v. Thompson*, where he opined that the Court had "effectively overruled the *Cort v. Ash* analysis in *Touche Ross & Co. v. Redington* and *Transamerica Mortgage Advisors, Inc. v. Lewis*, converting one of its four factors (congressional intent) into *the determinative factor*." 484 U.S. 174, 189 (1988) (Scalia, J., concurring) (citations omitted).

[36] *Sandoval*, 532 U.S. at 286.

[37] Id. at 286–87.

[38] *Cannon*, 441 U.S. at 740 (Powell, J., dissenting).

that unclear statutes shall always be resolved in a particular direction—inevitably involves a judicial choice influenced by an assessment of the advantages and disadvantages of private enforcement.[39] It is to these policy considerations that I now turn.

II. THE ADVANTAGES AND DISADVANTAGES OF PRIVATE ENFORCEMENT

The private right of action is a powerful but controversial tool for enforcing the substantive provisions of federal law. Though private enforcement suits may, under some conditions, improve both overall compliance with the law and the efficient allocation of enforcement resources, under other circumstances private suits may disrupt government regulatory schemes and lead to wasteful or excessive enforcement. The following overview of the purported advantages and disadvantages of private enforcement demonstrates that the desirability of authorizing private actions involves difficult policy judgments and is likely to depend on a number of context-specific factors. Making such determinations therefore requires familiarity with the nature of the particular policy problem, the substantive goals of the regulatory scheme, and the likely interaction of private lawsuits with other elements of the government's enforcement strategy. Thus, when considering how to allocate authority over private enforcement policy, an institutional designer must take into account the capacity of various decisionmakers to trade off a host of complex advantages and disadvantages within a

[39] See, e.g., H. Miles Foy III, Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts, 71 Cornell L. Rev. 501, 521–22 (1986) (asserting that various arguments for how to infer congressional intent in the face of textual silence "are not about actual legislative intentions; they are designed for cases in which there is no hard evidence of legislative intentions. These legal arguments masquerade as arguments about legislative facts. At bottom, they are legal arguments about the adjudicatory consequences that *should* be assigned to legislative silence by operation of law"); Douglas P. Ruth, Title VII & Title IX = ?: Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector?, 5 Cornell J.L. & Pub. Pol'y 185, 210 (1996) ("By the very nature of implied cause of action cases, there normally is no clear evidence of intent to identify. . . . This leads some observers to conclude that the [intent] test . . . in practice, is often nothing more than purpose-based analysis disguised in the language of congressional intent."); see also Zeigler, supra note 31, at 682, 723 (arguing for a general presumption favoring private enforcement of statutory rights).

particular substantive context, as well as the incentives such decisionmakers are likely to face.

A. Potential Advantages of Private Enforcement

Private enforcement of public law may provide a number of benefits to government regulators and to society at large. Three such benefits are especially salient. First, private enforcement can provide more enforcement resources and facilitate more efficient allocation of public resources. Second, private enforcement suits can provide a check on agencies that prevents them from shirking their responsibilities. Third, private enforcement can foster innovative litigation strategies and settlement techniques, which may then be adopted by government regulators.

1. More (and More Efficient) Enforcement

The budget and manpower of federal regulatory agencies are generally quite limited, and many agencies simply lack the capacity to enforce the law adequately.[40] By deputizing hundreds or thou-

[40] See Sunstein, supra note 18, at 221 (making this point with respect to environmental law enforcement); Barton H. Thompson, Jr., The Continuing Innovation of Citizen Enforcement, 2000 U. Ill. L. Rev. 185, 191–92 (2000) (same); see also Gilles, supra note 18, at 1409–10 (making the point with respect to DOJ efforts to combat abusive police practices). This problem is so acute that Susan Rose-Ackerman has urged that courts should be allowed, in the case of obvious congressional underfunding of a congressionally authorized program, to declare such programs impliedly repealed by Congress. See Susan Rose-Ackerman, Judicial Review and the Power of the Purse, 12 Int'l Rev. L. & Econ. 191, 192 (1992). One potential rejoinder is that "underfunding" may be a legitimate tool of congressional control over administrative agencies. For discussions of how Congress deliberately uses its "power of the purse" to constrain agencies, see Richard F. Fenno, Jr., The Power of the Purse: Appropriations Politics in Congress 264 (1966); Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343 (1988); Michael M. Ting, The "Power of the Purse" and Its Implications for Bureaucratic Policy Making, 106 Pub. Choice 243 (2001). The main responses to the notion that "underfunding" of agency enforcement is a reflection of a deliberate congressional choice are (1) underfunding is often the result of a simple scarcity of funds, not of a desire to constrain an agency, so we should not necessarily interpret chronic underfunding as a congressional conclusion that low enforcement is optimal; (2) because appropriations policy is less visible than the passage of a statute, Congress can evade responsibility more easily by underfunding than by failing to enact a substantive statute, see Rose-Ackerman, supra, at 191, 201–02; and (3) congressional minorities—in particular, the appropriations and oversight committees—have disproportionate influence on enforcement appropriations, and these congressional subunits may have preferences that diverge substantially from the larger body.

sands of individual citizens and interest groups to act as private attorneys general, citizen-suit provisions (and other forms of express or implied private rights of action) can dramatically increase the social resources devoted to law enforcement, thus complementing government enforcement efforts.[41]

Moreover, private parties may often be able to enforce certain provisions of the law more efficiently than the responsible government agencies. Effective enforcement requires the detection of violations, and private parties—especially those who are directly affected by a potential defendant's conduct—often are better positioned than the public agency to monitor compliance and uncover violations of the law.[42] Affected private parties may also sometimes be better at weighing the costs and benefits of bringing an enforcement action—at least when the social interest in bringing suit is strongly correlated with the private interest of potential plaintiffs.[43] Furthermore, centralized public enforcement bureaucracies frequently suffer from "diseconomies of scale, given multiple layers of decision and review and the temptation to adopt overly rigid norms in order to reduce administrative costs"[44]—problems that generally do not affect private plaintiffs to the same extent.

[41] See Barry Boyer & Errol Meidinger, Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws, 34 Buff. L. Rev. 833, 838 (1985); Coffee, supra note 13, at 218; Cross, supra note 8, at 56; Roach & Trebilcock, supra note 13, at 479–80; Steven D. Shermer, The Efficiency of Private Participation in Regulating and Enforcing the Federal Pollution Control Laws: A Model for Citizen Involvement, 14 J. Envtl. L. & Litig. 461, 463 (1999); Stewart & Sunstein, supra note 26, at 1214.

[42] For example, many violations of environmental statutes are extremely difficult for the government to detect, as continuous government monitoring of all potential sources of pollution is not feasible, at least not at reasonable cost. See Thompson, supra note 40, at 190. Similar arguments have been made with respect to violations of antitrust laws, see Roach & Trebilcock, supra note 13, at 472, 478–81, the detection and prevention of corporate fraud and other complex economic crime, see Bucy, supra note 6, at 5, 8, and the prevention of police brutality and other forms of "institutionalized wrongdoing," see Gilles, supra note 18, at 1387, 1413.

[43] See Mark A. Cohen & Paul H. Rubin, Private Enforcement of Public Policy, 3 Yale J. on Reg. 167, 188–89 (1985); Stewart & Sunstein, supra note 26, at 1290. But see infra notes 69–72 and accompanying text.

[44] Stewart & Sunstein, supra note 26, at 1298; see also Boyer & Meidinger, supra note 41 at 836 (noting that private plaintiffs are "free of some of the bureaucratic and political constraints that hobble government enforcers"); Coffee, supra note 13, at 226 (suggesting that "private enforcement may be able to mobilize and reallocate its re-

For these reasons, government agencies often may be able to economize by relying on private citizens to police those types of statutory violations where private parties are well-informed and have sufficient incentives to bring suit.[45] This delegation in turn allows the agency to devote more of its scarce resources to detecting and prosecuting those types of violations where private plaintiffs lack sufficient incentives or resources, or where the government has a particularly strong interest in conducting enforcement efforts and controlling any resulting litigation.[46]

The delegation of enforcement to private plaintiffs may have an additional efficiency advantage as well. Under circumstances where higher levels of statutory enforcement are a public good, but one that is valued differently by different citizens, private enforcement enables those citizens who value the public good more highly to subsidize enforcement by bearing some of the monitoring and prosecution functions themselves. Thus, citizen-suit provisions might implement the functional equivalent of a more efficient tax system, in which citizens' tax rates vary in proportion to the value they place on the public good to be supplied.[47]

---

sources more quickly than the public enforcer, who is confined within a bureaucratic setting").

[45] See Frankel, supra note 26, at 580 (pointing out that the Securities and Exchange Commission ("SEC") has largely left the enforcement of the proxy rules (§ 14(a) of the SEA) to private plaintiffs); Thompson, supra note 40, at 200 (noting that "government attorneys frequently are content to allow environmental nonprofits to take the lead in the enforcement actions that the nonprofits initiate, enabling the government to focus its limited resources elsewhere").

[46] See Shermer, supra note 41, at 469 (arguing that private enforcement promotes an efficient division of labor, in which government enforcers delegate certain responsibilities to private citizens, in turn allowing agencies to devote their resources to the areas where their expertise and resources are most needed); see also Boyer & Meidinger, supra note 41, at 879; Coffee, supra note 13, at 224–25 (suggesting that private enforcement suits may allow the government to devote its efforts to investigation and detection where it may have a comparative advantage, leaving actual litigation to private parties who may have more experience with litigation tactics). But see Michael Selmi, Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment, 45 UCLA L. Rev. 1401, 1404 (1998) (observing a perverse manifestation of this division of labor in the housing and employment discrimination context, in which "[t]he federal government, with its broad resources, pursues small, politically inoffensive, and easy cases, leaving the private bar to tackle the difficult and important discrimination claims").

[47] See Thompson, supra note 40, at 200–01 (explaining that "[i]f enforcement were an undifferentiated public good," citizen suits would be efficient because those parties that value a public good more highly than the median voter could supplement the re-

2. Reducing Agency Slack

Another potential benefit of private enforcement suits is that they can correct for agency slack—that is, the tendency of government regulators to underenforce certain statutory requirements because of political pressure,[48] lobbying by regulated entities,[49] or the laziness or self-interest of the regulators themselves.[50] Private rights of action can address the problem of agency slack (or shirking) in two ways. First, and most directly, private lawsuits can be a substitute for agency prosecutions in areas where the agency is excessively lax.[51] Second, private enforcement suits can prod an agency into action, either by shaming it or by forcing it to intervene to take over the management of those private suits where the government cares about the outcome.[52]

sources devoted to enforcement with private resources, but ultimately rejecting the premise that enforcement is an undifferentiated public good). Another problem with this argument is that, to the extent that enforcement is a public good, there is still a serious free-rider problem, as even those private parties who desire a higher level of enforcement than that provided by the public agency have an incentive to let other private plaintiffs with similar preferences take the lead in bringing private suits. The canonical citation for the free-rider problem is, of course, Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965).

[48] See Roger L. Faith et al., Antitrust Pork Barrel, 25 J.L. & Econ. 329 (1982) (concluding that FTC antitrust enforcement activity was influenced by the composition of the congressional oversight committee, with enforcement actions less likely against firms located in the districts of committee members); Thompson, supra note 40, at 191 (noting that political considerations sometimes lead agencies not to prosecute even known violations of environmental laws); Sanford C. Gordon & Catherine Hafer, Flexing Muscle: Corporate Political Expenditures as Signals to the Bureaucracy, at http://www.nyu.edu/gsas/dept/politics/faculty/hafer/GordonHaferFinal.pdf (last accessed Feb. 21, 2005) (on file with the Virginia Law Review Association) (finding that lobbying expenditures by nuclear power operating companies significantly reduced the likelihood of enforcement action by the Nuclear Regulatory Commission).

[49] See Bucy, supra note 6, at 32–33; Stewart & Sunstein, supra note 26, at 1294.

[50] See J.R. DeShazo & Jody Freeman, The Congressional Competition to Control Delegated Power, 81 Tex. L. Rev. 1443, 1445, 1455 (2003); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org. 243, 246–47 (1987).

[51] See Cross, supra note 8, at 56; Matthew D. Zinn, Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits, 21 Stan. Envtl. L.J. 81, 133–34 (2002).

[52] See Michael S. Greve, The Private Enforcement of Environmental Law, 65 Tul. L. Rev. 339, 350 (1990); Zinn, supra note 51, at 134–37.

Though this justification for private enforcement is most often associated with legislative distrust of the executive branch,[53] the agencies themselves may sometimes have reason to welcome this kind of external constraint. For example, an agency head may be concerned that subordinates will not be sufficiently zealous in enforcing the agency's mandate—that is, shirking may sometimes be a phenomenon that plagues lower levels of the agency hierarchy more severely than the upper echelons.[54] If this is the case, then agency heads might want to authorize citizen suits, both because such suits ensure enforcement even when subordinates shirk and because monitoring the volume and success rate of citizen suits may be an economical way for agency heads to assess the performance of their subordinates.[55] Additionally, agencies may sometimes have an interest in credibly committing themselves to aggressive enforcement of a statutory provision in order to induce rapid compliance by regulated entities or otherwise improve the agency's bargaining position.[56] Citizen suits may address the attendant time

[53] See Zinn, supra note 51, at 83–84 (noting that the environmental statutes' "anti-capture measures," including the citizen-suit provisions, emerged because of Congress's "grave distrust" of regulatory agencies' ability to avoid regulatory capture and zealously to fulfill their enforcement responsibilities); see also Boyer & Meidinger, supra note 41, at 843–47.

[54] There is some evidence that the EPA has occasionally exhibited this characteristic. Matthew Zinn reports the results of different studies indicating that the EPA's formal guidance documents tended to emphasize enforcement and deterrence, while EPA practice "on the ground" during roughly the same period tended to be much less adversarial and more negotiation-oriented. See Zinn, supra note 51, at 89–91. While this may simply mean that the EPA had chosen to talk tough but to act less aggressively, it may also suggest that the aggressive approach preferred by the agency's upper echelons was not always followed by the lower level officials responsible for initiating actual enforcement actions. Moreover, the "subordinate" enforcers under most major environmental statutes are often state rather than federal officials. These state officials may be much more prone than the EPA to adopting a cooperation-oriented, as opposed to deterrence-oriented, strategy. See id. at 91–96. Authorization of citizen suits may be an attractive way for federal officials to make sure state officials are not too lax in pursuing enforcement actions.

[55] This argument is a variation on the well-known theme that principals can use "fire alarm" oversight mechanisms to monitor the performance of their agents, and that these mechanisms are often more efficient than "police patrol" oversight initiated by the principals themselves. See Matthew McCubbins & Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols and Fire Alarms, 28 Am. J. Pol. Sci. 165 (1984).

[56] Cf. Jeffrey Kehne, Encouraging Safety Through Insurance-Based Incentives: Financial Responsibility for Hazardous Wastes, 96 Yale L.J. 403, 416 (1986) (noting

consistency problem by taking some of the decision on specific enforcement actions out of the agency's hands.[57] Similarly, the availability of private enforcement may reduce the incentives of regulated industries to lobby to cut the agency's budget in the hopes that this will significantly weaken the enforcement of the laws.[58] For these reasons, agency heads may not always oppose, and may sometimes even welcome, the constraints on agency enforcement behavior that private suits impose.

3. Innovation

Another potential advantage of private enforcement suits is their capacity to encourage legal innovation—whether in the form of novel legal theories, creative approaches to dispute settlement, or new techniques of investigation and proof. Legal innovations pioneered by private plaintiffs, who may be more willing than conservative government agencies to experiment with new approaches, may subsequently be adopted by the government regulators themselves.[59] An example, albeit a controversial one, of an innovation fostered by private enforcement suits is the introduction of the "supplemental enforcement projects" ("SEPs") that are now a common feature of settlements in environmental enforcement cases.[60] An SEP involves a commitment by the defendant, as part of a settlement agreement, to undertake or to fund additional projects to benefit the environment that have nothing directly to do with the environmental problems the defendant is accused of

that, as enforcement budgets are cut, it becomes increasingly difficult for environmental regulators to sustain the "commitment to credible enforcement that would be required for statutory and regulatory restrictions to exert effective control"); Joel P. Trachtman & Philip M. Moremen, Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?, 44 Harv. Int'l L.J. 221, 241 (2003) (arguing that granting private rights of action may be a way for governments to credibly commit themselves to enforcing their regulations); Zinn, supra note 51, at 101 (suggesting that failing to enforce a statute aggressively may "look to third parties as if the agency has become beholden to private interests, undermining the agency's legitimacy in the eyes of those third parties").

[57] The seminal paper on the time consistency problem is Finn E. Kydland & Edward C. Prescott, *Rules Rather Than Discretion: The Inconsistency of Optimal Plans*, 85 J. Pol. Econ. 473 (1977).

[58] See Coffee, supra note 13, at 227.

[59] See Thompson, supra note 40, at 188, 206.

[60] See id. at 207–09.

creating. Many commentators have praised this device as a creative way to further the goals of environmental protection statutes through future-oriented remediation, rather than an exclusive focus on punishment.[61]

In a related vein, several commentators have observed that "[p]rivate litigation in the United States has been responsible for many of the leading antitrust precedents[,] especially since public enforcement efforts tapered off in the early 1980s."[62] A similar claim has been made in the context of antidiscrimination law. Michael Selmi, for example, has argued that private plaintiffs rather than government agencies tend to bring the antidiscrimination cases that raise "cutting edge" legal issues,[63] and as a result "private attorneys . . . have been principally responsible for whatever social change has resulted from legal challenges [to discriminatory practices]."[64] Private antidiscrimination plaintiffs have also pioneered important evidentiary techniques, such as the use of "testers" to establish housing discrimination claims[65]—a strategy that was subsequently (if belatedly) adopted by government enforcement agencies.[66]

[61] See Bucy, supra note 6, at 39–40; Thompson, supra note 40, at 207–09. Critics, however, charge that SEPs are not actually a useful innovation in environmental protection, but merely an undesirable hidden wealth transfer to the environmental lobby. See Greve, supra note 52, at 342, 356.

[62] Roach & Trebilcock, supra note 13, at 481; see also Harry First, Antitrust Enforcement in Japan, 64 Antitrust L.J. 137, 179–80 (1995) ("[I]t was in the context of private litigation that the Supreme Court enunciated most of its important antitrust decisions. . . . Had there been no private cause of action under the antitrust laws, much of the development in antitrust doctrine [in the Reagan-Bush years] might never have occurred."). But see Benjamin S. DuVal, Jr., The Class Action as an Antitrust Enforcement Device: The Chicago Experience (Part II), 1976 Am. B. Found. Res. J. 1273, 1274–77 (concluding that, in the antitrust context, private plaintiffs rarely employed complex or novel legal theories, but rather concentrated on cases involving simple per se violations).

[63] Selmi, supra note 46, at 1404.

[64] Id. at 1403.

[65] This strategy entails ferreting out discrimination by using two "testers"—usually one white, and the other a member of a minority group—with otherwise similar qualifications, each of whom submits an application for the same residence. See id. at 1426.

[66] Id.

B. Potential Disadvantages of Private Enforcement

The foregoing advantages notwithstanding, the authorization of private enforcement suits can also create serious problems and in many cases may be counterproductive for at least three reasons. First, private rights of action can lead to inefficiently high levels of enforcement, causing waste of judicial resources and leading to excessive deterrence of socially beneficial activity. Second, private enforcement actions can directly interfere with public enforcement efforts, distorting government enforcement priorities and disrupting the cooperative relationship between regulators and regulated entities that is often necessary to achieve compliance with statutory objectives. Third, private enforcement actions raise concerns about the democratic accountability of law enforcers, since private plaintiffs are not subjected to the same electoral checks that constrain executive officials. While these problems do not necessarily refute or negate the benefits associated with private enforcement discussed above, they suggest that the case for authorizing private enforcement depends critically on context-specific judgments about the likely effect of private lawsuits on the enforcement of particular statutory schemes.

1. Excessive, Inefficient Enforcement

The first major disadvantage of private rights of action is their potential to waste social resources on excessive enforcement. The rhetoric of some commentators notwithstanding,[67] maximum enforcement is not necessarily, or even usually, optimal. In many cases, authorization of private enforcement suits may lead to overzealous and inefficient enforcement of federal statutes.[68] There are several reasons why this may be the case.

First, private enforcement suits entail social costs that are not internalized by private plaintiffs.[69] Private plaintiffs, for example,

[67] See, e.g., Shermer, supra note 41, at 490 (claiming that "[e]nvironmental statutes can never be overenforced").

[68] See Frankel, supra note 26, at 573, 578–79; William M. Landes & Richard A. Posner, The Private Enforcement of Law, 4 J. Legal Stud. 1 (1975); Stewart & Sunstein, supra note 26, at 1297; Thompson, supra note 40, at 201.

[69] See generally Shavell, supra note 12 (concluding that the privately determined level of litigation can either be socially excessive or inadequate and may call for corrective social policies); Greve, supra note 52, at 343 (observing that, while private citi-

may be insufficiently sensitive to the litigation costs of their suits (including the drain on judicial resources),[70] especially if they are able to recover attorneys' fees or if they receive subsidies in the form of tax benefits for their litigation activities.[71] Second, private parties may be less sensitive than government agencies to the economic and social costs of particular enforcement actions, such as the disruptive impact on affected communities, relative to the social benefits of such actions.[72] Third, private parties may derive benefits from litigation that, while substantial from a private perspective, are insufficient to justify the associated expenditure of social resources.[73] The most obvious private benefit is the possibility of a monetary recovery,[74] but other benefits include the notoriety and increased membership that a public interest group may gain from prosecuting a large number of high-profile cases[75] or the bene-

zens are good at assessing injuries to themselves, they are terrible at assessing injuries to others, or to the "public interest").

[70] See Shavell, supra note 12, at 577–78; Stewart & Sunstein, supra note 26, at 1293–94; Donald H. Zeigler, Rights, Rights of Action, and Remedies: An Integrated Approach, 76 Wash. L. Rev. 67, 146 (2001). Of course, government agencies may be similarly insensitive to this cost, so it is not necessarily the case that this consideration always cuts against emphasizing private enforcement. The problem, however, is likely to be more severe with private enforcement, given the number of potential enforcers and the fact that private parties are less likely to be repeat players with an incentive to maintain a good reputation with the courts for not bringing weak claims.

[71] See Thompson, supra note 40, at 194–95 (explaining that the federal government subsidizes private environmental enforcement suits through the tax code, since the major source of funding for nonprofit organizations' environmental suits are tax-deductible private contributions).

[72] See Bucy, supra note 6, at 63–64 (noting the problem of costly, and sometimes nonmeritorious, lawsuits under the FCA); Frankel, supra note 26, at 571 (arguing that private plaintiffs in securities litigation rarely concern themselves with the social costs and benefits of their lawsuits); Thompson, supra note 40, at 202 (noting that, in the environmental context, there is evidence that the EPA is more sensitive than private plaintiffs to economic and other costs associated with enforcement actions).

[73] See J. Randy Beck, The False Claims Act and the English Eradication of *Qui Tam* Legislation, 78 N.C. L. Rev. 539, 549 (2000) (claiming that the bounties available for qui tam plaintiffs under the FCA lead to plaintiffs' pursuit of personal pecuniary "gain at the expense of the common good"); Frankel, supra note 26, at 570 (arguing that "private compensatory actions (especially in the form of class actions) are ill-suited to the deterrence system of the securities laws and may hamper the central purposes of those statutes"); Shavell, supra note 12, at 578.

[74] See Shavell, supra note 12, at 578.

[75] See Jonathan H. Adler, Stand or Deliver: Citizen Suits, Standing, and Environmental Protection, 12 Duke Envtl. L & Pol'y F. 39, 50 (2001); Zinn, supra note 51, at 133, 138. See generally Mark Seidenfeld, Empowering Stakeholders: Limits on Col-

fits to a private business of harassing or damaging the reputation of its competitors by bringing a private lawsuit.[76] These incentives may lead some private plaintiffs to engage in "strike suits," seeking to extort from defendants a settlement offer that will enable the defendants to avoid the litigation costs and potential bad publicity associated with defending even nonmeritorious claims.[77] In contrast, government regulatory agencies (it is often claimed) are better at screening out enforcement actions that are either nonmeritorious or not worth the costs of prosecution.[78] Also, without the involvement of an expert government agency in the course of litigation, the risk of erroneous decisions in private actions may increase, as courts must decide difficult issues without the benefit of an administrative record or the agency's expert opinion.[79]

This overdeterrence problem is compounded by the tendency of agencies and legislatures, when faced with complex policy problems, to enact regulations that are deliberately overbroad and then to rely on the discretion of government enforcers to administer these regulations in a way that advances their underlying social goals. This strategy seeks to address the underinclusiveness problem by adopting broad rules, while avoiding the overinclusiveness problem via prosecutorial discretion.[80] Because private citizens do

laboration as the Basis for Flexible Regulation, 41 Wm. & Mary L. Rev. 411, 432, 436–39 (2000).

[76] See Joseph F. Brodley, Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals, 94 Mich. L. Rev. 1, 45 (1995); Krent & Shenkman, supra note 21, at 1808; Roach & Trebilcock, supra note 13, at 485.

[77] The lack of compensatory damages remedies under the applicable citizen-suit provision does not necessarily eliminate the strike suit problem, as private parties can threaten to bring a citizen suit and then settle out of court for some form of private relief, such as a contribution to a specified environmental cause. See Cross, supra note 8, at 70–71; see also supra note 61 and accompanying text.

[78] See Cross, supra note 8, at 69–70; Joseph A. Grundfest, Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority, 107 Harv. L. Rev. 961, 969–70 (1994).

[79] See Richard J. Pierce, Jr., Agency Authority to Define the Scope of Private Rights of Action, 48 Admin. L. Rev. 1, 2 (1996); Stewart & Sunstein, supra note 26, at 1293.

[80] See, e.g., Cross, supra note 8, at 69–70; cf. William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 546–57 (2001) (discussing an analogous approach in the criminal law context). But see Sunstein, supra note 18, at 217–18 (acknowledging the role of prosecutorial discretion in tempering congressional enactments, but stressing that "[a]gency rejection of congressional enactments, even if

not have the same incentives to exercise discretion in deciding which violations of the law are worth prosecuting,[81] allowing private suits forces the government either to tolerate excessive enforcement of an overbroad rule or to narrow the rule in a way that allows many socially undesirable activities to escape regulation, unless the government is willing to invest substantial up-front costs to define the scope of the rule with greater precision.[82] All of these choices may entail a substantial loss of social efficiency.

2. Interference with Public Enforcement

Private enforcement actions may also interfere with public enforcement efforts more directly. First, citizen suits may disrupt the cooperative relationship between regulators and regulated entities that many argue is essential for long-term compliance with statutory mandates.[83] As Richard Stewart and Cass Sunstein put it, private enforcement actions may interfere with an agency's ability "to negotiate with regulated firms and other affected interests in order to establish a workable and consistent regulatory system."[84] This is not to say that cooperation and negotiation can be effective with-

motivated by the President himself, is inconsistent with the system of separation of powers").

[81] See Cross, supra note 8, at 69–70; Greve, supra note 52, at 344; Stewart & Sunstein, supra note 26, at 1297.

[82] Cf. Louis Kaplow, Rules and Standards: An Economic Analysis, 42 Duke L.J. 557 (1992) (discussing the relative over- and underinclusiveness of rules, which are given content ex ante, verus standards, which are given content ex post).

[83] See Cross, supra note 8, at 67.

[84] Stewart & Sunstein, supra note 26, at 1292–93; see also Jeannette L. Austin, The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General, 81 Nw. U. L. Rev. 220, 223 (1987) ("[Citizen suits] may impair the EPA's ability to develop longstanding, cooperative relationships with regulated firms. These relationships, when used in conjunction with aggressive enforcement, are vital to attaining environmental enforcement objectives."); Blomquist, supra note 16, at 409–10 ("Instead of seeking to resolve [CWA] disputes by informal negotiation, mediation, or less restrictive agency compliance orders, 'diligence' [of government regulators] sufficient to halt the interference of private citizen suits preemption is measured solely by whether the government enforcement agency is pursuing the violation in a 'court' of law empowered to impose monetary sanctions . . . ."); Bucy, supra note 6, at 64 ("[P]rivate justice actions can . . . inhibit regulators' flexibility in dealing with regulated industry."); Zinn, supra note 51, at 84 (stating that "[o]fficious citizen enforcers" might undermine cooperative enforcement efforts because "the informal bargains struck by regulators and regulatees cannot protect the latter from citizen litigation").

out the credible background threat of coercive sanctions. Indeed, even those who criticize citizen suits on the grounds that they disrupt cooperative relationships between regulators and regulated entities concede that "[t]he case for cooperation over deterrence is not an unambiguous one" and that "some combination of deterrence and cooperation will produce maximum compliance."[85] Private enforcement suits, however, may often engender an overemphasis on coercion and deterrence at the expense of negotiation and cooperation, regardless of the wishes of the government enforcement agency. A related problem is that private suits may impede government efforts to persuade industries to regulate themselves, since industry-generated guidelines may subsequently become the basis for private enforcement suits.[86] If industries fear that cooperating with federal regulators to develop explicit standards of conduct will lead to greater exposure to liability in private suits, they may be more reluctant to engage in such cooperative efforts, which in turn would substantially raise the costs to regulators of developing appropriate regulatory standards.[87]

Private enforcement actions can also disrupt agency enforcement efforts by allowing citizens, rather than the agency regulators, to set the enforcement agenda. When private citizens file suit, the responsible agency is often forced either to allow the suit to go forward, which may be undesirable from the government's perspective, or to pursue its own preemptive enforcement action. Private citizens, therefore, have the ability to skew agency enforcement priorities, often unintentionally.[88] This phenomenon in turn can intensify the degree to which private enforcement disrupts co-

[85] Cross, supra note 8, at 67.

[86] Pamela Bucy illustrates this problem with the example of "false certification" cases, in which violations of rules and regulations for nursing homes that had been generated with the cooperation of the nursing home industry were subsequently used as the basis for fraud claims under the FCA. See Bucy, supra note 6, at 65–67. Robert Blomquist has made a similar point with regard to environmental regulation. See Blomquist, supra note 16, at 411 (suggesting that a "collateral consequence of citizen penalty suits for technical, non-hazardous environmental infractions by private industry is resistance by industry to the very idea of being able to determine appropriate permit parameters for a wide variety of pollutants").

[87] See Blomquist, supra note 16, at 411; Seidenfeld, supra note 75, at 465.

[88] See Austin, supra note 84, at 236; Cross, supra note 8, at 68. For example, environmental citizen suits have been disproportionately concentrated in the mid-Atlantic states, with comparatively few such suits filed in western states. See id.

operative regulatory strategies: If private enforcement leads to real or perceived inequities in the enforcement of the statutes—that is, if enforcement appears inconsistent or does not seem to correspond with the severity or bad faith of statutory violations—then regulated entities may be less willing to cooperate with government regulators to improve overall compliance.[89] Furthermore, judicial decisions rendered in citizen suits, brought piecemeal before non-expert courts by citizen groups with particularized interests, may establish adverse or inconsistent precedents that complicate or disrupt government enforcement efforts.[90]

3. Lack of Accountability

Another disadvantage closely related to the problems of excessive and inconsistent enforcement is private plaintiffs' lack of accountability for the social impact of their enforcement decisions. Prosecutorial discretion is an integral part of the American system of government, and executive agencies are accountable to the electorate for their exercise of this discretion through the President and, more indirectly, through congressional oversight.[91] Thus, when the executive considers whether to increase or decrease the level of enforcement of particular statutory provisions, it will be sensitive to the political repercussions that may be associated with both overenforcement and underenforcement.[92] As neither the citizens bringing private enforcement suits nor the judges who decide them are subject to electoral discipline, private enforcement may undermine a valuable democratic feature of American governance.[93]

[89] See Cross, supra note 8, at 67; Stewart & Sunstein, supra note 26, at 1295; Zinn, supra note 51, at 100–01.

[90] See Austin, supra note 84, at 223, 236; Bucy, supra note 6, at 66; Cross, supra note 8, at 68–69; Krent & Shenkman, supra note 21, at 1809; Pierce, supra note 79, at 8–9; Stewart & Sunstein, supra note 26, at 1292.

[91] See, e.g., Krent & Shenkman, supra note 21, at 1801–04; Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81, 91–99 (1985). In addition to this instrumental value of political accountability, democratic accountability for public decisions may have some intrinsic normative value. See infra note 144.

[92] See Krent & Shenkman, supra note 21, at 1803–04.

[93] See Adler, supra note 75, at 49 (claiming that citizen-suit plaintiffs "face no significant political repercussions for setting unwise enforcement priorities"); Pierce, supra note 79, at 12 (arguing that an important problem with citizen suits is the "lack of political accountability for important policy decisions"); Stewart & Sunstein, supra

This issue is sometimes thought to have a quasi-constitutional dimension, inasmuch as congressionally authorized citizen suits can interfere with the executive branch's efforts to "take Care that the Laws be faithfully executed."[94] Though private enforcement suits have been upheld as constitutional so long as the private plaintiffs satisfy the standing requirements of Article III, many proponents of a unitary executive nonetheless perceive a constitutional problem with allowing private citizens to determine the stringency with which the law will be enforced,[95] especially when the private citizen's injury, even if sufficient to satisfy Article III, does not seem to be the kind of personal injury for which the law usually provides compensation. Thus, for example, critics of the broad environmental citizen-suit provision in the Clean Water Act have charged that "the vast executive powers ceded by Congress to citizens in pursuing substantial civil penalties against environmental defendants . . . are so farreaching and uncircumscribed [that] the model of the 'citizen as prosecutor' undermines . . . process values, rule of law values, and division of labor legal values."[96]

note 26, at 1292 (noting that private rights of action can "undermin[e] the advantages of political accountability, specialization, and centralization that administrative regulation was designed to provide"); see also Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 896 (1983) (arguing that, when judges insist on a level of enforcement that the political process would not demand of the executive, the judges are likely to be enforcing, perhaps unintentionally, the political prejudices of the elite class they represent). Some scholars have argued, however, that private enforcement suits actually enhance democratic values by giving private citizens a more direct voice in the enforcement of public law and by educating the electorate. See Bucy, supra note 6, at 32–33; Roach & Trebilcock, supra note 13, at 474; Thompson, supra note 40, at 188.

[94] U.S. Const. art. II, § 3.

[95] See, e.g., Cross, supra note 8, at 72; see also Bucy, supra note 6, at 67–68 (noting that resolving the potential conflicts between public and private regulators requires courts to "rule upon issues of prosecutive discretion and Executive Branch policy"); Krent & Shenkman, supra note 21, at 1794–95 (arguing forcefully that Article II precludes general citizen suits, but conceding that Congress may allow suits by individuals who are "injured distinctively" by failure to enforce the law). But see Caminker, supra note 20, at 1083 n.50 (suggesting that the historical recognition of the legitimacy of private enforcement undermines the strong version of the unitary executive theory); Sunstein, supra note 22, at 131 (arguing that citizen suits raise no Article II problem).

[96] Blomquist, supra note 16, at 340. Executive branch officials have themselves sometimes expressed concern about an excessive transfer of enforcement power to private plaintiffs under the CWA. In one study of the Act's citizen-suit provision, "[e]xecutive officials warned that private enforcement was coming dangerously close

III. EXPLICIT CONGRESSIONAL DELEGATION

As the preceding discussion makes clear, the use of private suits to enforce public law has advantages and disadvantages. The desirability of private enforcement in a particular policy area will depend on context-specific information about the regulatory problem, the characteristics of the potential private plaintiffs, and the effect of private enforcement on public enforcement efforts.[97] From an institutional design standpoint, the most important question therefore concerns which decisionmakers ought to have primary authority to weigh the costs and benefits of private enforcement and to decide whether, and in what form, private actions ought to be permitted.

To the extent that this institutional design issue is discussed in the literature, it tends to arise in the context of debates over when, or whether, the judiciary ought to imply a private right of action in the absence of an explicit congressional mandate.[98] Much of this literature concludes that Congress has an institutional advantage relative to courts in determining whether authorizing a private cause of action is a good idea. Strangely overlooked in these discussions, though, is the fact that the responsible executive agency may be in an even better position than Congress to make such judgments.[99] After all, if any organ of government is likely to be

to producing a result which the congressional authors of environmental legislation ostensibly sought to prevent—namely, a shift of control over enforcement from the government to private parties." Greve, supra note 52, at 388. But see Bucy, supra note 6, at 41 (claiming that the EPA is a staunch supporter of environmental citizen suits).

[97] See Roach & Trebilcock, supra note 13, at 484 ("Determining the right mixture of public and private enforcement will be a complex, ongoing process . . . ."); Zinn, supra note 51, at 84–85 ("The pros and cons of citizen enforcement call for a delicate balancing . . . [and] nuanced distinctions between useful citizen suits that ameliorate failures of agency enforcement and those that disrupt productive cooperation.").

[98] See supra Section I.B.

[99] See Frankel, supra note 26, at 583–84 (arguing that "the legislature, rather than the courts, should determine" the appropriate role of private enforcers, because "Congress has superior capacity to develop the necessary information and strike the necessary compromises among competing interests," but not discussing the capacity of the executive branch in this regard relative to either Congress or the courts); Stabile, supra note 27, at 882 (noting the argument that Congress is in a better position than the courts to determine the proper means for enforcing federal law, and therefore in a better position to determine whether private enforcement suits are appropriate, but not considering whether the executive is in a better position than Congress to make such a determination); Zeigler, supra note 70, at 118 (asserting that Congress is

both especially good at ascertaining whether private enforcement would aid the pursuit of statutory objectives and especially sensitive to the risks that private enforcement might interfere with government regulatory strategy, it is the executive agency or department responsible for enforcing the relevant statute.[100] Therefore,

better able than courts to "gather facts, set priorities, and accommodate different viewpoints in providing rights, rights of action, and remedies," but not addressing the competence of the executive in this regard); see also Mark I. Steinberg, Implied Private Rights of Action Under Federal Law, 55 Notre Dame L. Rev. 33, 40 (1979) (arguing that while "there may well exist strong policy reasons why Congress rather than the federal judiciary should be the proper branch to authorize private actions" the courts also have an important role to play—but making no mention of any role for the executive); Stewart & Sunstein, supra note 26, at 1291 (suggesting that the judiciary may sometimes have advantages over Congress because of "courts' ability to draw upon experience with implementation of a particular regulatory program and to judge the impact and desirability of private rights of action," but not considering the institutional competence of the executive agencies).

[100] The desirability of executive input into decisions regarding private causes of action has not been entirely overlooked in the scholarly literature. Joseph Grundfest, for example, has argued that the SEC does and should have the power to "disimply" causes of action inferred by courts under the securities laws. See Grundfest, supra note 78. Similarly, Barton Thompson has suggested that Congress could reduce the problem of overzealous private enforcement by authorizing the executive to seek dismissal of any private enforcement action that the government believed was not in the public interest, see Thompson, supra note 40, at 206, and Pamela Bucy has advocated the wider use of the FCA's "dual plaintiff" structure, in which the DOJ exercises considerable control over suits initiated by private parties, see Bucy, supra note 6, at 68–72. In a proposal quite similar in spirit to the one advanced in this Article, Myriam Gilles suggests that Congress should amend 42 U.S.C. § 14141 (2000) (the Violent Crime Control and Law Enforcement Act) to "allow[] the Justice Department, in appropriate circumstances, to authorize private citizens to bring suits for injunctive relief against unconstitutional 'patterns or practices' [of local police departments]," see Gilles, supra note 18, at 1388. Another proposal for greater agency input into private rights of action suggests that agencies can and should, whenever possible, promulgate substantive regulations under statutes where the courts have already recognized a private right of action—for instance, by trying to shoehorn antidiscrimination regulations under § 601 of Title VI, 42 U.S.C. § 2000d (2000), rather than § 602, 42 U.S.C. § 2000d-1 (2000), to the extent that *Chevron* doctrine allows. See Brianne J. Gorod, Case Comment, The Sorcerer's Apprentice: *Sandoval*, *Chevron*, and Agency Power to Define Private Rights of Action, 113 Yale L.J. 939, 944–46 (2004). And, a number of commentators have suggested that *Chevron* principles support allowing agencies considerable latitude in determining which agency regulations should be enforceable under 42 U.S.C. § 1983 (2000). See Galle, supra note 5, at 165; see also infra notes 244–49. Richard Pierce has cited the importance of executive input into enforcement strategy in arguing that courts hearing private enforcement suits should be bound by executive determinations of the meaning of statutory terms. See Pierce, supra note 79, at 2. Other scholars have stressed, in more general terms, the need for a more "cooperative" or "integrated" approach to public and private enforcement. See,

the best policy solution may often be for Congress to delegate decisions regarding the extent and nature of private enforcement to the executive, rather than making these decisions on its own or delegating them to the courts.[101]

Consider a federal statute in which Congress neither created nor precluded citizen enforcement suits, but instead expressly delegated to the relevant agency the power to authorize and delimit such suits if the agency, in its discretion, concluded that citizen suits would lead to superior implementation of the substantive provisions of the statute and aid the agency in carrying out its mandate to execute federal law. Just as Congress often delegates to agencies the authority to make quasi-legislative decisions about the specific substantive content of broad legislative guidelines, under this proposal Congress would delegate to agencies the authority to decide for themselves whether and under what conditions a particular enforcement mechanism—the private suit—would be available.

In conjunction with this delegation, Congress could choose from a variety of default principles against which the agency would make its decision. On the one hand, Congress might write a citizen-suit provision into the statute but make it clear that the agency could modify or eliminate that provision if the agency believed that doing so would best serve the statute's purposes. That is, the default could be that citizen suits are available, but the agency can restrict or eliminate them if it chooses to.[102] Alternatively, Congress could employ the opposite default rule, providing for no private remedies but explicitly allowing the agency to authorize private en-

e.g., Austin, supra note 84, at 222; Boyer & Meidinger, supra note 41, at 839; Shermer, supra note 41, at 462–63. My proposals build on the insights of this prior work to make a more comprehensive and trans-substantive argument for broad delegations of power over the existence and scope of private remedies to federal administrative agencies.

[101] Some policy arguments for or against private enforcement would militate against giving the executive discretion over whether to authorize private enforcement suits. In some cases, therefore, Congress may want to mandate or preclude private enforcement rather than delegating. For a more sustained consideration of agencies' potential incentive problems and the appropriate congressional response, see infra Section III.A.2.

[102] This approach is similar in spirit to the proposals of Grundfest, supra note 78, and Frankel, supra note 26.

forcement suits.[103] Congress could always impose additional substantive limitations or guidelines on the agency regarding the creation and specification of private enforcement actions, as well as additional procedural requirements on adopting changes to the rules in place. The specific remedies available, as well as other aspects related to the design of private rights of action—limitation periods, notice requirements, additional standing requirements, the right of the executive to preempt or bar specific private actions and the conditions under which it would do so, and so forth—could also be left to agency discretion, though Congress could impose restrictions regarding some or all of these matters.

Agency creation, elimination, or modification of private enforcement rights would be treated like any other agency rulemaking, and would be subject to the procedures mandated by the Administrative Procedure Act ("APA"), including notice-and-comment requirements[104] and judicial review to ensure that an agency's final decision is not "arbitrary or capricious,"[105] as well as any other procedural requirements that Congress chose to impose.[106] Furthermore, all the constitutional limitations that apply to Congress's power to mandate private enforcement suits would apply to agency-authorized enforcement suits promulgated pursuant to an express congressional delegation. Thus, for example, Article III standing requirements would apply to agency-created private causes of action; "private attorneys general" would still need to

[103] Gilles's proposed amendment to the statute governing federal regulation of local police practices appears to subscribe to this approach. See Gilles, supra note 18, at 1417.

[104] 5 U.S.C. § 553 (2000).

[105] 5 U.S.C. § 706 (2000).

[106] A potentially difficult question is whether an agency would be able to authorize or preclude private enforcement through official activities other than notice-and-comment rulemaking. Clearly, under current doctrine, an opinion letter or a position adopted in litigation would not be sufficient. See United States v. Mead Corp., 533 U.S. 218, 223–24 (2001); Christensen v. Harris County, 529 U.S. 576, 586–87 (2000); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988). On the other hand, agencies are allowed to make important, prospective policy decisions through adjudication. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947). The creation and delineation of private enforcement rights does not, however, seem to be the sort of agency decision that could be made in an adjudicative procedure between the agency and a private party. I thus assume that notice-and-comment rulemaking would be the primary vehicle for agency activity with respect to private enforcement actions.

show sufficient injury in fact, causation, and redressability to satisfy the Constitution's mandate that federal courts hear only actual "cases" as opposed to "generalized grievances."[107] Similarly, the guarantees of the Equal Protection Clause and Due Process Clause would apply to agency-created private rights to the same extent that they would constrain legislatively created citizen-suit provisions.

Though this delegative approach to the authorization of private enforcement suits has not, to my knowledge, ever been tried, there is reason to believe that it would be both legal and desirable.[108] In this Part, I first lay out the policy advantages of this proposal, which all relate to the comparative institutional advantages that a responsible executive branch agency has, relative to Congress or the courts, in weighing the benefits and drawbacks of private enforcement. I then consider and reject a number of legal arguments

[107] However, inasmuch as standing doctrine is animated in part by Article II concerns about encroachment on executive power, it may be that executive authorization (pursuant to congressional delegation) of citizen enforcement suits might be subject to a less rigorous standing inquiry. See infra Section III.B.1.

[108] The fact that Congress has not delegated the authority to define private enforcement rights to an executive agency in the manner I propose here may be viewed as prima facie evidence that some combination of institutional constraints and political incentives makes such delegation incompatible with congressional preferences. While I acknowledge the potential force of this "if it's such a good idea, they would have done it already" objection, there are several reasons why I do not view the objection as fatal. First, my proposal is sufficiently novel that legislators and their staffs may simply have never considered it. In that sense, this Article is intended to introduce the possibility into the legal academic discourse and, I hope, the policy discourse. Second, inasmuch as Congress's main interest regarding private enforcement is in delegating to *somebody*, rather than achieving the most efficient result, then until recently all Congress had to do to delegate was to write a statute that was vague on the private enforcement question, and the responsibility for defining the scope of private remedies would fall to the judiciary. There is some evidence supporting the notion that Congress deliberately delegated to the courts in this way. See Stewart & Sunstein, supra note 26, at 1291 n.405 (arguing that, in some cases, Congress deliberately leaves it to the courts to determine whether a statute should be read to create a private right of action); see also Steinberg, supra note 99, at 45–46. The viability of this approach has been eroding for some time, but the Court has only made the extent of its hostility to implying private rights clear in the last ten years or so. Third, though part of my argument is that it would be in *Congress's* interest to delegate, I also argue that such delegation would often be *socially* beneficial, and thus worth lobbying Congress to implement. The lack of congressional adoption of the delegative approach to date does not apply to that separate strand of normative argument.

against the constitutionality of delegating agencies the power to authorize private enforcement actions.

A. The Benefits of Delegation

Evaluating the benefits of delegating to agencies the authority to fashion private enforcement rights requires an assessment of how well agencies would perform this task—not in comparison to a hypothetical ideal decisionmaker, but in comparison to the primary institutional alternatives, Congress and the courts. Such a comparative institutional evaluation entails several dimensions. First, which decisionmaker is likely to have the most expertise and best information regarding the likely effects of different private enforcement schemes? Second, what are each potential decisionmaker's incentives to adopt normatively desirable private enforcement policies? Third, to what extent is a given decisionmaker politically accountable for the consequences of its choices regarding private enforcement? Finally, how "sticky" are the decisions made by a particular actor—that is, how easily can policy change in light of new information or new political circumstances?

Considering each of these four dimensions of institutional competence—expertise, incentives, accountability, and flexibility—demonstrates that executive agencies, while hardly ideal decisionmakers, have some clear advantages over Congress and the courts in shaping policy with regard to private rights of action, at least when agencies operate in an environment characterized by a separation of powers and are monitored by the other branches of government. The prodelegation arguments elaborated below may sound familiar, as they are the standard rationales for delegating substantive policy decisions to administrative agencies. If one rejects the view that delegation of substantive policy decisions to administrative agencies is legitimate,[109] one is likely to reject my delegation proposal as well. But, if one accepts the consensus view of contemporary U.S. case law—endorsed by many (though cer-

[109] For critiques of broad congressional delegations to administrative agencies, see Theodore J. Lowi, The End of Liberalism: The Second Republic of the United States 125–26 (2d ed. 1979); Peter H. Aranson et al., A Theory of Legislative Delegation, 68 Cornell L. Rev. 1 (1982); Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231 (1994).

tainly not all) American legal scholars—that delegation to administrative agencies is generally legitimate and often desirable, then, I argue, one must recognize that the rationales supporting this view apply with equal or greater force to the delegation of power to authorize private enforcement actions.

1. Agency Expertise

As noted above, evaluating whether a private enforcement right would advance or hinder the achievement of statutory goals involves complex policy judgments, an expert understanding of the nature and likely effect of different enforcement strategies, and a sensitivity to the need for a consistent and efficient approach to enforcing statutory norms.[110] The government decisionmakers with the best information about and most sophisticated understanding of these issues are likely to be the executive administrators charged with overseeing the public enforcement of the statutory scheme in question. Thus, the case for congressional delegation of authority over the creation of private enforcement actions is largely the same as the case for other forms of congressional delegation to agencies: Agencies are often more competent, in the sense of being better informed or better able to gather the necessary information at low cost, than Congress or the courts.[111]

In fact, the case for delegation of authority over private enforcement policy may be even stronger than it is for other policy choices that are routinely delegated to agencies. After all, the critical questions related to the appropriate scope of private rights of action are bound up with issues of optimal enforcement policy that implicate the executive's core functions. Consider the questions that must be answered to make an intelligent decision regarding the scope of private enforcement: Is underenforcement or overen-

[110] See supra Part II.

[111] See, e.g., Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865 (1984). The classic statement of this "expertise" justification for delegation to administrative agencies is James M. Landis, *The Administrative Process* (1938). See also Cass R. Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421 (1987). For a more recent elucidation, in the vernacular of public choice theory, of the argument that superior agency expertise can justify broad delegations to administrative agencies, see David B. Spence & Frank Cross, A Public Choice Case for the Administrative State, 89 Geo. L.J. 97 (2000). See also Steven P. Croley, Public Interested Regulation, 28 Fla. St. U. L. Rev. 7 (2000).

forcement of the statute the bigger problem?[112] Is it more efficient to write narrow regulations that are enforced to the limit, or to write broad regulations that are enforced selectively?[113] How costly are different kinds of enforcement actions to the agency, and how costly are they likely to be to private plaintiffs?[114] What mix of deterrence and cooperative negotiation is best suited to promote compliance with the law in this particular regulatory area?[115] Would private lawsuits interfere with or complement the government's preferred enforcement strategy?[116] Do private lawsuits tend to identify and prosecute important statutory violations that are overlooked by government enforcers, or do private plaintiffs merely "piggyback" on government enforcement efforts?[117] These are questions that the agencies responsible for enforcing statutory mandates are often in the best position to answer.[118]

None of this is to say that deciding on an appropriate private enforcement action is merely a technocratic exercise. The myth of the

[112] Compare supra Section II.A.1, with supra Section II.B.1.

[113] See supra notes 80–82 and accompanying text.

[114] Compare supra Section II.A, with supra Section II.B.1.

[115] Compare supra Section II.A.1, with supra Section II.B.2.

[116] See supra Section II.B.2.

[117] Compare Coffee, supra note 13, at 220–22 (claiming that private plaintiffs usually "simply piggyback[] on the efforts of public agencies – such as the SEC, the FTC, and the Antitrust Division of the Department of Justice – in order to reap the gains from the investigative work undertaken by these agencies"), and Greve, supra note 52, at 371 (arguing that environmental groups "direct their energies *not* toward the violations that tend to escape the EPA, nor toward the expensive discovery and abatement of ongoing violations, but toward the punishment of known violations"), with Coffee, supra note 13, at 227 (acknowledging that, while the dominant pattern may be private piggybacking on government efforts, in some instances the government piggybacks on private enforcement efforts), Roach & Trebilcock, supra note 13, at 466 (claiming that the overwhelming majority of private antitrust cases between 1973 and 1983 have been independently initiated, rather than follow-on cases that piggyback on government enforcement actions), and Thompson, supra note 40, at 203–04 (asserting that citizen environmental plaintiffs usually prosecute "'significant violations'" that either had escaped the EPA's notice or, "'though not on EPA's priority list, were appropriate subjects of enforcement action'" (quoting Environmental Law Inst., Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes (1984))).

[118] See, e.g., Grundfest, supra note 78, at 966–67 (arguing that the SEC's expertise in securities litigation matters is a powerful argument in favor of giving the agency more power to define the scope of private causes of action under the securities laws).

politically neutral administrator collapsed long ago,[119] and I have no interest in reviving it. Nor do I mean to exaggerate or romanticize the extent of agency expertise. But the fact that expertise is not everything does not mean that it is irrelevant, and agencies' many well-documented failings do not mean that agencies lack any meaningful expertise advantage over other government decisionmakers. Indeed, recent scholarship increasingly recognizes that a rejection of the naïve view of administrators as politically neutral technocrats need not and should not entail a rejection of the potential importance of superior agency informational resources and analytical competence.[120] Especially when the critical issue is whether recognition of a particular cause of action would facilitate or interfere with the promotion of underlying statutory goals, delegation to the executive can be justified largely by reference to the greater information and understanding that administrative agencies have, relative to Congress and the courts, about the likely impact of various private enforcement schemes.

2. Agency Incentives

That agencies might often have better information than legislatures or courts does not necessarily mean that agencies ought to be entrusted with more authority over the scope of private enforcement policy. Precisely because agencies are so closely involved with the politics and practicalities of statutory enforcement, they may suffer from various familiar "pathologies"—that is, agencies' incentives may not be well aligned with social interests. One must therefore assess not only agency expertise but also agency incentives—again, comparing agencies not to some idealized hypothetical decisionmaker, but to Congress and the courts.

[119] See Gerald E. Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1276, 1320 (1984); Louis L. Jaffe, The Illusion of the Ideal Administration, 86 Harv. L. Rev. 1183, 1190 (1973); Laurence H. Silberman, *Chevron*—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 823 (1990).

[120] See Croley, supra note 111, at 7; Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1, 5 (1998); Spence & Cross, supra note 111, at 124–26; Cass R. Sunstein, Health-Health Tradeoffs, 63 U. Chi. L. Rev. 1533, 1562 (1996); Cass R. Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2087–90 (1990) [hereinafter Sunstein, Law and Administration].

There are two distinct sets of concerns about misaligned agency incentives, both of which have some plausibility even though the two concerns are not entirely consistent with each other. The first concern is that agencies will be excessively *reluctant* to authorize private enforcement, perhaps because agencies are "captured" or otherwise unduly influenced by the industries they are supposed to regulate,[121] or perhaps simply because each agency jealously guards its enforcement prerogatives and dislikes the idea of anyone else, including private plaintiffs, intruding on its turf.[122] The second concern is that agencies may be excessively *enthusiastic* about authorizing private enforcement because agencies tend to be overzealous regulators that focus narrowly on their own mission without consideration of costs or competing goals.[123]

The concern about misaligned agency incentives, though real, is mitigated by several considerations. First, though both the agency

[121] See Daniel A. Farber, Positive Theory as Normative Critique, 68 S. Cal. L. Rev. 1565, 1570 (1995); Sam Peltzman, Toward a More General Theory of Regulation, 19 J.L. & Econ. 211, 212 (1976); George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3, 10–13 (1971). While capture theory suggests that interest group influence on policy is generally undesirable, other perspectives are more sanguine about the role of pressure groups in shaping regulatory policy. See, e.g., Robert A. Dahl, A Preface to Democratic Theory 146 (1956); Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q. J. Econ. 371, 394–96 (1983). Einer Elhauge contends that interest group influence cannot be evaluated normatively without reference to some other normative goal, and thus it is incorrect to assume that interest group influence is per se an evil that must be "corrected." See Einer Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L.J. 31, 48–59 (1991).

[122] See, e.g., Boyer & Meidinger, supra note 41, at 841 (agencies sometimes "may resist private enforcement in the belief that the plaintiff groups are intruding on bureaucratic turf or interfering with established policies"); Elizabeth R. Thagard, The Rule that Clean Water Act Civil Penalties Must Go to the Treasury and How To Avoid It, 16 Harv. Envtl. L. Rev. 507, 529 (1992) (asserting that DOJ officials view vigorous citizen enforcement of the CWA as an intrusion on DOJ's turf).

[123] See Stephen Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 11–19 (1993); Anthony Downs, Inside Bureaucracy 107 (1967). But see Spence & Cross, supra note 111, at 119–21 (asserting the "tunnel vision" argument "overstates the magnitude and significance of the . . . problem, ignores other agency incentives, and ignores the enhanced ability of politicians to address [it]"). A related concern might be that executive agencies will be insufficiently sensitive to the degree to which private causes of action under federal statutes may impinge on the traditional powers of the states. See Zeigler, supra note 70, at 118 (raising the concern that private enforcement encroaches on state prerogatives); see also Steinberg, supra note 99, at 50 (same).

inaction and agency overzealousness critiques have merit in certain circumstances, one must not exaggerate their significance. For instance, recent research suggests that the "agency capture" problem has been wildly overstated.[124] Related work demonstrates that "public interest" considerations are also an important influence (though hardly the only one) on decisionmaking in administrative agencies.[125] The risk of capture is also less acute when an agency has a broad jurisdiction, as such agencies respond to (and draw their personnel from) multiple constituencies with competing interests.[126] In the private enforcement context, it is quite likely that such competing pressures are at work.

Moreover, the broad claim that agencies would never allow private plaintiffs to intrude on their enforcement turf is not viable given the fact that some agencies enthusiastically endorse and support the existence of private enforcement actions on some issues. For example, federal officials have sometimes expressly encouraged citizen enforcement suits under the federal environmental statutes as a desirable complement to government enforcement efforts,[127] and have allowed private plaintiffs to pursue these suits so that government regulators can concentrate their enforcement resources elsewhere.[128] Similarly, though the Securities and Exchange Commission ("SEC") takes the lead in prosecuting insider trading cases,[129] it has largely left the enforcement of the proxy contest rules to private plaintiffs.[130] This evidence suggests that if private enforcement actions would not otherwise exist, executive agencies

[124] See, e.g., Spence & Cross, supra note 111, at 121–22 & n.104 ("No family of public choice models seems more irrelevant yet is more widely cited than capture models.").

[125] See, e.g., Croley, supra note 111, at 28–54; Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1, 65–76 (1998); Michael E. Levine & Jennifer L. Forrence, Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis, 6 J.L. Econ. & Org. 167, 191–94 (1990); see also Joseph P. Kalt & Mark A. Zupan, Capture and Ideology in the Economic Theory of Politics, 74 Am. Econ. Rev. 279, 279–85 (1984).

[126] See Jonathan R. Macey, Organizational Design and Political Control of Administrative Agencies, 8 J.L. Econ. & Org. 93, 100 (1992).

[127] See Boyer & Meidinger, supra note 41, at 841; Bucy, supra note 6, at 41; Cross, supra note 8, at 56, 69; see also supra note 46 and accompanying text.

[128] See Thompson, supra note 40, at 200.

[129] See Frankel, supra note 26, at 579.

[130] See id. at 580; see also Grundfest, supra note 78, at 990 (noting the SEC's history of strong and explicit support for an implied private right of action under § 10(b)).

might often want to create them.[131] With regard to concerns about tunnel vision and overzealousness, the evidence that agencies at least sometimes appear responsive to the "public interest," the fact that agencies are not always enthusiastic about private enforcement, and the existence of presidential and congressional oversight[132] all work to counter such tendencies, if they exist.

But even if the concerns about pathological agency decisionmaking are overstated, that does not mean these concerns are irrelevant. Rather, the institutional design question becomes whether agencies are better or worse at advancing what we would consider socially desirable goals than Congress or the courts. To do this, one needs to decide on a normative baseline against which to evaluate policy outputs.

One possibility is to consider what a fully informed Congress would have enacted as the benchmark against which to measure agency outputs (or, for that matter, congressional or judicial outputs).[133] Note, however, that the proposal under consideration does not require Congress to relinquish ultimate say over private enforcement policy. Sometimes Congress enacts citizen-suit provisions because it perceives a need to constrain recalcitrant or irresponsible executive agencies.[134] Likewise, in some circumstances Congress may believe citizen suits are generally undesirable, or that a particular agency would be excessively likely to abuse its power to authorize such suits. In such cases, Congress always has the option of expressly creating or expressly precluding citizen en-

[131] See supra notes 42–46 and accompanying text; see also Cannon v. Univ. of Chicago, 441 U.S. 677, 706–07 (1979) (noting that the Department of Health, Education, and Welfare "perceives no inconsistency between the private remedy [for violations of Title IX] and the public remedy. On the contrary, the agency takes the unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purposes"); Gilles, supra note 18, at 1450 ("The deputation model provides a necessary element of political 'cover' [for the DOJ in enforcement actions against police departments]. It is one thing for the Justice Department to announce an attack on the policies and practices of a municipal police agency; it is quite another for it to allow aggrieved victims of police misconduct to seek to ensure that others do not likewise suffer . . . .").

[132] See infra note 135.

[133] In this subsection, when I refer to what "Congress" could do, I actually mean what could be done via the formal legislative process, which includes not only Congress (which is itself not a single entity, see supra note 4) but also the President.

[134] See supra note 53 and accompanying text.

forcement. Alternatively, Congress could structure the delegation in a way that counters the agency's "pathological" tendencies. For example, Congress can seek to compensate for perceived agency bias by manipulating the default rules and the agency's decision costs. Thus, if Congress believed an agency was likely to be biased against private enforcement, the statute could set a default rule that, absent agency action, a private enforcement action would exist. The agency could only eliminate private enforcement if it first cleared some costly procedural hurdles—perhaps the standard APA notice-and-comment procedures would suffice, or perhaps Congress might impose additional requirements. By making the elimination of private suits more costly than their retention, the statute would compensate for agency bias, leading the agency to adopt (approximately) the policy Congress would have adopted if it had the agency's informational resources.[135] Depending on the informational environment and the perceived direction of agency bias, other types of structural arrangements may also be effective.

To put the point more generally, Congress is likely to prefer delegation to agencies when the agency's preferences do not diverge too much from legislative preferences and/or when Congress can exercise sufficient direct or indirect control over how agencies exercise their authority. When these conditions hold, the benefits to legislators of delegation—particularly the greater information that agencies may possess about the implications of various policy choices—outweigh the costs that may derive from excessive agency zeal or reluctance regarding private enforcement.[136] The fact that

[135] For more on how political principals can manipulate decision costs to compensate for agent bias, see, e.g., McCubbins, Noll & Weingast, supra note 50; Pablo T. Spiller & Emerson H. Tiller, Decision Costs and the Strategic Design of Administrative Process and Judicial Review, 26 J. Legal Stud. 347 (1997). But see Jeffrey S. Hill & James E. Brazier, Constraining Administrative Decisions: A Critical Examination of the Structure and Process Hypothesis, 7 J.L. Econ. & Org. 373 (1991) (critically evaluating the claim that Congress structures the administrative process to control administrative decisions); David B. Spence, Agency Policy Making and Political Control: Modeling Away the Delegation Problem, 7 J. Pub. Admin. Res. & Theory 199 (1997) (critiquing political economy models that assume legislators can easily eliminate principal-agent problems).

[136] The idea that asymmetric information can make delegation desirable to a legislature even when the agency may have preferences that diverge from those of the legislative principal has been extensively explored in the formal political science literature. See, e.g., Kathleen Bawn, Political Control Versus Expertise: Congressional Choices

Congress chooses to delegate despite the existence of agency pathologies is good evidence that for a majority of legislators the benefits of delegation outweigh the costs. This line of argument has in fact been frequently invoked to justify congressional delegation of other kinds of policy decision; the argument here is no different.[137] So, if one takes congressional preferences as the normative baseline, the pathologies of agency decisionmaking are not a problem (except insofar as they deter some otherwise efficient delegations of legislative authority).

Of course, the preferences of a hypothetical fully informed Congress may not be the appropriate normative baseline. Indeed, the assumption that congressional incentives are properly aligned with social incentives is likely to strike many as dubious if not downright bizarre. Congress, after all, suffers from its own decisionmaking pathologies. But if that is true then one clearly cannot assume that an imperfect Congress would make better private enforcement policy than imperfect but perhaps better informed executive agencies.[138] Nor can one presume that courts have well-aligned incentives, despite the occasional tendency of legal scholars to idealize the judicial decisionmaking process.[139]

Ultimately, a full defense of delegation as a general matter lies beyond the scope of this Article; others have already laid out the basic prodelegation case, and the performance of administrative agencies in exercising their delegated power is an ongoing subject of empirical research. While I find persuasive much of the recent work suggesting that the reports of agency pathologies are greatly

about Administrative Procedures, 89 Am. Pol. Sci. Rev. 62 (1995); David Epstein & Sharyn O'Halloran, Administrative Procedures, Information, and Agency Discretion, 38 Am. J. Pol. Sci. 697 (1994); Susanne Lohmann & Hugo Hopenhayn, Delegation and the Regulation of Risk, 23 Games & Econ. Behav. 222 (1998); Spence & Cross, supra note 111, at 124–26.

[137] See David Epstein & Sharyn O'Halloran, The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach, 20 Cardozo L. Rev. 947, 961–65 (1999); Mashaw, supra note 91; Spence & Cross, supra note 111, at 120, 133.

[138] See Spence & Cross, supra note 111, at 123–24, 134–38.

[139] For criticisms of this tendency, see Frank B. Cross, The Judiciary and Public Choice, 50 Hastings L.J. 355 (1999); Frank B. Cross, Shattering the Fragile Case for Judicial Review of Rulemaking, 85 Va. L. Rev. 1243 (1999); Elhauge, supra note 121, at 66–87; Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, 68 U. Cin. L. Rev. 615, 624–34 (2000); Spence & Cross, supra note 111, at 140–41.

exaggerated,[140] at least when agencies are compared to other real government decisionmakers rather than an ideal social planner, I recognize that this is unlikely to convince someone who believes that the existing administrative state is out of control and that some form of nondelegation doctrine ought to be revived.[141] But for those who agree that the informational and efficiency benefits of delegation are often substantial and that the pathologies of agency decisionmaking, while real, are not so acute that these gains are not often worth the costs, I claim that the same underlying logic applies with equal force to delegation of private enforcement decisions.

3. Agency Accountability

One of the standard objections to judicial implication of private rights of action in the absence of clear congressional intent is that decisions about the rigor with which the law should be enforced—and about whether private parties ought to be able to participate in that enforcement—ought to be made by politically accountable decisionmakers.[142] Would a similar objection also apply to agency creation or limitation of private rights of action, if such power were expressly conferred by Congress? The answer is no, for several reasons.

First, delegating authority from one elected branch (Congress) to another one (the executive) does not entail any obvious accountability loss, unless one believes that decisionmaking by the

[140] See supra notes 124–29 and accompanying text.

[141] See supra note 111.

[142] See Cannon v. Univ. of Chicago, 441 U.S. 677, 743 (Powell, J., dissenting). There are two possible (and nonexclusive) reasons why one might think political accountability for enforcement policy is important. First, accountability may have instrumental benefits, in the form of better incentives for political actors to make socially beneficial enforcement decisions. Second, some might view political accountability for enforcement decisions as having some intrinsic normative or constitutional value. The former reason for valuing political accountability overlaps with the question of appropriate incentives. See supra Section III.A.3. Viewed in that perspective, the discussion in this Section can be seen as an extension of the discussion in the previous Section, incorporating the widespread but contestable assumption that political accountability generally induces more socially beneficial enforcement policy. The claim that political accountability has intrinsic value is harder to explicate, and I do not attempt to develop or defend a full account of such a view here. Inasmuch as one subscribes to such a notion, the value of accountability would have to be weighed against costs, if greater accountability leads to socially worse outcomes.

former inherently involves a greater degree of political accountability than decisionmaking by the latter.[143] The executive, however, is ultimately accountable to a national constituency for its decisions regarding private enforcement,[144] and Congress is also accountable for the decision to delegate in the first place.[145] With regard to both of these institutions, informed voters will reward or punish politicians at the polls for their specific decisions (to delegate or not, to authorize private enforcement or not), while the votes of the uninformed are likely to be shaped by low-cost cues from publicly available information[146] and by the ultimate (though perhaps small) impact of the final policy decision on their welfare.[147]

Second, the fact that executive agencies would have to use notice-and-comment rulemaking to expand or restrict the scope of private rights of action[148] has the potential to increase the amount of attention paid to private enforcement policy, which in turn may increase both ex ante lobbying efforts and the ex post political consequences of a final decision. An agency rulemaking that deals primarily with the creation, elimination, or modification of a pri-

[143] Some scholars do make precisely this claim. See, e.g., Lowi, supra note 109, at 125–26; David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 10 (1993). But see Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2335 (2001); Mashaw, supra note 91, at 96–99; Peter H. Schuck, Delegation and Democracy: Comments on David Schoenbrod, 20 Cardozo L. Rev. 775, 783–790 (1999); Spence & Cross, supra note 111, at 128–29.

[144] See Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 58–67 (1995); Kagan, supra note 143, at 2335; Mashaw, supra note 91, at 95–96.

[145] See Mashaw, supra note 91, at 87; Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1748 (2002).

[146] See Arthur Lupia & Mathew D. McCubbins, The Democratic Dilemma: Can Citizens Learn What They Need to Know? (1998); Larry M. Bartels, Uninformed Votes: Information Effects in Presidential Elections, 40 Am. J. Pol. Sci. 194 (1996); Richard D. McKelvey & Peter C. Ordeshook, Information, Electoral Equilibria, and the Democratic Ideal, 8 J. Pol. 909 (1986).

[147] See David Austen-Smith & Jeffrey Banks, Electoral Accountability and Incumbency, *in* Models of Strategic Choice in Politics 121, 123 (Peter C. Ordeshook ed., 1989); John Ferejohn, Incumbent Performance and Electoral Control, 50 Pub. Choice 5, 7 (1986); Susanne Lohmann, An Information Rationale for the Power of Special Interests, 92 Am. Pol. Sci. Rev. 809, 823 (1998); Scott Ashworth & Ethan Bueno de Mesquita, Electoral Selection and the Incumbency Advantage with Electoral and Institutional Variation (Aug. 20, 2004), at http://www.artsci.wustl.edu/~ebuenode/PDF/inc_adv.pdf (on file with the Virginia Law Review Association).

[148] See supra notes 104–06 and accompanying text.

vate right of action is likely to focus the attention of organized groups and the interested public on the special issues surrounding private enforcement.

Relatedly, delegation of authority to an executive agency to fashion a private enforcement right may increase the visibility of executive decisions regarding how vigorously to enforce particular statutes. Inasmuch as one believes that visibility and accountability are correlated, this effect would be beneficial. While it is widely accepted that political accountability is important for decisions about how rigorously to enforce the law, just as it is for decisions about the substantive content of the law,[149] executive enforcement policy is generally difficult to observe.[150] Prosecutorial decisions are made by dozens or hundreds of lower-level officials in thousands of individual cases, most of which never result in any enforcement action. How agencies allocate their enforcement resources is similarly difficult to assess. This problem is inevitable, and for the most part the interested public will need to rely on its intuitive judgments or signals from the media and other monitoring groups about whether enforcement is efficient or inefficient, zealous or lenient, deterrence-oriented or compromise-oriented.[151] But an agency decision regarding the recognition of private enforcement rights provides at least one relatively high profile indicator of the agency's overall en-

[149] See Austin, supra note 84, at 234–35 (differentiating a "naive" view in which enforcement and policymaking are distinct from a "sophisticated" recognition that "[e]nforcement efforts . . . are an integral part of the policymaking process").

[150] See David R. Hodas, Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?, 54 Md. L. Rev. 1552, 1614 (1995) (claiming that "[f]or all practical purposes, administrative enforcement activity is not subject to public scrutiny; thus there is no independent public check on state and federal enforcement practices" (citation omitted)); Zinn, supra note 51, at 127 (describing enforcement as a "low-visibility activity" and arguing that this "opacity prevents third parties from effectively monitoring enforcement"). But see Boyer & Meidinger, supra note 41, at 914 (claiming that agency enforcement issues have become "highly visible" and that "enforcement officials can expect to have congressional committees, the General Accounting Office, and a variety of media representatives and constituency groups routinely monitoring their enforcement activities"). Nonetheless, Boyer and Meidinger also argue that codification of enforcement policy through rulemaking significantly improves the dialogue between regulators and interest groups. See id. at 915–16.

[151] See supra note 149.

forcement policy.[152] Those who find the agency excessively lax can take it to task if it fails to authorize supplementary private enforcement, while those who object to draconian enforcement can lobby against allowing citizen suits. The contribution of this sort of executive decision to overall executive accountability is likely to be modest but not insignificant.

Finally, a related but less important consideration is that congressional creation of private rights of action almost always involves a delegation to politically unaccountable courts of important decisions regarding the nature and scope of these rights. This is especially obvious with regard to judicially implied rights of action,[153] which is why many commentators are skeptical of such rights.[154] Even when Congress creates an express right of action, it often leaves important questions about the nature and scope of that right unanswered, thus leaving the judiciary as the institution primarily responsible for determining the contours of the right.[155] This may

[152] This effect is attenuated by the fact that public and private enforcement are generally (partial) substitutes, such that the existence of private enforcement may imply less public enforcement, and vice versa. In practice, though, the willingness of an agency to authorize citizen suits is likely to be a good signal of the agency's commitment to aggressive enforcement.

[153] For example, in the securities regulation field courts have had to determine not only which provisions of the securities laws create a private right of action in the first place, but also: (1) the scope of the implied right of action, compare Superintendent of Ins. v. Banker's Life & Cas. Co., 404 U.S. 6 (1971), with Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994); (2) which parties have standing to bring the action, see, e.g., Piper v. Chris-Craft Indus., 430 U.S. 1 (1977); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); and (3) the statute of limitations, see Lampf v. Gilbertson, 501 U.S. 350, 355–58 (1991) (plurality opinion).

[154] See Pierce, supra note 79, at 8; Stewart & Sunstein, supra note 26, at 1292.

[155] Explicit citizen-suit provisions often leave unresolved important issues which the courts must then address. For example, even with regard to the relatively detailed citizen-suit provision of the Clean Water Act, 33 U.S.C. § 1365 (2000), the judiciary still had to decide: (1) whether civil damages would be available, see Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14–15 (1981) (no damages available under CWA, even though the Act authorizes "any appropriate civil penalties," 33 U.S.C. § 1365(a) (2000)); (2) whether citizen suits could be maintained against defendants whose violations of the Act were solely in the past, see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 59 (1987) (citizens cannot sue for past violations unless the violations continue in the present or are likely to recur in the future); and (3) the conditions under which a federal enforcement effort precludes a citizen suit, see, e.g., Ark. Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376, 380 (8th Cir. 1994); see also Austin, supra note 84, at 223. This problem would be redressed somewhat by a modified version of my proposal, in which

be attributable to Congress's lack of attention to detail,[156] its lack of familiarity with the intricacies of private lawsuits, or its inability to reach consensus on the relevant questions. Whatever the reason, congressionally mandated rights of action implicitly delegate authority to politically unaccountable federal courts.[157] An express delegation of authority to executive agencies to fashion private enforcement rights addresses this problem at least in part, since the agency can be expected to flesh out many of the critical details that would otherwise be left to the courts. Parties that are dissatisfied with an agency's decision can punish the executive by withdrawing, or threatening to withdraw, political support.

4. Agency Flexibility

An additional advantage to delegating agencies the power to create and delimit private enforcement rights is agencies' relatively greater capacity to experiment with private causes of action, expanding and contracting their scope in response to new evidence and changing conditions. Flexibility, like expertise, is often invoked to justify delegation of substantive policy choices to agencies.[158] A degree of flexibility may be particularly valuable with regard to authorizing and circumscribing private causes of action because of the difficulty in predicting ex ante the overall effect of private citizen suits and the likelihood that relevant factual or political conditions will vary over time.

Congress made the primary decision about whether to authorize a private right of action and, if Congress decided to do so, the responsible agency rather than the court would fill in the details.

[156] This generalization does not hold in some contexts. The tax code, for example, is extraordinarily detailed. See David Epstein & Sharyn O'Halloran, supra note 137, at 963–64; Morris P. Fiorina, Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power, 2 J.L. Econ. & Org. 33, 35 (1986). Nonetheless, the generalization is frequently accurate. See William E. Eskridge, Dynamic Statutory Interpretation 38 (1994); Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 806 (1983).

[157] By contrast, congressional preclusion of private rights of action clearly raises no accountability problem.

[158] See, e.g., Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517.

Though the agency rulemaking process is cumbersome,[159] agencies can and do implement policy changes in response to new information, changing circumstances, or shifting political preferences. An administrative agency with the power to fashion private enforcement rights could adjust those rights over time as their actual effects became clearer. For instance, an agency might initially authorize broad private enforcement rights and later curtail those rights if it appeared that overzealous private enforcers were interfering with the agency's regulatory agenda. Or an agency might experiment by authorizing private enforcement in one relatively narrow policy area and then expanding the scope of citizen enforcement if the experiment proves successful. The executive could also respond to changing political currents by expanding the scope of private enforcement when underenforcement was perceived as the more serious problem but restricting it when overenforcement was the dominant concern.[160] Again, while I do not want to romanticize the process of executive agency decisionmaking, on the whole the flexibility of executive branch agencies is an important asset in this context, especially when compared to the alternatives.

Congress has a number of institutional features that make it ill-suited to engage in the experimental, adaptive, trial-and-error approach to policymaking that may be particularly valuable in the private enforcement context.[161] First, legislative resources are limited, and it is therefore difficult for legislatures to monitor continuously the effect of particular policies and to make regular adjust-

[159] See James T. Hamilton & Christopher H. Schroeder, Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste, 57 Law & Contemp. Prob. 111 (1994); Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385 (1992). But see William S. Jordan III, Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?, 94 Nw. U. L. Rev. 393 (2000) (claiming that the burdens imposed by notice-and-comment rulemaking and judicial review do not substantially interfere with agency pursuit of regulatory objectives).

[160] This aspect of agency flexibility is another way in which delegation to agencies can actually enhance political accountability. See supra Section III.A.3.

[161] See Steinberg, supra note 99, at 47 (noting the institutional barriers to congressional correction of mistakes with regard to the existence and scope of private causes of action).

ments.[162] Second, the decentralized nature of legislative power and the need for a congressional majority makes it difficult to revisit and adjust legislative programs once they have been established.[163] Third, this problem is exacerbated by the institutional structure of Congress and the legislative process, which is characterized by numerous gate keepers and veto-points.[164]

Courts are in an even worse position than Congress to revise private enforcement policy in light of changing circumstances. Courts are likely to know considerably less than either the legislature or the executive about how well private enforcement is working in practice.[165] Additionally, the stare decisis principle means that once the courts have resolved the question as to the existence or scope of a particular private right of action, that decision is unlikely to change.[166] The extant jurisprudence on implied rights of action is powerful evidence for this point, as the Court has continued to uphold established private remedies even in cases where drastic changes in the Court's implied right of action jurisprudence leave the earlier decisions without doctrinal foundation.[167]

The fact that agencies are more flexible than Congress or the courts does, however, raise at least two concerns. First, while flexibility is often useful, stability can be important as well. There is an obvious and important trade-off between these virtues. In general, stability is more important when risk-averse parties need to plan for the long term (for instance, when large irrevocable investments in specific assets are required) and when the government faces a time consistency problem.[168] Flexibility is more valuable when the effects of a particular policy choice or underlying preferences are highly uncertain and variable, and when the relevant decisionmaker's incentives are likely to track social incentives reasonably

[162] See Eskridge, supra note 156, at 131.

[163] See Mark Seidenfeld, Bending the Rules: Flexible Regulation and Constraints on Agency Discretion, 51 Admin. L. Rev. 429, 482 (1999).

[164] See, e.g., Kenneth A. Shepsle & Barry R. Weingast, Structure-Induced Equilibrium and Legislative Choice, 37 Pub. Choice 503, 513–14 (1981).

[165] See supra Section III.A.1.

[166] In the implied right of action context, this problem is exacerbated by the Court's move toward viewing the question whether a statute authorizes private enforcement as an inquiry into congressional intent rather than an exercise of the judiciary's common lawmaking powers. See Stabile, supra note 27, at 883–85.

[167] See Grundfest, supra note 78, at 994–98.

[168] See supra note 57.

well even as conditions change. In the context of private enforcement, there is no obvious time consistency problem,[169] and while there is a loss of efficiency if firms, interest groups, or lawyers plan on the existence (or nonexistence) of private enforcement only to have the rules change, this loss is likely to be small given that these parties are usually large multifunction entities, and the assets needed to bring or defend citizen suits are relatively nonspecific. By contrast, the factors favoring flexibility in private enforcement policy are likely to be more salient, given the considerable uncertainty about the effects of different private enforcement schemes, the possibility of fairly rapid changes in underlying circumstances, and the fluidity of policy preferences regarding the rigor of enforcement of various statutes.

The second concern with increased flexibility involves the retroactive effect of changes in the rules: What happens if a plaintiff suffers some actionable harm and initiates a private enforcement suit, but while the suit is pending the agency finalizes a rule that eliminates the private right under which the plaintiff brought the action? This is a potentially knotty issue, but it is hardly unique to agency authority over private enforcement policy. Essentially the same issue arises every time Congress eliminates or modifies a private enforcement right legislatively, and the issue also arises any time Congress or an administrative agency alters, via legislation or regulation, a substantive rule in such a way that a defendant's

[169] If the government announces that private enforcement rights shall exist, and private parties organize their behavior accordingly, the government gains no clear benefit from announcing a surprise withdrawal of such rights. Nor does the surprise introduction of private enforcement lead to any readily apparent social loss. My argument that there is no serious time consistency problem with creating or eliminating private rights of action may appear in tension with my earlier argument, see supra notes 56–57 and accompanying text, that one advantage of private enforcement is that it can make the threat of enforcement more credible. The two arguments are not, however, inconsistent. Private rights of action, once created, can be eliminated, but doing so is costly because of the need to initiate a new rulemaking. These costs mean that once an agency creates private enforcement rights it can credibly signal to regulated industries that the agency's substantive rules will be enforced unless the regulated industries can successfully pressure the agency (or Congress) to change the rules. This is generally more difficult than inducing an agency not to pursue a public enforcement action vigorously. Of course, the credibility of the commitment to private enforcement, like the commitment to particular substantive rules, is even stronger if it is enshrined in legislation, but that level of commitment generally bestows little additional benefit in this context.

once-prohibited conduct is no longer illegal. Though the doctrines addressing the retroactivity problem are hardly a model of conceptual clarity, they appear workable and would apply in the case where an agency eliminated a private right of action just as they do in other circumstances where the legal basis for a lawsuit disappears while the suit is in progress.[170]

B. The Constitutionality of Delegation

The benefits associated with delegating to agencies the authority to fashion private causes of action derive primarily from pragmatic considerations. But even if delegation were desirable, would it be constitutional? The answer seems clearly to be yes. I elaborate on this claim by considering and rejecting the most obvious constitutional objections to the proposal. First, the Take Care Clause of Article II[171] not only poses no barrier to allowing executive agencies to determine the appropriate scope of private enforcement actions, but delegation to the executive actually resolves an Article II problem that some scholars and jurists have raised with respect to congressionally mandated or judicially implied private enforcement actions. Second, the nondelegation doctrine, grounded in Article I's vesting of legislative power in Congress,[172] has no more vitality as an objection to delegation of authority over private enforcement than it does over delegation of other substantive policymaking authority. In fact, the delegation of authority to create and define private enforcement actions raises fewer nondelegation concerns than run-of-the-mill delegations of policymaking power,

[170] The leading case on the retroactive effect of changes in the law is *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). In general, while *Landgraf* endorses a general presumption against retroactive application of a statute's substantive terms, it also holds that a statute that "affects the propriety of prospective relief" is not retroactive, id. at 273–74, that courts may apply "intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed," id. at 274, and that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity," id. at 275. These statements strongly suggest that a plaintiff whose private enforcement suit was eliminated by a change in agency regulations would have little recourse.

[171] U.S. Const. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . . .").

[172] U.S. Const. art. I, § 1 ("All legislative Powers . . . shall be vested in [the] Congress of the United States . . . .").

given the close relationship of private enforcement policy to traditional executive responsibilities. Third, the proposed delegation of authority does not implicate Congress's power to regulate the jurisdiction of the federal courts under Article III.[173] There is thus no constitutional barrier to a regime in which the executive, pursuant to a grant of authority by the legislature, determines the existence and scope of private actions to enforce the substantive guarantees of federal statutes.

1. Article II: The Take Care Clause

One common constitutional objection to congressionally authorized citizen-suit provisions is that they offend the Take Care Clause of Article II,[174] and a similar charge could be leveled against the judicial implication of private rights of action. The objection maintains that Article II vests executive power solely with the President and those officials under his direct supervision and control; other branches of government cannot usurp this executive prerogative by conferring the power to enforce federal law on private citizens aided by the federal courts.

The persuasiveness of this objection when applied to congressionally authorized (or judicially implied) private rights of action is a controversial subject, and though this view may have some sympathizers on the bench,[175] it does not seem to have a majority. Even if one were to concede, however, that congressional imposition of a

[173] U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[174] See Cross, supra note 8, at 71, 73–74; see also Johnson, supra note 17, at 383–84, 398–400 (discussing but rejecting the notion that environmental citizen-suit provisions offend the Take Care Clause). Alternative textual hooks for this theory, which support a functionally identical argument, are the Article II Vesting Clause, U.S. Const. art. II, § 1, cl. 1 (vesting executive power in the President), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2 (granting the President the power to appoint officers of the United States). See Johnson, supra note 17, at 384. These separation of powers concerns are often folded into the analysis of plaintiff's standing, even though the latter requirement is grounded in Article III. See Scalia, supra note 93, at 881–82.

[175] See Scalia, supra note 93, at 896; see also Johnson, supra note 17, at 384 (noting that, while most challenges to citizen suits have relied on Article III standing claims, several justices have raised Article II concerns "in dicta, dissents, and concurrences, [and] at least some members of the Court appear to invite parties to present the Article II issue to the Court directly").

citizen-suit provision on an unwilling executive branch would raise an Article II concern, the proposal advanced here avoids this problem entirely. In fact, a congressional delegation of power to the executive to authorize citizen suits could be seen as a solution to the Article II problem that otherwise inheres in such private enforcement provisions, because citizen suits under this proposal would be authorized when, and only when, the executive approved.[176]

2. Article I: The Nondelegation Doctrine

Another possible constitutional objection to an express congressional delegation to executive agencies of the power to fashion private causes of action derives from the Article I Vesting Clause. Here, the objection would be that it is for Congress, rather than the executive, to determine whether and under what circumstances private citizens can sue to enforce congressional statutes.

This Article I objection boils down to nothing more than a standard nondelegation argument.[177] But the nondelegation doctrine—at least as a basis for finding a statute constitutionally invalid rather than as a background principle of statutory construction[178]—is basically a dead letter.[179] The most recent attempt to revive the doctrine was resoundingly rejected by the Supreme Court,[180] and, although the choice as to whether private enforcement is permissible may seem like the kind of major decision the legislature ought to make, Congress routinely delegates policy decisions of comparable or greater importance to administrative agencies. The only formal legal requirement that the nondelegation doctrine imposes is the requirement that Congress supply some minimally sufficient "intelli-

[176] Cf. Gilles, supra note 18, at 1434–35 (arguing that the suggestion that Congress "deputize" private citizens to sue under 42 U.S.C. § 14141 (2000) would not result in an aggrandizement of the legislature's power at the expense of the executive since Congress would retain no control over the deputies).

[177] Note that this argument on its face is inconsistent with the Article II claim, discussed above, that congressional authorization of citizen suits is problematic because such a delegation would impinge on the executive's prerogative to make decisions regarding the enforcement of federal law.

[178] See infra Section IV.C.1.

[179] See, e.g., Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 322 (2000) (describing the conventional version of the nondelegation doctrine as having had "one good year, and 211 bad ones (and counting)").

[180] See Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001).

gible principle" for the administrative agency to follow.[181] This standard is easily satisfied in the private action context by the principle that the agency should adopt whatever rule would advance the goals established by the substantive portions of the statute in the most socially desirable way.

Moreover, just as the close relationship between private enforcement policy and the executive's traditional duties and prerogatives means that the proposed delegation redresses rather than raises a Take Care Clause concern, so too does this factor mitigate any lingering Article I concerns.[182] If modern courts have few qualms about allowing Congress to delegate quasi-legislative power to administrative agencies, it is hard to see why courts should be more rather than less concerned when Congress delegates decisionmaking authority over an issue that is more closely related to the executive's primary functions.[183] It would be an odd separation of powers doctrine that allowed the executive to make quasi-legislative judgments about the content of primary standards of conduct but precluded the executive from participating in quasi-executive decisions as to whether to employ a particular tool to enforce those standards.

3. Article III: Congressional Control of Federal Jurisdiction

Another possible constitutional objection to an express delegation of power over private enforcement policy might sound in the principle, derived from Article III, that Congress has the exclusive power to control the jurisdiction of the federal courts.[184] Instead of an assertion that Congress has impermissibly delegated its Article I legislative responsibilities, here the claim would be that Congress has impermissibly abdicated its Article III powers of control over federal jurisdiction. There are at least two reasons why this consti-

[181] Id. at 472; J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

[182] Cf. Zeigler, supra note 31, at 717 (arguing, in the context of judicially implied rights of action, that the creation of a private enforcement right is not an act of "legislat[ion] at large," but rather a "relatively narrow decision to grant a judicial remedy to enforce a right that Congress has already created").

[183] See Cross, supra note 8, at 72 (noting that "civil enforcement of the law is a form of . . . executive power").

[184] I thank Dan Meltzer both for pointing out this possible objection and for suggesting a number of the responses.

tutional objection is even less tenable than the Article I nondelegation claim.

First, the argument is misguided inasmuch as it interprets the delegation at issue here as a delegation of Congress's Article III powers to control the jurisdiction of the federal courts. Such is not the case. Jurisdictional statutes are distinct from statutes that create actionable rights; otherwise, virtually every statute or regulation would be "jurisdictional."[185] Functionally, Congress delegates to the executive branch the power to determine what sorts of cases can be heard in federal court every time it delegates to agencies the power to make regulations of which violations are actionable, or to define statutory terms in a way that affects their interpretation in subsequent private lawsuits. Second, even if the creation of private rights did somehow implicate Congress's prerogatives under Article III, Congress should still be able to delegate this authority. Because the Article III argument is ultimately a nondelegation argument, the standards that apply to an Article I objection ought to apply here as well. Again, the delegation proposed here contains an intelligible principle and would be adopted pursuant to the normal legislative process. Relatedly, if Congress has the power to confer or to deny federal court jurisdiction, then arguably it has the authority to confer or deny such jurisdiction subject to consent by the executive branch.[186] This is a species of "greater includes the lesser" argument, and though such arguments are sometimes fallacious, here the argument is compelling given the absence of discrimination[187] or implication of some other substantive constitutional right.[188]

[185] See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 92 (1998).

[186] But see Clinton v. City of New York, 524 U.S. 417 (1998) (striking down "line item veto" provision on similar separation of powers grounds); INS v. Chadha, 462 U.S. 919 (1983) (using formalistic separation of powers reasoning to invalidate "legislative veto" provisions).

[187] See, e.g., McLaughlin v. Florida, 379 U.S. 184, 194 (1964).

[188] See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510–13 (1996) (rejecting a greater-includes-the-lesser argument where state statute implicated the First Amendment).

IV. IMPLICIT DELEGATION: *CHEVRON* MEETS *CORT V. ASH*

I have argued that an express congressional delegation to an administrative agency of the power to fashion private enforcement policy would be constitutional and would often be preferable on policy grounds to having Congress or the courts make final decisions as to the nature and scope of private remedies. These arguments lay the necessary groundwork for my more radical claim that whenever a statutory provision is ambiguous as to whether it creates a private remedy, courts should infer an implicit delegation of authority over this question to the responsible administrative agency.

While this proposal is novel and runs against the current of recent Supreme Court opinions—which appear increasingly sympathetic to a strong presumption against private remedies[189]—in fact my argument for interpreting statutory ambiguity as an implied congressional delegation to an executive agency is quite conservative. I merely propose extending the principle, well-established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[190] that the judiciary should presume an implicit delegation of authority to the responsible agency whenever a statute fails to address conclusively some issue necessary to the implementation of the statutory mandate. Under my proposal, a court, when it must decide whether a statute creates private rights, would begin by assessing the *Cort v. Ash*[191] factors. If the court can discern a clear congressional intent, then the inquiry is at an end—this is simply an application of *Chevron*'s first prong. When application of the *Cort*

[189] In *Alexander v. Sandoval*, for example, the Court denied that "rights-creating language" in an agency regulation can create a private right of action if the statute pursuant to which the regulations are promulgated does not contain such language. 532 U.S. 275, 291 (2001). Rejecting the notion that "language in a regulation can conjure up a private cause of action that has not been authorized by Congress," Justice Scalia's majority opinion in *Sandoval* asserted that "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself." Id. at 291; see also id. at 288–89 (finding the "text and structure" of the statute dispositive that no private rights exist under § 602 of Title VI, 42 U.S.C. § 2000d-1 (2000)); Foy, supra note 39, at 574–75 (observing, fifteen years before *Sandoval*, that the Court was moving toward "remov[ing] the right of action from the category of legal things that can exist in the absence of demonstrable legislative intentions" and instead "plac[ing] this right in a category of legal things for which demonstrable legislative intentions are indispensable").

[190] 467 U.S. 837, 843–44 (1984).

[191] 422 U.S. 66 (1975).

factors does not yield a clear answer—that is, when one could make a good case either way—the court should invoke *Chevron*'s second prong and defer to the authoritative judgment of the responsible administrative agency. My proposal is also conservative in that, despite the tension with the tenor of certain recent Supreme Court decisions, extending the *Chevron* presumption to *Cort* cases would not require overruling any established precedent.

A. Benefits of the Implied Delegation Presumption

1. The Chevron *Rationales: Expertise, Flexibility, Accountability*

The *Chevron* presumption is widely acknowledged to be a judicially created legal fiction justified on policy grounds,[192] and the extension I propose is grounded in the same legal fiction and justified by similar policy considerations.[193] The policy arguments favoring a judicial presumption that ambiguous statutes should be read to confer on agencies the discretion to determine the proper scope of private enforcement are precisely the same arguments that favor express congressional delegation of such authority: superior agency expertise, flexibility, and political accountability.[194] Moreover, these policy arguments are sufficiently powerful that the ambiguity-means-delegation fiction is superior to any other background principle of interpretation that the courts might employ when faced

[192] See David J. Barron & Elena Kagan, Chevron's Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 203, 223–25 (2002); Thomas W. Merrill & Kristin E. Hickman, *Chevron*'s Domain, 89 Geo. L.J. 833, 870–72 (2001); Scalia, supra note 158, at 517. The fiction rationalizes what would otherwise be a constitutionally problematic exercise of agency authority. See Scalia, supra. Note that the presumption that Congress "intends" to delegate interpretive authority actually comprises two fictions. The first is that individual legislators have any specific intent with regard to which actors should interpret statutory ambiguities, or even realize that particular statutory provisions are ambiguous. The second fiction, noted earlier, supra note 4, is that a collective intent can be ascribed to Congress, even if one could determine the intent of individual legislators.

[193] In asserting the SEC's authority to "disimply" private rights of action under § 10(b), Joseph Grundfest makes a *Chevron* argument substantially similar to the position advanced here. See Grundfest, supra note 78, at 983–85 (arguing that § 10(b) is "'silent or ambiguous' on the question" of whether it implies a private right of action, and therefore the SEC's "authority to disimply . . . seems well within the contours of a *Chevron* analysis"). I extend Grundfest's insight to its logical conclusion and apply it more broadly to a range of agencies and private enforcement schemes.

[194] See supra Section III.A.

with a statute that is unclear as to whether it creates a private remedy. This is again merely a special application of the standard line of reasoning used to support the *Chevron* presumption that ambiguous statutes should be read as delegations to agencies. For purposes of this Article, I simply accept the *Chevron* doctrine and its prevailing justifications as given, and argue that these rationales apply in the private remedy context to the same extent that they do elsewhere. General objections to *Chevron*[195] apply with equal force to this specific application, but if one accepts the arguments for the legitimacy and desirability of the *Chevron* rule, those arguments also all apply here.

2. The "Judicial Encroachment" Concern

Because my proposal relies on a fictitious, judicially presumed congressional intent rather than a textually grounded statutory expression of such intent, it may raise an additional concern about the proper role of courts that does not apply to the express delegation proposal. Judicial encroachment is seen as a problem not only because of formal, constitutionally grounded separation of powers principles, but also because of the perceived lack of judicial competence and accountability. While judicial implication of causes of action from ambiguous statutory text may raise a serious judicial encroachment issue, such a concern is less salient when the judiciary merely decides whether a statute is sufficiently ambiguous that the executive branch should be allowed to determine whether to imply a private remedy. Inasmuch as the ambiguity-implies-delegation presumption means that courts will look to administrative agencies to determine whether statutes authorize private enforcement, instead of the courts trying to make this determination themselves, the presumption redresses rather than exacerbates the worry that the judiciary is assuming powers and functions beyond its institutional competence or constitutional role.

There is, however, an alternative separation of powers argument that has more bite. If the judiciary is too quick to find statutory

[195] See William N. Eskridge, Jr. & John Ferejohn, Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State, 8 J.L. Econ. & Org. 165, 165–67, 186–88 (1992); Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 456 (1989); Sunstein, Law and Administration, supra note 120, at 2087–90.

ambiguity, it may improperly transfer power from Congress to the executive even in those instances where Congress made a conclusive decision about the desirability of private enforcement.[196] Two considerations mitigate the seriousness of this concern. First, the problem would only arise in circumstances where Congress had made a definitive collective decision on the private enforcement question but had failed to express it clearly. This situation is probably relatively infrequent; in the rare instance where Congress really has a clear intent on a specific issue like whether private enforcement suits are allowed, it generally appears on the face of the statutory text. If Congress does have such a clear intent, it can correct a judicial misinterpretation so long as current legislative preferences have not drifted too far from those of the enacting legislature.[197] Second, if the section of the statute that may create private remedies is, from the court's perspective, ambiguous, then the court is itself quite likely to misconstrue Congress's instructions. While a judicial presumption that an ambiguous statute is an implied delegation may sometimes allow the executive to make decisions that run contrary to a congressional command, the judiciary may make similar errors if it tries to parse the ambiguous statute itself. Unless one believes that judicial tools of statutory construction are much more accurate than those used by administrative agencies,[198] there is little reason to favor direct judicial interpretation over delegation to the executive on grounds of respecting Congress's intent.

[196] In other contexts, commentators have noted that the *Chevron* delegation presumption, which on its face appears to transfer power from *courts* to agencies, may also effect a transfer of power from *Congress* to agencies. See, e.g., William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523, 547–51 (1992); Eskridge & Ferejohn, supra note 195, at 166–67.

[197] On legislative drift, see Murray J. Horn & Kenneth A. Shepsle, Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs, 75 Va. L. Rev. 499, 503–04 (1989).

[198] Surprisingly little is known about how agencies go about the business of statutory interpretation and how their approach differs from that of courts. For thoughtful and provocative preliminary explorations of this issue, see Bernard W. Bell, Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-*Chevron* Era?, 13 J.L. & Pol. 105 (1997); Jerry L. Mashaw, Agency Statutory Interpretation, Issues in Legal Scholarship, Dynamic Statutory Interpretation (2002), at http://www.bepress.com/ils/iss3/art9/ (last accessed Feb. 21, 2005) (on file with the Virginia Law Review Association).

3. Superiority to an Anti-Private Enforcement Clear Statement Rule

Ultimately, the court must adopt *some* default rule to govern how it will behave when faced with an unclear statute that might or might not authorize private rights of action to enforce the statute's substantive provisions. The choice of interpretive default rule must ultimately be justified on policy grounds.[199] Thus far, the discussion has implicitly focused on a comparison of an ambiguity-implies-delegation presumption with a judicial attempt to discern each statute's meaning. There are, however, other alternatives. Indeed, the alternative that many commentators and several members of the current Court seem to favor is a general background presumption against private rights of action.[200] The strong version of this principle would be a clear statement rule under which, unless Congress explicitly and definitively authorizes private enforcement suits, the courts will presume that Congress did not intend to allow such suits. Recent decisions, especially *Alexander v. Sandoval*,[201] suggest that the Court is sympathetic to this position, though none of these cases goes so far as to rule out the possibility of judicially implied rights of action in the absence of express authorization.

Most of the arguments in favor of a strong presumption against private enforcement melt away when that presumption is compared not to an open-ended or multifactor judicial resolution of statutory ambiguity, but rather to a presumption that ambiguity implies delegation to the responsible administrative agency. For example, one rationale for the presumption against private enforcement is the concern that without it the judiciary would encroach on executive prerogatives.[202] Such an objection has little applicability when the executive itself gets to decide whether the ambiguous statute creates private rights.[203] Other arguments in favor of a strong presumption against private rights of action derive

[199] See Elhauge, supra note 4, at 2036, 2061–65; Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 411–12 (1989). "Policy" in this context should be construed broadly: Sunstein, for example, stresses prudential and constitutional concerns, whereas Elhauge emphasizes default rules that seek to maximize the political satisfaction of current legislators' "enactable preferences."

[200] See supra note 189.

[201] 532 U.S. 275 (2001).

[202] See supra Section II.B.3.

[203] See supra Section III.B.1.

from the policy objections to private enforcement.[204] Reading ambiguity as an implied delegation to the executive obviates this problem because the executive is generally in a better position than the courts to determine whether the benefits of private enforcement outweigh the costs.[205]

Moreover, a strong presumption against private enforcement creates several problems that a presumption in favor of delegation to the executive avoids. First, the presumption against private enforcement is likely to be overinclusive, erroneously denying private rights where Congress intended to create them and/or where they would be socially beneficial. This point is underscored by the degree to which the proponents of a presumption against private rights of action rely on practical policy objections to private enforcement. If, as I have argued, the policy costs and benefits of private enforcement are likely to vary by issue area,[206] and if the executive is in a better position to evaluate these policy arguments than the courts,[207] then the presumption in favor of statute-by-statute executive evaluation of the policy benefits of private enforcement has clear advantages over a blanket judicial determination that the benefits of such suits do not justify their costs.[208] A

[204] See supra Section II.B.1–2.

[205] See supra Section III.A.1. There may be some policy arguments against private enforcement of federal statutes that do favor a presumption against private rights of action over a presumption in favor of delegation to the executive. The most important such consideration may be the concern about encroachment on traditional state prerogatives. The executive, as noted above, may be insufficiently sensitive to such issues. See supra note 123. This consideration, however, provides only weak support for a blanket presumption against private enforcement. First, this concern is only sometimes implicated by private enforcement; under many statutory schemes private enforcement would not plausibly interfere with state law. Second, private rights of action to enforce federal law generally do not involve actual *preemption* of state law; rather, the concern is with a more general "interference" with state regulatory schemes. Thus, federalism concerns are much weaker here than they are in the preemption context. Finally, the interference with traditional state prerogatives argument may prove too much, in that every delegation of regulatory authority to administrative agencies, whether explicit or via *Chevron* ambiguity, allows the executive to make decisions that potentially affect policy areas traditionally left to state regulation, but this is generally not taken as sufficient reason, absent direct preemption of state law, to construe such agency authority narrowly.

[206] See supra Part II.

[207] See supra Section III.A.1.

[208] One might argue that, if agencies are overzealous regulators, see supra note 123 and accompanying text, courts skeptical of the benefits of private enforcement might

second, related argument is that a strong clear statement rule deprives Congress of a potentially useful option that it can use in cases where legislators are unsure about what sort of private enforcement action, if any, they ought to authorize, or where they are unable to reach consensus.[209]

On the whole, then, the presumption in favor of delegation appears to have clear advantages, as a means of resolving statutory ambiguity, over a presumption against private enforcement. The appeal of the latter presumption derives, I conjecture, primarily from the fact that it has been considered only in comparison either to a regime in which the judiciary adopts a presumption in favor of implying rights of action or to one in which the courts try to determine the existence of private rights case by case without a strong background presumption in either direction. If the judiciary were the only institution with the power to construe ambiguous congressional language, then the presumption against private enforcement might well be the best approach. But if Congress may legitimately delegate such authority to the executive, a judicial presumption in favor of such delegation is a superior alternative.

B. Legality of the Implied Delegation Presumption

Even if desirable on policy grounds, application of the *Chevron* principle to the availability of private enforcement may entail difficult legal questions that did not apply to an express delegation of authority over these matters. First, a judicial presumption that am-

sensibly prefer a clear statement rule to a rule that conferred authority on agencies. Such a position, however, is blatantly inconsistent with supposed concerns about judicial encroachment—why, after all, should the courts presume to tell the executive that its enforcement preferences are unwise? Moreover, it is not at all obvious that the courts have better-aligned incentives than the agencies. See supra note 139 and accompanying text.

[209] A response to this objection is that Congress could always delegate explicitly. While this is certainly true, legislative transaction costs are a frequent obstacle to express delegation; statutory ambiguity can function as a kind of delegation on the cheap. Inasmuch as the presumption that ambiguity implies delegation lowers the costs of delegation, it increases the availability of this tool to legislators. Another, more powerful version of the objection would be that Congress is too quick to delegate decisions on important issues, and the courts ought to make it harder, not easier, for Congress to shift responsibility for important policy decisions to the executive. The counter to this position would entail the standard arguments in favor of delegation, and in favor of *Chevron*. See supra Section III.A.3.

biguity should be read as an implicit delegation of power over private enforcement policy might raise constitutional problems that are not implicated by express delegation. In particular, the nondelegation doctrine, applied as a canon of construction, might plausibly disfavor delegation of authority over private enforcement policy in the absence of clear congressional instructions. Second, the proposed presumption in favor of delegation to the executive appears in tension with recent Supreme Court implied right of action jurisprudence. Third, adopting this presumption may also be complicated, albeit more indirectly, by certain aspects of the Court's Section 1983 jurisprudence. These objections, however, turn out to be less serious than they first appear.

1. Constitutionality of Presuming Implicit Delegation

An *express* congressional delegation to the executive branch of power over private enforcement policy, I have argued, raises no nondelegation problem[210] and actually redresses a potential Article II problem.[211] An *implied* delegation of such power similarly remedies rather than raises Article II concerns, since the executive branch rather than the courts takes the lead in determining whether to authorize private enforcement of federal statutes. The fact that the purported delegation from Congress to the executive branch is inferred by courts, rather than explicit in the statutory language, however, might make the Article I nondelegation objection more potent. In particular, commentators have noted that the Supreme Court enforces the nondelegation principle not by striking down statutes but, as John Manning explains, by "narrowly construing administrative statutes that otherwise risk conferring unconstitutionally excessive agency discretion. The nondelegation doctrine, in other words, now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions."[212] Thus, a court faced with a statute that is ambiguous

[210] See supra Section III.B.2.

[211] See supra Section III.B.1.

[212] John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 223 (2001); see also Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving

on the question whether it creates a private right of action might conclude that interpreting the statute to delegate the decision to the executive would raise serious Article I concerns that could be avoided by interpreting the ambiguous statute as definitely creating, or definitely not creating, private remedies.

Despite the superficial plausibility of this argument, it suffers from two critical flaws.[213] First, taken at face value, the argument suggests that whenever a statute is unclear, courts should avoid a nondelegation problem by interpreting the statute themselves rather than inferring an implied delegation to administrative agencies. Such an argument proves far too much: A principle that courts should construe ambiguous statutes to avoid finding a congressional delegation to agencies would entail a blanket rejection of most applications of the *Chevron* doctrine.[214] The more sensible understanding of the principle that courts should avoid nondelegation problems is not that ambiguous statutes should be interpreted as nondelegative, but rather that extremely open-ended delegations, whether explicit or implicit, should be construed narrowly if a broad reading might raise serious nondelegation concerns. This leads, however, into the second flaw in the nondelegation argument: The scope of delegated power under consideration here is sufficiently narrow, and sufficiently related to the executive's tradi-

narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

[213] These rejoinders to the nondelegation/avoidance argument implicitly accept that argument's basic premises that the nondelegation doctrine remains an important constitutional norm and that a strong constitutional avoidance canon is a desirable feature of judicial interpretive methodology. Both premises, however, are open to serious question. See Posner & Vermeule, supra note 145 (arguing for the wholesale abandonment of the nondelegation doctrine, even as an interpretive norm); Frederick Schauer, *Ashwander* Revisited, 1995 Sup. Ct. Rev. 71 (1996) (criticizing the modern form of the constitutional avoidance doctrine). Accepting these more fundamental critiques would provide an independent basis for rejecting the nondelegation objection to my proposal.

[214] This general tension between the nondelegation norm and the *Chevron* presumption has been widely noted. See, e.g., Abner S. Green, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123, 186–87 (1994); Douglas W. Kmiec, Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine, 2 Admin. L.J. 269, 269–70 (1988); Jerry L. Mashaw, Textualism, Constitutionalism, and the Interpretation of Federal Statutes, 32 Wm. & Mary L. Rev. 827, 834 (1991); Peter B. McCutchen, Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best, 80 Cornell L. Rev. 1, 35 (1994); Sunstein, supra note 179, at 329–30.

tional powers and duties, that there is simply no serious constitutional question that would arise if Congress delegated the power to define and delimit private enforcement actions.[215] Though the Court has been known to invoke the avoidance canon even in cases where the constitutional "problem" to be avoided is dubious at best,[216] the delegation here seems no more problematic from an Article I perspective than many of the numerous types of policy choices that Congress routinely leaves to administrative agencies.[217]

2. Consistency with Implied Right of Action Jurisprudence

Even if there is no inherent constitutional problem with applying *Chevron* to implied right of action questions, such a doctrinal move is arguably in tension with recent Supreme Court pronouncements on implied right of action jurisprudence. The most obvious obstacle is the language in *Sandoval* rejecting the notion that agencies can create private rights of action when those rights are not authorized by the statute itself.[218] Nonetheless, while adopting the pre-

[215] See supra Section III.B.2.

[216] See Schauer, supra note 213, at 89.

[217] The point may be made clearer by noting that the specific instances where the courts have found that a constitutionally-based nondelegation canon trumps *Chevron* are cases where the agency's action would implicate an independent constitutional concern such as free speech or due process, see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); where the agency's interpretation would preempt state law, see Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 880 F.2d 422, 428 (D.C. Cir. 1989); or where the interpretation would involve retroactive application of a statute, see Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). See generally Sunstein, supra note 179, at 331–32. In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000), the Court was arguably motivated by nondelegation concerns when it concluded that the FDA could not classify tobacco as a drug, even though the Court did not invoke the nondelegation canon explicitly. See Manning, supra note 212, at 227. However, that case was exceptional because, as the Court noted, the policy decision was "of such economic and political magnitude" that it was extremely unlikely that Congress would delegate such a decision to the FDA, especially in light of other congressional actions that would seem to bear on the issue. *Brown & Williamson*, 529 U.S. at 133. While private enforcement is indeed an important issue, it is not obviously more important than many other issues that courts routinely let agencies decide, and *Brown & Williamson* may have been sui generis in many respects.

[218] *Sandoval*, 532 U.S. at 291 (arguing that "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not"); see also Touche Ross & Co. v. Redington, 442 U.S. 560, 577 n.18 (1979) ("[T]he language of the statute and not the rules must control."). *Sandoval* is not directly on point, since the issue in that case was not whether

sumption that ambiguous language constitutes a delegation of authority over the scope of private enforcement might require rejecting or qualifying some of the more sweeping language in the *Sandoval* opinion, it would not necessarily require overruling the holding in that case, for two reasons.

First, Justice Scalia's majority opinion in *Sandoval* concludes that the text and structure of the Civil Rights Act of 1964 indicates definitively that Congress did *not* intend to create a private right of action to enforce the Section 602 prohibition on disparate impact discrimination.[219] Having reached this conclusion, the Court's subsequent reasoning that an agency could not create a private remedy in the absence of any statutory authorization is unexceptional. Though one might dispute the Court's conclusion that the statute clearly indicates that Congress did not intend to authorize private actions to enforce Section 602's disparate impact regulations,[220] nothing in the holding of the case would conflict with adopting the presumption that ambiguity implies delegation. *Chevron* Step Two deference would not apply because Congress's intent to preclude such actions is sufficiently clear under *Chevron* Step One.

Second, even if the Court had found Section 602 ambiguous as to whether it authorizes a private remedy, one could reconcile *Sandoval* with my proposed application of *Chevron* by adopting the default rule that an administrative agency cannot create a private cause of action merely by using rights-creating language in a substantive regulation, but rather must issue a clear statement that it intends to create such a private remedy.[221] The result in *Sandoval*

an agency could interpret an ambiguous statute to authorize private enforcement, but whether agency regulations could create a private right of action even if those regulations were promulgated under a statutory provision that (the *Sandoval* majority concluded) did not itself create a private remedy. See *Sandoval*, 532 U.S. at 291–93. Nonetheless, the passage asserting that an agency cannot create a private right of action where Congress has not done so is clearly problematic for the position I advocate.

[219] *Sandoval*, 532 U.S. at 288 ("We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI.").

[220] Id. at 293 (Stevens, J., dissenting); see also Note, After *Sandoval*: Judicial Challenges and Administrative Possibilities in Title VI Enforcement, 116 Harv. L. Rev. 1774, 1778 (2003).

[221] See infra Section IV.C.2.

would therefore be upheld, though the reasoning would not.[222] If a federal agency implementing Section 602 were to adopt new regulations expressly authorizing private suits to enforce the disparate impact requirements, then under my proposal this authorization would be a permissible exercise of the agency's discretion even in light of *Sandoval*.[223]

In addition to the potential *Sandoval* problem, my proposed application of *Chevron* is also in some tension with language in *Adams Fruit Co. v. Barrett*.[224] In *Adams Fruit*, the Court held that an exclusivity provision in Florida's workers' compensation laws did not preclude injured employees from bringing a lawsuit under the express private right of action provided by the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").[225] Florida had argued, among other things, that because AWPA was ambiguous as to its preemptive scope, the Court should defer to the Department of Labor's position that if "a State workers' compensation law is applicable and coverage is provided for a migrant or seasonal agricultural worker by the employer, the workers' compensation benefits are the exclusive remedy for loss under this Act

[222] This approach to precedent, though perhaps problematic, is endorsed by the *Sandoval* opinion itself. See *Sandoval*, 532 U.S. at 282 (claiming, in response to an argument that refusal to recognize a private right of action to enforce § 602 is inconsistent with clear language in prior opinions, that "this Court is bound by holdings, not language"). What's good for the goose is good for the gander.

[223] The fact that § 602 is a generic statute implemented by multiple federal agencies raises an additional complication for the proposed application of the *Chevron* presumption to the existence of private enforcement, as some circuit courts have found *Chevron* deference inappropriate where multiple agencies administer the same statute. See Rapaport v. Office of Thrift Supervision, 59 F.3d 212, 216–17 (D.C. Cir. 1995); 1185 Ave. of the Americas Assocs. v. Resolution Trust Corp., 22 F.3d 494, 497 (2d Cir. 1994). However, other circuits apparently disagree, see Navajo Nation v. Dep't of Health & Human Servs., 285 F.3d 864, 874–75 (9th Cir. 2002), aff'd on other grounds, 325 F.3d 1133 (9th Cir. 2003) (en banc); Commonwealth Edison Co. v. Vega, 174 F.3d 870, 875 (7th Cir. 1999), and even the D.C. Circuit, which has adopted a fairly strong version of this exception to *Chevron*, has suggested that the exception does not apply when agencies have exclusive, nonoverlapping jurisdictions and there are not otherwise strong reasons for interagency consistency. See Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246, 1252–53 (D.C. Cir. 2003). The Supreme Court has noted this issue, but has not yet resolved it. See Bragdon v. Abbott, 524 U.S. 624, 642 (1998).

[224] 494 U.S. 638 (1990). I thank Larry Tribe for bringing this issue to my attention.

[225] 29 U.S.C. § 1854 (2003).

in the case of bodily injury or death."[226] The Court's conclusion that the AWPA provision was not, in fact, ambiguous was sufficient to dispose of this claim.[227] Nonetheless, the Court went on to say that "even if AWPA's language establishing a private right of action is ambiguous" the Court did not owe any special deference to the Department of Labor's interpretation because "Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute."[228] Because AWPA gave private parties direct recourse to the federal judiciary, the Court reasoned, it would be "inappropriate to consult executive interpretations . . . to resolve ambiguities surrounding the scope of AWPA's judicially enforceable remedy."[229]

Adams Fruit is problematic insofar as the above language suggests that issues related to private rights of action are entirely outside of the federal enforcement agency's domain. But on closer analysis, *Adams Fruit*, like *Sandoval*, proves to be less of an obstacle than it appears. First, as noted above, the problematic language was clearly dicta, unnecessary to the resolution of the case. Second, *Adams Fruit* involved a statute that the Court concluded *expressly* vested authority over private enforcement in the judiciary.[230] Because one of the reasons Congress sometimes chooses express creation of private rights of action is distrust of the agency,[231] it is both reasonable and entirely consistent with my proposal to find that agencies should not be able to restrict private enforcement rights when Congress has explicitly assigned jurisdiction over private enforcement to the courts. A third, more tenuous basis for distinguishing *Adams Fruit* is that the case deals with deference to an agency on the issue of a statute's preemptive effect, and the Court has suggested elsewhere, though not clearly decided, that the question of whether a statute preempts state law (as opposed to the statute's substantive meaning) may be an issue for courts to decide

[226] *Adams Fruit*, 494 U.S. at 649 (quoting Migrant and Seasonal Agricultural Worker Protection Act, 29 C.F.R. § 500.122(b) (1989)).

[227] *Adams Fruit*, 494 U.S. at 649 ("A 'gap' is not created in a statutory scheme merely because a statute does not restate the truism that States may not pre-empt federal law.").

[228] Id.

[229] Id. at 650.

[230] Id. at 649–50.

[231] See supra note 53.

de novo, without *Chevron* deference to the agency's interpretation.[232]

While *Sandoval* and *Adams Fruit* do not turn out to be serious obstacles to my proposed application of *Chevron* doctrine to implied rights of action, existing Supreme Court doctrine does impose one potentially significant limit on the scope of that application: Congress cannot delegate the authority to authorize recovery of attorneys' fees. In *Alyeska Pipieline Service Co. v. Wilderness Society*, the Supreme Court held that, except in very limited circumstances, federal courts may not award attorneys' fees to prevailing parties without express statutory authorization from Congress,[233] and the fact that a congressional statute explicitly endorses private enforcement does not change this rule.[234] In other words, private right of action provisions do not implicitly delegate to courts the power to fashion fee-shifting rules to further the statute's purposes.[235] While *Alyeska Pipeline* does not preclude an *express* congressional delegation to agencies to authorize fee-shifting,[236] inferring such a

[232] See Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 743–44 (1996). I thank Cass Sunstein for pointing out this possible limitation on *Chevron* doctrine.

[233] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 257–62 (1975).

[234] Congressional use of "the private-attorney-general concept," the Court held, cannot be "construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." *Alyeska Pipeline*, 421 U.S. at 263.

[235] Id. at 260 (observing Congress has not "extended any roving authority to the Judiciary to allow counsel fees . . . whenever the courts might deem them warranted").

[236] Though the case does not address this question directly, it strongly emphasizes the need for congressional guidance, which presumably would be adequately supplied in the case of an express delegation. See id. at 247 ("[I]t would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation . . . ."); id. at 262 ("[T]he circumstances under which attorneys' fees are to be awarded . . . are matters for Congress to determine."); id. at 269 ("[A judicially created fee-shifting rule] would make major inroads on a policy matter that Congress has reserved for itself."); id. at 271 ("[The distribution of litigation costs is a matter within] the legislature's province."); see also id. at 260 (noting that Congress has not "extended any roving authority to the Judiciary" to award attorneys' fees, but implicitly suggesting that Congress could extend such authority if it chose to). Indeed, the main rationale for the decision—judicial incompetence to determine which private enforcement rights implicitly authorize attorneys' fee awards—is clearly inapplicable when the executive rather than the courts is responsible for making this determination. See id. at 263–64 ("[I]t would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former."); id. at 264 (noting that, if

delegation from an ambiguous statute is considerably more problematic. When a cause of action is implied rather than express, recovery of attorneys' fees is virtually impossible because, as the Court explained in *Key Tronic Corp. v. United States*, "conclud[ing] that a provision that only impliedly authorizes suit nonetheless provides for attorneys' fees with the clarity required by *Alyeska* would be unusual if not unprecedented. Indeed, none of our cases has authorized fee awards to prevailing parties in such circumstances."[237] Thus, the Court appears to have endorsed a clear statement rule under which the only way Congress can modify the American rule (that parties must pay their own legal expenses absent some special legal basis for fee-shifting) is to do so explicitly.

The limitation on the power of executive agencies to authorize attorneys' fee awards may constrain the potency of the private enforcement mechanism, but this is acceptable—indeed, probably desirable—when the executive's power to create the private cause of action in the first place derives not from an express congressional command but from a judicial presumption grounded in a legal fiction. Moreover, plaintiffs will sometimes still be able to recover attorneys' fees under more general fee-shifting statutes. The best example of such a statute is 42 U.S.C. § 1988, which authorizes recovery of reasonable attorneys' fees to prevailing plaintiffs in suits to enforce the civil rights laws.[238] If an executive branch agency construed an ambiguous provision contained in a civil rights statute to create a private cause of action, Section 1988's fee-shifting provision would entitle prevailing parties who brought such an action to an award of attorneys' fees.

courts were to fashion fee-shifting provisions without explicit congressional instructions, they would have to decide a number of questions beyond their competence, including: "[S]hould courts . . . opt for awards to the prevailing party, whether plaintiff or defendant, or only to the prevailing plaintiff? Should awards be discretionary or mandatory? Would there be a presumption operating for or against them in the ordinary case?").

[237] 511 U.S. 809, 818 (1994).

[238] Section 1988 covers actions brought to enforce, *inter alia*, Title VI, 42 U.S.C. §§ 2000d-1 to -7 (2000), and Title IX, 20 U.S.C. § 1681 (2000).

3. Interaction with Section 1983 Jurisprudence

A final issue to consider with respect to the proposals advanced in this Article concerns private suits brought under 42 U.S.C. § 1983, which provides an express right of action for plaintiffs whose rights have been violated "under color of state law."[239] Where a statute clearly confers substantive rights on a particular class of plaintiffs, there is ordinarily no question that those rights are enforceable in a Section 1983 action. But what if the statute is not clear on this point? The Court addressed this question in *Gonzaga University v. Doe* and concluded that the "implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983."[240] This perspective led the Court to "reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."[241] Perhaps recognizing that its analysis came perilously close to rendering Section 1983 superfluous by suggesting that an implied private right of action would exist in any case where Section 1983 would also be available, Chief Justice Rehnquist's majority opinion explained that plaintiffs seeking to bring suit under an implied right of action had an additional burden that Section 1983 plaintiffs did not have: Implied right of action plaintiffs must show not only that the statute confers a private right, but also that it (implicitly) authorizes a private remedy.[242]

The conjunction of *Gonzaga* and *Sandoval* raises a difficult and important legal question with possible implications for the proposals advanced in this Article: If an administrative agency adopts regulations pursuant to an ambiguous statute, are substantive rights conferred by those regulations enforceable under Section 1983 even if the statute itself does not create private rights with sufficient clarity to satisfy the *Gonzaga* standard? The circuit courts are divided on this question,[243] and the Supreme Court has

[239] 42 U.S.C. §1983 (2000). I thank Katherine Franke for bringing the relationship between the Court's implied right of action jurisprudence and its § 1983 jurisprudence to my attention.

[240] 536 U.S. 273, 283 (2002).

[241] Id.

[242] Id. at 284–85.

[243] Compare Save Our Valley v. Sound Transit, 335 F.3d 932, 943 (9th Cir. 2003) (holding agency regulations cannot create private rights enforceable under § 1983), S.

yet to address the issue.[244] While addressing this knotty problem is beyond this Article's scope,[245] this strand of Section 1983 jurisprudence clearly relates to my proposed application of *Chevron* doctrine to implied right of action jurisprudence.[246] After all, *Gonzaga* made it clear that the determination whether a statute creates a right enforceable under Section 1983 was "no different" from the determination whether a statute creates a right enforceable pursuant to an implied cause of action.[247] The only difference is that in an implied cause of action case, a clearly conferred right is not sufficient in the absence of additional evidence that Congress intended

Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 790 (3d Cir. 2001) (same), Banks v. Dallas Hous. Auth., 271 F.3d 605, 610 n.4 (5th Cir. 2001) (same), Harris v. James, 127 F.3d 993, 1008–09 (11th Cir. 1997) (same), and Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987) (same), with Powell v. Ridge, 189 F.3d 387, 403 (3d Cir. 1999) (holding agency regulations can create actionable § 1983 rights), Loschiavo v. City of Dearborn, 33 F.3d 548, 553 (6th Cir. 1994) (same), and Samuels v. District of Columbia, 770 F.2d 184, 199–200 (D.C. Cir. 1985) (same).

[244] Several commentators have argued that *Sandoval* and *Gonzaga* do not preclude agencies from promulgating regulations that, because of their rights-creating language, can be enforced under § 1983, using some variant of the following logic: *Sandoval* held that a substantive right created by an agency could not be enforced in a private lawsuit because the authorizing statute did not provide for a private remedy. In *Gonzaga*, § 1983 provided an express remedy, but the problem was that the statute under which the plaintiffs brought suit clearly (in the Court's view) created no individual rights. But, if one cannot conclude at *Chevron* Step One that the statute is clearly intended *not* to create private rights, as was implicitly the case in *Gonzaga*, then under standard *Chevron* Step Two reasoning the agency can interpret the statute via regulations, and such regulations thus create valid rights that can be enforced under § 1983. See Galle, supra note 5, at 177–82; Case Comment, Save Our Valley v. Sound Transit, 117 Harv. L. Rev. 735, 740–42 (2003). It is not clear whether the Court would accept such a distinction or whether it would conclude, along with several of the circuits and some academic commentators, that "in the absence of any indication in the language or legislative history of a regulation-authorizing statute that Congress intended to create enforceable rights, regulations that purport to create privately enforceable individual rights [under § 1983] usually will be contrary to statutory law and not entitled to deference." Charles Davant IV, Sorcerer or Sorcerer's Apprentice?: Federal Agencies and the Creation of Individual Rights, 2003 Wis. L. Rev. 613, 615.

[245] For more thorough scholarly investigations of this issue, see Davant, supra note 244, at 615; Galle, supra note 5, at 226; Bradford C. Mank, Using § 1983 To Enforce Title VI's Section 602 Regulations, 49 U. Kan. L. Rev. 321, 324 (2001); Case Comment, supra note 244, at 740–42.

[246] My other proposal, see supra Part III, that Congress can and often should *explicitly* delegate the power to fashion private remedies to administrative agencies, would not implicate *Gonzaga*: In the express delegation case, Congress explicitly creates a right, so there is no *Gonzaga* problem, and delegates the question of the remedy.

[247] *Gonzaga*, 536 U.S. at 284–85.

a private remedy. While one might conceivably encounter a statute that unambiguously creates a private right but is ambiguous as to whether it also authorizes a private remedy (in which case one could apply *Chevron* to the remedy issue without having to address *Gonzaga*), the more likely scenario is that the statute contains confusing language or provisions that are ambiguous as to *both* whether Congress intended to create a private right *and* whether Congress intended to create a private remedy.[248] If the Court were to follow my suggestion that it abandon the clear statement rule on the question of private *remedy* and adopt in its place the *Chevron* presumption that ambiguity is intended as a delegation of authority, it would be conceptually difficult for the Court to retain the parallel clear statement rule that a statute which is ambiguous as to whether it creates private *rights* shall be construed not to create such rights. Further, retaining the latter presumption would render the former less meaningful in practice, as the number of statutes that clearly create rights but are ambiguous as to the remedies they allow may be few in number. This suggests that abandoning the former clear statement rule may imply rethinking the latter as well.

Such a rethinking would not require overruling *Gonzaga* anymore than applying *Chevron* to the implied right of action inquiry requires overruling *Sandoval*.[249] Like *Sandoval*, the result in *Gonzaga* is consistent with an implicit delegation theory on one or both of two grounds: (1) the statute at issue is not in fact ambiguous, but rather clearly does not create private rights;[250] and (2) since the agency has not exercised its impliedly delegated power, the outcome of the case is consistent with a sensible default rule under which, in the absence of agency action, the clear statement rule applies.[251] This suggests that the courts and commentators who advo-

[248] Indeed, as Justice Stevens pointed out in his *Gonzaga* dissent, prior to *Gonzaga* and *Sandoval*, courts seem not to have drawn any distinction between rights-creating and remedy-creating language. See *Gonzaga*, 536 U.S. at 301 (Stevens, J., dissenting).

[249] See supra notes 219–27 and accompanying text.

[250] See *Gonzaga*, 536 U.S. at 279–80; cf. supra notes 219–24 and accompanying text (noting that the Court held in *Sandoval* that the text of Title VI unambiguously indicates that Congress did not intend to create a private right of action in § 602, so there could be no delegation of authority to create such a private right through agency regulations).

[251] Cf. supra notes 221–27 and accompanying text (arguing that the *Sandoval* result, though not its reasoning, is consistent with the implicit delegation theory if the Court

cate allowing administrative agencies to promulgate regulations enforceable under Section 1983 have the better of the argument, and their position is more consistent with the proposal I advance in this Article.

C. Implementing the Implied Delegation Presumption

Though the legal and policy justifications for finding an implied authorization of executive discretion over private enforcement rights are generally similar to the justifications that support express delegation, the implied delegation presumption raises several additional implementation questions. First, under what conditions is a congressional statute sufficiently ambiguous on the private enforcement question that the presumption of delegation to the executive ought to apply? Second, in the absence of clear agency action, is the presumption that ambiguous statutes do or do not create private remedies?

1. The Finding of Statutory Ambiguity

The deference normally applied under *Chevron* Step Two first requires a finding, at *Chevron* Step One, that the courts using the "traditional tools of statutory construction"[252] cannot discern a clear answer to the interpretive question at hand. Here, the *Chevron* Step One question is whether Congress clearly mandated (or clearly precluded) private enforcement suits. How is that question to be answered?

The meta-question as to whether a statutory provision is "ambiguous" is as much a matter of subjective interpretation as the underlying question of what the provision means. There are, of course, some easy cases in which the statute obviously creates, or obviously does not create, private remedies.[253] There are also hard

adopts a clear statement rule for the creation of a private right of action in agency regulations promulgated under an ambiguous statute); see also infra Section IV.C.2.

[252] *Chevron*, 467 U.S. at 843 n.9.

[253] It is worth noting that a statute that is totally silent on the question of remedies and does not strongly imply that private remedies were intended would not, by virtue of its failure to preclude private enforcement expressly, thereby create an "ambiguity" to which *Chevron* deference would apply. See U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 566 (D.C. Cir. 2004) ("[T]he failure of Congress to use 'Thou Shalt Not' language doesn't create a statutory ambiguity of the sort that triggers *Chevron* defer-

cases: The question whether particular statutory language is "rights-creating" (or "remedy-creating"[254]) may involve just as much interpretive uncertainty as other questions that provoke *Chevron* deference. Similarly, a statute might make certain conduct illegal but provide for no explicit remedy, thereby suggesting, though not conclusively, that private enforcement might be appropriate. Or a statute might provide a clear private remedy under one provision, but the structure of the statute makes it unclear whether that remedy also applies to a separate but related substantive provision in the same statute.[255]

The most straightforward doctrinal approach to the question of when a statute is ambiguous on the question of the availability of private remedies is for the courts to engage in the standard inquiry into congressional intent—the four-factor *Cort v. Ash* test, as modified by *Touche Ross & Co. v. Redington*,[256] *Transamerica Mortgage Advisors v. Lewis*,[257] and *Sandoval* (absent, of course, the emerging suggestion in this line of cases that ambiguity must be interpreted as an absence of congressional intent to authorize private enforcement). Often this inquiry will be inconclusive. Indeed, ambiguity may be inevitable and often intentional given Congress's incentives to delegate.[258] Thus, the question whether a statute is ambiguous as

ence."); Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.").

[254] The Court has not been altogether clear on what constitutes remedy-creating language, or on how to square its distinction between rights-creating and remedy-creating language with its earlier implied right of action cases, which seem to blur this distinction. See *Gonzaga*, 536 U.S. at 301 (Stevens, J., dissenting) ("Contrary to the Court's suggestion . . . our implied right of action cases do not necessarily cleanly separate out the 'right' question from the 'cause of action' question.").

[255] The *Sandoval* case itself might illustrate this possibility, in that one of the issues in dispute was the relationship between the implied right of action to enforce the § 601 prohibition of intentional discrimination and the § 602 prohibition of disparate impact discrimination. Compare *Sandoval*, 532 U.S. at 288–89 (distinguishing the language and purposes of § 601 and § 602), with id. at 303–04 (Stevens, J., dissenting) (describing § 601 and § 602 as part of an "integrated remedial scheme").

[256] 442 U.S. 560 (1979).

[257] 444 U.S. 11 (1979).

[258] As Joseph Grundfest and A.C. Pritchard have argued, Congress's ability to obfuscate statutory meaning is greater than the judiciary's power to impose discipline through the use of any particular interpretive methodology. See Joseph A. Grundfest & A.C. Pritchard, Statutes with Multiple Personality Disorders: The Value of Ambi-

to whether it creates private remedies is not that difficult—at least, it is no more difficult than determining when ambiguity exists under any other statute.

An important related issue is whether this application of *Chevron* would have any retroactive effect on arguably ambiguous statutes that the courts have already construed as authorizing or rejecting a private right of action.[259] As a matter of current doctrine, stare decisis trumps *Chevron*;[260] as the presumption of delegation that I advocate here is merely an extension of *Chevron*, that principle would also apply to my proposal. Those decisions holding that a particular statutory provision does or does not create a private cause of action would stand and the executive would have no authority to expand or contract the scope of the judicially recognized right, no matter how ambiguous the underlying statute, without some express congressional amendment.[261] While some commentators have argued persuasively that the priority of stare decisis over *Chevron* deference ought to be reconsidered,[262] I do not pursue or evaluate that critique in this Article.

2. Default Presumptions

Ambiguous congressional language, I have argued, ought to empower agencies to make a specific, explicit decision as to whether a private enforcement action is appropriate and what form that action ought to take. If an agency fails to act with sufficient clarity,

guity in Statutory Design and Interpretation, 54 Stan. L. Rev. 627, 634 (2002); see also Steinberg, supra note 99, at 41 (observing, in the context of private rights of action, that Congress is often deliberately unclear).

[259] Examples may include § 10(b) of the Securities Exchange Act, see Grundfest, supra note 78, at 983, and § 602 of the Civil Rights Act of 1964, see supra note 255.

[260] See Lechmere, Inc. v. NLRB, 502 U.S. 527, 536–37 (1992); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990).

[261] But see Grundfest, supra note 78, at 985 (suggesting that, because the Supreme Court has interpreted § 10(b) "to *allow* the implication of private rights" but has never held that § 10(b) "*mandates* a private right of action," stare decisis might pose no bar to agency disimplication of § 10(b) actions under *Chevron*).

[262] See Kenneth A. Bamberger, Provisional Precedent: Protecting Flexibility in Administrative Policymaking, 77 N.Y.U. L. Rev. 1272, 1274 (2002). One could, on the basis of these arguments, make a strong case that prior judicial decisions regarding the existence of private causes of action under ambiguous statutes should be treated, to borrow Bamberger's phrase, as "provisional precedents"—that is, default rules that apply unless and until the agency modifies them. See id. at 1276.

however, the courts will need to apply some kind of default rule to determine whether and to what extent private enforcement suits are viable.[263] The need for the courts to establish default principles arises primarily in two contexts.

First, if the agency simply fails to act—that is, if the agency does not complete a private enforcement rulemaking—should the default rule be that the ambiguous statutory language creates a private right of action, or that no private action exists until the agency expressly creates it? Or should the courts, in the absence of final agency action, take their best guess as to what the statute means, using some version of the *Cort* approach? In my view, the most sensible approach would usually be to presume no private enforcement rights until the agency acts. This does not mean that, in the absence of agency action, the courts should hold that the statute definitely does not authorize private enforcement, thus establishing a precedent that precludes subsequent agency action.[264] Rather, courts should simply apply the principle that a court will not imply a private right under an ambiguous statute if the responsible agency has not done so.[265] The justification for this default principle is twofold. First, it is easier to square with current doctrine.[266] Second, the policy concerns regarding judicial authorization of private enforcement are substantial.[267]

Courts would also need to fashion some background default principle for situations in which an agency faced with an ambiguous statute took some affirmative action, but that action is itself ambiguous. For instance, the agency might promulgate a rule that uses "rights-creating language," but does not explicitly say that the agency is authorizing a private cause of action, nor elaborate the rules that would govern such an action. In short, the agency might use language in a regulation that, if used in a statute, would be clear enough for courts to find a congressionally created private right of action, but which is nonetheless relatively opaque.

[263] This issue did not arise in the express delegation case because there I assumed Congress would have set a default rule in the relevant provision of the statute. See supra notes 102–03 and accompanying text.

[264] See supra notes 259–62 and accompanying text.

[265] In essence, the courts should adopt, in this specific context, Bamberger's "provisional precedent" proposal. See Bamberger, supra note 262.

[266] See supra note 222 and accompanying text.

[267] See supra Section II.B.

There are two ways of approaching this problem. The first would be for courts to use the same standards for determining the clarity or ambiguity of agency regulations that they use to determine the clarity or ambiguity of a congressional statute. Thus, if an agency regulation used rights-creating language that courts would interpret as mandating a private right of action if that language had appeared in a statute, then that would be sufficient for a court to conclude that the agency intended to exercise its power to authorize private enforcement. The other approach would be for courts to subject administrative agencies to a more rigorous clear statement principle. Under this approach, rights-creating language in a regulation, without more, would be insufficient to authorize private enforcement.

The latter approach is preferable. The major advantages of agency authority over private enforcement are that the agency can give the matter close attention, carefully craft the private right of action to meet the particular needs of the regulatory scheme in question, and attract the input of interested parties specifically on the issue of the proper scope of private enforcement. These values are not well-served if the executive can create private rights of action merely by slipping rights-creating language into more general regulations, especially if the agency might end up doing so accidentally. Additionally, one advantage of the presumption in favor of delegation, from the judiciary's perspective, is that it gets the courts out of the difficult and thankless business of figuring out whether ambiguous language does or does not create private rights. This advantage is mooted to the extent that the judiciary will have to engage in similar close readings of agency regulations.

Taken together, these two background principles—no private rights without agency authorization, no agency authorization without a clear statement—constrict the degree to which ambiguous statutory text will give rise to private enforcement rights. This is as it should be. A private enforcement action can be an extraordinarily powerful tool, and a clear determination by a politically accountable branch of government that such a tool is appropriate ought to be required before the courts will recognize its validity. Either a clear statement by Congress or a clear statement by the executive therefore ought to be required.

The viability of my general proposal, though, does not depend on the choice of background default rules. One could easily and sensibly endorse my larger argument—that *Chevron* ought to apply to the creation of private rights—while supporting alternative background principles that would operate when the agency had failed to act with clarity. I advocate specific default rules for the sake of completeness, to maximize the compatibility of my proposal with established doctrine, and because I am sympathetic to the case against judicial implication of private remedies in the absence of express authorization from an electorally accountable branch of government. But this should not obscure the fact that my proposed extension of *Chevron* doctrine is compatible with a range of possible default rules, including rules that are more liberal with respect to judicial implication of private enforcement rights.

CONCLUSION

The design of appropriate private enforcement policy is a difficult but crucial task. While much of the debate about private enforcement focuses on when, and under what conditions, private remedies are desirable, a key meta-debate concerns the issue of institutional design: Which organs of government ought to be involved in the creation and definition of private enforcement rights and what form should that involvement take? To date, most of this institutional design discussion has focused on the relative capabilities and respective constitutional roles of Congress and the federal judiciary. I have argued that, given the close interrelationship between private and public enforcement mechanisms, the executive agencies charged with administering federal statutes ought to have a much greater role in shaping private enforcement policy.

Because of the executive's relative expertise in matters related to public law enforcement, its greater ability to adapt and experiment with various private enforcement systems, and the political accountability associated with executive rulemaking, Congress ought to consider seriously the possibility of delegating the power to fashion private rights of action to administrative agencies, just as Congress routinely delegates to agencies the authority to fashion primary conduct rules. Such delegation would not always be the best course. Sometimes Congress may want to mandate private enforcement, as when the executive cannot be trusted to carry out its

duties faithfully, while in other cases Congress may want to preclude private enforcement altogether, especially when administrative agencies are thought to be insufficiently sensitive to the costs of private suits. Under a variety of plausible circumstances, however, delegation to the executive may be the wisest alternative.

The policy advantages associated with delegation also support extending the *Chevron* presumption—that ambiguous statutes implicitly delegate decisionmaking authority to administrative agencies—to private enforcement questions. When Congress passes a statute that, as a matter of text and context, neither clearly creates nor clearly precludes private enforcement, the relevant executive agency, rather than the courts, ought to determine whether to recognize a private right of action.

While the foregoing arguments follow straightforwardly from well-established principles of administrative and constitutional law, their implications might be quite dramatic. If applied retroactively, the ambiguity-means-delegation presumption might mean that the SEC could drastically scale back the scope of private securities fraud actions,[268] the EPA could revise the rules governing contribution actions under the Superfund hazardous waste statute,[269] the Department of Transportation and other federal administrative agencies could restore a private action for disparate impact discrimination claims,[270] and so on. If Congress adopted the proposal for express delegation, or picked up on and took advantage of a presumption in favor of implied delegation, the ramifications could be even broader, as future statutes would place more responsibility to fashion private enforcement rights squarely on the executive. Such a development ought to be welcomed. Though the wisdom of any given decision regarding the scope of private enforcement under a particular statute will always be open to question and debate, as a matter of institutional design it is generally far better for these decisions to be made with the continuing participation of responsi-

[268] See Grundfest, supra note 78, at 969–70.

[269] See Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994) (noting that the private right to contribution under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2000), is implied rather than express).

[270] See supra note 223 and accompanying text.

ble administrative agencies than for them to be made, and made difficult to undo, solely by Congress and the courts.