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Private Attorneys General and The First Amendment

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PRIVATE ATTORNEYS GENERAL AND THE FIRST AMENDMENT

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INTRODUCTION

The "private attorney general" is under fire again. It has been in and out of favor in the six decades since it was named,[1] in part because it has come to signify so many different things.[2] At its core, however, the term denotes a plaintiff who sues to vindicate public interests not directly connected to any special stake of her own.[3] The remedies sought in such actions tend to be correspondingly broad: rather than seeking redress for discrete injuries, private attorneys general typically request injunctive or other equitable relief aimed at altering the practices of large institutions. From school desegregation to fair housing, environmental management to consumer protection, the impact of private attorney general litigation is rarely confined to the parties in a given case.[4] It is perhaps unsurprising, then, that the private attorney general has not been universally admired. While some regard it as critical to the effectuation of the public interest, others worry its authority may be abused by plaintiffs better likened to "extortionist[s]."[5] Much of this disagreement concerns the *wisdom* of relying on private actors to implement broad public norms. Occasionally, however, arguments surface about the *legality* of doing

1. *See* Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943) (using the phrase "private Attorney Generals" [sic] for the first time to refer to plaintiffs empowered by Congress to "su[e] to prevent action by an officer in violation of his statutory powers," and noting the permissibility of granting private actors such authority "even if the sole purpose is to vindicate the public interest"); *see also* Flast v. Cohen, 392 U.S. 83, 119 (1968) (Harlan, J., dissenting) (tracing the term "private attorneys-general" to *Associated Industries*).

2. *See* Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 355 (1988) (suggesting that there is no "single, 'lasting' reform, institutionalized as the private attorney general"); Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS., Winter 1998, at 194-95 (stating "there is still no legal definition, nor any well-established pattern of usage, which precisely identifies a litigant as a 'private attorney general'").

3. The term thus aligns with what Louis Jaffe famously dubbed the "non-Hohfeldian plaintiff," and what Abram Chayes first called "public law litigation." *See* Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Jaffe adapted his term from Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

4. *See* Chayes, *supra* note 3, at 1284 (including these areas, among others, as examples of private attorney general litigation).

5. Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 618 (2001) (Scalia, J., concurring).

so. The latest challenge to the private attorney general takes the latter form, and comes from a rather unlikely quarter: the First Amendment.

The challenge arose in *Nike v. Kasky*.[6] The case was ostensibly about the Supreme Court's commercial speech doctrine, which generally permits the government to promote accuracy and integrity in the marketplace by prohibiting false advertising and other misleading commercial statements.[7] A private plaintiff sued Nike under a California law prohibiting "unfair, deceptive, untrue or misleading advertising,"[8] alleging that Nike had publicly misrepresented the working conditions in its subcontractors' factories.[9] The main question before the Supreme Court was whether Nike's statements constituted "commercial" or "noncommercial" speech.[10]

The Solicitor General of the United States filed a brief as amicus curiae supporting Nike, but urging the Court to avoid the commercial/noncommercial issue. Instead, he focused on the fact that the suit against Nike was initiated by a private attorney general. California law provided that, in addition to direct government enforcement, unfair competition and false advertising actions could be brought by private plaintiffs even without any allegation that they had been injured by the statements in question.[11] In the Solicitor General's view, that feature of the California regime exceeded the legitimate injury-compensating scope of traditional common law actions for fraud, misrepresentation, and the like. In so doing, it raised the prospect of vexatious and abusive litigation, which in turn threatened to "chill[] the scope of public debate and the free flow of useful information."[12] To protect against that harm, the Solicitor General urged the Court to hold that the First Amendment bars "legal regimes in which a private party who has suffered no actual injury may seek redress on

6. 539 U.S. 654 (2003) (dismissing writ of certiorari as improvidently granted).

7. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising. . . . [T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.").

8. CAL. BUS. & PROF. CODE § 17200 (West 1997). When a private plaintiff sues to enforce a speech-restrictive law, the judiciary's involvement constitutes sufficient "state action" to bring the First Amendment into play. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) ("Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment.").

9. *See infra* notes 187-194 and accompanying text.

10. *See infra* notes 196-198 and accompanying text.

11. *See infra* notes 74-76 and accompanying text.

12. Brief for the United States as Amicus Curiae Supporting Petitioners at 21, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

behalf of the public for a company's allegedly false and misleading statements."[13]

At the same time, the Solicitor General argued there should be no bar to direct government enforcement of speech restrictions substantively identical to those invoked by the plaintiff in *Nike*. He asserted that the Federal Trade Commission and its state counterparts are subject to "institutional checks" such as "legislative oversight and public accountability,"[14] which ensure that their actions do not interfere with First Amendment values. Unlike suits initiated by private attorneys general, therefore, government enforcement actions do not imperil free speech values, even in the absence of any allegation that the challenged speech has caused any specific injury. Accordingly, the Solicitor General reasoned, the Court ought to invalidate the California private attorney general regime while preserving the power of government entities to bring essentially identical enforcement actions.

The argument was nothing if not novel.[15] A number of state consumer protection laws observe the distinction advocated by the Solicitor General — requiring injury in suits brought by private plaintiffs but not in those initiated by the government[16] — but the Solicitor General pointed to no judicial precedent or scholarly commentary defending the distinction under the First Amendment. Yet neither, it appears, had any court or commentator explicitly rejected such a distinction.

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13. *Id.* at 8.

14. *Id.* at 23.

15. Although not framed as such, the argument may echo certain themes sounding in the largely moribund "private delegation doctrine." Applied to state governments, the doctrine imposes due process limits on delegations of governmental or quasi-governmental power to private individuals. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1437-45 (2003) (describing the doctrine). As Gillian Metzger describes, the animating concern of the doctrine is that "public power may be abused to achieve particular private aims instead of the public interest." *Id.* at 1437. The Solicitor General's argument in *Nike* certainly takes up that theme, and thus one might wonder about the application of private delegation doctrine in cases like *Nike*. As a practical matter, however, invocations of the private delegation doctrine would be unlikely to persuade a modern court: the doctrine has been "dormant" since the New Deal. *Id.* at 1438. Moreover, even if the doctrine were active today, it is far from clear that the conferral of private litigating (but not more formal regulatory) power would constitute a paradigm case of problematic "private delegation." Finally, although Metzger mounts a powerful theoretical argument for a new form of private delegation analysis that accounts for the present trend toward privatizing governmental functions, *see id.* at 1456-1501, it appears that her new model would not require any greater judicial superintendence of private attorneys general than that ordinarily provided by the courts in the course of litigation. In any event, these issues are all beyond the scope of this Article. Accordingly, I do not address whether, instead of relying upon the First Amendment, the *Nike* argument against private attorneys general could have been supported by recourse to the private delegation doctrine.

16. *See* DEE PRIGDEN, CONSUMER PROTECTION AND THE LAW § 5:9 (2002).

The Court ultimately avoided the issue by dismissing the writ of certiorari as improvidently granted,[17] but not before as many as five Justices expressed at least some interest in the Solicitor General's argument.[18] More recently, in November 2004, the California voters endorsed a ballot initiative that limited the litigating authority of private attorneys general by imposing an injury requirement along the very lines proposed by the Solicitor General in *Nike*.[19] Those who campaigned in favor of the new limits justified them, in part, on First Amendment grounds.[20] Thus, both at the Court and in the public at large, the idea of a First Amendment distinction between public and private enforcement seems to be attracting support.

If formally embraced as a doctrinal matter, this distinction could have substantial theoretical and practical consequences, the latter hardly limited to the field of consumer protection. Consider, for example, the anti-pornography ordinance proposed by Andrea Dworkin and Catharine MacKinnon, a version of which was adopted by the city of Indianapolis in 1984. One provision of the ordinance made "trafficking in pornography" a civil offense actionable by "any woman . . . acting against the subordination of women."[21] The underlying theory was that pornography inflicted harm on all women,[22] but the ordinance did not require any showing of injury in the conventional sense. Rather, all women were authorized to enforce the trafficking provision as private attorneys general. Courts made quick work of the ordinance as enacted in Indianapolis, concluding its definition of pornography was viewpoint-discriminatory and thus facially unconstitutional.[23] Although courts thus had no occasion to consider other arguments against the ordinance, free speech advocates suggested the trafficking provision had additional constitutional flaws in that it allowed "*anyone* to bring a lawsuit to halt *any* production or

17. *See* Nike, Inc. v. Kasky, 539 U.S. 654 (2003).

18. Justice Breyer issued an opinion dissenting from the dismissal, expressing apparent support for the Solicitor General's argument. *See id.* at 680-81 (Breyer, J., dissenting from the dismissal of the writ). Justice O'Connor joined Justice Breyer's opinion. Justice Stevens issued an opinion concurring in the dismissal, in which he characterized the Solicitor General's argument as raising "difficult and important" questions. *Id.* at 664 n.5 (Stevens, J., concurring in the dismissal of the writ). Justice Ginsburg joined Justice Stevens' opinion in full; Justice Souter joined it in relevant part. *See infra* notes 226-230 and accompanying text for further discussion.

19. *See infra* notes 233-237 and accompanying text.

20. *See infra* note 237.

21. ANDREA DWORKIN & CATHARINE MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 141 (1988).

22. CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 190 (1987).

23. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985) ("The definition of 'pornography' is unconstitutional."), *aff'd mem.*, 475 U.S. 1001 (1986).

distribution of sexual materials."[24] The problem, on this view, was that the speech in question would be intolerably chilled if over half the population was suddenly empowered to regulate it.[25]

Whether applied to commercial speech, pornography, or any other area of regulated expression, the public/private distinction urged in *Nike* might seem a ready solution to such problems. Especially where a regulation's substantive provisions are couched in relatively malleable terms, authorizing the general citizenry to enforce the regulation might threaten to open the proverbial floodgates of litigation, meritorious and otherwise. Government enforcement, in contrast, may seem more stable, less subject to abuse, and — to the extent the officials responsible for enforcement are sympathetic to the position of the entities they regulate — more restrained.

Analytically, this newly proposed public/private distinction raises at least two sets of questions. First, it provokes a number of questions specific to the First Amendment. It is clear that the First Amendment tolerates some content-based limits on speech.[26] True threats, fighting words, defamation, obscenity, copyright-infringing speech, and commercial speech are all examples of "speech" subject to regulation on the basis of its content.[27] But the fact that certain speech may be regulated does not mean that all *forms* of such regulation are permissible; the First Amendment cares about the means as well as the ends of speech regulation. The question raised here is whether the First Amendment's sensitivity to regulatory means should distinguish among plaintiffs challenging the speech in question. Specifically,

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24. NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 76 (1995).

25. *See, e.g.*, Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 640 (1987) (noting concerns that "the ordinance . . . made a bookseller vulnerable to suits brought by almost anyone and for any motivation," and describing "'fear of what groups like the Moral Majority could do with the Dworkin-MacKinnon ordinance as a precedent'").

26. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 358 (2003) ("The protections afforded by the First Amendment . . . are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.").

27. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186 (2003) (copyright); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1980) (commercial speech); Gertz v. Welch, 418 U.S. 323 (1974) (defamation); Miller v. California, 413 U.S. 15 (1973) (obscenity); Watts v. United States, 394 U.S. 705 (1969) (per curiam) (true threats); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words). Beyond the fact that the First Amendment accords different levels of protection to different kinds of speech, some restrictions are not regarded as First Amendment events at all — that is, the expression being regulated is deemed beyond the First Amendment's coverage. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89-92, 134-35 (1982); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769-73 (2004). Schauer identifies a number of examples of "speech" regulation falling outside the First Amendment, including securities regulation, antitrust law, the law of criminal solicitation, much of the law of evidence, and the regulation of professionals. *See id.* at 1777-84.

should it matter for First Amendment purposes whether the party invoking a speech-restrictive law is the government or a private actor? Does, or should, the First Amendment prefer public over private enforcement when it comes to regulating speech?

The second set of questions goes beyond the First Amendment. By contending that there is something especially problematic about private litigation by a plaintiff who asserts no direct injury, the public/private distinction raises basic questions about the role of the private attorney general across substantive domains. On one hand, discrete dispute resolution has traditionally been viewed as the basic purpose of private litigation.[28] On the other, it has long been clear that litigation aimed primarily at resolving private disputes can have the secondary effect of advancing broader public values.[29] But may privately initiated "public law litigation"[30] seek *only* to advance broad public interests, even though the plaintiff has no direct stake in the defendant's conduct and has suffered no direct injury requiring compensation? Who, in short, may enforce public law?

I address both sets of questions in this Article. My argument can be distilled into two main contentions. First, a categorical First Amendment preference for public over private enforcement cannot be squared with existing free speech doctrine or the principles underlying it. To the contrary, as a general matter, the First Amendment properly regards private enforcement of speech-related regulations as neither more nor less threatening to free expression than public enforcement. Second, the distinction between public and private enforcement urged in *Nike* is best understood as more than merely an unpersuasive First Amendment argument. Rather, it should be viewed against the backdrop of a number of efforts by the Supreme Court over the last decade to limit the power and influence of private attorneys general in a whole range of substantive areas, while leaving the government a relatively free hand to enforce the laws directly. To the extent the proposed public/private distinction garners support at the Supreme Court and elsewhere despite its doctrinal weaknesses, the reason may be that it seems to offer a novel means of advancing the Court's policy-preferred end of elevating public over private enforcement. That preference may, in turn, reflect a more fundamental hostility to regulation itself.

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28. *See* Chayes, *supra* note 3, at 1282 ("In our received tradition, the lawsuit is a vehicle for settling disputes between private parties about private rights.").

29. *See, e.g.*, Louis Kaplow, *Private Versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. 371, 371 n.2 (1986) (noting that in private tort litigation, the "private benefits are simply the damage award, whereas social benefits consist of the reduction in accident costs resulting from the deterrence effect of private suits").

30. *See* Chayes, *supra* note 3, at 1284 (describing "public law litigation" as an "emerging model," replacing the "traditional model" of private dispute resolution).

This Article proceeds in five parts. In Part I, I place the modern private attorney general in two contexts, one historical and the other policy-based. As to the first, I show that legislatures have long relied upon private plaintiffs to enforce public law and to obtain broad remedies in the public interest, even when doing so is not connected to the vindication of any individualized injury. As to the second, I survey contemporary policy arguments for and against the private attorney general, showing that views on the matter have vacillated over time. In part because of that vacillation, I suggest that the decision whether to deploy private attorneys general in a particular context requires the kind of pragmatic balancing best undertaken by legislatures, not courts. In short, Part I establishes the private attorney general as an institution with a long historical pedigree, whose proper role in any particular context is best determined by the legislature responsible for the underlying law being enforced.

Part II focuses on the modern Supreme Court's treatment of the private attorney general. Although the policy debate over private attorneys general yields no universal conclusion about their utility, the current Court is hardly in equipoise on the matter. Indeed, the Court over the past decade has erected a number of legal obstacles to the private enforcement of public law. It has articulated strict new standing requirements; it has crafted an expansive view of state sovereign immunity; and it has severely limited plaintiffs' entitlement to attorney's fees. Though doctrinally diverse, these developments reflect a consistent hostility to privately initiated public law litigation, and a preference instead for direct government enforcement. By thus raising the cost of regulation in a variety of areas, the Court has pushed a fundamentally anti-regulatory agenda: hostility to private enforcement of the law predictably yields less enforcement overall. In the main, however, these developments have been confined to litigation in the federal courts; the Supreme Court's ability to shape state court litigation is much more limited.

Enter *Nike v. Kasky* in Part III, and the Solicitor General's argument for a distinction between public and private enforcement that, because based on the First Amendment, would apply in state and federal court alike. *Nike* stands as a case study of the proposed distinction. Stated most strongly, the contention is that the First Amendment should specially disfavor statutory regimes that empower private individuals to enforce speech-related regulations by seeking broad injunctive and other equitable relief. The basic concern is about remedies: the aim is to limit the ability of private plaintiffs to use the judiciary to compel far-reaching changes in a defendant's expressive activities, especially where those activities are directed not at a particular individual but at the public more generally.

With the First Amendment argument against private attorneys general thus laid out, I turn in Part IV to showing that it is

fundamentally at odds with free speech doctrine and values. My point is not that private enforcement of speech-related laws should be immune from First Amendment scrutiny. To the contrary, laws regulating speech should be, and are, no less constitutionally suspect simply because they are enforced by private plaintiffs instead of the government. But neither should they be any *more* suspect. If a particular speech restriction poses First Amendment problems on its face, the source of the problem is the substance of the restriction. The problem persists regardless of whether it is enforced by private parties, government actors, or both. And in the case of public enforcement, appeals to the public accountability and wise discretion of the enforcing agency do not solve the problem. Indeed, a critical premise of the First Amendment is that freedom of speech must not be entrusted to the government's discretion. Thus, the government cannot cure a regulation's First Amendment defects unless it is prepared authoritatively to narrow the regulation's substantive scope. If it engages in such narrowing, then it is the resulting, more modest reach of the regulation, not the identity of the plaintiff, that relieves constitutional concerns. Absent such narrowing, a regulation that would raise First Amendment concerns if privately enforced fares no better when publicly enforced.

In the last Part of the Article, I return to a suggestion made earlier: that the Supreme Court may see in this new argument against private attorneys general an opportunity to extend to the state courts the anti-private enforcement campaign that it has been pursuing in the federal courts. Though untenable as a matter of First Amendment doctrine and at odds with centuries of legislative practice, the argument invites a Court already distrustful of privately initiated public law litigation to impose new limits on its use. Going further, to the extent some on the Court may favor the reduction of regulation more generally, the First Amendment argument may provide a new, though substantively limited, opportunity to pursue an anti-regulatory agenda in the state courts. Yet, while this possibility may help explain the argument's attraction, it is not a justification: appeals to the Court's own policy preferences should be rejected as inadequate to overcome the clear legal shortcomings in the First Amendment attack on private attorneys general.

I. PRIVATE ATTORNEYS GENERAL IN PRACTICE AND AS POLICY

New challenges to the private attorney general must be placed in context. My aim in this Part is to provide two such contexts. First, I trace the long history of legislative reliance on private plaintiffs to perform the function we today associate with the private attorney general, namely, bringing suit to effectuate broad public interests. Second, I survey some of the contemporary policy arguments for and

against the private attorney general. The sum of these two examinations is that private attorneys general have long been viewed as a permissible means of pursuing the public interest, but that the wisdom of relying on them depends on policy tradeoffs best made by legislatures.

A. *Practice*

Writing in the mid-1970s, Abram Chayes coined the term "public law litigation" to denote a new paradigm of private plaintiff-initiated litigation. Whereas traditional private litigation "is a vehicle for settling disputes between private parties about private rights,"[31] public law litigation seeks "the vindication of constitutional or statutory policies" on a broader plane.[32] The interests advanced are those of the public at large (or at least a significant subset thereof), not simply the individual plaintiff. Often, such litigation targets unlawful government action and seeks to remedy it with injunctive relief aimed at restructuring the offending institution. School desegregation litigation is a prime example. Indeed, Richard Fallon has gone so far as to say that "[t]he era of the public lawsuit began with *Brown v. Board of Education*."[33]

Public law litigation need not, however, be confined to suits against the government. Chayes himself pointed to "features of public law litigation" in numerous fields targeting private actors, including antitrust, environmental management, securities fraud, and consumer protection.[34] That is the kind of litigation relevant here. And although Chayes identified a rise in such litigation over the second half of the twentieth century, the aim of this Section is to show that its historical

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31. Chayes, *supra* note 3, at 1282 (citing M. COHEN, LAW AND THE SOCIAL ORDER 251-52 (1933), as exemplifying the traditional view).

32. *Id.* at 1284.

33. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 1-2 (1984); *accord* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1390-91 (2000) ("The modern structural reform revolution began the 1950s, when federal courts began to hear cases asserting the deprivation of rights to large groups of people by state and local institutions, such as schools and prisons."). Others have contended that, as a matter of form and procedure, the model of public law litigation Chayes identified was not as new as he claimed. *See, e.g.*, Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (arguing that English and American courts have been engaged in reordering the affairs of complex institutions for centuries, and that the principal change from the 1950s onward was the creation of new substantive rights, not the development of novel judicially enforceable remedies). For an account of an emerging "experimentalist" model of public law litigation targeting a variety of public institutions, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004).

34. *See* Chayes, *supra* note 3, at 1284.

roots are far deeper, and then to highlight some of its contemporary manifestations. It is in the context of this long and continuing reliance on private actors to enforce public norms, I argue, that contemporary questions about the private enforcement of speech regulations should be appraised.

1. *Historical Antecedents*

As noted in the Introduction, the term "private attorney general" was first used a little over sixty years ago.[35] If understood in the terms articulated in the Introduction, however — as denoting one who sues to vindicate public interests not directly connected to any special interest or injury of one's own — its origins are much earlier.[36] As the Supreme Court observed almost a century ago:

> Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government. The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer.[37]

Historically, litigation meeting this description has taken a variety of forms. One of the most salient — and the one most directly evoked in the above passage — is the *qui tam* action.[38] In England, statutes authorizing *qui tam* actions were enacted as early as the fourteenth century.[39] Such statutes typically prohibited certain conduct, and then

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35. *See supra* text accompanying note 1.

36. *See* Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961) ("[T]he public action — an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations — has long been a feature of our English and American law.").

37. Marvin v. Trout, 199 U.S. 212, 225 (1905); *see* Jaffe, *supra* note 3, at 1035 ("[I]t has not been true in the past, and it is even less true now, that Anglo-American courts have been . . . restricted by any requirement of a Hohfeldian plaintiff.").

38. *See* Flast v. Cohen, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting) (including *qui tam* cases in list of cases involving "private attorneys-general"); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1314 (1961) (describing the "private Attorney General" coined by Judge Frank in *Associated Industries* as "akin to the 'relator' of the old prerogative writs and the private person currently permitted by the Attorney-General under the English practice to sue in the latter's name"). As the Supreme Court has observed, "*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.' The phrase dates from at least the time of Blackstone." Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *160).

39. *See, e.g.*, The Penalty for Selling Ware at a Fair After it is Ended, 1331, 5 Edw. 3, ch. 5 *in* STATUTES OF THE REALM 266 (reprinted 1993) (1811); *see also Vermont Agency*, 529 U.S. at 775 (noting that, starting in the fourteenth century, "Parliament began enacting statutes that explicitly provided for *qui tam* suits," some of which "allowed informers to

authorized private parties (known as "relators" or "informers") to enforce the prohibition by suing on the government's behalf.[40] If successful, the relator was typically entitled to share in the damages or civil penalties paid by the defendant. Critically, *qui tam* statutes often did not require the relator to have any connection to the controversy beyond the right to sue granted in the statute itself.[41]

Qui tam statutes have a long history in this country as well,[42] dating at least from the first years of the Union.[43] The most prominent federal *qui tam* statute, the False Claims Act (FCA),[44] was first enacted in 1863 and continues in use today.[45] The FCA imposes civil liability on those who defraud the federal government, and its *qui tam* provision empowers otherwise uninvolved individuals who learn of such fraud to sue on the government's behalf. The FCA also provides for direct governmental enforcement of its provisions, and permits the government to intervene in and direct actions initiated by private relators.[46] In this respect, it "establish[es] a dual enforcement scheme

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obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves").

40. *See* Priebe & Sons v. United States, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting) (calling *qui tam* relators "the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation"). Although "relator" and "informer" actions are today often grouped together under the *qui tam* rubric, some commentators discuss them separately. *See, e.g.*, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394-1409 (1988).

41. *See Marvin*, 199 U.S. at 225 ("The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer."); *see also Vermont Agency*, 529 U.S. at 775 (noting that the English Parliament began enacting *qui tam* statutes in the fourteenth century, and that some versions "allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves").

42. *See Vermont Agency*, 529 U.S. at 776 ("*Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution."); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 129 (1998) (Stevens, J., concurring in the judgment) (describing *qui tam* actions as "deeply rooted in our history"); Richard A. Bales, *A Constitutional Defense of* Qui Tam, 2001 WIS. L. REV. 381, 387 n.37 (citing *qui tam* statutes from the first Congress and shortly thereafter); Evan Caminker, Comment, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 341-42 (1989) (noting that "the *qui tam* enforcement framework is familiar to our legal tradition," that "*qui tam* actions were routinely authorized by the First and subsequent early Congresses," and that *qui tam* actions were also popular at the state level in early American history); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 296-303 (1989) (discussing early American uses of *qui tam* statutes).

43. *See Vermont Agency*, 529 U.S. at 777 n.6 (listing early *qui tam* statutes, including Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 102; Act of Jul. 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133; Act of Jul. 22, 1790, ch. 33, § 3, 1 Stat. 137-38; Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 209).

44. 31 U.S.C. §§ 3729-3731 (2000).

45. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

46. 31 U.S.C. § 3730(a) (2000); 31 U.S.C. § 3730(b)(2)-(4) (2000).

whereby both public officials and private citizens are permitted to represent the United States in litigation to enforce statutory mandates."[47] To encourage private enforcement, the FCA, like its English antecedents, grants relators a share of the damages and civil penalties if they prevail.[48] In this way, the statute relies on the relator's interest in a monetary reward as a means to enforce its substantive aims.[49] That, in fact, is the basic premise of all *qui tam* legislation: that giving private parties a financial interest in enforcing public law is an efficient way to promote the public interest.[50]

In addition to enforcing civil remedies on the government's behalf, private parties were empowered during some periods in English, American colonial, and early U.S. history to prosecute criminal cases,[51] whether or not they had been injured by the criminal conduct in question.[52] Where the criminal penalty took the form of a fine, it was

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47. Caminker, *supra* note 42, at 350.

48. 31 U.S.C. § 3730(a)-(b) (2000).

49. *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997) ("As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.").

50. As the Supreme Court has observed, *qui tam* statutes are

> passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.5 (1943) (quoting United States v. Griswold, 24 F. 361, 366 (D. Or. 1885)). For more on the view that *qui tam* and related provisions are cost-effective ways to pursue the public interest, see *infra* notes 85-86 and accompanying text.

51. *See* Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 801 (2000) (Stevens, J., dissenting) (observing that "private prosecutions were commonplace in the 19th century"); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 127-28 (1998) (Stevens, J., concurring in the judgment) (discussing the practice); ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA 1800-1880, at 1-2 (1989) ("Private prosecution — one citizen taking another to court without the intervention of the police — was the basis of law enforcement in Philadelphia and an anchor of its legal culture, and this had been so since colonial times."); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515 (1994) ("[S]cholars have determined that the notion of private prosecutions originated in early common law England, where the legal system primarily relied upon the victim or the victim's relatives or friends to bring a criminal to justice."); *id.* at 518 ("American citizens continued to privately prosecute criminal cases in many locales during the nineteenth century.").

52. STEINBERG, *supra* note 51, at 46, 66 (noting that private criminal prosecutions in nineteenth-century Philadelphia could be brought even by those not injured by the defendant's conduct); H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 525 n.72 (1986) (noting that private prosecution of penal statutes was "an essential feature of the late medieval and early modern criminal process," and explaining that "although the private award was ordinarily payable to the aggrieved party, it occasionally lost its remedial character entirely and was payable, essentially as a reward, to any private citizen ('common informer') who successfully prosecuted the offender").

often paid in whole or in part to the private prosecutor as a "reward" for obtaining the conviction.[53] In this respect, private prosecutions mirrored *qui tam* actions.[54] But private prosecutors were not always limited to circumstances where a share in the award provided a financial incentive to prosecute. In some cases, "[t]he interest in punishing the defendant and deterring violations of law by the defendant and others was sufficient to support the 'standing' of the private prosecutor even if the only remedy was the sentencing of the defendant to jail or to the gallows."[55]

In sum, the history of *qui tam* actions and privately initiated criminal prosecutions confirms that legislative reliance on uninjured private parties to enforce public-regarding statutes is no recent innovation. These longstanding historical practices must inform any appraisal of comparable modern institutions, and should confer on those modern institutions a presumptive legitimacy.

2. *Modern Instruments*

Although *qui tam* statutes remain in use today,[56] the "citizen suit" is probably the most familiar contemporary form of private attorney general litigation.[57] For my purposes, the most significant citizen-suit provisions are those that authorize private suits against private actors

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53. Foy, *supra* note 52, at 525 n.72.

54. Some treat private prosecutions of this kind as literal *qui tam* actions. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 175 (1992) ("The purpose of this [*qui tam*] action is to give citizens a right to bring civil suits to help in the enforcement of the federal criminal law."). Whether or not the *qui tam* label is employed in the criminal context, I do not mean to discount the difference between criminal prosecutions and civil suits. Although the line between criminal and civil law can be blurry at the margins, the distinction has considerable significance in a range of constitutional areas. Thus, empowering private individuals to enforce criminal laws may raise special constitutional concerns not present in the civil context. I do not consider any such issues here. Rather, my argument in this Article is confined to the civil context.

55. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 128 (1998) (Stevens, J., concurring in the judgment).

56. *Qui tam* statutes remain in use in the United States, but are no longer a part of English law. *See* J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 608 (2000).

57. The term "private attorney general" also appears in other contemporary contexts. For example, it is often used to refer to attorney's fee provisions in federal civil rights laws, reflecting the idea that the plaintiff, though suing to enforce his own civil rights, is also serving the public interest. *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205 ("Attorney's fees are the fuel that drives the private attorney general engine. Every significant contemporary civil rights statute contains some provision for attorney's fees, and in 1976, Congress passed a comprehensive attorney's fee statute that provides for fees under the most important Reconstruction Era civil rights statutes as well." (footnotes omitted)); Rabkin, *supra* note 2, at 180 (noting the frequency with which the private attorney general concept is used to describe attorney fee provisions). I discuss the Supreme Court's treatment of attorney's fees in Part II, *infra*.

to enforce legal obligations that do not correspond to specific individual rights held by the plaintiff.[58] Starting in the 1970s, such provisions became especially common in federal environmental statutes. The Clean Air Act was the first statute in this area to authorize citizen suits, and by the early 1990s nearly all federal environmental laws contained similar provisions.[59]

Typically, a federal citizen-suit statute takes one of two forms. After imposing certain legal obligations on the regulated entity, it provides that the obligations may be enforced either (1) by "any person" (or "any citizen"),[60] or (2) by any person "aggrieved" (or "injured" or "adversely affected").[61] Occasionally, the statute will merge these approaches by defining "citizen" or "person" as someone who has been "aggrieved" or "injured."[62] But even for those plaintiffs suing under an "any person" provision that itself does not require injury, the Supreme Court has provided that a plaintiff does not have constitutional standing to sue in federal court unless she alleges "injury in fact."[63] I will discuss the Court's standing jurisprudence at greater length in Part II, but for present purposes it suffices to observe that, whether on account of statutory language or constitutional standing doctrine, federal citizen-suit plaintiffs must allege injury. On this point, federal citizen suits differ from *qui tam* actions.

The critical point here, however, is that even though federal citizen-suit plaintiffs must allege injury, the *remedies* available to such

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58. *Cf.* Sunstein, *supra* note 54, at 231 ("Many citizen-suit provisions in the environmental laws give the citizen the option of initiating proceedings against the private defendant allegedly operating in violation of federal law.").

59. As Barton H. Thompson, Jr., describes:

> Perhaps the most pervasive, prominent, and continuing innovation in the modern environmental era has been the involvement of citizens in the enforcement of environmental laws. The federal environmental laws passed in the 1970s and early 1980s, although far stricter and sweeping than earlier state and local environmental statutes, looked structurally similar to the earlier regimes — with one principal exception. Unlike their predecessors, almost all of the major laws provided for suits by private citizens to enjoin or penalize violations of their provisions.

Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 185; *see also* James R. May, 33 ENVTL. L. REP. 10704 (Sept. 2003).

60. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619(a) (2000) ("any person"); Endangered Species Act, 16 U.S.C. § 1540(g)(1) (2000) ("any person"); Clean Air Act, 42 U.S.C. § 7604(a) (2000) ("any person").

61. *See, e.g.*, Natural Gas Act, 15 U.S.C. § 717r(b) (2000) ("[a]ny party to a proceeding under this chapter aggrieved"); Energy Policy and Conservation Act, 49 U.S.C. § 32909(a) (2000) ("[a] person that may be adversely affected").

62. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(a) (2000) ("any citizen," which the statute defines as "a person or persons having an interest which is or may be adversely affected").

63. *See infra* notes 150-171 and accompanying text.

plaintiffs are not necessarily coterminous with their injuries.[64] Provided a citizen-suit plaintiff establishes injury, Congress may empower her to seek a broad range of relief having little or nothing to do with the remediation of her own injury. Indeed, federal citizen-suit statutes frequently do not authorize any monetary compensation for the plaintiffs themselves.[65] Instead, these provisions often empower plaintiffs to seek broad injunctive relief and/or civil penalties payable to the government.[66] That remedial breadth, more than the presence or absence of individualized injury, is the critical ingredient in private attorney general litigation.

Numerous state environmental laws also provide for citizen suits seeking broad-gauged relief, and most require no showing of individual injury.[67] This proliferation reflects not only an increased

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64. *See* Sierra Club v. Morton, 405 U.S. 727, 737 (1972) ("[T]he fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate."); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 443-44 n.65 (3d ed. 2000) (describing in similar terms *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), in which the Court recognized a radio broadcaster's federal standing to challenge the grant of a broadcasting license to a potential rival; noting that, although the plaintiff was "[m]otivated by its own economic injury at the hands of the agency . . . [its] action as a 'private attorney general' brought to judicial attention the interests directly protected by the statute — those of listeners, who might lack the means or motivation to challenge what the agency had done").

65. Citizen-suit plaintiffs may, however, be able to extract payment through the settlement process.

66. *See* Holly Doremus, *Environmental Ethics and Environmental Law: Harmony, Dissonance, Cacophony, or Irrelevance*, 37 U.C. DAVIS L. REV. 1, 4 (2003) (noting that "in most cases, penalties for violations of environmental laws go to the general treasury, and although citizen suits can result in injunctions halting harmful actions, they cannot produce money damages that might be used to reverse those effects"). Even when the injunction the plaintiff seeks is aimed at remedying the plaintiff's own injury, it is in the nature of injunctive relief that the award will often confer a much broader benefit. A judicial order directing a factory to decrease its emission of certain air pollutants, for example, will necessarily benefit not just the individual plaintiff seeking the order but also everyone else similarly affected by the pollution. *See generally* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 180 (2003) ("[A] winning effort to stop the disputed conduct (or to compel legally required conduct) would, as a practical matter, redound to the benefit not just of those who are parties to the litigation but also to other affected persons who remain on the sidelines."); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 398 (2003) ("[W]here a single plaintiff brings an action for injunctive relief against an institutional actor, the remedy benefits not only the individual plaintiff, but also all other similarly situated individuals.").

67. *See* Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1007-08 (2001) ("Environmental rights acts or constitutional provisions in fifteen states confer broad citizen standing to challenge ecologically deleterious activities. . . . Only three of the environmental rights acts condition standing on personal injury or harm."). The fifteen state provisions cited by Elmendorf are: HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; CONN. GEN. STAT. §§ 22a-14 to -20 (1999); FLA. STAT. ANN. § 403.412 (West 2000); IND. CODE §§ 13-30-1-1 to -12 (2000); IOWA CODE § 455B.111 (1999); LA. REV. STAT. ANN. § 30:2026 (West 2000); MD. CODE ANN., NAT. RES. §§ 1-501 to -508 (2000); MASS. GEN. LAWS ch. 214, § 7A (2000); MICH. COMP. LAWS §§ 324.1701-.1706 (2000); MINN. STAT. §§ 116B.01-.13

awareness of the need for robust environmental standards, but also a determination that public enforcement alone cannot ensure adequate compliance with those standards. In this respect, citizen-suit provisions, both state and federal, serve essentially the same purpose as *qui tam* statutes: "[b]oth are designed to encourage private citizens to help the executive branch deter and redress violations of . . . [public] law."[68]

The private attorney general also appears in a number of other modern contexts. Many state consumer protection laws, for example, empower private citizens to enforce the public interests in fair competition and accurate advertising, and to do so by seeking broad equitable remedies against those engaged in false advertising or other misleading commercial speech.[69] At the time of *Nike v. Kasky*,[70] the California unfair competition statute was likely the most far-reaching of these laws.[71] It covered a wide range of conduct, imposing strict liability for any unfair business practice and for any "unfair, deceptive, untrue or misleading advertising."[72] In addition to public enforcement,[73] the law was enforceable by "any person acting for the interests of itself, its members or the general public."[74] Injury did not

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(2000); NEV. REV. STAT. ANN. §§ 41.540-.570 (Michie 2000); N.J. STAT. ANN. §§ 2A:35A-1 to:35A-14 (West 1999); N.D. CENT. CODE §§ 32-40-01 to -11 (2000); S.D. CODIFIED LAWS §§ 34A-10-1 to -17 (Michie 2000). He identifies Iowa, Louisiana, and North Dakota as the three states requiring individual injury. Elmendorf, *supra*, at 1007-08 nn.22 & 24.

68. Caminker, *supra* note 42, at 344. In making this point, I do not mean to suggest that *qui tam* actions and citizen suits are identical in all respects. In particular, the former may be understood to involve a private plaintiff suing quite literally on the government's behalf — that is, acting in the shoes of the executive branch itself — while the latter are better described simply as involving private assertions of the public interest. The distinction is not germane to this Article, but it might be significant if the object were to identify circumstances where private actors wield governmental power as such, as opposed to situations where private plaintiffs merely act in the public interest. *See, e.g.*, Metzger, *supra* note 15, at 1462-70 (proposing a more robust, judicially enforceable "private delegation doctrine," and arguing that the doctrine should focus on, among other things, whether the private actor acts on the government's behalf).

69. *See* PRIGDEN, *supra* note 16, § 6:9, at 6-21 to 6-22 (stating that "thirty-three states explicitly authorize" individual plaintiffs "to act as . . . private attorney[s] general" and to seek "not only damages for [their] own injuries, but also to enjoin any future violations of the state consumer protection act by the same defendant").

70. *See supra* notes 6-8 and accompanying text.

71. In November 2004, the California voters passed a ballot initiative substantially amending the statute's private attorney general provisions. *See infra* notes 233-237 and accompanying text for further discussion.

72. CAL. BUS. & PROF. CODE § 17200 (West 1997); *see* Cortez v. Purolator Air Filtrations Prods. Co., 999 P.2d 706, 717 (Cal. 2000) (stating that the UCL imposed strict liability).

73. The state attorney general, all district attorneys, and certain county and city attorneys were, and remain, empowered to enforce the statute. CAL. BUS. & PROF. CODE § 17204 (West 1997).

74. *Id.*

need to be asserted;[75] it sufficed to allege that "members of the public are likely to be deceived" by the actions or statements in question.[76] Finally, the statute permitted private attorneys general to seek a range of equitable remedies, including injunctions and, in certain cases, disgorgement.[77] Taken together, the absence of an injury requirement and, in particular, the availability of broad remedial measures made the California statute especially powerful.[78] The design was deliberate: as the California courts explained, the private attorney general provision operated to "effectuate the full deterrent force" of the statute.[79] In that sense, private attorneys general acting under state laws like the California statute are descendents of the *qui tam* relator and cousins of the federal citizen-suit plaintiff.[80]

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75. Comm. on Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 668 (Cal. 1983); *see* State Farm Fire & Cas. Co. v. Superior Court, 53 Cal. Rptr. 2d 229, 235 (Cal. Ct. App. 1996) ("[A] section 17200 violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage.").

76. *Comm. on Children's Television, Inc.*, 673 P.2d at 668.

77. CAL. BUS. & PROF. CODE § 17203 (West 1997). *See infra* note 203 and accompanying text for a discussion of disgorgement. Attorney's fees were available, but only to private attorneys general who vindicated important public interests and secured significant public benefits. *See* CAL. CIV. PROC. CODE § 1021.5 (West Supp. 2004); Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086, 1101 (Cal. 1998).

78. Other state consumer protection laws also confer considerable power on private plaintiffs, though somewhat less than under the California statute. In New York, for example, a private plaintiff may be able to obtain an injunction against misleading advertising by showing only that the advertising will cause irreparable harm to the public generally, but without necessarily establishing the likelihood of any particular individualized harm. *See* PRIGDEN, *supra* note 16, § 6-9, at 6-23 (citing McDonald v. N. Shore Yacht Sales, Inc., 513 N.Y.S.2d 590 (Sup. Ct. 1987)). Moreover, Minnesota, New Mexico, Ohio, and Oklahoma all allow private plaintiffs to seek injunctions against deceptive trade practices if they are "likely" to be harmed by the practices in question. *See* MINN. STAT. ANN. § 325D.45 (West 2004); N.M. STAT. ANN. § 57-12-10(A) (Michie 2000); OHIO REV. CODE ANN. § 4165.03(A)(1) (Anderson 2001); OKLA. STAT. tit. 78, § 54(A) (2001).

The California statute raised, and continues to raise other significant issues as well. One factor not discussed here is uncertainty over the res judicata effect of private attorney general actions. For example, if a private citizen purports to sue on behalf of the general public and then settles with the defendant, does that settlement preclude all other members of the public (and/or the government itself) from suing the defendant for the same or related conduct? The California statute is unclear on this point. *See* Robert C. Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions*, 26 CAL. L. REVISION COMMISSION REP. RECOMMENDATIONS & STUD. 227, 262 (1996). Questions of preclusion like this, though important, may presumably be resolved without disturbing the underlying mechanism of the private attorney general itself. For example, a private attorney general action that yields injunctive relief in the public interest might be deemed preclusive of subsequent litigation on behalf of the general public, but not preclusive of suits by individuals seeking compensation for their individual injuries. Such considerations, however, are beyond the scope of this Article.

79. Fletcher v. Sec. Pac. Nat'l Bank, 591 P.2d 51, 57 (Cal. 1979).

80. The availability of disgorgement under statutes like California's also parallels the law of unjust enrichment. Claims of unjust enrichment do not necessarily require a showing that the plaintiff has been tangibly injured by the defendant's conduct. It may be enough "in some cases that the plaintiff simply has a superior moral claim to whatever enrichment the defendant obtained." Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV.

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As this Section has shown, Anglo-American legislatures have long authorized private parties to sue in the public interest, either as *qui tam* relators, "common informers," private prosecutors, or otherwise.[81] Today, citizen-suit statutes and other private attorney general arrangements make similar use of private plaintiffs. Federal citizen-suit plaintiffs are generally required to allege individual injury to proceed with their cases, but not because the purpose of the suit itself is thought to be confined to redressing individualized injury. Rather, the independent limitations of Article III standing doctrine, which I will discuss further in Part II, require an allegation of injury. Critically, however, the remedies available under all these regimes extend far beyond the circumstances of the individual case. In the modern period, these remedies often take injunctive form — for example, an order compelling a polluter to cease and desist even if doing so would affect its industrial activities on a very broad scale, or an order directing an advertiser not to make certain false statements and to publicly correct those it has made in the past. Legislatures, in short, have often commissioned private plaintiffs in the pursuit of the public interest.

B. *Policy*

This Section turns from legislative practice to policy debate, and reviews some of the more familiar arguments for and against private attorneys general. Of course, "law" and "policy" are not mutually exclusive domains: legal analysis often includes consideration of whether proposed rules are workable and effective in practical terms, and policy discussions are necessarily shaped by a sense of what options are legally available. Moreover, one's views on law and policy may both derive, at least in part, from a common set of ideological or other commitments. Still, some distinction is possible. At least at the

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1443, 1448 (2004). Thus, for example, "when the beneficiary of a will murders the testator, an heir who would not otherwise have inherited the estate may claim restitution from the murderer. Similarly, a trust beneficiary may recover a bribe paid to the trustee even if trust assets were not impaired." *Id.* at 1448-49 (citing Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889) and RESTATEMENT OF RESTITUTION § 187, 197 (1937)). The traditional availability of such actions further confirms that laws like the California UCL are not historical anomalies.

81. *See* Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2241 (1999) (summarizing scholarship identifying "a long history in English courts, in the courts of the several states, and in the federal courts themselves of judicial proceedings brought by those who have not suffered any . . . individualized injury in fact," and explaining that, "[f]or example, the prerogative writs of mandamus, prohibition, and certiorari, as well as qui tam, relator, and informer actions, could all be brought by litigants who had suffered no injury in fact").

level of formal argument, a regime's legal permissibility can be separated from its wisdom. Observing that distinction, I have three goals here: to sketch some of the contours of the policy debate, to show that there are valid arguments both for and against private attorneys general, and to suggest that the institution best positioned to decide whether to permit private attorneys general in any particular context is the legislature.[82]

1. *Arguments in Favor*

Policy support for the private attorney general has ebbed and flowed over time.[83] Its supporters tend to mount a relatively familiar set of arguments. First, as suggested above,[84] private attorneys general are depicted as a cost-effective means of supplementing resource-constrained public enforcement. As Frederick Schauer and Richard Pildes have observed in a related context, "[l]aw whose effectiveness depends on constant monitoring and enforcement by government officials will, absent massive commitment of public resources, be far less effective than law that can enlist social norms or private incentives to assist in enforcement."[85] Operating on that premise, the theory is that private plaintiffs valuably supplement the government's enforcement efforts without taxing state resources.[86]

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82. The policy arguments that are relevant here generally assume the existence of *some* form of litigation to enforce statutory norms and then divide over the wisdom of relying on privately initiated litigation to achieve those ends. That is, the arguments here are over the appropriate form of litigation, not the propriety of litigation in the first place. I therefore do not engage the more generalized debate over whether litigation of *any* kind is an appropriate means of achieving regulatory ends. *See generally* REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002) (collecting essays in that broader debate).

83. *See, e.g.*, Garth et al., *supra* note 2, at 357-66 (describing changes over time in the rationales supporting private attorneys general); Rabkin, *supra* note 2, at 179 ("The 'private attorney general' came out of the shadows in the 1970s. . . . Over the past decade, however, the 'private attorney general' has been in retreat, beset by critics and rivals and increasingly starved of resources and political support. If not quite back in the shadows, it is certainly under a cloud.").

84. *See supra* note 50 and accompanying text.

85. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1831 (1999).

86. *See, e.g.*, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (observing that, given the modest resources available to the Attorney General to enforce federal fair housing law and the "enormity of the task of assuring fair housing," the law could only be effectively enforced if "the main generating force" came from private complainants "act[ing] not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority") (internal quotation marks omitted); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.5 (1943) (noting that *qui tam* statutes are "passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain") (quoting United States v. Griswold, 24 F. 361, 366 (D. Or. 1885))); Schnall v. Amboy Nat'l Bank, 279 F.3d 205, 217 (3d

A second argument in favor of private attorneys general is that they ensure enforcement is "not wholly dependent on the current attitudes of public enforcers."[87] In some areas, this point may be articulated in terms of "capture." That is, a legislature might enlist private parties to enforce a statute out of a concern that if a government agency were granted exclusive enforcement authority, the agency might become unduly influenced by the entities it regulates.[88] Whether, and when, agencies actually fall victim to capture is a matter of considerable disagreement in the literature.[89] At least in some areas, however, the argument can be restated to focus less on capture by external forces and more on the executive's simple failure, by choice or inadvertence, to enforce certain laws to the extent the legislature desires. Where, for example, the legislature is controlled by one political party and the executive branch by another, diverging policy priorities may lead executive actors to underenforce certain of the legislature's enactments. That is, the executive branch might value certain legislative goals less than does the legislature that enacted them. Mindful of that problem, the legislature might seek to circumvent this political conflict by empowering private actors to enforce the statute themselves. In other circumstances, the reasons for governmental underenforcement may be more cultural than political. The private attorney general provision in the anti-pornography

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Cir. 2002) ("Although TISA [the Truth in Savings Act] authorizes the Federal Reserve Board to enforce the Act . . . the Board has limited resources to devote to enforcement, and Congress may have deemed it more cost-effective to cede TISA enforcement to individuals in the private sector who stand to profit from efficiently detecting and prosecuting TISA violations."); *see also* PRIGDEN, *supra* note 16, § 6:2, at 373 ("It became apparent early on" in the history of consumer protection legislation "that the state could not alone handle the quantity of complaints, and so states that did not already provide for a private right of action created one by amending their statutes."); Fellmeth, *supra* note 78, at 266-67 (noting that in the area of California consumer protection law, "[p]ublic prosecutors are able to pursue only a small fraction of potentially meritorious cases, including those which impact on large numbers of consumers. . . . [M]ost of the significant consumer abuses [in California] over the past two decades have been detected and litigated by private counsel . . . .").

87. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 227 (1983).

88. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713 (1975) ("It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests." (footnotes omitted)); *see also* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 42 (1991) (collecting literature on agency capture); John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723-28 (1986) (same).

89. Sources challenging the capture thesis include DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 24-25, 28-33 (1991), and Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).

ordinance proposed by Dworkin and MacKinnon, for example,[90] responded to the perception that governments tend to underenforce legal protections for women by putting the power of law enforcement in women's own hands.[91]

Putting these arguments together, we have an assertion that private attorneys general are a cost-effective means of both pursuing the public welfare and returning power to the people themselves. For legislatures that value cheap, robust regulatory enforcement, private attorneys general may present an attractive option.

There are, of course, many potential objections to this positive account. Because the objections tend to merge with various freestanding arguments against the private attorney general, I will move directly to considering those arguments against.

2. *Arguments Against*

Over the last two decades, a number of policy objections to private attorneys general have emerged. Four are salient. First, some object that private attorneys general are not an army of anonymous, altruistic citizens responding to some higher calling to promote the greater good.[92] Instead, they are individuals and organizations acting on specific ideological or financial incentives, using the private attorney general's mantle to advance their own interests. In its strongest form, this objection casts private attorneys general as "extortionist[s]" who abuse the power granted them both to assert marginal or even "phony

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90. *See supra* notes 21-22 and accompanying text.

91. *See* DWORKIN & MACKINNON, *supra* note 21, at 54 ("No prosecutors decide whether or not a woman's case is valid. . . . It is time to place the power to remedy the harm in the hands of those who are hurt, rather than to enhance the power of those who have done so little with so much for so long."); Brest & Vandenberg, *supra* note 25, at 640 ("MacKinnon and Dworkin saw this [trafficking provision in their anti-pornography ordinance] as a means of empowering women, and they envisioned that when women sued under the ordinance, the courtroom would become a public forum in which the victims of pornography could make themselves heard . . . .").

Occasionally, a legislature will provide for private enforcement precisely because prior governmental action has been inadequate. Such was the case for the provision of the Violence Against Women Act creating a private damages action for victims of gender-motivated violence, struck down by the Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000). Congress enacted the provision in part to combat the evidence that state police departments, prosecutors, and judges tended to regard gender-motivated violence as less serious than other violent crime, and thus that state criminal justice systems tended to provide inadequate protection from, and remedies to, gender-motivated violence. *See id.* at 619-20.

92. *See* Rabkin, *supra* note 2, at 180 ("The abstract term implies that the 'private attorney general' could be almost anyone — an ordinary citizen, perhaps, with just a bit more public spirit than his neighbors. The truth was always different.").

claim[s]" and to extract settlements from defendants eager to avoid the risks of a full trial.[93]

To the extent the objection here is simply that private attorneys general act out of self interest, there is little with which to quarrel. The theory of the private attorney general has never depended on idealistic notions of public service or altruism. Rather, it has always been clear that citizen-suit provisions and comparable private attorney general arrangements would be invoked most frequently by particular plaintiffs with particular agendas.[94] Indeed, the archetypal depiction of private attorneys general casts them as either "mercenary law enforcers" seeking to profiteer or "social advocates" hoping to advance a political cause.[95]

The critical point here is that ideological and pecuniary motivations are not necessarily problematic. In the environmental area, for example, the most likely citizen-suit plaintiffs may be ideologically driven affiliates of a relatively recognizable set of advocacy and special interest groups.[96] That can count as a virtue: if the point of a citizen-suit provision is to ensure robust enforcement of the statute's underlying substance, the fact that the most likely citizen plaintiffs are "known quantities" with strong ideological commitments to the relevant issues simply increases the likelihood of vigorous enforcement.[97] The same is true of the financial incentives created by *qui tam* and comparable statutes. Indeed, as discussed above,[98] the very object of *qui tam* legislation is to align the private individual's interest in financial reward with the public's interest in robust enforcement of certain legal standards. To be sure, a careful legislator might consider ways to minimize the opportunities for rank "extortion."[99] But the fact that private attorneys general are motivated

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93. Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 618 (2001) (Scalia, J., concurring).

94. *See* Rabkin, *supra* note 2, at 182 (noting that citizen suit provisions "do[] not reflect any expectation that a random assortment of parties . . . will come forward to litigate as private attorneys general. On the contrary, the underlying assumption is that in each particular area, the private attorney general will be a known quantity, reflecting a well-established interest or constituency."). It is unclear whether Rabkin regards this phenomenon as a good thing. But as I argue here, there is no particular reason to view it as a bad thing.

95. Garth et al., *supra* note 2, at 356.

96. These include, for example, the petitioner in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), the respondent in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), and the respondent in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

97. *See* Garth et al., *supra* note 2, at 358-59 (noting that private attorney general provisions of this and related sorts flourished when there was a general "societal consensus" about the importance of the substance being enforced).

98. *See supra* notes 50, 85-86 and accompanying text.

99. I briefly note some such options at *infra* notes 119-121 and accompanying text.

by their own peculiar incentives merely states the theory of their office, not a persuasive basis for categorically rejecting their use.

A second, more targeted objection emphasizes a "free-rider" problem especially acute in areas where the plaintiff's motivation to sue is more economic than ideological. In theory, monetary incentives should spur private individuals to ferret out and prosecute violations that might otherwise go unnoticed.[100] But such investigative work can be expensive and time-consuming. Thus, in areas policed by both private actors and governmental agencies, private actors may simply wait for the agency to investigate a particular problem and then file actions based on the information gleaned from that investigation.[101] That approach is certainly less expensive than relying on one's own investigative work, but it may also lead private plaintiffs to focus their energies on relatively unimportant cases. Indeed, to the extent the cases are those the government itself chooses not to pursue even after investigating the matter, they may involve violations that are at once easily detected and relatively insignificant from a regulatory perspective. If so, then free riding may create a pattern of private enforcement that corresponds very little, if at all, to the legislature's enforcement priorities.[102]

One response to this free-rider objection is that private reliance on the fruits of government investigation is not necessarily undesirable in all cases. Suppose an agency investigates a matter, discovers an actionable wrong, and then declines to bring an enforcement action. One reason for the inaction might be that, even though it has detected wrongdoing, the agency simply lacks the requisite resources to litigate the matter. Another might be that the agency's litigation decisions are unduly affected by those it regulates — that is, the agency is captured. Either way, a legislature interested in vigorous enforcement might see value in private enforcement even if the private plaintiff merely free rides on government investigations. The legislature's first preference might be for private plaintiffs to focus their energies on investigating and litigating violations that the government would never uncover

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100. *See* Coffee, *supra* note 87, at 220 ("In theory, the private attorney general is induced by the profit motive to seek out cases that otherwise might go undetected."); Rabkin, *supra* note 2, at 191 ("From a public perspective, private actions would be most beneficial if they focused on pollution sources not already known to the government.").

101. *See* Coffee, *supra* note 87, at 222 ("[A] recurring pattern is evident under which the private attorney general simply piggybacks on the efforts of public agencies — such as the SEC, the FTC, and the Antitrust Division of the Department of Justice — in order to reap the gains from the investigative work undertaken by these agencies.").

102. *See* Rabkin, *supra* note 2, at 191 ("The incentive of the private attorney general under the current system is . . . to focus on those pollution sources which have already been identified in government filings, which are thus cheapest and easiest to proceed against in a lawsuit."); *id.* at 191-92 ("There is . . . an incentive to bring suit when the case is easiest to win rather than where enforcement deficiencies are responsible for the most pollution.").

itself. But at least to the extent the legislature desires greater enforcement than that available through government action alone, any extra enforcement may be better than none.

In some circumstances, however, the free-rider problem may produce not just private litigation based on government investigations, but private litigation duplicative of government litigation. That is, private actors may wait to see what entities the government targets with enforcement actions, and then bring their own suits against those same entities. A private plaintiff may even wait for the government to prevail in its action, and then rely on that result to advance her own case. Consider *Parklane Hosiery Co. v. Shore*,[103] which, though not a private attorney general case, highlights this particular manifestation of the free-rider issue. The Securities and Exchange Commission had secured an injunction against a corporate defendant for making false and misleading proxy statements, in violation of federal securities law. Private shareholders then filed their own action against the same defendant, seeking damages on account of the misstatements. The Supreme Court permitted the private plaintiffs to invoke offensive nonmutual collateral estoppel, barring the defendant from relitigating the liability issue that it had lost in the SEC action.[104] In authorizing this form of preclusion, however, the Court acknowledged certain potential problems. First, offensive nonmutual collateral estoppel may disserve interests in judicial economy by "increas[ing] rather than decreas[ing] the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action."[105] Second, such preclusion may be unfair to the defendant if the small stakes of the first action provided inadequate incentive to litigate the issues robustly, or the defendant faced special procedural impediments in the first action, or the judgment in that action was itself inconsistent with earlier judgments in the defendant's favor.[106]

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103. 439 U.S. 322 (1979).

104. *Id.* at 331-33.

105. *Id.* at 330.

106. *Id.* at 330-31. In addition, permitting nonmutual offensive collateral estoppel will eventually encourage defendants to *over*-litigate the initial case. As Robert Casad and Kevin Clermont have described, nonmutual offensive collateral estoppel

> destroys the equivalence of litigating risk, weights the scale against the common party, and changes the most basic of the rules of the procedural system: the first plaintiff risks losing only the one case, which is all the defendant can win; in return, the defendant risks losing all the cases at once, so that over the series of cases the odds overwhelmingly favor the plaintiffs; and the first plaintiff thereby acquires tremendous settlement leverage, but in the absence of settlement will face an opponent willing to litigate down to the scorched earth.

ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 177 (2001).

To be sure, free riding of the sort permitted in *Parklane* may well yield certain difficulties. But those difficulties are not unique to private attorneys general, or to private enforcement actions more broadly. Preclusion problems in particular can be addressed from within preclusion doctrine, while leaving the basic operation of private enforcement intact.[107]

Beyond the specific question of preclusion, the extent of any free-rider problem is likely to vary across substantive areas. Some statutes' private attorney general provisions may raise serious free-rider concerns; others may not. Legislatures are particularly well situated to make those assessments on a statute-by-statute basis. Consider, for example, the 1986 amendments to the federal False Claims Act, which permit *qui tam* actions even when based on information the government has in its possession, except where the information has been publicly disclosed and the relator is not the original source of the information.[108] In enacting those amendments, Congress evidently weighed the benefits of a more robust *qui tam* presence against the costs of free riding, and struck a balance somewhere in the middle.[109] Other legislatures may reach different conclusions in other areas. But to the extent the balance may vary from area to area and statute to statute, the best response to the free-rider issue may be to resist seeking a single, uniform resolution.

A third objection to private attorneys general is that they too willingly accept cheap settlements. This is a more particular articulation of the extortion argument. The point here is that because the amount the defendant stands to lose in a formal judgment often far outstrips the amount the private attorney stands to gain, there is a powerful bilateral incentive to settle the case.[110] There is evidence to

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107. That is, courts could decide to permit nonmutual offensive collateral estoppel only rarely. *Parklane* itself did not make this sort of preclusion available in every case. Rather, it "grant[ed] trial courts broad discretion to determine when it should be applied," based in part on an assessment of whether the problems identified above are present in a given case. 439 U.S. at 331.

108. 31 U.S.C. § 3730(4)(A) (2000). Before 1986, the FCA directed district courts to "dismiss [all *qui tam*] action[s] . . . based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982). In 1986, however, Congress loosened that restriction in an effort to revive *qui tam* enforcement. *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 946 (1997) ("Congress amended the FCA in 1986 . . . to permit *qui tam* suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information.").

109. The 1986 amendments certainly increased the volume of *qui tam* litigation under the False Claims Act. *See* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 48 (2002) ("Before 1986, the DOJ received about six qui tam cases per year. Since the 1986 amendments went into effect, and through October 30, 2000, 3326 qui tam cases have been filed and $4.024 billion has been recovered." (citations omitted)).

110. *See* Jan T. Chilton & William L. Stern, *California's Unfair Business Practices Statutes: Settling the "Nonclass Class" Action and Fighting the "Two-Front War"*, 12 CEB

suggest this may be a substantial problem in some areas.[111] It may be especially problematic in areas where the private plaintiff has suffered no injury, and where the available judicial relief includes broad injunctive relief and/or statutory penalties payable only to the government. In such cases, the defendant has an incentive to settle for less than the cost of complying with the injunction or paying the penalties, and the plaintiff may be likely to regard any settlement for any value above the cost of litigation as a windfall.[112] As a result, and contrary to one of the basic tenets of the affirmative case for private attorneys general, such plaintiffs may actually contribute to the underenforcement of the substantive norms in question.

At least as a theoretical matter, this argument has some force. As with the free-riding issue, however, it seems likely that the extent of the problem may vary considerably from area to area. The problem may be most acute, for example, where the only available remedies are injunctive relief or civil penalties paid to the government. *Qui tam* relators, in contrast, may be less prone to settle on the cheap, since they are entitled to a share in the (potentially much larger) final judgment if the action succeeds. On the other hand, this distinction might point in the other direction: if a suit for injunctive relief is brought by an "ideological" private attorney general, then the plaintiff might have no interest in a monetary settlement; but if a *qui tam* relator is acting principally out of pecuniary opportunism, she might be more likely to accept a cheap settlement, thinking any amount is a

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CIV. LITIG. REP. 95, 96 (1990) (noting the complementary incentives of the plaintiff to assert interests beyond his own and the defendant to settle "cheaply," thus undervaluing the third-party interests supposedly represented in the suit).

111. *See* Coffee, *supra* note 87, at 225-26 (stating that evidence from antitrust class actions "seems to show that private litigated judgments are few, cheap settlements are common, and the typical settlement recovery is below even the level of the compensatory damages alleged by the plaintiffs (despite the existence of a treble damages penalty). Such evidence is consistent with a diagnosis that the private enforcer tends to accept inadequate settlements.").

112. *See* Rabkin, *supra* note 2, at 191 ("If [defendant] firms must pay all fines to the federal Treasury, both the firm and the plaintiff advocacy group have an incentive to reach an out-of-court settlement so long as the cost of the settlement is less than the full cost of paying the fine."); *see also* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990) (concluding that citizen suit provisions in federal environmental statutes do not yield a sensible enforcement regime). Note that this account assumes that a settlement between a private attorney general and a defendant would preclude later suits by different private attorneys general challenging the same conduct, at least to the extent the later suits sought the same public-benefiting remedies sought in the initial suit. *Cf.* CASAD & CLERMONT, *supra* note 106, at 160-61 (discussing similar preclusion issues in the context of successive suits by public officials and private plaintiffs). Where there is reason to believe the settlement would not preclude any later litigation, the defendant's incentive to settle may be severely undercut. On the other hand, experience under the California unfair competition statute shows that defendants in these circumstances may settle despite the absence of any assurance of preclusion. *See infra* notes 209-211 and accompanying text. Those cases suggest that the tendency to settle may be especially strong where the defendant is a relatively small entity with limited litigation experience.

windfall. Yet whichever way these varying incentives cut, the precise nature and extent of the problem is likely to be context-dependent. As with free riding, therefore, the cheap-settlement problem may be best tackled by legislatures on a statute-by-statute basis.

A fourth objection emphasizes the need for coordinated and consistent enforcement. The D.C. Circuit made this point in the early 1970s when it refused to construe the Federal Trade Commission (FTC) Act to support a private right of action.[113] Noting that the Act contained no express provision for private suits, the court concluded that recognizing a private right of action would conflict with the exclusive enforcement authority that the Act vests in the FTC. The court stressed the importance of "providing certainty and specificity to the [broad] proscriptions of the Act," and reasoned that reserving enforcement authority to the FTC alone would contribute to "the centralized and orderly development of precedent applying the regulatory statute to a diversity of fact situations."[114] Permitting private enforcement, on the other hand, could produce "piecemeal lawsuits, reflecting disparate concerns and not a coordinated enforcement program," thus "burden[ing] not only the defendants selected but also the judicial system."[115] In the court's view, Congress gave the FTC exclusive enforcement authority in order to avoid that precise outcome.

This objection has traction as an argument that judges should not recognize a private right of action if it appears the legislature did not intend one. That is, to the extent a statutory regime evinces a legislative preference for exclusive enforcement by the government, courts should not undermine that preference by creating a private right of action. By itself, however, this argument does not establish why legislatures should favor public over private enforcement in all cases. The choice is a matter of policy preference. Assuming, arguendo, that government enforcement reliably produces greater coordination and consistency, a regime of private enforcement may nevertheless carry a more powerful deterrent effect.[116] If the legislature prefers maximum deterrence over tightly coordinated enforcement, then it may opt for a private right of action.[117] That

113. Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973).

114. *Id.* at 998.

115. *Id.* at 997-98.

116. Indeed, such greater deterrence may exist precisely because it is more difficult to predict the incidence of suit in a private enforcement regime. *See, e.g.*, PRIGDEN, *supra* note 16, § 6:2, at 373 (noting that in the consumer protection context, "[a]llowing private actions is . . . more random and less subject to politicization than a government enforcement approach").

117. *See* Karlan, *supra* note 57, at 200 ("Reliance on private attorneys general elevates full enforcement of broad policy goals over formal political accountability for discrete enforcement decisions.").

judges should be reluctant to imply such rights of action simply does not speak to whether legislatures, having struck the policy balance in a particular way, should expressly create them.[118]

Moreover, there are a number of mechanisms available to legislatures interested in facilitating doctrinal coordination and coherence without forfeiting the deterrent power of private enforcement. If a legislature drafts a broad, open-ended statute, it could empower the attorney general or a subject-specific agency to promulgate narrowing regulations, binding in public and private enforcement actions alike.[119] A legislature could also require those planning to sue as private attorneys general to obtain governmental certification of their actions before proceeding to court.[120] Finally, a legislature could grant the relevant government agency the right to intervene in, and assume control over, all private attorney general actions.[121] Put simply, the availability of these and other similar measures confirms that enlisting the services of private attorneys general need not entail loosing them on the world, unfettered.

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There is, in sum, no definitive resolution to the policy debate over private attorneys general. There are reasons to regard them as valuable partners in the effectuation of the public interest; there are reasons to worry that they might be ineffective — or, worse, counterproductive — means to that end. Over the past few decades, legislatures have displayed inclinations in each direction. A few examples from the federal level make the point. On one hand, as discussed above, Congress since the 1970s has inserted citizen-suit provisions into virtually every major piece of federal environmental legislation.[122] Similarly, in 1986 Congress liberalized the *qui tam*

118. *Cf.* Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) (noting, in the course of refusing to recognize an implied private right of action, that "the Legislature is far more competent than the Judiciary to carry out the necessary 'balancing [of] governmental efficiency and the rights of employees'") (quoting Bush v. Lucas, 462 U.S. 367, 389 (1983)).

119. *See, e.g.*, PRIGDEN, *supra* note 16, §§ 7:23-24, at 507-8 (discussing agency rulemaking power under state consumer protection statutes).

120. *Cf.* Bessler, *supra* note 51, at 515-16 (noting that although British citizens retain the authority to institute criminal proceedings, "two English public authorities, the Director of Public Prosecutions and the Attorney General, have placed severe limitations on the ability of private citizens to prosecute criminal actions").

121. *See, e.g.*, 31 U.S.C. § 3630(c)(1)-(2) (providing that the federal government may intervene in and then dismiss or settle a False Claims Act action originally filed by a *qui tam* relator, and may also continue litigating the case while limiting the relator's participation); 33 U.S.C. § 1365(b)(1)(B) (granting the Environmental Protection Agency (EPA) the power to foreclose a Clean Water Act citizen suit by undertaking its own action); *id.* § 1365(c)(2) (providing the EPA may intervene in a Clean Water Act citizen suit "as a matter of right").

122. *See supra* notes 58-59 and accompanying text.

provision in the federal False Claims Act, making it easier for relators to file actions based on information already in the government's hands — that is, potentially to free ride on the government's investigations.[123] On the other hand, Congress in the mid-1990s enacted substantial new constraints on the litigating power of individual shareholders under the federal securities laws.[124] In the end, this mixed legislative record suggests, unsurprisingly, that there is no consensus today about the policy wisdom of the private attorney general, and that legislatures will resolve the issue differently in different contexts.

II. EXISTING JUDICIAL RESTRICTIONS

Despite the long history of legislative reliance on private attorneys general and the presence of credible policy arguments to support that reliance, in the last decade the Supreme Court has crafted a number of robust limits on privately initiated public law litigation. These limits operate in diverse doctrinal areas, ranging from state sovereign immunity, to attorney's fees, to standing. I examine these limits in this Part, and show that they reflect the Court's own opposition to the expansive litigating power traditionally wielded by private attorneys general. So far, however, the Court's efforts to cut back on that authority have been mostly confined to the federal courts; the Court has done far less to shape private attorney general litigation in the state courts.

A. *Limits in Federal Court*

Traditionally, the Supreme Court's inclination was to respect legislative choices to enlist private plaintiffs in the enforcement of public law. In *United States ex rel. Marcus v. Hess*,[125] for example, the Court considered an argument that the False Claims Act should be construed narrowly when enforced by a *qui tam* relator rather than by the government directly.[126] The Court rejected the argument, refusing to "say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different

123. *See supra* notes 108-109 and accompanying text.

124. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of Title 15 of the United States Code). Shareholder lawsuits may not leap to mind as a classic instance of public law litigation, but the structural similarities are sufficient to make legislative developments in this area relevant to considerations of congressional attitudes towards private attorneys general. *See* Rabkin, *supra* note 2, at 193 (describing, in the course of discussing citizen-suit litigation under federal environmental statutes, shareholder litigation under the securities laws as "somewhat analogous [to] private attorney general litigation").

125. 317 U.S. 537 (1943).

126. *See id.* at 540-41.

meaning where the same language is invoked by an informer."[127] Congress having provided for both public and private enforcement of the statute, the Court would not privilege one method of enforcement over the other.[128] Echoes of that approach are still heard today. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,[129] for example, the Court described the citizen-suit provision in the Clean Water Act as reflecting Congress's belief that private enforcement was needed to achieve the goals of the Act, and stressed that "[t]his congressional determination warrants judicial attention and respect."[130]

Such deference has not, however, been the norm in recent years. As Pamela Karlan observes, the Rehnquist Court has implemented a number of doctrinal changes the combined effect of which has been to "sharply abridge[] the ability of private attorneys general to get their day in court."[131] The Court's efforts to that end have taken a variety of forms. Common to each, however, is a determination to leave the substance of the law largely intact while severely restricting the power of private plaintiffs to enforce it.

1. *State Sovereign Immunity*

One area to which Karlan points is state sovereign immunity.[132] In a series of cases starting with *Seminole Tribe of Florida v. Florida*,[133] the Court has articulated an expansive principle of state sovereign immunity loosely affiliated with, but by no means constrained by, the Eleventh Amendment.[134] Under that principle, the legislative

127. *Id.* at 542.

128. *Cf.* Metzger, *supra* note 15, at 1437-45 (discussing the Supreme Court's strong reluctance, dating to the New Deal, to invalidate delegations of governmental or quasi-governmental power to private actors).

129. 528 U.S. 167 (2000).

130. *Friends of the Earth*, 528 U.S. at 185.

131. Karlan, *supra* note 57, at 187.

132. *See id.* at 188-95.

133. 517 U.S. 44 (1996).

134. The text of the Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. CONST. amend. XI. But the Court has held that the immunity reflected in the Amendment also bars suits against a state by citizens of that state. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 72-73 (2000); Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996). In addition, the Court has applied the principle of state sovereign immunity to contexts beyond the federal courts. *See* Fed. Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002) (holding states immune from privately initiated administrative proceedings before the Federal Maritime Commission); Alden v. Maine, 527 U.S. 706 (1999) (holding states immune from private suits in state court for violations of federal law). The Court has now conceded that this immunity is not found anywhere in the text of the Constitution. *See Fed.*

authority granted to Congress by Article I of the Constitution is insufficient to abrogate states' immunity from damages actions by private plaintiffs.[135] Thus, Congress may not rely on private damages actions to enforce Article I legislation against unconsenting states. In contrast, the Court has made clear that state sovereign immunity does not limit Congress's ability to authorize the federal executive branch to enforce federal legislation directly, through government enforcement actions.[136]

The Court's sovereign immunity decisions have received a great deal of judicial and academic criticism.[137] I agree with much of that criticism, but I will not dwell on it here. Instead, I want simply to stress that one of the effects of the Court's decisions in this area is to privilege government enforcement over enforcement by private actors. Indeed, the Court has gone so far as to suggest that if a statute provides for both public and private enforcement, we may expect that any truly important violations will be redressed by public enforcement.[138] As Karlan observes, this expectation "defies the central idea behind the private attorney general — that Congress might decide that decentralized enforcement better vindicates civil rights policies 'that Congress considered of the highest priority.'"[139]

Mar. Comm'n, 535 U.S. at 754 ("[T]he sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment."); *id.* at 767 n.18 ("The principle of state sovereign immunity enshrined in our constitutional framework . . . is not rooted in the Tenth Amendment.").

135. *See Garrett*, 531 U.S. at 364 ("Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); *Seminole Tribe*, 517 U.S. at 72-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). Only when legislating pursuant to its authority to enforce the Reconstruction Amendments may Congress empower private plaintiffs to bring such actions. *See Garrett*, 531 U.S. at 364 ("Congress may subject nonconsenting States to suit in federal court when it does so pursuant to a valid exercise of its § 5 [of the Fourteenth Amendment] power.").

136. *See Garrett*, 531 U.S. at 374 n.9; *id.* at 376 (Kennedy, J., concurring); *Alden*, 527 U.S. at 755-56, 759.

137. *See, e.g.*, *Alden*, 527 U.S. at 760 (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 76 (Stevens, J., dissenting); *id.* at 100 (Souter, J., dissenting); Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495 (1997); Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102 (1996).

138. *See Alden*, 527 U.S. at 759 (suggesting that the instant case did not implicate a strong "federal interest in compensating the States' employees for alleged past violations" of the Fair Labor Standards Act because "despite specific statutory authorization, the United States apparently found the same interests insufficient to justify sending even a single attorney to Maine to prosecute this litigation" (citation omitted)); Karlan, *supra* note 57, at 194 (noting the Court's "equation of importance with centralized enforcement").

139. Karlan, *supra* note 57, at 194 (quoting Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (per curiam)). The point must be qualified, as Karlan acknowledges, by the fact that the Eleventh Amendment does not bar private plaintiffs from suing state actors for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). Karlan, *supra* note 57, at 195. In

The Court, in other words, has effectively dictated to Congress the approach it must take if it wishes its statutes to be enforced effectively: it must appropriate sufficient funds for the government to take care of the enforcement itself.

2. *Attorney's Fees*

Karlan notes a parallel phenomenon in the attorney's fees area.[140] A number of privately enforceable federal statutes award attorney's fees to the "prevailing party."[141] In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,[142] the Court considered whether a plaintiff who achieves the precise object of the suit by way of the defendant's voluntary conduct qualifies as a prevailing party, despite the absence of a formal court judgment or court-ordered consent decree in her favor.[143] Up until then, settled precedent in at least nine federal courts of appeals observed the "catalyst rule," under which the plaintiff would be deemed a prevailing party in those circumstances.[144] In *Buckhannon*, however, the Court rejected the catalyst theory as inconsistent with the statute.[145]

Dissenting, Justice Ginsburg described the *Buckhannon* decision as "allow[ing] a defendant to escape a statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint."[146] In addition to "imped[ing] access to court for the less well heeled," the decision "shr[u]nk the incentive Congress created for

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that respect, the Court's sovereign immunity cases do not signal the end of all private party litigation against state entities under the statutes in question. But even admitting that qualification, the limitation on damages actions is significant. Indeed, Karlan seems right to suggest that "if the Amendment has any bite, that bite cuts deep into the heart of the private attorney general." *Id.*

140. *See id.* at 205-08.

141. *See, e.g.*, 33 U.S.C. § 1365(d) (2000); 42 U.S.C. § 1973*l*(e) (2000); 42 U.S.C. § 1988(b) (2000); 42 U.S.C. § 2000e-5(k) (2000); 42 U.S.C. § 3613(c)(2) (2000).

142. 532 U.S. 598 (2001).

143. Specifically, the case involved the attorney's fees provisions in the Americans with Disabilities Act and the Fair Housing Amendments Act. *See* 42 U.S.C. § 12205; 42 U.S.C. § 3613(c)(2).

144. *See Buckhannon*, 532 U.S. at 601-02 (describing the catalyst theory); *id.* at 602 n.3 (collecting cases adopting the catalyst theory); *id.* at 622 (Ginsburg, J., dissenting) (describing the Court's decision as departing from "long-prevailing Circuit precedent applicable to scores of federal fee-shifting statutes").

145. *See id.* at 605-06, 609-10.

146. *Id.* at 622 (Ginsburg, J., dissenting).

the enforcement of federal law by private attorneys general."[147] Of course, *Buckhannon* had no impact on the litigating authority of the federal government itself; it simply decreased the likelihood that private parties would be the effective enforcement instruments that Congress meant them to be.

Buckhannon thus fits the trend visible in the sovereign immunity cases. As Karlan describes, the "overriding theme" in both areas is a decline in the actual enforceability of the law.[148] While imposing few substantive constraints on Congress's legislative authority, the Court has "engaged in a form of court stripping that reduces the possibilities for judicial enforcement of statutory commands."[149] The specific target of that court stripping is the private attorney general. Public enforcement remains intact, but the erection of new barriers to private enforcement makes effective regulation more costly and, therefore, less likely.

3. *Standing*

The Court's sovereign immunity and attorney's fees decisions notwithstanding, it is in another area — standing — that the Court has had the greatest impact on private attorney general litigation.

As every federal courts student knows, the federal judicial power extends only to "cases" and "controversies" within the meaning of Article III of the United States Constitution.[150] The core of that limitation is the rule that a plaintiff must show she has suffered, or is in imminent danger of suffering, concrete, distinct, and palpable injury as a result of the defendant's conduct.[151] The injury must be more than "injury to the interest in seeing that the law is obeyed"; it must be an "injury in fact" that distinguishes the plaintiff from the general citizenry.[152]

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147. *Id.* at 623 (Ginsburg, J., dissenting).

148. *See* Karlan, *supra* note 57, at 208-09. Karlan discusses decisions in two other areas — arbitration and implied rights of action — and contends they display the same hostility to private attorneys general apparent in the sovereign immunity and attorney's fees cases. *See id.* at 195-205. Those areas are less germane to my argument here, however, because they do not involve the imposition of judicially crafted constraints on the express legislative delegation of litigating authority to private parties.

149. *Id.* at 209.

150. U.S. CONST. art. III, § 2.

151. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000) (explaining that "to satisfy Article III's standing requirements, a plaintiff must show," among other things, "it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical . . . .").

152. Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998).

The critical case in the modern Court's treatment of Article III standing is *Lujan v. Defenders of Wildlife*.[153] In *Lujan*, the Court held that an environmental organization lacked Article III standing to file suit challenging a federal regulation interpreting the Endangered Species Act's interagency consultation requirement.[154] Although the Endangered Species Act by its terms plainly authorized the suit, the Court held that the plaintiff organization could not establish that the regulation would inflict injury on it (or any of its members) in a way that distinguished the organization from any other citizen.[155] Rather, the organization was asserting "only a generally available grievance about government," and to permit such a suit would be to allow "the injury-in-fact requirement [to be] satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[156]

Under *Lujan*, therefore, it appears that legislation that both creates legal obligations and authorizes certain individuals to enforce those obligations might not, without more, satisfy the requirements for Article III standing. In this respect, *Lujan* is a marked departure from the Court's earlier approach to standing. As Laurence Tribe notes:

> Traditionally, the Article III-based injury requirement was understood only to limit the ability of federal courts to confer standing in the absence of statute; it was not thought to limit Congress' power to designate categories of individuals or groups as sufficiently aggrieved by particular actions to warrant federal judicial intervention at their behest.[157]

Lujan, however, appears to make the assessment of individualized "injury in fact" an inquiry undertaken somehow outside the context of the statutory framework governing the substance of the case.[158]

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153. 504 U.S. 555 (1992).

154. *Id.* at 578.

155. *Id.* at 573-74.

156. *Id.* at 573 (emphasis in original); *see id.* at 576-77 (rejecting the argument that "the public interest in proper administration of the laws . . . can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue"); *id.* at 573 n.8 (rejecting the argument "that the Government's violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed)").

157. TRIBE, *supra* note 64, at 394 (footnote omitted). This traditional approach is exemplified in cases like *Warth v. Seldin*, where the Court stated that the injury required by Article III "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'" 422 U.S. 490, 500 (1975) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)).

158. I acknowledge, however, that the precise ramifications of *Lujan* remain unclear. First, at least in some narrow circumstances, the Court since *Lujan* has been more accepting of Congress's role in defining legally cognizable injuries. In *Federal Election Commission v. Akins*, 524 U.S. 11, 13 (1998), for example, a group of voters challenged a decision of the Federal Election Commission (FEC) that the American Israel Public Affairs Committee was

Lujan's treatment of the Article III injury requirement has faced considerable judicial and academic criticism.[159] Cass Sunstein, for example, has argued that the Court's approach is premised on the fundamentally flawed idea that there is a "prepolitical or prelegal" way to separate those legitimately injured in a given transaction from those who are mere bystanders. To the contrary, he argues, injury is properly understood as "a function of law, not of anything in the world that is independent of the legal system."[160] On this view, a statute that broadly prohibits false advertising and other marketplace-corrupting conduct, and then grants all citizens a right of action to enforce the

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not a "political committee" under the Federal Election Campaign Act of 1971, and thus was not subject to the Act's requirements relating to the disclosure of membership and contribution information. The Court held that the voters had standing to challenge the FEC's decision on the ground that the statute created a right to information whose violation constituted "injury in fact." *Id.* at 21. That is, the Court measured Article III injury with reference to a statutorily created right to information, not some "pre-legal" notion of individual harm. *See* Cass R. Sunstein, *Informational Regulation and Informational Standing*, 147 U. PA. L. REV. 613, 642-43 (1999) (describing *Akins* as taking the approach that "[w]hether there was injury 'in fact' depended on what had been provided 'in law,'" and arguing that "the principal question after *Akins*, for purposes of 'injury in fact,' is whether Congress or any other source of law gives the litigant a right to bring suit"). Applied broadly, this approach might seem to signal a repudiation of *Lujan*'s conception of "injury in fact." But *Akins* did not overrule *Lujan*, and subsequent decisions have continued to cite *Lujan* as binding authority. *See, e.g.*, McConnell v. Fed. Election Comm'n, 124 S. Ct. 619, 707-09 (2003); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000). Thus, the precise impact of *Akins* on *Lujan* is unclear. Arguably, however, *Akins* may signal a shift in the direction of Justice Kennedy's concurring opinion in *Lujan*, which did not go so far as to say that assessing individualized "injury in fact" is an entirely pre-legal exercise, but instead simply stressed that Congress must speak clearly and carefully when creating enforceable legal rights:

> Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

Lujan, 504 U.S. at 580 (Kennedy, J., concurring) (citation omitted). Time will tell whether the Court adopts Justice Kennedy's approach.

159. *See, e.g.*, *Lujan*, 504 U.S. at 592 (Blackmun, J., dissenting); Sunstein, *supra* note 158, at 638 ("There now appears to be a consensus that the 'injury in fact' idea has extremely serious problems."); *id.* at 638-41 (elaborating on the doctrine's shortcomings); Sunstein, *supra* note 54, at 167 (describing "the very notion of 'injury in fact'" embraced and developed in *Lujan* as "not merely a misinterpretation of the Administrative Procedure Act and Article III but also a large-scale conceptual mistake," and arguing that "the injury-in-fact requirement should be counted as a prominent contemporary version of early twentieth-century substantive due process").

160. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436 n.18 (1988); Sunstein, *supra* note 158, at 640 ("The legal system does not 'see' an injury unless some law has made it qualify as such. If this point seems obscure, it is only because of widespread agreement, within the legal culture, about which injuries are 'injuries in fact' and which are not. But the agreement comes from understandings of law, not understandings of fact."); *id.* at 641 ("'Injuries' are not some kind of Platonic form, so that we can distinguish, without the aid of some understanding of law, between those that exist 'in fact' and those that do not exist 'in fact.'").

prohibition, creates by legislation an interest that ought to suffice for purposes of Article III.[161] That is so without regard to whether the targeted defendant has otherwise "injured" the plaintiff bringing the action. By appearing to hold otherwise, *Lujan* and its progeny substantially limit Congress's ability to enlist private plaintiffs in the enforcement of public law.[162]

This is not to say that modern standing doctrine prevents private plaintiffs from ever seeking the broad, institution-changing remedies typically associated with private attorneys general. To the contrary, as noted above in Part I, private attorney general litigation exists in federal court today in the form of the citizen suit (and also the *qui tam* action, to which I return below). Under the Court's standing requirements, citizen-suit plaintiffs must generally establish individualized "injury in fact" in order to sue. But once they show such injury, they may, as noted above, seek remedies extending far beyond their individual circumstances.[163] Thus, the Court's Article III injury doctrine does not categorically disable all private plaintiffs from pursuing broad-gauged "public law litigation" in federal court. But it does significantly reduce the number of private individuals constitutionally eligible to bring such litigation, and in that respect circumscribes Congress's authority to choose how its laws shall be enforced.

The Court has, however, recognized at least one clear exception to its individualized "injury in fact" requirement: *qui tam* litigation. As noted above,[164] the federal False Claims Act contains a *qui tam* provision granting private individuals the authority to bring fraud actions on the government's behalf. Because the Act does not require *qui tam* relators to show that they have been injured by the alleged fraud, it might seem to run afoul of the Court's "injury in fact" requirement. The Court considered that argument in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[165] but rejected it. The *Vermont Agency* Court cited two reasons for concluding that the Act's *qui tam* provision satisfies Article III. First, it reasoned that it

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161. *See* Sunstein, *supra* note 54, at 166 (arguing that standing analysis should focus on "whether the law . . . has conferred on the plaintiffs a cause of action").

162. As Sunstein explains:

> [T]he injury-in-fact requirement should be counted as a prominent contemporary version of early twentieth-century substantive due process. It uses highly contestable ideas about political theory to invalidate congressional enactments, even though the relevant constitutional text and history do not call for invalidation at all. Just like its early twentieth-century predecessor, it injects common law conceptions of harm into the Constitution.

Id. at 167.

163. *See supra* notes 64-66 and accompanying text.

164. *See supra* notes 44-49 and accompanying text.

165. 529 U.S. 765 (2000).

was possible to understand the Act as partially assigning to the relator claims originally belonging to the United States, and giving the relator a legally cognizable interest in the assignment.[166] On this reasoning, because the United States clearly has standing to assert the fraud claims, that standing travels with the claims when assigned. Second, the Court stressed uninjured *qui tam* relators' long history in Anglo-American law, and reasoned that the existence of *qui tam* statutes at the time of the Founding suggests the Framers thought they were consistent with Article III.[167] This second reason amounts to a carve-out from the modern Court's "injury in fact" rules, but by itself offers no principled justification for the exemption.

The existence of *qui tam* statutes during the Founding era strongly suggests that the modern Court's standing jurisprudence is at odds with historical practice.[168] Indeed, as Steven Winter has observed, a review of litigation patterns in the early years of the Republic reveals that federal courts regularly heard cases "astonishingly similar to the 'standingless' public action or 'private attorney general' model that modern standing law is designed to thwart."[169] My goal here is not, however, to make out a complete indictment of the modern Court's

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166. *Vermont Agency*, 529 U.S. at 773-74. For further discussion of *Vermont Agency*'s theory of standing, see Myriam E. Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CAL. L. REV. 315 (2001).

167. *Vermont Agency*, 529 U.S. at 774-78.

168. *See* Sunstein, *supra* note 54, at 176 (contending that the lack of contemporaneous constitutional objection to early *qui tam* statutes is "extremely powerful evidence that Article III did not impose constraints on Congress' power to grant standing to strangers"); Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL'Y F. 155, 160 (2001) (arguing that early *qui tam* statutes "give the lie to the Court's Article III jurisprudence").

A recent article by Ann Woolhandler and Caleb Nelson argues that "the notion of standing is not an innovation [of the modern Court], and its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning." Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004). Specifically, they contend that the nineteenth-century Supreme Court occasionally articulated ideas similar to the precepts of modern standing doctrine, and thus that it is not accurate to say that the modern doctrine departs from consistent, unanimous historical views and practices. At the same time, however, they acknowledge that "[t]he subsistence of *qui tam* actions alone might be enough to refute . . . [the] suggestion" that "history *compels* acceptance of the modern Supreme Court's vision of standing." *Id.* Woolhandler and Nelson further acknowledge that the early *qui tam* statutes "undoubtedly support the notion that Congress could authorize private citizens to initiate and conduct litigation on behalf of the public," *id.* at 726-27, at least where the defendant is a private actor and not the government, *id.* at 727. It is that legislative authority — to empower private plaintiffs to enforce broad public interests against other private actors — that is principally at issue here. Thus, whatever the force of Woolhandler and Nelson's defense of modern standing doctrine as a general matter or as applied to private suits against the *government*, in the specific context of private attorney general litigation against *private defendants*, they apparently agree that history — especially the history of *qui tam* litigation — cuts against modern doctrine.

169. Winter, *supra* note 40, at 1396.

standing doctrine. Others have already performed that task.[170] Rather, my aim is simply to note the effect of the Court's "injury in fact" decisions: with the exception of isolated pockets like informational standing and *qui tam* litigation, *Lujan* and its progeny have severely limited Congress's ability to enlist private plaintiffs in the enforcement of federal law.[171]

In contrast, the Court's Article III standing doctrine does not constrain government enforcement actions. Federal courts regularly adjudicate government enforcement actions that would lack "injury in fact" if brought by private plaintiffs.[172] As a formal matter, the Court squares such cases with its standing rules by saying the United States suffers Article III injury "to its sovereignty" when its laws are violated, even when the violation causes no concrete injury to anyone.[173] In other words, "generalized grievances" fall within the federal judicial power when brought by the United States itself, but not when brought by private plaintiffs.

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Rather than viewing private attorneys general as central to the "realiz[ation] [of] some of our most fundamental constitutional and political values,"[174] the current Court has consistently chipped away at Congress's power to deploy them. Government enforcement, on the other hand, has remained largely undisturbed. Again, the underlying assumption — an assumption quite contrary to the basic theory of the private attorney general — appears to be that if an important violation of federal law occurs, the executive branch will attend to it directly, without raising any of the risks posed by private enforcement. Put differently, the Court seems to be suggesting that if Congress cannot find a way to fund effective governmental enforcement of a given statutory regime, then the substantive regime itself must not be very important.[175]

The practical effect of the Court's decisions in all these areas is to increase the cost of enforcing broad, public-regarding federal statutes.

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170. *See, e.g.*, *supra* notes 159, 168.

171. *See* Gilles, *supra* note 166, at 315 (noting that the Court's standing decisions over the past three decades have "placed unprecedented limitations upon federal legislators who might otherwise wish to vest private individuals with broad standing to enforce various laws").

172. *See generally* Hartnett, *supra* note 81.

173. *See* Vermont Agency of Natural Res. v. United States *ex. rel.* Stevens, 529 U.S. 765, 771 (2000) (describing "the injury to [the United States'] sovereignty arising from violation of its laws" as sufficient to establish "injury in fact" in government enforcement actions).

174. Karlan, *supra* note 57, at 209.

175. *See supra* note 138 and accompanying text.

This is especially true of the Court's standing decisions. Under *Lujan* and its progeny, if Congress passes a law establishing certain substantive standards whose violation is unlikely to inflict individualized "injury in fact" on any particular party, its ability to rely on private plaintiffs to enforce the law is, at best, in serious doubt. Effective enforcement of the law in question may therefore depend on the appropriation of enough funds to ensure robust direct governmental enforcement. Such appropriations must compete with all the other demands on the general fisc. Of course, tradeoffs like this are an everyday fact of government. But by severely limiting Congress's discretion to rely upon private attorneys general to enforce federal law, the Court imposes new tradeoffs that could otherwise have been avoided.

Undoubtedly, at least some of these tradeoffs will yield underenforcement of the substantive law at issue. Congress will not always be able (or willing) to appropriate enough funds to support the level of public enforcement that a private right of action could have provided. As Karlan puts it, by privileging more expensive public enforcement over its cheaper private counterpart, the Court contributes to "an ever-greater regulation-remedy gap."[176] Thus, the Court's preference for public over private enforcement also seems to reflect a preference for — or at least a willingness to tolerate — less robust regulation. The Court's various moves against private enforcement, in other words, may be best understood as fundamentally *anti-regulatory*.

B. *Inapplicability of the Federal Limits in State Court*

Though dramatic, the above-described decisions constricting the power of private attorneys general are limited in one respect: as a general matter, they apply only in federal court. The Court's state sovereign immunity jurisprudence, for example, is principally confined to litigation in federal tribunals.[177] In addition, its attorney's fees decisions all involve the interpretation of federal statutes that are enforced mostly, if not exclusively, in federal court. The Court's control over the interpretation of state statutes is far more modest; it generally defers to state supreme courts on the proper construction of state law.[178]

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176. Karlan, *supra* note 57, at 208-09.

177. The exception is *Alden v. Maine*, 527 U.S. 706 (1999), which held states immune from private state-court damages actions alleging violations of federal law, at least where the federal law is passed pursuant to Congress's authority under Article I of the Constitution. Even after *Alden*, however, it seems clear that the Court's state sovereign immunity decisions have had greater effect in the federal courts.

178. *See, e.g.*, Wainwright v. Goode, 464 U.S. 78, 84 (1983) (per curiam); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 n.9 (1978). A famous, though

The Court's "injury in fact" standing decisions are similarly confined.[179] To say that Article III's limitations on the "*federal* judicial power" apply only in federal court is to state a tautology. Yet there is, as Helen Hershkoff has observed, a tendency to discuss the Court's standing rules "in universal or essential terms, as if Article III courts represent the institutional possibilities of courts more generally."[180] The point is therefore worth stressing: federal standing doctrine has no bearing in state court.[181]

To be sure, federal and state courts do share certain basic features defining them as courts in the Anglo-American tradition.[182] Accordingly, to the extent some aspects of federal standing doctrine are "founded in concern about the proper — and properly limited — role of the courts in a democratic society,"[183] state courts may observe

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substantively specific, exception to that rule is the Chief Justice's concurring opinion in *Bush v. Gore*, 531 U.S. 98, 111 (2000) (Rehnquist, C.J., concurring). For a brief argument that the *Bush v. Gore* concurrence misconceived the Court's role in interpreting state statutes, see Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 478 n.122 (2001). For an argument that the Court in fact has more authority to interpret state law than is often thought, see Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003). Even on Monaghan's or the Chief Justice's account, however, the Supreme Court lacks the authority to set aside a state supreme court's interpretation of state law in cases where no federal issue is implicated by the interpretation.

179. *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . ."). *But see* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263 (1990) (arguing that state courts should be required to adhere to Article III case or controversy requirements, at least when they adjudicate questions of federal law).

180. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836 (2001).

181. Beyond Article III's literal irrelevance to state court litigation, the main constitutional principle underlying federal standing doctrine has no necessary bearing on cases in state court. That principle is the separation of powers. *See* Allen v. Wright, 468 U.S. 737, 752 (1984) (stating that standing doctrine is "built on a single basic idea — the idea of separation of powers"). The fact that the federal government is divided into three departments has no necessary bearing on the distribution of governmental power at the state level. *See* Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937); Dreyer v. Illinois, 187 U.S. 71, 84 (1902). Admittedly, all states do distinguish in some measure among legislative, executive, and judicial power. But states need not, and often do not, adopt the fine points of federal separation of powers doctrine.

182. *See* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 61 (1998) (suggesting that "the state court shares with the federal court the limitations that flow from its status as a court"); Fletcher, *supra* note 179, at 265, 294-302 (describing some justiciability rules as reflecting "essential preconditions for wise adjudication" in any court). Moreover, "several provisions of the original federal constitution (*e.g.*, the constitutional prohibition against bills of attainder) seem to presuppose the existence of a separate state judicial system," distinct from the other branches of state government. Henry P. Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 524 n.23 (1970).

183. Warth v. Seldin, 422 U.S. 490, 498 (1975).

similar rules. The Supreme Court's notion of individualized "injury in fact," however, is not one of those rules. As Hershkoff has detailed, it is commonplace for courts in many states to hear cases where there is no individualized "injury in fact."[184] It follows, then, that the Article III version of injury is not necessary to our basic conception of judicial adjudication.

In sum, the Court's various decisions limiting the power of private attorneys general are largely confined to the federal courts. The Court's ability to shape state court litigation is much more modest. This is no accident: in "split[ting] the atom of sovereignty,"[185] the Framers left most administration of state law and litigation to the states themselves. Still, the Court does retain the power to affect state court litigation in some respects, most significantly by enforcing the Constitution against the states.[186] Thus, to the extent the Court is troubled by privately initiated public law litigation at both the federal and state level, it might look for a federal constitutional basis for reaching the state courts. *Nike v. Kasky* offered just that.

III. A NEW CHALLENGE: THE FIRST AMENDMENT

In the previous two Parts, I described the long history of legislative reliance on entities we would today call private attorneys general, the competing policy arguments for and against private attorneys general, and the limitations imposed by the current Supreme Court on private attorneys general in the federal system. It is against that backdrop, I suggest, that the anti-private attorney general argument pressed in *Nike v. Kasky* is best viewed. Unable to apply the restrictions it has crafted at the federal level to public law litigation in state court, the Supreme Court might be particularly solicitous of arguments relying

184. Hershkoff, *supra* note 180, at 1836-37, 1842-75 (summarizing and then discussing in detail certain state practices that diverge from the federal model).

185. United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

186. One other notable doctrinal means by which the Court affects state court litigation is the doctrine of preemption. Preemption does not necessarily involve privileging public over private enforcement, but many preemption cases do involve a federal regulatory regime displacing state tort law in a way that restricts private plaintiffs' litigating authority, or at least restricts their entitlement to recovery. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (holding that a Department of Transportation regulation impliedly preempted a state tort action targeting an auto manufacturer's failure to equip its vehicles with airbags). Moreover, although "'the purpose of Congress is the ultimate touchstone' in every pre-emption case," Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963)), the form of preemption known as implied conflict preemption turns not on strict statutory interpretation but on a judicial assessment of whether the state law in question "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941). In practice, therefore, implied conflict preemption is controlled more by the courts than by Congress.

on other, less obvious constitutional theories to achieve comparable results. By urging the Court to adopt a First Amendment rule against the enforcement of speech regulations by private attorneys general, the Solicitor General in *Nike* made precisely that kind of argument.

I begin this Part by presenting *Nike* as a kind of case study for examining this new First Amendment challenge to the private attorney general. Having done that, I then examine the argument more closely, seeking to identify the precise concerns driving it. Once I have done that, I will turn in the next Part to showing why the anti-private attorney general argument is untenable under the First Amendment.

A. *Case Study:* Nike v. Kasky

Starting in the mid-1990s, human rights activists, journalists, and others accused Nike of engaging in sweatshop labor practices — specifically, of doing business with subcontractors that mistreated and underpaid workers in their Southeast Asian factories.[187] Nike responded by publicly refuting these charges in a variety of media, including press releases, letters to newspaper editors, and letters to university presidents and athletic directors.[188] In 1998, a labor and consumer activist named Marc Kasky sued Nike under the above-described California unfair competition law (UCL),[189] claiming to act "'on behalf of the General Public of the State of California.'"[190] He alleged that Nike's responses to the sweatshop allegations contained false statements and material omissions of fact concerning the working conditions in its factories.[191] While expressly acknowledging that Nike's actions had caused him "'no harm or damages whatsoever,'"[192] Kasky sought an order requiring Nike to "'disgorge all monies . . . acquired by means of any act found . . . to be an unlawful and/or unfair business practice.'"[193] He also sought an injunction directing Nike to stop misrepresenting the working conditions in its factories and to

187. *See* Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (Stevens, J., concurring in the dismissal of the writ).

188. *See id.*

189. *See supra* notes 6-8, 70-79 and accompanying text.

190. Brief for Respondent at 10, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575) (quoting First Amended Complaint ¶¶ 3, 8).

191. *See* CAL. BUS. & PROF. CODE § 17200 (West 1997) (prohibiting unlawful and unfair business practices, including "unfair, deceptive, untrue or misleading advertising").

192. Brief for Petitioners at 5, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575) (quoting First Amended Complaint ¶ 8). The disclaimer may have been designed in part to ensure the case stayed in state court. *See infra* note 240 and accompanying text.

193. Kasky v. Nike, Inc., 45 P.3d 243, 248 (Cal. 2002) (quoting First Amended Complaint).

correct its past false statements on the subject.[194] Nike filed a demurrer to the complaint, arguing Kasky's suit was barred by the First Amendment.

After the case made its way through the California courts,[195] the United States Supreme Court granted certiorari to decide whether Nike's statements were commercial speech, and, if so, whether the First Amendment permits subjecting Nike to strict liability for any false or misleading aspects of its statements.[196] These were difficult questions: the Court's precedents delineate no categorical line between commercial and noncommercial speech,[197] leading some to suggest the distinction cannot tenably be maintained at all.[198]

In an amicus brief for the United States in support of Nike, the Solicitor General urged the Court to sidestep the

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194. *Id.*

195. The California trial court granted Nike's demurrer, the intermediate appellate court affirmed, *see* Kasky v. Nike, Inc., 93 Cal. Rptr. 2d 854, 857-63 (Cal. App. 2000), and the California Supreme Court reversed. That court concluded that the statements for which Nike had been sued constituted commercial speech and that the First Amendment tolerates strict liability for false commercial speech. *See Kasky*, 45 P.3d at 256-63.

196. *Nike*, 539 U.S. at 657 (listing questions presented).

197. *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 493 (1995) (Stevens, J., concurring in the judgment) (stating that "the borders of the commercial speech category are not nearly as clear as the Court has assumed"); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993) (noting "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category"); Central Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 594 (1980) (Rehnquist, J., dissenting) ("The plethora of opinions filed in [*Central Hudson*] highlights the doctrinal difficulties that emerge from this Court's decisions granting First Amendment protection to commercial speech."). Not everyone is troubled by the absence of a single bright line separating commercial and noncommercial speech. Steven Shiffrin, for example, has suggested that "the commercial speech problem is in fact many problems," and that we should approach commercial speech questions with a greater sensitivity to the precise context of each dispute. Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1216 (1983). I take no position here on the merits of the Court's commercial speech doctrine or any alternative approach.

198. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in the judgment) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."); *id.* at 523 n.4 ("The degree to which these rationales truly justify treating 'commercial' speech differently from other speech (or indeed, whether the requisite distinction can even be drawn) is open to question, in my view."); *see also, e.g.*, Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 634-50 (1990). Others, however, take the polar opposite view. *See, e.g.*, C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) (arguing that "a complete denial of first amendment protection for commercial speech is not only consistent with, but is required by, first amendment theory"); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1068 (1998) ("Corporate political speech is antithetical to the basic principles of democratic self-government. It should be entirely outside First Amendment protection."). For a variety of analyses of the commercial speech issue in the *Nike* case, see the contributions to *Symposium:* Nike v. Kasky *and the Modern Commercial Speech Doctrine*, 54 CASE W. RES. L. REV. 965 (2004).

commercial/noncommercial issue and to decide the case on a different ground. Specifically, he contended that without regard to whether the speech in question is commercial or noncommercial, the California statute violated the First Amendment by authorizing suits by uninjured private attorneys general.[199]

The Solicitor General's argument proceeded in two parts. First, he contrasted the California statute with traditional private causes of action for fraud, misrepresentation, and deceit by stressing the "self-limiting features" of the latter.[200] He argued that the common law has long provided actions against false statements in the marketplace, but only where the statements induce reliance and cause actual injury. These requirements, he maintained, confirm that protecting transactional integrity and compensating those actually injured are the only real public interests at stake in false advertising and like cases. They also ensure that traditional common law actions "pose scant risk of impinging on First Amendment values because they do not allow private plaintiffs to bring lawsuits based on misrepresentations 'in the air,' divorced from their actual effects."[201] The version of the California statute then in force, in contrast, required no showing of reliance or injury. As a result, it invited litigation based on mere "disagree[ment], as a theoretical matter, with the content or accuracy of the statement" in question.[202] Such suits extend far beyond the government's legitimate interest in "protecting transactions and consumers," and "create severe First Amendment concerns, particularly in connection with the broad remedies that [the statute] affords."[203]

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199. The Solicitor General argued:

> The First Amendment . . . allows government regulation of speech that is false, deceptive, or misleading. It does not, however, allow States to create legal regimes in which a private party who has suffered no actual injury may seek redress on behalf of the public for a company's allegedly false and misleading statements.

Brief for the United States as Amicus Curiae Supporting Petitioners at 8, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

200. *Id.* at 9-10.

201. *Id.* at 13.

202. *Id.* at 22.

203. *Id.* at 22, 21. Part of the Solicitor General's argument was inaccurate as a statutory matter. In developing his position, he characterized the UCL as especially problematic because it made disgorgement — the relinquishing of all ill-gotten gains — payable to private attorneys general. *Id.* at 22-25. Disgorgement can be strong medicine: in *Nike*, depending on how a court measured the causal connection between Nike's statements and its revenue stream, a disgorgement order might have captured very large sums indeed. While *Nike* was pending, however, the California Supreme Court clarified in a separate case that "nonrestitutionary disgorgement" — disgorgement paid to a plaintiff who was not injured by the defendant's actions — was not available under the version of the UCL then in force. *See* Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 943-49 (Cal. 2003). Although the UCL made "[a]ctual direct victims of unfair competition" eligible for restitutionary disgorgement, others could obtain only injunctive and declaratory relief. *Id.* at 949. Thus, the

More specifically, the Solicitor General contended that the California statute encouraged two kinds of plaintiffs. First, persons interested only in "the prospect of financial gain" could take advantage of the UCL's broad substantive coverage and lack of an injury requirement to sue virtually any commercial actor that makes public statements.[204] Such suits delivered financial rewards either in the form of disgorgement orders (where available) or through settlements with deep-pocketed defendants. Second, the UCL empowered plaintiffs "motivated, not by the need to redress for actual harm, but rather by disagreement with the speaker's policies, practices, or points of view."[205] These two cases correspond to the two archetypal descriptions of the private attorney general, discussed above in Part I: the "mercenary law enforcer" and the "social advocate."[206] As a general matter, these characterizations do little to undermine the legitimacy of the private attorney general. In the special context of speech regulation, however, the Solicitor General argued that empowering such plaintiffs could deter commercial entities from speaking out on matters of broad public concern.[207]

Although not specifically cited by the Solicitor General, anecdotal evidence arguably supported his charge. In 2003, for example, the press reported that a number of plaintiffs' attorneys had been abusing the UCL by suing small retailers solely to obtain nuisance settlements.[208] One strategy was to file complaints accusing the

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plaintiff in *Nike* was not eligible for disgorgement. The Solicitor General's mistake on this point underscores the perils of asking the Supreme Court to entertain a constitutional challenge to a state law before the state's own courts have had an opportunity to consider the challenge and to decide whether to resolve — or at least shape — the issue by construing the statute narrowly. *See* Harrison v. NAACP, 360 U.S. 167, 176 (1959) ("[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."). That said, the Solicitor General's error in *Nike* was specific to the California UCL, and a differently minded legislature might make disgorgement available to uninjured private attorneys general. Accordingly, nothing in my argument here depends on disgorgement not being available to private attorneys general like Marc Kasky.

204. Brief for the United States as Amicus Curiae Supporting Petitioners at 23, *Nike* (No. 02-575).

205. *Id.*

206. *See supra* notes 94-95 and accompanying text (quoting Garth et al., *supra* note 2, at 356).

207. Brief for the United States as Amicus Curiae Supporting Petitioners at 25-26, *Nike* (No. 02-575) ("The potential for massive monetary liability for past statements may cause even a company of Nike's size to refrain from presenting its side of the story, or to do so only in vague — and far less informative — generalities.").

208. *See, e.g.*, Michael Hiltzik, *Consumer-Protection Law Abused in Legal Shakedown*, L.A. TIMES, July 21, 2003; Editorial, *Legalized Extortion: Consumer Law Needs Fixing*, SACRAMENTO BEE, May 28, 2003; Walter Olson, *The Shakedown State*, WALL ST. J., July 22, 2003, at A10.

defendants of violating obscure or even nonexistent regulatory provisions, omitting (because not required by the statute) any allegation of injury.[209] The complaints would seek relief under the UCL, relying on its reference to "unlawful" and "unfair" business practices to incorporate violations of regulations that themselves create no independent cause of action.[210] Shortly after filing a complaint, the plaintiffs' attorneys would contact the defendant and offer a quick settlement, warning that the price would increase if acceptance were delayed.[211] To be sure, these highly publicized instances of UCL abuse did not directly involve speech. But it is easy to imagine an unscrupulous plaintiff invoking the open-ended language of the UCL or a similarly structured statute to target "misleading" aspects of a corporation's advertising campaign, all in an effort to leverage a quick settlement from a defendant eager to avoid trial. Indeed, some described *Nike v. Kasky* in those very terms.

To bolster his position, the Solicitor General invoked the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*[212] *Gertz* addressed the extent to which the First Amendment protects publishers from defamation actions by private citizens. The Court allowed that defamation cases implicate a "[strong and] legitimate state interest in compensating private individuals for wrongful injury to reputation," but stressed that this interest "extends no further than compensation for actual injury."[213] Accordingly, the Court held that the First Amendment prohibits recovery for "presumed or punitive damages" — i.e., damages not compensating proven injuries — unless the plaintiff establishes that the defendant knew the statements were false

209. For example, UCL actions against a number of nail salons alleged that the salons "violated rules of the Board of Barbering and Cosmetology by using the same bottle of nail polish for two or more customers." Press Release, Office of the Attorney General, State of California, Attorney General Lockyer Files Second Action to Fight Abuse of Consumer Protection Law (July 8, 2003), *available at* http://caag.state.ca.us/newsalerts/2003/03-085.htm (last visited Feb. 3, 2004) [hereinafter Attorney General Files Second Action]. Such conduct does not, in fact, violate applicable regulations, but the lawsuits intimidated many salons into paying anyway. *See Legalized Extortion: Consumer Law Needs Fixing*, *supra* note 208.

210. *See, e.g.*, Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 943 (Cal. 2003) ("Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices.").

211. *See* Attorney General Files Second Action, *supra* note 209; Olson, *supra* note 208. Such tactics do not necessarily go unpunished. In May 2003, for example, the press reported that a number of attorneys had been suspended from the State Bar after being accused of UCL abuse along the lines described in text. *See Legalized Extortion: Consumer Law Needs Fixing*, *supra* note 208. Those proceedings were resolved when the attorneys resigned from the Bar, but the California Attorney General continued to press enforcement actions (under, ironically enough, the UCL itself) against them and other attorneys accused of similar practices. *See* Jeff Chorney, *Trio at Center of 17200 Storm Resigns from Bar: Trevor Law Group Lawyers' Move Ends Bar Case, But AG's Continues*, RECORDER, July 11, 2003, at 1.

212. 418 U.S. 323 (1974).

213. *Id.* at 348-49.

or exhibited a reckless disregard for the truth.[214] Analogizing from *Gertz*, the Solicitor General in *Nike* argued that the California statute offended the First Amendment because it lacked the injury and remedy limitations that *Gertz* imposed on the law of defamation.[215] In so doing, he suggested that the *Gertz* Court's account of defamation reflected not just the specific dimensions of that particular cause of action, but rather the limited nature of the public interests served by *any* privately initiated litigation implicating free speech values.[216] On this view, private suits enforcing speech restrictions are justifiable only to the extent they seek compensation for direct injury.

Having assailed the private enforcement provision in the California law, the Solicitor General then asserted in the second main part of his argument that a substantively identical statute would raise no First Amendment problems if it were enforceable only by the government.[217] Here the Solicitor General focused on actions initiated by the Federal Trade Commission, while also referring to comparable litigation at the state level. The FTC, he observed, is empowered by statute to target "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce," including false advertising.[218] Injury need not be shown. Thus, the FTC could "bring an action against, for example, a coffee grower that represented that it employed rain-forest-protective practices or a tuna producer that represented its tuna as 'dolphin safe' if, in fact, those representations were false," without regard to whether the representations caused actual injury.[219] Moreover, the remedies

214. *Id.* at 349; *see id.* at 350 (observing that "jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship," and that "punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions" because "[t]hey are not compensation for injury").

215. Brief for the United States as Amicus Curiae Supporting Petitioners at 12-13, 21-22, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

216. *See, e.g.*, *id.* at 22 ("[H]ere, as in *Gertz*, the state interest in providing a remedy in private litigation generally 'extends no further than compensation for actual injury.'") (quoting *Gertz*, 418 U.S. at 349).

217. Brief for the United States as Amicus Curiae Supporting Petitioners at 14-20, 23, *Nike* (No. 02-575).

218. 15 U.S.C. § 45(a) (2001); *see* 15 U.S.C. § 52 (2001).

219. Brief for the United States as Amicus Curiae Supporting Petitioners at 28, *Nike* (No. 02-575). Under the Solicitor General's approach, it seems that the allegedly false statements at issue in *Nike* would be subject to FTC enforcement. The Solicitor General stressed that a company's statements, "if false, may be actionable [by the FTC] even if they appeared in the context of advertisements addressing a matter of public concern." *Id.* at 28 n.13. For an argument that the process by which a product is made is a legitimate matter of consumer and regulatory concern, see Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525 (2005).

available in such an action would include not only injunctive relief but also disgorgement.[220]

Government enforcement of the FTC Act thus covers just as much substantive ground as private enforcement of California's UCL, and its remedial reach extends even further. According to the Solicitor General, however, direct government enforcement of this kind has "inherent safeguards" that ensure compliance with First Amendment values.[221] In particular, he stressed government officials' political accountability and their obligation to bring only those enforcement actions that "represent the best use of public resources."[222] Private plaintiffs, in contrast, face no institutional constraints or public duties.[223] Rather, their interest is solely in obtaining favorable outcomes in their individual cases. A system driven by such motivations, the Solicitor General asserted, imposes intolerable burdens not only on individual defendants but also on the judicial system generally.[224]

Ultimately, the Supreme Court declined to reach the merits in *Nike*. Instead, it dismissed the writ of certiorari as improvidently granted, apparently concluding that review should never have been granted in the case.[225] Yet there is reason to think that at least some members of the Court may be receptive to the Solicitor General's argument in some future case. Most significant in this regard is Justice Breyer's opinion dissenting from the dismissal.[226] With Justice O'Connor joining him, Justice Breyer expressed apparent support for a First Amendment distinction between private and public enforcement, warning that "a private 'false advertising' action brought on behalf of the State, by one who has suffered no injury, threatens to impose a serious burden upon speech."[227] He found it particularly worrisome that the statute permitted suits by "purely ideological

220. Brief for the United States as Amicus Curiae Supporting Petitioners at 17, *Nike* (No. 02-575) (citing, *inter alia*, FTC v. Febre, 128 F.3d 530 (7th Cir. 1997); FTC v. Gem Merch. Corp., 87 F.3d 466 (11th Cir. 1996); FTC v. Pantron I Corp., 33 F.3d 1088 (9th Cir. 1994)).

221. Brief for the United States as Amicus Curiae Supporting Petitioners at 15, *Nike* (No. 02-575).

222. *Id.* at 18.

223. *See* Tr. of Oral Argument at 22, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575) (arguing that private attorneys general suing under the UCL have no "public duty").

224. Brief for the United States as Amicus Curiae Supporting Petitioners at 19-20, *Nike* (No. 02-575) (citing Holloway v. Bristol-Meyers Corp., 485 F.2d 986, 997-98 (D.C. Cir. 1973)).

225. Nike, Inc. v. Kasky, 539 U.S. 654 (2003).

226. *See id.* at 665-85. Justice Kennedy also dissented from the dismissal, but in a separate one-sentence statement containing no substantive discussion. *See id.* at 665.

227. *Id.* at 679.

plaintiff[s]."[228] In his view, plaintiffs motivated by ideological concerns are likely to abuse their litigating authority, whereas more conventional public enforcement regimes are constrained by the "legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm."[229] To guard against abusive private enforcement, Justice Breyer suggested the First Amendment should "limit[] the scope of private attorney general actions to circumstances where more purely commercial and less public-debate-oriented elements predominate."[230]

But the Court did not take that route. Instead, it simply dismissed the writ and remanded the case to the California courts for trial. Just over two months after the remand, the case settled.[231] The parties announced that Nike would contribute a modest $1.5 million to a fair labor organization, but beyond that the terms of the settlement were not disclosed.[232] *Nike v. Kasky* ended quietly.

Since then, however, the California voters have taken matters into their own hands. In November 2004, the voters passed a ballot initiative substantially amending the UCL's private attorney general provisions.[233] The amendments did not touch the substantive reach of the UCL, but instead provided that, in order to bring a private attorney general action under the statute, a plaintiff must have "suffered injury in fact and [have] lost money or property as a result of [the defendant's] unfair competition."[234] A private plaintiff who satisfies that injury requirement and who also meets California's separate requirements for class action representation may still seek broad injunctive and other relief in the public interest,[235] but the uninjured private attorney general is apparently a thing of the past in California. The campaign in favor of these changes highlighted

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228. *Id.*

229. *Id.*

230. *Id.* at 681. In addition to Justice Breyer's dissent from the dismissal, Justice Stevens filed an opinion concurring in the Court's action. *See id.* at 654-65. Without taking a position on the merits of the Solicitor General's argument, he stated that the question whether the First Amendment should distinguish between public and private enforcement is "difficult and important," and "would benefit from further development below." *Id.* at 664 n.5. Justices Ginsburg and Souter joined Justice Stevens on that point.

231. *See Nike Settles Suit by California Activist Over Statements on Working Conditions*, 72 U.S. L. WK. 2160 (2003).

232. *Id.*

233. *See* http://www.ss.ca.gov/elections/bp_nov04/prop_64_text_of_proposed_law.pdf (last visited Dec. 17, 2004) (setting forth the text of Proposition 64, the ballot initiative in question); http://vote2004.ss.ca.gov/Returns/prop/00.htm (last visited Dec. 17, 2004) (noting the passage of Proposition 64).

234. Http://www.ss.ca.gov/elections/bp_nov04/prop_64_text_of_proposed_law.pdf (last visited Dec. 17, 2004) (Sections 2 and 3, amending Cal. Bus. & Prof. Code §§ 17203-04).

235. *See id.*

instances of UCL abuse such as those described above.[236] But supporters of the changes also invoked the First Amendment, relying in particular on Justice Breyer's *Nike* opinion for the proposition that the law in its current form threatened free speech.[237] In this way, although *Nike* ended inconclusively, the Solicitor General's argument helped support a statutory change very much in keeping with the constitutional rule he urged on the Court.

* * *

Not only did *Nike* apparently help spur statutory change in California, it also brought to the fore a new challenge to any jurisdiction's reliance on private attorneys general to enforce speech-related regulations. That challenge can be boiled down to a few key contentions. First, laws authorizing private attorney general actions in the absence of injury go beyond the legitimate state interest in remedying actual harm to individual plaintiffs. Second, the substantive breadth of a law like the California UCL, coupled with the absence of an injury requirement, makes commercial speakers easy targets for suit. As a result, such laws threaten to chill commercial speech, especially when the topic is one of broad public concern. Third, public officials charged with enforcing speech-related regulations are subject to a variety of institutional constraints that ensure restraint and consistency, so that public enforcement does not raise the First Amendment concerns presented by private enforcement. Taken together, these contentions form an argument worth contemplating, especially on the assumption that the Court will return to the issue at some point in the future.

B. *Unpacking the Argument*

This Section parses the First Amendment argument against private attorneys general and seeks to identify its fundamental motivating concerns. My basic contention here is that, to be most effective, the First Amendment opposition to private attorneys general must be concerned not just with the plaintiff's lack of individualized injury, but with the broad, institution-changing remedies available in private attorney general litigation. I also assert that the Solicitor General's narrow description of the governmental interest in consumer protection is both inaccurate and unnecessary to the main thrust of his First Amendment argument.

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236. *See supra* notes 208-211 and accompanying text.

237. *See, e.g.*, John H. Sullivan, *Proposition 64: A Good Fix or a Disaster? 10 Reasons Lawyers Should Vote Yes*, CAL. B.J., Oct. 2004, at 8.

1. *Injury*

As presented in *Nike*, the argument for an injury requirement in private enforcement actions is largely instrumental: by limiting who may sue to enforce the statute in question, the goal is to minimize the statute's impact on speech. But if that is the goal, an injury requirement alone may often be inadequate because injury will be too easy to establish. In *Nike*, for example, a plaintiff stating that he had purchased a pair of Nike shoes in part because he believed Nike's public statements about its high labor standards could probably rely on the purchase to show injury.[238] Or, to borrow an example offered by the Solicitor General, purchasing a single can of tuna would likely suffice to support a suit challenging the seller's claims that its practices are "dolphin safe."[239] In an American economy marked by large-scale production, mass marketing, and product ubiquity, the number of potential plaintiffs who can establish "injury" on the basis of a single product purchase or similar low-cost, commonplace activity is surely very large. Indeed, in consumer protection cases like *Nike* the greater challenge may be in identifying potential plaintiffs who have *not* suffered any concrete injury as a result of the defendant's allegedly false or misleading statements.[240] In short, in at least some areas of the

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238. Justice Breyer made this point during oral argument:

> QUESTION: What will happen is, they'll find in 5 minutes somebody who bought some Nike shoes who feels the same way, you know, so you'll just have this exact suit with a different plaintiff, possibly, or maybe Mr. Kasky once bought some, for all I know, and — and so that isn't really going to help, is it?
>
> GENERAL OLSON: Yes, it is, Justice Breyer. It will limit . . . the regulation of marketplace speech to the traditional patterns and the regimes that have existed —

Tr. of Oral Argument at 24, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

239. *See supra* note 219 and accompanying text (discussing the example).

240. This last point suggests a more tangible effect of requiring state private attorneys general to show injury: satisfaction of federal jurisdictional requirements. If the parties were of diverse citizenship, and if the alleged injury put more than $75,000 in issue, then the articulation of injury would satisfy not only the Article III injury requirement, but also the statutory elements of federal diversity jurisdiction. *See* 28 U.S.C. § 1332(a) (2000). Granted, a single purchase of a pair of Nike shoes might not be able to satisfy those requirements, as the purchase would not meet the $75,000 amount-in-controversy threshold for diversity actions. But if the plaintiff sought injunctive relief, and if the value of his claim was determined by measuring the cost to the defendant of complying with the injunction, the threshold could easily be met. (The Supreme Court has never conclusively decided whether this method of measuring the amount in controversy is permissible, but some lower courts allow it. *See generally* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3703, at 121-25 (3d ed. 1998).) Alternatively, if a "socially conscious" shoe retailer were to sue its supplier Nike on the same theory relied upon by Marc Kasky, the dollar figure could easily exceed $75,000 even if measured purely in terms of the plaintiff's injury. With the jurisdictional minimum thus met, and provided Nike and the plaintiff were of diverse citizenship (with Nike being from out of state), Nike could remove the case to federal court. *See* 28 U.S.C. § 1441(a)-(b) (2000).

The possibility of removal could substantially affect the parties' litigating positions: empirical evidence suggests that parties do better when litigating in their chosen forum. *See*

law, merely requiring injury may do little to "rein in" ideologically and financially motivated plaintiffs with little "real" connection to the case.

Does this mean that the California voters engaged in a fruitless exercise when they voted to add an injury requirement to the California UCL? Not necessarily. Support for the ballot initiative was based in large part on concerns independent of the First Amendment — that unscrupulous plaintiffs' lawyers were using the UCL to file "shakedown" suits premised on trial technicalities incapable of causing any actual injuries. Obviously, an injury requirement could help address those abuses. It could provide a significant filer in other areas as well. For example, a conventional injury requirement would have substantially narrowed private enforcement under Dworkin and MacKinnon's anti-pornography ordinance.[241] But in cases like *Nike* — that is, in cases of misleading advertising or other sanctionable speech by a large corporate defendant — an injury requirement alone may well have relatively little effect. This suggests that an argument seeking to target the full power of the private attorney general must lie elsewhere.

2. *Remedy*

Closer examination suggests that the core of the private attorney general's power — and, therefore, the place where opposition must focus to be most effective — is a matter of remedy, not injury. The question of injury and the question of remedy are distinct.[242] Even in

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Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 606-07 (1998) (discussing empirical evidence establishing that choice of forum between state and federal court affects case outcomes, and that removal to federal court favors the defendant). Indeed, Clermont and Eisenberg calculate that removal in diversity cases reduces the plaintiff's chances of prevailing by about one-fifth. *Id.* at 606-07 & n.81. And although their study analyzes only cases brought to final judgment, the "removal effect" undoubtedly influences settlement activity as well. Since removal enhances the defendant's prospects at trial, its settlement position will be stronger when the case has been removed. *See id.* at 599 ("After removal . . . the parties will settle or litigate subject to the real or perceived differences of the federal forum."). *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (explaining that the settlement process in civil divorce litigation internalizes the governing law). The availability of removal, in other words, decreases a claim's value.

Defendants like Nike might well be grateful for the litigating advantage bestowed by a law that creates removal opportunities of this sort. But the First Amendment argument against private attorneys general has not been made in forum selection terms, and I see no persuasive reason for construing the First Amendment to contain any categorical preference as to forum. Thus, this side effect, though potentially significant as a practical matter, is just that: a side effect with no bearing one way or the other on the First Amendment question.

241. *See supra* notes 21-22 and accompanying text.

242. *See generally* Fallon, *supra* note 33, at 36-43 (stressing the importance of the distinction between justiciability issues and remedial issues).

federal cases, where the plaintiff must allege not just injury but "injury in fact," remedy and injury need not be coterminous. Injury-remedy parity is especially unlikely, moreover, where the plaintiff seeks an injunction against a large institutional defendant. Of course, the equitable nature of injunctive relief means that its availability is in part a matter of judicial discretion.[243] The point here, however, is simply to observe that injunctive remedies, when granted, may reach far beyond the plaintiff in a particular case.[244]

In this sense, and as suggested in Part I,[245] the real power in a private attorney general statute lies in the remedies it authorizes, not the absence of injury it excuses. Indeed, although the recent California ballot initiative targeted the absence of an injury requirement in the UCL while leaving its broad remedial provisions intact (provided the injured plaintiff can satisfy California's apparently modest class action requirements), those truly worried about the law's potential to chill speech should be concerned at least as much, if not more, about remedy.[246] To put the point in *Nike* terms, the concern is not so much with ensuring that plaintiffs like Marc Kasky establish injury when they sue for false advertising and/or unfair competition. Rather, it is with limiting Kasky's ability, injured or not, to obtain a judicial order directing Nike to alter or abandon certain advertising campaigns, to issue public statements correcting errors in its past advertisements,

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243. *See, e.g.*, Boomer v. Atl. Cement Co., 257 N.E.2d 870, 874 (N.Y. 1970) (approving the award of money damages instead of an injunction to successful plaintiffs in a nuisance action, even though an injunction is the ordinary remedy for nuisance, in part because the cost to the defendant of complying with an injunction would far exceed the plaintiffs' economic injuries); *cf.* Jaffe, *supra* note 38, at 1274 ("The English tradition of *locus standi* in prohibition and certiorari is that 'a stranger' has standing, but relief in suits by strangers is discretionary.").

244. The same is true, of course, of punitive damages, even under the Supreme Court's new due process-based limitations on such awards. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996). Catherine Sharkey has recently offered a persuasive argument for conceptualizing punitive damages as compensatory "societal damages" — *i.e.*, as aimed not at punishing the defendant in a retributive sense, but at redressing "widespread harms caused by the defendant, harms that reach far beyond the individual plaintiff before the court." Sharkey, *supra* note 66, at 389. On that view, punitive damages should probably be considered a tool of the private attorney general.

245. *See supra* notes 64-66 and accompanying text.

246. Although much of the Solicitor General's argument in *Nike* was formally phrased in terms of injury, he repeatedly expressed concerns sounding more in matters of remedy. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 21, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575) (stating that the First Amendment concerns raised by California's UCL were particularly acute in light of the "broad remedies that [it] affords"); *id.* at 22-23 (stating, on the basis of what turned out to be a misconstruction of the statute, that Kasky's suit "poses a particular prospect for chilling speech because California law appears to allow private parties to obtain substantial monetary awards based on no more than a threshold showing of materiality"); *id.* at 23 (criticizing "California's broad license to 'private attorneys general'").

and potentially even to disgorge all profits traceable to those past advertisements.[247]

The likelihood that remedy is at the heart of the concern is confirmed by the analogy, suggested by the Solicitor General in *Nike*, to *Gertz*.[248] As noted above, *Gertz* held that the public interest in "compensating private individuals for injury to reputation" was sufficient for a defamation action to withstand First Amendment challenge, but only to the extent the action sought "compensation for actual injury."[249] Accordingly, punitive damages are generally unavailable in defamation actions, as they go beyond compensation for individualized harm.[250] In the same vein, broad injunctive relief against the speaker is also strongly disfavored, at least to the extent the injunction would cover speech not yet specifically adjudged to fall outside the First Amendment's protections.[251] It is this remedial point that the Solicitor General endeavored to make by likening *Nike* to *Gertz*. That is, he cited *Gertz* not simply to argue that private plaintiffs must show injury, but to establish that the plaintiff's *remedies* should be confined to compensation for actual injury. On this view, even if Marc Kasky had alleged injury when he sued Nike, the broad injunctive relief he sought should have been unavailable. Rather, he should have stood to gain nothing more than compensation for his economic loss — potentially, the mere price of his running shoes.

That, it appears, is the gravamen of the argument pressed by the Solicitor General and endorsed by Justice Breyer in *Nike*: that the state interest in the private enforcement of speech-related regulations

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247. *See supra* notes 193-194 and accompanying text (discussing remedies sought in *Nike*); *supra* note 203 (discussing disgorgement under the California UCL).

248. *See supra* notes 212-216 and accompanying text.

249. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-49 (1974).

250. *Id.* at 350. *Gertz* does allow punitive damages in cases where the plaintiff establishes that the defendant speaker knew its statements were false or exhibited a reckless disregard for their truth or falsity. *Id.* at 349.

251. An injunction running against future speech whose constitutional status has not yet been ascertained would amount to a prior restraint. *See* Near v. Minnesota, 283 U.S. 697, 718, 720 (1931) (noting the "deep-seated conviction" that certain "previous restraints upon publication[]" would violate the First Amendment, and stating that "[s]ubsequent punishment" for libelous statements falling outside the First Amendment's protections "is the appropriate remedy, consistent with constitutional privilege"); *see also* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (refusing to enjoin publication of the Pentagon Papers, and stressing the Court's tendency to regard such prior restraints with strong disfavor). For a case closer to the context of the present inquiry, see Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), vacating an FTC order banning, without regard to context, a company's use of the phrase "instant tax refund" in its advertisements. As the Third Circuit explained, the FTC, "like any governmental agency, must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception." *Id.* at 620. On the prior restraint doctrine generally, see Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981).

extends only to remedies that compensate the plaintiff for actual injuries.

3. *State Interests*

It is one thing to argue that the First Amendment disfavors privately enforced remedies extending beyond compensation for discrete individual injuries; it is quite another to assert, as the Solicitor General did in parts of his *Nike* brief, that the state has no interest in privately enforced remedies extending beyond such compensation. As a categorical assertion, the latter cannot be squared with the long history, discussed above in Part I, of what is today called public law litigation. Of course, not all laws are designed to pursue broad public purposes; some are aimed at securing narrow private rights. But in areas where the legislature *does* seek to pursue the public welfare broadly defined, it is an established practice to use private plaintiffs as a means to that end.

This point exposes the flaws in the Solicitor General's claim that in *Nike*, "as in *Gertz*, the state interest in providing a remedy in private litigation generally 'extends no further than compensation for actual injury.'"[252] This claim simply overlooks the fact that the state interests served by the law of defamation are typically different, and narrower, than the interests served by the law of consumer protection. The *Gertz* Court's account of the injury-compensating state interest in defamation law[253] was a comment about the specific aims of that area of law as legislatures and common law courts have typically defined it.[254] In other fields, including consumer protection, legislatures seek to advance broader interests. As the Solicitor General himself stated in *Nike*, "the government has a responsibility [under consumer protection laws] to *prevent* deceptive and fraudulent practices from

252. Brief for the United States as Amicus Curiae Supporting Petitioners at 22, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575) (quoting *Gertz*, 418 U.S. at 349).

253. *See Gertz*, 418 U.S. at 348-49.

254. Even on that point, the Court's account of defamation law is best understood as a descriptive statement, not a rule of logical or doctrinal necessity. A legislature could, if it wanted, replace the common law of defamation with a broader, prophylactic statute aimed principally at preventing defamation from occurring in the first place. *Cf.* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) ("False statements of fact harm both the subject of the falsehood and the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens."). A First Amendment challenge to such a law might well prevail, but not for the precise reasons stated in *Gertz*. Were a legislature to define a broader set of state interests and further them with a more far-reaching defamation law, it would not be open to the Court to hold that the only state interest at stake was in compensating for actual injuries. The legislature itself would have provided otherwise. The Court could, however, conclude that the broader statute simply intruded too much on First Amendment values, and strike it down on those grounds. As discussed in Part IV, the critical point for purposes of this Article is that such a conclusion would have to be based on the substantive reach of the statute, not the identity of the party invoking it.

causing injury . . . without regard to whether any person has relied on the misrepresentations or has yet been injured thereby."[255] The state interest in consumer protection laws, in other words, is to pursue marketplace fairness and integrity by preventing false advertising and similar conduct from happening in the first place.[256] That is what defeats the Solicitor General's *Gertz* analogy: legislatures create consumer protection regimes to pursue a broader range of public interests than those typically served by the private law of defamation.

To the extent the Solicitor General would respond by asserting that the public interest in marketplace integrity extends only to direct government enforcement, his argument would simply ignore the private attorney general's long history, discussed above.[257] This is not to say that all privately enforced speech regulations necessarily pass constitutional muster. Rather, it is to say that if such a regime is unconstitutional, it is not because of some categorical limitation on the public interests served by private enforcement. Put another way, the private attorney general's long history establishes that private enforcement of a broad remedial regime is not necessarily ultra vires. Once a legislature decides to pursue a certain set of substantive interests, it is, as a general matter, well within its prerogative to enlist private plaintiffs in the effort.

Thus, although the Solicitor General in *Nike* at times appeared to contend that a private attorney general provision necessarily exceeds the state interest in regulating certain speech, that claim is not persuasive. The stronger case focuses on the individual right side of the scales, not the state interest side. It stresses that, whatever the state interest at issue, placing broad remedial authority in the hands of thousands or even millions of private attorneys general intrudes too much on the free speech rights of those subject to the underlying statute. Putting this point together with the call for reposing greater trust in public enforcement, the argument is that laws permitting private plaintiffs to seek broad speech-regulating remedies violate the First Amendment, while substantively identical laws authorizing only public enforcement do not.

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255. Brief for the United States as Amicus Curiae Supporting Petitioners at 17, *Nike* (No. 02-575).

256. *See* Fellmeth, *supra* note 78, at 267 (arguing, in general defense of private enforcement of the California UCL, that "modern marketing allows substantial damage and unjust enrichment through the mass application of deception or unfair competition, and . . . society has a strong stake in an inherently fair marketplace, and in effective means to draw and enforce lines of behavior").

257. *See supra* Part I.A.

IV. ENFORCEMENT MODELS AND THE FIRST AMENDMENT

In this Part, I turn directly to the assertion that the First Amendment should distinguish between private and public enforcement of laws implicating speech, and argue that such a distinction is untenable. To do so, I begin on the private enforcement side, and endeavor to specify the nature of the First Amendment argument against the private attorney general. The object in the opening section is not to agree or disagree with the substance of the argument, but rather to translate it into the language of the First Amendment so that we can understand its precise claims. As I explain, this translation reveals that the argument sounds principally in the doctrine of "overbreadth," as its main thrust is that private attorney general provisions have an intolerable chilling effect on protected speech.

With that exposition accomplished, the next section moves to the public enforcement side and examines the suggestion that the government's proper exercise of enforcement discretion can alleviate any free speech concerns that would otherwise arise from the face of the statute. My argument is simply stated: appeals to government discretion cannot cure a statute's First Amendment infirmities. Accordingly, *if* a particular speech-related regulation is facially unconstitutional when enforced by private actors, it would remain unconstitutional if enforced by the government alone. The First Amendment should draw no categorical distinction between public and private enforcement.

I would stress here that I do not argue that the substantive portion of the California unfair competition law or any other statute is necessarily consistent with the First Amendment. The California statute may intrude too far on the free speech rights of commercial speakers; it may be entirely consistent with the best understanding of the First Amendment. I take no position on that issue. Rather, I argue simply that the constitutionality of a statute's substance should not depend on the identity of the party enforcing it, and certainly should not turn on a categorical distinction between private and public enforcement. To conclude otherwise, I suggest, would be to turn the First Amendment on its head.

A. *Overbreadth*

As detailed above,[258] the public/private distinction pressed in *Nike.* is premised on an argument of facial unconstitutionality.[259]

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258. *See supra* notes 199-224 and accompanying text.

259. Brief for the United States as Amicus Curiae Supporting Petitioners at 8, *Nike* (No. 02-575) ("The First Amendment prohibits states from empowering private persons who have

Specifically, the assertion is that by permitting private actions in the absence of injury, and especially by making broad equitable remedies available in such actions, laws like the California UCL "chill[] the scope of public debate and the free flow of useful information."[260] My aim in this Section is to parse this assertion so that we may know the precise nature of the "chilling harm" at issue.

When a court examines whether a particular statute is facially invalid because it chills too much speech, the analysis typically proceeds under the doctrine of overbreadth. The public/private distinction proposed in *Nike* was not explicitly articulated in overbreadth terms, but the distinction's emphasis on the facially chilling effects of the California statute suggests that its doctrinal roots lie there. Accordingly, assessing the proposed public/private distinction must begin with overbreadth doctrine.[261]

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suffered no harm to seek judicial relief for allegedly false statements."); *id.* (arguing that the First Amendment bars "legal regimes in which a private party who has suffered no actual injury may seek redress on behalf of the public for a company's allegedly false and misleading statements").

260. *Id.* at 21. On the "chilling effect" generally, see Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978).

261. One problem with thinking of the Solicitor General's argument in *Nike* as asserting overbreadth is that overbreadth doctrine does not apply to laws regulating commercial speech. *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496-97 (1982) ("[I]t is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech."). Protection against overbreadth is unnecessary, the Supreme Court has reasoned, because the profit motive driving commercial speech is thought to render it more "hardy" and less subject to chill. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977) ("Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation."). Moreover, the Court has suggested that commercial speakers, especially advertisers, are well situated to know whether their expression is true (and thus constitutionally protected), and, if so, to proceed with the confidence that they are immune from liability. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976) ("The truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else."). The Court's reasoning on these two points has been heavily criticized in the academic literature. *See* Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 385-86 (1979); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 633 (1982); Shiffrin, *supra* note 197, at 1218. But the Court has not yet retreated from its position, and thus overbreadth analysis remains inapplicable to commercial speech. Accordingly, if the argument against the California law's private attorney general provision were heard to sound in overbreadth, it would likely fail.

For two reasons, however, I do not press overbreadth's inapplicability here. First, one of the principal questions presented in *Nike* was whether the expression at issue was properly deemed commercial speech. Nike urged the Court to adopt a fairly narrow definition of commercial speech, under which most, if not all, of its challenged statements would be deemed noncommercial. It would be rather unfair, then, to dismiss the Solicitor General's argument by calling the speech at issue commercial, when doing so would assume an answer to one of the questions upon which the case arguably turned. Second, the public/private First Amendment distinction urged by the Solicitor General need not be confined to commercial speech. In any area where expression or expressive conduct is regulated — for example,

As Laurence Tribe has explained, overbreadth analysis typically "compares the *statutory* line defining burdened and unburdened conduct with the *judicial* line specifying activities protected and unprotected by the first amendment; if the statutory line includes conduct which the judicial line protects, the statute is overbroad and becomes eligible for invalidation on that ground."[262] A statute is not impermissibly overbroad, however, simply by being marginally overinclusive. Rather, the overbreadth must be "substantial."[263] If a party challenging a law on First Amendment grounds shows that it prohibits a "'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,'" that showing "suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'"[264]

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pornography, as regulated by Dworkin and MacKinnon's anti-pornography ordinance discussed above — the legislature could elect to commission private actors in the enforcement of the regulation. In such circumstances, the overbreadth doctrine would apply. Thus, in the interest of conducting the analysis at a broader level of generality, I do not here rely upon the overbreadth doctrine's inapplicability to commercial speech.

262. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-27, at 1022 (2d ed. 1988) (emphasis in original). There is a considerable scholarly debate over whether the overbreadth rule is best understood as allowing litigants to assert the rights of third parties or as confirming each litigant's own right to be judged according to a constitutionally valid rule. The essential literature on the subject includes Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 369 (1998); and Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1. The Court generally takes the former view. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985) ("[A]n individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."); Alexander v. United States, 509 U.S. 544, 555 (1993) (describing First Amendment overbreadth as a departure from traditional standing requirements). Yet on either account, the underlying concern is that overbroad laws will deter constitutionally protected speech. On the "third party" view of overbreadth, the plaintiff asserts the interests of those who are deterred by the statute from engaging in protected speech. *See* Isserles, *supra*, at 369 ("[T]he Court understands the doctrine's principal purpose to be protecting third parties, who might fear prosecution under an overbroad statute, from self-censoring or 'chilling' protected speech."). On the "valid rule" view, the invalidity of a rule comes from its imprecision and overinclusiveness — *viz.*, from its prohibition of protected speech. *See* Monaghan, *supra*, at 37 (describing the "dominant idea" of the overbreadth doctrine as the requirement of regulatory precision). It is the point on which these two accounts converge that is important for purposes of this Article, and so I take no position as to which account is better. All that is required here is to see that overbreadth doctrine targets laws that, on their face, threaten to chill protected speech.

263. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

264. Virginia v. Hicks, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick*, 413 U.S. at 615, 613). In addition to the problem discussed in note 261, *supra*, another difficulty with challenging the California UCL on overbreadth grounds is that the statute applies to more than just speech. It empowers private attorneys general to challenge "any unlawful, unfair or

Overbreadth doctrine generally takes account of two distinct speech-chilling harms, both of which are implicated in the First Amendment argument against private attorneys general. First, there is a worry about *liability*. Simply put, the concern is that private enforcement of speech-related regulations will yield a high volume of enforcement litigation, which will in turn increase the chances that anyone governed by the regulations will be held liable.[265] This concern is heightened where, as with statutes like the version of the California UCL in force during the *Nike* litigation, the available remedies include not just civil penalties but potentially costly injunctive and other equitable relief.[266]

The point is not that strict enforcement is always undesirable. For example, although the Supreme Court's commercial speech jurisprudence is muddled in several respects,[267] it is clear under current doctrine that the government may prohibit the dissemination of false and misleading advertising.[268] Thus, if a statute prohibited only false

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fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." CAL. BUS. & PROF. CODE § 17200 (West 1997). Because overbreadth must be "judged in relation to the statute's plainly legitimate sweep," *Broadrick*, 413 U.S. at 615, in the case of the UCL the analysis must take account of all applications that have nothing to do with speech — suits targeting anticompetitive behavior, tortious interference with business relations, failure to observe industry regulations, and the like. Even if *every* application of the UCL to speech or expressive conduct were deemed unconstitutional, it is far from clear that the total number of such applications would be substantial when compared to the statute's permissible applications. For that reason, the Court has suggested that overbreadth challenges to laws "not specifically addressed to speech or to conduct necessarily associated with speech" will succeed only "[r]arely, if ever." *Hicks*, 539 U.S. at 124. Whether or not one sees this as a salutary development in the doctrine, as a practical matter it would likely doom an overbreadth challenge to the California statute. Rather than resting my argument here on that rather narrow, statute-specific ground, I proceed on the assumption that the state law in question is structured to maximize the prospects for a successful constitutional challenge. Thus, I assume a state law targeting only the kinds of expression to which the overbreadth doctrine applies, and extending no further than that expression.

265. Brief for Petitioners at 41, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575) ("A corporation faced with the prospect of *post hoc* strict liability in an uncertain but potentially staggering amount can forgo, or at the least substantially limit, speech on broader social and moral issues."); Brief for the United States as Amicus Curiae Supporting Petitioners at 25, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575) (suggesting that "[c]ompanies like Nike that seek to engage in a debate on issues of public concern with a connection to their own operations" may be deterred from doing so, for fear that they will "subject[] themselves to the risk of a judgment . . . that divests them of their profits on the basis of a statement that, after the fact, is held to have been 'likely to deceive' the public, even if it injured no one").

266. *See supra* notes 77, 193-194 and accompanying text.

267. *See supra* notes 197-198 and accompanying text.

268. *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002) (stating that, under the test articulated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), "we ask as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment."); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.").

and misleading advertising (where the terms "false," "misleading," and "advertising" were defined with adequate precision), and if the only entities sued were those whose advertisements were clearly covered by the statute, the prospect of liability would be of no constitutional moment.[269]

Concerns arise, however, when the statute seems to sweep within its ambit a substantial amount of constitutionally protected expression, or when the statute's outer boundaries are too unclear for a speaker to know whether it reaches certain protected expression. The Court has stressed the particular importance of accounting for a statute's ambiguity when determining overbreadth: "[A] court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis."[270] Indeed, "indefinite statutes whose terms . . . abut upon sensitive areas of basic First Amendment freedoms" may cause speakers to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked."[271] In either case, the concern is that the threat of liability will deter constitutionally protected speech. Rather than trusting the courts to shield them from liability, even those whose expression is clearly entitled to First Amendment protection will simply refrain from speaking.[272]

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269. This is wholly apart from the fact, noted *supra* note 261, that commercial speech regulations are not subject to overbreadth analysis under current doctrine. Frederick Schauer makes the point nicely with two examples drawn from two other areas of speech regulation:

> [I]t may be that the fear of punishment generated by federal and state obscenity laws chills the distribution of hard-core pornography. However, since hard-core pornography . . . is not deemed to be constitutionally protected, any chilling effect of this nature is permissible, and indeed, the intended result of the regulatory measures involved. Similarly, the existence of a civil damage remedy for injury caused by the malicious publication of defamatory falsehood is expected to deter individuals from publishing such defamatory material. Again, these utterances are unprotected by the first amendment, and thus the possible imposition of civil liability creates another example of what I would term a *benign* chilling effect — an effect caused by the intentional regulation of speech or other activity properly subject to governmental control.

Schauer, *supra* note 260, at 690 (footnotes omitted).

270. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 n.6 (1982); *see* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 88 n.10 (1973) ("[T]he problems of vagueness and overbreadth are, plainly, closely intertwined."). Although vagueness bears on the overbreadth analysis, the Court has also stressed the need to distinguish between overbreadth and void-for-vagueness analysis. The latter applies when a statute is not just ambiguous on its margins, but so imprecisely drawn that one simply cannot ascertain what it prohibits. *See Hoffman Estates*, 455 U.S. at 497 n.9 (distinguishing between overbreadth and vagueness).

271. Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958) (citation omitted)).

272. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 610-12 (1973) (describing overbreadth doctrine as proceeding from the "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression").

Applied to the California statute at issue in *Nike*, the argument is that by "arm[ing] millions of private citizens" with the power to seek broad injunctive and other equitable relief against those found to be in violation of an open-ended ban on "unfair competition," the version of the California UCL then in place created huge liability exposure for speakers like Nike.[273] Such exposure "unacceptably chills speech, particularly unpopular speech that is likely to become the target of such lawsuits."[274] Rather than engage in such speech, entities like Nike would simply remain silent.[275]

The second chill-based concern focuses on *litigation*. The worry is that by permitting essentially any citizen to challenge an entity's public statements as false or misleading, laws like the California UCL threaten to produce a flood of litigation.[276] Whether or not such suits have any merit, defending against them can be costly. Fearful of such costs, even those speakers whose expression is clearly protected by the First Amendment may simply decline to speak.[277]

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273. Brief for the United States as Amicus Curiae Supporting Petitioners at 25, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

274. *Id.* The Solicitor General elaborated:

> Companies like Nike that seek to engage in a debate on issues of public concern with a connection to their own operations (if only to respond to their critics) may well think long and hard before subjecting themselves to the risk of a judgment, at the behest of a single resident of California, that divests them of their profits on the basis of a statement that, after the fact, is held to have been "likely to deceive" the public, even if it injured no one.

Id. As noted above, the argument that Nike risked a disgorgement remedy was premised on a misinterpretation of the UCL. *See supra* note 203.

275. Nike argued that it had indeed forgone considerable speech during the pendency of the *Nike* litigation:

> Nike has determined on the basis of this suit that the very real prospect that a California resident will take it upon him or herself to dispute the veracity of one of the company's statements in a California court requires petitioner to restrict severely all of its communications on social issues that could reach California consumers, including speech in national and international media.

Brief for Petitioners at 38-39, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575). The self-censorship concern is certainly real, though one suspects at least a touch of hyperbole in the reference to "all" communications on social issues.

276. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 25, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575) ("[T]o arm millions of private citizens with such [broad equitable] relief, and to permit them to demand it without showing of injury to themselves or anyone else, unacceptably chills speech, particularly unpopular speech that is likely to become the target of such lawsuits.").

277. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 n.21 (1978) (suggesting that, without regard to the likely outcome of the litigation, "the burden and expense of litigating the issue . . . would unduly impinge on the exercise of the constitutional right"); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52-53 (1971) (plurality opinion) ("The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance.") (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)); New York Times Co. v. Sullivan, 376 U.S. 254, 278 (1964) ("Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms

Although the Supreme Court plainly recognizes the risk of litigation as a speech deterrent, the relationship between this risk and the risk of liability is not clear. Can the risk of litigation by itself be enough to establish overbreadth, without any regard to the likely outcome of the litigation? Or must there be some connection between the litigation risk and a liability risk? The Court's cases contain conflicting statements on this point. On one hand, cases like *Dombrowski v. Pfister* state that "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."[278] On the other hand, Justice Scalia's recent concurring opinion in *Virginia v. Black* takes a seemingly contrary position:

> We have never held that the mere threat that individuals who engage in protected conduct will be subject to arrest and prosecution suffices to render a statute overbroad. Rather, our overbreadth jurisprudence has consistently focused on whether *the prohibitory terms* of a particular statute extend to protected conduct; that is, we have inquired whether individuals who engage in protected conduct can be *convicted* under a statute, not whether they might be subject to arrest and prosecution.[279]

Can these positions be reconciled?

The first step is to recognize that the Court's statement in *Dombrowski* cannot be taken literally. If the prospect of litigation constituted a cognizable First Amendment harm without *any* regard to the likely outcome of the litigation, the harm would be ubiquitous. Everyone faces some risk of being sued, however frivolously. Suppose, for example, a private plaintiff invokes a false advertising law to sue a newspaper for publishing editorials with which he disagrees. Clearly, the newspaper has a winning First Amendment defense. Just as clearly, however, the statute simply does not cover the newspaper's actions; writing editorials, even bad ones, is not advertising. If the newspaper is nevertheless saddled with a meritless suit of this kind, it

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markedly greater than those that attend reliance upon the criminal law.'") (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

278. 380 U.S. 479, 487 (1965). The analysis appears no different if the potential litigation is civil rather than criminal. *See Bellotti*, 435 U.S. at 785 n.21; *Rosenbloom*, 403 U.S. at 52-53; *Sullivan*, 376 U.S. at 279.

279. Virginia v. Black, 538 U.S. 343, 371 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part). For support, Justice Scalia cited the following cases (parenthetical comments and emphasis his): R.A.V. v. City of St. Paul, 505 U.S. 377, 397 (1992) (White, J., concurring in the judgment) (deeming the ordinance at issue "fatally overbroad because it *criminalizes*... expression protected by the First Amendment"); City of Houston v. Hill, 482 U.S. 451, 459 (1987) (a statute "that *make[s] unlawful* a substantial amount of constitutionally protected conduct may be held facially invalid"); Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) (a statute may be overbroad "if in its reach it *prohibits* constitutionally protected conduct"); *Black*, 538 U.S. at 371-72.

will likely incur litigation costs in order to obtain dismissal.[280] Surely, though, the background possibility that other newspapers could be named in similarly frivolous suits does not establish unconstitutional overbreadth. Indeed, it is difficult to see how a statute could possibly be called overbroad simply because misguided plaintiffs might invoke it in places it has no application.

In what circumstances should the fear of litigation become cognizable? In my view, the Court's cases are best read to suggest that the risk of litigation attaches when there is at least a colorable argument that the statute at issue covers the expression in question.[281] On that point, the question is essentially as Justice Scalia described it in *Virginia v. Black*: "whether *the prohibitory terms* of a particular statute extend," or reasonably appear to extend, to expression protected by the First Amendment.[282] If the answer is yes, then we turn to the rule articulated in *Dombrowski*. That is, once we determine that certain protected expression is covered by the statute, we count the risk of suit as an independent chilling effect. Viewed this way, the underlying point of the *Dombrowski* rule becomes clear: not to convert the background risk of frivolous litigation into unconstitutional overbreadth in all cases, but to establish that, to the extent the terms of a statute at least arguably cover certain constitutionally protected expression, the fact that the speaker could assert a winning First Amendment defense does not negate the statute's chilling effect.

Returning to *Nike*, the chilling effect of the threat of suit under the California statute was arguably quite substantial. The statute's rather open-ended terms prohibited, among other things, all false and misleading advertising and other forms of commercial speech.[283] As a result, every commercial entity engaged in any amount of advertising or other commercial speech could have been exposed to litigation. The risk was heightened, moreover, if the entity engaged in advertising or other expression touching on areas of significant public interest, because its expression was more likely to come to the attention of more potential plaintiffs. As Nike argued to the Court:

> However careful it tries to be, no company can have confidence in its

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280. To the extent the suit is truly meritless or even frivolous, the newspaper may be able to recover fees and costs under a fee-shifting statute. But that is a separate inquiry. The Court's treatment of the chilling effect of litigation costs does not appear to take fee shifting into account.

281. *See, e.g.*, the references in *Houston v. Hill*, *Grayned*, and *R.A.V.* to what the statute in question prohibits, as quoted in note 279, *supra*.

282. 538 U.S. at 371.

283. *See* CAL. BUS. & PROF. CODE § 17200 (West 1997) (prohibiting "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising").

> ability to speak about hotly contested aspects of its operations or its employees' activities in far-flung facilities without inviting a lawsuit by at least *one* dubious or critical resident of California — a lawsuit that will impose on the company the substantial and one-sided costs of defending the litigation — *even if* the company believes that, by enduring years of litigation, it would ultimately secure a trial court's judgment that its statements were absolutely truthful.[284]

* * *

In sum, the Solicitor General's argument against the California statute was that it threatened to chill intolerable amounts of constitutionally protected speech. The chill came from two sources: from the risk of liability under such a broad and open-ended statute, and from the risk of having to litigate a First Amendment defense to such liability. According to the Solicitor General, the fact that the statute was enforceable by "millions of private citizens" — many of whom may be motivated by ideological agendas or pure greed — accentuated both risks by maximizing the likelihood of both liability and litigation.[285]

B. *Free Speech and Government Discretion*

This Section turns directly to the contention that the speech-chilling harms attending a regime of private enforcement would be absent (or at least substantially lessened) if a substantively identical regime were enforced only by the government. The assertion depends on the idea that public agencies will exercise wise discretion and restraint in their enforcement decisions. As the Solicitor General put it in *Nike*, "The provision of broad authority to seek such [wide-ranging equitable] remedies without proving an actual injury to specified individuals is by no means inappropriate for governmental agencies charged with enforcing the law. Such agencies are subject to numerous constraints and can be expected to exercise appropriate discretion in the invocation."[286]

To evaluate this assertion, recall that we are concerned here with the facial constitutionality of a statute. As described in the previous Section,[287] the argument is that a regime of privately enforced speech regulations will chill too much protected speech. That assertion

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284. Reply Brief for the Petitioners at 18, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

285. Brief for the United States as Amicus Curiae Supporting Petitioners at 25, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

286. *Id.* at 24-25.

287. *See supra* notes 258-260 and accompanying text.

necessarily amounts to the contention that the text of the statute covers, or at least arguably covers, a substantial amount of constitutionally protected expression.[288] The inquiry considers the "literal scope" of the statute (including any ambiguities in its outer reaches),[289] which is to say everything "ma[d]e unlawful" by the "prohibitory terms" of the statute.[290]

There is a critical point here. Because overbreadth analysis evaluates a statute according to its full reach, the prospect of "millions" of private attorneys general suing under the statute adds nothing material to the analysis. Such actions are either within the scope of the statute (including any ambiguities on its periphery), in which case they are already included in the overbreadth analysis, or they are meritless invocations of the statute where it plainly does not apply, in which case they have no real substantive connection to the statute itself and thus do not bear on its facial validity. Overbreadth, in other words, assumes a flood of litigation within the terms of the statute; anything beyond those terms is not attributable to the statute.

To be clear, by "flood of litigation" I mean full litigation against all potential defendants covered by the statute. I do not mean multiple lawsuits against the same defendant for the same conduct. Repeatedly subjecting a single defendant to liability for the same harm to the same public interest could well raise constitutional difficulties sounding principally in due process. But those concerns are distinct from the question of public or private enforcement, and can be addressed by adopting preclusion principles that would foreclose follow-on litigation after the first private (or public) attorney general suit has been litigated.[291] That issue aside, the point here is that overbreadth analysis assumes litigation against all defendants whose conduct falls within the statute's prohibitions.

Suppose, then, that a statute is deemed overbroad as privately enforced. The question here is whether the conclusion would be any different if enforcement authority rested exclusively with the government. It should not. The essence of the Solicitor General's argument on this point is that the public officials charged with enforcing the statute will be restrained in their enforcement decisions, that this restraint will produce less litigation under the statute, and

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288. *See* Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, n.6 (1982).

289. Smith v. Goguen, 415 U.S. 566, 573 (1974).

290. City of Houston v. Hill, 482 U.S. 451, 459 (1987); Virginia v. Black, 538 U.S. 343, 371 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).

291. *See* CASAD & CLERMONT, *supra* note 106, at 160-61 (discussing general preclusion principles relevant to such circumstances).

that less litigation will diminish the statute's chilling effect.[292] Note what this argument is *not* saying. It is not saying that executive agencies entrusted with the enforcement of overbroad statutes will promulgate regulations or other binding guidance narrowing the statute to within constitutional bounds.[293] Such narrowing could indeed alleviate overbreadth concerns: as the Court has explained, statutory overbreadth can be cured by the adoption of a binding narrowing construction,[294] and there is no reason to require the narrowing to be performed by a court rather than an executive actor. But the argument here is not that executive officials will publicly bind themselves to a narrow reading. Rather, it is that they will exercise wise discretion in enforcing the statute's broad prohibitions.

There is a certain attraction to the idea that government actors have a special obligation to discharge their duties in a manner consistent with the Constitution and laws, and that this obligation includes a self-policing duty to promote constitutional values when exercising discretionary power.[295] Employed by the courts, the expectation that government officials respect constitutional boundaries is a familiar instrument of judicial restraint. Courts generally presume that the democratically elected branches of government act constitutionally, and thus will not strike down government action as unconstitutional absent a showing of patent irrationality.[296] As the Supreme Court explained in the early nineteenth century, applied to legislative action "[i]t is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all

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292. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 18, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

293. In *Nike*, the Solicitor General did refer to regulatory guidance provided by the FTC regarding what sorts of commercial statements trigger liability under the FTC Act. *See id.* at 19 (citing 16 C.F.R. pt. 260; 16 C.F.R. 1.1-1.4). But the point of the Solicitor General's argument was not to say that regulatory narrowing would cure an otherwise unconstitutionally overbroad statute. Rather, he maintained that the FTC Act was constitutional as written. He also implicitly acknowledged that the Act's substantive scope is similar to that of the California UCL, and suggested that there would be no First Amendment problem with the California UCL if it were enforceable only by state officials. Brief for the United States as Amicus Curiae Supporting Petitioners at 19-20, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

294. *See* Virginia v. Hicks, 539 U.S. 113, 118-19 (2003); New York v. Ferber, 458 U.S. 747, 769 n.24 (1982); Dombrowski v. Pfister, 380 U.S. 479, 491 n.7, 497 (1965).

295. *See generally* JOHN A. ROHR, PUBLIC SERVICE, ETHICS, AND CONSTITUTIONAL PRACTICE (1998).

296. Here I am referring, of course, to the standard account of "rational basis" review. *See, e.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307, 314-15 (1993) ("On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" (citation omitted)).

reasonable doubt."[297] The same reasoning supports an expectation that executive actors will enforce the laws in a manner consistent with the Constitution.[298]

The general presumption that government actors will discharge their responsibilities in a manner consistent with constitutional values does not, however, justify the deference sought by the Solicitor General in *Nike*. First, presuming that a government official will act lawfully when enforcing a facially constitutional statute is not the same as presuming that government discretion will save an otherwise unconstitutional law. The public/private distinction at issue here champions the latter. The argument is that a private attorney general provision will yield a flood of enforcement litigation, which in turn will cause the underlying substantive regulation to be maximally enforced, and that such maximum enforcement will unduly chill protected speech. The statute as fully enforced, in other words, is unconstitutional. But government enforcement can be presumed to be restrained, and this restraint will bring the statute's speech-chilling effects down to tolerable levels. As the Solicitor General put it, government agencies are "subject to numerous constraints *and can be expected to exercise appropriate discretion*" when exercising their enforcement authority.[299] Government discretion, in other words, will prevent the statute from being fully enforced, thus curing its facial overbreadth. This is not merely an argument that government enforcement will presumptively remain within constitutional bounds; it is an argument that government enforcement can cure a statute's unconstitutionality. In that sense, it goes far beyond the conventional presumption of constitutionality.

Second, the argument here also asks for deference in a substantive area where it is not typically granted. As a general matter, the presumption of constitutionality does not apply when the government legislates or otherwise acts in an area affecting fundamental constitutional rights.[300] In the First Amendment context, laws

297. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827).

298. At the federal level, the expectation is bolstered by the President's constitutionally prescribed oath of office: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, § 1, cl. 8.

299. Brief for the United States as Amicus Curiae Supporting Petitioners at 25, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575) (emphasis added).

300. The first prominent articulation of this rule came in the "most celebrated footnote in constitutional law," Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982), footnote four of Justice Stone's opinion for the Court in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). Although footnote four is today best known for its suggestion that the presumption of constitutionality does not apply to statutes reflecting "prejudice against discrete and insular minorities," its significance for present purposes derives from the first paragraph of the footnote, which states: "There may be narrower scope for operation of the presumption of constitutionality when legislation

regulating expression on the basis of its content are not subject to mere rational basis judicial review; they are presumed unconstitutional unless they can withstand strict judicial scrutiny.[301] Thus, the general presumption of constitutionality does little work when free speech is at stake.

In addition — and apart from whether government action affecting speech should be presumed constitutional — the argument that government discretion can ever remove a statute's First Amendment defects is inconsistent with substantive tenets of free speech doctrine. At bottom, the argument effectively entrusts freedom of speech to the government's discretion. But as Justice Jackson famously explained, "[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind," as "the forefathers did not trust any government to separate the true from the false for us."[302] Instead of committing the protection of free speech to official discretion, the First Amendment puts it beyond the government's reach.[303]

The First Amendment's general distrust of government discretion is incorporated into its specific doctrines. This is particularly true of overbreadth doctrine and its sensitivity to the chilling effect. As Frederick Schauer explains in his classic treatment, the "chilling effect doctrine" is a response to two propositions. First, "all litigation, and

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appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Id.* at 152 n.4. *See generally* Peter Linzer, *The* Carolene Products *Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277 (1995) (suggesting that subsequent descriptions of the footnote by Stone's former clerk Louis Lusky and by John Hart Ely have characterized it as justifying invasive judicial review only when there is a process breakdown in majoritarian democracy, and that this characterization overlooks the special position accorded to personal, non-economic rights in the first paragraph of the footnote).

301. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816-17 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed." (citations omitted)); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 77 (1981) (Blackmun, J., concurring) ("[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment.").

302. Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring); *see* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 111 (1998) ("[O]fficial discretion to determine the value of speech content has long been understood to be incompatible with the principle of free speech itself, one of whose central themes is distrust of government.").

303. *See, e.g.*, *Playboy Entm't Group*, 529 U.S. at 818 ("The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.").

indeed the entire legal process, is surrounded by uncertainty."[304] Second, "an erroneous limitation of speech has, by hypothesis, more social disutility than an erroneous overextension of freedom of speech."[305] This second proposition "represents an ordering of values mandated by the existence of the first amendment within a legal system characterized by error and uncertainty."[306] To be faithful to that ordering, "we must isolate . . . those factors that cause a significant increase in the degree of uncertainty and fear normally surrounding the legal process."[307]

Overbreadth analysis treats the text of a statute as a source of legal uncertainty. A broad, open-ended prohibition reaching constitutionally protected activity, especially when drafted in imprecise terms, creates both liability and litigation risks. As long as the prohibition remains in effect, the uncertainty persists. And unless it is authoritatively narrowed, those potentially covered by its literal terms bear the brunt of the uncertainty. That is, even if a particular speaker has a strong First Amendment defense against the prohibition, the fact that it covers her expression subjects her to "a significant increase in the degree of uncertainty and fear normally surrounding the legal process."[308] Those concerns are not dispelled by non-binding assurances that the government will exercise restraint in enforcing the law. That is partly because such assurances do not alter the text of the law, which is where the uncertainty resides. But it is also because, as noted above, the First Amendment generally regards government discretion as a further source of legal uncertainty, not a solution to it.

Beyond the uncertainty point, an additional reason why the First Amendment takes no comfort in government discretion is that it creates opportunities for discrimination. As Steven Shiffrin has observed, especially where the regulation in question targets false or misleading speech, the government's discretionary enforcement decisions may mask highly problematic forms of discrimination.[309] Similar concerns of government bias and discrimination help to

304. Schauer, *supra* note 260, at 687.

305. *Id.* at 688.

306. *Id.*

307. *Id.* at 732. In this respect, Schauer is sensitive to the risks of both liability and litigation. *See id.* at 700 (describing "the costs involved in securing a successful judicial determination," explaining that "[t]hese costs of securing vindication create a fear of the entire process, with a commensurate increase in the degree of deterrence," and concluding that "even those with perfect knowledge of the ultimate outcome of litigation will be deterred from engaging in protected activity if it will be necessary for them to demonstrate publicly the lawfulness of that conduct").

308. *Id.* at 732.

309. *See* Shiffrin, *supra* note 197, at 1262 ("If government intervenes to prevent speech, simply on the basis that it is false, without more, there are reasons to fear that the government acts out of bias or in an effort to repress minorities.").

explain the distinct, though related, void-for-vagueness doctrine.[310] Unless a legislature crafts its enactments with sufficient clarity, government officials charged with enforcing the law may be able to take advantage of the law's vagueness to act unreasonably, arbitrarily, or even discriminatorily. The substantive nature of the discrimination may take a variety of forms. It may, for example, coincide with the problem of agency capture noted above.[311] That is, enforcement decisions may reflect which private actors have, and have not, managed to exert disproportionate influence on the enforcing agency. In addition, discriminatory enforcement may operate against speech that is especially controversial or offensive to the public.[312] As the Solicitor General himself stressed in *Nike*, government officials are politically accountable for their decisions.[313] Although such accountability ordinarily accords well with principles of democratic governance, in matters of speech it creates the risk that officials may base their enforcement decisions on assessments of political expediency and public sentiment. Such decisions cut to the heart of the First Amendment, one of whose core purposes is to protect dissent from majoritarian oppression.[314]

To be sure, there is ample reason also to worry about discrimination by private attorneys general. In *Nike*, for example, both the Solicitor General and Justice Breyer suggested that the California statute enabled private individuals who opposed Nike on ideological grounds to express that opposition through litigation.[315] As noted, such ideologically driven litigation matches one of the archetypal depictions of the private attorney general.[316] And although the "social advocate"

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310. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."); *see also supra* note 270 (noting relationship between overbreadth and vagueness). For the classic treatment of the vagueness doctrine, including an argument that guarding against discriminatory enforcement is the best defense of the doctrine, see John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

311. *See supra* notes 87-89 and accompanying text.

312. *Cf.* Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (noting that the First Amendment bars licensing schemes that grant unduly broad discretion to licensing officials, given the potential for such discretion to "becom[e] a means of suppressing a particular point of view").

313. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 18, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

314. *See generally* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999).

315. *See supra* notes 205-207, 227-230 and accompanying text.

316. *See* Garth et al., *supra* note 2, at 356 (describing "the 'social advocate,' for whom litigation is a form of pressure group activity").

litigant is not a problem in most areas of the law,[317] it may raise concerns in matters relating to speech. Suing to advance a political or ideological position can amount to using the law to punish certain points of view. Discrimination of that sort might be tolerated when a private plaintiff sues on her own behalf. But when private actors are invested with the authority to censor, punish, or otherwise control expression on a broader scale and on behalf of the public at large, the First Amendment properly regards them with as much suspicion as public actors wielding the same power.[318] The point here, however, is that they should not be treated with any *more* suspicion.[319] If a broadly phrased speech regulation permits an intolerable amount of private discrimination in how it is enforced, that may confirm the statute's unconstitutional overbreadth. But the constitutional infirmity does not disappear if the discretion is transferred from private to public hands. Discretion in the enforcement of speech regulations, whether exercised by public or private actors, threatens free speech values.

Finally, even if government discretion could alleviate the chilling effect of an overbroad law in theory, there is little reason to expect this to happen in practice. The factors generally guiding official discretion — political accountability and resource scarcity — have little to do with free speech. Thus, wholly apart from the possibility that political accountability may actually increase the likelihood of content- or viewpoint-discrimination, a government official acting in all good faith may simply base his enforcement decisions on factors having no real bearing on the First Amendment. An official charged with deciding whether to bring a particular enforcement action must consider "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action . . . best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all."[320] All of these factors are legitimate from the perspective of democratic accountability; none is particularly likely to reflect First Amendment values.

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317. *See supra* notes 96-99 and accompanying text.

318. *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71-72 (1963) (holding that a regime of "informal censorship" by a citizens' commission violates the First Amendment).

319. *Bantam Books* is instructive. There, the critical point for the Court was to "look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Id.* at 67. That is, non-formalist analysis enabled the conclusion that informal censorship was just as odious to speech as more formal versions of the same thing. *See id.* at 68 ("It is not as if this were not regulation by the State of Rhode Island."). The Court nowhere suggested, however, that the citizens' commission at issue in the case would be somehow *less* constitutionally suspect if formally run by the government.

320. Heckler v. Chaney, 470 U.S. 821, 831 (1985).

C. *Two Objections*

My treatment of the First Amendment argument against private attorneys general has focused on concerns of overbreadth, and has attacked the assertion that the problems present in a private enforcement regime may be alleviated simply by converting to a regime of public enforcement. I pause now to address two possible objections to this treatment.

1. *Enforcement Discretion and Judicial Review*

First, one might object that I have placed too much emphasis on the problem of unfettered government discretion. True, an objector might concede, government discretion can indeed be a problem for First Amendment values, but a preference for public over private enforcement need not entail total judicial deference to the exercise of such discretion. Although the Solicitor General's account of the proposed public/private distinction in *Nike v. Kasky* did not seem to provide for any judicial review of that discretion, that part of the proposal need not be adopted. Instead, courts might reject initial facial challenges to publicly enforced statutes by presuming the government will exercise restrained enforcement, but remain open to later challenges asserting that the government has in fact overenforced the law.[321]

To be sure, this approach would alleviate concerns about unchecked executive discretion. But it would replace those concerns with others, focused this time on judicial excess. If governmental underenforcement of a statute is required to preserve its constitutionality, then the government is not free to increase enforcement beyond a certain point, and the courts will be called upon to determine when that point has been reached. Suppose, for example, a newly elected governor determines that consumer deception has reached intolerable levels and therefore sets as her top priority the full enforcement of her state's unfair competition and false advertising

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321. This may have been what Justice Souter had in mind during the following colloquy in the *Nike* oral argument:

> QUESTION: [W]hy shouldn't it be sufficient to say that when it is the State rather than any citizen, self-selected, who brings this suit, we would at least depend upon some State . . . [for] political responsibility . . . and accountability as . . . our safeguard, and we would let that go forward because we don't think there's enough risk of improper chilling? The distinction is, when anybody can walk in . . . there's no accountability. Why isn't that the line to draw?
>
> MR. TRIBE [counsel for Nike]: Well, it seems to me, Justice Souter, that's a line enough to reverse this decision . . . .

Tr. of Oral Argument at 15-16, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575). Justice Souter may have been advocating not complete immunity of a public enforcement regime from overbreadth scrutiny, but a presumption in favor of such a regime that can be rebutted if the government enforces the underlying statute too robustly.

laws. The statute is enforceable only by the government, so the governor obtains from the legislature a budgetary increase sufficient to fund a tenfold increase in the enforcement level. Or suppose the increase is one hundredfold. At some point, the government would reach a level of full enforcement — which, as discussed above,[322] is the level presumed to exist under overbreadth analysis — whereupon the statute would become unconstitutional. The result, then, would be to prohibit the government from fully enforcing its laws. A statute's constitutionality would turn on a judicial assessment of whether the government has devoted too many resources to enforcement, even though all the enforcement remains within the literal terms of the statute.

Such assessments are unknown to both the First Amendment specifically and judicial review more generally. To be sure, courts may well expect executive actors to construe ambiguous statutes to avoid constitutional difficulties, and may enforce that expectation by setting aside executive actions that exceed the reach of the statute as narrowly construed. But those are circumstances where the statute is ambiguous, triggering the familiar rule that ambiguity should be resolved in favor of a reading that avoids constitutional questions.[323] In contrast, the premise of the public/private distinction at issue here is not that the government will formally adopt a narrow construction of the statute. Rather, the idea is that the government will simply initiate a lower volume of litigation under the statute while leaving its full substantive reach intact.[324] Unless the statute itself manifests a legislative preference for a particular volume of enforcement, requiring such underenforcement cannot seriously be considered an act of interpreting the statute.[325]

In short, the constitutionality of a statute does not, and should not, depend on a judicially decreed assumption that it will be underenforced according to a metric found nowhere in the statute

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322. *See supra* notes 227-291 and accompanying text.

323. Though frequently the target of academic criticism, the canon of constitutional avoidance has been described by the Supreme Court as "'a cardinal principle' of statutory interpretation." Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). For a discussion of whether federal executive actors should construe statutes to avoid constitutional questions, separate from whether courts should do so in the context of litigation, see Trevor W. Morrison, *Statutes Outside the Courts: Executive Branch Statutory Interpretation and the Canon of Constitutional Avoidance* (in progress).

324. *See supra* notes 221-222, 299 and accompanying text.

325. By saying "the statute itself," I do not mean to suggest that statutory interpretation must be confined to only the plain text, without any consideration of the law's animating purpose as reflected in legislative history or other evidentiary sources. Rather, my point here applies without regard to one's preferred method of statutory interpretation. The point is that, unless the statute (as interpreted according to one's preferred method) can be read to dictate, or at least to prefer, a particular volume of enforcement, the judicial imposition of a volume requirement cannot be justified as a matter of statutory interpretation.

itself. Otherwise, courts will usurp the roles of both the executive and the legislature: the executive, by dictating enforcement (or rather, underenforcement) priorities, and the legislature, by effectively rewriting the statute to announce those priorities.[326]

2. *Multiple Mal-Enforcement*

One might also object that, by addressing the First Amendment argument against private enforcement in overbreadth terms, I have missed the real thrust of the argument. It is not, the objector might contend, that the choice between public and private enforcement somehow alters a statute's substantive scope, thus changing the overbreadth calculus. Rather, it is that a relatively small corps of public officials is likely to bring far fewer suits than a vast militia of private attorneys general, and thus that the *in terrorum* effect of a private enforcement regime is more severe than that of a public one. On this view, the constitutional flaw in a private enforcement regime is not that it fully enforces the statute, but that it predictably overenforces the statute in a way that renders the entire regime facially unconstitutional. Private attorneys general, in other words, will engage in *multiple mal-enforcement*, filing actions lacking in substantive merit in order to advance their own ideological or financial interests.

To respond to this objection, I would first stress that I do not deny that a private enforcement regime might produce more litigation than a purely public one. Indeed, as I have described at length,[327] one of the policy arguments in favor of private attorneys general is precisely that they will provide more robust enforcement of the underlying law. Especially where a private attorney general provision aligns the law's aims with the financial or ideological interests of private plaintiffs, it is naïve to suppose that private and public actions will be filed at the same rate.

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326. There is a parallel here to severability analysis in the federal courts. When a court holds one provision of a federal statute to be facially unconstitutional, it must determine whether to strike down the entire statute on that basis or to sever the infirm provision from the rest of the law. In making that determination, the court looks in part to whether the unconstitutional aspect of the statute can be excised without requiring a rewriting of the remainder of the statute. If not — if the constitutional and unconstitutional parts can only be separated by inserting new distinctions into the text — then severance is improper. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 884-85 (1997) ("This Court 'will not rewrite a . . . law to conform it to constitutional requirements.'") (quoting Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 397 (1988)). Similarly here, a judicially imposed requirement of underenforcement would amount to severing the statute as fully enforced from the statute as underenforced. Unless the text of the statute itself suggests that the legislature intended such a distinction, a court usurps the legislature's role by creating one.

327. *See supra* notes 87-91 and accompanying text.

The objection here, though, is that private enforcement will yield not just more litigation, but an intolerable amount of meritless litigation. And it is the risk of such litigation, the objection runs, that establishes a statute's facial unconstitutionality. To be clear, we are *not* here talking about litigation that could arguably fall within the substantive scope of the underlying statute. As noted above,[328] that litigation is included in the overbreadth calculus and thus affects the statute's facial validity regardless of whether it is publicly or privately initiated. Instead, the argument that private enforcement will yield multiple mal-enforcement beyond what is captured by overbreadth analysis necessarily focuses on actions that invoke the underlying statute where it clearly does not apply. These actions can be divided into two groups. First, there are actions that, even on their own terms, fall outside the scope of the statute. Second, there are actions that allege what would be a violation of the statute if proved, but that turn out to be wrong in their factual assertions. These two kinds of suits bear separate consideration.

The first kind of actions are those that simply fail to allege a violation of the relevant statute. Think, for example, of a suit that invokes a false advertising statute but does not actually allege that the defendant engaged in false or misleading advertising. Such a suit is not only meritless, but frivolous.[329] It should be summarily dismissed. As I have already explained,[330] suits of this sort are properly excluded from overbreadth analysis; a statute is not deemed overbroad simply because a plaintiff attempts to invoke it where it plainly does not apply. The same should be true when considering multiple mal-enforcement beyond the confines of overbreadth doctrine. To say that a lawsuit is frivolous is precisely to say that its claims have no arguable basis in law. And if the suit is not even arguably based in a particular law, why should it expose the law to facial invalidation?[331] Instead,

328. *See supra* notes 270-272, 281-282 and accompanying text.

329. *Cf.* Neitzke v. Williams, 490 U.S. 319, 325 (1989) (defining "frivolous" for purposes of 28 U.S.C. § 1915(d) as "lack[ing] an arguable basis either in law or in fact" and as "embrac[ing] . . . the inarguable legal conclusion . . . [and] the fanciful factual allegation").

330. *See supra* note 280 and accompanying text.

331. Moreover, it is useful to recall the precise remedies that the First Amendment argument against private attorneys general would provide in this context. As the Solicitor General pitched the argument in *Nike*, it would require private plaintiffs to allege individualized injury in order to enforce speech-related regulations. As further elaborated above, the argument would also authorize private plaintiffs to obtain only those remedies necessary to redress their individualized injuries. Neither of these limitations is likely to have much impact on frivolous litigation. If the problem is that private litigants are abusing their litigating authority by filing frivolous lawsuits, why should we assume that those same litigants will adhere to standing or remedial limits? If a plaintiff is prepared to file a frivolous lawsuit in the hope that merely filing it will advance her ideological agenda or extract a nuisance-value settlement, why would she not be prepared to file a suit advancing a frivolous theory of injury, or seeking broad injunctive or other costly relief even though it is not

courts and legislatures have a variety of ways to address frivolous litigation without invalidating enforcement regimes in toto. Courts, for example, may impose sanctions for the filing of frivolous actions.[332] Legislatures may enact fee-shifting provisions requiring plaintiffs who file frivolous suits to pay the defendant's attorney's fees and costs. In short, frivolous litigation is better treated with plaintiff-specific sanctions, not facial invalidation of the statute's enforcement mechanism.[333]

The second, more vexing, kind of actions are those that properly allege a violation of the underlying statute, but that turn out to be premised on a factual error. Think, for example, of a private suit brought under a law like the California unfair competition statute, alleging that a company like Nike engaged in false or misleading advertising by claiming that the average hourly wage for its factory workers is higher than that of its major competitors. If those allegations are accurate, Nike did indeed violate the statute. Suppose,

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authorized by the statute? The answer, of course, is that we cannot exclude the possibility of frivolous litigation under any legal regime.

332. *See, e.g.*, FED. R. CIV. P. 11.

333. The Supreme Court adopted this approach recently in *Cheney v. United States District Court*, 124 S. Ct. 2576 (2004). The case involved a civil suit by two public interest organizations, alleging that the Vice President's energy task force had failed to comply with the Federal Advisory Committee Act's open meeting and public-disclosure requirements. *Id.* at 2583. As the case came to the Supreme Court, the principal issue was whether the Vice President was entitled to mandamus relief to vacate certain discovery orders entered by the trial court, even though the President had not yet asserted executive privilege against the orders. *Id.* at 2582. In holding that the President did not necessarily need to assert executive privilege in order for the Vice President to gain mandamus relief, the Court stressed the potentially harassing nature of civil discovery. More specifically, the Court drew a clear distinction between subpoenas directed at the President as part of a criminal prosecution, and discovery orders addressed to high-ranking members of the executive branch as part of a privately initiated civil suit. Whereas the decision to bring a criminal prosecution "is made by a publicly accountable prosecutor" who faces "budgetary considerations and . . . ethical obligation[s]" that help to "filter out insubstantial legal claims," private litigants often assert "meritless claims against the Executive Branch." *Id.* at 2590. This was the precise point the Solicitor General made in *Nike* when he argued that private attorneys general would tend to abuse their litigating power, but that public officials can be expected to exercise appropriate discretion when discharging their enforcement authority. The critical point, however, lies in what consequences the *Cheney* Court assigned to the differences it perceived between publicly and privately initiated litigation. The Court did not invalidate all private enforcement of the Federal Advisory Committee Act, nor did it hold that the kind of discovery sought in that case is necessarily invalid. Instead, it simply directed the lower courts to consider the Vice President's arguments against the discovery orders, without first requiring him to assert executive privilege. *Id.* at 2593. That is, the Court held that in resolving discovery disputes of this kind, courts should maintain a case-specific sensitivity to the burdens imposed on the executive branch. To the extent the discovery process is subject to abuse, the Court's answer was not to impose categorical limits on private enforcement, but to ensure that courts balance the relevant concerns on a case-by-case basis. Although *Cheney* did not involve the First Amendment, its general approach supports the position I have advanced here — that litigation abuse is generally better addressed by judicial and legislative measures targeting the abusive litigants themselves, not the statute they are abusing.

however, that Nike's statements are actually true and nonmisleading, affording it a complete defense to the suit. But suppose also that establishing the truth of the statements will require considerable factual development. In those circumstances, even though Nike has a winning defense, it likely cannot obtain a summary dismissal of the suit.[334] Instead, it will have to spend the time and resources necessary to litigate the case to summary judgment,[335] or even trial.

Suits of this kind obviously raise speech-chilling concerns relating to litigation exposure, since successfully defending against the suit could be a costly and time-consuming endeavor. They also raise liability worries, in that litigating a case to summary judgment or a jury verdict arguably increases the risk that the case may be resolved incorrectly. Thus, even a defendant with what should be a winning defense would face a heightened risk of liability. For these reasons, if a particular private attorney general provision were to yield a lot of lawsuits like this, the twin threats of litigation and liability could well chill substantial amounts of speech.

The question, then, is whether the risk of this kind of mal-enforcement should be enough to invalidate a statute's entire private enforcement regime. The best answer, I think, is no. The reason is that courts lack any stable method for determining whether a particular private attorney general provision will yield an intolerable amount of mal-enforcement. Just as a private enforcement regime will predictably yield more lawsuits falling within the literal terms of the underlying statute,[336] it will also probably yield more mal-enforcement of the sort just described, where the defendant must incur substantial expense in order to defeat a lawsuit premised on factual error. But more mal-enforcement does not necessarily mean an unconstitutional amount.

Borrowing from overbreadth doctrine, a court might say that multiple mal-enforcement reaches an unconstitutional level when it presents a "substantial" speech-chilling risk.[337] But how would the court measure substantiality?

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334. Suits of this kind are properly excluded from the overbreadth calculus. As I have explained, overbreadth analysis considers the full sweep of a statute's terms, and also takes account of any ambiguity in the statute's outer edges by including cases that arguably fall within the statute's reach. *See supra* notes 270-272, 281-282, 287-290 and accompanying text. The defendant's conduct in the kind of case under discussion here, however, is not even arguably covered by the statute. The plaintiff's allegations make it *seem* like the defendant has violated the statute, but those allegations are factually incorrect. In other words, the key feature of this kind of case is that, once the facts of the case are properly established, it is clear that the defendant's conduct falls entirely outside the statute.

335. For the rules governing summary judgment in federal court, see FED. R. CIV. P. 56.

336. *See supra* note 327 and accompanying text.

337. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

Overbreadth analysis solves this problem by hewing to the substance of the speech regulation. That is, courts ask whether the statute prohibits a "'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'"[338] The analysis thus trains on the text of the statute, and compares the amount of protected speech covered by the statute to the amount of proscribable speech so covered. Determining whether a particular statute is substantially overbroad on these terms still involves some degree of speculation, but at least the analysis is anchored in the text of the statute.

A claim of multiple mal-enforcement, in contrast, is necessarily unmoored from the text. By definition, it focuses on litigation targeting speech that is not, in fact, subject to the statute's prohibitions. Accordingly, the text of the speech regulation itself is of no use. Indeed, there is *nothing* to guide the analysis, save the prediction that private attorneys general will engage in more mal-enforcement than their public counterparts. But unless a court assumes that the level of mal-enforcement produced by public enforcement will be right at the constitutional maximum — and I see no reason to make that assumption — the fact that private enforcement will predictably yield more mal-enforcement does not necessarily make it unconstitutional. If, as Frederick Schauer has suggested, any analysis of chilling effects must seek "some way of determining under what circumstances the inevitable chilling effect becomes great enough to require judicial invalidation of legislative enactments,"[339] the problem with the multiple mal-enforcement argument is that it affords no reliable means of making that determination. In short, the mere prediction that private attorneys general will produce more mal-enforcement should not be enough to invalidate an entire private enforcement regime.

This does not mean, however, that courts should never take account of multiple mal-enforcement. To the contrary, if the *prediction* of multiple mal-enforcement were replaced by *evidence* of the extent of the problem in a particular context, a court might then provide a remedy. Suppose a defendant establishes that the actual pattern of litigation under a particular statute — whether by private or public enforcement — has included an intolerable amount of mal-enforcement, chilling a substantial amount of protected speech. To support its claim, the defendant submits specific evidence regarding the historical pattern of mal-enforcement, its effect on protected expression, and the inadequacy of plaintiff-specific remedies to deal with the problem. In that circumstance, the court might conceivably

338. Virginia v. Hicks, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick*, 413 U.S. at 615).

339. Schauer, *supra* note 260, at 701.

strike down the enforcement provision on the ground that it has been shown to have an unconstitutional chilling effect that cannot be cured by other means. The critical point here, however, is that courts should not *assume* that private enforcement will necessarily yield unconstitutional levels of mal-enforcement. Instead, courts should require a powerful, context-specific factual record before striking down either a private or a public enforcement regime on grounds of multiple mal-enforcement.

* * *

I have argued in this Part that the proposed First Amendment distinction between public and private enforcement is inconsistent with both free speech doctrine and the values underlying that doctrine. The core of my argument is easily summarized. First, determining whether a speech-regulating law is overbroad involves examining the full sweep of the law, including cases in which ambiguities in the law make its applicability uncertain. Whether those empowered to sue under the law will actually enforce it to that literal maximum is irrelevant to the overbreadth calculus. Thus, a law's overbreadth is not affected by assurances that a particular plaintiff — whether public or private — will exercise restraint when enforcing it. An overbroad law, in short, cannot be saved by underenforcement. Second, and conversely, a statute does not become overbroad or otherwise facially invalid merely because particular plaintiffs might invoke it where it does not apply. Even if we can reliably predict that a private enforcement regime will yield more mal-enforcement than a public one, that bare prediction is not enough to hold the entire regime facially unconstitutional.

V. CODA: THE SUPREME COURT AND PRIVATE ATTORNEYS GENERAL

I hope to have established in the preceding Part that the First Amendment does not support a categorical distinction between public and private enforcement of speech regulations. Indeed, to the extent the distinction is premised on trusting the government to exercise restraint in its enforcement decisions, it is fundamentally at odds with core First Amendment principles. There is, however, reason to fear that the distinction may ultimately appear attractive to the current Supreme Court. This final Part develops that concern by returning to a point suggested earlier: that there are parallels between the First Amendment argument and the Supreme Court's other doctrinal moves against private attorneys general. Those parallels suggest that a Court already apparently inclined against the private attorney general

might seize upon the First Amendment argument to further that project at the state level.[340]

As discussed in Part II, there is a common theme in the Supreme Court's decisions on state sovereign immunity, attorney's fees, and standing. In each area, the Court has made it more difficult for Congress to rely upon private actors to enforce federal law. Whether by limiting the kinds of federal laws that are enforceable against the states in private damages actions, by imposing new restrictions on plaintiffs' entitlement to attorney's fees, or by conditioning plaintiffs' standing on their ability to show individualized "injury in fact," the Court has erected a number of barriers to privately initiated public law litigation in the federal courts. At the same time, however, it has imposed relatively few limitations on publicly initiated litigation in the federal courts. The result, in effect, is a two-track enforcement regime, with public enforcement enjoying the Court's favor.[341]

Though limited only to areas involving speech, the First Amendment argument against private attorneys general would achieve parallel results not only in federal court, but in state court as well. Like the Court's decisions on sovereign immunity, attorney's fees, and standing, the First Amendment argument depicts private attorneys general as problematic because of their financial or ideological motivations.[342] Simultaneously, the argument asserts that it "is by no means inappropriate for governmental agencies charged with enforcing the law" to be able to seek broad injunctive and other equitable relief against those who violate the underlying substantive law.[343] Unlike private enforcement, which on this view is properly confined to redressing discrete injuries, public enforcement discharges the government's responsibility to advance the broad regulatory aims in the underlying law.[344] Moreover, close judicial supervision of public enforcement is unnecessary; government actors "can be expected to

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340. In addition to the points raised in this Part, a First Amendment argument against private attorneys general may appear attractive to the Court because, as Frederick Schauer has observed, the First Amendment itself has a kind of "political, cultural, and economic . . . magnetism":

> [T]he First Amendment, freedom of speech, and freedom of the press provide considerable rhetorical power and argumentative authority. The individual or group on the side of free speech often seems to believe, and often correctly, that it has secured the upper hand in public debate. The First Amendment not only attracts attention, but also strikes fear in the hearts of many who do not want to be seen as opposing the freedoms it enshrines.

Schauer, *supra* note 27, at 1789-90 (footnotes omitted).

341. *See* Karlan, *supra* note 57, at 208-09.

342. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 23, *Nike* (characterizing the California unfair competition statute as enabling "vexatious and abusive litigation").

343. *Id.* at 24-25.

344. *Id.* at 17.

exercise appropriate discretion" when exercising their enforcement power.[345] The First Amendment argument, in short, provides the Court with an opportunity to export to the state courts its project of privileging public over private enforcement.

One might object that it does the Court a disservice to assume it would impose its policy preferences not just on the federal courts — over which, after all, it wields supervisory authority[346] — but on the separately sovereign states as well. To that objection one can respond that there are already hints of this approach in other areas. Consider, for example, the disparity between the Court's Eighth Amendment jurisprudence on the proportionality of criminal punishment and its emerging due process doctrine governing punitive damages in civil litigation.[347] Although the Court has construed the Eighth Amendment to impose a proportionality constraint on the duration of prison sentences,[348] the constraint has become exceedingly modest.[349] In *Ewing v. California*,[350] for example, the Court sustained California's "three strikes" law against an Eighth Amendment challenge. In so doing, it upheld a twenty-five-years-to-life sentence for a defendant convicted of stealing three golf clubs, where he had previously been convicted of several other serious felonies. In a companion case called *Lockyer v. Andrade*,[351] the Court found no reversible error in imposing a life sentence on a defendant found guilty of stealing $150 worth of videotapes, where, again, he had committed a number of more serious

345. *Id.* at 25.

346. *See, e.g.*, McNabb v. United States, 318 U.S. 332 (1943); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963). The precise scope of the supervisory power is far from clear. "By this point in our history, however, most observers (and certainly the Supreme Court and lower federal courts) accept the existence of *some* supervisory authority in the federal courts. The question is simply how far it extends." Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1311 (2003) (footnotes omitted). I do not mean to suggest that the supervisory power necessarily allows the Court to impose its own policy preferences on public law litigation in the federal courts. Rather, I simply note the possibility that the existence of the supervisory power might lead some to see such an imposition as somewhat less egregious at the federal level than at the state level.

347. *See generally The Supreme Court, 2002 Term — Leading Cases*, 117 HARV. L. REV. 255 (2003) (contrasting the Court's Eighth Amendment and punitive damages decisions).

348. *See* Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring); Solem v. Helm, 463 U.S. 277 (1983); Rummel v. Estelle, 445 U.S. 263 (1980).

349. *See* Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1263-64 (2000) (noting that "while proportionality review of excessive criminal punishments survives, successful challenges are nearly impossible").

350. 538 U.S. 11 (2003).

351. 538 U.S. 63 (2003).

criminal offenses in the past.[352] In contrast, the Court during the same Term adopted a much more robust proportionality constraint on punitive damages in civil litigation. In *State Farm Mutual Automobile Insurance Co. v. Campbell*,[353] the Court instructed that the Due Process Clause is likely violated whenever the ratio of punitive to compensatory damages "significant[ly]" exceeds a "single-digit ratio."[354] The Court went on to state that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[355]

The contrast between the two doctrines is stark. For example, it appears that had the defendant in *Lockyer* first been sued for conversion, he would have had a due process right not to be exposed to more than $1,500 in punitive damages. When prosecuted for the theft, however, he could be sentenced to life.[356] This disparity may be accounted for in a number of ways. Pamela Karlan has suggested that it may be explained in part on the basis of differences in the level of appellate oversight and political accountability between states' criminal and civil court systems.[357] Another, perhaps more obvious, distinction is that criminal prosecutions are brought by the government, while the vast majority of civil tort actions are brought by private plaintiffs. Thus, even if Karlan's thesis helps explain the Court's divergent approaches in these two fields, one might also see in the divergence a tendency to privilege the enforcement decisions of public officials over those of private individuals. One might, in other words, see the Court's Eighth Amendment and punitive damages decisions as consistent with its decisions on federal standing, state sovereign immunity, and attorney's fees. And in that light, one might

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352. Unlike *Ewing*, which came to the Court at the direct appeal stage, *Andrade* came on federal habeas corpus review. Because the federal habeas statute requires federal courts to defer considerably to the state court decision at issue, the denial of federal habeas relief is not the same as the denial of relief on direct appeal.

353. 538 U.S. 408 (2003).

354. *Id.* at 425. *State Farm* built on the Court's earlier decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

355. *State Farm*, 538 U.S. at 425.

356. This assumes that the criminal sentence in *Andrade* is indeed consistent with the Eighth Amendment. As noted above, *see supra* note 352, the posture of *Andrade* left that question at least somewhat open. It is possible that the sentence is inconsistent with the best understanding of the Eighth Amendment, but not inconsistent enough to warrant federal habeas relief. *See* 28 U.S.C. § 2254(d)(1) (2000) (providing that a federal habeas petition challenging a state criminal conviction or sentence shall not be granted unless the underlying state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

357. *See* Pamela S. Karlan, *Pricking the Lines: The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880 (2004).

well suspect that the Court may be inclined to adopt the First Amendment argument against private attorneys general in order to advance the same underlying project.

Admittedly, there is a certain artificiality in describing the Court as a monolithic entity across these cases. The Court consists of nine individuals, and members of the majority in one case may dissent in another. Such was the case in *Ewing*, *Andrade*, and *State Farm*. Two Justices on the majority side of the 5-4 decisions in *Ewing* and *Andrade* (Justices Scalia and Thomas) dissented in *State Farm*, while three members of the 6-3 majority in *State Farm* (Justices Stevens, Souter, and Breyer) dissented in *Ewing* and *Andrade*.[358] Thus, to the extent one can attribute any common purpose to the *Andrade*, *Ewing*, and *State Farm* decisions, the attribution is most justified when confined to the three Justices who were in the majority in all three cases: Chief Justice Rehnquist and Justices O'Connor and Kennedy.[359] My suggestion here is that those three Justices (in addition to Justice Breyer, who has already expressed agreement with the Solicitor General's argument in *Nike*) may be among those especially inclined to embrace a First Amendment rule preferring public over private attorneys general.

It is also useful to distinguish between two rather different reasons why a member of the Court might support a rule favoring public over private enforcement. First, a Justice might support robust enforcement of the underlying law, but believe that such enforcement should be done by the government. That is, a Justice might prefer strong public enforcement. The problem with this position is that even if the legislature and executive also favor strong public enforcement, it is not always feasible. In the resource-constrained environment in which they so frequently operate, state legislatures are often required to discount the importance of certain regulatory goals against the cost of implementing them. Public enforcement is expensive. If states are required to rely on such a resource-intensive form of regulation, some enforcement discounting is inevitable. Put simply, states will not always be able to afford robust public enforcement.

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358. *See State Farm*, 538 U.S. at 411 (noting that Justice Kennedy delivered the opinion of the Court, in which the Chief Justice and Justices Stevens, O'Connor, Souter, and Breyer joined, and that Justices Scalia, Thomas, and Ginsburg each filed dissenting opinions); *Andrade*, 538 U.S. at 65 (noting that Justice O'Connor delivered the opinion of the Court, in which the Chief Justice and Justices Scalia, Kennedy, and Thomas joined, and that Justice Souter filed a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined); *Ewing*, 538 U.S. at 13 (noting that Justice O'Connor announced the judgment of the Court and delivered an opinion in which the Chief Justice and Justice Kennedy joined, that Justices Scalia and Thomas each filed opinions concurring in the judgment, that Justice Stevens filed a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined, and that Justice Breyer filed a dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined).

359. *See id.*

The second reason why a Justice might support a rule privileging public enforcement is precisely because it will yield less enforcement. That is, a Justice opposed to robust enforcement of the underlying law may perceive a rule against private attorneys general as, in effect, an instrument of deregulation. This can happen in either or both of two ways. First, as just described, the sheer cost of government enforcement means that an exclusively public enforcement regime will likely be less effective than a regime with private attorneys general. Second, in some instances the executive branch may be less enthusiastic about the underlying law than the legislature that passed it. A judicially declared rule privileging public over private enforcement puts enforcement discretion primarily in executive hands, and an executive branch that does not share the legislature's regulatory goals may simply refrain from enforcing the law as robustly as the legislature would prefer. In these ways, a judicial preference for public over private enforcement may further a fundamentally anti-regulatory agenda.[360]

Ultimately, whatever the basis for a Justice's preference for public over private enforcement, the problem is that constitutionalizing the preference would read state legislatures out of the analysis. Instead of deferring to legislative decisions about whether to employ private actors in the enforcement of public norms, the First Amendment argument embraces a categorical, judicially imposed rule nullifying such decisions.[361] Yet in the absence of a genuine constitutional reason to treat public and private enforcement differently — and, as I argued in Part IV, the First Amendment provides no such reason — the Court's own suspicions about the reliability, efficacy, and importance of private attorneys general should not displace a state legislature's faith in them. This point sounds in both practical considerations of institutional competence and the more formal doctrinal values of federalism: legislatures are generally better situated than courts to balance the costs and benefits of a given method of law enforcement, and the Supreme Court cannot possibly justify substituting its own policy preferences on such matters for those of a state legislature. In short, the fate of state private attorneys general should rest with the states.

360. *See supra* notes 138-139, 175-176 and accompanying text.

361. *Cf.* Karlan, *supra* note 57, at 194 (arguing that the Court's privileging of public over private enforcement in its state sovereign immunity decisions "defies the central idea behind the private attorney general — that Congress might decide that decentralized enforcement better vindicates civil rights policies 'that Congress considered of the highest priority'").

CONCLUSION

As the lines between the public and private domains continue to blur, hard questions arise about the legal limits and policy ramifications of relying upon private actors to advance public interests. Even when a particular practice is deeply rooted in our legal traditions — such as legislative reliance on private plaintiffs to enforce public-regarding norms — new dilemmas may surface. Policymakers in particular must balance the benefits of such arrangements against their tangible costs. But skepticism about the policy wisdom of an institution like the private attorney general should not lead courts to create novel constitutional prohibitions on their use. In particular, the suggestion that the First Amendment categorically prohibits certain speech restrictions when privately enforced, but permits them when enforced by the government, has no support in First Amendment doctrine. Speech regulations may comport with the First Amendment; they may violate it. But a statute's facial status under the First Amendment should not change with the identity of the party the legislature picks to enforce it.