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THE PROMISE AND PERILS OF PRIVATE ENFORCEMENT

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A new crop of private enforcement suits is sprouting up across the country. These laws permit people to bring enforcement actions against those who aid or induce abortions, against schools that permit transgender students to use bathrooms consistent with their gender identities, and against schools that permit transgender students to play on sports teams consistent with their gender identities. Similar laws permit people to bring enforcement actions against schools that teach critical race theory and against those who sell restricted firearms. State legislatures are considering a host of laws modeled on these examples, along with other novel regimes. These are new adaptations of private enforcement regimes—laws that task members of the public with enforcing regulatory statutes in court. Private enforcement has a somewhat long lineage in U.S. law, dating back to at least the nineteenth century. Since then, in contexts as diverse as employment discrimination, housing discrimination, antitrust, securities, and other contexts, the U.S. legal system has endowed members of the public with the power to enforce regulatory law in court. While these traditional

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forms of private enforcement have been relatively stable and survived legal challenges, the new adaptations cropping up have prompted challenges in court and intense debate. Among other things, scholars argue that they amount to a form of legal vigilantism, suppress existing legal rights, and pose due process concerns in their design. Yet, to fully distinguish between private enforcement's traditional forms and these new variations, we need a richer account of the meaning and role of private enforcement in democracy.

This Article provides such an account, analyzing and distinguishing private enforcement regimes through the lens of a participatory democracy theory of regulatory governance. Drawing on debates and thinking at the dawn of the modern regulatory state, this Article argues that private enforcement is democratically valuable when it (1) evens out structural power disparities that can undermine democracy, (2) enables members of the public to bring the expertise of experience to dynamic regulatory environments, and (3) facilitates democratic deliberation. This Article argues that traditional private enforcement suits generally contribute to democratic governance under each rationale. In contrast, the new private enforcement suits perform less well, and indeed, often undermine the rationales for popular participation in regulatory governance. This Article thus articulates a richer theory of popular participation in regulatory governance that shows the promise of private enforcement generally and the perils of recent adaptations.

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INTRODUCTION

A legal maelstrom is developing over private enforcement litigation. Citizens have long been endowed with the authority to enforce regulatory laws by filing civil suits in court in contexts as diverse as employment discrimination, housing discrimination, antitrust, civil rights, labor and employment, healthcare, and others.¹ While private enforcement has a long and complicated lineage, paradigmatic private enforcement suits involve members of the public enforcing regulatory statutes governing the marketplace and codifying civil rights commitments.² But across the legal landscape, private enforcement suits are being adapted creatively today—provoking serious legal challenges and prompting heated debate.

¹ See *infra* Section I.A. I occasionally use the term “citizen” to refer to private enforcers, in part because private enforcement suits are at times styled as “citizen suits,” particularly in the environmental context. See, e.g., Katherine A. Rouse, Note, Holding the EPA Accountable: Judicial Construction of Environmental Citizen Suit Provisions, 93 N.Y.U. L. Rev. 1271, 1275–84 (2018) (exploring citizen suit regimes). However, I am referring to citizenship as a practice of participation in political-legal enforcement, and I do not mean to draw the formal distinction delineating citizens and non-citizens under various U.S. legal regimes, particularly because some private enforcers need not be U.S. citizens under the law and, indeed, some private enforcement regimes *protect* non-citizens. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 703, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-2) (banning employment discrimination on account of national origin).

² See *infra* Section I.A; see also David L. Noll & Luke Norris, Federal Rules of Private Enforcement, 108 Cornell L. Rev. (forthcoming 2023) (manuscript at 2–3) (on file with the author) (noting private enforcement is a product of legislatures “creating private rights of action, modifying court procedures, and subsidizing litigation through attorney’s fee-shifts, damages enhancements, and other measures that make it attractive for private parties and the attorneys who represent them to shoulder the work of enforcing the law”).

Texas's S.B. 8 is at the center of the maelstrom. The law, which permits people to bring actions against anyone who aids or abets the performance or inducement of an abortion after approximately six weeks of pregnancy, relies exclusively on private enforcement.³ S.B. 8 is part of a new wave of private causes of action, including those that task members of the public with enforcing laws banning transgender people from using bathrooms or playing on sports teams that correspond with their gender identities.⁴ New laws passed and others proposed in several states give people the ability to sue school districts that teach critical race theory ("CRT") or employers that train based on it, and one law gives people the authority to sue purveyors of restricted firearms.⁵

Questions about the legality of these private enforcement schemes are already percolating through the courts. The U.S. Supreme Court recently weighed in on one aspect of S.B. 8.⁶ The bill lacks public enforcement mechanisms, in large part to stop pre-enforcement suits against government officials,⁷ but a divided Supreme Court allowed pre-

³ S.B. 8, § 3, 87th Leg., Reg. Sess. (Tex. 2021) (codified at Tex. Health & Safety Code Ann. § 171.208 (West 2022)) (permitting "any person" to bring an action against anyone who "aids or abets the performance or inducement of an abortion").

⁴ See, e.g., H.B. 1233, § 1(5)(a), 112th Gen. Assemb., Reg. Sess. (Tenn. 2021) (codified at Tenn. Code Ann. § 49-2-805 (2021)) (permitting any student, teacher, or employer to sue if they have to share a restroom with a transgender person); S.B. 1028, 2021 Leg., Reg. Sess. § 12 (Fla. 2021) (codified at Fla. Stat. § 1006.205 (2021)) (permitting students to sue if they are "deprived of an academic opportunity" by being required to play sports with a transgender person).

⁵ See, e.g., S.B. 1327, 2022 Leg., Reg. Sess. (Cal. 2022) (codified at Cal. Bus. & Prof. Code § 22949.60 (Deering 2022) and Cal. Civ. Proc. Code § 1021.11 (Deering 2022)) (authorizing private enforcement suits against anyone who manufactures, distributes, or sells restricted firearms); Teaganne Finn, DeSantis Pushes Bill Targeting Critical Race Theory in Schools, NBC News (Dec. 15, 2021), <https://www.nbcnews.com/politics/politics-news/desantis-pushes-bill-targeting-critical-race-theory-schools-n1286049> [<https://perma.cc/2XDZ-UHP3>] ("Republican Florida Gov. Ron DeSantis is pushing a new bill that would allow parents to sue school districts if their children are taught critical race theory in classrooms, which mirrors how Texas' abortion ban is enforced."); Laura Meckler, Teachers Union Sues New Hampshire Over Law Barring Certain Race Lessons, Wash. Post (Dec. 13, 2021), <https://www.washingtonpost.com/education/2021/12/13/new-hampshire-critical-race-theory-lawsuit/> [<https://perma.cc/N884-TTHK>] (describing law passed in New Hampshire regarding the teaching of topics around race and its private right of action). For an overview of all CRT bills proposed and passed, see Peter Green, Teacher Anti-CRT Bills Coast to Coast: A State by State Guide, Forbes (Feb. 16, 2022), <https://www.forbes.com/sites/pete-rgreene/2022/02/16/teacher-anti-crt-bills-coast-to-coast-a-state-by-state-guide/?sh=306100ec4ff6> [<https://perma.cc/E5CZ-Y6BJ>].

⁶ See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 529–30 (2021) (deciding whether pre-enforcement review of the statute's constitutionality is permissible).

⁷ See *infra* notes 50, 67–69 and accompanying text.

enforcement suits to be brought against state medical licensing officials who are tasked with enforcing the law.⁸ The law is also a troubling precedent—in large part because its six-week ban on abortions ran afoul of controlling Supreme Court precedent when it was passed—although that precedent has since been overturned.⁹

The controversy over these laws, however, extends further. Commentators argue that many of these recent adaptations, by having members of the public enforce laws against one another upon merely witnessing their conduct, amount to a form of legal vigilantism, suppress existing legal rights, entrench marginalization, and pose due process concerns in their design.¹⁰ They also argue that these laws are different in kind from most traditional private enforcement suits, which are characterized by enforcers who suffer direct harm—say, consumer fraud or unlawful termination—enforcing regulatory laws governing those harms.¹¹

All of these criticisms have merit. But the debate over which kinds of private enforcement are justified and valuable suffers from a deeper problem: our theory of the role of private enforcement in democracy is underdeveloped.

This Article claims that to better analyze private enforcement's various forms, we need to first understand the proper role of citizen enforcement

⁸ See *Whole Woman's Health*, 142 S. Ct. at 535–37.

⁹ See *infra* note 70 and accompanying text; *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

¹⁰ See Jon D. Michaels & David L. Noll, *Vigilante Federalism*, *Cornell L. Rev.* (forthcoming 2023) (manuscript at 3–4, 18–22), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915944 [<https://perma.cc/J8ZY-V26M>] [hereinafter Michaels & Noll, *Vigilante Federalism*] (advancing all of these arguments); see also Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 *Tex. L. Rev.* (forthcoming 2023) (manuscript at 51–54), <https://ssrn.com/abstract=4072800> [<https://perma.cc/CD2F-HQW8>] (connecting S.B. 8 to the Fugitive Slave Act and a larger history of private suppression of constitutional rights that includes labor suppression and racially restrictive covenants); Jon Michaels & David Noll, *We Are Becoming a Nation of Vigilantes*, *N.Y. Times* (Sept. 4, 2021), <https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html> [<https://perma.cc/6UPG-PLB9>] (“In the seemingly endless battle to deny disfavored groups equal citizenship, Republican lawmakers around the country have . . . inverted private enforcement laws . . . to enable individuals to suppress the rights of their neighbors, classmates and colleagues.”); Laurence H. Tribe & Stephen I. Vladeck, *Texas Tries to Upend the Legal System With Its Abortion Law*, *N.Y. Times*, (July 19, 2021), <https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law-reward.html> [<https://perma.cc/G9EF-CZN4>] (arguing that S.B. 8 is designed to evade federal review). A federal district court judge overseeing litigation surrounding S.B. 8 found that it violates constitutional due process. See *Whole Woman's Health*, 141 S. Ct. at 2494.

¹¹ See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 28–31.

in democracy. Fundamentally, the debate over private enforcement is one over whether and when members of the public should participate in enforcing regulatory laws. For some thinkers, tasking members of the public, their lawyers, and courts with regulatory enforcement authority is problematic.¹² They argue that public enforcers and bureaucrats are more accountable regulatory agents.¹³ Some even argue that private enforcement suits pose constitutional concerns or fit uncomfortably under Article II of the Constitution, which vests law-enforcement power in the executive branch.¹⁴ For others, private enforcement is justified largely for its structural, gap-filling role in regulatory enforcement: private enforcers and their lawyers bring cases that public enforcers might not have the information, resources, or political will to bring.¹⁵ On this view, private enforcement is valuable in a complementary sense. But the *democratic theory* that maintains that public enforcers are best vested with authority to implement the law survives largely unscathed.

Lost from view in this dialogue is a deeper theoretical account of popular participation in regulatory governance that both can generally justify private enforcement as a democratic practice and enable us to better sort through its variations. Scholars have noted in passing that private enforcement facilitates popular participation in self-government, but have not developed the rationales explaining why this is so.¹⁶ But there are rich resources in U.S. legal and intellectual history for developing a better account of popular participation in regulatory governance that can reveal both the promise and the limits of private enforcement.

At the turn of the twentieth century, as questions roiled over whether members of the public should participate in regulatory governance or whether the domain should be left to public officials and experts alone, thinkers developed a *participatory democracy* account of regulatory

¹² See *infra* Section II.A.

¹³ See *infra* Section II.A.

¹⁴ See, e.g., Cass R. Sunstein, Article II Revisionism, 92 Mich. L. Rev. 131, 131 (1993) (overviewing and critiquing the argument that “certain grants of standing—to citizens, taxpayers, or others without an individuated injury—would compromise the vesting of executive power in the President and the grant of power to the President, rather than to courts or to citizens, to ‘take Care that the Laws be faithfully executed’”).

¹⁵ See *infra* Section II.A.

¹⁶ See Stephen B. Burbank, Sean Farhang & Herbert Kritzer, Private Enforcement, 17 Lewis & Clark L. Rev. 637, 666 (2013) (arguing that “private enforcement regimes contribute to participatory and democratic self-government”).

governance. At the time, they elaborated three core justifications for why and when we might center members of the public in regulatory enforcement. They asserted that popular participation in regulatory enforcement is democratically valuable because it can (1) even out structural power imbalances that threaten to undermine democracy, (2) enable members of the public to bring the expertise of their direct, affected experience to dynamic regulatory contexts, and (3) help to facilitate democratic deliberation over regulatory norms. These justifications remain relevant today and aid in navigating the evolving terrain of private enforcement regimes.

Traditional private enforcement suits exhibit democratic promise under each justification. First, they often involve dispersed members of the public—at times those who have faced historical and enduring forms of marginalization—bringing suits against often powerful firms or government actors. In this way, citizens as workers, consumers, patients, and in other roles can exercise countervailing power by bringing suits in court. Second, in these suits, private enforcers tend to bring their direct experiences and personally felt harms to courts, leveraging the expertise of experience. And, they do so in contexts where the changing behavior of regulatory subjects raises complicated interpretive questions. In these contexts, members of the public directly experience evolving forms of economic and social behavior and are well-positioned to measure them against regulatory norms and to engage with state institutions to commence processes of regulatory interpretation. And finally, by doing so, private enforcers' suits can deepen the well of deliberation between members of the public, courts, agencies, and legislators over the meaning and application of regulatory norms.

In contrast, recent adaptations of private enforcement tend to exhibit less democratic promise. First, they often either do not respond to or threaten to exacerbate existing power imbalances. The suits tend to involve citizens enforcing against fellow citizens, hardly David-versus-Goliath-type contests. And the suits at times exacerbate power disparities. The people who are affected the most by enforcement are often those who have faced historical and enduring forms of marginalization, including Black, pregnant, and transgender people. Second, the suits involve enforcers bringing less direct, affected experience to less dynamic regulatory environments. Private enforcers in these regimes tend not to have the kinds of experiences and personally felt harms that enrich regulatory deliberation. They are more voyeurs than victims. And the

kinds of suits they bring involve fewer questions of regulatory interpretation and application. In contrast to thorny questions over, say, whether complicated workplace dynamics trigger employment laws or whether certain parallel business conduct triggers antitrust laws, the laws involve simpler questions, like whether a transgender person was in a bathroom that corresponded with their gender identity rather than their sex assigned at birth. Indeed, the largest interpretive questions about these laws may be about whether or not they are constitutional in the first place—whether they violate the rights of transgender students, Black students, and pregnant people—rather than issues of complex, ongoing implementation. Finally, these suits have the potential to undermine democratic deliberation in a variety of ways—including by posing citizen against citizen and fraying the social fabric and by further subordinating people who have faced historical and enduring forms of oppression.

This Article thus mines the deeper democratic foundations of private enforcement litigation to make sense of, and sort among, its variations. Its core claim is that to navigate the brave new world of private enforcement, it is useful to theorize more richly about what democratic regulatory governance entails and who should be its agents. And its core contribution is to develop a participatory democracy account within the context of private enforcement that enables us to analyze its variations. In doing so, it builds on both democratic theories of adjudication and regulatory enforcement in other contexts, particularly in agencies.¹⁷ One caveat is that while this Article provides a general theoretical account of the promises of traditional private enforcement suits, at the more granular level—in particular, regulatory regimes and enforcement settings—legislators, courts, and civil rule-makers have to make context-dependent decisions about facilitating, calibrating, and at times limiting private enforcement.¹⁸ Such decisions involve a complex constellation of considerations that will vary across contexts. Similarly, particular ways of organizing litigation—including those that stymie public

¹⁷ See generally, e.g., Blake Emerson, *The Public's Law: Origins and Architecture of Progressive Democracy* 84–95 (2019) (drawing on Progressive Era thought to develop a democratic vision of administrative law and governance); Jerry L. Mashaw, *Reasoned Administration and Democratic Legitimacy: How Administrative Law Supports Democratic Government* (2018) (articulating a vision of administrative governance as reasoned administration and showing how administrative law contributes to democratic legitimacy); K. Sabeel Rahman, *Democracy Against Domination* (2016) (drawing on Progressive Era democratic theory to develop a progressive vision of regulatory governance).

¹⁸ See *infra* note 167 and accompanying text.

participation—may also undermine private enforcement, and particular private enforcement actions may be less valuable because of redundancy or over-enforcement concerns and calibration issues. This Article, however, at the least can inform analyses about designing private enforcement regimes by augmenting and clarifying the set of *general reasons* for Congress to rely on private enforcement in traditional contexts and for courts and civil rule-makers to facilitate it.

While this Article supplies a framework for justifying traditional private enforcement suits and critiquing recent adaptations, it also suggests that dynamics in U.S. law and politics may portend a future where traditional suits wither and recent adaptations grow and flourish.¹⁹ Traditional suits are threatened by arbitration's increasing privatization of private regulatory law enforcement and Supreme Court procedural decisions making it more difficult for private enforcers to bring and maintain their suits.²⁰ At the same time, bills mimicking the recent adaptations are proliferating across state legislatures, increasing the prospects of a future where private enforcement turns away from traditional concerns with marketplace regulation and civil rights and towards issues of cultural grievance and contest.²¹ This Article suggests that such a paradigm shift might be understood as being emblematic of a political strategy of plutocratic populism—defined by an effort to undermine worker- and consumer-protective regulatory law and enact deregulatory policies favoring the ultra-wealthy and powerful corporations while using cultural grievance to obscure those policies and win working-class support.²²

This Article proceeds in four Parts. Part I explores the characteristics of both traditional forms and recent adaptations of private enforcement. It also describes some of the emerging critiques of the recent private enforcement regimes. To make inroads in the debate over private enforcement's variations, Part II takes a step back to consider the various democratic rationales for and against private enforcement. The Part then builds on this body of thought by developing a participatory democracy account of regulatory enforcement, laying out the rationales for it, and sketching out how it might apply to enforcement processes. Part III digs in further, applying the participatory democracy theory to both the

¹⁹ See *infra* Part IV.

²⁰ See *infra* Section IV.A.

²¹ See *infra* Section IV.B.

²² See *infra* notes 225–27 and accompanying text.

traditional forms and newer adaptations of private enforcement. It argues that traditional private enforcement schemes are generally supported by the rationales elaborated in Part II, while the newer adaptations are generally not.

Part IV steps back further and explores how dynamics in our law and politics may mean that traditional private enforcement suits wither while recent adaptations bloom. And it suggests that legal challenges to these new laws and the enactment of copycat laws in Democrat-controlled states are unlikely to stem the tide and indeed will fit into the cultural grievance playbook. The only effective response to the paradigm shift away from traditional private enforcement, then, may perhaps be the most difficult to achieve: building an inclusive working-class populism that re-centers questions of democracy, equality, and economic distribution and calls for vibrant and robust democratic-regulatory governance.

I. PRIVATE ENFORCEMENT'S VARIATIONS

S.B. 8 and similar recent laws build on—and in significant ways depart from—a tradition of centering private enforcement in U.S. regulatory governance. This Part describes the rise of private enforcement in its traditional, more long-standing forms. It then explores the recent adaptations, analyzes what makes them distinctive, and surveys the emerging critiques of them. It argues that, while the emerging critiques pose serious concerns, the conversation surrounding private enforcement would be improved by more analytical clarity about its democratic role.

A. Traditional Forms

Mobilizing members of the public and courts in enforcing regulatory statutes is a long-standing congressional design choice in the United States, dating back to at least the nineteenth century.²³ The Fugitive Slave Acts of 1793 and 1850, which deputized bounty hunters to seek out persons who escaped slavery, were among the earliest private enforcement regimes—and are connected to a bleak legacy of state-authorized private suppression of constitutional rights that some see resurrected with recent laws, especially S.B. 8.²⁴ In addition, private

²³ The False Claims Act, enabling citizens to recover for contractor fraud on the government, was passed in 1863. See 31 U.S.C. § 3729(a).

²⁴ See *infra* note 71 and accompanying text.

enforcement statutes once targeted the sale of sex and liquor.²⁵ But since then, private enforcement has largely been put in the service of tasking members of the public with and facilitating them in enforcing regulatory laws governing the marketplace and expressing civil rights commitments. Thus, as the country has increasingly become a “republic of statutes,”²⁶ with the federal and state governments taking on more regulatory powers over workplaces and the marketplace over the twentieth and twenty-first centuries, legislators have relied on private enforcers to implement those regulatory regimes.²⁷

In the federal context, Congress has placed private causes of action in hundreds of statutes across the regulatory landscape,²⁸ with private enforcement mechanisms being most prevalent in significant labor, communications, civil rights, and environmental laws passed during the latter half of the twentieth century.²⁹ Private enforcement mechanisms also exist in securities and banking, housing, public health, election, and national security laws, among others.³⁰

²⁵ See Scott Stern, *Moral Nuisance Abatement Statutes*, 117 *Nw. U. L. Rev.* (forthcoming 2022) (manuscript at 5–6, 13–14) (on file with author) (outlining history of redlight abatement and liquor abatement laws).

²⁶ See William N. Eskridge, Jr. & John Ferejohn, *A Republic of Statutes: The New American Constitution* 1–2 (2010).

²⁷ For accounts of the rise of the regulatory state, see Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920*, at 288–89 (1982); William Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* 2–3, 16–17 (Thomas A. Green & Hendrik Hartog eds., 1996); John Kenneth Galbraith, *The New Industrial State* 318–20 (1967); Herbert Croly, *The Promise of American Life* 518–24 (Princeton Univ. Press 2014) (1909); John Dewey, *The Public and its Problems: An Essay in Political Inquiry* 46–54 (Melvin L. Rogers ed., Pa. State Univ. Press 2012) (1927); Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* 230–37, 240–42 (1977); see also Burbank et al., *supra* note 16, at 644 (describing periods of increasing federal regulation).

²⁸ Burbank et al., *supra* note 16, at 643–47 (describing the rise of private enforcement regimes).

²⁹ See *id.* at 686. The authors do not purport to have identified all private enforcement regimes but have identified those in the roughly three hundred “important” pieces of legislation passed by Congress between 1947 and 2002. See *id.* at 685–87 (explaining their methodology); David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–2002*, at 52–73 (2d ed. 2005) (identifying important pieces of legislation passed by Congress between 1947 and 2002).

³⁰ See Burbank et al., *supra* note 16, at 685; *id.* at 639 n.2 (“We use the phrase ‘private enforcement’ for both enforcement initiated by private parties but taken over by public officials as well as enforcement initiated and prosecuted by private parties.”). Private enforcement can be viewed as part of a larger part of procedural political economy that provides workers and consumers with countervailing power. See Luke P. Norris, *Labor and*

Public and private enforcers work in tandem as regulators in this scheme.³¹ When vesting citizens with enforcement authority in court, legislators often at the same time vest government lawyers with enforcement power in court and agencies with parallel or similar bureaucratic enforcement power.³² Thus, unlike systems where regulation is performed almost exclusively by bureaucrats in agencies, the U.S. legal system pairs administrative enforcement power with public and private judicial enforcement power.

Over time, private enforcement has become a prominent part of U.S. regulatory governance. Sean Farhang found in his book *The Litigation State* that where public and private litigation enforcement mechanisms are coupled, private enforcers bring over ninety-five percent of enforcement actions.³³ Areas of regulatory law as diverse as anti-discrimination, antitrust, disability, securities, consumer protection, and housing are deeply and arguably primarily shaped by cases brought by private enforcers.³⁴ As Myriam Gilles has explained, without private enforcement litigation governing the workplace, the “protections afforded to gay and

the Origins of Civil Procedure, 92 N.Y.U. L. Rev. 462, 472–73 (2017) (discussing procedure and countervailing power).

³¹ See, e.g., David Engstrom, *Agencies as Litigation Gatekeepers*, 123 Yale L.J. 616, 619–21, 627–29 (2013); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suit by State Attorneys General*, 126 Harv. L. Rev. 486, 488–90 (2012) [hereinafter Lemos, *Aggregate Litigation Goes Public*]; Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698, 700–02, 707–11 (2011); Reza Rajabiun, *Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States*, 8 J. Competition L. & Econ. 187, 187–89 (2012); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. Pa. L. Rev. 2173, 2174–75 (2010).

³² See, e.g., Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 Vand. L. Rev. 285, 293–94 (2016) (analyzing various enforcement approaches).

³³ See Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* 10 (2010).

³⁴ See Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. Ill. L. Rev. 371, 414–16 (exploring the role of private lawsuits in shaping employment and antitrust law); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. Rev. 1401, 1403 (1998) (exploring the importance of private enforcement cases in the employment discrimination and housing contexts); Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. Irvine L. Rev. 557, 563, 599–603, 611–13 (2020) (exploring the prominence of private enforcement in the disability context); Randal C. Picker, *Twombly, Leegin, and the Reshaping of Antitrust*, 2007 Sup. Ct. Rev. 161, 163 (exploring the “case-by-case evolution that is the common law of the Sherman Act”); Samuel Issacharoff, *Regulating After the Fact*, 56 DePaul L. Rev. 375, 380–83 (2007) (exploring private enforcement in the securities and consumer protection contexts). For a comparative account of the role of litigation, see Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* 1–4 (1998).

transgendered employees, victims of retaliation, whistleblowers, [and] pregnant employees” would look remarkably different.³⁵ Similarly, Michael Selmi has argued that private enforcers have been responsible for the lion’s share of precedential cases in the housing discrimination context, bringing more significant cases and securing more meaningful outcomes than public enforcers.³⁶

This is not to say that all traditional private enforcement regimes are the same. Some private enforcement suits run against private parties—for example, companies that are alleged to pollute or discriminate. Others run against the government, as with § 1983 suits supplying citizens with a private right of action when government officials violate clearly established constitutional rights.³⁷ Some differ in their means and ends. For example, David Pozen refers to the Freedom of Information Act (“FOIA”), through which members of the public can obtain records from federal agencies, as a “personal enforcement regime.”³⁸ Pozen observes that private enforcement actions typically “identify some desired end, such as reducing pollution or discrimination, and empower citizens to bring lawsuits in service of that end.”³⁹ However, “in the case of FOIA, there is no specific, substantive policy that is being served. The filing of a FOIA request creates the legal norm—the obligation to disclose records responsive to that request—which then may be the basis of an enforcement action.”⁴⁰ Thus, while private enforcement is generally designed to implement the public norms contained in regulatory statutes, FOIA deviates to an extent from the model.

In addition, some private enforcement regimes differ in how much authority they give public enforcers to intervene. In the *qui tam* context, members of the public are empowered as “relators” to bring actions on the government’s behalf to recover fraudulent or false claims submitted

³⁵ See Gilles, *supra* note 34, at 423.

³⁶ Selmi, *supra* note 34, at 1403, 1423–27.

³⁷ See 42 U.S.C. § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . .”).

³⁸ David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. Pa. L. Rev. 1097, 1102 (2017).

³⁹ *Id.* at 1004.

⁴⁰ *Id.*

to the government.⁴¹ Citizen-relators vindicate the governmental—and taxpayer—interest in not having agencies pay out false or fraudulent claims with public monies. But because the enforcer is vindicating the larger governmental interest, the government itself retains a strong role in the litigation: it can intervene and take primary responsibility for the action, either taking over from the relator or partnering with the relator, and it can move to dismiss the case in its entirety.⁴² As David Freeman Engstrom explores in depth, there are various levels of government gatekeeping authority to intervene in, oversee, or end private enforcement litigation across federal and state regulatory regimes.⁴³

Private enforcement has been prioritized as a regulatory design choice for a complex constellation of reasons, but a powerful one is party politics and legislative distrust that administrative enforcement of statutory regimes would be robust.⁴⁴ As Farhang explains, “From Congress’s point of view—primarily Democratic Congresses facing Republican presidents—statutorily-provided opportunities and incentives for private enforcement, as an alternative or supplement to bureaucracy, offered valuable enforcement insurance when Congress distrusted presidential commitment to robust implementation of legislative mandates.”⁴⁵ At the same time, Republican legislators have supported private enforcement because of concerns about relying instead on and empowering agencies.⁴⁶ However, as the next Section explores, Republican legislators have come to favor private enforcement for different reasons—and have reworked some of its components along the way.

B. Recent Adaptations

In recent years, scholars have documented increasing Republican Party support for private enforcement, particularly “in bills that were anti-

⁴¹ See 31 U.S.C. §§ 3729(a), 3730(b); Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 7 & n.25.

⁴² 31 U.S.C. § 3730(b)–(c).

⁴³ See Engstrom, *supra* note 31, at 644–54.

⁴⁴ See Farhang, *supra* note 33, at 36.

⁴⁵ Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 *Calif. L. Rev.* 1529, 1533 (2018).

⁴⁶ See Farhang, *supra* note 33, at 108–09.

abortion, immigrant, and taxes, and pro-gun and religion.”⁴⁷ S.B. 8 is an example of such a bill becoming law.⁴⁸

S.B. 8 permits “any person” to bring an action against anyone who “aids or abets the performance or inducement of an abortion” after a heartbeat is detectible, or against any person who intends to do so.⁴⁹ The law prohibits public officials from enforcing the abortion ban in court, cabining enforcement to private parties.⁵⁰ If the private enforcer prevails, they are entitled to damages “of not less than \$10,000 for each abortion that the defendant performed or induced,” as well as costs and attorney’s fees.⁵¹ The legislation also empowers plaintiffs to sue in Texas state courts, enables plaintiffs to prohibit transfer to a more convenient venue, and restricts courts’ ability to award costs or attorney’s fees to defendants, even where the suit is found to be frivolous.⁵² Two states have enacted copycat laws, and several other states have introduced similar bills.⁵³

In the education sphere, private enforcement legislation has been passed or is currently being considered in various states. States have passed laws empowering students to sue over sharing a restroom or playing on a sports team with a transgender person.⁵⁴ Recently passed

⁴⁷ Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. Irvine L. Rev. 657, 660 (2021).

⁴⁸ See Texas Heartbeat Act (S.B. 8), Tex. Health & Safety Code Ann. §§ 171.201–12 (West 2022). States such as Oklahoma and Louisiana have in the past provided tort liability for doctors who perform abortions, and these laws arguably provide an antecedent for S.B. 8. See Okla. Stat. Ann. tit. 63, § 1-740 (West 2021); La. Stat. Ann. § 9:2800.12(A) (2022); see also Michaels & Noll, *Vigilante Federalism*, supra note 10, at 18–19, 19 n.117 (describing the regimes and their connection to S.B. 8).

⁴⁹ Health & Safety §§ 171.204, 171.208.

⁵⁰ Id. § 171.207 (“No enforcement of [S.B. 8] may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.” (authorizing the filing of amicus curiae briefs)).

⁵¹ Id. §§ 171.208(i), 171.210(b).

⁵² Id. §§ 171.208(i), 171.210.

⁵³ See Act of May 25, 2022, ch. 321, 2022 Okla. Sess. Laws; Act of Mar. 23, 2022, ch. 152, 2022 Idaho Sess. Laws 532, 534–35; Christine Vestal, *Citizen Enforcement of Texas Abortion Ban Could Spread to Other Laws*, Stateline (Sept. 23, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/09/23/citizen-enforcement-of-texas-abortion-ban-could-spread-to-other-laws> [https://perma.cc/SLB7-UCHZ] (stating that abortion advocates fear other states will enact copycat versions of S.B. 8).

⁵⁴ See, e.g., Tennessee Accommodations for All Children Act, Tenn. Code Ann. § 49-2-805 (2021) (permitting any student, teacher, or school employee to sue if they have to share a restroom with a transgender person); Fairness in Women’s Sports Act, Fla. Stat. Ann. § 1006.205 (West 2021) (permitting female students to sue if they are “deprived of an athletic opportunity” by being required to play sports with a transgender person).

laws give students and parents a private right of action against school districts teaching critical race theory or related racial topics and employees a right of action against companies that provide training based on it, and several copycat laws have been introduced.⁵⁵ In these instances and others, public enforcement mechanisms are once again often omitted.⁵⁶

Such private enforcement regimes are on the rise across various statehouses, and their numbers are likely to grow in the months and years ahead.⁵⁷ And they are not limited to Republican legislatures: California has passed, and Illinois is considering, a private enforcement law targeting purveyors of restricted firearms.⁵⁸ Others have suggested that Democratic state legislatures pass laws authorizing suits against those who interfere with elections or the right to vote, bundle campaign donations, or violate public health protocols.⁵⁹

Many of these laws deviate from the traditional private enforcement regimes surveyed in the previous Section in several respects. Private

⁵⁵ See *supra* note 5 and accompanying text; see also Theodore R. Johnson, Emelia Gold & Ashley Zhao, How Anti-Critical Race Theory Bills Are Taking Aim at Teachers, *FiveThirtyEight* (May 9, 2022, 6:00 AM), <https://fivethirtyeight.com/features/how-anti-critical-race-theory-bills-are-taking-aim-at-teachers/> [<https://perma.cc/JR6Z-X8UB>] (finding that eleven states have already passed anti-CRT bills and another eighty-four bills are pending in state legislatures); Katie Riley, Florida's Governor Just Signed the 'Stop Woke Act.' Here's What It Means for Schools and Businesses, *Time* (Apr. 22, 2022, 6:04 PM), <https://time.com/6168753/florida-stop-woke-law/> [<https://perma.cc/2THB-NLJ8>] (exploring the act and its private right of action); Jeffrey Sachs, New Stop W.O.K.E. Act Fits Disturbing Pattern in Education Culture War, *Pen America* (Dec. 23, 2021), <https://pen.org/stop-woke-act-fits-disturbing-pattern-education-culture-war/> [<https://perma.cc/HAN5-L3P4>] (“Sixty-six [anti-CRT bills] have been introduced so far in 2021, and not counting Florida’s bill, nine include a private right of action.”).

⁵⁶ See Tennessee Accommodations for All Children Act, *Tenn. Code Ann.* § 49-2-805 (2021) (limiting right of action to students, teachers, or employees who encounters a transgender person “in a multi-occupancy restroom or changing facility located in a public school building”); Fairness in Women’s Sports Act, *Fla. Stat. Ann.* § 1006.205 (West 2021) (“Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of this section shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school or public postsecondary institution.”).

⁵⁷ See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 8–18.

⁵⁸ S.B. 1327, 2022 Leg., Reg. Sess. (Cal. 2022) (codified at *Cal. Bus. & Prof. Code* § 22949.60 (Deering 2022) and *Cal. Civ. Proc. Code* § 1021.11 (Deering 2022)); Bring Responsible Enforcement Targeting Those Knowingly Advancing Violence and Needlessly Abetting Unlawful Gun Homicides (“BRETT KAVANAUGH”) Act, H.B. 4150, § 15, 102d Gen. Assemb., Reg. Sess. (Ill. 2021).

⁵⁹ See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 43–47.

enforcement typically exists in two lanes. In the first, an enforcer alleges direct, individualized harm that regulation prohibits—say, being terminated for discriminatory reasons in violation of Title VII of the Civil Rights Act of 1964 or being defrauded by a company with whom the person does business in violation of consumer protection laws.⁶⁰ In the second, smaller class of suits, an enforcer has a less direct and personal harm but seeks to vindicate a shared public interest—preventing fraud on the government, as in the *qui tam* context, or ensuring safe and clean air and water, as in some state environmental enforcement regimes that do not require individualized harm to sue (in contrast to federal environmental laws that generally require concrete and particularized injury for a citizen to bring suit).⁶¹ The people vested with enforcement power under S.B. 8 and these other adaptations do not fall into the first lane. There is no individualized harm to them in the sense long understood under U.S. law; living in a community where pregnant people make reproductive decisions or transgender people utilize public spaces in ways people disagree with does not invest enforcers with a legally cognizable individual harm under most every legal and philosophical conception of rights, as Jon Michaels and David Noll explore in detail.⁶²

One counterargument could be made concerning § 1983 suits. It might be maintained, that is, that private enforcement schemes against school districts for teaching critical race theory or for permitting transgender

⁶⁰ Cf. *id.* at 7–8 (describing such laws).

⁶¹ For example, under the New Jersey Environmental Rights Act, “[a]ny person may commence a civil action in a court of competent jurisdiction against any other person alleged to be in violation of any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment.” Environmental Rights Act, N.J. Stat. Ann. § 2A:35A-4 (West 2021). Under federal law, citizens can also enforce environmental statutes, but must demonstrate a “concrete and particularized [harm]” to proceed. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 562 (1992). Laws like the New Jersey Environmental Rights Act also connect to historical private enforcement schemes involving the sale of liquor and sex, which also did not require individualized harm and which Scott Stern refers to as “moral nuisance abatement statutes.” See generally Stern, *supra* note 25, at 1, 12–28 (describing the history of alcohol abatement, brothel abatement, and pollution abatement and their connections). As Stern notes, such laws have consistently included public enforcement mechanisms alongside private enforcement mechanisms. See *id.* at 5. And they have a deeper historical lineage, with private enforcement of gambling laws reaching back into the eighteenth century. See, e.g., An Act for the Better Preventing of Excessive and Deceitful Gaming 1710, 9 Ann. c. 19 (Gr. Brit.) (allowing private citizens to sue gamblers); An Act to Restrain Gaming, 1827 Ill. Laws 235, 235–36 (early American analog); 720 Ill. Comp. Stat. 5/28-8 (2012) (modern version).

⁶² See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 28–31.

students to play sports or use certain facilities are similar to § 1983 suits. Section 1983 suits permit students and parents to sue school districts for violating their clearly established constitutional rights.⁶³ But, unlike § 1983 suits, there is no constitutional violation in these statutory regimes. There is, that is, no clearly established constitutional right not to share a space with a transgender person or not to learn certain theories or aspects of U.S. history. Indeed, to the contrary, rather than enforcing constitutional rights, these laws may violate them: the laws banning the teaching of critical race theory may run afoul of the First and Fourteenth Amendments, and the laws targeting transgender students may violate their equal protection rights.⁶⁴ Thus, quite unlike § 1983 suits, which are a vehicle for private parties to enforce their constitutional rights against rogue government officials, these lawsuits provide statutory enforcement rights for laws that potentially *embody* constitutional violations.

Nor do these recent adaptations fit into the second lane—with members of the public standing in on behalf of the government or all members of the public to vindicate settled rights.⁶⁵ Indeed, they depart from them in three significant ways.

First, most of these new laws lack public enforcement mechanisms.⁶⁶ To the extent they are analogized to *qui tam* laws, with members of the public stepping in to vindicate the larger public's interest, the lack of public enforcement is puzzling. Because the enforcer has a less direct

⁶³ See *supra* note 37 and accompanying text; see also *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (“[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered . . .”).

⁶⁴ See Tiana Headley, *Laws Aimed at Critical Race Theory May Face Legal Challenges*, Bloomberg L. (July 7, 2021, 10:24 AM), <https://news.bloomberglaw.com/us-law-week/laws-curbing-critical-race-theory-may-face-legal-challenges> [https://perma.cc/96FY-JCTY] (exploring potential First and Fourteenth Amendment challenges to laws restricting instruction on race); John Raby, *DOJ: 2 States' Transgender Restrictions Unconstitutional*, AP News (June 17, 2021), <https://apnews.com/article/college-sports-west-virginia-laws-sports-education-a3e8852ced2bf0c3bd8ce546bfe70d2b> [https://perma.cc/D7S8-9629] (discussing equal protection challenges to the laws).

⁶⁵ See John C.P. Goldberg & Benjamin C. Zipursky, *Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas S.B. 8*, 14 *J. Tort L.* (forthcoming 2022) (manuscript at 1), <https://ssrn.com/abstract=4019710> [https://perma.cc/EW4M-SNAS] (“Unlike genuine tort plaintiffs, persons authorized to sue by S.B. 8 do *not* sue in their own right, for wrongs personal to them. Instead, their nominally personal actions are suits on behalf of the state of Texas.”).

⁶⁶ California's proposed private enforcement regime for restricted firearms is an exception. See *supra* note 58 and accompanying text.

injury in the qui tam context—essentially, a common public interest in avoiding fraud on the public fisc—the ability of the government to intervene in enforcement is critical, because the government may be better suited to represent its own interests. In S.B. 8, the absence of public enforcement is perhaps then puzzling, until one understands that it was designed to shield the laws from pre-enforcement judicial review under long-standing doctrines that enable courts to enjoin public officials from enforcing unconstitutional laws.⁶⁷ As mentioned in the Introduction, abortion providers challenged S.B. 8 in part for this reason, arguing they should be permitted to bring pre-enforcement suits against government officials.⁶⁸ The Supreme Court concluded that pre-enforcement suits could be brought against certain state licensing officials with the responsibility to enforce the statute, but not against a bevy of other public officials.⁶⁹ This gives the abortion providers some ability to seek pre-enforcement review, but the regime still lacks public enforcers who can step in and oversee the litigation.

Second, the laws depart from the traditional account of rights-enforcement and public interest involved in qui tam and environmental suits. The laws do not involve clearly established and shared public rights—as in the qui tam context (preventing fraud on the government) or environmental context (preserving safe air and water)—that a member of the public can enforce on behalf of all other members of the public. S.B. 8, to the contrary, tasks people with enforcing a law that was patently unconstitutional under U.S. Supreme Court precedent at the time of its passage: as Chief Justice Roberts recently explained, when passed, the Texas law’s ban on abortions after approximately six weeks contravened long-standing Court precedents (that have since been overturned).⁷⁰ And

⁶⁷ 42 U.S.C. § 1983 supplies a cause of action against actors who act under the color of law to deprive plaintiffs “of any rights, privileges, or immunities secured by the Constitution and laws.” The Supreme Court has interpreted § 1983 as permitting pre-enforcement challenges so long as the plaintiff shows a “realistic danger of sustaining a direct injury as a result of the [challenged] statute’s operation or enforcement.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979). Furthermore, under *Ex Parte Young*, 209 U.S. 123, 159–60 (1908), actions in federal court seeking to enjoin state actors from undertaking unconstitutional actions are not barred by sovereign immunity.

⁶⁸ Cf. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 545–48 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (arguing that pre-enforcement review of S.B. 8 should be available because of its chilling effect).

⁶⁹ See *id.* at 531–32, 539 (majority opinion).

⁷⁰ See *id.* at 543 (Roberts, C.J., concurring in part and dissenting in part) (“[Texas’s] law is contrary to this Court’s decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern*

the laws targeting transgender students, critical race theory, and restricted guns at the very least do not enforce very settled and uncontroversial rights. Instead, they intervene in ongoing struggles over those rights—over the scope of the protections afforded to transgender people, the scope of permissible gun regulations, and over what schools can teach or ban—and, as I mentioned above, some of these laws may well violate people’s constitutional rights. Aziz Huq has therefore analogized S.B. 8 to the Fugitive Slave Acts, placing it in a history of private suppression of constitutional rights that “uses law to realize the brute fact of caste.”⁷¹

Third, some of the laws pose real due process concerns.⁷² By stripping public enforcement from the regime, S.B. 8 is designed to avoid pre-enforcement review of unconstitutional legislation. But there is more. The law requires defendants to litigate the suit in any county in which a plaintiff resides, regardless of whether the county bears a relationship to the defendant or the abortion.⁷³ It supplies plaintiffs with veto power over venue transfer.⁷⁴ The law also bars defendants from invoking non-mutual claim and issue preclusion and denies them attorney’s fees if they prevail, even though plaintiffs are guaranteed attorney’s fees if they prevail.⁷⁵

These features of the new laws raise serious concerns. But there is a deeper problem lurking beneath them: commentators have never fully articulated the democratic rationale for private enforcement and its place in our system of democracy against which any of these laws—whether the new variations or traditional forms—can be measured. There is enduring angst over and lack of clarity about the legitimacy and meaning of private enforcement writ large.

II. PRIVATE ENFORCEMENT AND DEMOCRATIC REGULATORY GOVERNANCE

Private enforcement is an enigma of sorts. It features prominently in U.S. law and to some extent defines the legal-regulatory system. Yet

Pa. v. Casey. It has had the effect of denying the exercise of what we have held is a right protected under the Federal Constitution.” (internal citations omitted).

⁷¹ Huq, *supra* note 10, at 4–6, 50–54.

⁷² For an overview of the potential due process violations involved in the S.B. 8 scheme, see generally Brief of Legal Scholars as Amici Curiae in Support of Petitioners at 4–16, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21–463).

⁷³ Texas Heartbeat Act (S.B. 8), Tex. Health & Safety Code Ann. § 171.210(a)(4) (West 2022).

⁷⁴ *Id.* § 171.210(b).

⁷⁵ *Id.* §§ 171.208(b)(3), 171.208(e)(5), 171.208(i).

private enforcement is incompletely understood and theorized—a reality that permits the recent adaptations to be so puzzling and challenging to analyze. Defenders of the adaptations, indeed, argue they pose no challenge at all; they are just new iterations of a popular form of regulatory enforcement. These adaptations are problematic, but to understand why, we need to dive deeper into the rationales that support popular participation in regulatory enforcement. This Part thus dives into rich historical debates about regulatory theory that can illuminate the debate over private enforcement today.

A. Existing Views

First, it is useful to get a lay of the land. Roughly speaking, there are two prominent views of private enforcement today. Critics of private enforcement argue that the hallmarks of democratic regulatory governance are *institutional accountability and expertise* and maintain that public enforcers in courts and agencies are more faithful, expert, and politically accountable agents of regulatory enforcement than private enforcers.⁷⁶ For them, public enforcers are more accountable to the political branches in making regulatory enforcement choices because they are subject to legislative and executive appointment, oversight, and control.⁷⁷ Critics also stress the institutional advantages of agency processes led by public enforcers, and in particular, the ability of bureaucrats to make rules in a systematic and prospective fashion.⁷⁸ In contrast, private enforcers and their (often) profit-motivated lawyers are viewed as pursuing their own pecuniary and personal ends, without regard for public priorities, and as lacking the expertise of public enforcers.⁷⁹

⁷⁶ See Farhang, *supra* note 45, at 1542–44 (summarizing the critiques). Margaret Lemos develops a democratic, representative theory of public enforcement, focused on accountability and independence, but also explores how “public enforcement as currently constituted is neither adequately accountable to the public, nor adequately sheltered from narrow private pressures.” Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 *Cornell L. Rev.* 929, 934–36 (2017).

⁷⁷ See Farhang, *supra* note 45, at 1543 (“Administrative bodies generally are led by people who are appointed by the President. They can be influenced by presidential oversight instruments and often can be removed by the President. Congress has available to it a variety of mechanisms to oversee administrators, including investigations, oversight hearings, and control over agency budgets.”).

⁷⁸ See *id.* at 1544.

⁷⁹ See *id.* at 1543–44 (overviewing the argument); see also Martha A. Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Politics* 5–7 (3d ed. 2012) (criticizing litigation “policymaking” for its lack of public deliberation and describing its prominence in

And judges are insulated from political control by life tenure and must (1) judge a broad variety of cases, becoming generalists rather than experts,⁸⁰ and (2) often resolve cases one-by-one, in a piecemeal and reactive fashion.⁸¹

Some criticisms take on a constitutional valence. Article II of the Constitution tasks the executive branch with the responsibility to “take Care that the Laws be faithfully executed,”⁸² and some commentators argue that Article II reflects a judgment that public enforcers are the *exclusive* authorities who can be tasked with enforcing law.⁸³ This argument has always been strained for historical support, particularly because of the prominence of citizen suits in early U.S. history and because the argument flows from a theory of the “unitary executive” that is also at odds with constitutional history and practice.⁸⁴ But those who advance this argument elaborate a democratic theory of the allocation of enforcement authority that valorizes public enforcers for their political accountability and still has centrifugal pull in current debates over private enforcement.⁸⁵

In contrast, private enforcement is most prominently defended functionally for its capacity to play a *structural, gap-filling role* in

the United States); Patrick M. Garry, *A Nation of Adversaries: How the Litigation Explosion is Reshaping America* 6 (1997) (arguing that the rise of litigation has created an adversarial culture that undermines the democratic political culture); Daniel P. Kessler, Introduction, *in* Regulation vs. Litigation: Perspectives from Economics and Law 1, 2–4 (Daniel P. Kessler ed., 2011) (summarizing previous research on regulation versus litigation); Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, Regulation by Litigation 14–15 (2009) (arguing that regulation by litigation can weaken due process protections as compared to notice-and-comment rulemaking); Walter K. Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit 2 (1991) (arguing that the expansion of litigation has led to social harms); W. Kip Viscusi, Overview, *in* Regulation Through Litigation 1, 2 (W. Kip Viscusi ed., 2002) (arguing that agency regulation does a better job of promoting good policy in the area of health and safety given the inadequacy of case-by-case adjudication).

⁸⁰ See Farhang, *supra* note 45, at 1533 (summarizing the argument); *id.* at 1544 (“[F]ederal judges are generalists by training, and in the course of judging they deal with a multitude of policy areas, one after another, developing a depth of knowledge in none. This makes federal judges, on balance, far less informed and expert than administrators as policy-makers.”).

⁸¹ See *id.* at 1544 (“Because the court system is decentralized, non-expert judges make policy piecemeal, one case at a time, often without adequate consideration or understanding of the larger policy scheme.”).

⁸² U.S. Const. art. II, § 3.

⁸³ See Harold J. Krent & Ethan G. Shenkman, Of Citizen Suits and Citizen Sunstein, 91 *Mich. L. Rev.* 1793, 1794 (1993); Sunstein, *supra* note 14, at 133 (overviewing the argument).

⁸⁴ See Sunstein, *supra* note 14, at 134–35.

⁸⁵ See Krent & Shenkman, *supra* note 83, at 1806.

regulatory governance. Scholars show how the presence of private enforcers may mean that fewer “good cases” interpreting and enforcing regulatory commands are missed that would have been missed by public enforcers lacking the information, resources, or political will to bring those cases.⁸⁶ Pairing public and private enforcement thus enables society to remedy abuses by powerful actors that would otherwise go unredressed⁸⁷ and “to identify social problems and devise public solutions” that might be missed without private enforcers.⁸⁸ In performing this role, private enforcement can “multiply prosecutorial resources” dedicated to enforcement and “encourage legal and policy innovation.”⁸⁹ Aggregate private enforcement mechanisms may be especially helpful in this regard. In their seminal account of the class action, Harry Kalven and

⁸⁶ For arguments about agency limitations, see Clopton, *supra* note 32, at 290 (suggesting that private litigation can remedy underenforcement); Alexandra Lahav, *In Praise of Litigation* 36 (2017) (warning that agencies are vulnerable to regulatory capture); Engstrom, *supra* note 31, at 632 (arguing that, due to the costs of uncovering wrongdoing, public enforcement will be minimal or absent in some regulatory areas); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 *Wm. & Mary L. Rev.* 1137, 1155–56 (2012) (listing ways that private enforcement mitigates agency limitations). Lahav also notes that even the government as a litigator may suffer from slowness, cautiousness, lack of funding, and lack of information. See Lahav, *supra*, at 38.

⁸⁷ See, e.g., Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 *Fordham L. Rev.* 2223, 2224 (2018) (locating private enforcement and class actions in a system whereby “citizens remedy widespread violations of labor, consumer, employee benefits, debt collection, and antitrust laws”); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 *Mich. L. Rev.* 373, 378 (2005) (claiming that litigation contributes to the deterrence of wrongdoing); Jean R. Sternlight, *No: Permitting Companies to Skirt Class Actions Through Mandatory Arbitration Would Be Dangerous and Unwise*, *Disp. Resol. Mag.*, Spring 2002, at 13, 20 (suggesting that private class actions facilitate otherwise unviable claims, furthering justice and the public interest).

⁸⁸ Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 *Wm. & Mary L. Rev.* 507, 544 (2011); Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 *U. Pa. L. Rev.* 1793, 1836–37 (2014) (stating that litigation “forces dialogue upon the unwilling” and “enable[s] debate about norms”); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *Yale L.J.* 2804, 2816 (2015) [hereinafter Resnik, *Diffusing Disputes*] (“Courts offer the potential for egalitarian redistribution of authority, and the possibility of public oversight of legal authority.”). Adjudication has long been theorized to provide public goods generally. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 *J. Legal Stud.* 235, 236 (1979) (stating that judicial systems create goods that promote “compliance with socially desired standards of behavior”); Kenneth E. Scott, *Two Models of the Civil Process*, 27 *Stan. L. Rev.* 937, 937–39 (1975) (describing civil suits as avoiding violence and encouraging desirable behavior).

⁸⁹ See Burbank et al., *supra* note 16, at 662–64.

Maurice Rosenfield stressed the class action's ability to complement public enforcement for broad, mass harms that might not be redressed otherwise.⁹⁰

Because private enforcement plays this gap-filling role in regulatory enforcement, diminishing private enforcement can in turn diminish the ability of litigation to implement statutory policy.⁹¹ Scholars thus argue that, in playing a gap-filling role over time, private enforcement has become an institutional feature of American public law supplementing and often complementing public enforcement.⁹² Indeed, members of the public bringing statutory claims have long been referred to as private attorneys general—private actors stepping in to enforce public policies in place of or sometimes alongside public attorneys general.⁹³ Private attorneys general are lauded for their ability to supplement public

⁹⁰ See Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 684–87 (1941).

⁹¹ David L. Noll, *Regulating Arbitration*, 105 Calif. L. Rev. 985, 990–91 (2017).

⁹² See Glover, *supra* note 86, at 1141; see also Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 Fordham Urb. L.J. 803, 806 (2009) (arguing that Congress favors private enforcement “so that individuals [can] serve as private attorneys general and enforce [regulatory] laws in court, where transparency and adherence to the law are matters of first principle”); Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of *Buckhannon* for the Private Attorney General*, 54 UCLA L. Rev. 1087, 1088 (2007) (“Congress enacted fee-shifting statutes to encourage private enforcement of civil rights laws . . .”); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 Duke L.J. 345, 409 (2008) (“[S]pending statutes liberals care about . . . all require private enforcement . . .”); Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform*, 64 Law & Contemp. Probs. 137, 137 (2001) (“[D]amage class actions . . . supplement regulatory enforcement . . .”); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1213–16 (1982) (“[Because of] budget constraints . . . private actions can be a useful supplementary remedy . . .”); Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 Vand. L. Rev. 859, 860–62 (2003) (highlighting the complementary role state corporate law and federal securities law play in regulating corporate governance).

⁹³ For an overview of this claim, see Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. Rev. 1339, 1346–47 (2012); see also Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183, 186 (exploring how private attorney general regimes allow “Congress [to] vindicate important public policy goals by empowering private individuals to bring suit”); William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 Vand. L. Rev. 2129, 2130–33 (2004) (defining the concept as “a placeholder for any person who mixes private and public features in the adjudicative arena” and arguing that there are distinct manifestations of the concept).

enforcement and to fill gaps where public enforcement capacity is weak or lacking.⁹⁴

Scholars have also noted in passing another rationale for private enforcement: it promotes “participation in the enterprise of self-government.”⁹⁵ Certainly, there are democratic theories of adjudication, which posit that members of the public bringing cases and judges adjudicating them contribute to the enterprise of self-government by, among other things, elaborating public values.⁹⁶ But private enforcement has never been deeply tied to these theories of adjudication and democracy, and thus one is left with a sense that it is to be celebrated for its gap-filling functions and a weaker, and fuzzier, sense that it could play an important role in democratic self-government.

In contrast, critics of private enforcement supply their own seemingly coherent view of democratic regulatory governance, tying democratically legitimate enforcement to public officials amenable to oversight and control. While defenders of private enforcement therefore valuably point out its functional and structural role, they do not supply a competing democratic account of the public’s role in regulatory enforcement. But if

⁹⁴ See Johnson, *supra* note 93, at 1346–48 (describing how in the literature private attorneys general are lauded for “supplementing” state authority, for helping to “cope with state incapacity,” and how this form of enforcement is understood as “effectively delegat[ing] pursuit of the statute’s public goals to private parties”); Rubenstein, *supra* note 93, at 2133–34 (discussing the role of the private attorney general in supplementing public enforcement).

⁹⁵ See Burbank et al., *supra* note 16, at 666; Lahav, *supra* note 86, at 84 (“Every type of lawsuit involves participation in self-government.”); Christopher B. Busch, David L. Kirp & Daniel F. Schoenholz, Taming Adversarial Legalism: The Port of Oakland’s Dredging Saga Revisited, 2 N.Y.U. J. Legis. & Pub. Pol’y 179, 210–11 (1999) (highlighting the net benefit of participatory democracy by using an example of private enforcement preventing public environmental damage); Susan E. Lawrence, Justice, Democracy, Litigation, and Political Participation, 72 Soc. Sci. Q. 464, 472 (1991) (arguing that litigation offers citizens a significant means of political participation, particularly when comparing the lawyer-client relationship to the legislative representative-constituent relationship); Frances Kahn Zeman, Legal Mobilization: The Neglected Role of the Law in the Political System, 77 Am. Pol. Sci. Rev. 690, 695 (1983) (“[Sociologists] have recognized that the legal process makes the individual a participant in governance . . .”).

⁹⁶ See Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1085 (1984) (“[T]he purpose of adjudication . . . [is to] explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes . . .”); David Luban, Settlements and the Erosion of the Public Realm, 83 Geo. L.J. 2619, 2626 (1995) (exploring adjudication’s value as a “reasoned elaboration and visible expression of public values”); Judith Resnik, Courts: In and Out of Sight, Site, and Cite, 53 Vill. L. Rev. 771, 804 (2008) (“Open court proceedings enable people to . . . materialize the exercise of both public and private power.”); see also Lahav, *supra* note 86, at 38 (highlighting the direct participation “in calling one another to answer and account for wrongdoing” that litigation provides).

the adage “it takes a theory to beat a theory” is true, there may be value in elaborating a different account of democratic regulatory governance to which we might anchor our understanding of private enforcement and from which we might analyze its variations.⁹⁷

B. A Participatory Democracy Theory

U.S. intellectual history provides rich resources for thinking about the democratic reasons for and against centering members of the public in regulatory enforcement. On the heels of the Industrial Revolution, as the United States was transforming from an agrarian republic into a mass democracy and as large firms were amassing significant power, questions about who should regulate and how in this evolving context came to the center of a robust debate.⁹⁸

Thinkers on one side of the debate advanced arguments that critics of private enforcement today still employ. These thinkers were skeptical about the ability of the public to participate in regulatory enforcement and turned away from popular participation and towards making and enforcing regulatory law solely through institutional structures, governmental actors who would be politically accountable, and bureaucratic experts.⁹⁹ For these thinkers, government actors and experts provided the best chances for robust regulatory governance that was accountable to the larger public. Their democratic theory of regulatory governance thus presaged the one that today casts private enforcement in a negative light.

For others, regulatory governance in this complex environment did not require giving up on popular participation. It demanded more of it. While many progressive theorists contributed to articulating this view, perhaps

⁹⁷ See Lawrence Solum, *Legal Theory Lexicon 053: It Takes a Theory to Beat a Theory*, *Legal Theory Blog* (Oct. 21, 2012, 9:40 AM), <https://lsolum.typepad.com/legaltheory/2012/10/introduction-it-takes-a-theory-to-beat-a-theory-this-is-surely-one-of-the-top-ten-all-time-comments-uttered-by-law-professo.html> [<https://perma.cc/D5EG-5EN4>].

⁹⁸ Dewey, *supra* note 27, at 102–06; see also *id.* at 101, 103 (exploring how U.S. models of public governance and popular sovereignty “took form when English political habits and legal institutions worked under pioneer conditions” and how the rise of the large “continental national state” complicates “maintaining a unified state, even nominally self-governing, over a country [so] extended as the United States and consisting of a large and racially diversified population”).

⁹⁹ See generally Henry Sumner Maine, *Popular Government: Four Essays* (N.Y.C., Henry Holt & Co. 1885) (providing an example of this line of thinking); Walter Lippmann, *Drift and Mastery: An Attempt to Diagnose the Current Unrest* (1914) (same).

none articulated it as strongly as philosopher and democratic theorist John Dewey. Dewey elaborated a set of reasons for centering popular enforcers in regulatory governance alongside public enforcers in courts and agencies that is still helpful in guiding our thinking about the virtues and limits of private enforcement litigation.¹⁰⁰ Below, I sketch out three core rationales that Dewey and other progressive democratic theorists advanced for why popular participation in regulatory governance was democratically valuable. Together, these reasons make up the core of the participatory democratic account of regulatory governance.

1. Reducing Structural Power Imbalances

First, popular participation in regulatory governance can be valuable because it can reduce power imbalances and structural biases that threaten to undermine democracy.

Progressives understood that concentrated forms of power could threaten or undermine democracy, and they argued that members of the public directly affected by concentrated forms of power were both well-positioned to engage in regulating such power and that their participation was necessary for doing so effectively.

Their chief concern was concentrated economic power and the effects it could have on democracy. During and in the aftermath of the Industrial Revolution, progressives had seen that powerful firms could determine whether people's lives as workers and consumers were ones of dignity, freedom, and security, or ones of subordination and domination.¹⁰¹

¹⁰⁰ As one of America's foremost democratic theorists, Dewey's influence runs deep in constitutional and administrative law but is surprisingly absent in scholarship about litigation and regulation. See, e.g., Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 *Minn. L. Rev.* 1331, 1341–49 (1987) (using Dewey's thought to justify pragmatic judicial review in constitutional law); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 283–85, 314–23 (1998) (drawing on Dewey to envision a system of local and national constitutional experiments). Scholars have also drawn on Dewey's thought to envision more localized sites of governance. These approaches are part of a "new governance" or "democratic experimentalism" movement. See, e.g., Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *Minn. L. Rev.* 342, 345–47 (2004); Charles Sabel, *Dewey, Democracy, and Democratic Experimentalism*, 9 *Contemp. Pragmatism* 35, 35 (2012). I join other scholars in extending Dewey's theories of democracy to national law-making processes as well as more localized sites. See, e.g., Emerson, *supra* note 17, at 84–95 (extending Dewey's thinking in various ways, including the context of the federal administrative state); Rahman, *supra* note 17, 139–65 (2017) (same).

¹⁰¹ Dewey, *supra* note 27, at 102–05; Rahman, *supra* note 17, at 79–86 (overviewing the progressive critique of market domination).

Witnessing workers struggle for decent pay, labor in mill villages living on company credit, and have their health and safety threatened or ignored, and witnessing markets soar and crumble based on the activities of firms, progressives came to understand the consequences of unchecked concentrated power.¹⁰² Their second concern was that if left unchecked, concentrated economic power would bleed into political power, with powerful economic actors controlling political processes and creating conditions of oligarchy.¹⁰³ All of these concerns bore on democracy—on whether members of the public were free or dominated and whether our politics was determined by the public or the powerful. Thus, progressives argued that countering concentrated accumulations of power through regulation was essential to sustaining democracy.¹⁰⁴

But they also believed that removing members of the public from the process of regulating such power was counterproductive. Indeed, they believed that a regulatory enforcement system led by public officials alone might actually cement existing power imbalances. As Dewey wrote, “No government by experts in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few.”¹⁰⁵ The concern was in part that experts and government officials would be too close to powerful interests. And it was in part that without public input into and control over regulatory processes, public regulatory officials would not fully understand and be responsive to the issues citizens faced in their lives.¹⁰⁶ Thus, rather than viewing accountable experts as the lodestar of

¹⁰² Economic relationships had become, as Dewey wrote, the “dominantly controlling forces in setting the pattern of human relations,” and the public would therefore need to determine the values and norms that would guide these relationships. See John Dewey, *Liberalism and Social Action* 34 (1935).

¹⁰³ For an exploration of how progressives and citizens throughout U.S. history have framed the problem of oligarchy and fought against it, see generally Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* (2022).

¹⁰⁴ Dewey argued that earlier liberals had articulated an idea of freedom “tinged by fear of government” and did not appreciate the “historic relativity” of their interpretation of the idea of liberty and that “effective liberty is a function of the social conditions existing at any time.” See Dewey, *supra* note 27, at 87; Dewey, *supra* note 102, at 34.

¹⁰⁵ Dewey, *supra* note 27, at 154.

¹⁰⁶ See *id.* at 154–55 (arguing that ruling classes and oligarchic conditions are part of the problem of modern politics and that the “essential need” for changing these conditions is more public participation in “debate, discussion, and persuasion. That is *the* problem of the public. We have asserted that this improvement depends essentially upon freeing and perfecting the processes of inquiry and of dissemination of their conclusions.”).

regulatory governance—as critics of private enforcement do—progressive theorists understood that popular participation was necessary for regulatory governance to function properly. Put in more modern terms, private enforcers played an essential role alongside public enforcers.

Marshaling public participation to even out these power imbalances, however, was difficult. Large, powerful organizations could be trusted to pursue their own interests. Members of the public, however, were dispersed across a large nation-state, unknown to one another, which complicated the project of regulatory governance.¹⁰⁷ It was therefore misguided to think that a unified public would spontaneously spring to action and form a regulatory will or that, if they could, legislators could easily translate such a will into pristine text that would meaningfully resolve complex and changing economic and social issues going forward without further interpretation and elaboration.¹⁰⁸

The solution was for popular participation in regulatory governance to work from the ground-up—for piecemeal participation to guide the democratic process whereby regulatory commitments are expressed and enforced. Groups of people who were directly subjected to and affected by concentrated forms of power—who felt the harms and effects of power in their own lives—would come together as “publics” to frame the problems for regulatory action.¹⁰⁹ These affected members of the public

¹⁰⁷ Id. at 115; id. at 109–11 (“[T]he machine age has so enormously expanded, multiplied, intensified and complicated the scope of . . . [politics and] . . . formed such immense and consolidated unions in action on an impersonal rather than a community basis, that the . . . public cannot identify and distinguish itself.”); see also id. at 110 (“There are too many publics and too much of public concern for our existing resources to cope with. The problem of a democratically organized public is primarily and essentially an intellectual problem in a degree to which the political affairs of prior ages offer no parallel.”); id. at 103 (“The notion of maintaining a unified state, even nominally self-governing, over a country as extended as the United States and consisting of a large and racially diversified population would once have seemed the wildest of fancies. It was assumed that such a state could be found only in territories hardly larger than a city-state and with a homogeneous population.”); see also id. at 105 (“Legislatures make laws with luxurious abandon; subordinate officials engage in a losing struggle to enforce some of them; judges on the bench deal as best they can with the steadily mounting pile of disputes that come before them. But where is the public which these officials are supposed to represent?”).

¹⁰⁸ See id. at 103–04, 112–14 (“The developments of industry and commerce have so complicated affairs that a clear-cut, generally applicable, standard of judgment becomes practically impossible. The forest cannot be seen for the trees nor the trees for the forest.”); see also Emerson, *supra* note 17, at 90 (“[Dewey’s] major innovation was to discard the concept of social organism as a basis for political unity . . .”).

¹⁰⁹ Melvin L. Rogers, Introduction to Dewey, *supra* note 27, at 1, 24–25.

would push for regulatory legislation, but equally importantly, they would need to play an ongoing role in processes of regulatory enforcement thereafter—leveraging their own experiences from living and working in a complex society to interpret and apply regulatory norms and make them real in their own lives through enforcement actions in courts and agencies. A person whose wages were stolen, or who was defrauded, would be well-positioned to measure that behavior against regulatory legislation and commence enforcement actions. As more and more members of the public participated in official processes, seeking to apply and refine regulatory norms, deliberation between those members of the public and government institutions would provide the larger public with information and help it to form and entrench regulatory norms over time.

Democratic regulatory governance would therefore both require and benefit from ongoing deliberation over regulatory norms between members of the public and government institutions after legislation was passed—in the courts and agencies that enforce legislation and in the legislative chambers that amend regulation.¹¹⁰ In a context where accumulations of power could undermine democracy, popular participation was essential to challenging and counterbalancing that power.

2. The Expertise of Experience & Regulatory Dynamism

Second, popular participation in regulatory governance can be valuable because affected persons and communities can bring the expertise of experience to creating, enforcing, and interpreting regulatory norms in dynamic environments.

Through participating in regulatory governance, members of the public can bring a particular type of expertise: the expertise of experience. As regulation targets complex and changing forms of social and economic behavior and must evolve to respond, people who are directly affected by those behaviors have an important role to elaborating the public's regulatory law. They can bring to regulatory governance the expertise of experience—of being directly affected by evolving behaviors in a dynamic regulatory context.¹¹¹ In this way, they are well-positioned to

¹¹⁰ See Dewey, *supra* note 27, 142–60 (articulating a process of public knowledge, communication, and participation that allows for the creation of the public).

¹¹¹ See *id.* at 154 (arguing that expertise and governance must “involve a consultation and discussion which uncover social needs and troubles”).

frame the problems for regulatory resolution and to contribute both to ensuring that private and public behavior conforms with regulatory commands and to accountable processes of regulatory enforcement.

Dewey envisioned a potentially symbiotic relationship between two kinds of expertise: the citizen's expertise of affected experience and the government official's expertise of amassed skill and knowledge in a regulatory domain. The citizen offers facts and framing from lived experience that can guide the government official's actions. As Dewey memorably put it, "The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied."¹¹² Thus, some progressive theorists like Dewey did not reject the importance of institutionally accountable experts and bureaucrats but instead insisted that they could not fulfill their tasks adequately without popular participation in regulatory governance. As Melvin Rodgers explains, "Since citizens are uniquely situated to offer knowledge of their own experiences, Dewey argues, their role in the design and implementation of policies is essential"¹¹³

This view of citizen-government dialogue and complementary expertise was fundamentally shaped by a distinctive understanding of democracy and what it means for regulatory governance. Progressive theorists understood that to reduce democracy to representation and expertise—to reduce the citizen's role to voting by removing them from ongoing practices of regulatory governance—was to misgauge democracy's nature.¹¹⁴ Democracy is a social process through which individuals come together to set the values and conditions of collective life to ensure, as Dewey put it, "the general social welfare and the full development of human beings as individuals."¹¹⁵ The state is the institutional channel through which those values and conditions are determined and should therefore be a channel for public deliberation on collective regulatory values *among* members of the public *and* government officials—not a sealed realm delineating, on one side,

¹¹² Id.

¹¹³ See Rodgers, *supra* note 109, at 21.

¹¹⁴ See id. at 23 ("Dewey's defense of democracy is important for redefining the meaning of political participation. . . . Democracy, as he describes it, defines members not simply by virtue of the actual participation with which they engage in determining social possibilities, but also by the potential participation that remains open to them if need so arises.").

¹¹⁵ John Dewey, *Democracy and Educational Administration*, 45 *Sch. & Soc'y* 457, 457 (1937).

representatives and officials who can govern, and on the other, members of the public who can only watch and occasionally vote.

There are thus a few takeaways for regulatory enforcement. First, members of the public can bring the expertise of experience to regulatory governance and, by doing so, enrich the tasks of government officials and regulatory accountability. Second, that expertise can be valuable not only because members of the public are directly affected by social and economic behavior but also because of regulatory dynamism: social and economic behavior evolves around regulatory structures, raising new questions of application and interpretation that are felt in the lives of citizens, who are well-placed to guide enforcement actions and to ensure that public regulatory commands are applied to those behaviors. These first two justifications are pragmatic and functional; they respond to the structures of modern society, the challenges of regulatory governance within it, and the demand that regulatory norms be accountably applied and elaborated. The third justification is more principled: democracy is fundamentally a social process and not merely a representative process, and it therefore demands popular participation in law-making and enforcement.

3. Fueling Deliberation

Third, popular participation in regulatory governance can be valuable because it can facilitate democratic deliberation.

Popular participation in regulatory governance not only flows from a rich conception of democracy and functional premises about modern regulatory governance. It can also enrich democratic deliberation. Regulation is best understood as an ongoing deliberative process, where new behaviors and practices test out the meaning and content of norms governing economic and social life, and where the public both decides those questions and potentially entrenches those norms over time.

When members of the public have the ability to participate in regulatory processes—bringing new enforcement cases and interpreting regulatory norms—the exchanges between members of the public, legislators, agencies, and courts benefit the larger public. Those exchanges give the public information about their fellow citizens' experiences and about how they and government officials view those

actions when measured up against regulatory norms.¹¹⁶ For Dewey, such processes are ones of democratic experimentalism, where new approaches and applications to social and economic problems are tested, debated, and refined over time.¹¹⁷

These ongoing experimental processes of deliberation among members of the public and government institutions give regulatory norms their lived content, flesh out their meaning through acts of interpretation, and give the larger public enough information and input to form a deeper common will on how democratic norms should shape social and economic life.¹¹⁸ These practices of popular participation and engagement with governmental actors and institutions spark debate, discussion, and experimentation, and lead to the formation of a public that can govern economic and social life in an ongoing, iterative fashion.¹¹⁹

* * *

A general sketch of the possibilities and functional realities of democratic regulatory governance now comes into view. It is remarkably different from the one advanced by critics of private enforcement. It recognizes that problems of concentrated power and structural inequality both require regulatory counterbalancing and make it harder for members of the public to accomplish. But rather than giving up on popular participation, it views popular participation, even though piecemeal and bubbling from the ground up, as part of how the lived experiences of people subjected to decisions by powerful actors come to inform and guide regulatory governance in enforcement processes. Popular participation can be essential to both identifying regulatory problems and guiding the tasks of governmental actors. And those ongoing processes of engagement between members of the public and government actors help

¹¹⁶ As Dewey explained, popular participation can fuel an ongoing regulatory dialogue between the people and government institutions where the “agencies of legislation, administration and judicial decision . . . serve social ends.” John Dewey, *Policies for a New Party*, 66 *New Republic* 202, 203 (1931).

¹¹⁷ See Dewey, *supra* note 27, 142–60.

¹¹⁸ For Dewey, popular engagement with state organs in this way is part of a system of democratic experimentalism through which the larger public itself over time identifies its regulatory commitments. See *id.* at 151–52 (“[In a system of democratic experimentalism] policies and proposals for social action be treated as working hypotheses, not as programs to be rigidly adhered to and executed. They will be experimental in the sense that they will be entertained subject to constant and well-equipped observation of the consequences they entail when acted upon, and subject to ready and flexible revision in the light of observed consequences.”).

¹¹⁹ See *id.* at 119–60.

the larger public to refine, define, and perhaps entrench regulatory norms over time.

Having elaborated this participatory democracy theory of regulatory governance, the next Part turns to exploring how it helps us to understand the democratic value and limits of private enforcement litigation schemes.

III. ANALYZING PRIVATE ENFORCEMENT'S VARIATIONS

Private enforcement litigation is undergoing significant changes today. While commentators worry about various aspects and consequences of the more recent adaptations, a fuller understanding of participatory democratic regulatory governance helps us to gain deeper analytical clarity on what makes some forms of private enforcement valuable and what makes some forms less valuable. This Part returns to the various forms of private enforcement to measure them against the participatory democratic theory outlined above.

Before proceeding, it is important to acknowledge the extent to which the landscape has changed since Dewey and other progressive democratic theorists wrote about citizen participation in regulatory governance. The New Deal saw a rise in federal regulatory capacity, with Congress passing a flurry of statutes regulating the workplace, environment, securities and banking, and much more.¹²⁰ With them rose a series of federal agencies charged with enforcement, reflecting the New Deal trust in administrative expertise and skepticism about courts.¹²¹ Indeed, while private enforcement in court was not unheard of—and was featured in contexts such as wage and hour and antitrust¹²²—it was the exception rather than the norm.¹²³ Over the next several decades, however, the script flipped: many progressives became skeptical of administrative governance,

¹²⁰ Much has been written on the regulatory transformation of the New Deal. See, e.g., 2 Bruce Ackerman, *We the People: Transformations* 255–422 (1998); Irving Bernstein, *The Turbulent Years: A History of the American Worker 1933–1941* (Haymarket Books 2010) (1969); William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal 1932–1940* (perennial ed. 2009); Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Coming of the New Deal 1933–1935* (Mariner Books 2003) (1958).

¹²¹ See, e.g., Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment: The Counterrevolution Against Federal Litigation* 4 (2017) (describing the New Deal reliance on, and faith in, expert, centralized bureaucracy).

¹²² See, e.g., Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b)); Clayton Antitrust Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 15(a)).

¹²³ See, e.g., Farhang, *supra* note 33, at 4–6 (exploring the prominence of administrative and bureaucracy centered approaches to enforcement through the early 1960s).

increasingly worried that regulators were too close to the interests they were tasked with regulating, and the tide began to shift towards courts and litigants as agents of regulatory implementation.¹²⁴ When Congress passed Title VII of the Civil Rights Act of 1964, private judicial enforcement was included as a compromise to appease Republicans distrustful of a blossoming administrative state.¹²⁵ Private enforcement soon took off, however, as the bar saw the possibility of organizing practice around private enforcement suits and as Democrat-controlled congresses became wary of administrative enforcement under Republican presidents and pushed for private enforcement causes of action in new regulatory regimes.¹²⁶

Throughout these eras, public enforcement transformed as well. Government enforcement institutions grew and professionalized in the decades leading up to and after the New Deal.¹²⁷ With the growth of governmental enforcement capacity, public enforcement came to look more robust than it did when progressive democratic theorists reasoned about the possibilities of a future regulatory era. Yet, as I explore below, the transformations of the past near century have done little to diminish the points these theorists made about the democratic virtues and importance of private enforcement. Indeed, the path of public enforcement since the 1980s—including the turn towards privatization and weakening of the public regulatory apparatus—has made their points increasingly salient.

A. Traditional Forms

The regulatory landscape today looks different than it did when progressive democratic theorists wrote, but the changes in some ways

¹²⁴ See, e.g., Burbank & Farhang, *supra* note 121, at 4–5.

¹²⁵ See *id.* at 9.

¹²⁶ See *id.* at 10–16.

¹²⁷ For accounts of how public enforcement functions have changed and grown, see generally Jon D. Michaels, *Constitutional Coup: Privatization's Threat to the American Republic* (2017); William E. Nelson, *The Roots of American Bureaucracy, 1830–1900* (1982); Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940* (2013); Robert W. Gordon, *The American Legal Profession, 1870–2000*, in 3 *The Cambridge History of Law in America* 107 (Michael Grossberg & Christopher Tomlins eds., 2008); Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 *Harv. L. Rev.* 853 (2014); Lemos, *Aggregate Litigation Goes Public*, *supra* note 31; Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 *Stan. L. Rev.* 121 (2014).

highlight the democratic value of traditional private enforcement suits at a general level.

1. Reducing Power Disparities

First, traditional private enforcement suits often even out structural power imbalances that threaten to undermine democracy—and do so in a context where public enforcement has significant limits. The power disparities that progressive democratic theorists worried about persist and, in some cases, are magnified today. Corporate concentration levels and monopsony power are at remarkably high levels, meaning that firms have amassed power over workers and consumers and that perceived competitive forces may be less effective at evening out those power imbalances.¹²⁸ At the same time, corporate and wealthy actors are playing outsized roles in shaping law and policy, raising new fears about oligarchy.¹²⁹ The demand for countervailing power is strong.¹³⁰

¹²⁸ See José Azar, Ioana Marinescu & Marshall Steinbaum, Labor Market Concentration, 57 *J. Hum. Res. (Special Issue)* S167, S167 (2022); Kevin Rinz, Labor Market Concentration, Earnings, and Inequality, 57 *J. Hum. Res. (Special Issue)* S251, S253 (2022); Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, Monopsony in Online Labor Markets, 2 *Am. Econ. Rev.* 33, 33 (2020); Yue Qiu & Aaron Sojourner, Labor-Market Concentration and Labor Compensation 1 (IZA Inst. of Lab. Econ., Discussion Paper No. 12089, 2019); Brad Hershbein, Claudia Macaluso & Chen Yeh, Concentration in US Local Labor Markets: Evidence from Vacancy and Employment Data 2–3 (Soc’y for Econ. Dynamics, Meeting Paper 1336, 2019), <https://ideas.repec.org/p/red/sed019/1336.html> [<https://perma.cc/3EUN-T395>]; Josh Bivens, Lawrence Mishel & John Schmitt, It’s Not Just Monopoly and Monopsony: How Market Power has Affected American Wages 1 (2018), <https://files.epi.org/pdf/145564.pdf> [<https://perma.cc/4H2B-PTZM>]; David Card, Ana Rute Cardoso, Joerg Heining & Patrick Kline, Firms and Labor Market Inequality: Evidence and Some Theory, 36 *J. Lab. Econ. (Special Issue)* S13, S13–14 (2018); David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, Concentrating on the Fall of the Labor Share, 107 *Am. Econ. Rev.* 180, 180 (2017).

¹²⁹ See, e.g., Ganesh Sitaraman, The Puzzling Absence of Economic Power in Constitutional Theory, 101 *Cornell L. Rev.* 1445, 1462–65 (2016) (overviewing the political science findings on the influence of money in politics and slanted political representation); see also Fishkin & Forbath, *supra* note 103, at 1 (discussing concerns about oligarchy).

¹³⁰ For the seminal account of countervailing power, see generally John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power* (rev. ed. 1956). For more modern takes on countervailing power, see generally Norris, *supra* note 30 (exploring the concept in civil procedure); Kate Andrias & Benjamin I. Sachs, Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality, 130 *Yale L.J.* 546 (2021) (elaborating how law can be used to facilitate countervailing power for the poor and working class); Catherine L. Fisk, The Once and Future Countervailing Power of Labor, 130 *Yale L.J.F.* 685 (2021) (exploring the complicated role of law in the labor context in thwarting or facilitating countervailing power).

And public enforcement suffers from a range of issues. Presidents of both parties have in the past several decades gutted and privatized government enforcement functions, starving government in order to run it “like a business.”¹³¹ At the same time, scholarly work has illuminated some of the pathologies of public enforcement, showing how public enforcers face budgetary constraints, are often under intense pressure to settle cases, and can be driven by partisan calculations in making enforcement decisions.¹³² The notion that public enforcers will be responsive to public interests is also undercut by structural trends in our politics, including the influence of monied interests in law-making, slanted political representation due to gerrymandering, and increasing voter suppression efforts.¹³³ These features provide a new gloss on the fears that progressive democratic theorists had about the limits of public enforcement. Indeed, there is growing evidence of bureaucratic sabotage and structural deregulation today, where public officials seek to undermine the regulatory regimes they are tasked with enforcing.¹³⁴

In such a context of slanted power and governmental unresponsiveness, traditional forms of private enforcement litigation have a potentially powerful and equalizing effect. Members of the public endowed with private enforcement authority can directly bring behavior they have experienced and believe departs from regulatory norms to courts for resolution. Prototypical private enforcement suits involve workers, consumers, or patients bringing claims against corporations, large organizations, or government officials. This is not to say that all private enforcement suits involve such power disparities, but many do. For a

¹³¹ See Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 *UCLA L. Rev.* 104, 111 (2021); Jon D. Michaels, *Running Government Like a Business . . . Then and Now*, 128 *Harv. L. Rev.* 1152, 1152–53 (2015) (book review).

¹³² See, e.g., Lemos, *Aggregate Litigation Goes Public*, *supra* note 31, at 491–92, 511–12 (highlighting budgetary constraints and resulting pressures to settle in the context of public aggregate litigation).

¹³³ See, e.g., Sitaraman, *supra* note 129, at 1462–65 (exploring the prominence of monied interests in U.S. politics); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 *Mich. L. Rev.* 351, 411–18 (2017) (describing “hyperpartisanship” and its negative consequences for governmental responsiveness).

¹³⁴ See generally David L. Noll, *Administrative Sabotage*, 120 *Mich. L. Rev.* (forthcoming 2022) (manuscript at 1) (on file with the author) (exploring the various strategies agencies use to affirmatively undermine and attack the programs they are charged with administering); Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 *Harv. L. Rev.* 585 (2021) (assessing how presidential control systematically undermines the ability of agencies to fulfill their statutory mandates).

worker who thinks they have been underpaid or subjected to an adverse employment decision in a discriminatory manner, or for a consumer who thinks that they are subjected to practices violating antitrust law or that amount to fraud, private enforcement offers a direct method of arguing that these practices violate public statutory norms. Thus, private enforcement mechanisms in labor and employment, antitrust, consumer protection, healthcare, disability, and civil rights laws—among others—can be generally justified for their power-balancing effects.

In these contexts, the structure of judicial decision-making has some benefits. Both courts and the other party or parties must respond to the private enforcer's claim, and judges must give reasons for the decisions they reach.¹³⁵ Unlike a legislator who ignores a citizen's plea or a bureaucrat who declines to enforce or make rules based on it, the parameters of judicial decision-making can have an equalizing effect by enabling the enforcer to be heard in public and requiring public officials to respond.¹³⁶ Adjudication thus prompts both official response and response from (often powerful) private actors whose conduct is challenged. As Judith Resnik explains, adjudication is in this way "itself a democratic practice—an odd moment in which individuals can oblige others to treat them as equals as they argue—in public—about alleged misbehavior and wrongdoing."¹³⁷

Thus, in a context characterized both by growing corporate and governmental power and by forms of representational unresponsiveness, traditional private enforcement suits hold particular promise. But even under conditions of more governmental responsiveness, private enforcement provides members of the public with a *direct* role in arguing that their experiences amount to violations of regulatory norms.¹³⁸ These characteristics of private enforcement are borne out in practice. Whether the context is antitrust, housing discrimination, employment discrimination, or many others, the reality is that, even when there is

¹³⁵ See, e.g., Owen M. Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 13 (1979) (exploring several features of judging, including that judges do not control their agenda or who they must listen to, are bound by rules for responding, and are compelled to speak back and justify their decisions).

¹³⁶ See *id.*

¹³⁷ Resnik, *supra* note 96, at 806; see also Lahav, *supra* note 86, at 29 (arguing that litigation facilitates the flourishing of civil society).

¹³⁸ See Lauren Henry Scholz, Private Rights of Action in Privacy Law, 63 Wm. & Mary L. Rev. 1639, 1663–64 (2022) (arguing that private rights of action give "individuals the power to enforce their own rights, thereby affirming the dignitary status of citizens").

overlapping public-private enforcement capacity, private enforcers have brought cases that public enforcers have refused or failed to bring and, along the way, have contributed to courts developing important precedents fleshing out the meaning of regulatory norms.¹³⁹

Indeed, the practice of private enforcement bears out a point that progressive theorists of participatory regulatory governance missed but that strengthens the case for private enforcement. It is that regulatory governance both responds to and can help dis-entrench existing power imbalances along axes of race, gender, sex, disability, indigenous status, LGBTQIA status, and other axes.¹⁴⁰ That is, some regulatory regimes seek to eradicate discrimination based on one's membership in those groups or communities—by, for example, banning discrimination in the workplace based on people's membership in those groups. Similarly, § 1983 suits also target government actors who violate the equal protection and other constitutional rights of citizens.¹⁴¹ Dewey saw the state as a problem-solving space where groups affected by social and economic behavior could shape regulatory norms. But he did not emphasize that people come to those spaces with unequal power—shaped by history, practice, law, and culture—or how the state itself can be a source of regulatory violations. These features make citizens' ability to officially commence regulatory processes—to make the decision to enforce themselves—all the more important. And they also clarify why private enforcement litigation may matter: if private enforcement is directed at making real regulatory norms that attack inequality and other forms of subordination, it can put members of the public on more equal footing by enabling people from those communities and groups to control regulatory enforcement processes and seek redress.

All of these facts, again, make the institutional features of courts and litigation somewhat appealing, because members of the public retain case-commencement power and officials must respond with public reasons. None of this is to say that courts or their procedures are perfect

¹³⁹ See *supra* notes 34–36 and accompanying text.

¹⁴⁰ See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-1) (banning employment discrimination on account of race, color, sex, religion, or national origin); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213. (prohibiting discrimination based on disability).

¹⁴¹ Section 1983 is a vehicle for bringing equal protection claims related to discrimination on the basis of race, ethnicity, gender, and disability, among other things. See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 755–57 (2011) (exploring the Court's equal protection doctrines in these areas and the levels of scrutiny it applies to them).

participatory vehicles; far from it, as I explore below.¹⁴² Nor is it to say that every private enforcement action is valuable or to ignore that redundancy and over-enforcement can become issues. But the persistence of forms of inequality and subordination and the structure and grammar of judicial decision-making both suggest some virtues of traditional forms of private enforcement suits at a general level.

2. The Expertise of Experience & Regulatory Dynamism

Second, and relatedly, traditional private enforcement suits can enable affected members of the public to bring the expertise of experience to dynamic regulatory contexts.¹⁴³ Regulatory governance is complex, but it is always interacting with people's lived experiences. Legislators lay down legislative norms, enshrining them in text, and questions arise as to whether ongoing and often adapting behavior that directly affects people's lives complies with or departs from those commands. Is the prohibition of discrimination on the basis of sex in employment violated when a gay or transgender person is terminated or demoted for their membership in that group?¹⁴⁴ Is an employer who encourages or witnesses off-the-clock work in a certain manner responsible for overtime pay?¹⁴⁵ Does certain parallel behavior among firms accompanied by a statement that competing would be wrong create an inference of conspiracy in restraint of trade?¹⁴⁶ Does an injury that occurred when an employee was following employer commands, but outside the scope of their ordinary work, entitle the employee to workers' compensation?¹⁴⁷ Does the level of control a ride-sharing app exercises over its drivers

¹⁴² See *infra* Section IV.A.

¹⁴³ See also Scholz, *supra* note 138, at 1659 (“[P]rivate actions provide access to private expertise.”).

¹⁴⁴ See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (holding that discrimination on account of being gay or transgender qualifies as sex discrimination under Title VII of the Civil Rights Act of 1964).

¹⁴⁵ See, e.g., *Davis v. Food Lion*, 792 F.2d 1274 (4th Cir. 1986) (holding that a plaintiff must prove actual or constructive employer knowledge of overtime work in order to succeed on a Fair Labor Standards Act claim).

¹⁴⁶ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (holding that a complaint with similar allegations should have been dismissed for failure to plausibly allege a conspiracy in restraint of trade).

¹⁴⁷ See *Eckis v. Sea World Corp.*, 134 Cal. Rptr. 183 (Cal. Ct. App. 1977) (holding that the employee was entitled to workers' compensation as an exclusive remedy).

make them employees or independent contractors?¹⁴⁸ All of these questions have been raised by private enforcers and have led to further clarity on the meaning and scope of regulatory norms.

In these instances and many others, the behavior of regulatory subjects evolves, and people who are subjected to those behaviors both have the information and interests to trigger regulatory enforcement processes. They have been in the workplace, have read the bill or contract, and have seen their finances or even fates change based on these decisions. And it is because they are *directly affected* by these experiences and have felt the real-life impacts of them that they are well-positioned to commence regulatory enforcement processes.¹⁴⁹ While public enforcers may have access to some of this information or can gain some of it, the unevenness and limits of public enforcement make it unlikely to fill the regulatory void. And furthermore, there is imminent value—too little realized in the literature on private enforcement—in having affected members of the public frame the regulatory problem, bring their own interpretation of how the behavior that directly impacted them departs from regulatory law, and speak for themselves about the harms involved and the remedies that are appropriate.¹⁵⁰

Thus, the lion's share of private enforcement causes of action in labor and employment, antitrust, consumer protection, healthcare, and civil rights laws can be generally justified for permitting members of the public to bring the expertise of experience to dynamic regulatory environments where complicated questions about social and economic behavior persist.

¹⁴⁸ Compare *Berwick v. Uber Techs., Inc.*, No. 11-46739, 2015 WL 4153765, at *10 (Cal. Dept. Lab. June 3, 2015) (holding that Uber drivers are employees), with *Rasier, LLC v. Fla. Dep't of Econ. Opportunity*, No. 0026 2825 90-02, at *8 (Fla. Dep't of Econ. Opportunity Sept. 30, 2015) (holding that Uber drivers are independent contractors).

¹⁴⁹ See Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 *Va. L. Rev.* 93, 108 (2005) (“[P]rivate 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.”).

¹⁵⁰ Some scholars recognize that private enforcement can fulfill these functions. See, e.g., Burbank et al., *supra* note 16, at 664 (exploring how “litigation of an issue among many parties and interests, and across many judicial jurisdictions, can lead to experimentation with a multiplicity of policy responses to a problem, and successful policy solutions will gain traction and spread”); Stephenson, *supra* note 149, at 112 (“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.”).

There are a few wrinkles, however, that should be considered. The first concerns contexts—such as the *qui tam* and some state environmental contexts—where individualized injury is not required.¹⁵¹ These contexts arguably involve members of the public bringing less direct, personally-felt experience to enforcement processes. While private enforcers do often bring inside information, they are simply stepping in to vindicate the government or public’s interests without having to prove their own individualized harm.¹⁵² As a result, private enforcement under these regimes may be less justified under the participatory governance theory. These suits, however, are arguably still justified under the structural, gap-filling account of private enforcement laid out in Section II.A because they involve members of the public bringing suits that public enforcers may lack the information, resources, or will to bring.¹⁵³ In light of this, government gatekeeping and enforcement authority properly exist in these contexts, because the individual citizen may not be best positioned to effectuate the government’s interests.¹⁵⁴ Similarly, because citizens remain adjuncts and the government retains overall enforcement power, the suits might even be justified under a theory prioritizing *public* enforcement.

The analysis also raises questions about standing for non-profit organizations seeking to enforce regulatory law and whether they bring the expertise of experience to regulatory enforcement. Under the Supreme Court’s standing doctrine—which, as Cass Sunstein explores, it made out of whole cloth—environmental and civil rights organizations seeking to bring enforcement actions to address regulatory harms often have a difficult time establishing standing.¹⁵⁵ The Sierra Club, for example, lacked standing to challenge alleged environmental harms located in California because it had not shown that the California environmental activities would affect the organization or its members.¹⁵⁶ The Supreme Court has more recently required that a concrete harm for standing

¹⁵¹ See *supra* Section I.B.

¹⁵² See *supra* Section I.B.

¹⁵³ See *supra* Section II.A.

¹⁵⁴ See *supra* Section II.A.

¹⁵⁵ See Cass R. Sunstein, *Injury in Fact, Transformed* 1–13 (Mar. 12, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4055414 [<https://perma.cc/M5C5-HZHR>].

¹⁵⁶ See *Sierra Club v. Morton*, 405 U.S. 727, 733–41 (1972).

purposes to be akin to those that existed at common law.¹⁵⁷ One might argue that this constrictive approach to standing is supported by the analysis here; after all, the Sierra Club may not have the expertise of experience of a citizen who directly experienced regulatory harm to their own property, body, or pocketbook. But, as was the case above, a host of other considerations support relaxing standing requirements. The first is that environmental and civil rights organizations can contribute to the exercise of countervailing power discussed in the previous Section and to regulatory deliberation. The second is that private enforcers in these contexts bring a more distinctively modern kind of expertise: the expertise of a group that focuses on a social or economic problem and develops legal experience in seeking to remedy it through litigation and other enforcement actions. Finally, their suits can also be justified under the structural, gap-filling theory of private enforcement. Indeed, suits by non-profit organizations may not only complement public enforcement or substitute for it when it is weak; they are also, as was the case in *Sierra Club v. Morton*, at times aimed at public actions that allegedly violate regulatory law.¹⁵⁸

A final potential wrinkle concerns aggregate litigation. One might question whether class actions and Multidistrict Litigation (“MDL”), through which private enforcement actions are frequently organized, sufficiently permit *all litigants* involved in them to bring the expertise of experience to regulatory enforcement. Class actions and MDL frequently coordinate hundreds or thousands of plaintiffs, raising questions about whether they are vehicles for collective problem solving¹⁵⁹ or lawyer-

¹⁵⁷ See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) (“Central to assessing concreteness is whether the asserted harm has a ‘close relationship’ to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms”); see also Sunstein, *supra* note 155, at 12–16 (explaining and critiquing the Court’s focus on common law analogues).

¹⁵⁸ *Sierra Club*, 405 U.S. at 727 (explaining that the Sierra Club sought to restrain the federal government from approving an extensive skiing development).

¹⁵⁹ See, e.g., Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 849–50 (2017) (exploring how technological developments and the structure of MDL provide more opportunities for plaintiffs to participate in and control aggregate proceedings); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 338 (arguing that class actions delegate “to private individuals the power to lead a diffuse group in a collective endeavor”); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913, 921 (1998) (analogizing class actions to trade unions and congregations coming together to problem-solve); Sergio J. Campos, *The Class Action as Trust*, 91 Wash. U. L. Rev. 1461, 1471 (2016) (analogizing the class action lawyer to a trustee).

driven vehicles that promote “factory justice.”¹⁶⁰ At the same time, aggregation procedures are, from another perspective, natural responses to modern regulatory harms: as broad bases of people are harmed by wide-reaching social and economic behavior, aggregating their claims may be the best and sometimes only way to secure relief—especially when claim amounts are individually small yet collectively large.¹⁶¹ Aggregation is thus arguably an unavoidable and positive feature of modern regulatory enforcement.¹⁶² But, to better fulfill the promise of participatory governance, class actions and MDL should evolve in ways that facilitate increased litigant voice and control so that more plaintiffs can better bring the expertise of experience to bear on suits. In the class action context, scholars have suggested having more individuals participate in trials as witnesses, having judges conduct more town hall-style meetings that permit plaintiffs to share their views, and having more “bellwether” trials for plaintiffs to develop differing approaches to enforcement.¹⁶³ In the MDL context, they have proposed imposing heightened duties on lawyers to engage with plaintiffs, among other innovations.¹⁶⁴ All of these reforms would give private enforcers more opportunities to bring their experiences to the table and enrich regulatory enforcement.

¹⁶⁰ See, e.g., Lahav, *supra* note 86, at 91 (exploring the features of class actions that limit litigant participation); Abbe R. Gluck & Elizabeth Chamblee Burch, MDL Revolution, 96 N.Y.U. L. Rev. 1, 5 (2021) (exploring the features of MDL that limit litigant participation).

¹⁶¹ See Kalven & Rosenfield, *supra* note 90, at 684 (arguing that class actions respond to the kind of “injury which tends to affect simultaneously the interest of many people,” which involves “immensely complex facts and intricate law,” and for which “redress . . . is likely to involve expense totally disproportionate to any of the individual claims”); see also *id.* at 686 (“Modern society seems increasingly to expose [people] to such group injuries for which individually they are in a poor position to seek legal redress. . . . If each is left to assert his rights alone . . . there will at best be a random and fragmentary enforcement, if there is any at all.”).

¹⁶² For these reasons, scholars have also proposed—and successfully have had adopted—aggregation in the agency adjudication context. See Michael D. Sant’Ambrogio & Adam S. Zimmerman, The Agency Class Action, 112 Colum. L. Rev. 1992, 1992 (2012) (proposing aggregation procedures for agency adjudications); Michael D. Sant’Ambrogio & Adam S. Zimmerman, Inside the Agency Class Action, 126 Yale L.J. 1634, 1634 (2017) (mapping agencies’ nascent efforts to use aggregation procedures).

¹⁶³ See Lahav, *supra* note 86, at 92–94.

¹⁶⁴ See David L. Noll, MDL as Public Administration, 118 Mich. L. Rev. 403, 462 (2019); Gluck & Burch, *supra* note 160, at 67–73.

3. *Facilitating Deliberation*

Third, and finally, traditional private enforcement suits can facilitate democratic deliberation. They can do so in at least a couple of ways. Private enforcement suits can provoke juries to reach results and courts to write decisions interpreting and applying regulatory norms. These are forms of deliberation in their own right—reasoned, often collective and dialogic, exercises of applying the facts to regulatory statutes and interpreting the terms of those statutes.¹⁶⁵ But, equally important, popular engagement with these actions can promote broader deliberation. Giving members of the public the ability to bring enforcement actions advancing their own interpretations of the meaning of regulatory norms supplies the larger public with differing interpretations of regulatory statutes, widening the pool of applications and meanings to be considered and potentially prompting broader democratic deliberation.¹⁶⁶ Members of the public who bring claims that public enforcers would not, or bring them in a different way (for example, making substantively different claims or interpreting statutory norms differently), can fuel ongoing processes of regulatory deliberation. Thus, the differences in approaches that public and private enforcers take can be beneficial for regulatory governance—although legislators and civil rule-makers should pay attention to the risks and costs of redundant enforcement.¹⁶⁷

A few institutional features of private enforcement litigation are relevant in elaborating how the suits can foster deliberation. Private enforcement suits generally enable members of the public to (1) commence actions based on their own affected experience, (2) control and shape the content of their claims, (3) gather and publicly share information about economic and social behavior, and (4) trigger judicial

¹⁶⁵ See, e.g., Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 *J. Emp. Legal Stud.* 697 (2014) (exploring the relationship between jury service and deliberative democracy).

¹⁶⁶ This is not to deny that it is problematic for citizens or courts to subvert or resist legislative will. Instead, it is to recognize that legislative text and structure will leave open questions of interpretation and application that inevitably involve democratic judgments. See, e.g., Burbank & Farhang, *supra* note 121, at 234 (“[J]udicial subversion of legislation raises troubling questions from the standpoint of democratic values.”).

¹⁶⁷ See generally Clopton, *supra* note 32 (exploring both some of the benefits of redundant enforcement and how preclusion, gatekeeping, and other doctrines can manage less beneficial redundancy issues). See also Stephenson, *supra* note 149, at 114, 117–18 (exploring the questions of calibration involved when private enforcement interferes with public enforcement efforts); *id.* at 106 (“[T]he desirability of authorizing private actions involves difficult policy judgments and is likely to depend on a number of context-specific factors.”).

responses to their claims and remain in dialogue with courts through litigation and appellate processes. These features generate public information and create institutional dialogue and citizen-government dialogue in ways that can enrich public deliberation. They also make private enforcement litigation somewhat distinctive. Indeed, in agency adjudications, these features are not always present. Depending on the agency, private enforcers have differing abilities to initiate cases, control or participate in the proceedings (with some agencies turning over enforcement power to public enforcers), and differing information-gathering and appellate rights.¹⁶⁸ This is not to deny that agency adjudication plays an important role in regulatory implementation, but instead to suggest that private enforcement litigation has certain deliberation-inducing benefits.

These deliberative benefits can attach even where a private enforcement action is unsuccessful. Indeed, courts may be united on the fact that the behavior at hand does not violate a regulatory statute, but their decisions may nonetheless provoke public contest and debate and lead to regulatory elaboration.¹⁶⁹ Consider, for example, the case of Lily Ledbetter. Ledbetter argued that she faced sex discrimination under Title VII of the Civil Rights Act of 1964 based on the pay decisions of her employer, Goodyear Tire and Rubber.¹⁷⁰ By a 5-4 majority, the Supreme Court found that her claim was time-barred.¹⁷¹ It reasoned that Ledbetter had not filed her charge within the Equal Employment Opportunity Commission's ("EEOC") 180-day charging period because she should have brought the claim within 180 days of the discriminatory *pay decision* that was made establishing her salary; each subsequent *paycheck* issued pursuant to that pay decision would not reset the clock for the charging period.¹⁷² After public outcry, Congress passed the Ledbetter Fair Pay Act of 2009, amending Title VII to reset the clock each time a discriminatory

¹⁶⁸ See Michael Sant'Ambrogio, *Private Enforcement in Administrative Courts*, 72 *Vand. L. Rev.* 425, 450–52 (2019) (exploring the differing procedural and institutional features of agency adjudications).

¹⁶⁹ See generally Douglas NeJaime, *Winning Through Losing*, 96 *Iowa L. Rev.* 941 (2011) (exploring how litigation losses can fuel social movements to seek redress outside the courts).

¹⁷⁰ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621–22 (2007).

¹⁷¹ See *id.* at 625 (rejecting Ledbetter's claim that each paycheck "'carried forward' the effects of prior, uncharged discrimination decisions" and was a new violation).

¹⁷² See *id.* at 628.

compensation decision is made, including each time wages are paid.¹⁷³ This is a powerful example of what Douglas NeJaime calls “winning through losing,” a process where litigation loss fuels social movements—constructing their organizational identities, mobilizing constituents, and pushing them to seek resolution outside of the courts.¹⁷⁴

Private enforcement thus enables members of the public to trigger a process of judicial interpretation that is part of a larger institutional framework of regulatory norm development involving members of the public, courts, legislators, the media, agencies, and executive branch officials. After a regulatory statute is passed, ongoing administration, litigation, and legislative amendment give organized movements more routes to frame the issues and seek solutions and also give the broader public more potential interpretations and approaches to consider.

Other modern theorists understand these practices similarly, exploring how lawsuits can provoke broader societal change and settle norms into the social fabric. For example, constitutional scholars focus on how engagements between members of the public and government institutions through the legislative process, litigation, and administration can produce ongoing deliberation that settles regulatory statutes into the constitutional fabric as “superstatutes” or durable “constitutional constructions.”¹⁷⁵ While these scholars do not address private enforcement litigation by name, it looms large in the histories they tell about statutes as varied as the Civil Rights Act of 1964, the Sherman Antitrust Act of 1890, the Endangered Species Act of 1973, and the Family and Medical Leave Act of 1993.¹⁷⁶ Traditional private enforcement suits are thus part and parcel of the scheme of citizen-government deliberation that fuels regulatory dialogue and that scholars see as settling regulatory statutes into the constitutional fabric. Thus, rather than seeing private enforcement as a

¹⁷³ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

¹⁷⁴ See NeJaime, *supra* note 169, at 941, 969.

¹⁷⁵ See Jack M. Balkin, *Living Originalism* 3–6 (2011); Eskridge & Ferejohn, *supra* note 26, at 1–2, 15–16.

¹⁷⁶ Eskridge and Ferejohn flesh out how this process of citizen-government engagement and deliberation has entrenched a broad variety of regulatory statutes. See Eskridge & Ferejohn, *supra* note 26, at 16. For Balkin, ongoing exchanges between citizens, courts, administrators, and legislators over time makes constitutional constructions “durable” and even “canonical.” See Balkin, *supra* note 175, at 312 (emphasis omitted).

threat to constitutional governance, as those who argue that Article II requires exclusive public enforcement do, we can see how it enriches it.¹⁷⁷

B. Recent Adaptations

On the flip side, the recent adaptations and proposed changes to private enforcement being considered by state legislatures generally fall short on each axis of analysis. They are either largely unresponsive to or exacerbate existing power imbalances, do not involve members of the public bringing the expertise of experience to dynamic regulatory environments, and have a complicated and potentially harmful relationship to democratic deliberation.

1. Unaddressed or Exacerbated Power Disparities

First, the adaptations are generally either unresponsive to or threaten to exacerbate power imbalances. At the most basic level, there is no structural power imbalance to be solved in many regimes targeted by recent private enforcement legislation. The regimes at times involve citizens enforcing laws that target fellow citizens, such as transgender people inhabiting public spaces or people who get abortions. Enforcers are not dispersed, uncoordinated parties seeking to enforce regulatory laws often involving large, corporate entities. There is no need for countervailing power.¹⁷⁸ In this sense, the structural and functional rationale for private enforcement—that its need arises from concentrated power and that it is well structured to rein it in—is absent. The enforcement regimes are more neighborly surveillance than David-versus-Goliath. The private enforcement regime for purveyors of restricted firearms in California, which mobilizes members of the public in bringing suits against powerful gun manufacturers, is a potential exception. It remains to be seen both whether the regulatory targets will be large manufacturers or individual or smaller sellers. However, while the bill may involve power equalizing, it performs less well under the other rationales, as I explore below.

One might also view the laws targeting the teaching of critical race theory or targeting schools allowing transgender people to use certain bathrooms or play on sports teams as exceptions, permitting students and

¹⁷⁷ See *supra* Section II.A.

¹⁷⁸ See *supra* note 130 and accompanying text.

parents to enforce against powerful school districts. But this argument runs into two problems. First, as the analysis in Section I.B explored, there is no constitutional violation by powerful, rogue government actors to be remedied, and indeed the laws may violate the constitutional rights of transgender and Black students.

Second, and relatedly, the laws are arguably motivated by racial or anti-trans animus, thus cementing rather than dis-entrenching the kinds of power accumulations—white supremacy and cis-heteropatriarchy—that lead to the continuing subjugation and oppression of citizens and undermine democracy.¹⁷⁹ Transgender people are subjected to ongoing violence, intimidation, and discrimination in modern society—and have struggled for a long time for acceptance even within the LGBTQIA community.¹⁸⁰ Black Americans face racism and bias in various forms in public and private spaces—from housing to policing to the workplace and more.¹⁸¹

This point extends to S.B. 8, as well. It threatens to entrench forms of patriarchy that harm pregnant people. Pregnant people have long been subjected to discrimination in the United States, linked in part to forms of enduring discrimination based on sex and gender.¹⁸² And, as the Supreme Court has reasoned, forcing a pregnant person to carry a pregnancy to term is fraught with consequences for their liberty and equal status.¹⁸³ Thus, as transgender, pregnant, and Black people continue to seek equal

¹⁷⁹ See *supra* notes 63–66 and accompanying text.

¹⁸⁰ See, e.g., Marie-Amélie George, *Framing Trans Rights*, 114 *Nw. U. L. Rev.* 555 (2019) (exploring the struggle for transgender rights and its often-fraught place in the larger LGBTQIA movement).

¹⁸¹ For an overview of the various ways that race and inequality intersect, see generally Khiara M. Bridges, *Critical Race Theory: A Primer* (2019).

¹⁸² See generally Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 *Wm. & Mary L. Rev.* 969 (2018) (exploring the history of pregnancy discrimination and the Pregnancy Discrimination Act).

¹⁸³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (“The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.”), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

treatment and status, private enforcement in these contexts becomes a tool for the powerful to enforce the unequal status of the less powerful.¹⁸⁴

2. Less Expertise and Regulatory Dynamism

Second, the recent adaptations of private enforcement generally do not involve members of the public bringing the expertise of experience to dynamic regulatory environments. This is not to deny that these enforcers have had experiences in the world that inform their suits—seeing a transgender person in a locker room, seeing someone facilitate an abortion, or seeing someone sell a restricted firearm that may cause damage someday.¹⁸⁵ But this is leaps and bounds removed from the *affected* experience that generally motivates citizen enforcement of regulatory law. For one thing, in some of the contexts, the enforcer has received no concrete harm to them apart from personal disgust or negative feelings—at having seen a transgender person in a space, at having discovered that a person had an abortion, or at having to learn an academic theory about race.¹⁸⁶ In addition, in those contexts, enforcers are not vindicating a settled public interest—such as one in safe air and water or preventing fraud on the government. They are either enforcing unconstitutional laws or laws that are in the mix of larger public contest and may well be unconstitutional.

Such removed experience does not enhance the prosecutorial function of suits. Direct experience enhances the prosecutorial function of suits in instances where that experience bears on the dynamic understanding of a regulatory norm. Does the corporate conduct the person experienced run

¹⁸⁴ One counterargument in the abortion context is that some believe that the power imbalance is against the interest of fetal life. But this counterargument does not resolve the issue: it poses on one side the liberty and equality interests of pregnant people and on the other side that of the fetus. But as construed this way, private enforcement is not about equalizing power. Instead, the private enforcer is shifting power away from a pregnant person entirely, rather than equalizing, and doing so based on a contested moral and legal conception of rights. The very thorniness of that problem makes popular enforcement potentially threatening to the social fabric and, as I explore below, may undermine rather than facilitate deliberation.

¹⁸⁵ For a thoughtful analysis of the proposed California law, see Jake Charles, Newsom's Riff on the Texas Abortion Law Is Less Radical Than It Sounds, *L.A. Times* (Dec. 13, 2021), <https://www.latimes.com/opinion/story/2021-12-13/newsoms-gun-ban-idea-is-less-radical-th-an-texas-abortion-law-sb8> [<https://perma.cc/J3VZ-S7TY>].

¹⁸⁶ See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 4 (“But a common thread runs through the [rights suppressing] laws: they empower culture warriors, who often have suffered no material harm, to wield the power of the state to suppress the rights of disfavored or marginalized individuals and groups (or their allies).”).

afoul of Title VII's prohibition of sex discrimination? Does this form of corporate behavior the person experienced run afoul of consumer protection law? In contrast, when regulatory norms are less dynamic—when the only question is whether a student played on a sports team with a transgender person, whether the person performed an abortion for someone more than six weeks pregnant, or whether a person sold a restricted firearm—then experience is less useful to democratic regulatory governance. Indeed, the most vexing interpretive questions about the recent adaptations may be about whether they are constitutional in the first place. Such baseline questions about whether or not the laws cannot stand are miles removed from the kinds of thorny questions of *ongoing* application that drive traditional regulatory regimes.

This is not to deny that the modern variants of private enforcement will raise some interpretive questions, but it is to posit they involve less regulatory dynamism than traditional private enforcement suits involving evolving corporate, organizational, or governmental behavior in complex and changing economic and social environments. And, in instances where experience proves less useful to regulatory dynamism, *public* prosecution of suits may be especially more useful because citizen-to-citizen litigation can fray the social fabric.¹⁸⁷ Suits by the government take on a different valence: they are both less likely to be seen as neighbor-to-neighbor contests, and they have the benefit that those facing the prosecution of a suit can seek redress against the enforcer at the ballot box even if they lose in the courtroom.

3. *Complicating and Undermining Deliberation*

Finally, the recent adaptations have a complicated and potentially harmful relationship to democratic deliberation. One could argue that they might facilitate deliberation. After all, if one does not like a person enforcing an abortion ban or a ban on transgender people using certain spaces, they can take to the streets and seek to overturn those laws. Private enforcement, indeed, may magnify for opponents of these laws their pernicious effects, as pregnant people struggle to exercise reproductive freedom and as transgender people are kept out of spaces that should be theirs as equal citizens.

But this argument suffers from a few weaknesses. The first is that, by directly involving members of the public in enforcing laws that involve

¹⁸⁷ See *id.* at 31–38.

deep moral and personal disagreement, the enforcement mechanism may undermine the kinds of mutual respect and civility that make deliberation possible. The question is one of who should enforce, and in this context governmental enforcement may be preferable, because so long as these laws stand, transgender people, pregnant people, Black people, and some gun owners will view enforcement as undermining their rights, status, dignity, equality, or liberty.¹⁸⁸ The prospect of viewing their neighbors as subordinating them and impinging on their most fundamental rights may lead to incivility, unrest, and potentially even greater forms of discord between neighbors. In these circumstances, it may be better for those affected by these enforcement decisions to direct their ire at an enforcing government official who is ultimately formally accountable to them.

The second is that, for some members of the public, these laws subordinate them—removing them from public spaces and activities, tying them to a pregnancy, or perpetuating white supremacy—in ways that both undermine their equal citizenship and potentially make it more difficult for them to participate in deliberative processes. As many political theorists have argued, subordination undermines the possibility of rich deliberative democracy—a reality that counsels again against having the enforcers of such perceived subordination be fellow citizens.¹⁸⁹

And, finally, in the laws dealing with the teaching of critical race theory, private enforcement may undermine democratic deliberation by removing from educational spaces and workplaces teachings of history and ideas that are central to the free intellectual thought that makes deliberation possible—not to mention teachings that can make us reflective about our history and present so we can govern with wisdom.

* * *

We can now better grasp and analyze private enforcement in its various forms. Traditional private enforcement regimes often involve popular participation in regulatory enforcement processes that even out power imbalances. They often feature enforcers bringing the expertise of

¹⁸⁸ See *id.* at 50–51 (“[T]he new laws redefine the meaning of rights to encourage litigious citizens to surveil and sue members of their own communities; stoke social and cultural conflicts; encourage private parties to take enforcement of the law and social norms into their own hands; and support broader efforts to entrench minority rule and restrict the polity to ‘real’ Americans.”).

¹⁸⁹ See, e.g., Carole Pateman, *Participation and Democratic Theory* 34–51 (1970); Iris Marion Young, *Inclusion and Democracy* 3–5, 94–102 (2000); Lynn M. Sanders, *Against Deliberation*, 25 *Pol. Theory* 34, 348–53 (1997).

experience to dynamic regulatory environments. And the participation of members of the public potentially enriches democratic deliberation. More modern adaptations, by contrast, either exacerbate or do not respond to structural power imbalances, arguably involve less direct expertise and less regulatory dynamism, and potentially undermine deliberation. The core democratic reasons for centering members of the public in regulatory enforcement therefore are either weakened or do not attach in these regimes. Private enforcement, then, loses its democratic promise and instead holds the potential of becoming perilous.

IV. THE POSSIBILITY OF A REGULATORY PARADIGM SHIFT

Peril, however, may be the way of the future with private enforcement. While this Article has thus far elaborated a theory that generally shows the promise of traditional private enforcement suits and the perils of emerging variations, dynamics in U.S. law and politics may portend a future where traditional suits wither and recent adaptations proliferate. This Part explores those dynamics and, in particular, how judges have been undermining and may continue to undermine traditional private enforcement suits and how legislatures appear poised to copy the emerging regimes. The end result may be a paradigm shift in U.S. regulatory governance away from traditional issues of marketplace regulation and civil rights and towards issues of cultural division. This Part suggests that such a paradigm shift, if it arises, might be understood as being emblematic of a political strategy of plutocratic populism—defined by an effort to undermine worker- and consumer-protective regulatory policies and enact deregulatory policies favoring the ultra-wealthy and powerful corporations while using cultural grievance to obscure those policies and win working-class support. Finally, this Part reasons briefly about what may be necessary to resist such a paradigm shift.

A. The Withering of Traditional Regimes

Traditional private enforcement suits enable the public to play a role in implementing and entrenching the norms that govern economic and social life. But these suits have faced significant backlash, and there are reasons to be concerned about their future.

First, traditional suits are increasingly being privatized and pushed out of courts. Aided by the Supreme Court's interpretation of the Federal

Arbitration Act of 1925 (“FAA”), companies have placed arbitration clauses in contracts with consumers and workers—often contracts of adhesion that the parties have not bargained over.¹⁹⁰ These clauses by and large mandate that private enforcement actions be brought in arbitration rather than in court, and they have become ubiquitous across core areas of the economy.¹⁹¹ In the banking, credit card, telephone, and cable and internet sectors, arbitration clauses are present in fifty to ninety percent of consumer contracts.¹⁹² In the employment context, approximately sixty

¹⁹⁰ See, e.g., Resnik, *Diffusing Disputes*, *supra* note 88, at 2808.

¹⁹¹ The Court was initially wary of, and indeed prohibited in some circumstances, arbitration of statutory rights of action in the 1950s and beyond. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56–57, 59–60 (1974); *Wilko v. Swan*, 346 U.S. 427, 435, 438 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.* 490 U.S. 447 (1989). But the tables began to turn in the 1980s. In a blow to private enforcement, the Court has since widely permitted the arbitration of federal statutory claims. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000); see also Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. Rev. 1939, 2018–21 (2014) (examining shifts in the Court’s reasoning with respect to arbitration of statutory claims). And it has disarmed many workers as private enforcers in *Circuit City Stores, Inc. v. Adams* by ruling that the FAA generally directs federal courts to enforce arbitration clauses in employment contracts, excluding only a slice of transportation workers. See 532 U.S. 105, 109 (2001). This holding paved the way for the Court to rule recently that employment contracts barring workers from arbitrating or litigating collectively are consistent with the FAA and do not conflict with the rights of collective action enshrined in federal labor law. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623–30 (2018).

¹⁹² Arbitration clauses are present in over three-quarters of internet, phone, and data service contracts. Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871, 882–84 (2008). Credit card agreements have oscillated between including arbitration clauses approximately fifty and ninety percent of the time. Before 2009, arbitration clauses were present in over ninety percent of credit card agreements. See Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. Rev. 1, 8. A 2009 settlement between major credit card issuers and the Department of Justice requiring those companies to remove arbitration clauses from their contracts for three years reduced that figure to approximately fifty percent. See Jay Miller, *J.P. Morgan Drops Card-Dispute Arbitration Rule*, *Wall St. J.* (Nov. 22, 2009), <https://www.wsj.com/articles/SB10001424052748704888404574547991052980108> [<https://perma.cc/N4J4-BBLT>]; Annie Nova, *JPMorgan Chase Credit Card Customers Have a Month to Opt out of Binding Arbitration*, *CNBC* (July 11, 2019), <https://www.cnbc.com/2019/07/11/suing-chase-is-about-to-get-harder-what-you-can-do-about-it.html> [<https://perma.cc/Q3AQ-T5LJ>]; Rutledge & Drahozal, *supra*, at 8 (“[O]nly forty-eight percent of the outstanding credit card loans in the industry . . . are held by firms using arbitration clauses (down from ninety-five percent as of December 31, 2009, as a result of a civil settlement under which several banks agreed to suspend their use of such clauses).”). But recently, major credit card companies have reintroduced the clauses, and the number of clauses is quickly ticking back up. J.P. Morgan Chase’s decision to reintroduce the clauses alone is likely to affect forty-seven million

percent of non-unionized, private-sector workers were governed by arbitration clauses as of 2018.¹⁹³ The number is projected to rise to eighty percent by 2024.¹⁹⁴ A large and growing number of workers and consumers who might bring private enforcement actions are thus being pushed into arbitration.¹⁹⁵

Historically, private enforcers have simply been less likely to bring their suits in arbitral fora.¹⁹⁶ There is some evidence that this is changing, as lawyers are creatively bringing “mass arbitrations” that aid more private enforcers in bringing their claims.¹⁹⁷ But arbitration’s capacity to

consumers. See, e.g., Emily Flitter, JPMorgan Chase Seeks to Prohibit Card Customers from Suing, N.Y. Times (June 4, 2019), <https://www.nytimes.com/2019/06/04/business/jpmorgan-chase-credit-card-arbitration.html> [<https://perma.cc/YS6H-QSR5>]. A study of the fifty largest banks in the United States found that between 2013 and 2016, the proportion requiring arbitration with their customers rose from about sixty to about seventy percent. The Pew Charitable Trusts, Consumers Want the Right to Resolve Bank Disputes in Court 2 (2016), <https://www.pewtrusts.org/~media/assets/2016/08/consumerswanttherighttoresolvebankdisputesincourt.pdf> [<https://perma.cc/LTW6-PHEN>].

¹⁹³ See, e.g., Alexander J.S. Colvin, Econ. Pol’y Inst., The Growing Use of Mandatory Arbitration: Access to the Courts Is Now Barred for More Than 60 Million American Workers 2 (2018), <https://files.epi.org/pdf/144131.pdf> [<https://perma.cc/9UUW-K2Z4>].

¹⁹⁴ See Kate Hamaji et al., The Ctr. for Popular Democracy & Econ. Pol’y Inst., Unchecked Corporate Power: Forced Arbitration, The Enforcement Crisis, and How Workers are Fighting Back 4 (2019), <https://www.epi.org/files/uploads/Unchecked-Corporate-Power-web.pdf> [<https://perma.cc/UMC2-FULX>].

¹⁹⁵ While the number of arbitration clauses is high and growing across core areas of the economy, not all private enforcers are being pushed out of courts. One might therefore argue that enough “good cases” will get through to keep private enforcement alive. However, there are reasons to be less than confident that this will be the case. One reason is that the number of arbitration clauses has generally been trending up, squeezing more and more cases out of the system. Another reason for concern has to do with the nature of legal development; precedents can be cumulative, and removing a significant slice of them could slant regulatory development. A new case may produce the kind of precedential sediment upon which other cases are brought. In addition, parties are not fungible. They bring to litigation differing facts, retain counsel with differing levels of skills, and face judges with differing interpretations of the law. All of these features affect the process of regulatory development, and a robust supply of cases with differing resolutions and attributes can create circuit splits and other forms of legal contest that ultimately bubble up in the system to higher courts. Indeed, in some states, arbitration clauses are more pervasive than they are in others, which again may affect the supply of cases to federal courts in those districts. See Colvin, *supra* note 193, at 2 (“[M]andatory [employment] arbitration is especially widespread in California, Texas, and North Carolina . . .”).

¹⁹⁶ See, e.g., Judith Resnik, Stephanie Garlock & Annie J. Wang, Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge, 24 Lewis & Clark L. Rev. 611, 615 (2020) (“[D]uring the course of the last decade, very few consumers used single-file arbitration.”).

¹⁹⁷ See J. Maria Glover, Mass Arbitration, 74 Stan. L. Rev. 1283, 1289 (2022).

displace public adjudication in court still poses serious difficulties for the regulatory system and participatory governance.¹⁹⁸ Because arbitration proceedings are private, precedent need not be followed, appellate rights are limited, and the *public* processes of bringing open suits, elaborating and enforcing regulatory norms, and sparking public dialogue and deliberation are gutted by arbitration.¹⁹⁹ Arbitration holds the possibility of undermining democratically robust regulatory governance.

Indeed, scholars have predicted that arbitration's effects on our legal and regulatory system could be severe in the years ahead. Myriam Gilles predicts that, as arbitration displaces public adjudication, "whole categories of claims will be evicted from the public court system."²⁰⁰ The problem is not only that the public may be robbed of precedential decisions interpreting regulatory law; it is also that regulatory laws may wither as new precedents and applications wane and as the public loses faith in courts as public institutions for regulatory redress.²⁰¹ The parties being shifted out of court matter, too. Arbitration clauses tend to disproportionately push women, Black, and low-income private enforcers out of courts.²⁰² The kinds of cases that are being lost from the system may have troubling distributional effects and foreclose large swaths of the

¹⁹⁸ For accounts of the rise of private arbitration and its effects on enforcement and U.S. law, see generally Cynthia L. Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679 (2018) (exploring arbitration's claim-suppressing effects in the employment context); Gilles, *supra* note 34 (predicting that arbitration's continuing rise will cause some claims to disappear from courts entirely); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052 (2015) (arguing that private arbitration has led to the weakening of substantive law); Resnik, *Diffusing Disputes*, *supra* note 88 (arguing that arbitration erodes both substantive law and the role of courts in democracy).

¹⁹⁹ For useful descriptions of the various ways arbitration relies on private norms, see Estlund, *supra* note 198, at 680; Gilles, *supra* note 34, at 410 n.226.

²⁰⁰ Gilles, *supra* note 34, at 377. Gilles makes this prediction in part based on the experience in the broker-dealer context, where arbitration clauses became almost universal and doctrinal development stalled. See *id.* at 421. The effects of these trends may be especially pronounced in areas like antitrust and employment law, which are driven by private enforcement and doctrinal development based on it. See *id.* at 414–21.

²⁰¹ See, e.g., Glover, *supra* note 198, at 3055 ("[P]rivatizing disputes that would otherwise be public may well erode public confidence in public institutions and the judicial process by removing disputes from the public realm.").

²⁰² See Colvin, *supra* note 193, at 2 (finding that arbitration clauses are more common in workplaces where workers earn lower wages and sectors that "are disproportionately composed of women workers and . . . African American workers"); Myriam E. Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 Emory L.J. 1531, 1535–36 (2016) (finding that claims brought by low-income private enforcers are disappearing from the dockets).

public, with perhaps the keenest interest in regulatory development to end discriminatory and abusive practices, from pursuing actions.²⁰³

Second, even if private enforcers are not bound by arbitration clauses, the Supreme Court's procedural decisions have made private enforcement suits harder to bring and maintain in court. Over the past generation, the Court has altered standing, personal jurisdiction, discovery, summary judgment, and pleading doctrines, making it more difficult for private enforcers to pursue claims at every stage, and has made it more difficult for plaintiffs to find counsel.²⁰⁴ The Court has also erected barriers to parties proceeding as a class,²⁰⁵ making it more difficult for classes to be certified,²⁰⁶ for settlements to be achieved,²⁰⁷ and for punitive damages to

²⁰³ There are reasons to be doubtful that public enforcement will fill the void. As Zachary Clopton and David Noll have shown, in recent years, federal agencies have “refuse[d] to exercise their own enforcement authority because employees or customers ‘agreed’ to arbitrate.” Zachary Clopton & David Noll, *Trump Labor Officials Are Secretly Using Forced Arbitration to Get Corporations off the Hook*, *Slate* (May 10, 2019) (emphasis omitted), <https://slate.com/news-and-politics/2019/05/trump-labor-officials-forced-arbitration.html> [<https://perma.cc/B78B-WHU5>]. While this is less likely to continue under the current presidential administration, it is possible these trends could return again in the future. And, as Stephanie Bornstein shows, these circumstances reflect the development of “a new level of financial and political pressure on legislators and the executive branch pushing directly away from public enforcement of civil laws and toward deregulation.” See Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 104 *Minn. L. Rev.* 811, 817 (2019).

²⁰⁴ See Lahav, *supra* note 86, at 21–28 (describing each of these changes); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 *U. Pa. L. Rev.* 1543, 1604–06 (2014) (same); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 *U. Pa. L. Rev.* 1839, 1878–79 (2014) (same); see also Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 *Emory L.J.* 293, 296–97 (2014) [hereinafter Miller, *The Preservation and Rejuvenation of Aggregate Litigation*] (describing the constraints on class actions); Paul D. Carrington, *Protecting the Right of Citizens to Aggregate Small Claims Against Businesses*, 46 *Mich. J.L. Reform* 537, 542–43 (2013) (same); Norris, *supra* note 30, at 522–28, 535–38 (same); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 *Duke L.J.* 1, 9–11 (2010) (describing the barriers raised to pleading); A. Benjamin Spencer, *Plausibility Pleading*, 49 *B.C. L. Rev.* 431, 466 (2008) (same); Karlan, *supra* note 93, at 205–07 (discussing changes in attorney financing).

²⁰⁵ Miller, *The Preservation and Rejuvenation of Aggregate Litigation*, *supra* note 204, at 297.

²⁰⁶ See, e.g., *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–35 (2013).

²⁰⁷ See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 838–39, 846 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

be awarded.²⁰⁸ And self-represented litigants face a sea of hurdles that have been well-documented by scholars.²⁰⁹

Thus, privatization and procedural interpretation work together to make it harder for private enforcers to bring and maintain their suits, undermining the potential for vibrant, participatory regulatory enforcement. These trends are likely to continue with a conservative Supreme Court that is hostile to traditional forms of private enforcement litigation.²¹⁰ The result may well be substantial withering, although perhaps not an entire displacement, of traditional private enforcement suits. If the role of courts in regulatory enforcement diminishes, those seeking robust regulatory enforcement at the federal level will need to turn to agencies and legislative amendment. Neither seems likely to fill the void. In agencies, administrative sabotage, structural deregulation, and chronic underfunding undermine the possibility of robust enforcement.²¹¹ With regard to Congress, partisan gridlock and the influence of anti-regulatory monied interests make the prospects for legislative amendment to protect workers, consumers, patients, and civil rights claimants unlikely in the short term.²¹²

The promise of private enforcement—robust democratic control of economic and social life—then could wane as courts close their doors, agencies oscillate, and Congress becomes further fractured and unresponsive.²¹³

²⁰⁸ See *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); see also Catherine M. Sharkey, *The Future of Classwide Punitive Damages*, 46 U. Mich. J.L. Reform 1127, 1128 (2013) (exploring “the doctrinal restraints that have been imposed on class actions”).

²⁰⁹ See, e.g., Lahav, *supra* note 86, at 87–90 (discussing the costs of litigation and the challenges of self-representation); Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 Colum. L. Rev. 1183 (2022) (exploring the prevalence of “lawyerless courts” in the U.S. legal system); Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 Lewis & Clark L. Rev. 439, 442–44 (2009) (same); see also Andrew Hammond, *Pleading Poverty in Federal Court*, 128 Yale L.J. 1478, 1497–503 (2019) (discussing the difficulties litigants face when attempting to proceed in forma pauperis).

²¹⁰ See Burbank & Farhang, *supra* note 121, 130–91 (presenting findings on the Court’s hostility to and backlash against private enforcement).

²¹¹ See *supra* note 134 and accompanying text.

²¹² See *supra* note 133 and accompanying text.

²¹³ This may push private enforcement into the states, with members of the public seeking to enforce state regulatory statutes. But even in states with robust enforcement regimes and private enforcement mechanisms, there are limits, including those posed by preemption doctrine. For example, California’s doctrine finding unconscionable some arbitration clauses disallowing class-wide proceedings was found by the Supreme Court to be preempted by the FAA—a ruling that made it harder for those who faced small-value harms to aggregate and seek damages. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). In these

B. The Blooming of Recent Adaptations

As traditional forms of private enforcement wither, it is possible that the recent adaptations and spinoffs of them will flower. It is, of course, difficult to predict what state legislatures will do and where trends will lead. But, as of today, there are strong signs that recent adaptations and spinoffs of private enforcement are likely to proliferate in the years ahead. In Republican-controlled states, legislatures are quickly introducing bills to mimic the regimes already enacted. As of this writing, several states have introduced bills mimicking S.B. 8, and two states have signed such bills into law.²¹⁴ Dozens of laws banning critical race theory or other “divisive” topics have been introduced or passed by Republican-controlled state legislatures.²¹⁵ Similarly, dozens of laws have been introduced targeting transgender students in school facilities and on sports teams.²¹⁶ The Florida Legislature has passed a “Don’t Say Gay” bill, which prohibits “encouraging classroom discussion about sexual orientation or gender identity in primary grade levels.”²¹⁷ Other states are mulling private rights of action against schools that carry books on topics related to race or LGBTQIA issues.²¹⁸

In Democrat-controlled states, the march has been slower, but if Republican-controlled states keep passing bills, there is reason to think Democrat-controlled states may decide to counter with their own laws. As mentioned above, California has passed, and Illinois is considering, a private enforcement regime for restricted firearms.²¹⁹ Illinois is also considering a statute creating a private cause of action against people who

instances and others, there are limits on the ability of state regulatory law and law enforcement to fill the federal void.

²¹⁴ See supra note 53 and accompanying text.

²¹⁵ See supra note 55 and accompanying text.

²¹⁶ See Legislative Tracker: Youth Sports Bans, Freedom for All Ams., <https://freedomforallamericans.org/legislative-tracker/student-athletics/> [<https://perma.cc/SC8D-E278>] (last visited Sept. 23, 2022).

²¹⁷ See Florida Parental Rights in Education Act, H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (codified at Fla. Stat. § 1001.42(8)(c)(1) (2022)).

²¹⁸ See S.B. 1142, 58th Leg., 2d Sess. (Okla. 2022) (“No public school district, public charter school, or public school library shall maintain in its inventory or promote books that make as their primary subject the study of sex, sexual preferences, sexual activity, sexual perversion, sex-based classifications, sexual identity, or gender identity or books that are of a sexual nature . . .”).

²¹⁹ See supra note 58 and accompanying text.

commit or enable domestic sexual violence or assault.²²⁰ There are other potential moves that some have envisioned and are encouraging Democrat-controlled legislatures to make: these include private enforcement schemes for campaign finance issues, electoral interference at the polls, and public health issues.²²¹ Some envisioned schemes would authorize people to bring enforcement actions against churches that meet in violation of COVID-related public health policies or against people who fail to comply with COVID-related public health protocols in public spaces.²²²

The consequences of such a world coming into shape are difficult to predict, but a couple seem possible or even likely. The first is a federalist system of deepening asymmetric and shifting rights. The rights of parents, students, teachers, gun owners, healthcare providers, pregnant people, voters, churchgoers, transgender people, Black people, and others may differ sharply from state to state.²²³ And in states where political control changes between parties, rights may shift *within* the states from one administration to another, creating rights-whiplash.²²⁴ Furthermore, people who commute to work across state lines may find an entirely different rights apparatus depending on which side of their commute they are on.

The second consequence is likely widening cultural and political divides on issues of deep moral disagreement. The recent laws and those proposed both reflect and have the capacity to sharpen divides over race, reproductive rights, voting, gun rights, and many other topics by having

²²⁰ See Hannah Meisel, Democrat-Sponsored “TEXAS Act” Would Allow \$10k Bounties on Sexual Abusers, Those Who Cause Unwanted Pregnancies, NPR Ill. (Sept. 14, 2021), www.nprillinois.org/statehouse/2021-09-14/democrat-sponsored-texas-act-would-allow-10k-bounties-on-sexual-abusers-those-who-cause-unwanted-pregnancies [<https://perma.cc/55ST-UATF>].

²²¹ See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 43–45 (envisioning such schemes).

²²² See *id.*

²²³ For a broader understanding of how partisanship shapes our system of federalism, see generally Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077 (2014); *id.* at 1078 (“We cannot fully understand our federal system today without taking account of partisan competition.”).

²²⁴ These dynamics are already apparent in our administrative governance. For example, Jody Freeman and Sharon Jacobs describe a system of structural deregulation, where a President “erodes an agency’s staffing, leadership, resource base, expertise, and reputation,” and observe that “Republican Presidents historically have been more likely to engage in structural deregulation,” although they note this may not always be the case. Freeman & Jacobs, *supra* note 134, at 587, 589.

neighbors prosecute neighbors. The spaces members of the public share—healthcare facilities, schools, shopping centers, roadways, and even voting stations—may become freighted, charged spaces, where people are suspicious that fellow members of the public will wield the power of the state and bring the weight of the law to bear on their activities. The everyday rhythms and routines that stitch together social fabric may change, and the fabric may well fray.

Finally, were such a shift to come, it might be understood as being emblematic of a political strategy of plutocratic populism. Political scientists Jacob Hacker and Paul Pierson describe plutocratic populism as reflecting a two-pronged Republican Party approach to (1) shift away from robust, social welfare-focused regulatory policies protecting workers and consumers and towards policies favoring the ultra-wealthy and powerful corporations, while at the same time (2) stoking racial resentment and culture wars to obscure this economic politics and maintain working-class support.²²⁵ These efforts, combined with efforts to gerrymander and restrict voting, enable the party to win elections.²²⁶ And they permit economic policy for the wealthy to exist alongside ginned up popular fever and contest over (often manufactured) cultural issues.²²⁷

A paradigm shift away from traditional private enforcement and towards the recent adaptations might be understood through this lens. The rise of new adaptations would mark a turn towards cultural contest, while the decline of traditional forms of private enforcement would entail a weakening of social-welfare focused regulatory implementation. As the previous Section showed, such a weakening need not require the repeal of worker- or consumer-protective regulatory statutes; procedural interpretation that places barriers in the way of enforcement may be enough to take the wind out of such regulations' sails. In this sense, the feat would be deregulation by procedural interpretation. Under such a

²²⁵ See Jacob S. Hacker & Paul Pierson, *Let Them Eat Tweets: How the Right Rules in an Age of Extreme Inequality* 2–4 (2020).

²²⁶ See, e.g., Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, Brennan Ctr. for Just. (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression> [<https://perma.cc/X38M-TUBG>] (exploring Republican voter suppression strategies); Andrew Witherspoon & Sam Levine, *These Maps Show How Republicans Are Blatantly Rigging Elections*, *The Guardian* (Nov. 12, 2021), <https://www.theguardian.com/us-news/ng-interactive/2021/nov/12/gerrymander-redistricting-map-republicans-democrats-visual> [<https://perma.cc/D8AR-LFT4>].

²²⁷ See Hacker & Pierson, *supra* note 225, at 2–4 (defining the concept).

scenario, the closing of federal courts effectuated by such procedural barriers would lead members of the public to see that judicially enforceable economic and civil rights are largely meaningless paper-rights. And if patterns of agency sabotage and structural deregulation continue, the prospects for a vibrant regulatory life elsewhere may fade, too.²²⁸ Then, as cultural-grievance enforcement blooms, the public's eyes may be trained off the burgeoning and multifaceted forms of inequality that may increasingly unite the polity.

Resisting such a paradigm shift would not be easy. Piecemeal, tinkering efforts would be unlikely to stem the tide. Judicial challenges to the new private enforcement regimes may fall on deaf ears before a conservative Supreme Court—as perhaps evidenced by the Court's refusal, over Justice Sotomayor's powerful dissent, to stop S.B. 8 in its tracks by enjoining the law for violating pregnant people's constitutional rights under *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which were then good law.²²⁹ Tit-for-tat private enforcement schemes in Democrat-controlled states are not promising mechanisms for undoing the turn, either. They would fall into the playbook of stoking cultural grievance and shifting attention away from structural inequality.

The best solution may thus be the hardest to achieve: resisting a turn towards plutocratic populism by building an inclusive working-class populist politics that shifts the polity's energies away from stoked divisions, frames and seeks to resolve the problems of inequality and unfairness that define our era, and mobilizes members of the public in the processes of regulatory enforcement to make real the promise of democracy in the various domains of our lives—our schools, our workplaces, the marketplace, our environment, and elsewhere. The hope of realizing such a vibrant democratic-regulatory politics is dim, but it may be the only and best hope.

CONCLUSION

Private enforcement is at a crossroads. A series of new laws adapt private enforcement in innovative ways, and others are waiting in the

²²⁸ See supra note 134 and accompanying text.

²²⁹ See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 550–52 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part); supra note 70 and accompanying text (discussing S.B. 8's unconstitutionality under *Roe* and *Casey*).

wings. These laws potentially call into question the more traditional model of popular enforcement of regulatory law. This Article has taken a step back to reason about the democratic justifications for private enforcement in the first place. That act of reconstruction has vindicated the unease that so many have with the recent adaptations. Private enforcement is democratically valuable when it evens out structural power imbalances that threaten democracy, when members of the public bring the expertise of experience to dynamic regulatory contexts, and when popular participation deepens the well of democratic deliberation over regulatory norms. Traditional private enforcement regimes perform well under these measures; recent adaptations perform much more poorly, undercutting the justifications for centering members of the public in regulatory governance.

This Article's reconstruction highlights another reality: regulatory governance is fundamentally about power. In its traditional sense, it has been about restraining concentrated power and unleashing the power of the public—enabling citizens to bring the problems of their everyday lives to public institutions for redress and to participate in deliberative processes that set the norms governing our shared life. The recent adaptations of private enforcement flip the script in too many ways. They at times pit the powerful against the marginalized and subordinated. They turn popular participation in regulatory governance into voyeurism rather than an exercise in translating lived expertise and felt harm into regulatory action. And they seek to use courts and procedure in ways that threaten to undermine civility and the possibility of deliberation. These new adaptations strip away from private enforcement the features that make it a promising tool of democratic governance, and potentially lead courts and the country down a perilous road.