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Public Regulation and Private Lawsuits in the
American Separation of Powers System

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Abstract

This article investigates causes of the legislative choice to mobilize private litigants to enforce statutes. It specifies the statutory mechanism, grounded in economic incentives, that Congress uses to do so, and presents a theoretical framework for understanding how certain characteristics of separation of powers structures, particularly conflict between Congress and the president over control of the bureaucracy, drive legislative production of this mechanism. Using new and original historical data, the article presents the first empirical model of the legislative choice to mobilize private litigants, covering the years 1887 to 2004. The findings provide robust support for the proposition that interbranch conflict between Congress and the president is a powerful cause of congressional enactment of incentives to mobilize private litigants. Higher risk of electoral losses by the majority party, Democratic control of Congress, and demand by issue oriented interest groups are also significant predictors of congressional enactment of such incentives.

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The huge role of private litigation in federal statutory policy implementation in the United States, which has grown steeply over the past four decades, is to an important degree the product of legislative choice over questions of statutory design (Kagan 2001; Burke 2002; Melnick 1995, 2004). This paper investigates the causes of the legislative choice to proactively mobilize private litigants and their attorneys in policy implementation. Part I frames the statutory mechanism, fundamentally grounded in economic incentives, that is the central one used by Congress to mobilize private litigants to prosecute enforcement actions against the regulated population. Part II presents a theoretical framework for understanding how certain characteristics of separation of powers structures, particularly conflict between Congress and the president over control of the bureaucracy, drive legislative production of the mechanism outlined in Part I, and sets forth a series of testable hypotheses concerning the relationship between separation of power structures and legislative mobilization of private litigants. Part III presents four additional causal accounts of the legislative choice to mobilize private litigants, which have long appeared in the scholarly literature but have never been empirically tested due to lack of appropriate data. Part V, using original and newly collected historical data, presents the first empirical model of the legislative choice to mobilize private litigants, covering the years 1887 to 2004. In addition to testing the separation of powers hypotheses developed in Part II, this new data allows systematic evaluation of the previously untested hypotheses sketched in Part III, confirming some of these longstanding claims and rejecting others. Part V discusses the findings and concludes.

The empirical findings provide robust support for the central argument that motivates this article: ideological conflict between Congress and the president, most simply measured as divided government, is a statistically significant, consistent, and substantively powerful predictor

of congressional enactment of incentives to mobilize private litigants. These findings link long-run historical patterns of divided government and legislative-executive polarization, which increased in frequency and intensity starting in the late 1960s, with the coincident growth of the role of litigation and courts in the implementation and elaboration of federal statutory policy. Higher levels of risk of electoral losses by the majority party, Democratic control of Congress, and demand by issue oriented interest groups are also significant predictors of congressional enactment of such incentives.

I. The Mechanism of Litigant Mobilization: Private Enforcement Regimes

Before turning to sources of the legislative choice to mobilize private litigants, it is necessary to specify the mechanism that Congress uses to do so. In order to systematically conceptualize the ways in which Congress mobilizes private litigants, this article draws theoretically on the model of rational litigant behavior developed in the law and economics literature (e.g., Cooter and Ulen 2004, Chapter 10; Polinsky and Shavell 1998; Posner 2003, Chapter 21). This model generally contemplates that a prospective plaintiff will proceed with litigation when a case's expected monetary value (EV) if tried is positive, where EV is a function of the plaintiff's estimate of the expected monetary benefit of the case if she prevails (EB), the probability that she will prevail if the case goes to trial (p), and the expected costs of litigating the claim (EC). Thus, $EV = EB(p) - EC$, and the rational plaintiff will file suit if EV is positive.

In determining EB, Congress is free to enact rules in a statute capping economic damages well below the actual harm suffered, or assuring that they will far exceed it, such as with a triple damages provision (Galanter and Luban 1993; Polinsky and Shavell 1998). In determining EC, Congress can either allow the default "American rule" to govern, in which case each side generally pays their own attorney's fees and costs of litigation, or it can lay down an alternative

rule, such as one providing that winning plaintiffs can recover such expenses from defendants, with no similar recovery allowed for winning defendants (Kritzer 2002; Zemans 1984).

Congress can significantly influence p , for example, with statutory rules of proof, evidence and liability (Cooter and Ulen 2004, 431-32). The critical point is that when Congress drafts a regulatory statute, if it is going to allow private enforcement litigation at all, it has wide latitude in selecting rules that substantially determine EB , EC , and p . This system of rules constitutes a statute's *private enforcement regime*, and it can have profound consequences for how much or little private litigation is filed to enforce it.

An example serves to illustrate the potentially potent effects of private enforcement regimes on incentives to litigate, as well as the cumulative effects of different attributes of private enforcement regimes. Consider a potential plaintiff who sustained \$10,000 in actual damages due to an arguable violation of a statutory right, and assume that \$10,000 is typical of damages caused by violations of this particular statute. In hypothetical 1, assume that Congress has written the statute such that it has provided a private right of action, only actual monetary damages are recoverable, the American rule applies to attorney's fees, and default burdens and standards of proof apply. The plaintiff and her attorney estimate her probability of prevailing as .6, and estimate the costs of litigating through to final judgment as \$10,000. These facts yield an expected value of negative \$4000 $((10,000 \cdot .6) - 10,000)$. The plaintiff will not file suit. Congress has elected to provide a private right of action, but beyond simply allowing private litigants to enforce the statute, it has not particularly sought to affirmatively mobilize them.

In hypothetical 2, Congress includes a treble damages provision, so that EB is now increased from \$10,000 to \$30,000, and EV is increased from negative \$4000 to positive \$8000 $((30,000 \cdot .6) - 10,000)$, rendering a positive incentive for the plaintiff to file suit. In hypothetical

3, in addition to the treble damages provision, Congress adds an explicit pro-plaintiff statutory burden of proof rule, which increases the plaintiff's estimate of p from .6 to .8. This increase in the plaintiff's probability of success raises the expected value of her case to \$14,000 $((30,000 \cdot .8) - 10,000)$. Finally, in hypothetical 4, Congress also adds a rule allowing plaintiffs to recover attorney's fees and litigation costs, which has the effect of reducing EC from \$10,000 to \$2000 (since the plaintiff will be able to recover those costs if she wins, an outcome to which she assigns a probability of .8). This increases the expected value of the case commensurately, by \$8000, to \$22,000. Going from hypothetical 1 (a minimal private enforcement regime) to hypothetical 4 (a very robust one), the expected value of the case, from the plaintiff's point of view, increases from negative \$4,000 to positive \$22,000. The four hypotheticals represent four (among a vastly larger number) configurations of rules within a private enforcement regime, each corresponding to a successively higher degree of mobilization of private enforcers, and each the product of legislative choice. When constructing private enforcement regimes, Congress is constructing markets for enforcement lawsuits.

It bears emphasizing where this mechanism of litigant mobilization stands in relation to a line of analysis in the oversight literature that develops a model in which Congress endeavors to control the bureaucracy, as McNollgast (1987) famously put it, using "administrative procedures as instruments of political control" (see also McCubbins and Schwartz 1984; McNollgast 1989; Shipan 1997). Congress "stacks the deck" in favor of intended beneficiaries of legislation by specifying statutory procedures such as rules of standing, evidence and proof that make it more probable that the intended beneficiaries will prevail in agency proceedings, and it thereby harnesses the energies and resources of private actors to achieve the purpose of controlling agency policymaking. This literature is about "how to regulate the regulators," and "*not* how to

regulate society” (McCubbins and Schwartz 1984, 175, emphasis added). In contrast, my subject is precisely the regulation of society through the use of direct enforcement against the regulated population by private litigants as an adjunct to, or as an alternative to, bureaucratic power, not as a mechanism to monitor agencies.

To characterize the legislative mechanism of litigant mobilization as centrally economic is not conventional wisdom among political scientists, who have paid relatively little attention to ordinary statutory enforcement actions filed against the regulated population by individual private plaintiffs represented by private counsel. While political scientists have shown a fairly keen interest, and rightly so, in litigation filed or orchestrated by interest groups, and suits filed against government agencies seeking to enjoin or revise the policy decisions of administrators, such suits comprise only about 2 percent and 5 percent, respectively, of published federal court of appeals cases between 1960 and 2004.ⁱ Such litigation is aimed at shaping national policy, and while in some circumstances there may be economic motivations for the policies sought by organized interests, economic recovery in the suit itself is typically not a central issue. However, the vast bulk of private litigation enforcing federal statutes (well over 90 percent) is prosecuted by a radically decentralized army of private plaintiffs and their private attorneys pursuing their private interests, though, no doubt, with large public consequences. Such ordinary litigation, by and large, will proceed only on the threshold judgment that the suit will not result in a net economic loss (Galanter and Luban 1993; Johnson 1980; Kritzer 2002), even if there frequently may be other important non-economic motivations for proceeding.

II. Congressional Choice of Private Enforcement Regimes under Separation of Powers

When Congress enacts a law to regulate some facet of economic or social life where compliance is mandatory (as opposed to incentive based regulation), it faces a choice between

enforcement through bureaucratic machinery and the use of lawsuits, or some combination of the two in a mixed approach (e.g., Bardach and Kagan 2002; Burke 2002; Eskridge, Frickey, and Garrett 2001, 1099; Fiorina 1982). This choice must be situated within the institutional context of separation of powers. In his foundational work on adversarial legalism, Robert Kagan (2001, 15) has argued that the large role of adversarial legal process in American public policy is rooted partly in the “weak” and “fragmented” character of American state structures, which are characterized by crosscutting institutional checks and the dispersion of authority across executive, legislative, and judicial branches. Adversarial legalism, according to Kagan, is driven significantly by the mismatch between public demand for an activist state on the one hand, and a weak and fragmented administrative state on the other, which drives much policymaking into the courts. Thomas Burke (2002) provides an important development of Kagan’s work, emphasizing the extent to which the same “weak state” characteristics provide incentives for interest groups and policymakers to purposefully structure laws so as to encourage litigation as a policy instrument over implementation through bureaucratic means.

The delegation literature in general, and the work of Terry Moe (1989, 1990, 1994 (with Caldwell)) on congressional choice of bureaucratic structure in particular, provides a useful analytical frame for specifying the institutional dynamics through which the American separation of powers system produces high levels of private litigation to enforce public policy, and for generating testable hypothesis about the relationship between separation of powers structures and enactment of laws that utilize litigation and courts for implementation (see Burke 2002, 173-74; Smith 2005). A central theme of Moe’s work is that when creating agencies rational legislators in the United States make choices about agency structure and procedure meant to guard and insulate their preferences from political opponents who would subvert them in both the short and

long run. Two potential sources of subversion are of particular importance here: (1) subversion by the president, who has distinct institutional interests, and potentially divergent ideological preferences, and (2) subversion by future legislative coalitions should the enacting coalition's power be diminished in future elections. These same institutional dynamics create incentives for Congress to enact private enforcement regimes.

Conflict between Congress and the President. Moe argues that, even aside from ideological differences between Congress and the president, there are fundamental institutional divisions which will give the two branches different preferences regarding the exercise of bureaucratic authority. As compared to presidents, legislators are influenced more by particularistic than national interests and are more subject to interest group pressure, differences which can lead to divergent preferences over regulatory implementation (Moe 1989, 1990). Further, while legislators certainly have significant continuing power over agency actions (e.g. Weingast and Moran 1983), presidents possess considerable capacity to unilaterally influence agency structure and behavior (Moe 1982, 1990; Moe and Caldwell 1994). Thus, legislators and the interest groups that influence them strive to create agency structures calculated to implement their policy preferences while tightly constraining bureaucratic discretion so as to insulate it, to the degree possible, from presidential subversion.

To the extent that these structural dynamics are driving Congress' construction of the character and capacities of the American administrative state, the relationship should be intensified with increasing ideological conflict between Congress and the president. The more congressional and presidential ideological preferences diverge, the more likely the president will be to use his significant institutional resources to subvert implementation of congressional policy choices, and the more likely Congress will be to constrain and limit delegations of power to the

bureaucracy. Empirical research strongly bears out this prediction. Epstein and O'Halloran (1999) find that under conditions of divided party government Congress enacts more detailed laws, thus limiting agency discretion in implementation, and places more structural constraints on the exercise of bureaucratic implementation authority. Similarly, at the state level Huber and Shipan (2002) find that divided party government between the executive and legislative branches leads legislators to enact more detailed laws and thus to delegate less discretion to bureaucrats.

This institutional logic for delegating less authority to the bureaucracy, and structurally constraining its exercise of the powers delegated, simultaneously motivates Congress to enact private enforcement regimes. To the extent that Congress has concerns about whether the president will undertake enforcement at a level consistent with congressional policy preferences, due to the distinct institutional and electoral imperatives of the presidency, Congress has reason to fashion private enforcement regimes calculated to mobilize private litigants and lawyers to do so. To the extent that this structural cause for enactment of private enforcement regimes is in fact at play, it will be intensified under conditions of ideological conflict between Congress and the president. This is the flip side of the delegation literature just discussed. Under conditions in which that literature has found legislators delegating less implementation power to the bureaucracy – ideological conflict between the legislative and executive branches – legislators do not abandon implementation. Rather, under those conditions legislators marshal other resources to achieve their policy goals, including private litigants and lawyers.ⁱⁱ The operation of economic incentives on private litigants and lawyers in statutorily constructed enforcement markets creates an enforcement apparatus with an autopilot character, substantially beyond the reach of presidential influence (the possibility of gradual and indirect presidential influence via judicial appointments will be discussed below). This suggests:

SOP Hypothesis 1: *The more ideologically distant Congress is from the president, the more likely it will be to enact private enforcement regimes.*

It bears emphasis that this article does not claim that Congress will *only* enact private enforcement regimes under conditions of ideological conflict, but rather that it will be more likely to do so. The institutionally rooted difference between the preferences of legislators and presidents in the separation of powers system can make private enforcement regimes appealing to Congress even when the president is an ideological ally, but their appeal will multiply when he is an enemy.

If private enforcement regimes give power to lawyers, litigants, and courts that might alternatively be given to the executive branch, one might be tempted to ask why a president would facilitate her own disempowerment by signing laws containing them which advance the regulatory goals of ideologically distant Congresses. Among numerous possible reasons, two are particularly important. First, and most fundamentally, presidents simply don't get everything they want. While a president who dislikes some aspect of a legislative proposal can engage in "veto bargaining" in an effort to shape its content, the president's preferences will typically only be partially fulfilled, with multiple other factors, most importantly legislative preferences, also shaping the law's content (Cameron 2000). Second, it is not, in fact, at all clear that presidents always facilitate their own disempowerment by signing regulatory laws with private enforcement regimes passed by ideologically distant Congresses. It may be that legislative resistance to bureaucratic state-building is such that the president's choice is between a regulatory law with a private enforcement regime and no law at all. As an empirical matter, it is hardly a new notion that executives do sign laws passed by ideologically distant legislatures that give them less power than differently drafted laws could give them. As already discussed, the empirical literature on legislative delegation to the bureaucracy has provided systematic evidence that

under conditions of divided government, executives sign laws that contain greater limits and constraints on executive discretion than under conditions of unified government (Epstein and O'Halloran 1999; Huber and Shipan 2002).

Electoral Uncertainty and the Stickiness of the Status Quo. Moe identifies a second potential source of subversion, rooted in separation of powers structures, of Congress' policy preferences that will motivate it to insulate its policy decisions through strategic choice of bureaucratic structure. Members of Congress are eminently mindful of the prospects of electoral defeat, and they and their constituents recognize the possibility that rival political forces may gain control of Congress in the future and seek to undo the good works of the enacting Congress (Moe 1990; Moe and Caldwell 1994). Congress thus does not rely only upon its own ability to monitor agency behavior in the course of implementation, but rather also enacts formal rules and structures calculated to limit bureaucratic discretion and thereby secure implementation of the enacting Congress' preferences into the future, possibly in the absence of the enacting Congress and under the oversight of legislators with different and distant policy inclinations. Whereas new majorities in parliamentary systems have little trouble undoing the acts of past governments, this strategy of insulation can be effective in the American separation of power system because the many impediments that the system famously presents to enacting laws (particularly its many veto points) apply with equal or greater force to repealing an existing one, around which vested interests may already have formed. As Moe (1990, 240) puts it, in the American separation of powers system "[w]hatever is formalized will tend to endure."

This institutional logic for constraining bureaucratic power simultaneously constitutes a potent incentive for legislators and their constituents to opt for private enforcement regimes. Indeed, once formalized, private enforcement regimes provide *better* insulation on the

enforcement front than rule-governed agency powers, which future Congresses will have more continuing control over. Most significantly, future Congresses could shift agency enforcement efforts under a regulatory law through oversight hearings and investigations, and by exercising control over the agency's purse strings, even if they lack the political capacity or will to alter the agency's enforcement authority by formal legal enactment (Eskridge, Frickey, and Garrett 2001, 1129-73). On the other hand, if an enacting Congress utilizes a private enforcement regime there is little if anything that future Congresses can do to influence private enforcement levels short of repealing or amending the law, which may be difficult or impossible. For the same reason that private enforcers will be largely beyond the reach of the president -- due to the autopilot character of private litigants and lawyers responding to statutorily constructed economic incentives -- they will be beyond the reach of future legislative majorities as well, short of a new legal enactment. Thus, while private enforcement regimes will always have some appeal in a separation of powers system due to their ability make policy choices stick even when the opposition comes to power, greater concern about electoral losses will make an enacting Congress more likely to utilize private enforcement regimes. This suggests:

SOP Hypothesis 2: *As the risk of electoral losses increases for the majority party, it will be more likely to enact private enforcement regimes.*

Judicial Ideology. Though the delegation literature does not consider it, if Congress is concerned about the possibility of subversion by the president, and the possibility of subversion by future legislative majorities, then it seems reasonable to expect that it will also be concerned about subversion by the judiciary, whose ideological complexion is, of course, importantly influenced by presidential preferences. It is in the nature of statutory interpretation that the interpreter, whether judicial or administrative, will frequently be called upon to make policy (see, e.g., Mashaw 1997; Melnick 1994; Posner 1987), and thus when Congress makes courts central

to implementation of a statute, as former political scientist and now United States Court of Appeals Judge Robert Katzmann put, it makes courts “an integral component of the *legislative* process” (Katzmann 1995, 2346 (emphasis added)). Systematic empirical evidence demonstrates that judges’ partisan and ideological preferences influence the way they exercise this policymaking power through their voting patterns in statutory enforcement actions across the waterfront of policy domains (see, e.g., Farhang and Wawro 2004; Revesz 1997; Merritt and Brudney 2001). The literature on congressional overrides of statutory interpretation by courts also makes abundantly clear that Congress is well aware of the prospect of judicial subversion of congressional preferences through statutory interpretation, and that at times Congress crafts statutes with the specific purpose of defeating statutory interpretations advanced by ideologically distant courts (Barnes 2004; Eskridge 1991; Hausegger and Baum 1998).

The ideological position of the federal judiciary, from Congress’ point of view, has two components. The first is simply the judiciary’s ideological distance from Congress. The second is the direction in which the judiciary is moving with new appointments. In spatial terms, when Congress and the president are on the same side of the judiciary in ideological space, the appointment of new judges will have the effect of drawing the judiciary closer to Congress, whereas when Congress and the president are on opposite sides of the judiciary, judicial appointments will draw the judiciary away from Congress.ⁱⁱⁱ

At first blush, intuition suggests that Congress would be less likely to enact private enforcement regimes due to fear of judicial subversion the further away ideologically courts move from Congress. If courts will elaborate the substantive meaning of statutes in a manner objectionable to Congress the more distant they are ideologically, this naturally should militate against congressional enactment of private enforcement regimes. Further, as the distance

between Congress and the judiciary increases it is reasonable to expect judicial ideology to move a plaintiff's probability of prevailing (p) in a direction objectionable to Congress, making the judiciary a less hospitable enforcement venue from Congress' point of view. These considerations suggest:

SOP Hypothesis 3: *As the judiciary becomes more ideologically distant from Congress, Congress will become less likely to enact private enforcement regimes.*

However, contrary to initial intuition, there are also theoretical reasons to expect countervailing forces to incline Congress toward *increasing* incentives for private litigation as courts move ideologically *further* away from Congress. As discussed in Part I, with private enforcement regimes Congress is partly endeavoring to control expected value in the equation $EV = EB(p) - EC$, and with it the level of enforcement activity. If, as just suggested, with increasing distance between courts and Congress, courts will move plaintiffs' probability of prevailing (p) in a direction objectionable to Congress, Congress can counteract this by *increasing* EB or EC . Thus, it is evident that in some circumstances Congress may rationally respond to an increasingly ideologically distant court by enacting ever more robust private enforcement regimes. This suggests:

SOP Hypothesis 4: *As the judiciary becomes more ideologically distant from Congress, Congress will become more likely to enact private enforcement regimes.*

Because there are countervailing forces that cause increases in the judiciary's distance from Congress to create incentives to enact private enforcement regimes, and not to enact them, theory does not generate firm expectations about which causal force will predominate, if either does.

Whatever the effect of the judiciary's ideological position, there is reason to expect that it will be weighed significantly less by Congress than that of the executive. Bureaucratic implementation typically gives agencies both powers of *rule articulation* (the elaboration of the

meaning of a statute) and *rule enforcement* (monitoring, investigation, and prosecution of violators). In contrast, private enforcement regimes divide the two powers between courts (rule articulation) and private plaintiffs and their attorneys (rule enforcement), who will execute rule enforcement functions guided by, and insulated from subversion by, economic incentives.

Whereas in the bureaucratic case the president and her officers could subvert congressional preferences with respect to *both* rule enforcement and rule articulation, in the case of private enforcement regimes the rule enforcement functions are largely self-executing and insulated.

This logic suggests that while Congress may be influenced by the judiciary's ideological distance from it, the magnitude of this effect will be substantially weaker than the president's ideological distance.

III. Other Causes of Private Enforcement Regimes

There are an additional four potential causes of legislative enactment of private enforcement regimes that appear repeatedly in the scholarly literature. They must be controlled for in the empirical model below in order to isolate the effects, if any, of separation of powers structures. Moreover, they are of considerable interest in themselves because, although they have appeared in the scholarly literature for some time, none have been empirically tested due to lack of appropriate data.

Rent-Seeking Lawyer Hypothesis. Two main arguments causally link interest group activity to enactment of private enforcement regimes. In the first, rent-seeking lawyer interest groups, such as the Association of Trial Lawyers of America, securities class action lawyers, labor and employment lawyers, or the American Bar Association lobby to create and maintain opportunities for remunerative litigation so as to enrich themselves (Frymer 2007; Heymann and Liebman 1988, 309; Rau et al. 2006, 56; White 1992, 394-95). It is a commonplace that

professional associations seek to advance and protect the economic interests of their members, and lawyer associations are no different. Under the sway of lawyer interest groups, “legislators frequently benefit lawyers by passing ... legislation known popularly as ‘lawyers’ relief acts’,” which make fee generating litigation central to implementation (White 1992, 394). According to the rent-seeking lawyer hypothesis, greater lobbying influence by lawyer associations will be associated with increased enactment of private enforcement regimes.

Issue Group Hypothesis. A second line of explanation is that beginning in the mid to late 1960s, issue oriented citizens groups, such as environmental, civil rights, and consumer protection organizations burst on the American policy scene, proliferated in their number and lobbying intensity and effectiveness, and successfully demanded court-based implementation (Burke 2002; Kagan 2001:38-39, 47; Melnick 1995, 2004; O’Conner and Epstein 1985; Vogel 1981). This view links, at least implicitly, the interest group “explosion” of the late 1960s and early 1970s (Baumgartner and Leech 2001, 1191) to the storied “explosion” of at least some kinds of litigation. As contrasted with the personal economic motivations of the rent-seeking lawyer groups, these issue groups are guided by policy preferences. Their preference for private enforcement regimes is motivated by a distrust of bureaucracy, which they regard as timid, establishment oriented, prone to capture, and likely to suffer from lack of resources (Burke 2002; Melnick 2004, 93; Vogel 1981, 170). Also beginning the mid-1960s, there was a particularly strong growth of such groups specifically dedicated to reform through litigation, and these “public interest law” groups were especially focused on lobbying Congress for private enforcement regimes with sufficient economic rewards to bankroll their continued operation (McCann 1986; O’Conner and Epstein 1985). According to the issue group hypothesis, greater

lobbying influence by issue groups will be associated with increased enactment of private enforcement regimes.

Budget Constraint Hypothesis. A number of scholars have argued, quite plausibly, that lack of adequate tax revenue encourages Congress to achieve public policy goals through private adversarial legal process because it shifts the costs of regulation away from the state and to private parties (Burke 2002; Kagan 2001; O’Conner and Epstein 1985; see also McCubbins and Schwartz 1984). Whether for reasons of state structure (Steinmo 1993) or voter ideology (Wilensky 1975), among the more economically developed democracies the United States extracts the least revenue from the polity as a proportion of gross national product. This places obvious limits on state-building of a bureaucratic form. According to the budget constraint hypothesis, when resources are tight Congress will be relatively more likely to enact private enforcement regimes.

Party Alignment Hypothesis. Arguments that interest groups – whether of the rent-seeking lawyer or issue oriented variety – are key causes of adversarial legalism in the United States have been closely tied to political party. These arguments link the plaintiffs’ bar to the Democratic party, and link business opponents of civil legal liability to the Republican party. While the connections of the plaintiff’s personal injury bar to the Democratic party have received the most extensive attention, scholars have pointed to apparent influence by plaintiffs’ lawyers on Democrats more broadly, fostering litigation across such policy areas as civil rights, consumer protection, the environment, securities and exchange, and health care (e.g., Gordon and Assefa 2006; Romano 2005; Yeazell 2004), shaping rules of civil procedure, such as the class action device, so as to strengthen plaintiffs’ position in litigation (O’Neal 2005), and discouraging alternative dispute resolution mechanisms that would divert disputes away from

adversarial legal venues (Ware 1999). In an analysis of the parties' respective positions on federal securities regulation, Romano (2005, 1561) observes that "Republicans' general support for and Democrats' opposition to litigation reform that restricted liability ... paralleled the perspective of key party constituencies, the business community for Republicans and the plaintiffs' bar for the Democrats."

The party alignment hypothesis can be construed weakly or strongly. Construed weakly, it simply suggests that, other things being equal, Democratic controlled Congresses will be more likely to enact private enforcement regimes than Republican ones. Construed strongly, it suggests that the construction of private enforcement regimes is a uniquely Democratic phenomenon, abhorred by Republicans and their constituents, and thus the influence of other theorized causes of legislative enactment of private enforcement regimes, such as divided government, electoral uncertainty, interest group mobilization, and budgetary conditions, may all be conditional upon Democratic control of Congress.

Costs of Private Enforcement Regimes. It is tempting to ask why a Congress enacting a regulatory prohibition would not always include a private enforcement regime given that it privatizes a huge majority of the costs of enforcement and achieves the insulation goals discussed in Part II. However, private enforcement regimes are not really a free lunch. They clearly consume judicial resources, whether or not those expenditures can be traced by voters to legislators. Moreover, a flip side of the insulation phenomenon is that private litigants and lifetime tenured judges are less susceptible to ongoing supervision by the enacting Congress than are bureaucrats, who can be called into hearings and have their budgets slashed. Finally, from a policy point of view, many regulation scholars have suggested that, as compared to administrative regulation, private enforcement regimes: (1) produce inconsistency and

uncertainty (since policy emanates from a multitude of litigants and judges); (2) mobilizes less policy expertise; (3) is needlessly adversarial, subverting cooperation and voluntary compliance; (4) is extremely costly; and (5) is painfully slow and cumbersome (Cross 1989, 67-69; Stewart and Sunstein 1982, 1292-93; Kagan 2001; Kagan and Bardach 1982, 114). While debates over the merits of private enforcement regimes are beyond the scope of this paper, suffice it to say that there are ample reasons that Congress does not simply include one in every regulatory law it enacts, which would moot the present inquiry.

III. An Empirical Model of Enactment of Private Enforcement Regimes

The Dependent Variable. An exhaustive measure of the larger constellation of elements that comprise private enforcement regimes, such as rules of evidence, proof, liability, damages, fee recovery, the scope of standing, statutes of limitations, judge versus jury factfinding, etc., is not feasible. This may well be the reason that no effort has previously been made to collect data that would allow for hypothesis testing regarding causes of the legislative mobilization of private litigants. Moreover, as suggested in hypothetical 1 in section I, to simply allow lawsuits is not the same thing as to proactively mobilize them, for the high costs of litigation and the modest actual economic damages caused by violations in many federal regulatory contexts will produce many negative net value claims unless Congress elects to include rules aimed at bolstering their expected value. What is needed are a few discrete and clear indicators of Congress' efforts to proactively mobilize private litigants. The best such indicators are (1) statutory provisions requiring that defendants pay successful plaintiffs' attorney's fees, and (2) statutory provisions providing that successful plaintiffs are entitled to monetary damages that exceed the actual material harm suffered. Data was collected on the full universe of such provisions enacted by

Congress in between 1887 and 2004. The annual sum of the number of plaintiff's fee shifts and damaged enhancements enacted is the dependent variable in the models presented below.

Plaintiff's Fee Shifts. The standard "American rule" is that each party pays its own attorney's fees and other costs of litigation, whereas the "English rule" (which prevails in Europe, and most of the rest of the world) provides that the loser pays most of the winner's fees and costs (Leubsdorf 1984; Pfennigstorf 1984). Congress sometimes explicitly departs from the default American rule in regulatory legislation and proactively opts instead for an asymmetrical rule under which winning plaintiffs may recover the costs of enforcement, while similar recovery of fees and costs is not granted to winning defendants. Plaintiff's fee shifting provisions directly reduce EC in the equation $EV = EB(p) - EC$, thereby increasing EV. Among the multiple potential arrangements for allocating responsibility for paying litigation expenses, the plaintiff's shift creates the greatest incentives for plaintiffs to file enforcement actions (Shavell 1982; Zemans 1984; Kritzer 2002).

Damages Enhancements. The general baseline rule governing monetary damages available in American courts is that, in the absence of contrary legislative intent, successful plaintiffs are entitled to damages proportional to the harm or loss they suffered, not more (Galanter and Luban 1993, 1404). Congress, however, sometimes enacts express statutory provisions that depart from this default rule and confer monetary damages greater than a plaintiff's actual material damages, such as double, triple, or punitive damages. Double or triple damages operate as multiples on the actual monetary damages suffered by the plaintiff, and punitive damages can be awarded separately in an amount that need not be tied to actual monetary harm at all, and can far exceed it. Damages enhancements directly increase EB, thereby increasing EV.

Plaintiff's fee shifts and damages enhancements measure Congress' propensity to depart from default rules and proactively stimulate private enforcement litigation, and this is well understood by lawmakers and courts. The Supreme Court has referred to plaintiff's fee shifts as "congressional utilization of the private-attorney-general concept," while noting that "under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation."^{iv} Courts have likewise recognized that statutory damages enhancements "are justified as a 'bounty' that encourages private lawsuits seeking to assert legal rights, "^v serving to "reward individuals who serve as 'private attorneys general' in bringing wrongdoers to account,"^{vi} and providing an "incentive to litigate" that is "designed to fill prosecutorial gaps"^{vii} (see also Luban 1998). Both fee shifts and damages enhancements have been self-consciously utilized by members of Congress over the full time span of this study.^{viii}

I collected data on the full universe of plaintiff's fee shifts and damages enhancements enacted into federal law from 1887 to 2004.^{ix} The search yielded 275 plaintiffs' fee shifts, and 104 damages enhancements, for a total of 379 litigation incentives. Each such provision was coded for when it was enacted and the year it ceased to be operative if the statute was repealed by Congress (8 %), expired of its own terms (3%), or was struck by the Supreme Court (2%). Of plaintiff's fee shifts and damages enhancements enacted since 1887, 87% remain in effect. This is consistent with the theoretical expectation, discussed above, that formal legal enactments will tend to endure in the American separation of powers system, and that private enforcement regimes, once enacted, will likely persist through the reign of future governing coalitions. Of the 13% to exit the United States code, in all instances the exit occurred because the statute or some

substantive portion of it was repealed, expired, or was struck, and in no instance was the fee shift or damages enhancement itself specifically cut out. Thus, while it would be sensible to deduct from annual counts proactive decisions by Congress to eliminate fee shifts and damages enhancements while leaving the underlying right intact, no such events occurred.^x

The data reveal that the enactment of private enforcement regimes is not predominantly driven by some few policy domains, but rather has occurred across the waterfront of federal regulation. The fee shifts and damages enhancements are distributed across areas of federal regulation as follows: Antitrust (4% of enhancements), Banking (6%), Bankruptcy (2%), Civil Rights (9%), Communications (2%), Consumer (9%), Elections (2%), Environmental (6%), Housing (5%), Interstate Commerce (6%), Labor (9%), Property (predominantly intellectual property) (12%), Public Health and Safety (8%), Securities and Commodities Exchange (6%), Other (14%) (other contains all policy areas with less than 2% of enactments).

Private enforcement regimes are also not the unique province of any particular ideological or partisan program, nor have they then been exclusively deployed to serve any specific type of constituency. Consistent with conventional expectations that Democratic legislators and their issue group constituents favor private enforcement regimes, Democratic controlled Congresses have enacted private enforcement regimes directed at business regulation, for example, serving constituencies of low wage workers under the Fair Labor Standards Act of 1938,^{xi} minority groups under the Civil Rights Act of 1964,^{xii} and consumers under the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994.^{xiii} However, much less consistent with conventional expectations, Republican controlled Congresses have also found private enforcement regimes to be a useful regulatory strategy to serve their constituents as well. For example, in the Taft-Hartley Act of 1947 they gave companies a private right of action with

economic damages against unions engaged in labor actions proscribed by the Act;^{xiv} in the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, they gave United States nationals whose property was confiscated by the Cuban government during or following the Cuban revolution a private right of action, with attorney's fees for successful plaintiffs, against "traffickers" in such property;^{xv} and in the so-called Partial-Birth Abortion Ban Act of 2003 they created a private right of action with treble damages, and damages for emotional pain and suffering, to fathers (*if* married to the woman on whom the procedure is performed), and to "maternal grandparents of the fetus" if the woman is a minor, against a doctor who performs an abortion in violation of the act.^{xvi} While these examples of Republican enactments seem to cut against the strong version of the party alignment hypothesis, both the strong and weak versions will have to be tested in the empirical model presented.

The solid line in figure 1 represents the cumulative number of plaintiffs' fee shifts and damages enhancements in effect annually (accounting for provisions that exit the United States Code), reflecting the structural environment of private enforcement regimes in existence annually. The dashed line in figure 1 is the annual rate, per 100,000 population, of private federal statutory enforcement litigation (it is only possible to distinguish privately from governmentally filed actions beginning in 1942).^{xvii} The strikingly close association between these two variables, and particularly the coincident sharp upward shift in both at the end of the 1960s, reinforces the plausibility of plaintiffs' fee shifts and damages enhancements as measures of the broader phenomena of private enforcement regimes, and of the efficacy of private enforcement regimes in mobilizing private litigants. The figure also illustrates a ratchet effect on statutory litigation in the federal system produced by the combination of enactments over time and their durability through time.

Separation of Powers Conflicts. In order to test hypotheses regarding the relationship between interbranch conflict and the use of private enforcement regimes, this article uses two alternative sets of measures of political actors' ideological preferences and the extent of congruence or conflict between them, one based on partisan identification and the other on NOMINATE scores. On the partisan side, model 1 starts with a simple *DIVIDED Government* variable coded 0 when the president's party controls both chambers of Congress, and coded 1 otherwise. As a more sensitive alternative to measuring intrerbranch partisan conflict, model 2 substitutes an *OPPOSITION Seat Share* variable, which is defined as the proportion of seats held by the party opposite the president minus the proportion held by the president's party, averaged across both chambers (Epstein and O'Halloran 1999, 129). The variable will be positive when the party opposed to the president controls Congress, negative when the president's party controls Congress, and of increasing magnitude the larger the margin of control. It is coded 0 when the House and Senate are controlled by different parties.

As an alternative approach to measuring ideological preferences and interbranch conflict, Poole and Rosenthal's first dimension common space NOMINATE scores are employed, which are only available beginning in 1937 (Poole and Rosenthal 1997; Poole 1998). While the model utilizing this measure has the limitation of only covering the period 1937 to 2004, providing a relatively small sample size, it allows testing the robustness of the legislative-executive conflict findings using an alternative to party variables, and it offers the advantage of allowing one to test separation of powers hypotheses concerning the position of the judiciary, as explained below. The NOMINATE procedure is based upon a Downsian spatial theory of voting and creates estimates of the ideological positions of legislators on an interval scale based upon their pattern of roll call voting behavior. The common space ideology scale is standardized so as to render the

scores comparable across chambers and over time. To model presidential ideology, McCarty's (2003) presidential NOMINATE scores are employed, which are based upon public positions taken by the president on roll call votes. Using this set of roll calls for each president, the president is then treated as a legislator for purposes of estimating his ideological position.^{xviii}

The federal Court of Appeals is used to measure judicial ideology. The Court of Appeals level is modeled rather than the trial or Supreme Court level because each litigant is entitled to have any trial court decision reviewed by the Court of Appeals as a matter of right, whereas the overwhelming majority of cases have no meaningful prospect of obtaining Supreme Court review. Further, because of the Supreme Court's limited opportunity to extensively flesh out the meaning of particular statutes, and the trial court's lack of authority to issue decisions that bind in future cases, a huge majority of binding statutory interpretation comes from the Court of Appeals.

A combination of appointing presidents' and senators' NOMINATE scores are used in order to capture the effects of senatorial courtesy on appointments. Each judge is assigned the value of the president's NOMINATE score when an appointment is in a state in which neither senator is from the president's party, and each judge is assigned the value of the senator's (or the average of the two senators') NOMINATE score(s) when an appointment is in a state in which one or both senators belong to the president's party. Giles, Pepper, and Hettinger (n.d.) demonstrate that incorporating senatorial courtesy in this fashion produces a better predictor of Court of Appeals judges' voting behavior than imputing only the president's NOMINATE score or party to a judge. The judiciary's ideological position is then measured with the average score of federal Court of Appeals judges. Relative to the party variables, common space NOMINATE scores have the advantage of allowing one to locate the ideological position of the judiciary

relative to the president and Congress in the same metric, allowing measurement of the judiciary's distance from Congress and whether it is moving toward or away from it.

PRESIDENTIAL Distance is the absolute value of the distance between the presidential NOMINATE score and the average of the House and Senate median NOMINATE scores.

JUDICIAL Distance is the absolute value of the distance between the average Court of Appeals NOMINATE score and the average of the House and Senate median NOMINATE scores.

Alternative measures of *PRESIDENTIAL Distance* and *JUDICIAL Distance*, operationalizing Congress' ideological position differently, yielded nearly identical results.^{xix} *JUDICIAL Direction* is coded 0 when the president and Congress are on the same side of the judiciary in ideological space, such that the appointment of additional judges will draw the judiciary closer to Congress, and coded 1 when Congress and the president are on opposite sides of the judiciary, such that appointment of judges will draw the judiciary away from Congress.

Risk of Electoral Losses. Testing the hypothesis that majority coalitions in Congress will be more likely to use private enforcement regimes when faced with increases in the risk of electoral losses poses an empirical challenge. It would be ideal to have a measure of legislators' contemporaneous beliefs about electoral risk, but no data exists to construct such a variable going back many decades as the present study calls for. Researchers studying 19th century Congresses have dealt with this problem by projecting backward based upon actual electoral outcomes (Binder 1997, 73). Theoretically, the expectation that the risk of electoral losses will influence policy design is predicated on the assumption that current majorities are able to gauge, to some meaningful extent, the degree of risk they face in an upcoming election. *ELECTORAL Risk* reflects seat gains or losses as a proportion of total seats in the next election by majority parties, averaged across the two chambers. The variable has positive values when the majority

party loses seats in the next election, and negative values when it gains seats, and it will indicate whether congressional majorities heading into electoral losses are more likely to utilize private enforcement regimes for regulatory implementation.

Partisan Control of Congress. *PARTISAN Seat Share* is positive when Democrats control Congress and reflects their margin of total seats over Republicans, and is negative when Republicans control Congress and reflects their margin of total seats over Democrats. It is important to be clear about what this variable is isolating. As discussed below, the models will contain controls for how much and what type of regulatory legislation Congress is enacting. Thus, for example, if more Democratic Congresses enact more economic regulation than more Republican ones, and as a function of this they enact more private enforcement regimes, this will be picked up by the controls for the extent and type of regulatory legislation Congress is enacting. The *PARTISAN Seat Share* variable therefore isolates whether, given some level and kind of regulatory intervention, partisan control influences the selection of private enforcement regimes as an instrument of implementation.

Magnitude and Nature of Regulatory Productivity. Congress' enactment of private enforcement regimes may vary over time merely as a function of the ebb and flow of Congress' production of regulatory legislation in general, and of shifts in the nature of its regulatory agenda. The literature on regulation recognizes a basic distinction between economic and social regulation (e.g., May 2002; McGarity 1986; Schuck 2000). Economic regulation, which typically targets particular industries, is generally aimed at promoting market stability, efficiency, and competition, and is "concerned with preventing undue economic concentration, regulating natural monopolies, eliminating economic windfalls, ensuring adequate distribution of goods and services, and reducing fraud in economic transactions" (McGarity 1986, 254). Social

regulation, which typically cuts across all industries and sectors, is generally aimed at addressing problems of externalities, inadequate information, and public goods, and it is concerned with promoting public health and safety, consumer protection, environmental protection, equal opportunity, and quality of life in general. During the Progressive and New Deal periods economic regulation was the main source of the growth in federal regulatory statutes, whereas by the early 1970s social regulation became the main focus of regulatory legislation (McGarity 1986, 255; Schuck 2000, 123; Vogel 1981). It is possible that Congress' use of private enforcement regimes will vary across these domains.

In order to capture these factors, a random sample of twenty percent of all public laws enacted between 1887 and 2004 was drawn, and within that sample regulatory laws were identified (554 laws), and each was coded as economic regulation, social regulation, or other regulation, and further coded for its specific policy domain. For each classification, annual counts were generated of the number of pages of regulatory legislation in the Statutes at Large from 1887 to 2004. Decomposing from economic, social, and other regulation into more specific policy classifications (e.g., consumer, environmental, banking, antitrust) yielded no additional insights beyond those reflected in the basic *ECONOMIC Regulation*, *SOCIAL Regulation*, and *OTHER Regulation* variables reported below, and weakened model fit, and thus for the sake of parsimony only these broad policy classification variables were included in the model.

Interest Groups. To the extent that interest groups are influencing the shape of regulatory legislation, a visible venue in which this occurs is committee hearings, where committee members select representatives of groups to offer their views on legislation. In order to measure interest group demand, with respect to the random sample of 554 regulatory laws, all committee hearings held on the laws were identified, witness lists for each hearing were

examined, and each witness was coded for the type of organization or interest she represented. Variables were then generated defined as the annual count of witnesses appearing in support of issue oriented citizens groups, such as Friends of the Earth, American Association of Retired Persons, and National Council of La Raza (*ISSUE Witnesses*), and the number of witnesses appearing on behalf of lawyers associations, such as the American Bar Association, the Association of Trial Lawyers of America, and the National Employment Lawyers Association (*LAWYER Witnesses*). Issue groups focused on law reform through litigation as a principle tactic, frequently referred to as “public interest law” groups, such as the National Women’s Law Center, the National Housing Law Project, and the National Consumer Law Center, are included in *ISSUE Groups*. When incorporated into the model as a separate variable they are not independently significant.^{xx} A variable was also generated defined as the annual count of witnesses appearing on behalf of businesses or business organizations, such as the National Association of Manufacturers, the Chamber of Commerce of the United States, and the Securities Industry Association (*BUSINESS Witnesses*). A number of scholars have suggested that business interests at times have mobilized against the use of private enforcement regimes (Kagan 2001; Vogel 1981), and thus this variable is necessary as a control with the expectation that it will be negatively associated with enactment of private enforcement regimes.

Budget Constraint. *BUDGET Constraint* is the size of the federal budget surplus or deficit relative to total expenditures (Mayhew 1991). Larger negative numbers indicate relatively sizeable deficits, and larger positive numbers indicate substantial surpluses. All independent variables discussed above are annual.

Estimation Method. The dependent variable -- the sum of all fee shifts and damages enhancements enacted annually -- is a series of annual counts. Because the distribution of event

counts is discrete, not continuous, and is limited to non-negative values, it is best modeled assuming that the errors follow a poisson rather than a normal distribution (Cameron and Trivedi 1998). Because the count data is time series, in order to check for autocorrelation a plot of the autocorrelation function of the residuals of each model was examined (Cameron and Trivedi 1998; Tobias and Campbell 1998), which revealed second order autocorrelation. In order to account for autocorrelation in count data, Schwartz et al. (1996) and Katsouyanni et al. (1996) have developed an autoregressive poisson model which includes a specification of the autocorrelation in the model, and which also allows for overdispersion (where the variance of the series does not equal the mean, which is an assumption of a standard poisson model). This approach fits a log-linear model using iterative weighted least squares. Starting values for the parameters are obtained by running a standard poisson regression, and the residuals are saved and incorporated into subsequent iterations of the model as explanatory variables for the number of lags specified (Tobias and Campbell 1998), in this case two. Plots of the autocorrelation function of the residuals in each model confirmed that this method eliminated the autocorrelation problem.

Applying the Dickey-Fuller and Augmented Dickey-Fuller unit root tests to the raw series reveals evidence of non-stationarity in the dependent variable and several of the independent variables (*PARTISAN Seat Share* and *PRESIDENTIAL Distance*). Statistical analysis of the relationship between two non-stationary time series can yield spurious results. All of the non-stationary series analyzed here are integrated of order one (that is, they are rendered stationary by taking first differences). However, running regressions on period to period changes in variables (first differences), rather than levels of variables, changes the theoretical meaning of the hypotheses being tested and leads to loss of information, particularly

regarding the kind of long run relationships that the present inquiry is centrally concerned with (Kennedy 1994, 253-54).

The long run relationship between levels of non-stationary variables can only be estimated if they are integrated of the same order (as they are here), and the series are cointegrated. The core idea of cointegration is that even if series are non-stationary, there may be a long run co-movement between the variables such that a linear combination of them is stationary. The principle diagnostic technique for determining whether non-stationary series are cointegrated was developed by Engel and Granger (1987) and entails assessing whether the model residuals are stationary using the Augmented Dickey-Fuller test, but evaluating the test statistic against critical values computed by Engel and Granger. This test, known as the Augmented Engel-Granger test, shows that all modes reported in table 1 are stationary (the test statistic is reported as “AEG”), such that t statistics are valid and spurious regression results are avoided regarding the long run effects of *PARTISAN Seat Share* and *PRESIDENTIAL Distance* (Gujarati 2003, 822).

IV. Findings and Conclusions

In a poisson model, an x-unit increase in an independent variable translates into a change in the incidence rate of the dependent variable given by $\exp(x_i\beta_i)$. With respect to the most straightforward measure of interbranch conflict, model 1 in table 1 shows that divided government increases Congress’ enactment of private enforcement regimes. The *DIVIDED Government* variable is significant and positive, with a quite substantial substantive effect, supporting SOP hypothesis 1. A move from unified to divided government nearly doubles the predicted rate of enactments, increasing it by a factor of 1.93, or 93%. Model 2, table 1, substitutes the *OPPOSITION Seat Share* variable as the measure of legislative-executive

conflict, and it is statistically and substantively significant as well. An increase in *OPPOSITION Seat Share* by 15% is associated with an increase in enactments by a factor of 1.28. To put this in perspective, the increase in *OPPOSITION Seat Share* when Nixon took office, holding other variables constant, rendered an increase in predicted enactments by a factor of 1.76. Model 3, table 1, substitutes the *PRESIDENTIAL Distance* variable as the measure of legislative-executive conflict, and it is again positive and statistically and substantively significant. Reinforcing the findings regarding divided government using party variables in models 1 and 2, as the ideological distance between the president and Congress increases, Congress becomes more prone to utilize private enforcement regimes. An increase of one standard deviation (.206) translates into an increase in predicted enactments by a factor of 1.80. To put the magnitude in practical perspective, the increase in *PRESIDENTIAL Distance* moving from Jimmy Carter to Ronald Reagan elevated predicted enactments by a factor of 1.99, which is, sensibly enough, quite comparable to the substantive effects of the divided government dummy in model 1.

JUDICIAL Distance and *JUDICIAL Direction* are insignificant. Neither the direct measure of the judiciary's distance from Congress, nor whether the judiciary is moving toward or away from Congress, explains the incidence of private enforcement regimes. As discussed in Part II, there are theoretical grounds to expect increases in the judiciary's distance from Congress to reduce enactment of private enforcement regimes, *and* to increase enactment of private enforcement regimes, generating conflicting hypotheses (SOP hypotheses 3 and 4). It may be that these conflicting forces are canceling one another out. What is clear is that, contrary to intuition, on balance Congress is not more likely to enact private enforcement regimes in the presence of an ideologically friendly judiciary.

The *ELECTORAL Risk* variable is significant and has the expected sign in all three models, supporting SOP hypothesis 2, which predicted that the prospect of electoral losses increases Congress' enactment of private enforcement regimes. A seat share loss of 12% for the majority party (about average in years that the majority lost seat share in the next election, which was true of 72 of 118 years), was associated with the current majority increasing its enactments by a factor of 1.43 in model 1, 1.38 in model 2, and 1.53 in model 3.

The issue group hypothesis is supported in all three models. *ISSUE Witnesses* is positive and significant, indicating that the presence of more witnesses representing issue oriented citizens groups in hearings on regulatory legislation is associated with increased utilization of private enforcement regimes. An increase in *ISSUE Witnesses* by one standard deviation (15.35) is associated with an increase in predicted enactments by a factor of 1.47 in model 1, 1.44 in model 2, and 1.34 in model 3. *LAWYER Witnesses* is highly insignificant and, contrary to the rent-seeking lawyer hypothesis, has a negative sign in all three models. *BUSINESS Witnesses* is also insignificant in all three models.

The budget constraint hypothesis is not supported by the data. The insignificance of *BUDGET Constraint* in all three models indicates that the relative size of budget deficits or surpluses is not significantly related to the enactment of private enforcement regimes. Two of the controls for the extent and nature of regulatory legislation enacted (*ECONOMIC Regulation* and *OTHER Regulation*) are significant and positive in models 1 and 2, but insignificant in model 3, while the third such control (*SOCIAL Regulation*) is insignificant in all three models.

The *PARTISAN Seat Share* variable is significant with the expected sign in models 1 and 2, but insignificant in model 3, which has a substantially smaller sample size. If congressional ideology is incorporated in model 3 with the average of the House and Senate median

NOMINATE scores, as an alternative to *PARTISAN Seat Share*, that variable too is insignificant. The significance of *PARTISAN Seat Share* in models 1 and 2 provides support for the weak version of the party alignment hypothesis, holding that, even controlling for the extent of regulatory legislation being enacted, Democratic majorities are more likely to utilize private enforcement regimes than Republican ones. An increase of 15% in Democrats' margin of control is associated with an increase of predicted enactments by a factor of 1.24 in model 1, and 1.26 in model 2. The data provide no support for the strong version of the party alignment hypothesis, which holds that creation of private enforcement regimes is uniquely the province of Democrats, and accordingly that the effects of other independent variables will be conditional upon Democratic control of Congress. Interactions between Democratic control of Congress and each other independent variable all proved insignificant.

The central hypothesis about the relationship between legislative-executive conflict in the American separation of powers system and enactment of private enforcement regimes is strongly born out by the data: conflict between the executive and legislative branches causes Congress to rely more heavily upon the mobilization of private litigants for regulatory enforcement. These findings are robust across multiple operationalizations of interbranch conflict, whether one uses a simple divided government dummy, opposition seat share, or a party-neutral measure of the ideological distance between Congress and the president. The hypothesis that impending electoral losses increases Congress' enactment of private enforcement regimes is also strongly born out, showing that legislators understand that private enforcement regimes can insulate not just from presidential subversion, but also, given the stickiness of the status quo in the American separation of power system, from subversion by future legislative majorities.

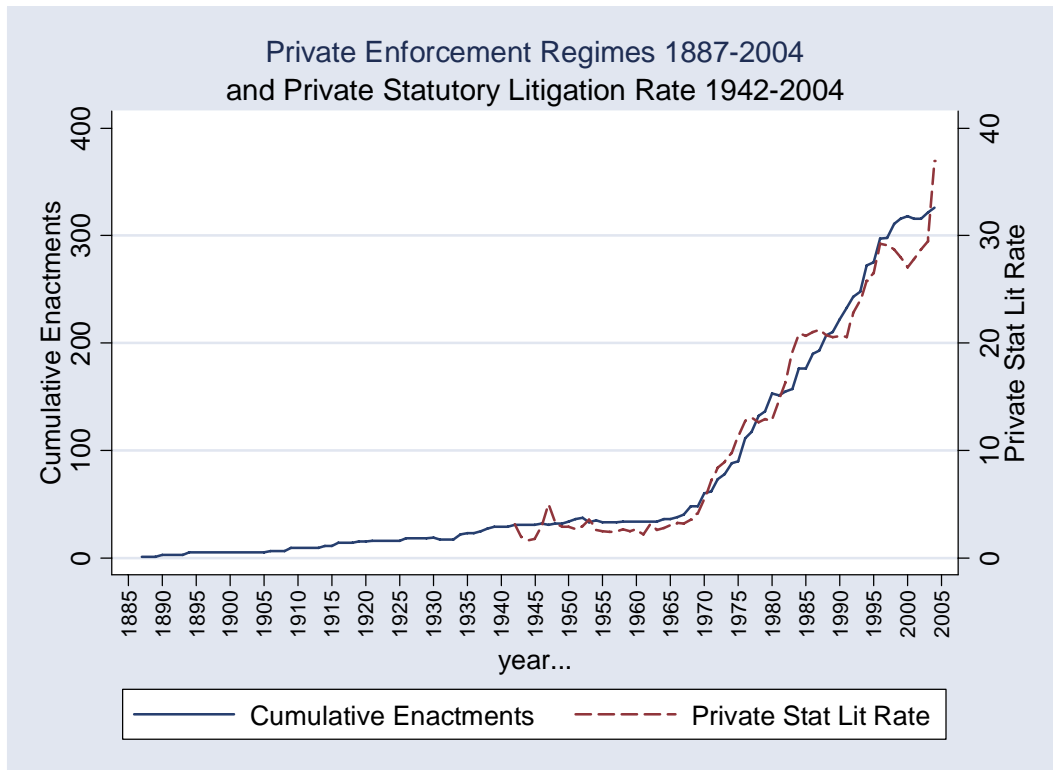
The findings linking interbranch conflict and enactment of private enforcement regimes have significant implications for understanding patterns of development of some important forms of litigation or “litigiousness” in the United States. The rate of federal statutory litigation filed by private parties increased sharply at the end of the 1960s, in tandem with the corresponding growth of Congress’ enactment of private enforcement regimes (figure 1). This growth in private statutory enforcement litigation far outstripped the growth in other types of litigation in the federal system, such as tort and contract claims brought under diversity jurisdiction. Consequently, privately filed statutory claims have grown from a relatively minor share of the federal civil docket to the dominant one. In 1965 they accounted for only 18%, and over the past five years, averaging more than 163,000 per year, they have accounted for an average of 63% of the federal civil docket.^{xxi}

The analysis and findings presented here link long-run historical patterns of divided government and polarization between the legislative and executive branches, which markedly increased in frequency and intensity in the late 1960s (see Jacobson 2003), with the sharp increase in the rate of private statutory enforcement litigation, and the corresponding increase in the role of private litigants, lawyers, and courts in federal policy implementation and elaboration. As distinct from explanations for American litigiousness grounded in American political culture (Glendon 1991; Lipset 1996; Manning 1977), these findings highlight the importance of the structure of American political institutions for explaining levels of at least some kinds of litigation. As contrasted with accounts of American litigiousness that decry the undemocratic influence over public policy exercised by the unholy alliance of an imperial judiciary and irresponsible plaintiffs’ lawyers (Glazer 1975; Olson 1991; Sandler and Schoenbrod 2002), the evidence presented here traces the roots of the extensive role of private litigants, lawyers, and

courts in the implementation of federal regulatory laws to choices made in Congress, widely regarded as our most democratic branch of government.

The new data collected to create the first empirical model of legislative enactment of private enforcement regimes, in addition to testing the separation of powers hypotheses developed in this paper, also presented the opportunity to systematically evaluate four theories of sources of private enforcement regimes that have long appeared in the scholarly literature but had never been tested. The model confirmed the issue group hypothesis and the weak version of the party alignment hypothesis. The number of issue oriented interest group actors seeking to influence legislation at the committee stage in Congress significantly predicts the enactment of private enforcement regimes. Controlling for other factors, including the extent and nature of regulatory legislation being enacted, Democratic party control of Congress is also significantly associated with utilizing private enforcement regimes in implementation. The model fails to support the rent-seeking lawyer hypothesis, the budget constraint hypothesis, and the strong version of the party alignment hypothesis. While lawyer associations do appear in committee hearings to offer views on regulatory legislation, the frequency with which they do so does not significantly predict enactment of private enforcement regimes. Likewise, contrary to plausible theoretical expectations, budget deficits are not significantly associated with enactment of private enforcement regimes. Finally, while Democratic party control of Congress has significant direct effects, none of the other significant independent variables are conditional upon it.

Figure 1



Source for federal litigation data: Annual Report of the Administrative Office of the U. S. Courts, Table C-2 (1942-2004).

Table 1: Autoregressive Poisson Models of Enactments

Variable	1887-2004 Model 1	1887-2004 Model 2	1937-2004 Model 3
Divided Government	.655 ** (.254)	—	—
Opposition Seat Share	—	1.63 ** (.567)	—
Presidential Distance	—	—	2.86 ** (.954)
Judicial Distance	—	—	.876 (1.76)
Judicial Direction	—	—	.272 (.309)
Electoral Risk	3.00 ** (.942)	2.70 ** (.872)	3.53 * (1.44)
Partisan Seat Share	1.44 * (.680)	1.55 * (.704)	-.060 (1.04)
Lawyer Witnesses	-.024 (.096)	-.014 (.092)	-.107 (.101)
Issue Witnesses	.025 ** (.007)	.024 ** (.007)	.019 * (.009)
Business Witnesses	-.003 (.004)	-.003 (.004)	.001 (.006)
Budget Constraint	.045 (.630)	-.184 (.609)	.280 (.960)
Social Regulation	-.001 (.001)	-.001 (.001)	-.001 (.001)
Economic Regulation	.005 * (.002)	.005 * (.002)	.003 (.003)
Other Regulation	.033 * (.015)	.029 * (.013)	.010 (.016)
Constant	.073 (.250)	.479 * (.189)	-.627 (.697)
Residuals Lag 1	.330 ** (.102)	.364 ** (.101)	.072 (.158)
Residuals Lag 2	.309 ** (.111)	.304 ** (.108)	.207 (.159)
R ²	.60	.61	.57
N	116	116	66
AEGL	-6.51 *	-8.10 *	-5.32 *

** $p < .01$, * $p < .05$

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ⁱ These figures come from a random sample of 1125 published federal Court of Appeals cases.

Given that interest group litigation and challenges to agency policymaking are more likely to be high policy salience cases, and high policy salience cases are more likely to be published, these figures very likely significantly overstate the presence in aggregate federal filings of suits orchestrated by interest groups and suits challenging agency policymaking.

ⁱⁱ Epstein and O'Halloran find that during divided government, while Congress is less likely to delegate to executive agencies, it is more likely to make "non-executive" delegations of authority, which are measured by an amalgamation of delegations of authority to state agencies, local authorities, and the courts (1999, 156-57). However, no separate analysis of delegation to the courts is provided, nor do they discuss in detail what they count as delegation to courts, and

thus while their findings are suggestive, it is not possible to conclude from them whether or not Congress delegated more power to courts during periods of divided government.

ⁱⁱⁱ I owe recognition of this dimension of the judiciary's position to Gary Cox.

^{iv} *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975).

^v *Smith v. Wade*, 461 U.S. 30, 58 (1983); see also *United States v. Snepp*, 595 F.2d 926, 941 (4th Cir. 1978); *TVT Records v. Island Def Jam Music Group*, 2003 U.S. Dist. LEXIS 15271 (S.D.N.Y. 2003).

^{vi} *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986).

^{vii} *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985).

^{viii} The use of damages multiples has ancient roots and has been utilized by American legislators since the colonial period (Blakey and Cessar 1987, 531 n.17). The Force Act of 1870, aimed at securing the voting rights of freed slaves, created a private right of action and provided the first plaintiffs' fee shift in a federal statute. The Interstate Commerce Act of 1887 contained the second, where floor debates on the issue made clear that legislators departed from the American rule on fees for the express purpose of mobilizing private litigants in the regulatory struggle to bring railroads under control. See floor debates on the ICA of 1887, reprinted in Sloan (1976), remarks of Senator Spooner of Wisconsin, Representative Crisp of Georgia, and Representative Hopkins of Illinois (vol. 3, 280-81, 466, 471-72).

^{ix} Only provisions that applied to de novo court actions by private plaintiffs, and explicitly provided for recovery of attorney's fees, or multiple or punitive damages, were included in the dataset. In addition to provisions providing for an award of fees to a prevailing plaintiff, provisions providing for fees to a prevailing party were also included since such provisions, according to courts and commentators alike, have been consistently intended by Congress, and

have accordingly been consistently applied by courts, to asymmetrically favor plaintiffs, conferring upon them the right to fees as a matter of course, and conferring upon defendants the right to fees only in rare instances in which litigation is deemed frivolous and intentionally vexatious and abusive (Conte 2004, vol. 1, 667-701; Florio 2000, 722-32; Berger 1987, 77-82; Newberg 1986, 178-85; Larson 1981, 85-97).

^x In a handful of instances Congress provided in a statute that prevailing plaintiff-enforcers of the statute would *not* be entitled to punitive damages (no analogous provisions occurred concerning attorney's fees). I did not subtract these from the annual count because such provisions only occurred in laws in which Congress did create a private right of action and some economic damages, giving rise to Congress' desire to make explicit that it did not intend such damages to include punitive damages. It would be erroneous to count such litigation fostering laws as anti-litigation laws. In order to evaluate the robustness of the findings presented below to this choice, I examined an alternative specification in which I subtracted these provisions from the annual count, and the findings were statistically and substantively unaffected.

^{xi} Public Law No. 75-718.

^{xii} Public Law No. 88-352.

^{xiii} Public Law No. 103-297.

^{xiv} Public Law No. 80-101. These provisions in Taft-Hartley are not contained in the dependent variable because, while allowing recovery of economic damages for injury to a business and the costs of suit, 29 U.S.C.A. § 187, it did not contain a punitive damages provision or allow recovery of attorney's fees.

^{xv} Public Law No. 104-114

^{xvi} Public Law No. 108-105.

^{xvii} The private statutory litigation figures reflect cases classified by the Administrative Office of the United States Courts as private/federal question/statutory cases, excluding prisoner petitions and deportation cases.

^{xviii} McCarty's (2003) presidential scores are calculated using the DW-NOMINATE procedure on presidential positions taken on roll calls in the House. In order to make these scores comparable to the House and Senate common space scores, I regressed House common space scores on House DW scores and obtained the transformation equation, which I then applied to the presidential DW scores to move them into the common space. Presidential common space scores calculated by Poole and Rosenthal do not exist prior to Eisenhower.

^{xix} Rather than seeing the floor medians as critical, some theories emphasize the importance of the majority party (e.g., Cox and McCubbins 2004). Thus, in an alternative specification congressional ideology was measured as the distance from the president to the medians of the majority party in both chambers, averaged across them. Other theories emphasize the importance of veto players, and thus in two additional alternative specifications congressional ideology was measured as the distance from the president to the floor median, and as the distance from the president to the majority party median, in the chamber furthest away from the president, operationalizing the notion that the most distant chamber's preferences are decisive because if they are not satisfied, that chamber could exercise its veto powers. In these three alternative specifications the statistically and substantively significant variables remained such, and likewise the insignificant variables remained insignificant. More complex veto pivot models, such as Keith Krehbiel's (1998), do not yield predictions about whether Congress would include private enforcement regimes in regulatory legislation, and do not point to operationalizable strategies for identifying legislators pivotal to that decision for purposes of measuring their distance to the

president. The literature focusing on the size of the gridlock interval is concerned with legislative productivity (ascertaining the range of possible movement away the policy status quo, or the range of opportunity for new legislation). The goal of this article is quite different. Given movement in the status quo through the enactment of new regulatory legislation, this article seeks to explain a particular aspect of the content of the law – whether a specific implementation strategy is adopted. Further, while Krehbiel's gridlock interval measures when it is possible to move the status quo and adopt a new policy, within the set of policies outside the gridlock interval that can be adopted, in order to know which pivotal players in Krehbiel's game (filibuster, floor median, veto override, or president) will be most important in deciding which of the feasible policies is adopted, one has to know where the status quo is relative to those players (Krehbiel 1998, 35). In the vast majority of empirical settings, including the present one, it is not possible to identify the position of the status quo (no law) within the ideological space of Krehbiel's game, and thus it is not possible to identify the legislator most powerful in shaping the law's content for purposes of measuring distance to the president.

^{xx} This is not entirely surprising. Issue groups in general are a far larger force than organizations focused upon litigation. There were 1017 issue organizations in the sample, not including litigation advocacy groups, and 66 litigation advocacy groups. Further, many issue organizations that are not litigation advocacy groups clearly are actively aware of and concerned with the role of courts in implementation, as shown, for example, by the frequency with which issue groups file amicus briefs. Thus, the line between issue groups and legal advocacy organizations, as it pertains to their likely views on private enforcement regimes, is not a bright one.

^{xxi} Annual Report of the Administrative Office of the U. S. Courts, Table C-2 (1965 to 2007).