# CLASS ACTIONS AND EXECUTIVE POWER

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*Decisions about class certification and arbitration have depressed private enforcement class actions, reducing deterrence and enforcement of important substantive rights. Until now, the consequences of these procedural decisions for the separation of powers have not been well explored. An aggressive Supreme Court and an inactive Congress have increased the importance of federal administrative law—for example, administrative attempts to regulate arbitration. Moreover, a reduction in private enforcement compounds the importance of public enforcement. State and federal enforcers may piggyback on (successful or unsuccessful) private suits, and they may employ new tactics to maintain deterrence. While proponents of a robust regulatory state may take solace in these executive rejoinders, they are not without costs. Specifically, executive action may be less transparent, less durable, and more susceptible to political pressures than its alternatives.*



## INTRODUCTION

Proceduralists are careful to say that Federal Rule 23 does not abridge, enlarge, or modify any substantive right—otherwise it would run afoul of the Rules Enabling Act.[1] But when Rule 23 class actions are put together with substantive rights, "private enforcement" of those rights may occur in situations where it would not be possible without the class device.[2] In other words, when combined with statu-

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[1] 28 U.S.C. § 2072 (2012).

[2] *See, e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 4–16 (2017) (describing the rise of private enforcement); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 6 (2010) (discussing private enforcement regimes as "critical component[s] of American regulatory state capacity"); Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 639–42 (2013) (considering the private enforcement of statutory and administrative law); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1146–53 (2012) (describing the

tory rights, the birth of the modern class action in 1966 increased the power of private enforcement in U.S. law.[3] And since 1966, federal and state legislatures have routinely relied on private enforcement to further societal goals such as deterrence and compensation.[4]

Scholars have ably documented the connections between changes in class action law and private enforcement,[5] but that is not the whole story. Less well explored have been the consequences for the separation of powers. For better or worse, these recent trends have empowered state and federal *executive* actors.[6]

This Article begins in Part I with a brief survey of developments in class action law and a recapitulation of the critiques of those developments with respect to deterrence and enforcement. This Article then turns to federal and state executives. Part II analyzes the "administrative law" responses to the decline of private enforcement, and Part III considers the effect of class action retrenchment on executive

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history of U.S. private enforcement). This is especially significant in the context of "negative expected value" suits. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Actions and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 9–10 (1991) ("The class action is a tool for overcoming the free-rider and other collective action problems that impair any attempt to organize a large number of discrete individuals in any common project.").

[3] This Article addresses Rule 23(b)(3), but of course other parts of Rule 23 matter too. *See, e.g.*, David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 830–33 (2016) (discussing suits for injunctive or declaratory relief under Rule 23(b)(2)).

[4] *See generally* FARHANG, *supra* note 2, at 60–68 (measuring private enforcement regimes); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 303–04 (2016) (discussing the overlapping authority private and public actors have to enforce the law).

[5] *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 735 (2013) (analyzing developments in class action law that "undermine[ ] the compensation, deterrence, and efficiency functions of the class device"); Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 499 (2016) [hereinafter Marcus, *Bending in the Breeze*] (highlighting the "headwinds" class actions face and "concerns about precluding private enforcement of public law norms"); David Marcus, *The History of the Modern Class Action, Part I:* Sturm Und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587, 590 (2013) (identifying a "regulatory conception" of Rule 23, under which "class actions offered an important substitute for, or addition to, public administration"); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 296–97 (2014) (noting that the constrained availability of class actions has reduced their effectiveness as a means of private enforcement); Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 406–12 (2014) (describing common conception of class actions that focuses, in part, on "effective vindication" of rights and deterrence through private enforcement).

[6] This connection between the class action and state power is consistent with Professor Samuel Issacharoff's three functions of class actions in *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369 (2012), which discusses the class action as a challenge to state authority, a complement to state authority, and a substitute for direct state authority.

"law enforcement."[7] In brief, while executive actions could revive or replace private enforcement, those effects will be incomplete and unstable. Moreover, over-reliance on executive enforcement risks creating a new political economy of enforcement that may have pernicious consequences for social welfare and access to justice.

## I
## Developments in Class Action Law

The private enforcement class action faces strong "headwinds" in the form of class certification, subject-matter jurisdiction, and arbitration.[8] This Part briefly reviews these developments before turning in the following Parts to the interbranch dynamics they have wrought.

First, although definitive data are not available, the Supreme Court seems to have made it more difficult to certify a class action under Rule 23, particularly under Rule 23(b)(3).[9] *Wal-Mart Stores, Inc. v. Dukes*,[10] though in many ways a decision about Title VII,[11] seems to have tightened requirements on Rule 23 commonality.[12] *Comcast Corp. v. Behrend* may have done the same for Rule 23 predominance.[13] Earlier decisions such as *Amchem Products, Inc. v.*

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[7] I use "administrative law" to refer to various forms of lawmaking, and "law enforcement" to refer to the exercise of prosecutorial discretion for civil enforcement and representative litigation. Both functions are housed in the executive branch.

[8] *See* Marcus, *Bending in the Breeze*, *supra* note 5, at 499, 504–11 (discussing the developments in class action law since 2002). For additional elaboration of these issues in this volume, see Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. Rev. 973–74 (2017).

[9] *See* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. Pa. L. Rev. 1543, 1568–82 (2014) (emphasizing the role of Supreme Court jurisprudence in retrenching private enforcement).

[10] 564 U.S. 338 (2011).

[11] *See, e.g.*, Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 Wash. U. L. Rev. 1027, 1028–29 (2013) (discussing the relationship between Title VII policy and the operation of Rule 23). The Title VII-specific aspects of *Dukes* restrain private enforcement too, just not trans-substantively.

[12] *Dukes*, 564 U.S. at 348–60 (describing the "rigorous analysis" for commonality). *See generally* Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 Nw. U. L. Rev. Colloquy 34, 35 (2011) ("[T]he Court drew a boundary line that favors large, powerful employers over everyday workers alleging systemic discrimination."); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 Harv. L. Rev. 78, 148–54 (2011) (discussing the Court's requirement of "commonality" in the class); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. Rev. 441, 463–74 (2013) (discussing the development of heightened commonality).

[13] 133 S. Ct. 1426, 1432–33 (2013) (describing the "rigorous analysis" whether "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class"). *But see id.* at 1436 (Ginsburg & Breyer, JJ., dissenting) (arguing that "the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable on a class-wide basis").

*Windsor* suggested that some sense of "cohesion" among class members is now necessary for certification.[14]

Lower courts have tightened certain aspects of Rule 23 certification as well.[15] For example, for decades lower courts routinely certified classes based on the pleadings.[16] But beginning with the Seventh Circuit in 2001,[17] courts of appeals have changed course, regularly requiring district courts to resolve factual disputes antecedent to certification.[18] Professor Wolff also has cataloged federal courts' use of the "discretion not to certify."[19] And, of course, the Federal Rules have not been unchanged since 1966. The authorization of interlocutory appeals in 1998 has allowed defendants to challenge certification early.[20] Along similar lines, the 2003 amendments may have contributed to some lower courts scrutinizing class definitions more closely under an emerging "ascertainability" doctrine.[21]

A second key development relates to the scope of federal subject-matter jurisdiction. Decisions about Rule 23 apply only in federal

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[14] 521 U.S. 591, 623 (1997) ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."). *See generally* Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 654–55 (2014) ("[T]he *Amchem* Court focused on intraclass cohesion not so much to avoid conflicts that might impair outcome quality, but to assure the degree of intraclass homogeneity necessary for due process and legitimacy.").

[15] Professor Klonoff ably surveyed lower court decisions making class certification more difficult, *see* Klonoff, *supra* note 5, at 739–45, though in this volume, he documents some slowing of that trend. *See* Klonoff, *supra* note 8, at 994–1002 (collecting sources).

[16] *See* Klonoff, *supra* note 5, at 747 (collecting sources).

[17] Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675–76 (7th Cir. 2001) (stating that district judges should make all necessary factual and legal inquiries before allowing a case to proceed as a class action).

[18] *See, e.g.*, Klonoff, *supra* note 8, at 994–1002 (collecting sources); Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 349–54 (2011) ("[T]he Seventh Circuit recognized that evidentiary inquiries are necessary to determine whether a class should be certified. Shortly thereafter, the Second Circuit upheld doing something a great deal like a *Daubert* analysis of the expert theory propounded by the plaintiffs in support of class certification . . . ." (citation omitted)).

[19] Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1926–38 (2014) (collecting cases).

[20] *See* FED. R. CIV. P. 23(f) (discussing appeals). Admittedly, plaintiffs may challenge decisions denying certification as well, though many have suggested that settlement pressures were the primary drivers of the amendment. *See, e.g.*, Klay v. Humana, Inc., 382 F.3d 1241, 1275 (11th Cir. 2004) (reaching this conclusion and collecting cases). Though far from determinative, a Westlaw review of court of appeals decisions in 2015 related to Rule 23(f) reveals twenty appeals from defendants following class certification, seven from plaintiffs following denial of certification, and one cross-appeal filed after partial certification.

[21] *See* Klonoff, *supra* note 5, at 761–68 (collecting sources). For a recent discussion of ascertainability, see Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1124–33 (9th Cir. 2017).

court[22]—and, indeed, I have documented elsewhere state court decisions expressly declining to apply *Dukes* and *Comcast* to state certification law.[23] But the broader that federal jurisdiction sweeps, the more cases to which federal procedure applies. Enter the Class Action Fairness Act of 2005 (CAFA).[24] A frequent source of commentary and criticism,[25] CAFA expanded the scope of federal jurisdiction to include many more putative state class actions.[26] The word "putative" is significant—even if a case is ultimately denied certification in federal court (e.g., under *Dukes* or *Comcast*), it will not be remanded to state court where certification might be possible.[27]

A third important development is arbitration.[28] The Federal Arbitration Act (FAA) declared that certain arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[29] Though this statute dates to 1925, it has taken on added prominence in recent years.[30] The Roberts Court has been particularly aggressive in pro-

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22 *See* Rules Enabling Act, 28 U.S.C. § 2072 (2012); *see also* FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . .").

23 Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. (forthcoming 2018) (manuscript at 20–21).

24 28 U.S.C. § 1453 (2012) (stating that class actions are removable to federal court "in accordance with section 1446 . . . without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants").

25 *See, e.g.*, Symposium, *Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, 156 U. PA. L. REV. 1439 (2008) (reviewing the development and impact of CAFA).

26 *See* 28 U.S.C. § 1453. For example, under CAFA, some putative state class actions seeking more than $5 million may be removed based on minimal (rather than complete) diversity of citizenship. 28 U.S.C. § 1332(d)(2) (2012).

27 *See* Clopton, *supra* note 23, at 30–31 (collecting cases and sources). Although *Smith v. Bayer Corp.* held that a state is not bound by a previous federal court decision to deny certification, 564 U.S. 299, 302 (2011), if the new state case may be removed under CAFA, then the putative class action will remain putative.

28 Judith Resnik, among others, has put forth considerable effort to highlight the role of arbitration in U.S. law. *See, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2816 (2015) (providing a genealogy of arbitration "through waves of United States Supreme Court interpretation"); Resnik, *supra* note 12, at 113 ("[T]he Court has moved the FAA from a limited role to a major source of regulation of both state and federal judges and, to a lesser degree, of arbitrators.").

29 9 U.S.C. § 2 (2012).

30 *See, e.g.*, Resnik, *supra* note 28, at 2809 ("The recent Supreme Court FAA case law has garnered a good deal of criticism for cutting off the production of law, for undermining the role of Article III courts, for limiting associational rights, and for constricting access to law by enforcing bans on the collective pursuit of claims.").

moting arbitration[31]: allocating more issues to arbitrators (and fewer to judges);[32] preempting state laws that attempt to regulate arbitration;[33] and paring back the exception for the effective vindication of rights.[34] With respect to class actions, *AT&T v. Concepcion* held that the FAA preempted a state law treating certain class action waivers as unconscionable.[35] In other words, class action waivers in arbitration clauses are permissible—and good business.[36] Blessed by the Supreme Court, putative defendants have included mandatory arbitration clauses in consumer and employment contracts, among others.[37] One less studied option is the inclusion of mandatory arbitration provisions in corporate bylaws.[38] The Delaware courts enforce forum-selection

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[31] *See, e.g.*, Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 852 (2012) ("[T]he Roberts Court . . . produced more infatuatedly and dramatically divisive pro-arbitration opinions restricting class action litigation and even class action arbitration.").

[32] *E.g.*, Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 72 (2010) (holding that an arbitration agreement may assign all questions of enforceability to the arbitrator); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (holding that the validity of a contract as a whole, where the contract contains an arbitration clause, is an issue for the arbitrator).

[33] *E.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340, 352 (2011) (preempting a California rule that invalidated as unconscionable certain class-arbitration waivers); Preston v. Ferrer, 552 U.S. 346, 363 (2008) (preempting administrative-exhaustion requirement).

[34] *E.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309–12 (2013) (refusing to invalidate arbitration agreement prohibiting class arbitration).

[35] 563 U.S. at 340, 352. Though not a class action decision per se, consistent with *Concepcion*, the Supreme Court in *American Express Co. v. Italian Colors Restaurant* refused to invalidate an arbitration agreement with a class-arbitration waiver even if class resolution was the only economically viable way to "effectively vindicate" a federal right. 133 S. Ct. at 2310 n.2. Justice Kagan noted the Court's consistency in dissent: "To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled." *Id.* at 2320 (Kagan, J., dissenting).

[36] Connecting these procedural doctrines to substantive law, Professor Glover remarked that federal arbitration law had the effect of "erod[ing] substantive law from the books, with the consequent erosion of both the private compensatory goals and public deterrent objectives of that law." J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015).

[37] *See, e.g.*, Resnik, *supra* note 28, at 2872 (describing the millions of employees and consumers covered by arbitration provisions).

[38] *See generally* Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751, 752 (2015) (examining "the legal and policy issues raised by arbitration bylaws, whether adopting such bylaws would be attractive to public companies, likely reactions from stockholders, and opportunities for private ordering"); Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 587 (2016) (addressing "whether the FAA takes the choice to allow arbitration of corporate disputes out of state hands by commanding that states enforce arbitration clauses in corporate charters and bylaws and by preempting any attempt states might make to regulate their use"); Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIRICAL LEG.

bylaws,[39] and the Supreme Court has characterized arbitration clauses as a "specialized form of forum-selection,"[40] so mandatory arbitration by bylaw seems plausible too.[41]

Put together, the requirements of Rule 23, CAFA, and the FAA have weakened private enforcement class actions. The result, in many situations, is a reduction in deterrence and enforcement—there are simply fewer cost-justified private claims in this new era.[42] Although resolving debates about optimal enforcement is beyond the scope of this Article, this reduction in deterrence and enforcement has been a central frame for critics of the Supreme Court in this area.[43] Public-enforcement agencies seem to agree: For example, eighteen states recently filed a comment supporting a proposed federal regulation limiting arbitration in consumer law cases.[44] The states argued that private enforcement is a *necessary* component of the overall regulatory scheme.[45]

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STUD. 31, 33–34 (2017) (reporting findings on the adoption of exclusive forum provisions); Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 498–522 (2016) (documenting procedural provisions in corporate charters and bylaws).

[39] *See, e.g.*, Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 939 (Del. Ch. 2013) (stating that "forum selection bylaws are not facially invalid as a matter of statutory law").

[40] Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).

[41] *See, e.g.*, Allen, *supra* note 38, at 808 ("The Delaware courts have signaled that board-adopted bylaws addressing the phenomenon of frivolous litigation, including forum selection bylaws, are valid, although their adoption and enforcement are subject to situational challenge."). At least one state court in Maryland expressly endorsed the use of a mandatory arbitration provision in corporate bylaws. *See* Corvex Mgmt. v. Commonwealth REIT, No. 24-C-13-001111, 2013 WL 1915769, at *9–12 (Md. Cir. Ct. May 8, 2013) (denying plaintiff's petition to stay arbitration).

[42] Other legal developments have further retrenched private enforcement. *See, e.g.*, BURBANK & FARHANG, *supra* note 2, at 130–81 (discussing, *inter alia*, decisions on offers of judgment, pleading, private rights of action, standing, attorney fees, and damages).

[43] *See generally id.* at 169–80 (analyzing the Supreme Court's private enforcement decisions from 1960 through 2014); Burbank & Farhang, *supra* note 9, at 1546 ("[J]ust as the Supreme Court has been more successful in constricting private enforcement through decisions . . . so too, we argue, has the Court's power to make procedural law constraining private enforcement through decisions—specifically its power to 'interpret' Federal Rules—been more consequential than its power to promulgate Federal Rules."); Miller, *supra* note 5, at 296–97 (stating that the constrained availability of the class action has impaired its utility as a deterrent to large-scale wrongdoing); Resnik, *supra* note 28, at 2836–55 (discussing the courts' "erasure of rights"); Resnik, *supra* note 12, at 80 ("The reason to link *AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers* is that all three rest on . . . the impact of public processes on rights enforcement, and on the function of courts in democratic orders.").

[44] Letter from the Commonwealth of Mass. Office of the Attorney Gen., to Richard Cordray, Dir., Consumer Fin. Prot. Bureau (Aug. 11, 2016), www.mass.gov/ago/docs/consumer/cfpb-multistate-letter.pdf.

[45] *Id.* at 2. For another example, SEC Chairman Arthur Levitt Jr. observed that "[t]he Commission has long maintained that private actions provide *valuable* and *necessary* additional deterrence against securities fraud." *The Effectiveness of the Private Securities*

## II
## Administrative Law

The retrenchment of the private enforcement class action has not occurred in a vacuum, but instead has created opportunities for the other branches to act. Certainly Congress has the power to respond, but it does not seem eager to reverse the Court's arbitration and class action jurisprudence—whether because Congress supports these decisions or because of generalized gridlock.[46] Meanwhile, because pro-arbitration doctrine is derived from a preemptive federal statute, and because CAFA sweeps in even putative state class actions, state attempts to deviate through legislation or judge-made law are not effective.[47]

That leaves the executives. This Part reviews executive action, roughly labeled as "administrative law," before turning in the next Part to the executive's "law enforcement" responses. I use the term "administrative law" loosely: the making of law and policy by executive agencies. In particular, in recent years, multiple federal agencies have sought to use their existing authorities to tamp down on arbitration in support of private enforcement.[48]

A classic form of administrative law is notice-and-comment rulemaking.[49] Following a major study on consumer arbitration,[50] the Consumer Financial Protection Bureau issued a final rule pursuant to the Dodd-Frank Act that seeks to prohibit the use of mandatory arbitration clauses in many consumer finance contracts.[51] The Centers for

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*Litigation Reform Act of 1995 to Curb Securities Litigation Abuses, Including the Degree to Which State Laws May Be Used to Circumvent the Purposes of That Act: Hearing Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous. & Urban Affairs*, 105th Cong. 45 (1997) (statement of Arthur Levitt, Chairman, Securities and Exchange Commission) (emphasis added).

[46] *See, e.g.*, Symposium, *The American Congress: Legal Implications of Gridlock*, 88 Notre Dame L. Rev. 2065 (2013) (offering various perspectives on the concept of gridlock).

[47] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 338, 352 (2011) (holding that California's *Discover Bank* rule, which struck certain arbitration clauses as unconscionable, is preempted by the FAA); Preston v. Ferrer, 552 U.S. 346, 359 (2008) (holding that under the FAA, arbitration agreements supersede state laws requiring adjudication in another forum).

[48] *See infra* text accompanying notes 50–64.

[49] Administrative Procedure Act, 5 U.S.C. § 553 (2012).

[50] Consumer Fin. Prot. Bureau, Arbitration Study: Report to Congress, Pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a) (2015) [hereinafter CFPB Study], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[51] Arbitration Agreements, 81 Fed. Reg. 32,830 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040). Meanwhile, the Department of Labor limits (but does not prohibit) the use of arbitration for ERISA. 29 C.F.R. § 2560.503–1(c)(4) (2016) (barring

Medicare and Medicaid Services, within the Department of Health and Human Services, adopted a rule limiting arbitration of nursing-home contract disputes.[52]

Another approach is lawmaking by agency adjudication.[53] The National Labor Relations Board (NLRB), for example, held that class waivers in employment agreements violate the National Labor Relations Act.[54] The Seventh and Ninth Circuits agreed,[55] though other courts rejected this view.[56] The Supreme Court recently granted certiorari on this question, so perhaps we will have a more definitive answer soon.[57]

A third way to support private enforcement is for agencies to litigate arbitration-law issues generally. The Equal Employment Opportunity Commission (EEOC), for example, takes the position that making certain mandatory arbitration agreements a condition of employment is contrary to Title VII, independent of any discriminatory act.[58] Multiple courts have rejected this view,[59] but the EEOC continues to press the argument.[60] Relatedly, government actors often

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claims procedures that include mandatory arbitration, unless the arbitration meets one of two outlined criteria).

[52] 42 C.F.R. § 483.70(n) (amended by Final Rule, Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688, 68,867 (2016)). Notably, shortly after this rule was adopted, the Supreme Court decided that the Federal Arbitration Act (FAA) preempts *state* power-of-attorney law. Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1423 (2017).

[53] 5 U.S.C. § 554.

[54] D.R. Horton Inc., 357 N.L.R.B. 2277, 2277 (2012), *rev'd*, 737 F.3d 344, 348 (5th Cir. 2013). *See also* Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 LOY. U. CHI. L.J. 391, 412–19 (2012) (discussing this and other regulatory options).

[55] Morris v. Ernst & Young, LLP, 834 F.3d 975, 979 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017); Lewis v. Epic-Systems Corp., 823 F.3d 1147, 1151 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017).

[56] Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 776 (8th Cir. 2016); Murphy Oil U.S.A., Inc. v. NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017); D.R. Horton, Inc. v. NLRB, 737 F.3d at 348; Sutherland v. Ernst & Young LLP, 726 F.3d 290, 292 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1051 (8th Cir. 2013).

[57] 137 S. Ct. 809 (Jan. 13, 2017) (consolidating the cases of *Epic Systems Corp. v. Lewis*, *Ernst & Young, LLP v. Morris*, and *NLRB v. Murphy Oil U.S.A., Inc.*).

[58] *See, e.g.*, Borg-Warner Protective Servs. Corp. v. EEOC, 245 F.3d 831, 832, 836 (D.C. Cir. 2001) (rejecting an APA challenge to this EEOC policy).

[59] *See* Oblix, Inc. v. Winiecki, 374 F.3d 488, 491 (7th Cir. 2004); EEOC v. Luce, Forward, Hamilton & Scripps, 303 F.3d 994, 1002–03 (9th Cir. 2002) (collecting cases), *rev'd en banc*, 345 F.3d 742 (9th Cir. 2003).

[60] *See* EEOC v. Doherty Enters., Inc., 126 F. Supp. 3d 1305, 1306–08, 13 (S.D. Fla. 2015) (explaining that the EEOC sought to enjoin use of an arbitration agreement as a pattern or practice of resistance to Title VII rights because it prohibited or deterred filing EEOC charges, but not ruling on the merits of that issue in denying the defendant's motion to dismiss).

file *amicus* briefs in private litigation to argue against procedural retrenchment in private enforcement.[61]

These various executive-led administrative responses tell a familiar institutional story.[62] From immigration to civil rights to sick leave, we have seen executive actors take major steps where the legislature has been silent.[63] Here, in the face of a hostile Supreme Court, an inactive Congress, and foreclosed state lawmakers, the federal executive branch has taken the leading role in attempting to regulate arbitration.[64]

Proponents of vigorous enforcement may applaud these federal administrative responses. But, at the same time, these efforts are subject to standard challenges grounded in legislative supremacy, transparency, etc.[65] Moreover, one seeming advantage of executive action—flexibility—has an obvious downside. Whatever flexible process allowed for the executive action can be used to reverse it, and so a change in administration can result in a swift reversal of administrative lawmaking. Proponents of arbitration regulation thus may find recent victories short lived.[66]

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[61] *See, e.g.*, Brief for the States of Illinois, Maryland, Minnesota, Montana, New Mexico, Tennessee, and Vermont and the District of Columbia as Amici Curiae Supporting Respondents, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 3973890, at *6 (arguing that consumer class actions supplement government enforcement).

[62] Though not central to this Article, it is also notable that these battles pit a transsubstantive judiciary against primarily issue-specific executive actions. The Supreme Court decides the scope of the FAA writ large, while the Equal Employment Opportunity Commission (EEOC) challenges employment contracts, the Consumer Financial Protection Bureau (CFPB) consumer ones, etc.

[63] *See, e.g.*, United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (affirming 4-4 a Fifth Circuit ruling striking down the Obama Administration's Deferred Action for Parents of Americans program); Establishing Paid Sick Leave for Federal Contractors, 81 Fed. Reg. 67,598 (Sept. 30, 2016) (to be codified at 29 C.F.R. pt. 13) (implementing Executive Order 13,706 by requiring certain federal contractors to provide paid sick leave); U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf (providing guidance on schools' obligations to transgender students under Title IX of the Education Amendments of 1972).

[64] For non-arbitration issues, CAFA reduces the effectiveness of state attempts to promote private enforcement through procedural reform. *See* Clopton, *supra* note 23, at 30–31 (observing that state attempts to resist federal procedural reform will be stymied by removal).

[65] One might respond that legislative silence suggests acquiescence. *But see* Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (suggesting that congressional inaction may represent "(1) approval of the status quo, . . . , (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice").

[66] *See, e.g.*, Tim Devaney et al., *14 Obama Regs Trump Could Undo*, THE HILL (Nov. 12, 2016), http://thehill.com/regulation/305673-14-obama-regs-trump-could-undo

## III
## Law Enforcement

Decisions that weaken private enforcement also may have consequences for the roles of executive actors as law enforcers. This Part reviews and then appraises these developments.

### *A. Review*

Public enforcement may take the form of civil enforcement litigation or public suits that represent citizens, e.g., as *parens patriae*.[67] Private enforcement is often "redundant" with public enforcement, meaning that private enforcement supplements resource-constrained public enforcement to increase overall deterrence.[68] In "redundant" regimes, public agencies also may multiply their efforts by collaborating with private enforcers or signaling good cases to them.[69]

Decisions regarding class certification, jurisdiction, and arbitration have weakened private enforcement, but these decisions do not apply to public enforcement. Rule 23 certification is not required for public suits,[70] even *representative* public suits in which public actors sue on behalf of their citizens.[71] CAFA does not provide a basis to remove governmental actions.[72] And public suits should not be constrained by arbitration clauses because public enforcers would not be

(identifying regulations that may be overturned under the Congressional Review Act, revisited, or weakened through guidance and non-enforcement).

67 *See generally* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486 (2012).

68 *See generally* Clopton, *supra* note 4. Though not universally so, in many cases there was an existing structure for public law enforcement when modern private enforcement was introduced (by the creation of new private causes of action after 1966 or by the introduction of the 1966 version of Rule 23(b)(3) to existing private rights).

69 *Id.* at 309–10.

70 Of course, states may require certification or other procedures for public suits.

71 *See, e.g.*, Washington v. Chimei Innolux Corp., 659 F.3d 842, 848 (9th Cir. 2011) ("[T]he Attorneys General have statutory authority to sue in *parens patriae* and need not demonstrate standing through a representative injury nor obtain certification of a class in order to recover on behalf of individuals."). I have documented elsewhere various public enforcement options that were expressly expanded in light of the challenges of Rule 23 certification. *See* Clopton, *supra* note 23, at 33–34 (describing an example in the antitrust context).

72 *See* Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736, 739 (2014) (holding that state-filed suits seeking restitution for citizen injuries are not "mass action[s]" under CAFA).

contract parties.[73] Note also that these permissive interpretations are applicable to both federal and state enforcers.[74]

Public-enforcement decisions are often opaque, so it is difficult to reach definitive conclusions about how public enforcers have reacted to reduced private enforcement. Instead, this section considers this issue from the perspective of (informed) theory: How could public enforcers respond, and what might that look like?[75]

The most likely result is that public enforcers accept a reduction in overall levels of deterrence and enforcement. This does not mean that the exact distribution of public-enforcement cases will remain the same. Public enforcers may pick up some formerly private cases at the expense of formerly public ones. Indeed, this exchange could be a response to particular failed private enforcement actions. Public enforcers often "piggyback" on successful private enforcement,[76] and here I am suggesting that they could piggyback on unsuccessful cases in which certification is denied or non-class arbitration is compelled.[77]

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[73] I developed this argument more fully in Clopton, *supra* note 23, at 40–44. At least one court has used a private-arbitration agreement to impede public enforcement. Although the Eastern District of Louisiana did not dismiss an EEOC lawsuit alleging transgender discrimination because of an underlying arbitration clause, it stayed the public litigation pending the outcome of the private arbitration. *See* Broussard v. First Tower Loan, LLC, 150 F. Supp. 3d 709, 714–16 (E.D. La. 2015) (staying the EEOC suit); Broussard v. First Tower Loan, LLC, No. 15-CV-1161, 2016 WL 879995, at *1 (E.D. La. Mar. 8, 2016) (denying the EEOC's motion to alter, amend, or reconsider the stay order).

[74] California's *qui tam*-like Private Attorneys General Act of 2004, Cal. Lab. Code §§ 2698–2699.5, also seems to have escaped the pull of the Federal Arbitration Act. *See* Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 427 (9th Cir. 2015) (holding that California decisional law, which bars waiver of representative claims under the aforementioned Act, is not preempted by FAA); Brown v. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854, 856 (2011) (same); *see also* Janet Cooper Alexander, *To Skin a Cat:* Qui Tam *Actions as a State Legislative Response to* Concepcion, 46 U. MICH. J.L. REFORM 1203 (2013) (discussing how California's Private Attorneys General Act can be a model for state legislative reform in other areas of private enforcement). Additionally, suits under this Act are not subject to class certification and may not be removed under CAFA's "mass action" provision. *See* Baumann v. Chase Inv. Servs. Corp., 747 F.3d 1117, 1122 (9th Cir. 2014).

[75] Over time, perhaps this theory can be tested against public enforcement in practice—or perhaps public enforcers' performance can be evaluated against this theory.

[76] *See* Clopton, *supra* note 4, at 287–89, 296–99 (collecting sources and cases); *see also* CFPB STUDY, *supra* note 50 at § 9 (collecting data for consumer law enforcement).

[77] *See* Clopton, *supra* note 23, at 34–35, 42 (discussing the denial of class certification as a possible trigger for public enforcement). For example, a private enforcement case that fails at the level of class certification may be understood as a signal of a potentially good claim on the merits. In *EEOC v. Cintas Corp.*, the EEOC was alerted to a potential case by a putative class action, but the Commission did not pursue enforcement with any vigor until class certification was denied. Nos. 04-40132, 06-12311, 2011 WL 3359622, at *1 (E.D. Mich. 2011), *vacated sub nom.* Serrano v. Cintas Corp., 699 F.3d 884, 889 (6th Cir. 2012). The EEOC ultimately settled the case on behalf of putative class members for $1.5 million. Press Release, EEOC, Cintas Corporation to Pay $1.5 Million to Settle EEOC Class Sex

But shifting from one case to another will not reverse overall declines in deterrence and enforcement levels.

Alternatively, if public enforcers concluded that deterrence and enforcement levels should be maintained, they could try to increase their own enforcement efforts. Of course, resource constraints are a major drag on public enforcement.[78] Weakening private enforcement might encourage agencies or appropriators to shift resources to public enforcement from other sources, though this does not seem likely to make up for lost private enforcement resources.[79]

Without new resources, public enforcers also may attempt to maintain deterrence levels by changing tactics. Public enforcers might leverage their limited budgets by hiring private firms on contingent fee,[80] or they might specifically select cases that produce resources that can be reinvested in public enforcement.[81] Public enforcers also may substitute more "impact litigation" for smaller "non-impact" cases.[82] Finally, as I have noted elsewhere, public enforcers could attempt to affect behavior through prosecutorial discretion—e.g., discouraging the use of arbitration clauses by announcing a prosecutorial priority on cases where private claims would be subject to mandatory arbitration.[83]

Although the specific tradeoffs involved in each of these tactical shifts are beyond the scope of this project, it must be acknowledged that such changes imply that the public enforcer is adopting tactics it would not have used under prior levels of private enforcement. In other words, there may be something less desirable about these tactics

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Discrimination Lawsuit (Nov. 30, 2015), www.eeoc.gov/eeoc/newsroom/release/11-30-15.cfm.

78 *See, e.g.*, Burbank et al., *supra* note 2, at 662–63 (collecting sources).

79 That said, particularly in states where politics support more rigorous enforcement, this may be possible. *See* Zachary D. Clopton, *Diagonal Public Enforcement*, 70 STAN. L. REV. (forthcoming 2018) (manuscript at 43–47) (explaining practical and political reasons why state agencies may seek to enforce laws outside their own state).

80 *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 669 (2012) (explaining that there are few legal constraints on such arrangements).

81 *See* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 864–75 (2014) (discussing "revolving funds" and other funding options).

82 *See, e.g.*, Claire McCusker, Comment, *The Federalism Challenges of Impact Litigation by State and Local Government Actors*, 118 YALE L.J. 1557, 1561–67 (2009) (collecting examples); *see also* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 341 (7th Cir. 2017) (holding that sexual orientation discrimination claims may be brought under Title VII); *supra* note 73 (discussing the EEOC's *Broussard* case addressing transgender discrimination). The EEOC's litigation opposing mandatory arbitration, *see supra* notes 58–60 and accompanying text, also could be considered impact litigation, though here I treat it as administrative lawmaking.

83 Clopton, *supra* note 23, at 42–43.

such that they are only justified in this new circumstance.[84] To give a more concrete illustration, many public enforcers have the capacity to hire private attorneys on contingency, but have chosen not to do so—perhaps out of normative concerns with accountability, democracy, and conflicts of interest.[85] Weakening class actions (and therefore reducing deterrence) may encourage some attorneys general to hire contingent-fee lawyers or take other questionable steps despite these serious objections.

This is not to suggest that new types of public enforcement are necessarily "worse" than the private enforcement they replace. Many critics of private enforcement expressly endorse public enforcement,[86] and some courts have denied class certification because public enforcement is "superior."[87] My point is more formal: For public enforcement to substitute for private enforcement (without additional resources), the nature of the public-enforcement substitute must change.

### *B. Appraisal*

The retrenchment of private enforcement combined with legislative inaction has elevated the role of executive law enforcement. For one thing, by reducing the amount of private enforcement, state and federal executives represent a more substantial share of enforcement authority.[88] This blunt effect has the consequence of aggrandizing the executive relative to previous levels. And it runs counter to the ani-

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[84] Of course, each of these options would be available independent of the level of private enforcement. But the agency might tip in favor of action only after private enforcement is degraded—especially when the public enforcer has become accustomed to a certain level of deterrence and enforcement only to have it unexpectedly reduced.

[85] *See, e.g.*, Gilles & Friedman, *supra* note 80, at 669–71; *see also* David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of* Parens Patriae *Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315 (2001) (endorsing concerns about conflicts and agency costs, and surveying but minimizing concerns about democracy and corruption).

[86] *See, e.g.*, Clopton, *supra* note 4, at 287–89 (collecting sources).

[87] *See, e.g.*, Kamm v. Cal. City Dev. Co., 509 F.2d 205, 212–13 (9th Cir. 1975) (examining factors that might render government action superior to class action); Pennsylvania v. Budget Fuel Co., 122 F.R.D. 184, 185 (E.D. Pa. 1988) (arguing that the lack of a certification requirement for government action is itself evidence of superiority to class action).

[88] While these decisions do not formally affect executive authority, they increase the proportion of cases for which executive enforcement is available relative to private enforcement.

mating purpose of many private enforcement authorizations: a distrust of the executive to carry out effective enforcement.[89]

This tilt toward public enforcement also means that executive enforcement discretion becomes an even more important policy lever—without private enforcers, the executive has more power to dictate the overall level of deterrence as well as the types of cases it wants emphasized (or deemphasized).[90] As a general matter, we might have reasons to be concerned about policymaking by enforcement. Enforcement decisions lack many of the interbranch checks of legislation or regulation,[91] and likely lack many of the intrabranch checks as well.[92]

Further, a shift from private to public enforcement might have distributional consequences.[93] For example, public-enforcement agencies may be relatively disinclined to pursue claims against other government actors.[94] Public enforcement also may be subject to majoritarian pressures that make it less effective at protecting

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[89] *See* FARHANG, *supra* note 2, at 31–49, 60–81 (analyzing empirical data to show private enforcement may be motivated by ideological conflict between Congress and the President).

[90] Obama era policies on marijuana provide an example of such discretion. *See* U.S. DEP'T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GEN., MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT (2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (outlining priorities for marijuana enforcement under the Controlled Substance Act, in light of state laws legalizing marijuana); *see also* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014) (assessing the appropriate scope of enforcement discretion); Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31 (2017) (analyzing "crackdowns" as a type of enforcement discretion).

[91] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's *absolute* discretion." (emphasis added)). *But see* Press Release, U.S. House of Representatives, Comm. on Sci., Space, and Tech., Smith Subpoenas MA, NY Attorneys General, Environmental Groups (July 13, 2016), https://science.house.gov/news/press-releases/smith-subpoenas-ma-ny-attorneys-general-environmental-groups (discussing the House Committee's subpoenas to state attorneys general regarding their investigations into climate science).

[92] *See, e.g.*, Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 at 557 (1994) (calling for OIRA review of proposed regulations).

[93] In addition to the political bent described here, this shift also may disproportionately affect cases in which private parties have informational advantages. *See, e.g.*, Glover, *supra* note 2, at 1183–84 (discussing wage claims).

[94] This seems self-evident in cases in which the executive would not sue itself, and it may also be true when the federal executive has the power to check state actors. For example, for discussion of the DOJ's limited use of Section 14141 against states, see Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1399–414 (2000); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009).

minority interests than private alternatives.[95] And, it would not be unreasonable to think that, as compared to private enforcement, public enforcers may be less likely to pursue cases against their political allies.[96] The result, therefore, is even more favorable treatment of executive interests if private enforcement alternatives are unavailable.

Relatedly, the empowerment of executive actors, especially when we include state-level enforcers, suggests a new political economy of enforcement. With a silent (and potentially gridlocked) legislature, the other branches become more important battlegrounds for enforcement politics—and potentially more fertile territory for pro- and anti-enforcement spending.[97] For example, last year reports surfaced that a certain presidential candidate made a donation to a group supporting the reelection campaign of a sitting State Attorney General who was actively considering whether to bring fraud allegations against the donor-candidate.[98] The smaller, the more localized, and the more specialized the governmental unit, the more sway that concentrated interests might wield.[99]

Finally, the rise of public enforcement might have consequences for individual claimants.[100] With respect to individual due process, Professor Lemos has documented reasons to be concerned about the rights of individuals when represented by the state *parens patriae*.[101] These concerns are heightened when options for private redress are

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[95] *See* Clopton, *supra* note 79, at 36–37 (developing this argument in interjurisdictional cases).

[96] Depending on one's view of agency priorities, political allies could mean allies of the executive, allies in the legislature (appropriators, oversight, etc.), or even allies in potential post-government employers.

[97] *See* Clopton, *supra* note 23, at 54–55 (discussing these issues at the state level).

[98] *See* Steve Eder & Megan Twohey, *Donald Trump's Donation Is His Latest Brush with Campaign Fund Rules*, N.Y. TIMES (Sept. 6, 2016), https://www.nytimes.com/2016/09/07/us/politics/donald-trump-pam-bondi.html; *see also* CHISUN LEE ET AL., BRENNAN CTR. FOR JUSTICE, SECRET SPENDING IN THE STATES 10–22 (2016), https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf (citing examples of suspicious campaign spending in lower-profile races). For example, according to a Utah state legislative committee, the State Attorney General's campaign appeared to have coordinated with payday lenders to exchange leniency in public enforcement for about $450,000 in undisclosed campaign contributions. *Id.* at 11; *see also* UTAH HOUSE OF REPRESENTATIVES, REPORT OF THE SPECIAL INVESTIGATIVE COMMITTEE (2014), http://le.utah.gov/investigative/Final_Report_simple.pdf (detailing the results of the investigation into this incident).

[99] *See, e.g.*, Pranab Bardhan & Dilip Mookerjee, *Capture and Governance at Local and National Levels*, AM. ECON. REV., May 2000, at 135, 135 (noting the common view that "the lower the level of government, the greater is the extent of capture by vested interests, and the less protected minorities and the poor tend to be").

[100] For purposes of this analysis, we can put aside the usual debates about how much due process and just compensation class actions provide to their members, and instead we can compare public and private enforcement on these terms.

[101] *See generally* Lemos, *supra* note 67.

weak,[102] and when public enforcers take on new techniques that might be less respectful of process values.[103] With respect to individual compensation, public agencies have the capacity to provide individualized relief in civil cases—and a few high-profile programs have done so.[104] But we might ask whether, on balance, these options represent an improvement over private suits.[105]

## Conclusion

The private enforcement class action is a central feature of the U.S. regulatory system.[106] As the courts have seemingly made private enforcement class actions more difficult, overall levels of deterrence and enforcement have been reduced—and certain types of claims, including those against government actors, may be disproportionately affected. Weakening private enforcement also has consequences for the separation of powers, namely an increased emphasis on executive action at the state and federal levels. While such executive responses may, in some ways, counteract the courts' retrenchment, they are not without costs. Specifically, executive actors may be less transparent, less durable, and more susceptible to political pressures than we would like. And I have not found recent history to inspire much confidence in Congress or the courts to constrain them.

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[102] *See* Clopton, *supra* note 4, at 326–27 (describing how public suits offsetting private damages might discourage private plaintiffs from bringing follow-on claims).

[103] *See* Clopton, *supra* note 79, at 36–37 (noting the risk to minority interests posed by interjurisdictional public enforcement).

[104] *See, e.g.*, Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 Stan. L. Rev. 331 (2015) (discussing an SEC compensation scheme for defrauded investors); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. Rev. 500, 527–39 (2011) (examining compensation schemes at the SEC, FTC, and FDA).

[105] *See* Clopton, *supra* note 4, at 318–24 (explaining that overlapping public-private enforcement sometimes allows redundant suits for purposes of obtaining remedies left behind in the first case).

[106] *See supra* note 2 (collecting sources on private enforcement).