Law & Social Inquiry
Journal of the American Bar Foundation

*Law & Social Inquiry*
Volume 37, Issue 3, 657–685, Summer 2012

# Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law

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*Examining qualitative historical evidence from cases of federal regulation in the areas of labor, civil rights, and environmental policy, this article provides support for the hypothesis that divergence between legislative and executive preferences—a core and distinctive feature of the American constitutional order—creates an incentive for Congress to rely upon private lawsuits, as an alternative to administrative power, to achieve its regulatory goals. It also shows that this mechanism encouraging statutory mobilization of private litigants had been operative long before its powerful growth started in the late 1960s, that it operated in similar fashion with Republican legislators facing Democratic presidents and Democratic legislators facing Republican presidents, and that it remained a source of controversy and an active influence on congressional decision making throughout the half century covering the 1940s through the 1980s.*

## INTRODUCTION

This article presents historical evidence demonstrating that legislative-executive conflict over control of the bureaucracy in the United States operates as an important cause of the legislative choice to mobilize private lawsuits for regulatory implementation. The evidence focuses primarily upon enactment of five important regulatory laws, spanning the half-century covering the 1940s through the 1980s, and cutting across the policy areas of labor, civil rights, and environmental policy. In conjunction with other recent scholarship, the evidence shows that when Congress fears that it cannot control the bureaucracy as a vehicle to implement its directives, it often self-consciously turns to private lawsuits as a supplement or as an alternative to reliance upon administrative power. Legislative-executive conflict is a core and distinctive feature of American constitutional separation of powers arrangements, and it is an important source of the unusually large role of private litigation in regulatory policy implementation in the United States.

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## LEGISLATIVE DELEGATION TO PRIVATE LITIGANTS

Legal scholars have long recognized that when Congress enacts a civil statute regulating some facet of economic or social life where compliance is mandatory, it faces a choice between implementation through bureaucratic machinery versus implementation through litigation in courts, or some combination of the two in a mixed regime (Fiorina 1982; Eskridge, Frickey, and Garrett 2001, 1099; Bardach and Kagan 2002; Burke 2002). When Congress elects to rely upon private litigation by including a private right of action in a statute, it faces a series of additional choices of statutory design—such as who has standing to sue, which parties will bear the costs of litigation, what damages will be available to winning plaintiffs, and whether a judge or jury will make factual determinations and assess damages—that together can have profound consequences for how much or little private enforcement litigation will actually be mobilized (Melnick 1983, 2005; Kagan 2001; Burke 2002; Frymer 2007, chap. 4; Farhang 2008, 2009b). This article refers to this constellation of rules as a statute's "private enforcement regime."

The phenomenon of private enforcement regimes is linked to a line of research in the field of law and society concerning the significance of certain legal infrastructures to the elaboration and protection of rights through courts. Marc Galanter famously argued that "repeat players" (who use the courts frequently, and are typically "haves") possess significant advantages over "one-shotters" (who use the courts infrequently, and are typically "have-nots"; Galanter 1974). The advantages importantly include access to greater legal resources, skill, and expertise in the litigation process. Galanter speculated that one way to counterbalance the inequality between repeat players and one-shotters could be through legal rules and policies that have the effect of increasing the supply of quality legal services for have-nots. Building on this line of research, in a cross-national study focusing on civil rights and civil liberties, Charles Epp (1998) demonstrates in *The Rights Revolution* that successful rights revolutions were more likely in countries characterized by more extensive "support structures" for legal mobilization, particularly activist organizations, skilled and committed lawyers, and sources of funding to support litigation campaigns.

The logic of statutory private enforcement regimes highlights that the existence of an important support structure to enforce regulatory statutes—a bar of ready, willing, and able lawyers—can be profoundly influenced by legislation. It can be fostered and sustained by the legislative construction of robust private enforcement regimes, creating extensive opportunities for successful private enforcement, and substantial affirmative incentives for it, such as economic damages and attorney's fee awards for winning plaintiffs, which straightforwardly operate as resources to support litigation. Robust private enforcement regimes in statutes can contribute importantly to the creation and sustenance of an infrastructure of private lawyers possessed of the skill and desire to execute the function of enforcing them, and that earn a living, at defendants' expense, practicing in the relevant area of law (Derfner 1977; O'Connor and Epstein 1985; Sander and Williams 1989, 470; Frymer 2007, chap. 4; Farhang 2009a, 2009b; Melnick 2009, 40). This phenomenon extends far beyond litigation by have-nots, and beyond the policy domain of civil rights and civil liberties. It concerns regulation through private enforcement regimes in general.

## LEGISLATIVE-EXECUTIVE CONFLICT AND PRIVATE ENFORCEMENT REGIMES

In recent years, scholars studying the large role of litigation in American policy implementation have argued that a core and perennial feature of American separation of power structures—conflict between Congress and the president over control of the administrative state—is a critical cause of Congress's purposeful and extensive reliance upon private enforcement regimes for policy implementation (Kagan 2001, 48–49; Burke 2002, 14–15, 173; Melnick 2005; Ginsburg and Kagan 2005, 6–7; Smith 2005; Farhang 2008). Recognizing the choice between bureaucracy and litigation, this recent literature builds, theoretically, upon scholarship seeking to understand the conditions that motivate Congress to limit and curtail administrative power, and argues that those same conditions simultaneously motivate Congress to turn to private lawsuits as a supplementary or alternative implementation vehicle.

### Delegating to Administrators

In a series of noted articles, Terry Moe (1989, 1990; Moe and Caldwell 1994) has argued that when delegating to agencies, rational legislators in the United States make choices about agency structure, procedure, and power meant to insulate their preferences from political opponents who threaten to subvert them. The most fundamental and persistent threat of subversion is subversion by the president, who possesses a variety of means to influence agency behavior. The president also has distinct institutional interests, and potentially divergent ideological preferences. Accordingly, legislators and the interest groups that influence them, when delegating regulatory implementation power to agencies, strive to write laws in ways calculated to implement their policy preferences while tightly constraining bureaucratic discretion to insulate it, to the extent possible, from presidential subversion. Empirical research has demonstrated that, in fact, under conditions of divided party government (different parties controlling Congress and the presidency), legislators enact laws with increased detail, thus limiting agency discretion in implementation, and place more structural constraints on the exercise of bureaucratic implementation authority (Epstein and O'Halloran 1999; Huber and Shipan 2002).

### Delegating to Litigants and Courts

This institutional logic for delegating less authority to the bureaucracy, and structurally constraining its exercise of the powers delegated, can simultaneously motivate Congress to enact private enforcement regimes (Kagan 2001, 48–49; Burke 2002, 14–15, 173; Melnick 2005; Ginsburg and Kagan 2005, 6–7; Smith 2005; Farhang 2008). To the extent that Congress has concerns about whether the president will pursue an enforcement agenda consistent with congressional policy preferences, due to the distinct institutional and electoral imperatives of the presidency, or to the president's divergent ideological preferences, Congress has reason to enact incentives for private

litigants and lawyers to do so. Adequately incentivized, private lawsuits can operate as an enforcement mechanism with an autopilot character, substantially beyond executive control.

It should be stressed that this theoretical claim need not only be about *elevating* the extent of enforcement with private enforcement regimes, as compared to bureaucratic implementation, but rather it is about *controlling the level of enforcement*. As an enforcement strategy, private enforcement regimes can protect against either *under-* or *over-*enforcement by bureaucrats. Private enforcement regimes, like bureaucratic regimes, can range from weak to strong. A private enforcement regime with limited opportunities and incentives for private enforcement can be calculated to produce less intervention than an overzealous agency (from Congress's point of view), and a robust private enforcement regime can be calculated to produce more intervention than an agency disinclined toward vigorous implementation (from Congress's point of view).

## Comparative Institutional Implications

The legislative-executive conflict hypothesis for enactment of private enforcement regimes is tied to an important cross-national comparative institutional question about the role of private litigation in policy implementation. Moe's argument about legislative-executive conflict as a source of structural constraints and encumbrances on the administrative state was partly marshaled in response to a comparative institutional puzzle raised in the work of James Q. Wilson. In decrying the extent to which the effectiveness of the American state was weakened by procedural and structural encumbrances on bureaucratic discretion, Wilson (1989, chap. 16) observed that, by comparison, bureaucracies in European parliamentary regimes were less burdened by formal rules, procedures, and constraints, giving rise to stronger and more effective administrative states.

In response, Moe stressed that it is precisely the institutional structure of the separation of powers system—particularly legislative-executive conflict over the control of the bureaucracy—which motivates Congress to cabin bureaucratic discretion with formal rules and structural constraints. In parliamentary systems, by comparison, Moe (1990, 241) writes:

> [T]he executive arises out of the legislature and both are controlled by the majority party. Thus, unlike in the United States, the executive and the legislature do not take distinctive approaches to issues of structure; they do not struggle with one another in the design and control of public agencies; they do not push for structures that protect against or compensate for the other's political influence.

Moe thus posits relative legislative-executive unity as an explanation for the development of comparatively stronger, more coherent, unified, and centralized bureaucratic state machinery in parliamentary regimes, and correspondingly he posits relative legislative-executive conflict as an explanation for the failure of a "strong state" on this European model to develop in the United States. This comparative institutional argument has important implications for the present discussion.

Legal scholars have long recognized that private litigation plays an unusually pervasive and important role in the implementation of public policy in the United States as compared to industrial democratic countries with predominantly parliamentary systems (Kagan 2001, 6–9 [reviewing this literature]). This fact is noteworthy in the context of the foregoing discussion of legislative-executive conflict as a simultaneous cause both of legislative constraints on administrative power, and of legislative mobilization of private litigants. The legislative-executive conflict hypothesis suggests that, viewing the United States in comparison to parliamentary regimes, the twin phenomena of a more limited and constrained American administrative state, on the one hand (noted by Wilson), and a greater role for private litigation in policy implementation, on the other (noted by Kagan), are opposite sides of the same institutional coin. Focusing partly on separation of powers structures as an explanation for American "adversarial legalism," Kagan writes, "it is only a slight oversimplification to say that in the United States, lawyers, legal rights, judges, and lawsuits are the functional equivalent of the large central bureaucracies that dominate governance in high-tax, activist welfare states" (2001, 15–16). The legislative-executive conflict hypothesis, if validated, would give some support to Kagan's contention, and it would provide potentially fruitful comparative institutional lessons for understanding the role of private litigation, and its relationship to bureaucratic forms of regulatory implementation, in different national regulatory systems.

## The State of the Evidence and the Need for More

While the legislative-executive conflict hypothesis for congressional reliance upon private lawsuits in policy implementation is theoretically plausible, very little research has produced evidence in support of it. This is, perhaps, because the argument emerged less than a decade ago, and empirical work tends to lag behind theory. Recently, Farhang (2008) demonstrated, in an empirical model analyzing data on federal statutory regulation across all policy areas from 1887 to 2004, that Congress has been significantly more likely to include economic incentives for private lawsuits in regulatory statutes under conditions of ideological division between Congress and the president, as measured both by divided party government and by ideological distance between Congress and the president. Political scientists have established that the conjuncture of more frequent divided party government, and increasing party polarization, has produced growing legislative-executive conflict since roughly the Nixon administration (Cameron 2000, 10–11; Jacobson 2003; McCarty, Poole, and Rosenthal 2006), and Farhang's findings suggest that this has been associated with growing congressional reliance upon private lawsuits for policy implementation during this period. Thus, while the legislative-executive conflict hypothesis is anchored in a core structural feature of the American constitutional order, this evidence suggests that its effects have increased since the late 1960s due to the historical trend toward growing legislative-executive polarization.

Qualitative historical evidence, which reveals that legislative-executive conflict over control of the bureaucracy is actually operative as a mechanism motivating legislative reliance upon private enforcement regimes, can add significantly to statistical

evidence in support of the legislative-executive conflict hypothesis. With statistical analysis of correlation between variables—such as between divided party government and Congress's passage of legislation with economic incentives for private enforcement—the causal mechanism linking them is not directly observed and remains purely theorized. With qualitative historical analysis, in contrast, the causal mechanism—such as legislative-executive competition for control of the bureaucracy—can be rendered visible through description of the processes leading to the outcome of interest. Each form of evidence underwrites a distinctive form of causal inference, and the combination of the two forms of evidence enhances inferential leverage relative to either alone because "the characteristic strengths of each approach supplement and enhance research based on the other approach" (Collier, Brady, and Seawright 2004, 249–50; see also Gerring 2007, 43–48).

## THE CASES OF LABOR, CIVIL RIGHTS, AND ENVIRONMENTAL POLICY

This article presents qualitative historical evidence demonstrating that conflict between legislative and executive preferences over policy has contributed to Congress's self-conscious and strategic mobilization of private litigants for implementation, repeatedly, over a long stretch of time, and across multiple policy domains. Given that it is the *choices of legislators* that the article seeks to explain, it relies centrally on legislative historical evidence. With respect to each of the five laws examined herein, after being introduced as a bill, each law was subject to committee hearings in which both government officials and interest groups testified about its merits or deficiencies; was amended in committee; was referred to the full body for consideration with committee reports explaining, justifying, and sometimes attacking its provisions; was debated on the floor of each chamber; and was amended through recorded roll-call votes prior to passage. With respect to each of the five laws, the entire legislative historical record was reviewed in order to identify the genesis and trace the development of the enforcement provisions, identify key legislators responsible for the private enforcement outcome, and assess legislators' motivations for electing to mobilize private litigants. The legislative historical record reviewed included all (1) initial bills introduced in the hearings, (2) hearing testimony, (3) revisions to bills following the hearings, (4) committee reports, (5) debate on the bills by members of Congress, and (6) roll-call votes on proposed amendments (for a discussion of the significance of these forms of legislative historical evidence, see Eskridge, Frickey, and Garrett 2001, especially chap. 8). Further, in each case, congressional committee oversight hearings targeting relevant agencies with implementation authority in the years leading up to the legislative interventions were also relied upon.

### Labor Regulation: Industrial Conflict

The Taft-Hartley Act of 1947, also known as the Labor Management Relations Act, was a highly significant piece of labor legislation. It amended the landmark

National Labor Relations Act (NLRA) of 1935, which compelled that employers recognize unions designated by a majority of employees, bargain with them in good faith, and refrain from engaging in a list of "unfair labor practices" that employers had long used to subvert unionization (49 Stat. 449; 61 Stat. 136). By 1947, the extent of unionization in the American economy had increased fivefold since passage of the NLRA, and alongside this burgeoning unionization, organized labor's prominence as a member of the Democratic party's ruling coalition had also grown (Hardin et al. 2002, 34–35; Farhang and Katznelson 2005). Organized labor assertively exercised its new capacity for collective action—particularly using strikes, picketing, and boycotts—under the shelter of the NLRA's protections (Dubofsky 1994: chap. 6). In the year of Taft-Hartley's passage, a preeminent labor economist of the period described the American labor movement as the "largest, the most powerful, and the most aggressive that the world has ever seen," and he characterized the strongest unions as "the most powerful private economic organizations in the country" (Slichter 1947, 154).

Labor's growing assertiveness and influence was met by denunciations from conservative Republicans and southern Democrats—a "conservative coalition" that, by the end of the 1930s, shared strong antiunion preferences (Farhang and Katznelson 2005). Further, the conservative coalition viewed the National Labor Relations Board (NLRB or the Board) as a partisan agency serving liberal benefactors in the Roosevelt and Truman executive branch, aiding leftist labor organizations, and generally pursuing policies grossly biased in favor of unions and against employers. The coalition vociferously attacked the agency on these grounds in investigative and oversight hearings starting in the late 1930s, calling for amendments to the NLRA to bring the agency under control and to check labor's mounting power (US House of Representatives [US House] 1939, 1940; Scher 1962; Gross 1981; Dubofsky 1994, 151–61). When Republicans took control of Congress in 1947, after a stretch of fourteen years in the minority, amending the NLRA to curtail the power of organized labor was at the top of their domestic policy agenda. Though Truman would veto amendments to the NLRA that struck hard at organized labor or the NLRB, the addition of southern Democratic votes to Republican majorities in both chambers created the necessary margins to override the veto, which is how the Taft-Hartley Act became law (Dubofsky 1994: chaps. 6–7; Hardin et al. 2002, 29–36; Farhang and Katznelson 2005, 16–18).

Taft-Hartley's provisions were manifestly aimed at scaling back union power, as well as the power of the NLRB. Among other important amendments to the NLRA, Taft-Hartley outlawed the "closed shop," in which union membership is a precondition to gaining employment; allowed states to pass "right-to-work" laws banning the "union shop," which permits hiring nonunion employees only on the condition that they join the union or pay union dues; and restricted political contributions by unions. Taft-Hartley also illegalized certain important forms of collective protest by unions, most significantly (1) secondary strikes, boycotts, and picketing, and (2) jurisdictional strikes, and provided for implementation of these new bans on union activity through private lawsuits for monetary damages against unions by any injured party (NLRB 1948, 1–30; Johns 1951; Sherman 1955). The law also contained numerous amendments aimed at curtailing the NLRB's discretion in a manner calculated to counteract its putative bias in favor of labor unions (Farhang and Katznelson 2005, 17–18).

A secondary labor action is defined as "a combination to influence A by exerting some sort of economic or social pressure against persons who deal with A," with the purpose of pressuring A into recognizing a union or conceding an economic benefit to one (Frankfurter and Greene 1930, 43). At the time, a typical secondary labor action involved mobilizing workers to strike, boycott, or picket firms that were not themselves engaged in a labor dispute with their own employees, but rather did business with a firm that was (Johns 1951, 264–65). In an extensively organized labor force characterized by disciplined concerted action across unions, secondary labor actions can operate as an extremely potent union weapon, and they were a weapon used frequently, effectively, and controversially by unions in the years leading up to Taft-Hartley (Cox 1947, 25–26; Dereshinsky, Berkowitz, and Miscimarra 1981, 1–3; Hardin et al. 2002, 36, 1625). Jurisdictional strikes are those arising from conflicts between unions over which union is entitled to represent employees, or which union has rights over certain work assignments within a firm, leaving employers caught in the middle of interunion conflicts, and, from the perspective of labor opponents, were highly disruptive in some industries (Comment 1953, 183–85; Hardin et al. 2002, 32, 37). According to legislative advocates of Taft-Hartley, both secondary labor actions and jurisdictional strikes unfairly caused substantial economic injuries to innocent third parties, and both were particularly damaging to economically vulnerable small businesspersons such as shopkeepers and farmers (NLRB 1948, 460–62; Hardin et al. 2002, 1625).

Among forms of collective action undertaken by unions in the years leading up to Taft-Hartley, secondary labor actions and jurisdictional strikes were, by far, the two most controversial (Teller 1949, 56–57; Hardin et al. 2002, 36–37, 1625). Said one observer shortly after Taft-Hartley was passed about the prohibitions on secondary labor actions and jurisdictional strikes, "Those who wrote the Taft-Hartley Act believed that these unfair labor practices were extreme cases of unlawfulness which struck at the very existence of a business" (Teller 1949, 57). It was, in part, conservative legislators' intense antagonism toward these particular forms of collective labor action that motivated them to press for private lawsuits to enforce the prohibitions against their use (NLRB 1948, 460–62). Moreover, in the legislative process leading to passage of Taft-Hartley, the decision to rely upon private lawsuits for enforcement was extremely controversial. The provision creating the private right of action against unions for economic damages was among the most extensively debated provisions in the entire legislative process. In the legislative history of Taft-Hartley produced by the NLRB, of the 203 topical subject headings in the index, only three topics covered more pages of the legislative historical record than "suits for damages" (xxvii–xlvii).

The conservative coalition's reliance upon private lawsuits to implement Taft-Hartley's bans on secondary labor actions and jurisdictional strikes was a radical departure from the NLRA's robustly bureaucracy-centered approach. In order to implement the regulatory commands of the NLRA of 1935, that act had created a powerful administrative apparatus, with no role for private litigation. The NLRB was set up as a quasi-judicial expert board to investigate and adjudicate labor disputes arising under the act. It was empowered to issue orders to cease and desist, pay back wages, and reinstate terminated employees, and its findings of fact were generally to be regarded as conclusive by federal courts (49 Stat. 449, §§ 3–6, 10–12; US House 1935, 11–15, 23–25). The

drafters of the NLRA deliberately elected not to allow for private litigation in implementation, generally limiting the role of courts to that of appellate review.

Employers' use of private lawsuits against unions to obtain injunctions from judges ordering the cessation of strikes, boycotts, and picketing, from the late nineteenth century until such "labor injunctions" were prohibited in the Norris-LaGuardia Anti-Injunction Act of 1932, had been a powerful weapon used by employers to limit labor's organizational capacity, fostering deep antipathy toward courts within the organized labor movement (Teller 1949, 50–54; Hattam 1993; Forbath 1998; Hardin et al. 2002, 1621–25). The New Deal liberal Democrats and labor activists who crafted and most forcefully supported the NLRA clearly anticipated much more favorable treatment of unions before the Board, who they knew would be selected by Roosevelt, than they were accustomed to expecting from judges, particularly a federal bench dominated by Republicans for decades (Blumrosen 1971, 40; Estlund 2002, 1553–54). The conservative coalition's turn toward the courts and away from the agency in Taft-Hartley was sought by employer interests (Estlund 2002, 1553; Brudney 2005, 231–32).

The Hartley bill passed by the House placed quite severe limitations on labor unions. The Taft bill passed by the Senate was, by comparison, more moderate. The final compromise reached in the conference committee was principally based upon the Senate bill (Dubofsky 1994, 202–03; Hardin et al. 2002, 36–39). The bill reported out of the House Committee on Education and Labor and passed by the House prohibited, among other things, a wide range of strike, picketing, and boycott activities by unions (*both* primary and secondary in nature), and provided for enforcement of all of these prohibitions on union protest activity through private lawsuits by any injured party, with available remedies including an injunction directing cessation of the labor actions (expressly overriding the Norris-LaGuardia Anti-Injunction Act); monetary damages for any injury suffered; and an award of attorney's fees to be paid by the union (NLRB 1948, 41–43, 77–80, 168–70, 204–07). The bill reported by the Senate Committee on Labor and Public Welfare prohibited a narrower range of concerted union actions, including the prohibitions on secondary labor actions and jurisdictional strikes that ultimately became law. Unlike the House bill, however, no private litigation was allowed; enforcement through private lawsuits was considered and rejected in the Senate committee (460–62). Instead, following the administrative implementation model embodied in the NLRA, the Board was charged with determining violations, authorized to issue cease-and-desist orders, and required to seek injunctions in court *if* it found that an illegal secondary labor action or jurisdictional strike was occurring (112–14, 131–32).

There were two contending factions in the Senate that offered amendments to allow private lawsuits, which could be used as an alternative to the Board's cease-and-desist powers, to enforce the bans on secondary labor actions and jurisdictional strikes. The more union-restraining approach, which was proposed by Senator Ball (R, MN), would have allowed, like the House bill, private lawsuits by any injured party against unions to obtain injunctions, monetary damages for any economic harm suffered, and attorney's fees to be paid by the union. This proposed amendment was defeated in a roll call (1323–24, 1370). The less union-restraining approach was proposed by Senator Taft (R, OH). In committee, Taft had supported precisely the content of the defeated Ball amendment (460–63). However, because organized labor retained sufficient support in

the Senate, including among some moderate Republicans, to defeat this quite robustly antiunion private enforcement regime, Taft recognized that it would have to be moderated to pass. The prospect of privately obtained labor injunctions was particularly controversial (1365; Dubofsky 1994, 202). The Taft amendment allowed private lawsuits by any injured party against unions to obtain monetary damages for any economic harm suffered, but it did not provide for recovery of attorney's fees by winning employers, nor did it allow them to seek injunctions. The controversial injunctive remedy could only be sought in cases prosecuted by the federal government. This proposed amendment was put to a roll call and passed (NLRB 1948, 131–32, 1399–400), and it was retained in the law as ultimately enacted (15–16, 26).

Debate over these roll calls was extensive. If the new bans on secondary labor actions and jurisdictional strikes would be adopted, legislators sympathetic to organized labor opposed enforcement through private lawsuits for damages. They argued that the Board, which was created as an expert body to adjudicate labor disputes, was fully competent to enforce the new prohibitions; that judges lacked the expertise to adjudicate labor disputes; that introducing private lawsuits alongside the Board's power to issue cease-and-desist orders with respect to the same secondary labor actions and jurisdictional strikes would create a needlessly fragmented process and, possibly, contradictory judicial and administrative rulings; that it would be inequitable to allow damages actions by employers against unions for unfair labor practices, while not allowing damages actions by unions against employers for unfair labor practices; and that antiunion employers would be excessively litigious, prosecuting many claims of questionable merit for the purpose of harassing unions and bankrupting them out of existence (358, 387, 843–44, 1057–58, 1356–61, 1368, 1380, 1390, 1506, 1552–53). The conservative coalition was not persuaded.

Why did the conservative coalition insist upon implementation of the new prohibitions on secondary labor actions and jurisdictional strikes through private lawsuits, manifestly departing from enforcement of the NLRA through the administrative machinery created in the act for that very purpose? Quite emphatically, they did not trust the NLRB, whose leadership had been appointed by Roosevelt and Truman and that they regarded as partisan and ideologically biased in favor of labor unions and against business, a view that dated back to the late 1930s. Moreover, it was nothing new that legislators hostile toward the NLRB advocated for amendments to the NLRA calculated to displace implementation authority from the Board to litigation and courts. This strategy was reflected in proposed bills also dating back to the late 1930s (US House 1939; Millis and Brown 1950, 350).[1] The difference now was that they were in the majority.

In provisions not ultimately adopted, the House's Hartley bill proposed to completely eliminate the Board and replace it with a wholly new administrative structure. The House Report, submitted by Hartley, stated that the committee's investigation of the NLRB had "shown bias and prejudice to be rampant in the Board's staff, and among some members of the Board itself," and revealed that the agency had been deciding

1. For a summary of the bills examined in the cited hearings, see especially Report of the National Labor Relations Board on Proposed Amendments to the National Labor Relations Act, contained in the supplement to the record of the hearings.

labor disputes according to "prejudice and caprice" rather than based upon facts (NLRB 1948, 297–317). The committee therefore proposed to "abolish . . . the existing discredited NLRB, and create . . . a new board of fair-minded members" (296).

In the same vein, the Senate Report stated, "the Board has acquired a reputation for partisanship" (408). Key members of the Senate committee, who actively advanced and shaped the private enforcement provisions, claimed that this partisan Board had been grossly ideologically biased in favor of unions. Senate sponsor Taft (R, OH) stated that the NLRB had been "made up of . . . people who regarded themselves as crusaders to put a CIO union, if you please, in every plant in the United States," who made "no pretense of fairness or justice," and who perpetrated "outrages" and "injustices" against employers (1655). Senator Ball (R, MN) stated that the Board had been "rabid," had "harassed employers," and had "perverted the act and used it as an instrument of the CIO" (1201). He concluded: "I am distrustful in general of the administrative-law approach, because I have . . . seen too many administrative agencies granted . . . quasi judicial powers which have been abused" (1202).

Why, Ball asked, should an injured party be compelled to suffer through a "rigmarole" administrative proceeding before a Board marred by such bias (1355)? He advocated the "fundamental liberal doctrine" that Congress "define clearly in the law the rights, responsibilities and duties of citizens, and permit them to go directly into court," rather than to "delegate vast arbitrary power and discretion to some administrative agency of government to decide whether or not a citizen's rights shall be protected in a given situation" (1354). This contention that an injured party, represented by private counsel, should be free to litigate rather than be forced to submit to an agency that the conservative coalition denominated as "biased," "prejudiced," "partisan," "rabid," and "discredited," was repeated again and again by advocates of allowing private lawsuits against unions (see NLRB 1948, 460–61, 1350–55, 1369). Deeply distrustful of an administrative apparatus under the sway of their ideological adversaries in the executive branch, the conservative coalition sought to mobilize private lawsuits to do what, in their view, the agency would not.[2]

## Civil Rights Regulation: Job Discrimination

Denial of equality in the workplace had been a fundamental concern of the civil rights movement that culminated in passage of the Civil Rights Act (CRA) of 1964. Title VII of that act, barring job discrimination based upon race, gender, national origin, or religion, was among the most radical socioeconomic interventions by the national government in American history. The question of how the job discrimination prohibitions would be implemented, and specifically the role of administrative power versus private lawsuits, was the subject of focused conflict as the bill that became Title VII worked its way through the legislative process (Farhang 2009a).

2. It bears noting that Taft-Hartley also created a federal cause of action for breaches of collective bargaining agreements. By 1947, all but a few states had already adopted this rule. Although the cause of action was made available to either the employer or the union, this amendment was opposed by unions and sought by employers, who believed that it would serve their interests, apparently on the theory that unions were more often guilty of breaching collective bargaining agreements (Millis and Brown 1950, 500–13).

The job discrimination bill that ultimately became Title VII of the CRA of 1964 was initially introduced in 1963 in the House by liberal Democrats as H.R. 405. H.R. 405 framed a robust administrative enforcement machinery closely modeled on the NLRB. It proposed to create the Equal Employment Opportunity Commission (EEOC), empowered to conduct investigations, hold administrative hearings on complaints, and issue enforceable orders to cease and desist, reinstate, hire, and award back pay (US House 1963a, 2328–36; 1963b, 2–3, 4–6, 9–13). This administrative venue was exclusive, and there would be no private right to prosecute enforcement actions in court. H.R. 405, with its bureaucracy-centered enforcement framework—having no trial court proceeding and no private right of action—embodied the enforcement preferences of civil rights advocates among legislators and activists (Whalen and Whalen 1985, 16, 36–38, 46, 66; Blumrosen 1993, 48–49).

During the course of the legislative proceedings, congressional Republicans amended the law to eliminate nearly all administrative power to implement Title VII, substituting in its stead an explicit private right for aggrieved parties to prosecute lawsuits in federal district courts to vindicate their rights. In the House, Republicans stripped the EEOC of its authority to hold administrative hearings and issue cease-and-desist orders, and its role was converted to that of prosecutor of lawsuits in federal court (US House 1963c). In the Senate, Republicans stripped the EEOC of its authority to prosecute lawsuits and substituted a private right of action as an alternative implementation vehicle, along with a provision allowing winning plaintiffs to recover attorney's fees (*Congressional Record* June 10, 1964, 13310–19). Republicans were in a position to impose this substitution of private lawsuits for administrative power because the Democratic party was deeply divided over the issue of race, with the party's southern wing vehemently opposed to civil rights legislation, making substantial Republican support pivotal to passage of the CRA of 1964 (Rodriguez and Weingast 2003; Farhang 2009a).

Why did Republicans exercise their pivotal powers to substitute private lawsuits for administrative authority? The legislative historical record leaves little doubt. They believed that executive agencies, whose leadership had been appointed by Democratic presidents in all but eight of the last thirty-one years, were ideologically slanted against business and susceptible to the president's political influence in ways that they could not control. On this point, the analogy of the proposed EEOC to the NLRB, on which it was so clearly modeled, was repeatedly invoked by Republicans as emblematic of the political mischief that could emanate from strong bureaucratic powers placed in the hands of overzealous administrators appointed by liberal interventionist presidents. Republican members of the committee that reported the bill warned, "It is a major mistake to model legislation in this field on the NLRB, which has one of the sorriest records of all the Federal agencies for political involvement," admonishing that "administrative tribunals . . . too often operate in an atmosphere of political and emotional pressures," and "have acquired a well-deserved reputation for ignoring the rules of evidence" such that "the accused . . . must bear the burden of proving his freedom from guilt" (US House 1963b, 15–19).

As applied to the civil rights context, according to Republicans, this antibusiness abuse of administrative power would produce both substantively radical interpretations of the law, and overzealous enforcement of it. They expressed anxiety about the likelihood of an ideologically liberal commission interpreting Title VII to require

"forced racial balance" with "mathematical certainty" in employment (US House 1963c, 150). H.R. 405's opponents claimed that such practices were already being carried out by the Kennedy administration's Department of Labor and that the proposed civil rights bill "vests . . . almost unlimited authority in the President and his appointees to do whatever they desire," authority that would be used to force employers "*to hire according to race*, to 'racially balance' those who work for him *in every job classification* or be in violation of Federal law" (Minority Report, 68–69; emphasis in original).

According to Senate minority leader Everett Dirksen (R, IL), who actually introduced the amendment substituting private lawsuits for administrative power (*Congressional Record* June 10, 1964, 13310–19), the administrative powers sought by liberals were boundless, affording no protection whatsoever "to an employer from fishing expeditions by investigators, in their zeal to enforce title VII" (*Congressional Record* March 26, 1964, 6449). Administrators would use the proposed bureaucratic powers, according to Dirksen, to "draw and quarter the victim," by which he meant American business (*Congressional Record* March 26, 1964, 6449). Antiregulation Republicans' solution to this threat of excessively liberal and overzealous use of administrative authority was to eliminate the administrative powers and substitute, as an alternative, a private right to sue. They thereby created a statutory implementation regime for federal job discrimination laws dominated by private lawsuits.

A quarter century later, Title VII's private enforcement provisions were substantially bolstered in the CRA of 1991, which amended Title VII to allow for compensatory damages for emotional pain and suffering, punitive damages, and trial by jury, significantly increasing private enforcement of the law (105 Stat. 1071; Farhang 2009b). The story of those amendments really begins with conflict between congressional Democrats and the Reagan administration over civil rights policy in the 1980s. Reagan's emphasis on deregulation in his 1980 campaign included attacks on overly interventionist civil rights regulation, especially category-conscious, affirmatively oriented approaches to civil rights implementation (Belz 1991, 181; Blumrosen 1993, 268).

Once in power, the Reagan administration reduced the use of the administrative apparatus to enforce civil rights laws, in general, and job discrimination laws, in particular. As one civil rights advocate and critic of the administration put it, the administration "began using executive powers to dismantle the governmental machinery" for protecting civil rights (Friedan 1981, 237–38). It reduced the EEOC's budget, adjusted for inflation and case load, by 35 percent between 1979 and 1984, leading to reductions in staff; the average length of time it took to conduct investigations about doubled between 1980 and 1989; the proportion of cases in which it found *against* the claimant doubled between 1980 and 1987, rising from approximately 30 to 60 percent; the proportion of cases in which it achieved a settlement resulting in some benefit to the claimant sank steadily, from about 32 percent in 1980 until it bottomed out at between 12 and 15 percent in the years 1985 to 1989; the number of complaints for whom it obtained monetary relief fell by 81 percent between 1980 and 1985, from 15,328 to 2,964 (Burstein and Monaghan 1986, 363–65; Citizens Commission on Civil Rights 1989, 16; Wood 1990; Blumrosen 1993, 271, table 17.1; Wines 1994, 692; Occhialino and Vail 2005, 683). Simply put, people complaining of discrimination did worse by virtually every objective measure under the Reagan EEOC than they had during previous administrations.

Alongside its curtailment of administrative civil rights enforcement, the Reagan administration also sought to cut back private enforcement litigation. It regarded private litigation as a threat to its deregulatory program, and it sought to reduce it with proposals to sharply limit attorney's fee awards for winning plaintiffs in civil rights cases, but these efforts were defeated (Greve 1987; Decker 2009, 174–88). To the contrary, after having been roughly stable during the Ford and Carter administrations, during Reagan's first term, as the demobilization of the federal civil rights administrative machinery was under way, the number of private job discrimination suits in federal court surged by 62 percent, and total private civil rights litigation underwent a similar pattern of growth (Administrative Office of US Courts 1975–85, table C-2). Title VII had been self-consciously designed (by Republicans) to insulate at least a portion of the enforcement mechanism from presidential control, and it appears to have worked.

During the 1980s, a predominantly Democratic Congress was acutely aware of the Reagan administration's demobilization of the civil rights enforcement machinery, and the decade was marked by implacable conflict over civil rights policy between Congress and the executive branch. The conflicts ranged from confirmation battles over presidential appointments in which civil rights issues were central, to the first vetoes of civil rights legislation since Reconstruction, to legislative-executive struggles over control of agencies with responsibility for implementing civil rights laws (Citizens Commission on Civil Rights 1989; Eskridge 1991, 633–41; Govan 1993, 7–16; Fisher and Devins 2006, 270–77). The EEOC was a key focal point of this conflict. In the nine years between 1983 and enactment of the CRA of 1991, Democratic-chaired congressional committees conducted no less than fifteen oversight hearings examining various aspects of EEOC enforcement efforts, including (1) the conservatism of legal positions the agency advocated, (2) the limited nature of its enforcement litigation, and (3) problems with its complaint processing practices (e.g., US House 1983, 1986, 1987a). The hearings were marked by acrimonious attacks by committee Democrats upon the agency as biased in favor of employers and as *willfully* obstructing and sabotaging enforcement. Democratic leaders of oversight committees decried "the extent to which the administration has gone to undermine the Nation's civil rights enforcement efforts" (US House 1983, 1) has "obstruct[ed] enforcement of the law [and] . . . undermine[d] the mission of the agency" (US House 1986, 2), and has made "a mockery of the solemn promise of the Civil Rights Act" (US House 1987a, 2).

Dissatisfied with enforcement efforts by the EEOC, in the CRA of 1991 congressional Democrats opted for a legislative solution, substantially increasing the economic incentives for private lawsuits to enforce Title VII. Title VII amendments were placed on the legislative agenda by a series of five Supreme Court decisions interpreting Title VII handed down by a sharply divided Supreme Court in May and June of 1989 (Govan 1993). All but one of the decisions were stridently divided, with an ascendant conservative wing carrying the day. The decisions did not overtly strike at the substantive right to a discrimination-free workplace for protected groups, but rather constricted Title VII's private enforcement regime. Addressing rules governing burdens of proof, standards of evidence, standing, statutes of limitations, attorneys' fees, and expert witness costs, in *every single one* of the cases the court adjusted these elements of Title VII's private enforcement regime in the same direction—to the detriment of women and minority plaintiffs. Civil rights groups aggressively mobilized and succeeded in

securing legislation to override most of what the decisions had done (Farhang 2009b). It was in this context that the new monetary damages provisions, which went entirely beyond overriding the Supreme Court's decisions, were enacted.

Congressional Democrats made two things abundantly clear about their motivations in adding the new damages provisions to Title VII: they were intended to increase the number of private job discrimination lawsuits, and this was necessitated by an agency that, in their view, refused to enforce the law aggressively because of its conservative, pro-employer bias. Both the House and Senate Reports emphasized that while private enforcement litigation was intended, in the compromise of 1964, to be a central part of the enforcement scheme for federal employment discrimination laws, it had proven deficient in meeting this goal. There existed instead a condition of underenforcement of meritorious claims due to inadequate monetary incentives for plaintiffs to assert claims and for attorneys to prosecute them.

With respect to the effects of modest monetary damages available under Title VII (back pay only) on would-be plaintiffs, the Senate Report stated that "victims of intentional discrimination are discouraged from seeking to vindicate their civil rights" (US Senate 1990, 30; see also US House 1990a, 39). The House Report characterized the strict limitations on monetary recovery as "significant disincentives to would-be enforcers," and as likely having "a depressant effect on discrimination suits" (43). In addition to the effects of damages on plaintiffs, their effects on lawyers mattered too. Attorneys will only represent plaintiffs, the Senate Report observed, citing the comments of a distinguished federal judge, if "the civil rights market . . . adequately compensate[s] them" (US Senate 1990, 33). The extent of monetary incentives for attorneys to enforce statutes can be regarded, the House Report stated, "as a fuel that makes the machinery of adjudication work. If the fuel runs out, the machinery does not function and civil rights do not have the effect of protecting people whose interests are at stake" (US House 1990a, 42). The new damages provisions were meant, manifestly, to mobilize plaintiffs and their lawyers.

Congressional Republicans, Bush administration officials, and their constituents strongly attacked this goal, broadly advancing an antilitigation and antilawyer theme in opposition. They warned that the proposed amendments to Title VII would be an "engine of litigation," "unleash a torrent" of litigation, trigger an "onslaught" of litigation, usher in a "litigation bonanza," and cause courts and employers to be "inundated" with employment discrimination litigation (US House 1990b, vol. 1, 360–63, 681–85; vol. 2, 89; vol. 3, 155; *Congressional Record* June 4, 1991, 3836–37). Whereas Democrats argued that the legislation would lead to prosecution of previously neglected meritorious claims, the bill's opponents argued that it would lead to initiation of more nonmeritorious suits, based on false accusations, and pursued more out of greed than any sense of justice (US Senate 1990b, 136–38, 195–96, 200–01, 206, 809–11; US House 1990b, vol. 1, 394, 400–01). Congressional democrats were not persuaded.

Democrats' ideological antipathy toward the executive branch's posture on civil rights enforcement was a critical motivation for their decision to ratchet up incentives for private enforcement litigation. Attacks by congressional Democrats on executive enforcement of civil rights laws in general, and job discrimination laws in particular, were a major theme in committee hearings and floor debates leading to passage of the CRA of 1991. Moreover, Democratic legislators made clear that they did not regard the

EEOC's asserted deficiencies as an enforcer to be mere bureaucratic ineptitude, nor the result of simple resource constraints, but rather they understood them to result from their ideological opponents' control of the executive branch. Their denunciations of the civil rights bureaucracy under Reagan and Bush closely paralleled charges leveled regularly by Democrats during the near-continuous EEOC oversight hearings throughout the 1980s—charges that EEOC leadership was obstructing and sabotaging enforcement.

During committee hearings, in explaining the need for the bill's punitive damages provision to mobilize private enforcers, Representative Donald Payne (D, NJ) remarked,

> [T]his agency which is the appointed body of administration—have you followed the last eight, nine or ten years and observed the people who have been nominated for civil rights enforcement? I think that the less you want to do to enforce civil rights the better your opportunities are to get nominated (US House 1990b, vol. 2, 68).

"We had an EEOC during the Reagan years that did not function properly," complained Representative Mary Rose Oakar (D, OH) in her floor statement in support of the proposed enhanced private enforcement regime. "Ironically," she continued, "during the last decade we had a Civil Rights Commission that had a director and a majority who worked against civil rights" (*Congressional Record* August 2, 1990, 6791). Augusts Hawkins (D, CA), who introduced the House version of the bill that lead to the CRA of 1991, offered the same observation, arguing that the employment discrimination laws had to be amended to better mobilize private enforcers because the "EEOC and the other law enforcement agencies of the Administration are not effective. They are led by individuals who do not even believe in their own law" (*Congressional Record* August 3, 1990, 6749) and who do not "believe in civil rights" (US House 1990b, vol. 2, 172). Such attacks on the Reagan and Bush civil rights record were repeated again and again by Democratic supporters of the CRA of 1991's litigant mobilizing amendments (US House 1990b, vol. 1, 383; US Senate 1990b, 238; *Congressional Record* June 4, 1991, 3851–52, 3888).

According to Hawkins, speaking as chair of the committee with oversight authority over the EEOC, oversight efforts had failed, and he regarded further attempts at oversight as futile. In his view, the agency was under the control of his ideological opponents and the committee had been unable to monitor and control it effectively. Said Hawkins in the House hearings,

> The Subcommittee on Employment Opportunities of the Committee on Education and Labor has gone through this charade for almost a decade. We have given up even investigating the EEOC because it is useless to investigate the agency because they obviously are not going to protect against the type of [discrimination] cases that we have heard this morning. . . .
>
> I was surprised this morning that one of the corporate lawyers argued in favor of EEOC, defending EEOC. A rather strange case it seemed to me. It seemed that

> when they got control of EEOC, then the EEOC was okay because they had control of it . . . In the last 10 years we have become so disgusted with what EEOC was doing that we discontinued monitoring it (US House 1990b, vol. 2, 51, 172).

Civil rights advocates in Congress believed that with the agency in the hands of their ideological adversaries, committee oversight was of limited value. Accordingly, they sought to mobilize private litigants and attorneys to do what, in their view, the agency would not.

## Environmental Regulation: Clean Air

Alongside the growing adverse health effects of industrial air pollution in the postwar period, the issue of how to control it emerged as a matter of federal concern (Melnick 1983, 26). The first federal air pollution statute was the Air Pollution Control Act of 1955, a law that mandated federal research programs to investigate the public health consequences of air pollution, and authorized provision of federal technical assistance to states, but did not actually prohibit any air polluting activity (69 Stat. 322). The federal government first undertook to restrain air pollution, in a limited fashion, in the Clean Air Act of 1963. That law created federal executive authority, with the consent of states, to hold hearings on charges of air pollution that endangered the public health, to issue administrative abatement orders, and to prosecute lawsuits against polluters who failed to comply with them (77 Stat. 392). It did not permit private lawsuits.

Amendments to the Clean Air Act passed in 1970 were a far more comprehensive and assertive federal attempt to regulate air pollution and are the foundation of modern federal air pollution regulation. Principally authored by Senator Edmund Muskie (D, ME), a well-known champion of environmental regulation, the Clean Air Act of 1970 required the recently created Environmental Protection Agency (EPA) to establish national air quality standards; directed states to develop implementation plans to comply with them; mandated that the EPA promulgate emissions limitations for new stationary sources of air pollution; and authorized the EPA to prosecute civil enforcement actions (84 Stat. 1676; Quarles 1976, 78; Melnick 1983, 28–30; Andreen 1991, 99).

It also contained the first "citizen suit" provision in federal environmental law, a novel provision introduced in its initial form by Muskie, which provoked controversy and opposition in the legislative process (Smith 2005, 141–43). Whereas private rights of action were well known in federal regulatory statutes, they ordinarily were conferred upon people who suffered a tangible economic injury due to the violation of a statute and allowed suit only against the entity causing the injury (Thompson 2000, 196–97). In contrast, the 1970 Clean Air Act's citizen suit provision conferred broad authority upon "any person" to file suit in federal district court against violators of the law *and* against the EPA for failure to carry out its mandatorily prescribed responsibilities under the Act (84 Stat. 1676, 1706). This citizen suit provision thus sought to mobilize private litigation against the targets of regulation as well as utilizing it as an instrument to control the bureaucracy.

The law provided that private plaintiffs in citizen suits could obtain injunctions—court orders directing a polluter or the EPA to do or refrain from doing particular acts—and could be awarded attorney's fees if they prevailed (84 Stat. 1676, 1706). Congress took steps to encourage expansive interpretation of the fee-shifting provision in a manner clearly calculated to mobilize private enforcers. Committees in both chambers stated in reports that courts should permissively award attorney's fees and other litigation expenses in citizen suits against polluters "which result in successful abatement but do not reach a verdict" (US Senate 1970, 136, 1974, vol. 5, chap. 2, 136). Thus, for example, if a citizen suit against a polluter resulted in a settlement that caused a reduction in pollution, but was not litigated to the point that a legal judgment was entered against the polluter, the plaintiff could still recover attorney's fees and other litigation expenses.

The Nixon administration, some of its Republican allies in Congress, and important business interests opposed some or all aspects of the citizen suit provision. Congressional Republicans and representatives of industry argued primarily that the citizen suit provision would generate an excessive number of lawsuits, thereby unduly burdening courts, harassing private industry, and weakening the EPA's efficacy as an enforcer (US Senate 1974, vol. 5, chap. 3, 273–78, 295–96, 349–50, chap. 4, 748–54). Some further argued that administrative power would be fully adequate to accomplish the enforcement task and that proponents of the citizen suit provision operated on the unfair and unfounded assumption that the Nixon administration would *willfully* elect not to carry out congressional mandates (US Senate 1974, vol. 5, chap. 3, 277–78, chap. 4, 748, 783, 788). The Nixon administration, when drafting its own bill, considered and rejected allowing citizen suits against industry (US Senate 1974, vol. 5, chap. 7, 1206). During the legislative proceedings, it urged deletion of the act's authorization of citizen suits against the agency on the ground that it "would have the unintended result of reducing the overall effectiveness of our air pollution control efforts by distorting enforcement priorities" (*Congressional Record* December 18, 1970, 42390). It also sought to curtail private actions against industry by urging that private enforcers seeking certain remedies should be required to post bonds from which a defendant, if found not liable, could recoup economic costs suffered as a result of the litigation (42390). Republican opponents of the citizen suit provisions were defeated.

Why did Congress allow and encourage private lawsuits to implement the Clean Air Act? The first half of the 1970s was a time of conflict over environmental policy in general, and over clean air policy in particular, between a democratically controlled Congress and the Nixon administration, with congressional Democrats clearly to the left of Nixon on environmental policy (Quarles 1976, 77–93, 151–61, 212; Andreen 1991, 98). In his study of the Clean Air Act, R. Shep Melnick (1983) observes that despite the fact that Nixon proposed the EPA and signed some important environmental legislation into law, "[g]enerally suspicious of the federal bureaucracy and concerned about the costs the Clean Air Act placed on industry, the president and his White House staff carefully reviewed activity in the EPA, sought to block many agency regulations, and introduced legislation to reduce the EPA's goals and authority" (33). By 1971, the Senate committee that drafted and reported the Clean Air Act of 1970, headed by environmental liberal Muskie, was planning hearings—which proved to be highly belligerent in tenor—to investigate charges that the EPA was failing to

adequately implement and enforce the act due, according to key Democrats, to "pressure exerted through the White House," acting on behalf of industry (Quarles 1976, 77–93, quotation on 90). Congress passed the Clean Water Act of 1972 only by overriding Nixon's veto, and he stated in his veto message that the law would impose "unconscionable" costs upon business (Maurrasse 1991, 1148). In 1974, Nixon sought sweeping amendments to weaken the Clean Air Act, and he relented only when his EPA administrator threatened to resign in public protest (Quarles 1976, 141).

In the context of divergence between legislative and executive preferences over environmental policy, when drafting the act, a democratically controlled Congress was distrustful that the Nixon administration would enforce its statutory mandates, and it included the citizen suit provision with attorney's fee awards to ensure adequate enforcement (Blomquist 1988, 366–67; Allen 1989–90, 267; Andreen 1991, 98). While a few proponents of the citizen suit provision suggested that it was necessitated by lack of governmental resources to accomplish the large enforcement task (US Senate 1974, vol. 5, chap. 3, 355–57), the fact that the citizen suit provision specifically authorized suits to compel agency action makes it abundantly clear that Congress was concerned not only about supplementing agency resources, but was anxious about agency deviation from congressional mandates. The Democrat-led committee reports on the act stated that "government initiative seeking enforcement of the Clean Air Act has been restrained," and has "fail[ed] . . . to demonstrate sufficient aggressiveness"; that the citizen suit provision was intended to "motivate governmental agencies" to enforce the act; and that the citizen suit provision would ensure "vigorous enforcement action" even if "agencies should fail in their responsibility" to enforce it (US Senate 1970, 3, 21, 36–37; US House 1970, 5; see also Blomquist 1988, 367; Cross 1989, 56; Allen 1989–90, 268).

During the Senate floor debates, one Democratic supporter of the citizen suit provision introduced a statement into the legislative record asserting that environmental citizen suit provisions were necessary because bureaucrats were "derelict in the enforcement of the very standards they were created to enforce" (*Congressional Record* August 3, 1970, 12615–17), and another introduced a statement averring that environmental citizen suit provisions were necessary because "administrative agencies are not doing their job to protect and preserve natural resources" (US Senate 1974, vol. 5, chap. 3, 362). In 1971, the Senate Committee Report on the Clean Water Act, passed over Nixon's veto, emphasized that a similar citizen suit provision could remedy "an almost total lack of enforcement" by the EPA (Cross 1989, 56). In the Clean Air Act of 1970, divergence between legislative and executive preferences over environmental policy was an important factor contributing to Congress's decision to mobilize private enforcement litigation.

This was not the end of the controversy over private enforcement of the Clean Air Act. The law's citizen suit provision was substantially bolstered by amendments in 1990. Much like the case of the CRA of 1991, the story of those amendments really begins with conflict between congressional Democrats and the Reagan administration over environmental policy in the 1980s. Reagan's emphasis on deregulation in his 1980 campaign included attacks on environmental regulation in general, and the Clean Air Act in particular, as an impediment to industrial growth (Melnick 1983, 24; Kenski and Kenski 1984, 97). Once in power, the Reagan White House undertook a substantial

legislative initiative to weaken the Clean Air Act, but it was derailed by loud denunciations from congressional Democrats coupled with broad public support for existing environmental laws (Melnick 1983, 24; Andreen 1991, 102).

As an alternative strategy of deregulation, Reagan undertook to withdraw the administrative enforcement machinery—a strategy that one critic characterized as "deregulation through the back door" (Mikva 1990). The administration sharply reduced the EPA's budget, yielding a drop of 41 percent between 1980 and 1985; it cut staffing levels, producing a reduction in enforcement attorneys from 200 to 30 by the end of 1982; the extent of enforcement activity initiated by the EPA, correspondingly, "slowed to a trickle"; and it suspended regulations that it regarded as excessively stringent (Feller 1983, 554; Andrews 1984, 164–65; Fotes 1985, 130; Goodman and Wrightson 1987, 132; Montalvo 2002, 233; Miller 2008, 10192). The administration generally pursued "a clear policy, albeit unwritten, to discourage the vigorous enforcement of the environmental statutes" (Andreen 1991, 102).

The Reagan administration also sought to cut back private environmental lawsuits, which it regarded as a threat to its deregulatory program, through proposals to sharply limit attorney's fee awards in environmental cases, but these efforts failed (Greve 1987; Decker 2009, 174–88). To the contrary, in tandem with the executive demobilization, the number of private suits under federal environmental statutes against polluters surged: the average annual number increased by 38 percent between the Carter presidency and Reagan's first term, and it increased an additional 116 percent in Reagan's second term (Fotes 1985, 130–31; Administrative Office of US Courts 1977–88, table C-2). Whereas there had been one citizen suit for every six filed by the EPA in the Carter years (representing about 17 percent of prosecutions), in the Reagan years the number of private enforcement actions exceeded suits prosecuted by the EPA (Montalvo 2002, 223; Miller 2008, 10192). The 1970 Democrat-led Senate committee that crafted the Clean Air Act's private enforcement regime stated that it was meant, in part, to ensure "vigorous enforcement action" even if "agencies should fail in their responsibility," and the growth of private enforcement alongside slackening executive enforcement appears consistent with these intentions. This apparent gap-filling by private lawsuits, as we shall see, would later be cited by congressional Democrats as a reason to bolster the Clean Air Act's private enforcement regime.

Congressional Democrats took notice of Reagan's efforts at "deregulation through the back door." Oversight hearings and investigations of the EPA by Democrat-led congressional committees were frequent in number and sharply acrimonious in tone throughout the 1980s, and committee Democrats persistently leveled the same charge: the agency was *willfully* failing to implement, and was actively subverting, Congress's statutory mandates (Mintz 1995, 54–58, 78–81, 97–100; see also Kenski and Kenski 1984, 100–01, 104). Democratic leaders of oversight committees attacked EPA enforcement as "seriously deficient," to the point of simply ignoring known serious violations of environmental laws (US House 1982, 3–4); they decried its "unethical conduct, wrongdoing, and political manipulation" (US House 1984, iii); and they castigated its "continuing negligence," concluding that "continued inaction can simply no longer be tolerated by Congress" (US House 1987b, 2). Congress took action.

The 1990 amendments to the Clean Air Act increased the substantive reach of the act, including the imposition of new restrictions on the discharge of hazardous

pollutants into the atmosphere. It also made a number of very important modifications to how the law would be implemented, strengthening both its administrative and private enforcement provisions. The citizen suit provision was strengthened in a manner calculated to mobilize more private suits, both against the agency when it failed to implement the law vigorously and directly against polluters. The 1990 amendments provided new opportunities for suits asserting that the agency is failing to take actions prescribed by the act or is engaged in unreasonable delay in doing so, and for suits challenging agency decisions to approve emissions permits (Smith 2005, 146).

With respect to private suits directly against polluters, the 1990 law made a number of important changes. First, it allowed for the imposition of monetary penalties, whereas previously only injunctive relief—court orders that defendants stop polluting—could be obtained in private suits. Whereas the norm under environmental statutes was for civil monetary penalties to be paid to the Treasury's General Fund, under the 1990 amendments, the monetary penalties could be allocated to fund enforcement of the Clean Air Act by the EPA or to pay for "beneficial mitigation projects" that are consistent with the act and "enhance the public health or the environment" (104 Stat. 2399, 2679–83; Buente 1991, 2249–50). In addition to providing funds for environmental defense and improvement, such monetary penalties increased plaintiffs' bargaining power to achieve favorable settlements and thereby increased the incentive to file private actions (Fotes 1985, 155–59).

Second, the 1990 amendments specified that citizen suits could be filed against polluters for purely *past* violations, even if those violations had ceased by the time the suit was filed (104 Stat. 2399, 2683). This new language overruled a 1987 Supreme Court decision holding that the Clean Air Act's citizen suit provision applied only to ongoing violations and did not allow suit for purely past violations. Under that decision, if a defendant just stopped polluting prior to being subjected to a citizen suit, it would be immunized from one, which proved to be a significant impediment to citizen suits (Buente 1991, 2237–39; Smith 2005, 146).

Third, the 1990 amendments eased plaintiffs' burden of proving violations, thereby facilitating citizen suits. They substantially expanded the type of evidence that could be used to prove Clean Air Act violations in court, overruling federal court decisions in the 1980s that had imposed stringent evidentiary requirements that made such cases difficult and costly to prove (104 Stat. 2399, 2679; Buente 1991, 2239–43). They also expanded the use of operating permits that clearly define lawful emissions levels for facilities and mandated that facilities monitor and publicly report emissions, making violations easier and cheaper to detect and prove by simply using a facility's own publicly available emissions data and permit specifications (104 Stat. 2399, 2635–43; Fotes 1985, 159–64; Buente 1991, 2239–43).

These provisions strengthening the Clean Air Act's private enforcement regime were drafted in and reported out of a democratically controlled Senate committee (US Senate 1993, 8338–9049). A group of antiregulation Republicans in the Senate offered amendments on the floor to weaken or eliminate them, arguing that the proposed amendments to the Clean Air Act's citizen suit provision would produce excessive litigation, obstructing effective agency enforcement, wasting agency resources, and harassing business. The Republican amendments were narrowly defeated in a series of close roll-call votes (US Senate 1993, 6406–30; Smith 2005, 146).

It is abundantly clear that the 1990 revisions to the Clean Air Act's citizen suit provision were calculated to increase both private enforcement against polluters and private suits to monitor the agency. Why did Congress purposefully seek to increase private environmental litigation? A Democratic Congress chose to bolster private litigants' ability to enforce the Clean Air Act, in part, because it was deeply dissatisfied with the performance of the EPA, which it believed had been *willfully* subverting congressional preferences embodied in environmental statutes. This charge of willful subversion, made explicitly, harshly, and repeatedly during congressional oversight hearings and investigations throughout the 1980s, reverberated through the legislative debates over whether to expand citizen suits in the 1990 amendments.

Senate majority leader George Mitchell (D, ME), in urging the need for more citizen suits, characterized EPA delay and inaction as "nothing short of astonishing" and went on to claim that "without such [citizen suit] litigation, key provisions of the act may remain unimplemented" (US Senate 1993, 6446). In the House, Representative Cardiss Collins (D, IL) participated in drafting the amendments to the citizen suit provision. She explained her motivations on the House floor: "The objective is to ensure the rights of the clean air laws, even when the authorities have *chosen* not to pursue violations" (US Senate 1993, 1308, emphasis added). She claimed, "many . . . congressional directives [in the Clean Air Act] were never carried out by the EPA," that the EPA was "blatantly violating" such congressional directives, and that throughout the 1980s the EPA actively sought to avoid judicial scrutiny of violations of the act (2776). Representative Henry Waxman (D, CA) also participated in drafting and proposing the changes to the citizen suit provision. He characterized the Reagan administration's posture toward the Clean Air Act in the 1980s as a "fundamental assault" (Waxman 1991, 1726), and he introduced a statement into the record during the House debates that stated, "During the 1980s, the only effective enforcement of federal environmental laws was citizen involvement through lawsuits" (US Senate 1993, 2570). Unmistakably, legislative-executive conflict over control of the EPA was an important factor driving Congress to enlist private litigants in the campaign to execute its environmental regulatory program.

## CONCLUSION

Evidence from federal regulatory legislation in the areas of labor, civil rights, and environmental policy, covering a half-century, provides direct support to the theory that conflict between legislative and executive preferences over policy implementation creates an incentive for Congress to rely upon private lawsuits to achieve its regulatory goals. The mechanism operated with Republican legislators facing Democratic presidents, and Democratic legislators facing Republican presidents, and it remained a source of controversy, and an active influence on congressional decision making, throughout the half-century period studied. In the cases of labor, civil rights, and environmental law, the private enforcement regimes came at the expense of administrative power. In Taft-Hartley, the NLRB was essentially bypassed via private lawsuits; in Title VII, the proposed EEOC was stripped of adjudicatory powers in favor of private lawsuits; and in the Clean Air Act, private litigants were empowered not just to sue

violators, but also to sue the EPA to challenge agency decision making and force agency action. Further, private litigants were empowered under all three laws to prosecute cases that the agency, in its discretion, would prefer not be prosecuted. In all three cases, legislative-executive conflict, rooted in American constitutional separation of power arrangements, simultaneously led Congress to constrain administrative power and to mobilize private litigants.

While the focus of this article is on legislative-executive conflict as a cause of private enforcement regimes, in reflecting upon the significance of the cases, the question naturally arises what the consequences are of the legislative choice of private enforcement regimes at the expense of administrative power. This is an extremely difficult question. For more than three decades, scholars, mainly law professors, have debated the comparative virtues and vices of implementation through private litigation versus administrative power along various dimensions of policy efficacy, such as resource mobilization behind enforcement, legal predictability, and policy expertise, as well as along dimensions of economic efficiency and democratic responsiveness (see Stephenson 2005 for a review of this debate). The debate rages on today, and nothing remotely resembling a consensus has emerged regarding the policy consequences of the choice of private enforcement over administrative power. While that massive debate cannot be engaged in this brief conclusion, it does intersect with the evidence of this article in an important respect that deserves mention.

One relatively minor line of argument in the private litigation versus administrative power debate is the contention, from the perspective of advocates of private enforcement, that private enforcement regimes with sufficient incentives will produce a more durable, consistent, and predictable source of enforcement. In contrast, administrative regulators may choose to underenforce for a number of reasons, including the regulators' own policy preferences and pressure emanating from executive influence and oversight (Coffee 1983; McCubbins, Noll, and Weingast 1987; Burke 2002; Stephenson 2005). Thus, according to regulation scholar John Coffee (1983, 227), "private enforcement . . . performs an important failsafe function by ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers . . . and that the legal system emits clear and consistent signals to those who might be tempted to offend."

In the cases examined, this argument, which occupies a modest place in the sprawling policy debate over the effectiveness of litigation versus bureaucracy, proved to be a dominant concern among legislative advocates of private enforcement. This fact highlights something important that is largely missing from that debate—a debate in which critics of private enforcement tend to contemplate agencies as ideal types, operating at their full potential in the service of congressional mandates. The evidence in this article suggests that, *from Congress's point of view*, the concrete historical choice may not be one between private lawsuits and a faithful bureaucratic apparatus, but rather may be one between private lawsuits and a subversive bureaucratic apparatus. These are radically different choices, and evaluation of actual policy alternatives should recognize the distinction.

Indeed, this is a pragmatic lesson whose full import had to be learned from painful experience by some policy activists, giving rise to sharp ironies in how their positions shifted over time on the issue of private enforcement. Civil rights advocates in 1963–64 strongly preferred administrative adjudication on the model of the NLRB—to them a

symbol of effective administrative power—rather than private lawsuits for Title VII implementation. After private enforcement was imposed by pivotal conservative Republicans, however, civil rights liberals soon came to embrace it and pursue its entrenchment and expansion, a transformation in outlook owing partly to dismal underenforcement of Title VII by the executive branch (Farhang 2009a). Similarly, while union advocates were eager to minimize the judicial role and maximize the administrative role in implementation of the NLRA in 1935, in recent years some union advocates, complaining that the act's protections of worker rights are "notoriously underenforced" by the NLRB, have argued for amending the law to provide workers (rather than just employers) a private right of action on the model of Title VII for some of the law's core guarantees (Estlund 2002, 1551–59; Brudney 2005, 232–34; Sachs 2008, 2690, 2696–97).

Finally, the evidence in this article is in tension with the familiar argument that court-based elaboration and enforcement of policy is a deeply undemocratic and unaccountable form of governance, resulting from an unholy alliance of an imperial judiciary and irresponsible plaintiffs' lawyers (Glazer 1975; Sandler and Schoenbrod 2002). In contrast with this vision, there has emerged in recent years a line of research, often referred to as the "regime politics" approach to the study of courts, which seeks to shift from a focus on the judiciary as an autonomous bubble where judges and lawyers reign free from democratic constraint, to a focus on the judiciary as an institution that is used, strategically and instrumentally, by the elected branches in support of their political and policy agendas (Gillman 2008; Barnes 2007). As applied to the domain of statute, scholars working in this vein have shown how Congress self-consciously and strategically empowers courts, through the provision of statutory tools, to engage in policy elaboration that Congress cannot accomplish itself (Barnes 1997; Gillman 2002; Lovell 2003). The cases examined in this article build upon and contribute to this line of research, demonstrating how constitutional separation of powers constrains Congress's capacity to control bureaucratic enforcement and encourages it to mobilize private litigants to aid in the execution of its regulatory agenda, thereby empowering courts to elaborate policy. Of course, Congress can by no means fully control the way these powers are ultimately exercised by litigants, lawyers, and federal judges, but their empowerment by Congress is most definitely democracy at work.

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