

*Chapter 1*

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AN INTRODUCTION TO PRIVATE  
ENFORCEMENT REGIMES

NEXT TO PETITIONS by prisoners to be set free, job discrimination lawsuits are the *single largest category* of litigation in federal courts. Over the past decade or so, the annual number of such lawsuits averaged about 20,000.<sup>1</sup> Two percent of these job discrimination suits were prosecuted by the federal government, while 98 percent were litigated by private parties. The enormous volume of privately prosecuted employment discrimination litigation has earned it a prominent role among poster children for the much-maligned “litigation explosion.”<sup>2</sup> As one commentator recently put it, “[F]rom malpractice suits to libel actions, from job discrimination to divorce, litigation has become a way of life in the United States,” making it “the world’s most litigious society.”<sup>3</sup> How did job discrimination litigation become a part of the American way of life?

A critical part of the answer concerns the way federal job discrimination statutes—the most important of which is the foundational Title VII of the Civil Rights Act of 1964—are written. The existence and extent of private litigation enforcing a statute is to an important degree the product of legislative choice over questions of statutory design.<sup>4</sup> One need only consider two of the other largest federal interventions in the employment relationship—one before the CRA of 1964 and one after it—to drive this point home. While creating a wide array of rights for workers, neither the National Labor Relations Act of 1935 nor the Occupational Safety and Health Act of 1970 allowed private enforcement lawsuits for implementation. Instead, in those laws Congress opted for bureaucracy-centered enforcement regimes that empowered administrators to undertake investigations, hold hearings, and issue orders.

It is a *legislative choice* to rely upon private litigation in statutory implementation. And when Congress does choose 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 concerning who has standing to sue, which parties will bear the costs of litigation, what damages will be available to winning plaintiffs, whether a judge or jury will make factual determinations and assess damages, and rules of liability, evidence, and proof that together can have profound consequences for how much or

little private enforcement litigation will actually be mobilized. This book refers to this system of rules as a statute's *private enforcement regime*.

While private plaintiff-driven civil rights litigation is so familiar a part of the American legal landscape that it has an air of inevitability, this approach to implementing job discrimination laws was not foreordained. To the contrary, a resolutely bureaucracy-centered approach to remedying job discrimination, founded upon administrative cease-and-desist authority rather than the private right to sue, actually represented the dominant model in 1964. Of twenty-eight states with fair employment practice laws in 1964, twenty-one used the administrative cease-and-desist model, four used only criminal and no civil sanctions, and three lacked enforcement provisions and were strictly voluntary.<sup>5</sup> Only a single United States territory—Puerto Rico—used the enforcement model that Congress would ultimately follow in the job discrimination provisions in the CRA of 1964: statutory provision for private civil actions in court, with economic damages and attorney's fee awards for winning plaintiffs.<sup>6</sup> The dominance of private litigation enforcing federal job discrimination laws that we take for granted today, widely regarded as emblematic of America's litigious "way of life," was a remarkably anomalous departure in 1964. Why did it happen?

The answer to this particular policy history question, which is the focus of chapters 4 to 6, points to a conceptually broader argument taken up in this book about the large role of private litigation in the implementation of statutory policy in the United States. Legislators and the interest groups that influenced their behavior, with a high degree of self-consciousness, and centrally motivated by policy goals, constructed Title VII's enforcement provisions with the objective of mobilizing private litigants to execute the enforcement function in court. As Senator James Abourezk (D-SD) would later put it, Title VII's enforcement provisions were designed to provide for enforcement of the law "by enlisting private citizens as law enforcement officials."<sup>7</sup> The legislators who effectively deputized private litigants and their attorneys to enforce the law manifestly understood themselves to be facing a choice between building an authoritative bureaucratic enforcement apparatus on the one hand, and delegating enforcement to private litigants and courts on the other.

The legislative choice of private litigation over administrative power emerged from conflict between ideologically antagonistic interests, channeled through America's fragmented political institutions, particularly the dynamic of legislative-executive competition for control of the bureaucracy. The structure of American political institutions decisively shaped the outcome in Title VII of the CRA of 1964, and in subsequent important civil rights laws expanding the role of private enforcement. A

contention at the heart of this book is that America's fragmented state structures drives legislative enactment of private enforcement regimes. In elaborating this argument the book draws extensively on political science literature on American courts in the regulatory process (particularly Robert Kagan, Shep Melnick, and Thomas Burke), rational choice institutionalism (particularly Terry Moe, and the collaborative work of McCubbins, Noll, and Weingast), and historical institutionalism (particularly the literature on American political development). The core of the institutional arguments operates along several dimensions that are briefly previewed here, and that are spelled out in detail in chapter 2, where the literatures that the book builds upon are laid out and integrated.

The first institutional relationship is by far the most central to the argument of the book, powerful in effect, and pivotal to explaining the steep rise in private enforcement litigation starting in the late 1960s, documented below. It is that conflict between Congress and the president over control of the bureaucracy, a perennial feature of the American state, creates incentives for Congress to bypass the bureaucracy and provide for enforcement via private litigation. This cause of private enforcement regimes has become much more significant to American public policy since the late 1960s, when divided party control of the legislative and executive branches became the norm and relations between Congress and the president became more antagonistic, a condition that was exacerbated by growing ideological polarization between the parties. These conjoint conditions of divided government and party polarization continued through the end of the twentieth century and into the beginning of the twenty-first. The book will argue that this legislative-executive ideological polarization is an important cause of a coincident explosion of private lawsuits enforcing federal statutes since the Nixon administration, and of the corresponding, and widely remarked, role of private litigants, lawyers, and judges in American policy.

Second, the many veto points that characterize America's fragmented state structures render a very sticky status quo, making future amendments to a law, once passed, hard to accomplish. For reasons to be discussed in the next chapter, this sticky status quo creates an incentive for legislators and their interest group constituents to rely upon private enforcement regimes, which provide a form of auto-pilot enforcement, via market incentives, that will be difficult for future legislative majorities, or errant bureaucrats pursuing their own goals, to subvert. Third, the same veto-point-ridden institutional environment often necessitates compromising with many gatekeepers, which frequently entails scaling back ambitious policy proposals, and this institutional environment favors privatizing the enforcement function as opposed to administrative state-

building. Before these institutional arguments are set forth in chapter 2, it is necessary first to establish that private enforcement regimes, as a policy instrument, are a critical component of American regulatory state capacity.

#### PRIVATE STATUTORY LITIGATION AND REGULATORY STATE CAPACITY

Legislators' construction of statutory private enforcement regimes has deep and underexplored implications for American regulatory state capacity. "State capacity" refers simply to the state's capacity to effectively implement its policy choices.<sup>8</sup> "Regulation," as used here, to borrow a definition from Christopher Foreman, refers to "any governmental effort to control behavior by other entities, including small business firms, subordinate levels of government, or individuals."<sup>9</sup> Regulatory state capacity thus refers to the state's capacity to successfully implement its efforts to control the behavior of other entities.

Owing largely to the concepts and categories used to measure state capacity, scholars in political science and comparative political sociology have failed to adequately grasp private enforcement litigation as a form of state intervention. "State-centered" scholars have tended to operate within a narrow and executive-centered conception of what the state is. "State centered regimes," explains James Q. Wilson, "are executive-centered regimes, and executive-centered regimes are dominated by their bureaucracies ... [and] mak[e] the administrative apparatus the center of official action."<sup>10</sup> Drawing implicitly upon the Weberian ideal of the modern state, this conceptual framework for studying state capacity has tended to privilege (1) the number of bureaucratic personnel, (2) the degree of their organizational centralization, and (3) the state's capacity to extract resources, as the axial measures of state capacity.<sup>11</sup> These dimensions of bureaucracy, according to Theda Skocpol, are the "universal sinews of state power."<sup>12</sup>

Against this Weberian template, the scholarly literature on the American state has found it to be sorely wanting—a "weak state" as compared to the Weberian model of a "strong state," most closely instantiated in France or Prussia. In assessing this scholarly literature, Ira Katznelson observes that the American state has been "widely portrayed as weak, amateur, decentralized, negligible."<sup>13</sup> William Novak, likewise, has observed more broadly that American social scientists and historians have represented the American state as "something not quite fully formed, ... something less, something laggard, something underdeveloped when compared to the mature governmental regimes that dominate modern European history."<sup>14</sup>

This tendency is characteristic of the literature on American political development, the subfield within political science that has paid the most attention over the past quarter century to American state capacity. Indeed, where courts have entered this literature, it has often been as an explanation for state *incapacity*: courts contribute to the weakness of the American state by obstructing, constraining, and subverting the good works of the elected branches; they are a veto player against democracy; they *delimit* state capacity.<sup>15</sup> If the role of courts in the literature on American political development has been limited, the role of ordinary litigation, proceeding at the bottom of the judicial hierarchy, orchestrated by private lawyers and litigants, overwhelmingly occurring outside of the courtroom and beyond the view of any official state actor, has been almost entirely ignored.<sup>16</sup>

An excessively executive-centered perspective on state capacity has caused observers to miss the significance of private enforcement litigation as a form of deliberate and effective state intervention. Private enforcement litigation falls outside the scope of vision characteristic of the dominant executive-centered approach to state capacity, and beyond conventional definitional boundaries of the state more broadly. Consequently, its crucial role in the functioning of the American regulatory state—indeed its very “stateness”—has been largely overlooked by students of American state capacity.<sup>17</sup>

### *Private Litigation, Policy Instruments, and Infrastructural Power*

One might readily acknowledge the importance of private statutory enforcement litigation in American policy implementation while resisting the characterization of it as a form of state action. Why should *private* enforcement litigation be regarded as a component of *state* capacity? After all, the decision to pursue enforcement litigation will lie with private actors pursuing their own interests, not with state officials, and the costs of enforcement will be borne by private citizens who bring suits and the defendants they sue, not by government agencies. If the state is neither undertaking enforcement activities with its own personnel nor funding them with its revenue, why talk of state capacity?

The answer is that state capacity is not exhausted by the actions of state personnel or the expenditure of state resources. If the object of interest is the state’s capacity to implement its policy choices by controlling the behavior of other entities, then one must attend not only to the direct actions of state officers, but also to more indirect pathways of regulatory control. The concept of “policy instruments”—the repertoire of *means* available to policymakers to achieve their objectives—is useful for illuminating this point. Careful attention to the inventory of feasible policy

instruments available to state actors is crucial for understanding state capacity because, as Peter Katzenstein has observed, “[t]he instruments which policy makers command largely determine whether stated objectives can be achieved in the process of policy implementation.”<sup>18</sup>

When, for example, the Department of Labor undertakes enforcement action under the Fair Labor Standards Act, it constitutes the archetypal exercise of state capacity. The bureaucratic arm of the executive engages in potentially invasive and coercive investigative activity to ascertain violations, and carries out the prosecutorial function, which can result in judicial commands against violators, backed by federal police powers. But what of private litigation to enforce federal statutes? The American civil discovery process effectively confers upon private litigants and their lawyers the same investigatory powers as federal agencies to *compel* sworn testimony and to disgorge documents; they can obtain the same court orders commanding a violator to cease its unlawful conduct and pay for its violations; and the court orders are backed by the same federal police powers.

It is these litigant powers that Senator Abourezk was referring to when he characterized Title VII’s enforcement provisions as designed to provide for enforcement “by enlisting private citizens as law enforcement officials.” The remarkable level of authority and autonomy conferred upon private litigants and lawyers in American civil litigation is distinctive, contrasting sharply with European practices, where judges exercise far more power in managing the civil legal process.<sup>19</sup> This facet of the American civil law system leads Robert Kagan to label it “lawyer-dominated,” as contrasted with a European “judge-dominated” approach.<sup>20</sup> The standing statutorily conferred on private actors to enforce public regulatory laws in court effectively licenses them to wield the coercive instruments of state power. Marc Galanter and David Luban have referred to this phenomenon as the delegation of “enforcement endowments.”<sup>21</sup> The details of the private enforcement regime built on top of the initial decision to license private enforcement determines how likely private litigants and their attorneys will be to actually use the license. Thus, rules comprising the private enforcement regime surrounding substantive statutory rights and prohibitions are, straightforwardly, policy instruments.

There is, moreover, considerable evidence that private lawsuits can be an effective tool in shaping the behavior of the regulated population. Studies have found, ranging across such policy domains as job discrimination, sexual harassment, labor, playground safety, antitrust, and police brutality, that implementation of regulatory commands through private lawsuits can effectively encourage and induce compliance behavior by the regulated population, whether they be private entities or governmental subunits.<sup>22</sup> The findings have established both “specific deter-

rence” and “general deterrence” effects, where specific deterrence refers to the effects of enforcement against a particular violator on *that* violator’s future conduct, while general deterrence refers to effects of visible enforcement efforts in the legal environment on *other* would-be violators who have yet to actually be the targets of enforcement, and hope never to be.<sup>23</sup>

When private enforcement regimes are recognized as a policy instrument deployed by legislators to achieve state objectives, private enforcement litigation is easily integrated into the idea of state capacity. Sociologist Michael Mann’s influential distinction between despotic and infrastructural state power is useful to drive this point home. By despotic power, Mann refers to the “power of state elites *over* civil society ... [which] derives from the range of actions that state elites can undertake without routine negotiation with civil society groups.” Infrastructural power, in contrast, is the “institutional capacity” of the state “to penetrate its territories and logistically implement decisions. This is collective power, ‘power *through*’ society, coordinating social life through state infrastructures.” Mann further observes that “[i]nfrastructural power is a two-way street: It also enables civil society parties to control the state.”<sup>24</sup>

Private litigants and their attorneys represent a core dimension of the American regulatory state’s infrastructural power in Mann’s sense. Private litigation is state power exercised *through* society, as Senator Abourezk put it, “by enlisting private citizens as law enforcement officials.” Moreover, private enforcement litigation is infrastructural power in that it enables civil society to control the state by compelling judicial intervention in policy conflicts between private actors, and because it is sometimes directed at state defendants. This form of infrastructural power can penetrate far more deeply into civil society than despotic power. A state whose infrastructural power allows it to “harness the pluralism of civil society by hitching ‘stateness’ to competing political coalitions,” suggests Katznelson, will be regarded by the polity as more legitimate, which will facilitate building extensive capacities.<sup>25</sup>

Viewing private statutory enforcement litigation from this angle dovetails with an emergent strand of scholarship in American political development that pushes beyond the narrow conception of the state highlighted above toward a study of governance more broadly, emphasizing that policy outcomes are shaped by interactions between the state and private actors. A number of studies, while not self-consciously connected, represent a growing recognition of how state actors mobilize private resources in the service of state building in multiple ways across a wide range of policy domains. Christopher Howard and Jacob Hacker both demonstrate that lawmakers in the United States have used tax incentives to induce the private provision of social benefits, such as health insur-

ance, that are typically directly provided by more economically developed democratic states.<sup>26</sup> Daniel Carpenter demonstrates that during the Progressive Era entrepreneurial bureaucrats in the United States Postal Service and the Department of Agriculture, by mobilizing the support of powerful networks of private interests, managed to enlarge the mission and authority of their agencies.<sup>27</sup> Robert Lieberman shows that, during the early years of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission, lacking formal enforcement powers, actively collaborated with private civil rights groups in an ultimately successful campaign for expansive judicial interpretations of the law.<sup>28</sup>

These works converge in regarding the boundary between public and private to be porous and, most fundamentally, in recognizing linkages between state and civil society as crucial for comprehending and explaining the development, reach, and efficacy of the American state. “[A] realistic and pragmatic model of state development,” argues William Novak in this vein, “focuses directly on the convergence of public and private authority. The hallmark of American politics from this perspective is the distinctive way in which state power has long been distributed among persons, associations, and institutions that are not easily categorized fully as *either* private *or* public.”<sup>29</sup> Private statutory enforcement litigation, willfully mobilized by state actors, fits this characterization exactly.

### *Counting the Litigation State*

Recognizing private statutory enforcement litigation as an important form of state capacity has important consequences for how one understands the reach and strength of the American regulatory state. In the domain of regulatory enforcement, it brings into view causal linkages between the state and a tremendous volume of enforcement activity that in the past has been regarded primarily as private dispute resolution. Currently, in most major areas of federal regulatory policy, private litigants, and not federal agencies charged with enforcement responsibilities, prosecute the overwhelming majority of cases in federal courts. In the past decade, there was an average of about 165,000 lawsuits filed per year to enforce federal statutes in United States district courts.<sup>30</sup> These suits spanned the waterfront of federal policy, including antitrust, civil rights, labor and employment, environmental, banking, and securities/commodities exchange regulation. More than 97 percent of the suits were privately filed. At present, the role of private litigation in many important areas of federal policy in the United States is massive both in absolute terms and relative to enforcement by the national government.

It deserves emphasis here that this, overwhelmingly, is not the kind of private statutory litigation that political scientists have paid much atten-



tion to. Political scientists have shown a fairly keen interest in litigation filed or orchestrated by interest groups, and also in suits filed against government agencies challenging agency policymaking and seeking a court order enjoining or revising policy decisions of administrators.<sup>31</sup> However, such suits comprise a very small fraction of total litigation brought under federal statutes. In a stratified random sample of 2,625 published federal court of appeals cases between 1900 and 2004, I find that in only 1 percent of the cases were interest groups either a plaintiff or counsel to a plaintiff, and in only 4 percent of the cases did a plaintiff seek a court order to enjoin or revise agency policy decisions.<sup>32</sup> Even looking at the data only after 1960, when interest group litigation and challenges to agency policymaking are generally thought to have become more common, the figures are 2 percent and 5 percent, respectively. Moreover, these small numbers appear in published court of appeals decisions, which likely well exceed the representation of such cases in trial court filings, given that interest group litigation and challenges to agency policymaking are more likely to be cases with high policy salience, and therefore more likely to lead to published court of appeals decisions.<sup>33</sup>

The vast bulk of private litigation enforcing federal statutes (well over 90 percent) is neither a story of impact litigation by interest groups seeking to make policy, nor of suits challenging the policymaking prerogatives of national authorities. It is, rather, a radically decentralized story of private plaintiffs and their private attorneys pursuing their private interests. It is this kind of litigation that has been largely ignored by political scientists. As discussed in the next chapter, both law and economics and sociolegal scholars have paid considerable attention to ordinary litigation, focusing on the micro-level decision behavior of potential litigants and attorneys. However, they have done so largely in isolation from the broader political processes and institutions in which those potential litigants and lawyers are embedded, processes and institutions that this book argues shape litigants' and lawyers' behavior through the vehicle of statutory design. The phenomenon of private enforcement regimes explored in this book ties ordinary litigation that enforces statutes to those broader political processes and institutions.

To be sure, at one level the importance of private litigation in American public policy is legend, and the foregoing figures reflecting the volume of private suits enforcing federal statutes will strike many as unsurprising. They may even tempt some to invoke an aphorism meant to show that the centrality of legal rights and courts in the American regime dates to its very founding. How about Alexis de Tocqueville's famous 1835 dictum: "There is hardly a political question in the United States which does not sooner or later turn into a judicial one."<sup>34</sup> This impulse would be misguided, however. The overwhelming reliance upon private litigation to

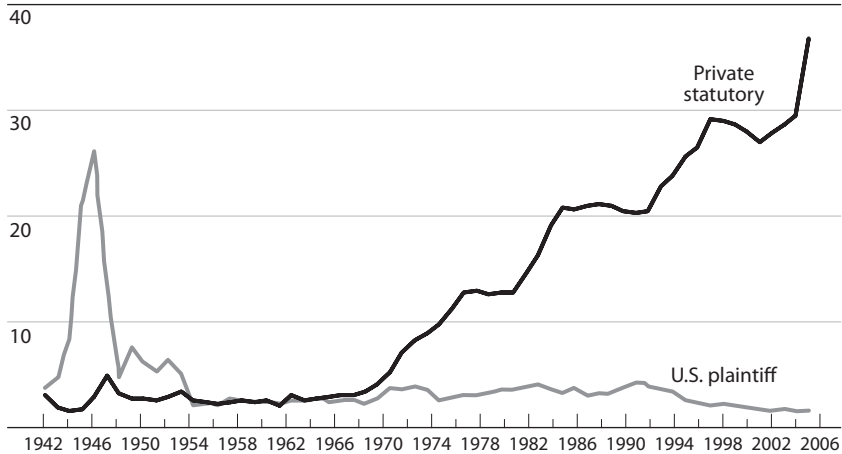
**Litigation rates**

Figure 1.1 Private and U.S. Plaintiff Statutory Litigation Rates in Federal Court, 1942–2005

enforce federal regulatory policy is not a static feature of the American state, but rather has varied dramatically over time.

Figure 1.1 reflects the rate of lawsuits brought to enforce federal statutes by private parties and by the federal government from 1942 to 2005.<sup>35</sup> Between 1942 and the end of the 1960s, the *majority* of judicial actions brought to enforce federal statutory policy were prosecuted by the national government, not private litigants. Only at the end of the 1960s did private litigation, which had long been an important part of the federal regulatory enforcement apparatus, begin to outstrip governmental prosecutions by a large margin. The interested reader may wish to know that the huge spike in enforcement actions prosecuted by the national government between 1942 and 1948 is accounted for overwhelmingly by suits enforcing the Emergency Price Control Act of 1942, which sought to stabilize prices and rents through the imposition of ceilings, and to ration scarce goods, after the outbreak of World War II.

While the United States has relied heavily upon private litigation to enforce policies passed into law by Congress since the rise of the federal regulatory state in the late 1880s, the frequency with which it has done so exploded in the late 1960s. From a rate of 3 per 100,000 population in 1967—a rate that had been roughly stable for a quarter century—it climbed to 13 by 1976, to 21 by 1986, to 29 in 1996, increasing by about 1,000 percent during these three decades. Despite much vitriolic rhetoric, typically focused on tort litigation, serious empirical scholars have *not* established a “litigation explosion” across American court sys-

tems as a whole during this period.<sup>36</sup> Figure 1.1 makes it clear that there was, however, an utterly unmistakable explosion of private lawsuits filed to enforce federal statutes.

It is well established that the modern American state relies to a vastly greater extent on litigation in policy implementation than most other industrial democratic countries.<sup>37</sup> What explains the massive volume of private litigation implementing federal law in the United States? Why has it grown so dramatically since the late 1960s? These questions motivate this book.

### EXPLANATIONS FOR RISING LITIGATION RATES

The ambition of this book is to illuminate, in general, the institutional foundations of the congressional choice to mobilize private litigants for policy implementation, not specifically to explain the sharp growth in the rate of such litigation beginning in the late 1960s. However, as already suggested, the most important dimension of this institutional account does shed considerable light on this remarkable pattern of growth: legislative-executive conflict encourages Congress to enact private enforcement regimes, and such conflict intensified potently starting in the late 1960s. Before discussing these institutional dynamics further, I identify a number of other candidate explanations in the scholarly literature for perceived rising litigation rates, and highlight their inadequacy for explaining the puzzle at hand. The two dominant explanations for perceived rising litigation rates over time might be called the “cultural transformation” and “modernization/economic development” hypotheses. The cultural transformation explanation comes in two varieties, one pejorative and the other celebratory, or at least sympathetic.

These cultural transformation explanations must be understood against the backdrop of the contention that American political culture is, to begin with, distinctively litigious. One particularly prominent strand of the notion of “American exceptionalism”—a perspective that sees the United States as differing fundamentally from other developed nations—understands the extensive role of legal rights, litigation, and courts in American policy as arising from an exceptionally individualist American political culture.<sup>38</sup> Seymour Martin Lipset, in the fullest exploration of the cultural roots of American exceptionalism, observes that the United States is “a society profoundly rooted in law,” with a “potent orientation toward individual rights,” fostering “the American eagerness for legal settlements to disputes.”<sup>39</sup>

According to the pejorative cultural transformation explanation, escalating litigation rates in the United States are the result of a process of

cultural degeneration from a rights-respecting people to a rights-abusing one. Beginning in the 1970s, legal scholars in particular diagnosed Americans as suffering from a “national disease”<sup>40</sup> that prevented them from “tolerat[ing] more than five minutes of frustration without submitting to the temptation to sue.”<sup>41</sup> According to then Chief Justice Warren Burger, there was “some form of mass neurosis developing in the country that leads people to think courts were created to solve all the problems of society,”<sup>42</sup> and he located the temporal onset of this cultural malady somewhere in the late 1960s.<sup>43</sup> During this period, America’s long-standing tradition of individualism morphed into the hyperindividualism of rabid “rights talk,” rights assertion became far more legalistic, and the American people became much more litigious.<sup>44</sup>

The celebratory cultural transformation story sees—rather than disease and neuroses—the emergence of a new and assertive form of American citizenship during the same period. Deeply influenced by the conjuncture of the civil rights movement on the one hand, and a Supreme Court that elaborated expansive understandings of individual and group rights on the other, there emerged an American citizen characterized both by a heightened state of “rights consciousness,” and by an increasing turn to courts to vindicate those rights.<sup>45</sup> The civil rights movement and its accomplishments provided a model for the polity to seize rights through litigation, and this model was extended across the waterfront of American life. This view, it seems, broadly apprehends a similar cultural transformation as that which Chief Justice Berger regretted, but from a radically different normative vantage point.

The modernization and economic development explanation finds the cause of increasing litigation in the development of complex modern economies and societies. With respect to economic development, an increasing volume of commercial activity in general engenders much legal disputing and litigation.<sup>46</sup> Modern economic activity also entails the proliferation and wide dispersal of risks that result in increases in the kinds of harm for which legal redress is sought,<sup>47</sup> while at the same time citizen expectations, fueled by the growing capacities of technology and the state, demand redress for all harms suffered.<sup>48</sup> Finally, the corresponding social processes of urbanization and social mobility increase interaction and interdependency among strangers, which drives the demand for intervention by a formal, neutral, authoritative third party to resolve disputes.<sup>49</sup>

However, explanations rooted in national culture or broad macro-historical transformations in economy and society cannot account for the changing level of private enforcement of federal statutory policy. While there are a number of problems with these explanations for the pattern of private enforcement of federal statutes, only one is addressed here. Most

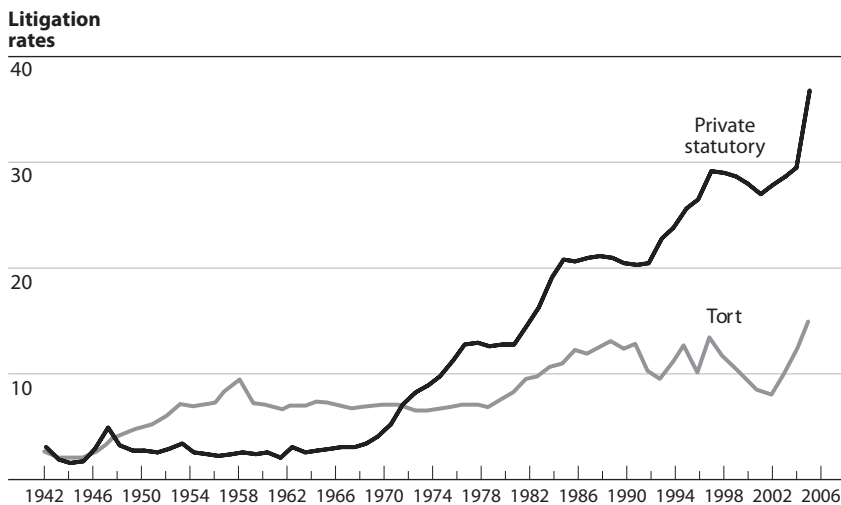


Figure 1.2 Private Statutory and Tort Litigation Rates in Federal Court, 1942–2005

importantly, such explanations are too global and reductive to convincingly account for sharp differences in the evolution of filing rates across different types of cases over time. This is well illustrated by figure 1.2, which shows the rate of private actions under federal statutes, alongside the rate of tort litigation filed in federal courts, from 1942 to 2005.<sup>50</sup> Tort litigation is, by far, the type of litigation subject to the most scholarly study and public commentary by those interested in and concerned about the extent of litigation in the United States.

While both types of federal litigation increased significantly over these roughly six and a half decades, the magnitude of the increase of federal statutory litigation vastly outstripped that of tort filings. Moreover, private statutory litigation and tort litigation followed distinct developmental trajectories. In the decade after the end of World War II, from 1946 to 1955, the rate (per 100,000 population) of tort litigation in federal court rose sharply, by about 350 percent, from 2 to 7, while the rate of private statutory litigation *declined* by 50 percent, from 3 to 2. During the decade from 1968 to 1977, the rate of private statutory litigation more than quadrupled, rocketing from 3 to 13, while the rate of tort litigation held constant at 7 over the same period. Between 1990 and 1996 alone, the rate of private statutory litigation increased by nearly 50 percent, from 20 to 29, during which time the rate of tort litigation held constant at 13.<sup>51</sup>

It is evident that important elements in the causal explanation for the level of private enforcement of federal statutes will be unique to *that*

category of litigation as distinct from others such as tort litigation, which followed its own path. Propensities to assert legal rights in court driven by transformations in national culture, or by processes of modernization and economic development, apply as much to private law as to public law, and as much to rights under tort law as to rights under statutory law.<sup>52</sup> It is simply not plausible that either cultural transformations with respect to legal claiming behavior, or processes of modernization and economic development, are critical in explaining the sea change in private enforcement of federal statutes in the late 1960s while having no similar effects on tort litigation filed in the very same courts. This is, *emphatically*, not to say that national culture or processes of modernization and economic development are not important. The point is to emphasize, instead, that there are other important forces in play that are obscured by too-easy reliance on such broad-gauged explanatory categories. This book turns to a narrower set of causal explanations—explanations rooted in *political institutions*—to explain the unique career of private enforcement of federal statutory policy.

#### PLAN OF THE BOOK

Chapter 2 lays out a theoretical framework for understanding how private enforcement regimes work, and why American state structures encourage Congress to enact them. With respect to *how* private enforcement regimes work, drawing on the law and economics paradigm for explaining rational litigant behavior in terms of the expected monetary value of claims, the chapter provides a systematic framework for understanding the core statutory elements from which private enforcement regimes are composed. The framework emphasizes the ways in which Congress utilizes these elements as mechanisms to regulate the volume of private enforcement litigation under a statute by effectively setting a market value for lawsuits, which can have the effect of creating an infrastructure of lawyers ready, willing, and able to prosecute enforcement actions.

With respect to *why* Congress enacts private enforcement regimes, the chapter argues that the legislative choice is made by purposive, goal-oriented, and strategically minded actors attempting to maximize on policy objectives. It argues, most importantly, that legislative-executive conflict over control of the bureaucracy drives Congress to rely upon litigants and courts as an alternative to administrative power. It further argues that the extreme institutional fragmentation of the American state, making statutes difficult to change once they are enacted, encourages congressional reliance upon private enforcement regimes because they will be difficult for bureaucrats and future legislative majorities to subvert. It

argues, finally, that private enforcement regimes can often attract broader legislative support than bureaucratic regulatory state-building, and such broad support can be critical in overcoming the multiple veto players that institutional fragmentation empowers. The chapter also traces the important consequences of the legislative choice of private enforcement regimes for the allocation of power among branches of government in the separation of powers system, and between the state and civil society.

In probing evidence on the causes of the congressional choice to mobilize private litigants for policy implementation, this book takes a mixed-methods approach, relying upon a combination of statistical and qualitative historical evidence. Chapter 3 presents statistical analysis of an empirical model of Congress's propensity to enact private enforcement regimes. It analyzes new data on a measure of Congress's efforts to mobilize private litigants from 1887 to 2004, testing hypotheses developed in chapter 2 linking American state structures to the congressional choice to enact private enforcement regimes. This data allows evaluation of additional hypotheses concerning legislative mobilization of private litigants that have long appeared in the scholarly literature but have never been tested because of a lack of appropriate data. These theories concern the role of (1) rent-seeking lawyers, (2) issue-oriented citizens groups, (3) the Democratic party, and (4) scarce tax revenues to fund bureaucracy, in driving the legislative enactment of private enforcement regimes. Analyzing a large number of regulatory laws over a long period of time, this model allows evaluation of whether hypothesized causes of congressional enactment of private enforcement regimes, such as legislative-executive conflict, are actually significantly correlated with passage of laws relying upon this form of implementation.

While the first three chapters of this book focus on understanding and explaining private enforcement regimes in general, the next three chapters focus closely on the policy area of civil rights in order to shed light on dimensions of private enforcement regimes that can only be discerned in particular policy episodes and contexts. Turning from statistical analysis of patterns in legislative behavior to qualitative historical evidence, chapters 4 to 6 carefully trace the historical record to uncover the key causes of the policy outcome described in the opening paragraphs of this book: massive reliance on private litigation, with very modest administrative powers, in the implementation of federal job discrimination laws. The evidence in this part of the book will lead well beyond the domain of job discrimination and into that of civil rights more broadly. These three chapters provide a detailed historical analysis of the origins and development through time of this approach to implementation, allowing evaluation of whether hypothesized causes of congressional enactment of private enforcement regimes, such as legislative-executive conflict, are

visible in the historical events and processes that produced the private enforcement outcome.

Some hypotheses about congressional enactment of private enforcement regimes are readily susceptible to validation or rejection through quantitative analysis of correlation between variables, and others are more conducive to illumination through scrutinizing the qualitative historical record reflecting the events and processes that produced an outcome of interest. When the two forms of evidence combine to validate a hypothesis in a mutually reinforcing way, the ability to draw inferences in favor of the hypothesized cause will be especially strong and convincing.<sup>53</sup> To anticipate one of the book's most significant findings, both the statistical model and the qualitative historical analysis will strongly support the conclusion that conflict between legislative and executive preferences encourages Congress to rely upon private litigation for statutory implementation. This evidence strongly links polarization between Congress and the president since the late 1960s to the steep growth of private enforcement litigation during the same period, and correspondingly to the growing empowerment of private litigants, lawyers, and courts in the implementation of American policy.