
ARTICLE

PRIVATE ENFORCEMENT IN THE STATES

DIEGO A. ZAMBRANO,[†] NEEL GUHA,^{††} AUSTIN PETERS^{†††} & JEFFREY XIA^{††††}

Scholarship on U.S. litigation and civil procedure has scarcely studied the role of private enforcement in the states. Over the past two decades, scholars have established that, almost uniquely in the world, the U.S. often relies on private parties rather than administrative agencies to enforce important statutory provisions. Take your pick of any area in American governance, and you will find private rights of action: environmental law, civil rights, employment discrimination, antitrust, consumer protection, business competition, securities fraud, and so on. In each of these areas, Congress has deliberately empowered private plaintiffs instead of, or in addition to, government agencies. Yet, despite the vast importance of private enforcement at the federal level, we have no account of how prevalent private rights of action are in state law. And this question is particularly pressing now that a number of states—triggered by the Texas abortion law S.B. 8—are using private enforcement to weaken constitutional rights. Is private enforcement a meaningful method of governance in the states or just at the federal level? Which political conditions lead to the adoption of state private enforcement? And why does it exist?

In this Article, we conduct the first systematic empirical investigation of the hidden world of state private enforcement. Using computational linguistics and machine learning, we identify private-enforcement provisions across a unique dataset

[†] Associate Professor, Stanford Law School. For thoughtful comments or conversations, we thank Jessica Bulman-Pozen, Stephen B. Burbank, Maureen Carroll, John Donohue, David Freeman Engstrom, Nora Freeman Engstrom, Brian Fitzpatrick, Michael Francus, Jacob Goldin, Eric Helland, Colleen Honigsberg, William Hubbard, Amalia Kessler, Mark Lemley, Luke Norris, Julian Nyarko, Shirin Sinnar, and Norm Spaulding. We also thank Sergio Valente and Mariah Mastrodimos for their invaluable research assistance.

^{††} Ph.D. Candidate in Computer Science, J.D. Class of 2024, Stanford University.

^{†††} Ph.D. Political Science, J.D. Class of 2023, Stanford University.

^{††††} J.D. Class of 2023, Stanford University.

of all fifty states' laws going back to 2003. Our results show that private enforcement is ubiquitous at the state level. Even by conservative estimates, there are more than 3,500 private-rights-of-action provisions in state law, ranging from traditional areas like antitrust and employment all the way to privacy violations, lawsuits against police, gravedigging, veterinary care, and waste disposal. Counterintuitively, private-enforcement provisions are expanding the most in an ideologically mixed group of small states like Utah, New Hampshire, Connecticut, Nebraska, and Wisconsin. One takeaway from these results is that state private enforcement is strikingly different from that of the federal system—it is sprawling, messy, and even chaotic.

We also use our data to test conventional theories behind private-enforcement adoption. The most prominent one—the separation-of-powers theory—posits that Congress enacts private rights of action when the executive is controlled by another political party. Our empirical bottom line is that we broadly fail to find evidence in favor of any of the theories, including separation of powers. Regression analyses based on our best estimates of private-enforcement provisions do not yield a statistically meaningful relationship between divided government and private-enforcement adoption. And, while some of our measures for fee-shifting and damage clauses unearth some evidence pointing toward the separations-of-powers theory, our preferred measures of such clauses do not. We even find no correlation between an increased adoption of private enforcement and legislative control by either Democrats or Republicans. It appears the political economy of private enforcement in the states diverges radically from that of the federal government. With an eye toward future theorizing and empirical testing, we put forth three institutional differences between the states and federal government that may explain this divergence. And we sketch a future comparative research agenda focused on studying federal–state divergence. Reaffirming the central role that private enforcement plays in our system reveals the need to reorient civil procedure and incorporate state private rights of action more explicitly into its core teachings.

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INTRODUCTION

If you have a problem with a drug dealer, a Utah statute gives you the power to sue the dealer in civil court “for injury resulting from an individual’s use of an illegal drug.”¹ If someone damages your family member’s grave, a South Carolina statute lets you file a claim in civil court.² In New Jersey, you can sue a pet dealer for offering you a lease agreement that transfers “ownership of a cat or dog at the end of the lease term.”³ And New Mexico gives anyone the power to sue an unlicensed veterinarian to enjoin them “from engaging in the practice of veterinary medicine”⁴ or a shop that sells cigarettes labeled “for export only.”⁵ In all of these cases, a state legislature

1 UTAH CODE ANN. § 58-37e-3 (West 2021).

2 S.C. CODE ANN. § 27-43-310(E)(1) (2021).

3 N.J. STAT. ANN. § 56:8-211 (West 2021).

4 N.M. STAT. ANN. § 61-14-19 (West 2021)

5 N.M. STAT. ANN. §§ 57-2A-3, -10 (West 2021).

created a private right of action for conduct typically regulated by the government, be it drug dealing, grave maintenance, pet leasing, unlicensed veterinary care, or cigarette distribution. And these examples only scratch the surface of such private rights of action.

Scholarship on civil litigation has established that America's system of private enforcement is without parallel in the world.⁶ Unlike other countries, the United States often relies on private parties rather than public agencies to enforce statutes.⁷ Even in the most important areas of American social life, take your pick and you will find private rights of action (usually alongside public enforcement): environmental law, employment discrimination, antitrust, consumer protection, business competition, securities fraud, and so on.⁸ In all of these areas, Congress decided to empower private plaintiffs instead of, or in addition to, government agencies. So, private parties, in addition to the EPA, SEC, or FTC take on the bulk of environmental, securities, and antitrust enforcement. Nowhere else takes this approach.⁹ This form of private-enforcement exceptionalism explains why scholars of civil procedure and litigation have insisted on the importance of access to courts, class actions, and other procedures as central to American governance.¹⁰

6 See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 6-9 (2001) (discussing the “unique legal ‘style’” of the United States, as revealed by multiple comparative studies).

7 See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 57 (2010) (“Scholars have long recognized that private litigation plays an unusually pervasive and important role in the implementation of public policy in the United States as compared to industrial democratic countries with predominantly parliamentary systems.”); KAGAN, *supra* note 6, at 7-9 (“The United States has by far the world’s largest cadre of special ‘cause lawyers’ seeking to influence public policy and institutional practices by means of innovative litigation.”). For further background and history of the U.S. model, see generally STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS & RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017) (detailing the history of private enforcement of federal law); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 *YALE L.J.* 616 (2013) (describing challenges of having both private and public enforcement systems and analyzing the potential use of administrative agencies as private enforcement gatekeepers); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 *VAND. L. REV.* 285 (2016) (defending the scheme of “redundant” enforcement in which public and private actors’ enforcement authority overlaps); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 *MICH. L. REV.* 589, 597-607 (2005) (outlining “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”).

8 See *infra* Part I.

9 See, e.g., J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 *WM. & MARY L. REV.* 1137, 1148-51 (2012) (using employment and labor law to describe the contrast between American private enforcement and a “European-style regulatory state”).

10 See, e.g., Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 *LEWIS & CLARK L. REV.* 637, 671-79 (2013) (discussing how “formal access” and “direct economic incentives” are some of the most important aspects of private enforcement regimes). See generally

And yet, despite the centrality of private enforcement, nearly all scholarship on the topic focuses solely on federal private rights of action.¹¹ While an admirable literature has mapped every detail of federal private enforcement, scholars have not systematically examined the presence of private enforcement in the states, observed trends in the adoption of private enforcement at the state level, or outlined whether the states' reliance on private claims mirrors federal trends in their underlying structure. We have no account of private enforcement in the states, its scope, history, or present status. This Article fills that gap.

While a study of private enforcement in the states would be valuable at any point in time, state private rights of action are one of the most important issues in the country today. The widely discussed Texas abortion law, originally titled S.B. 8, has triggered a scholarly and legal debate over state attacks on federal constitutional rights. Critics argue that Texas indirectly nullified an already-established constitutional right to abortion and deputized private vigilantes to deprive citizens of their rights as well as that the Supreme Court surrendered traditional tools to review state legislation.¹² Indeed, S.B. 8's private-enforcement regime was something of a "procedural Frankenstein" that violated due-process norms.¹³ The centerpiece of the law was its reliance on civil lawsuits by private citizens against anyone who performs, aids, or abets an abortion in violation of the six-week ban.¹⁴ Private individuals can even bring suit without alleging any injury whatsoever.¹⁵ While this may seem extreme, Jon Michaels and David Noll have documented

ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017) (arguing that litigation is a crucial part of American democracy).

¹¹ See, e.g., Burbank et al., *supra* note 10, at 641 (recognizing the authors "concentrate on federal law" even though "state law plays the dominant role in one of the two sectors [they] have chosen to study"); FARHANG, *supra* note 7 (discussing historical, political, and empirical evidence relating to patterns of private enforcement regimes at the federal level in the U.S., but not at the state level); cf. Morrison, *supra* note 7 (discussing legal challenges to the use of private attorney generals at both the federal and state levels, but only in the context of First Amendment challenges).

¹² See, e.g., Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1193 (2023) ("Because the federal courts had always enjoined state enforcement—and seemingly only state enforcement—of abortion bans, Texas gambled on private enforcement, hoping to exploit a loophole in justiciability doctrine. . . . When a challenge arrived at the Supreme Court, the Justices looked the other way."); Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1498-1502 (2022) (describing how S.B. 8 deviates from traditional private enforcement laws).

¹³ Diego A. Zambrano, *Maneuvering Around the Court: Stanford's Civil Procedure Expert Diego Zambrano on the Texas Abortion Law*, STAN. L. SCH.: LEGAL AGGREGATE (Sept. 28, 2021), <https://law.stanford.edu/2021/09/08/maneuvering-around-the-court-stanfords-civil-procedure-expert-diego-zambrano-on-the-texas-abortion-law/?sf150825496=1&fbclid=IwAR3nVLAKt1MRbSR8TDyUCyidy76ncKDKS1Izc26aeK77CgXbh7WbUxg2Kuo> [https://perma.cc/277F-QZW3].

¹⁴ See TEX. HEALTH & SAFETY CODE ANN. §§ 171.207(a), 171.208 (West 2021).

¹⁵ *Id.*

that S.B. 8 is just the beginning: over a dozen states have proposed or adopted similar laws “to use private rights of action to penalize and suppress highly personal and often constitutionally protected activities—not only abortions but also LGBTQ rights and even the rights of teachers and students to discuss race”¹⁶

Yet, focusing on private enforcement’s current iterations in political debates risks overshadowing its long history and roots in the states’ legal traditions. As one of us previously noted, “[f]or several decades, private enforcement has been popular in state legislatures, courts, and administrative agencies.”¹⁷ For example, nearly every state has a private right of action for antitrust claims, wages and hours, and a wealth of environmental violations.¹⁸ Take, for instance, the New Jersey Environmental Rights Act (NJERA). Enacted in 1974, the NJERA provides that “[a]ny person” may sue to enforce an existing environmental statute, ordinance, or regulation.¹⁹ The NJERA sets forth a hybrid enforcement regime: private-enforcement actions may not be commenced unless the person seeking to sue has provided thirty days’ notice to the Attorney General, the Department of Environmental Protection, the local governing body, and the intended defendant.²⁰ The bill’s sponsor declared that the statute “will enable citizens to have ready access to the courts to resolve environmental disputes.”²¹ Further, the sponsor noted that several other states had adopted statutes that allowed private enforcement of environmental laws with “favorable” results.²² Indeed, the New Jersey State Bar Association in a committee report concluded that the statute would “effectively grant to interested citizens the right to sue polluters without having to prove special injury to the plaintiffs.”²³ Taking environmental laws into account shows that the story of private enforcement is deeper and more searching than its current appearance in conservative states today.

This Article corrects the exclusively federal understanding of private enforcement by looking at the states. We conduct the first systematic

16 Michaels & Noll, *supra* note 12, at 1190-91; *see also id.* at 1200, 1204 (counting recent laws).

17 *See, e.g.*, Diego A. Zambrano, *The States’ Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1838 (2018).

18 *See, e.g.*, CONN. GEN. STAT. ANN. § 42-1100(b) (West 2021) (unfair trade practices); *see also infra* Part II.

19 N.J. STAT. ANN. § 2A:35A-4(a) (West 2021).

20 *Id.* § 2A:35A-11.

21 Gen. Assemb. 1245, 196th Leg., 1st Sess. (N.J. 1974), <https://repo.njstatelib.org/bitstream/handle/10929.1/5886/L1974c169.pdf?sequence=1&isAllowed=y> [<https://perma.cc/Q6C5-564A>].

22 *Id.*

23 N.J. STATE BAR ASS’N, REPORT ON ASSEMBLY BILL NO. 1245 3 (1974), <https://dspace.njstatelib.org/bitstream/handle/10929/54516/1974%20complete.pdf?sequence=1&isAllowed=y> [<https://perma.cc/Q6C5-564A>].

empirical investigation of the hidden world of state private enforcement. Using computational linguistics and machine learning, we identify private-enforcement provisions across a unique dataset of all fifty states' laws going back to the year 2003. In the past, two key obstacles have hindered the systematic study of private enforcement in the states. First, there was no comprehensive data on state statutory codes, making systematic inquiry difficult, if not impossible. And second, even if the data was available, limitations on data processing and modeling made it difficult to translate such large volumes of text into insightful measures capturing private rights of action. In this study, we overcome both challenges. Through a partnership with Fastcase, a legal research and technology company, we gained access to a pre-processed database of all state statutory codes from 2003 to 2021. Then, using recent advancements in computer science and machine learning, we combed through these statutory codes and identified private rights of action.

An essential contribution of this Article is our novel strategy for identifying private rights of action. Through trial and error, we found the results of conventional keyword searching unsatisfactory. For reasons discussed in Part II, we also found conventional supervised learning impractical. To create a more accurate and more practical private-rights-of-action measure, we blended keyword methods with supervised learning. Over several rounds in the space of a year, we (1) trained a model to identify private rights of action, (2) used four law-trained coders to label the model's predictions, and then (3) re-ran the model. The results provide the first comprehensive map of private enforcement in the states, including data on the substantive areas of law where private enforcement predominates and the states that rely most heavily on these statutes. Our results also demonstrate the following:

First, private enforcement is ubiquitous at the state level. Even by our conservative estimates, there are more than 3,500 private-rights-of-action provisions in state law, ranging from traditional areas like antitrust and employment all the way to gravedigging and waste disposal.²⁴ Our analysis then breaks down this top-level number on a state-by-state and year-by-year basis, allowing us to observe trends over time and illuminating the growth of private enforcement. For example, private-enforcement provisions grew the most (as a percentage of existing schemes) in Utah, New Hampshire, Connecticut, Nebraska, and Wisconsin.²⁵ Much of the growth in private enforcement was concentrated in areas affecting businesses, labor, the environment, and technology.²⁶ We also find evidence that private

²⁴ See *infra* Part II.

²⁵ See *infra* Part II.

²⁶ See *infra* Part II.

enforcement in the states is more dynamic than at the federal level.²⁷ For instance, states have added private remedies for harms arising from novel digital technologies, including issues related to privacy,²⁸ recording devices worn by police officers,²⁹ broadband accessibility,³⁰ electronic communications,³¹ and online criminal activity.³² Even where a robust federal private-enforcement regime exists—as is the case for civil rights—state regimes stretch far beyond their federal counterparts, creating unparalleled rights.³³ Uncovering the ubiquity and depth of these laws shines a light on the previously unknown world of state private enforcement.

Second, we use our dataset to test existing theories of private enforcement. Given its prominent place in literature, we focus our attention on the separation-of-powers theory. This theory—famously put forward by Sean Farhang in the civil-procedure classic *The Litigation State*—predicts that private enforcement legislation is the result of a political calculation by legislators.³⁴ Up until Farhang, previous work on private enforcement at the federal level had postulated other explanatory theories: cultural, historical, and political.³⁵ These older works argued that American dependence on private enforcement lies in a culture of litigiousness, individualism, and self-reliance.³⁶ But these aspects of American legal culture have been constant over time;³⁷ as a result, they cannot explain why, prior to the 1960s, American

27 See *infra* Parts III–IV.

28 See, e.g., CAL. GOV'T CODE § 6218(a)(2) (2021) (reproductive patient and provider privacy on the Internet); N.H. REV. STAT. ANN. § 193-E:5(I)(g) (2021) (privacy for students).

29 See, e.g., MINN. STAT. ANN. § 13.825 subdiv. 2(g) (West 2021).

30 See, e.g., TENN. CODE ANN. § 65-25-134(h) (2021).

31 See, e.g., TEX. BUS. & COM. CODE ANN. § 321.104 (West 2021) (e-mail); N.D. CENT. CODE § 51-28-08.1(3) (2021) (caller ID systems), *invalidated by* SpoofCard, LLC v. Burgum, 499 F. Supp. 3d 647 (D.N.D. 2020).

32 See, e.g., ARIZ. REV. STAT. ANN. § 18-543(A)–(B) (2021).

33 See, e.g., 740 ILL. COMP. STAT. 24/5 (2021) (protection against law-enforcement violence); MINN. STAT. ANN. § 144.4196 (West 2021) (protection for employees against health-quarantine discrimination); OKLA. STAT. tit. 21, § 870(A)(2) (2021) (protection against retaliation for reporting human trafficking).

34 See FARHANG, *supra* note 7, at 60 (“[I]deological conflict between Congress and the president is a statistically significant, consistent, and substantively powerful predictor of congressional enactment of incentives to mobilize private litigants.”).

35 Burbank et al., *supra* note 10, at 680 (citing SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 17-18 (1996)) (discussing the view that cultural factors in the U.S. have produced a distinctly litigious culture); KAGAN, *supra* note 6, at 35-40 (discussing the historical development of adversarial legalism and the dramatic increase in litigation since 1960); Michael Dominic Meuti, *Legalistic Individualism: An Alternative Analysis of Kagan's Adversarial Legalism*, 27 HASTINGS INT'L & COMP. L. REV. 319, 327-28 (2004) (positing that rent-seeking lawyers may be politically motivated to drive up litigation numbers).

36 See, e.g., Burbank et al., *supra* note 10, at 680 (citing SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 17-18 (1996)).

37 See Meuti, *supra* note 35, at 342 (arguing that the individualism that gave rise to America's adversarial system “has been a part of the American experience since the colonial days”).

reformers preferred administrative solutions (i.e., public enforcement), especially during the New Deal.³⁸ Similarly, historical explanations rooted in American culture or traditions cannot explain why most important private rights of action at the federal level are of recent vintage: civil rights (1964),³⁹ securities litigation (1960s and 1970s),⁴⁰ expansions to antitrust laws (1970s),⁴¹ and environmental statutes (1970s).⁴²

To help solve the puzzle, Farhang turned to politics and the separation of powers. In *The Litigation State*, Farhang argues that private enforcement is instead rooted in the separation of powers: in periods of legislative–executive conflict, including divided government, Congress prefers to shield enforcement from the President by empowering private plaintiffs rather than bureaucrats controlled by the other party.⁴³ Farhang convincingly supports this theory with both quantitative data on federal private rights of action and qualitative investigations of legislative history. For example, Farhang shows the first major private enforcement scheme—within the Civil Rights Act of 1964—emerged out of Republicans in Congress who refused to empower agencies controlled by the Johnson administration.⁴⁴ And, vice versa, Democrats in Congress supported private enforcement in 1970s, 1980s, and 1990s environmental statutes because they were reluctant to empower the Nixon, Reagan, and Bush administrations.⁴⁵ By relying on private enforcement, the argument goes, Congress seeks to ensure a high level of enforcement actions that are independent of the President’s choices.

Does the separation-of-powers theory explain private-enforcement adoption in the states? Our answer is a preliminary “No.” We specifically test whether states that go through periods of divided government are associated with a growth in private enforcement as compared to other states. The majority of our analyses fail to yield evidence favoring the separation-of-powers theory. Under a few specifications using measures of fee-shifting and damages clauses as the outcome, we detect some minor evidence favoring that theory. But our preferred measure for tracking these clauses yields no evidence suggesting that divided government is associated with greater adoption of such clauses.⁴⁶ Our alternative measures further probing the

38 FARHANG, *supra* note 7, at 69.

39 See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

40 See *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971).

41 See 15 U.S.C. §§ 15, 26.

42 See 42 U.S.C. § 7604.

43 See FARHANG, *supra* note 7, at 76-78 (showing a statistical increase in the enactment of private enforcement regimes when the government is divided).

44 See *id.* at 121-22.

45 See *id.* at 219-20.

46 See *infra* Part III.

separation-of-powers theory bolster this conclusion. As we show, divided government does not predict greater private-enforcement adoption. Neither does greater ideological distance between the governor and legislature. Nor do alternative measures of divided government using the political party of the state attorney general.

We also use our data to test other potential theories.⁴⁷ Again, the results yield no convincing empirical evidence. It does not seem that a greater presence of lawyers in a state predicts more private-enforcement adoption. This casts doubt on arguments that rent-seeking lawyers explain private-enforcement adoption, at least in the states. It also does not appear that states lacking tax revenue are more likely to rely on private enforcement as a cost-saving measure. Finally, we find no evidence supporting previous arguments that Democratic legislatures are more likely to adopt private-enforcement provisions.⁴⁸

Our takeaway from these results is that state private enforcement appears strikingly different from that of the federal system; it is much messier, and even unpredictable. Federal private enforcement relies on landmark legislation like the Civil Rights Act or the Clean Air Act.⁴⁹ Congressional adoption of private enforcement is carefully considered, deliberate, and federal private rights last indefinitely. As far as we can tell, Congress has only abrogated statutory private rights of action in extremely rare instances.⁵⁰

The states look nothing like that. Of course, the most obvious difference is that states rely on private lawsuits in a range of areas that do not have federal analogs. But beyond that, states constantly tinker with the language of existing rights and sometimes add new rights into previous legislative enactments.⁵¹ And unlike the federal system, state private enforcement is sprawling, chaotic, and full of reversals. An area like environmental law—

47 See *infra* Part III for our findings regarding other theories.

48 See *infra* Part III.

49 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Clean Air Act of 1963, 42 U.S.C. § 7401; see Anna Mance, *How Private Enforcement Exacerbates Climate Change*, 44 CARDOZO L. REV. 1493, 1516-17 (2023) (discussing a series of federal statutes that “frame[] the parameters of environmental protection today”).

50 See John M. Golden, *Patent Privateers: Private Enforcement’s Historical Survivors*, 26 HARV. J.L. & TECH. 545, 583 (2013) (discussing congressional abrogation of a *qui tam* private right of action in the patent context).

51 Compare FLA. STAT. § 701.041(6)(a) (2005), with FLA. STAT. § 701.041(6)(a) (2007) (showing the Florida legislature extended the private right of action to include causes of action against “title insurance agent[s]” in addition to “title insurer[s]”); TEX. INS. CODE ANN. § 101.201 (West 2017), with TEX. INS. CODE ANN. § 101.201 (West 2021) (showing the Texas legislature modified the private right of action to cover not just “procurement” but also “processing, administration, claims handling, adjusting, or claims payment” of a covered insurance contract).

concentrated in five major federal statutes⁵²—is dispersed in the states across more than 700 statutes with private rights of action, covering minute areas like minerals and waste disposal.⁵³ Counterintuitively, states like Texas have sprawling state environmental private-enforcement regimes.

To get a sense of the chaotic nature of state private enforcement, consider a Mississippi statute protecting the confidentiality of nonadjudicated driving-under-the-influence violations, which once allowed “[a]ny person whose confidential record” had been disclosed to sue.⁵⁴ In 2012, the Mississippi Court of Appeals decided a case related to eligibility for nonadjudication under the statute, but did not question the validity of the private-enforcement clause.⁵⁵ Shortly thereafter, the Mississippi legislature made substantial amendments to the statute and, surprisingly, completely abrogated the private right of action.⁵⁶ The disappearance of the private right was, as far as we can tell, not covered by the press at the time or since then. There is little record of legislative debates. It thus appears that the case prompted the Mississippi legislature to re-examine the statute and abruptly eliminate private enforcement. This kind of abrogation almost never occurs at the federal level.⁵⁷ We find similar “disappearances” of private enforcement across the states.⁵⁸

Another important difference between state and federal private enforcement is that model codes exert a powerful influence on state legislation, leading to the adoption of private enforcement in a non-partisan manner.⁵⁹ There is no analogous influence on federal statutes—no exogenous source of legislative language that may shape when and how the federal government adopts private-enforcement clauses. Moreover, we observe that model codes often come with private-enforcement clauses. For example, the model Athlete Agents Act—adopted by more than forty states—provides student-athletes with a private right of action against athlete-agents who violate a provision of the act.⁶⁰ The model Securities Act—adopted by more

52 National Environmental Policy Act of 1969, 42 U.S.C. § 4321; Clean Air Act of 1963, 42 U.S.C. § 7401; Clean Water Act of 1972, 33 U.S.C. § 1251; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 USC § 9601; Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901.

53 See Part IV.

54 See MISS. CODE ANN. § 63-11-30(3)(g) (2010).

55 Baker v. State, 99 So. 3d 241 (Miss. Ct. App. 2012) (finding appellant ineligible for nonadjudication under the statute).

56 See generally MISS. CODE ANN. § 63-11-30(3) (2015).

57 See *supra* note 50 and accompanying text.

58 See *infra* Section IV.B.

59 See *infra* Section IV.C.

60 See ATHLETE AGENTS ACT § 16 (UNIF. L. COMM’N 2019); *Athlete Agents Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?communitykey=cef8ae71-2f7b-4404-9af5-309bb70e861e> [https:// perma.cc/QM98-DLAD] (last visited Sept. 23, 2023).

than twenty states—provides numerous private rights empowering shareholders and investors to recover damages for fraud and other violations.⁶¹ There are many other examples, including animal welfare.⁶² This divergence, again, underlies how federal and state private enforcement exist within radically distinct institutional dynamics.

Moving forward, we believe the dynamic world of state private enforcement makes fertile ground for future scholarship. In Part IV, we put forth three institutional differences between the federal government and states that might explain why the states have taken such a different path: the disparities in structure between the state and federal governments and the role of state attorneys general; the quality of state administrative agencies; and partisanship patterns. One theory is that private enforcement may be a better alternative in the states than at the federal level because public enforcement is weaker. In comparison to federal counterparts, states face stricter budget constraints⁶³ and, as a result, have less tax revenue at their disposal.⁶⁴ Such limitations presumably leave fewer resources available for recruiting high-caliber lawyers and public-enforcement implementation. State agencies' uncertain standing in state constitutional law—particularly those nominally “independent”—might compound this problem.⁶⁵ Some scholars argue that de jure independence is a mirage in many states.⁶⁶ Instead, many agencies appear to be de facto dependent on other branches.⁶⁷ Adding to the challenge, states occasionally tinker with their civil-service system,⁶⁸ which might make state agencies an even less attractive place to work.⁶⁹ By

61 See UNIF. SEC. ACT § 509 (UNIF. L. COMM'N 2002).

62 See ANIMAL WELFARE ACT (ANIMAL LEGAL & HIST. CTR. 2004).

63 *What Are State Balanced Budget Requirements and How Do They Work?*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-are-state-balanced-budget-requirements-and-how-do-they-work> [https://perma.cc/V6FM-AD4A] (last visited Sept. 23, 2023) (noting Balanced Budget Requirements are now a pillar of state budgeting practice).

64 Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS INST. (Dec. 31, 2012), <https://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession/> [https://perma.cc/9N2S-2YBX] (showing that state governments collect less revenue than federal government).

65 Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1551-60 (2019) (“State constitutions today send mixed signals about independence.”).

66 See *id.* at 1543 (“[S]tate jurisprudence largely leaves questions of independence to the legislative and political domains. . . . [T]his distinctive state approach to independence—variegated, shifting, and often politically charged—yields de facto, if not de jure, limits on agency independence . . .”).

67 *Id.* at 1544 (discussing how state courts' approach to administrative law likely undermines independence).

68 See Elliott Ash, Massimo Morelli & Matia Vannoni, *Divided Government, Delegation, and Civil Service Reform*, 10 POL. SCI. RSCH. & METHODS 82, 90-91 (2020) (noting that civil-service independence goes up and down within states).

69 Cf. RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY* 14 (1994) (arguing the federal government adopted merit

contrast, the federal government has, for now, maintained some semblance of agency independence.⁷⁰ It also has a highly stable civil-service system for employees, dating back to at least the early 20th century.⁷¹ This may provide the federal government with a comparative advantage over the states in recruiting talented lawyers and, as a result, increase their comparative capacity to utilize public enforcement. Other factors may weaken the monitoring of state agencies, reducing their quality relative to federal counterparts. Miriam Seifter has argued that relative to federal analogs, state agencies are less constrained by “civil society oversight,” leading to a fear that state agencies may be unfaithful to legislative goals.⁷² By contrast, at the federal level, administrative agencies are held accountable by countless watchdogs in civil society that work to “monitor, expose, and impede executive misdeeds.”⁷³

A combination of features detailed in these accounts of state agencies might explain why the separation-of-powers theory has no predictive value in the states. Below, we pay close attention to the complexities of state constitutional design and agency quality. We also analyze how recent scholarship on state political polarization might explain our null findings. Although we fail to find evidence in our dataset, political divides over private enforcement might emerge in the future.

More broadly, affirming the central role that private enforcement plays in our system reveals the need to reorient civil procedure and incorporate state private enforcement more explicitly into its core teachings. Digging into state law discloses the shocking ubiquity of private enforcement in nearly every area of human affairs. Mapping this system has a few more payoffs for judicial federalism. One of us has argued that federal and state procedure are increasingly diverging, with a federal system embracing pro-defendant procedural changes while the states remain relatively pro-plaintiff.⁷⁴ The

civil-service reforms to, *inter alia*, improve the quality of the bureaucracy); Michael M. Ting, James M. Snyder, Jr., Shigeo Hirano & Olle Folke, *Elections and Reform: The Adoption of Civil Service Systems in the U.S. States*, 25 J. THEORETICAL POL. 363, 367 (2012) (“While we do not accord civil servants any competence advantage over patronage appointees, a wide range of empirical research generally supports the notion that civil service improves bureaucratic performance.”).

⁷⁰ See Seifter, *supra* note 65, at 1547-50 (arguing a mix of law and norms makes federal agency independence stable).

⁷¹ See Ash et al., *supra* note 68, at 83-84 (discussing the history of United States civil-service reform).

⁷² See Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 128-46 (2018).

⁷³ *Id.* at 108-09.

⁷⁴ See, e.g., Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2154 (2019) (“[F]ederal expansion has allowed business defendants to opt out of state courts into arbitration or federal court and, by consequence, turned state judiciaries more plaintiff friendly relative to federal courts.”).

ubiquity of private enforcement at the state level may serve as a partial explanation for that divergence: states simply cannot close the courthouse doors to plaintiffs because it would have substantial consequences across nearly every area of state law. Relatedly, the omnipresence of state private rights of action can also operate as substitutes to federal private rights of action; what used to be federal antitrust, employment, or environmental claims can simply become their state-level equivalents. Perhaps, then, federal efforts to close the courthouse doors have merely forced parties to move across the road to state courts. Moreover, understanding state private enforcement reveals the impact of recent decisions on the Federal Arbitration Act (FAA).⁷⁵ To the extent that mandatory arbitration keeps plaintiffs away from court, it may have a significant effect on the states' private enforcement apparatuses. Finally, Texas's bold use of private enforcement in S.B. 8 and structurally similar bills in other states underline the potential impact of private rights of action as a way to shield state laws from constitutional attacks.

Before proceeding, a final note on this Article's broader methodological contribution is appropriate. This piece breaks ground in civil procedure by being one of the first articles to rely on computational linguistics and machine learning. Using these tools, we develop the first measure of private rights in the states and, we believe, the most comprehensive empirical measure of private-rights provisions to date. These innovations in measurement allow us to perform the most extensive and stringent test of the separation-of-powers theory ever conducted. Farhang's pathbreaking study analyzed one government;⁷⁶ we build on this classic work and analyze all fifty states. Analyzing multiple states is especially helpful because it allows us to engage in statistical counterfactual analysis not possible when analyzing only one government. Crucially, we can compare states with a divided government with those without it, holding other variables in our regression constant. Given the lack of existing empirical research on private-enforcement provisions, our empirical tests are a novel contribution to legal scholarship and political-science research on the separation of powers.⁷⁷ We hope this

⁷⁵ See generally *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding the FAA preempts state law "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures"); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (finding the FAA's enforcement of arbitration agreements providing for individualized proceedings was not superseded); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (enforcing an arbitration clause that prohibited class action suits).

⁷⁶ FARHANG, *supra* note 7, at 60 (emphasis added) (presenting an empirical model that analyzes "congressional enactment of private enforcement regimes").

⁷⁷ See, e.g., Rui J. P. de Figueiredo, Jr., Tonja Jacobi & Barry R. Weingast, *The New Separation-of-Powers Approach to American Politics*, in *THE OXFORD HANDBOOK OF POLITICAL ECONOMY* 199 (Barry R. Weingast & Donald A. Wittman eds. 2006).

work pushes the field to increase its use of natural-language processing and machine learning.

I. THEORIES AND LITERATURE ON PRIVATE ENFORCEMENT

The term private enforcement can refer to different legal efforts to authorize private parties to bring lawsuits. For our purposes, we use the term as a reference to “situations in which government responds to a perception of unremedied systemic problems by creating or modifying a regulatory regime and relying in whole or in part on *private actors* as enforcers.”⁷⁸ The emphasis here is on *deliberate* government action to empower private parties *rather than* (or in addition to) government agencies. We can contrast this model both with public enforcement and with torts. While private-enforcement provisions authorize private parties to sue, public-enforcement schemes instead empower government bureaucrats. Numerous federal statutes, for example, empower agencies like the SEC or FTC.⁷⁹ And while torts similarly allow private plaintiffs to sue, that right emerges out of a common-law tradition—not out of a deliberate legislative act.⁸⁰ Private enforcement, as discussed here, is therefore unique.

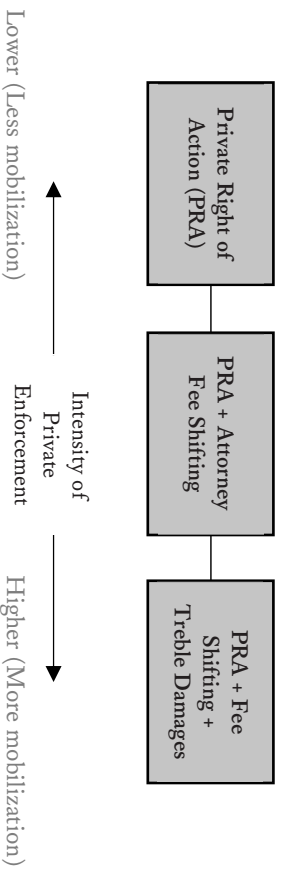
Still, private enforcement can manifest in different ways depending on a legislature’s desire to mobilize plaintiffs. A simple spectrum goes from private rights of action by themselves on one end, all the way to private rights of action combined with fee shifting and treble damages (and the availability of class actions).

⁷⁸ Burbank et al., *supra* note 10, at 639-40 (emphasis added).

⁷⁹ See, e.g., 15 U.S.C. § 15a (empowering the government to enforce antitrust laws).

⁸⁰ See David L. Noll & Luke Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. (forthcoming 2023) (manuscript at 20-21) (on file with authors) (explaining how private-enforcement suits differ from their common-law counterparts).

Figure I-1: The Spectrum of Private Enforcement



To be clear, when scholars use the phrase “private enforcement” they often refer only to the higher intensity end of the spectrum. For example, Farhang’s empirical measure of “private enforcement regimes” captures only when a private right of action is coupled with fee shifting or multiple damages.⁸¹ In this Article, however, we are exploring the full spectrum and often focusing on private rights of action by themselves. Whether Congress creates incentives to mobilize plaintiffs is an important consideration. But we think the legislative design choice of creating a private right of action, by itself, is the crux of litigation as a regulatory-enforcement tool. In other words, we aim to develop measures that capture a “larger constellation” of what encompasses private rights of action beyond just fee shifting and heightened damages.⁸² Still, we acknowledge that this definition can be overinclusive, because among other things, it covers private rights of actions that codify common-law claims (e.g., contracts and torts).⁸³ As we begin to explore in this Section, both federal and state legislatures employ the full spectrum of private enforcement in almost every area of law. To get an understanding of each system’s history and underlying theories—which differ in important ways—we must begin to build from the ground up.

A. Federal Private Enforcement

Congress has created private-enforcement regimes in various contexts, including antitrust, environmental, and employment law. For example, the

⁸¹ See FARHANG, *supra* note 7, at 66 (assuming that the “number of plaintiffs’ fee shifts and damage enhancements in effect annually . . . reflect[s] the structural environment of private enforcement regimes in existence annually”).

⁸² See *id.* at 61 (describing the many facets of private-rights provisions).

⁸³ We thank Norm Spaulding and William Hubbard for this point.

most important federal antitrust statute, the Sherman Act, empowers both public antitrust agencies (e.g., Department of Justice Antitrust Division, FTC) and private parties.⁸⁴ That is true, too, for major environmental statutes, the Civil Rights Act, and employment laws like the Fair Labor Standards Act.⁸⁵ In these areas, private parties are often the main vehicle of statutory enforcement, accounting for 90% of antitrust claims, 98% of employment-discrimination claims, and a large percentage of litigation in environmental and related contexts.⁸⁶ Relatively speaking, the United States is much more dependent on private enforcement than peer countries in Europe.⁸⁷

Take, for instance, employment discrimination, a paradigmatic area of federal private enforcement.⁸⁸ The landmark Civil Rights Act (CRA) of 1964 bars employment discrimination based on race, gender, national origin, or religion.⁸⁹ While the statute created a “hybrid enforcement framework including both private and public enforcement,” it is “primarily dependent on private lawsuits for enforcement.”⁹⁰ Indeed, in 2021, the U.S. Equal

⁸⁴ See 15 U.S.C. § 15a (empowering the United States to bring suit for violations); *id.* § 15 (empowering “any person” injured by a violation of the law to sue).

⁸⁵ See Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 197-98 (discussing citizen-suit provisions of federal environmental statutes). See generally Sean Farhang, *Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law*, 37 LAW & SOC. INQUIRY 657 (2012) (discussing Congress’s incentives to create private causes of action to enforce labor, civil rights, and environmental statutes).

⁸⁶ See Žygimantas Juška, *The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement*, 62 ANTITRUST BULL. 603, 605 (2017) (“Over 90% of antitrust litigation was filed by private plaintiffs between 1975 and 2004.”); FARHANG, *supra* note 7, at 3 (“[Ninety-eight] percent [of job discrimination lawsuits] were litigated by private parties.”); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1647 (2018) (Ginsburg, J., dissenting) (“Because of their limited resources . . . government agencies must rely on private parties to take a lead role in enforcing wage and hours laws.”); Glover, *supra* note 9, at 1150 (noting the Department of Labor investigates “fewer than 1 percent of FLSA-covered employers each year”); Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL’Y REV. 119, 125 (2014) (citing *Enforcement and Litigation Statistics*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm> [<https://perma.cc/K9VZ-JRTC>] (last visited July 12, 2023)) (“The EEOC serves . . . a crucial, but limited enforcement role, representing a few hundred plaintiffs out of the nearly 100,000 who file charges (less than 0.5 percent) each year.”).

⁸⁷ See, e.g., Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. REV. 303, 364-75 (2016) (comparing U.S. and European private and public enforcement of antitrust laws).

⁸⁸ See Burbank et al., *supra* note 10, at 685 (“In [employment discrimination], federal law provides a primary role for private enforcement . . .”).

⁸⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 251, 253-66 (current version at 42 U.S.C. §§ 2000e to 2000e-17).

⁹⁰ Burbank et al., *supra* note 10, at 688.

Employment Opportunity Commission filed 124 enforcement suits in federal district court,⁹¹ less than .01% of the 21,193 employment cases filed that year.⁹²

Private enforcement's prominent role in federal law has inspired a rich body of descriptive scholarship seeking to explain its emergence and evolution. Scholars and courts have put forth historical, cultural, and political theories. We turn to those in turn, sketching out these theories, the state of the evidence, and where we can test for their explanatory power in the states.

1. The Separation-of-Powers Theory

A recent but prominent theory proposed by Sean Farhang focuses on the separation of powers, arguing that private-enforcement regimes arise when (1) the "dominant party in Congress" is concerned about potential "subversion of legislative preferences if enforcement" were entrusted to (2) an administrative agency "under the control of an ideologically distant executive."⁹³ Pursuant to this hypothesis, Farhang demonstrated that increases in federal private enforcement "are associated with periods of divided government, and the great majority" of such regimes endure even after intervening elections change political control.⁹⁴ In particular, the incidence of divided government increased dramatically starting with the Nixon administration, at which time the ideological distance between the parties also began growing, and became correlated with congressional reliance on private enforcement.⁹⁵

Setting aside the premises of the separation-of-powers theory, scholarship on Congress's reliance on private litigation in civil rights is consistent with Farhang's theory.⁹⁶ Private enforcement of civil rights was the product of

91 *EEOC Litigation Statistics, FY 1997 Through FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/data/eeoc-litigation-statistics-fy-1997-through-fy-2021>. [<https://perma.cc/68VQ-LU2Y>] (last visited July 12, 2023).

92 See Gloria Huang, *Lex Machina Releases Its 2022 Employment Litigation Report*, LEX MACHINA (Aug. 4, 2022), <https://lexmachina.com/blog/lex-machina-releases-its-2022-employment-litigation-report/> [<https://perma.cc/PLM9-7XU9>] (reporting the number of employment cases filed in 2021); cf. Burbank et al., *supra* note 10, at 689-90 (discussing the private enforcement provisions in the Rehabilitation Act of 1973, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, the Civil Rights Act of 1866, and the Civil Rights Act of 1871).

93 Burbank et al., *supra* note 10, at 646 (summarizing Farhang's theory); see FARHANG, *supra* note 7, at 76-78. Others have connected this theory to the "slack minimization" theory whereby "legislators prefer delegation to an agency rather than a court when the ideological distance between legislator and agency is smaller than that between legislator and court." See Glover, *supra* note 9, at 1152 (quoting Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1043 (2006)).

94 Burbank et al., *supra* note 10, at 647.

95 *Id.* at 713.

96 *Id.* at 691.

repeated “ideological and institutional conflict between Congress and the President . . . across multiple configurations of party control of Congress and the presidency,” combined with both “fear of bureaucratic drift and concern about the public expense of administrative implementation”⁹⁷ While debating the CRA’s enforcement provisions, congressional Republicans argued against heavy reliance on the proposed Equal Employment Opportunity Commission, arguing that similar agencies like the National Labor Relations Board were “susceptible to the president’s political influence in ways that Congress could not control.”⁹⁸ At that time, President Kennedy was in the White House and six of the last seven administrations had been Democratic. In fact, in subsequent drafts of the legislation, Senate Republicans proposed eliminating the EEOC’s right to sue entirely and shifting enforcement completely to private plaintiffs.⁹⁹ The result of this tension between two polarized branches was the compromise that is today’s Title VII, a blend of public and private enforcement.

In sum, Farhang’s theory posits that separation of powers and political divides lead to increased adoption of private enforcement. Given its prominence and explanatory power at the federal level, we make the separation-of-powers hypothesis the main focus of our empirical investigation.

2. Historical and Cultural Theories

The historical and cultural theory posits that American “individualist and antistatist orientations” have created a litigious society reliant on lawsuits to resolve disputes.¹⁰⁰ While some scholars find deep roots for litigiousness all the way back to the colonial period, others instead emphasize a cultural transformation in the 1960s.¹⁰¹ On the former, scholars like Michael Dominic

⁹⁷ *Id.*

⁹⁸ FARHANG, *supra* note 7, at 100-01 (citing H.R. REP. NO. 88-570, at 15, 17 (1963)) (noting that Peter Frelinghuysen (R-NJ) and Robert Griffin (R-MI) wrote in their dissent from the CRA committee report that “administrative tribunals . . . too often operate in an atmosphere of political and emotional pressures”).

⁹⁹ John G. Stewart, *The Civil Rights Act of 1964: Tactics I*, in *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* 211, 249 (1997) (“Dirksen proposed shifting the burden of enforcing the equal employment standards in Title VII from the [EEOC] to the individual complainant.”).

¹⁰⁰ See Burbank et al., *supra* note 10, at 680 (citing SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 17-18 (1996)).

¹⁰¹ Compare, e.g., Burbank et al., *supra* note 10, at 680 (citing ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 299-305 (1998)) (“[S]cholars have argued that a cultural transformation occurred beginning around the late 1960s that resulted in a greater propensity among Americans to assert legal rights.”), with Meuti, *supra* note 35, at 342 (“[Individualism] has been a part of the American experience since the colonial days.”), and James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement for a Partisan World*, 92 *FORDHAM L. REV.*

Meuti have emphasized the cultural elements of adversarial legalism to argue that it is deeply rooted in “colonial days.”¹⁰² Amalia Kessler describes the long-roots theory as follows:

In the American context, in particular, adversarialism also became part and parcel of a grand narrative of American exceptionalism From this perspective, the ‘competitive individualism’ that underlies the United States’ . . . market-based society also contributed to its uniquely adversarial approach to litigation¹⁰³

But the long-roots theory is contested, with scholars questioning the historicity of an American culture of litigiousness. To the extent that American adversarialism and litigation can be equated, the historical origins seem highly dubious. Kessler, for instance, has explored the existence of quasi-inquisitorial models in the Early Republic, giving “the lie to the oft-repeated notion that American legal culture has always been necessarily and exclusively adversarial.”¹⁰⁴ Still, Kessler convincingly shows that adversarialism “came to be tied to American identity,”¹⁰⁵ and, in the words of an 1856 letter to a newspaper editor, “the very nature of Americans as ‘a litigious people.’”¹⁰⁶

Moving away from adversarialism and towards private enforcement, another pushback against the historical theory comes from political scientists. Farhang, among others, points out that until the Progressive Era, private parties in the U.S. had limited options for enforcing federal statutory rights.¹⁰⁷ New Deal legislation in the 1930s was based on a vision of “governance through expert bureaucracy,”¹⁰⁸ and although Congress did eventually begin relying on a combination of public- and private-enforcement provisions, a variety of other barriers kept the rate of private litigation fairly

(forthcoming 2023) (manuscript at 3) (on file with authors) (discussing federal legislation from 1794 authorizing private enforcement of anti-international slave trade laws). For scholarship on standing at the founding and *qui tam* litigation, see, for example, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235 (2018).

¹⁰² See Meuti, *supra* note 35, at 342.

¹⁰³ AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877* 6-7 (2017).

¹⁰⁴ See *id.* at 6.

¹⁰⁵ See *id.* at 262.

¹⁰⁶ See *id.* at 262 (quoting *Courts of Conciliation*, ALEXANDRIA GAZETTE, Jan. 21, 1856, at 2).

¹⁰⁷ See Burbank et al., *supra* note 10, at 647.

¹⁰⁸ FARHANG, *supra* note 7, at 69.

low.¹⁰⁹ For most of this period, private parties and the federal government filed suit at roughly the same rates.¹¹⁰ That changed only in the late 1960s, when the number of private lawsuits under federal statutes exploded.¹¹¹ In the decades after, private litigation increased by nearly 1,000%.¹¹²

To the extent that private enforcement is of recent vintage, some have still tried to root the 1960s changes in cultural developments. As Robert Kagan laid out in his seminal work *Adversarial Legalism*, America relies more heavily on litigation as a method of policymaking and dispute resolution than other countries.¹¹³ Such dependence, the argument goes, is a reflection of values like self-reliance, individualism, and distrust of government.¹¹⁴ But Kagan argues that “adversarial legalism in the United States does not arise from a deep-rooted American propensity to bring lawsuits.”¹¹⁵ Under the recent historical view, the 1960s saw a “cultural degeneration [across the U.S.] from a rights-respecting people to a rights-abusing one.”¹¹⁶ At some point, the argument goes, Americans began to see litigation as a solution to every problem. Society became more litigious and private enforcement increased.¹¹⁷

Other scholars have a more positive cultural explanation for the trend. The 1960s saw the confluence of the civil-rights movement and a series of Supreme Court cases emphasizing the strength of individual rights.¹¹⁸ In observing the success of the civil-rights movement, the public allegedly saw how litigation could be used as a powerful tool to vindicate individual rights. The increased prevalence of private litigation can be tied to this emergence of a “rights consciousness” characterizing a new American identity.¹¹⁹ Still others trace the explosion to the “political dominance” of the Democratic Party during this time period, and in particular, the congruence of statutory

¹⁰⁹ See Burbank et al., *supra* note 10, at 647, 656 (noting the Federal Rules of Civil Procedure later helped reduce barriers to private litigation).

¹¹⁰ See FARHANG, *supra* note 7, at 12 fig.1.1 (showing rate of private and government statutory litigation in federal court from 1942 to 2005).

¹¹¹ See *id.*

¹¹² See *id.* at 12 & fig.1.1 (noting private suits to enforce federal law increased by “about 1,000 percent” from 1967 to 1996).

¹¹³ See KAGAN, *supra* note 6, at 3 (“Compared to other economically advanced democracies . . . [t]he United States more often relies on lawyers, legal threats, and legal contestation in implementing public policies, compensating accident victims, striving to hold governmental officials accountable, and resolving business disputes.”).

¹¹⁴ See Burbank et al., *supra* note 10, at 645 (discussing how government institutions reflect societal attitudes).

¹¹⁵ See KAGAN, *supra* note 6, at 34.

¹¹⁶ FARHANG, *supra* note 7, at 13-14.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 14.

¹¹⁹ *Id.*

changes, greater availability of litigation financing, and changes to the legal profession that occurred during the Democrats' reign.¹²⁰

While the cultural theory is highly contested and lacks sufficient evidence, we cannot test it in this study and instead leave it to a future project that relies on survey evidence.

3. Other Political Explanations

Other less prominent theories attempt to explain the federal enactment of private-enforcement regimes. One focuses on lawyers and rent-seeking, arguing that private-enforcement regimes may be the result of lobbying by affected interest groups, including the Association of Trial Lawyers of America, labor and employment lawyers, and the American Bar Association.¹²¹ "After broader cultural and political forces pushed the adversarial boulder from the top of the hill, American lawyers concentrated intently on clearing the path of all obstacles. . . . [M]ore adversarial legalism means more legal disputes, which means more demand for lawyers."¹²² However, the rent-seeking hypothesis lacks historical and empirical support. As Farhang argues, the historical record surrounding the enactment of Title VII of the CRA does not demonstrate the importance of legal lobbying. Only one of the forty-four groups lobbying in favor of the act was a lawyers' association.¹²³ Instead, the driving force was antiregulation Republicans, and there is no evidence that they were motivated by a desire to enrich lawyers.¹²⁴ Nonprofit civil-rights groups, rather than for-profit lawyers associations, pushed for fee-shifting and attorneys-fees provisions in order to ensure that Title VII would be a tool for private parties.¹²⁵ While Farhang's study found little support for the rent-seeking theory,¹²⁶ we test for its explanatory power

120 See Burbank et al., *supra* note 10, at 647.

121 See FARHANG, *supra* note 7, at 69 (describing the "rent-seeking lawyer hypothesis").

122 Meuti, *supra* note 35, at 327 (citing KAGAN, *supra* note 6, at 48, 55).

123 FARHANG, *supra* note 7, at 126 ("There was only one lawyers' association (albeit the most important one, the ABA) among the forty-four groups lobbying in favor of the CRA of 1964 . . .").

124 *Id.*

125 *Id.* at 126-27 (arguing civil rights advocates promoted these provisions "to overcome well-known economic obstacles to private enforcement").

126 *Id.* at 168 ("The rent-seeking lawyer hypothesis . . . is not well supported by the historical evidence, though some of that evidence does reveal pursuit of fee-shifting rules in the civil rights context by for-profit lawyers. The empirical model in chapter 3 found no relationship between the presence of lawyers' associations in congressional hearings and enactment of private enforcement regimes . . ."); *id.* at 208 ("The for-profit plaintiffs' civil rights bar that emerged in the first half of the 1970s clearly was part of the mobilization, orchestrated by civil rights groups, to secure fee shifting across the entire domain of civil rights statutes, though the causal significance of the for-profit civil rights bar in producing the legislative outcomes was ambiguous.").

in the states by analyzing whether a greater number of lawyers per capita predicts private-enforcement adoption.

Another theory traces the rise in private enforcement to the explosion in “issue-oriented citizens groups with pro-regulatory agendas” in the late 1960s.¹²⁷ These issue groups are supposedly guided by policy preferences in arenas like the environment, civil rights, and consumer protection, and are motivated by a fear of bureaucratic drift and a preference for private-litigation campaigns.¹²⁸ As a result, the issue-group hypothesis predicts that “greater influence and participation by issue groups in the legislative process will be associated with increased enactment of private enforcement regimes.”¹²⁹

Unlike the rent-seeking-lawyer hypothesis, the “issue group hypothesis” is well-supported by both historical and empirical evidence. For example, in the 1965–1976 period following the passage of the CRA, civil-rights groups were active and successful in expanding the role of private lawsuits in civil-rights enforcement in subsequent legislation.¹³⁰ While initially hopeful about the prospect of strong public enforcement of the CRA (a hope “animated by optimism about executive power with roots in the New Deal”), civil-rights leaders became disillusioned as they observed an EEOC that was “not only underfunded, but also torpid, lacking in ambition, and potentially compromised by the powerful interests that the law was supposed to regulate.”¹³¹ As a result, civil-rights groups were present in hearings on subsequent legislation such as the School Aid Act, the Voting Rights Amendments, and the Civil Rights Fees Act, seeking to strengthen private rights of enforcement by advocating for clauses like attorneys’-fee awards.¹³² Farhang’s work substantiates this historical evidence, showing that a one standard-deviation increase in issue-group witnesses in hearings on regulatory legislation was associated with an increase in predicted enactments by up to 47%.¹³³ Unfortunately, the decentralized nature of state-committee data made it impossible for us to conduct a similar test. We leave it to future work to explore this possibility. Qualitative work focusing on a few case studies seems like a promising place to start.

Finally, a political-party theory attributes a preference for private enforcement to Democrats and an aversion to such enforcement to Republicans, with the former’s preference arising from ties to the plaintiffs’

127 *See id.* at 69.

128 *See id.*

129 *Id.*

130 *Id.* at 167.

131 *Id.*

132 *Id.* at 163.

133 *Id.* at 79.

bar and the latter's aversion arising from ties to the business community.¹³⁴ The weak form of this hypothesis predicts that Democrats will be more likely to support private-enforcement regimes than Republicans, while the strong form predicts that Republicans will consistently oppose such provisions.¹³⁵ There is some empirical support for the weak form of the hypothesis.¹³⁶ Farhang found that in some empirical models, the degree of Democratic control of Congress was correlated with the enactment of private-enforcement regimes, but it was not a strong predictor.¹³⁷ However, the strong form is not supported.¹³⁸ Recent data shows that there has actually been "escalating Republican Party support for private lawsuits to implement rights" in recent years.¹³⁹ The latest trend has been "led by the conservative wing of the Republican Party, fueled in part by . . . [the party's] anti-abortion, immigrant, and taxes, and pro-gun and religion agenda."¹⁴⁰ We contribute to this debate by analyzing whether unified Democratic legislatures are more likely to adopt private-enforcement provisions.

* * *

While theories abound, the strongest and best-supported one seems to be Farhang's separation-of-powers theory.¹⁴¹ Still, while private-enforcement regimes have been the subject of significant research, most of the focus has remained at the federal level.¹⁴² This is despite the fact that "[f]or most of its history, . . . the United States has depended far more on state and local laws and institutions than it has on federal laws and institutions for solutions to

¹³⁴ *Id.* at 70-71.

¹³⁵ *Id.* at 71, 209-10.

¹³⁶ *Id.* at 209-10 ("The weak form of the party alignment hypothesis is supported by the evidence, and the strong form of it is rejected; this is consistent with the empirical model . . . and the historical evidence.").

¹³⁷ *See id.* at 80-81.

¹³⁸ *Id.* at 209 ("[T]he strong form of [the party alignment hypothesis] is rejected.").

¹³⁹ Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. IRVINE L. REV. 657, 660 (2021).

¹⁴⁰ *Id.*

¹⁴¹ Besides those detailed above, there are other, less well-supported theories, including the "budget constraint" and the "blame deflection" theories. The former suggests that "lack of adequate tax revenue encourages Congress" to favor private-enforcement regimes as a method for shifting the cost of regulation to private parties. FARHANG, *supra* note 7, at 71. Accordingly, it predicts that "when resources are tight, Congress will be relatively more likely to enact private enforcement regimes." *Id.* at 72. Meanwhile, the "blame deflection" theory posits that Congress may generally prefer to delegate enforcement to courts, given that administrative agencies "are subject to ongoing congressional control and, therefore, might take actions for which the electorate will hold Congress . . . responsible." Glover, *supra* note 9, at 1152.

¹⁴² *See, e.g., id.*

systemic problems unremedied by judge-made common law rules”¹⁴³ That is why we now turn to the state private-enforcement literature.

B. State Private Enforcement

In contrast with the robust literature on federal private rights of action, the literature on state-law private rights of action is limited. Scholars have investigated discrete areas of private enforcement in the states, such as consumer protection,¹⁴⁴ environmental law,¹⁴⁵ and employment discrimination.¹⁴⁶ These studies often analyze private enforcement of particular laws. For example, scholars have investigated the use of the California Environmental Quality Act (CEQA), a state law that imposes procedural requirements on local governments before they approve or initiate projects that could harm the environment.¹⁴⁷ The law relies exclusively on private enforcement—public agencies are held accountable through suits brought by private citizens.¹⁴⁸ Some scholars have examined the patterns of CEQA enforcement and set forth conclusions about its efficacy.¹⁴⁹ While analyses of private enforcement of specific laws are useful in their own right, they do not answer broader questions about the extent, patterns, or effects of private enforcement of state laws.

Relatedly, scholars have paid some attention to public enforcement of state law. Many state statutes grant authority to attorneys general to sue on behalf of citizens injured by statutory violations.¹⁵⁰ These actions can also arise as *parens patriae* suits, where attorneys general sue to vindicate a state’s

¹⁴³ Burbank et al., *supra* note 10, at 643.

¹⁴⁴ See, e.g., Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 169-76 (2011) (providing an overview of the development of state consumer-protection laws and comparing their private rights of action to federal law’s public-enforcement standard).

¹⁴⁵ See, e.g., David Sive & Mark A. Chertok, “Little NEPAS” and Their Environmental Impact Assessment Processes, in ENVIRONMENTAL LITIGATION 801, 801 (Am. L. Inst., Am. Bar Ass’n eds., 2010).

¹⁴⁶ See, e.g., Burbank et al., *supra* note 10, 688-91 (describing federal and state employment-discrimination laws).

¹⁴⁷ See, e.g., Ha Chung, Note, *Moving CEQA Away from Judicial Enforcement: Proposal for a Dedicated CEQA Agency to Address Exclusionary Use of CEQA*, 93 S. CAL. L. REV. 307, 308 (2020).

¹⁴⁸ *Id.* at 308-09.

¹⁴⁹ See, e.g., Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California’s Housing Crisis*, 24 HASTINGS ENV’T L.J. 21, 58-71 (2018) (discussing the use of CEQA to block housing, public service, and infrastructure projects that environmental policies would otherwise support).

¹⁵⁰ See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 496 n.40 (2012) (citing various state laws that allow attorneys general to sue on behalf of injured citizens).

interest in promoting the health and well-being of its residents.¹⁵¹ Many state statutes also allow attorneys general to recover restitution payable to injured citizens.¹⁵² For example, state attorneys general have used state antitrust statutes to seek damages for citizens hurt by large businesses.¹⁵³ Scholarship has also begun to explore the political dynamics shaping public enforcement by state attorneys general.¹⁵⁴ These studies are also generally limited to discrete areas of regulation.¹⁵⁵ The role of supplemental private enforcement sometimes comes up¹⁵⁶ but has not been systematically examined across substantive areas.

Yet this lack of attention to private enforcement in the states belies the dominant role that private lawsuits play in many areas of state regulation when compared to federal law.¹⁵⁷ So why has private enforcement of state law been left unexamined? One reason may be that state private enforcement is considerably more difficult to study than that of the federal system. The universe of state laws containing private-enforcement provisions is orders of magnitude larger than the universe of federal laws.¹⁵⁸ Thus, no comprehensive, empirical survey of private enforcement in the states exists.

II. PRIVATE ENFORCEMENT IN THE STATES

Once we focus systematically on state statutes, the existence of private-enforcement provisions can be found in nearly every important area of law:

151 See *id.* at 493-94 (discussing the doctrine of *parens patriae*); see also Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982) (explaining the scope of states' authority to sue under the *parens patriae* doctrine).

152 Lemos, *supra* note 150, at 497-98.

153 See *id.* at 498 & n.48.

154 See, e.g., Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 85-105 (2018) (analyzing the impact of polarization on state litigation).

155 See, e.g., Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1015-25 (2001) (examining empirical data and litigation regarding the enforcement activities of New York's state antitrust-enforcement agency).

156 See, e.g., Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 293-94 (2016) (discussing *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014), where the state brought an action under state antitrust and consumer-protection statutes that provided both public and private rights of action).

157 See Burbank et al., *supra* note 10, at 644 ("Despite enormous increases in federal regulation since the 1960s, the states of the United States continue to guard their prerogatives, even if inconsistently, and it remains true that most law governing citizen-to-citizen relationships is state law and much of that is judge-made common law.").

158 Compare FARHANG, *supra* note 7, at 66 (counting fewer than 400 federal legislative fee-shifting and damage enhancements enacted between 1887 and 2004), with *infra* Section II.B (finding over 3,500 current state legislative enactments).

workers compensation,¹⁵⁹ the operation of gas pipelines,¹⁶⁰ petitions to challenge parental custody of minors,¹⁶¹ freedom of religion,¹⁶² and so on.¹⁶³ There are thousands of these kinds of private-enforcement provisions across a range of unrelated areas. In this Part, we report the results of the first systematic empirical investigation of private enforcement in the states. Employing an innovative computational-linguistic approach, we identify private-enforcement provisions across a unique dataset of all fifty states' laws, going back to the year 2003.

As discussed below, our findings indicate that private enforcement is even more ingrained in American governance than has been previously understood. Scholarship on federal law sometimes discusses private rights of action as a recent invention of Congress, concentrated in a range of important federal statutes. Prior to our work, it would have been easy to believe that state law is not as riddled with or reliant on private statutory claims, or that state administrative actions predominate. But we demonstrate that state law-making is dependent on courts, private litigants, and statutory grants of power. To borrow a phrase, the Litigation State in the states—or perhaps the State Litigation States or just simply the Litigation States—appears to be an even more expansive labyrinth than at the federal level.¹⁶⁴

To be clear, the growth of private enforcement does not diminish, replace, or otherwise substitute for public enforcement. Indeed, we find some evidence that states also rely on thousands of public rights of action that give power to state attorneys general and administrative bodies.¹⁶⁵ But, as we explain further below, the evidence from our computer-assisted quantitative methods show that private enforcement is so ubiquitous that it underlines a clear point: the states depend on private lawsuits even more than we thought.

¹⁵⁹ See, e.g., OHIO REV. CODE ANN. § 4123.90 (2021) (granting a private right of action to employees for employer retaliation related to workers' compensation claims).

¹⁶⁰ See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 756.124 (West 2021) (granting a private right of action for damages caused to pipeline facilities).

¹⁶¹ See, e.g., COLO. REV. STAT. § 19-4-122 (West 2021) (granting a private right of action to challenge “determine the existence or nonexistence” of familial relationships).

¹⁶² See, e.g., UTAH CODE ANN. § 63L-5-301 (West 2021) (granting a private right of action against the government for imposing land use regulations that impose a substantial burden on the free exercise of religion).

¹⁶³ See, e.g., N.Y. CIV. RIGHTS LAW § 79-n (McKinney 2021) (granting a private right of action to anyone harmed by bias-related violence or harassment).

¹⁶⁴ See FARHANG, *THE LITIGATION STATE*, *supra* note 7.

¹⁶⁵ See *infra* Section V.A.

A. *Finding Private Enforcement: Methods*¹⁶⁶

Our methodology in this Part follows a computational-linguistic approach used by other researchers and engineers: based on knowledge of private rights of action in federal statutes, we first constructed queries indicative of private rights (e.g., phrases like “anyone may sue” or “any individual may bring a claim”).¹⁶⁷ After initially constructing dozens of these phrases, we started several rounds of refinement in which we trained a simple “bag-of-words” machine-learning model on the clauses returned by the queries.¹⁶⁸ We then iteratively applied the refined model to the entire corpus and collected a sample of the clauses which the model classified as containing a private right but were not returned by our queries. We manually examined this sample and used it to develop new queries to add to our original list. In each round, we conducted validation testing in which four law-trained coders confirmed that the phrases were being used in the manner we expected—to grant a private right of action. We repeated this process eight times over a year.¹⁶⁹

Developing a perfect set of queries—which minimized both Type I and Type II errors—proved to be challenging.¹⁷⁰ We found state statutory language pertaining to private enforcement to be complex, diverse, and occasionally unintuitive.¹⁷¹ For example, a private right may employ highly

¹⁶⁶ The full methodology and validation process is discussed in this Section and in the Appendix.

¹⁶⁷ See, e.g., Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885, 921-22 (2021) (applying keywords to study the Federal Register, Code of Federal Regulations, and the United States Code); David A. Hoffman & Anton Strezhnev, *Leases as Forms*, 19 J. EMPIRICAL LEGAL STUD. 90, 98 (2022) (using keywords to study the prevalence of types of clauses in leases).

¹⁶⁸ Full training details are available in the Appendix.

¹⁶⁹ In effect, we blended dictionary and supervised machine-learning methods. By doing so, we join an emerging area of computational legal scholarship and benefit from the best of both worlds. While dictionary terms are robust and interpretable, they require us to have a comprehensive understanding, *ex ante*, of what the correct terms are. In contrast, machine-learning tools allow us to learn, *from the data*, how private-rights clauses actually manifest. Our approach uses machine learning as a discovery tool, allowing us to continually refine the set of keywords we use. See, e.g., Jonathan H. Choi, *An Empirical Study of Statutory Interpretation in Tax Law*, 95 N.Y.U L. REV. 363 (2020) (using dictionary methods and machine learning to study textualism and purposivism in tax law); Julian Nyarko, *Stickiness and Incomplete Contracts*, 88 U. CHI. L. REV. 1 (2021) (using supervised machine-learning methods to identify dispute-resolution clauses).

¹⁷⁰ Though not discussed in this work, we explored more sophisticated alternatives to queries, including state-of-the-art machine-learning approaches from natural-language processing. In practice, we found these methods to equally struggle, while offering less transparency. We also discovered that these models focused on language in clauses which correlated with but by themselves did not indicate private rights (e.g., language describing damages or notice requirements). As a result, we felt the search terms were a more robust approach.

¹⁷¹ Additionally, many clauses extensively qualify who may bring a claim and contain language excluding certain classes of individuals from filing suit. See, e.g., NEV. REV. STAT. § 493.060 (2021)

specialized language in naming the party capable of bringing a private right: “[a]n art dealer . . . is liable to the consignor”¹⁷² or “[a]ny mountain operator shall be liable for loss or damages”¹⁷³ Because of this kind of language, we investigated two distinct sets of queries, which we refer to as our *optimistic* and *pessimistic* sets. Each set corresponds to a different tradeoff on Type I (false positive) and Type II (false negative) errors. Our optimistic queries are overinclusive (preferring Type I errors), while our pessimistic queries are underinclusive (preferring Type II errors). This means that the pessimistic queries will underestimate the total number of private rights, while our optimistic queries will overestimate the number of private rights. During our manual validation, we found that around 75% of the clauses returned by our optimistic queries corresponded to a private right, while around 99% of the clauses returned by our pessimistic queries corresponded to a private right. Given that our pessimistic queries are validated to a higher accuracy threshold, we consider these to better approximate the true number of private rights in the states. Therefore, we primarily report the results of these queries. However, we found that along nearly all dimensions, the trends from our optimistic queries mirrored those from our pessimistic queries.

The table below provides examples of keywords and a typical resulting private right of action in a range of areas:

(instituting a presumption of liability for certain aircraft accidents, except where injury is caused by negligence of the injured person). Designing queries for such clauses proved to be challenging.

¹⁷² OR. REV. STAT. § 359.250 (2021).

¹⁷³ IDAHO CODE § 6-3307 (2021).

Table II-1: Examples of Private Rights of Action

Keywords	Private Right of Action
“athlete may bring an action”	“An educational institution or student athlete may bring an action for damages against an athlete agent” ¹⁷⁴
“dealer may bring an action”	“If any grantor violates this part, a dealer may bring an action against the grantor in the Circuit Court of Mobile County for damages” ¹⁷⁵
“applicant may recover damages”	“If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages” ¹⁷⁶
“shall be liable to the party”	“Any person who subjects, or causes to be subjected, a citizen of the State of Illinois or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws of the United States or of the State of Illinois, relating to registration to vote, the conduct of elections, voting, or the nomination or election of candidates for public or political party office, shall be liable to the party injured or any person affected, in any action or proceeding for redress.” ¹⁷⁷
“he may sue”	“If any money due to the laborers, materialmen, or subcontractors be not paid within 10 days after his notice is served as provided in sections 5, 24, and 25, then such person may file a claim for lien or file a complaint and enforce such lien within the same limits as to time and in such other manner as hereinbefore provided for the contractor in section 7 and sections 9 to 20 inclusive, of this Act, or he may sue the owner and contractor jointly for the amount due in the circuit court” ¹⁷⁸
“subcontractor shall have a civil cause of action”	“A subcontractor shall have a civil cause of action if the subcontractor proves that failure to comply with section 501.3(b) was the result of a searchable project owner or searchable project owner’s agent” ¹⁷⁹

¹⁷⁴ S.C. CODE ANN. § 59-102-160(A) (2021).

¹⁷⁵ ALA. CODE § 45-49-41.06 (2021).

¹⁷⁶ S.D. CODIFIED LAWS § 57A-5-111(b) (2021).

¹⁷⁷ 10 ILL. COMP. STAT. 5/29-17 (2021).

¹⁷⁸ 770 ILL. COMP. STAT. 60/28 (2021).

¹⁷⁹ 49 PA. CONS. STAT. § 1501.6(c) (2021).

“landlord may bring an action”	“If the tenant remains in possession without the landlord’s consent after expiration of the term of the rental agreement or its termination, the landlord may bring an action for possession” ¹⁸⁰
“shall be liable to the insured”	“[A]ny person who assisted or in any manner aided directly or indirectly in the procurement of such insurance contract shall be liable to the insured for the full amount of the claim or loss” ¹⁸¹
“renter may bring an action”	“After the corrective period expires, a renter may bring an action in a court . . . to enforce the renter remedy” ¹⁸²
“any franchisee may bring an action”	“Any franchisee may bring an action for violation of sections 42-133l or 42-133m” ¹⁸³
“is liable to the party”	“If any person knowingly . . . aids or assists in the violation of section 4364; he is guilty of a misdemeanor, and is liable to the party aggrieved in the sum of \$1,000.00 damages.” ¹⁸⁴
“the subscriber may bring an action”	“If the service connection or repair is not commenced within the specified four-hour period, . . . the subscriber may bring an action in small claims court against the company for lost wages, expenses actually incurred or other actual damages not exceeding a total of six hundred dollars (\$600).” ¹⁸⁵
“shall be liable in a civil action”	“[S]uch an officer or person shall be liable in a civil action to the party damaged for double the value of the property so illegally taken or seized and costs of the action.” ¹⁸⁶
“shall be liable to the purchaser”	“Any person who violates section 8-1721 shall be liable to the purchaser who may sue either at law or in equity to recover the consideration paid under the commodity contract” ¹⁸⁷
“a consumer may bring an action”	“A consumer may bring an action in court against a person for a violation or threatened violation of AS 45.48.100-45.48.290” ¹⁸⁸

180 ARIZ. REV. STAT. ANN. § 33-2147(B) (2021).

181 CONN. GEN. STAT. § 38a-275 (2021).

182 UTAH CODE ANN. § 57-22-6(5)(a) (West 2021).

183 CONN. GEN. STAT. § 42-133n(a) (2021).

184 MICH. COMP. LAWS § 600.4367 (2021).

185 CAL. CIV. CODE § 1722(b)(2) (West 2021).

186 735 ILL. COMP. STAT. 5/12-1005 (2021).

187 NEB. REV. STAT. § 8-1721.01 (2021).

188 ALASKA STAT. § 45.48.200(b) (2021).

As to our data, by definition, private-enforcement provisions are located in state law. Unfortunately, there is no publicly accessible repository that contains a simple compendium of all state laws. Instead, states publish parts of their code in separate sources. To make matters worse, even when there is an accessible source, the laws are in different data formats that are not friendly to computer processing. In light of these difficulties, the best data we could assemble was a pre-processed dataset of all state codes spanning the years 2003 to 2021. The data was provided as a collection of XML files,¹⁸⁹ where each file contained a particular subdivision of a state's code for a given year (e.g., the first file contained the California Insurance Code for the year 2021). The bulk of our analysis and data management was performed in the Python programming language.¹⁹⁰ We processed the XML files using a standard Python XML parsing library.¹⁹¹ This provided us with a list of clauses for each state in each year.¹⁹² Again, this means we had access to all state laws in a single dataset.

We take a moment to discuss the limitations of our query-based approach. First, our queries are imperfect. Thus, they miss clauses that are private rights and count clauses that aren't. Second, applying the definition of a private right to actual clauses can be challenging. In several instances, the authors of this paper disagreed as to whether a particular identified clause was a private right.¹⁹³ The room for subjectivity in classifying private rights creates an opportunity for perceived error. For instance, one could disagree with some of our queries, arguing they are narrow or broad.

Additionally, we note the limitations of focusing on state statutory text. Our queries will, for obvious reasons, fail to detect implied private rights of action. By definition, such rights would not be explicitly stated in state statutory text and could only be identified by parsing court opinions for each state. Moreover, the number of private rights contained in a state's code is an imperfect proxy for actual reliance on private enforcement. Such a statistic ignores, for instance, other factors that would help clarify the role of private enforcement: the ways in which state courts have interpreted clauses, the

¹⁸⁹ We purchased this collection of files from Fastcase, a legal research and technology company.

¹⁹⁰ PYTHON, <https://www.python.org> [<https://perma.cc/LH8H-UQKL>] (last visited Jan. 16, 2023).

¹⁹¹ See *xml.etree.ElementTree—The ElementTree XML API*, PYTHON, <https://docs.python.org/3/library/xml.etree.elementtree.html#module-xml.etree.ElementTree> [<https://perma.cc/NSV5-9F3Q>] (last visited Jan. 16, 2023) (describing the Python XML parsing library used in this study).

¹⁹² In the context of this work, a “clause” constitutes the smallest unit of statutory text identifiable by a distinct citation.

¹⁹³ When this occurred, the authors made a decision based on the surrounding context of the statute.

number of claims filed under different state provisions, and the breadth of possible claims that particular language would support. Instead, our measure captures when legislatures intend to make private enforcement available for litigants. Whether this translates to actual enforcement is a question we leave open for future work.

Despite these potential drawbacks, we believe that our methods support a significant foray into a subject matter relatively untouched by prior literature. Given the lack of empirical knowledge on private enforcement in the states, our methods—to a first approximation—provide an understanding of the frequency, growth, and evolution of private rights clauses across the past twenty years. Moreover, our measure is tailored to key descriptive questions addressed by us and many others: What circumstances lead legislatures to favor private enforcement over public enforcement?

B. A Descriptive Account of State Private Enforcement

1. The Current State of Private Enforcement

We begin by quantifying the current use of private rights of action. For the 2021 versions of each state code, we compute both optimistic and pessimistic estimates for the number of private rights. Aggregated across the fifty states, there are at least 3,503 private rights of action and, under our optimistic estimates, no more than 18,751 rights. In order to take into account several qualifications, however, below we report five different measures of the number:

1. Using our optimistic queries, we find 18,751 private rights of action. We believe this is an upper bound on the true number.
2. Using our pessimistic queries, we find 3,503 private rights of action. We believe this is a lower bound on the true number.
3. Accounting for the precision of our optimistic queries, our best estimate is that the true number of private rights of action is somewhere between 10,000 and 14,000.
4. In order to take into account that many private rights of action are merely codifications of the common law, we additionally count the number of rights after discarding those contained in the state commercial code (e.g., contracts) or those related to property (e.g., eviction). We find 1,994 private rights under our pessimistic queries, and 16,461 private rights under our optimistic queries.
5. Finally, we count the number of private rights that occur in a subsection also containing either a fee-shifting provision or a multiple-damages provision (or both). This matches the criteria used

by Farhang to identify private rights. We identify 1,495 private rights under our pessimistic queries and 6,077 private rights under our optimistic queries.

Under any of our measures, we find thousands of private rights of action. According to Farhang, there are over 300 such clauses at the federal level.¹⁹⁴ So the states' private-enforcement system, when taken as a whole, is large and significant. We additionally quantify the extent to which these private rights coexist with damage-enhancing or fee-shifting clauses. Damage-enhancement clauses allow a potential plaintiff to recover monetary awards that are sometimes double or triple the actual damages they suffered. Fee-shifting clauses allow victorious plaintiffs to recover the cost of attorneys' fees from the defendant.¹⁹⁵ The existence of such provisions is often taken as evidence of legislative desire to stimulate private enforcement in a particular area by making claims profitable for plaintiffs and attorneys.¹⁹⁶ To detect such clauses, we use the same keywords as Farhang.¹⁹⁷ For clauses identified by our pessimistic queries, we find that 24.5% appear in a subsection that also contains a multiple-damages provision, and 37.3% appear in a subsection that also contains a fee-shifting provision. For clauses identified by our optimistic queries, we find that 18.2% appear in a subsection with a multiple-damages provision and 27.7% appear in a subsection containing a fee-shifting provision.¹⁹⁸

We find that states vary significantly in their reliance on private enforcement. In Figure II-1, we present the number of private-rights clauses for each state. We observe that many of the states with a greater number of

194 FARHANG, *supra* note 7, at 66 & fig.3.1.

195 For an academic discussion of fee shifting, see generally, for example, Maureen Carroll, *Fee-Shifting Statutes and Compensation for Risk*, 95 IND. L.J. 1021 (2020); Maureen Carroll, *Fee Shifting, Nominal Damages, and the Public Interest*, 97 ST. JOHN'S L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4455766> [<https://perma.cc/QT75-6N97>] [hereinafter Carroll, *The Public Interest*].

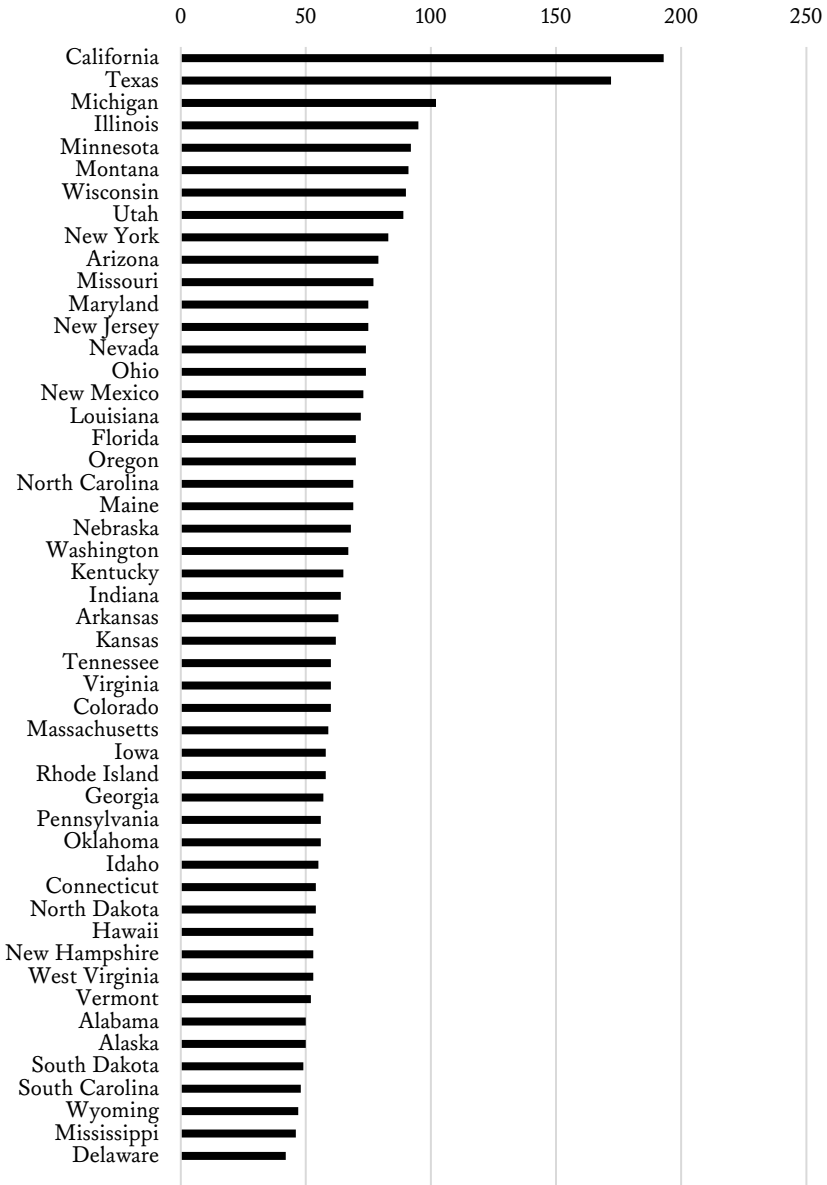
196 FARHANG, *supra* note 7, at 60.

197 *Id.* at 82-83.

198 Note that it is possible that fee-shifting provisions are structured differently at the state and federal levels. At the federal level, fee-shifting provisions are narrow; Congress "make[s] specific and explicit [fee-shifting] provisions . . . under selected statutes" after deciding that enforcement of such statutes is categorically in the public interest. Carroll, *The Public Interest*, *supra* note 195 (manuscript at 27-28) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (1975)). At the state level, fee shifting may be broader. Rather than enumerating "particular statutory or constitutional provisions," state legislatures may create broad roving provisions that permit fee shifting across a wide array of litigation. *Id.*; see, e.g., CAL. CIV. PROC. CODE § 1021.5 (West 2021) (permitting fee shifting for litigation affecting the public interest). As a result, fee shifting and private rights of action at the state level are not perfect analogs.

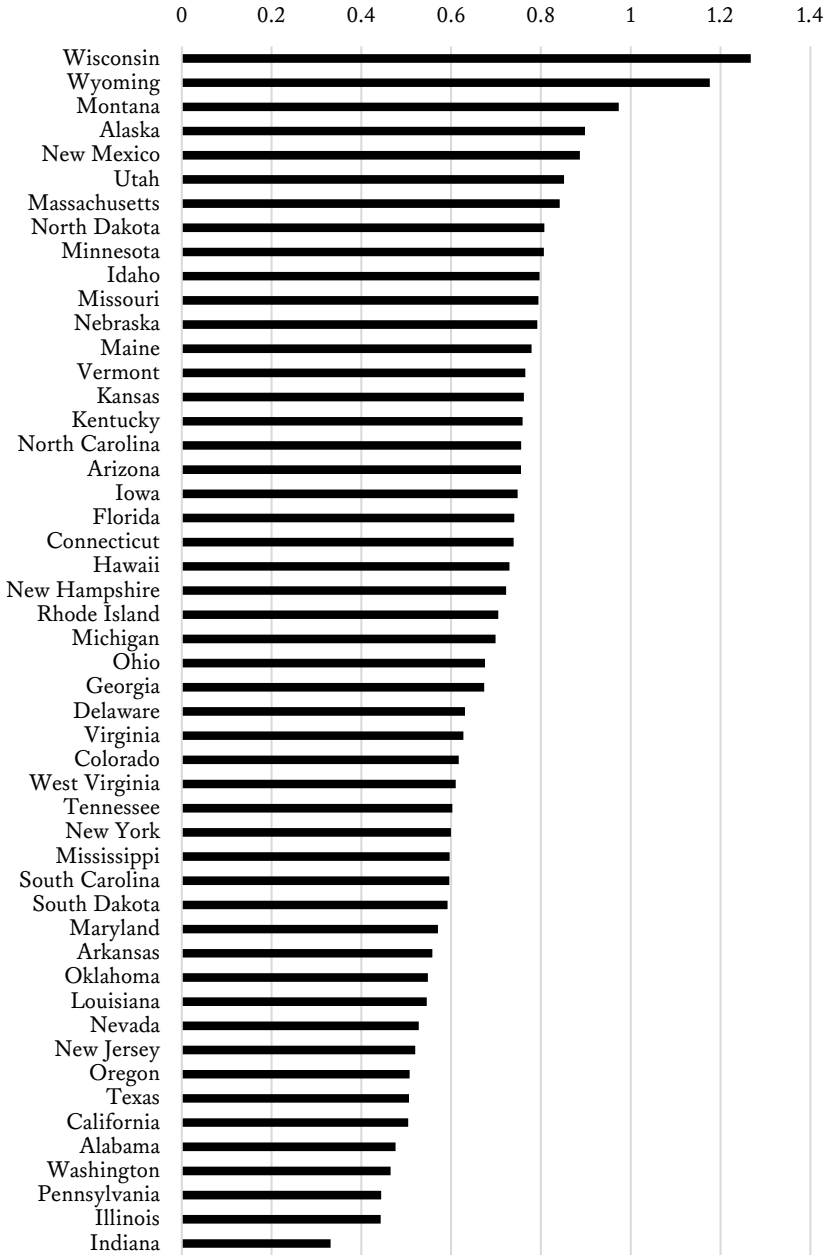
private rights tend to be large and populous states (e.g., California, Texas, and Illinois).

Figure II-1: Number of Private Rights Clauses by State in 2021 (Pessimistic Estimate)



In addition, we compute a separate measure capturing the intensity of private-rights provisions. Specifically, we calculate the number of private-enforcement clauses for each state relative to the total number of clauses in the state code. Though imperfect, comparing to the cumulative size of the code allows us to control for states that are simply more legislatively productive or verbose in the construction of their codes. We measure this by the number of private rights found for every one thousand clauses of statutory text. (For context, the total number of statutory clauses in the dataset exceeds 90 million). In Figure II-2, we present these rates for all fifty states. This measure results in significantly different rankings, with certain smaller states (e.g., Wisconsin and Wyoming) appearing to rely on private enforcement disproportionately more than their peers.

Figure II-2: Number of Private Rights Per Thousand Clauses by State in 2021 (Pessimistic Estimate)



States organize their codes by subject matter, with clauses pertaining to similar areas of regulation located proximately in the hierarchical structure of the state's code. For instance, chapter 125 of the Michigan code—named “Planning, Housing, and Zoning”—contains laws pertaining to different aspects of urban development and housing.¹⁹⁹ Chapter 125 is further divided into individual sections, each focusing on a narrower area. For example, sections 1551 through 1555 pertain to housing on tribal reservations,²⁰⁰ and sections 2501 through 2508 pertain to the sale of heating cables.²⁰¹ Each section is accompanied by a descriptive title, which further elaborates on the subject matter and focus of the contained clauses. Thus, for each clause, we have a collection of descriptive titles corresponding to each of the subdivisions the clause belongs to.

We use these descriptive titles along with the text of the clauses to classify each identified private right into one or more topical areas. To perform this classification, we devised a mapping from topics to keywords. The keywords for all twenty-two topical areas we used is available in the Appendix. Our classification is not exclusive—a clause may be associated with multiple subject areas, depending on the titles it is associated with. For instance, section 125.1554 of the Michigan code is titled “Powers and duties” and located in the “Indian Housing Authority” section within the chapter titled “Planning, Housing, and Zoning.”²⁰² As the titles corresponding to this title mention both “housing” and “Indian,” we would classify any private right in section 125.1554 under the topic areas “Tribal Affairs” and “Property.”

Below, Figure II-3 provides the number of clauses (aggregated across all states) belonging to each topic. Using these topic assignments—further described in the Appendix—we find that the vast majority of private-rights clauses in state's code pertain to matters of business. These include rights related to contracting,²⁰³ state IP law,²⁰⁴ and partnerships.²⁰⁵ Almost as prominent are private rights related to matters of property. These include clauses enshrining remedies for tenants and landlords,²⁰⁶ zoning,²⁰⁷ and nuisances.²⁰⁸

199 MICH. COMP. LAWS ch. 125.

200 *Id.* §§ 125.1551–.1555.

201 *Id.* §§ 125.2501–.2508.

202 *Id.* § 125.1554.

203 TENN. CODE ANN. § 43-15-104 (2021).

204 CAL. BUS. & PROF. CODE § 21755 (West 2021).

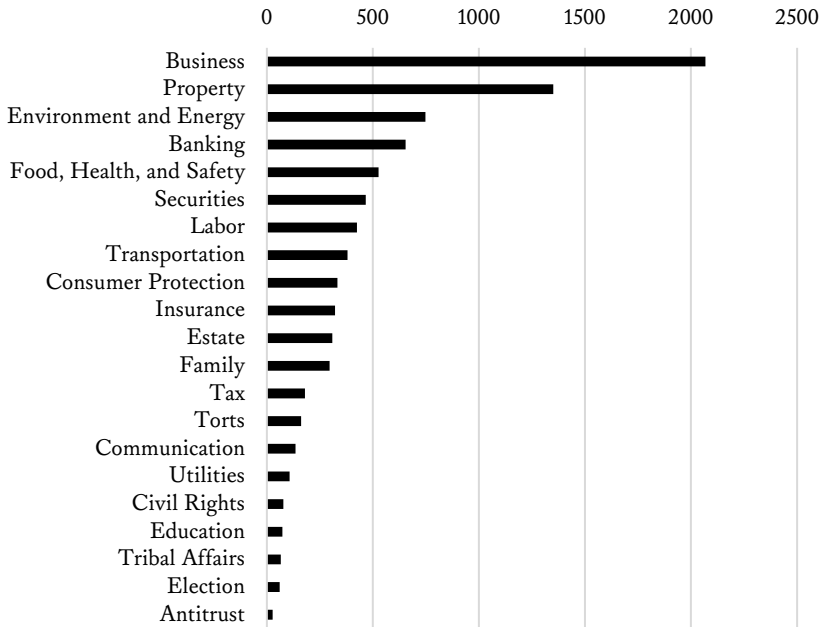
205 KY. REV. STAT. ANN. § 362.1-308 (2021).

206 HAW. REV. STAT. § 521-73 (2021).

207 IDAHO CODE § 31-3806 (2021).

208 CAL. FISH & GAME CODE § 12023 (West 2021).

Figure II-3: Number of Private Rights by Topic in 2021 (Pessimistic Estimate)



Yet counting the number of private rights of action in this manner occludes an enormous range in the significance of each clause. As discussed above, on the one hand, a private right of action can be as minimal as allowing lawsuits when somebody damages a family member's grave, involving perhaps few to no lawsuits in an average year. On the other hand, a single private right of action can empower plaintiffs in an area of significant economic importance like employment, antitrust, or environmental law, potentially leading to thousands of lawsuits per year.²⁰⁹

Take a paradigmatic example of a powerful right of action, California's Private Attorney General Act (PAGA).²¹⁰ PAGA allows aggrieved employees to sue their employers not only on behalf of (1) themselves but also on behalf of (2) other current or former employees, as well as (3) the State of

²⁰⁹ See, e.g., Sherman Act, 15 U.S.C. § 1; *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/HBF5-6CCB>] (last visited Aug. 3, 2022) (providing an overview of the federal antitrust laws that can be privately enforced).

²¹⁰ CAL. LAB. CODE §§ 2698–2699.8 (West 2021).

California.²¹¹ It empowers private parties to bring civil actions in response to *any* violation of the California labor code, so long as a civil penalty is available in a statute.²¹² PAGA's scope is massive, authorizing lawsuits for wage-and-hour violations,²¹³ child-labor law violations,²¹⁴ and even failure to provide itemized wage statements,²¹⁵ among others. Since it went into effect in 2004, the number of PAGA lawsuits has increased by more than one thousand percent,²¹⁶ with March 2021 marking the highest number of filings in a single month to date.²¹⁷ Successful suits benefit both private litigants and the state; a successful PAGA plaintiff keeps 25% of the recovered penalty while the remaining 75% percent goes to the Labor and Workforce Development Agency.²¹⁸ In fact, in 2019 alone, California collected eighty-eight million dollars in PAGA penalties from employers as a result of civil actions that ran the gamut of California labor laws.²¹⁹ All of this even though, at the end of the day, PAGA is embodied in a *single private right of action*.

Another example of a single private right of action with outsized influence—especially because it is often partnered with treble damages—is in the antitrust context. Congress adopted the first modern antitrust statute, the Sherman Act, in 1890.²²⁰ Congress then completed the current statutory regime with the Clayton Act of 1914.²²¹ While Congress has seemingly led the way in antitrust regulation and attracted most scholarly and media attention,

²¹¹ *Id.* § 2699(a).

²¹² *Id.*

²¹³ *Id.* § 558.

²¹⁴ *Id.* § 1288.

²¹⁵ *Id.* § 226(e)(1).

²¹⁶ CAL. CHAMBER COM., *Private Attorneys General Act, in* AGENDA FOR CALIFORNIA RECOVERY 95, 95 (2022), <https://advocacy.calchamber.com/wp-content/uploads/2022/02/2022-Business-Issues-Labor-and-Employment-Private-Attorneys-General-Act.pdf> [<https://perma.cc/2LJN-YXJL>].

²¹⁷ Michael J. Nader & Zachary V. Zagger, *No COVID-19 Slowdown for California PAGA Filings: The Data Is In*, NAT'L L. REV. (July 17, 2022), https://www.natlawreview.com/article/no-covid-19-slowdown-california-paga-filings-data?utm_source=sfmc&utm_medium=email&utm_campaign=&utm_term=2022-07-18+ILR+Daily&utm_content=7/18/2022 [<https://perma.cc/GB2A-TBY9>].

²¹⁸ CAL. LAB. CODE § 2699(i) (West 2021).

²¹⁹ RACHEL DEUTSCH, REY FUENTES & TIA KOONSE, CALIFORNIA'S HERO LABOR LAW: THE PRIVATE ATTORNEYS GENERAL ACT FIGHTS WAGE THEFT AND RECOVERS MILLIONS FROM LAWBREAKING CORPORATIONS 8 (2020), https://www.labor.ucla.edu/wp-content/uploads/2020/02/UCLA-Labor-Center-Report_WEB.pdf [<https://perma.cc/5B8W-FW9E>].

²²⁰ See Sherman Act, 15 U.S.C. § 1; *The Antitrust Laws*, *supra* note 209. For an example of antitrust enforcement under common law prior to the enactment of the Sherman Act, see *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 188 (1871).

²²¹ See 15 U.S.C. §§ 41–48; 15 U.S.C. § 12; *see also The Antitrust Laws*, *supra* note 209 (describing the Clayton Act as one of the three federal antitrust statutes).

every state has implemented its own analog.²²² And these laws are sometimes more expansive than federal regulation.²²³ One interesting feature is that these laws are almost always worded in a similar manner, empowering “any person” to “sue” or “recover” damages from trusts or some forms of monopoly. Below are five examples:

Table II-2: Examples of Antitrust Private Rights of Action

State	Antitrust Private Right of Action
AL	“Any person, firm, or corporation injured or damaged by an unlawful trust, combine, or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of \$500 and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly and may commence the action therefor against any one or more of the parties to the trust, combine, or monopoly” ²²⁴
IN	“Any person or persons or corporations that may be injured or damaged by any such arrangement, contract, agreement, trust, or combination described in section 1 of this chapter may sue for and recover in any court of competent jurisdiction in this state, of any person, persons, or corporation operating such trust or combination, the full consideration or sum paid by him or them for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust.” ²²⁵
MA	“Any person who shall be injured in his business or property by reason of a violation of the provisions of this chapter may sue therefor and recover the actual damages sustained, together with the costs of suit, including reasonable attorney fees. If the court finds that the violation was engaged in with malicious intent to injure said person, the court may award up to three times the amount of actual damages sustained, together with the costs of suit, including reasonable attorneys fees.” ²²⁶
MN	“Any person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies, injured directly or indirectly by a violation of sections 325D.49 to 325D.66, shall recover three times the

²²² See NATIONAL SURVEY OF STATE LAWS 3-7 (Richard A. Leiter ed., 8th ed. 2019) (providing an overview of every state’s antitrust regulations).

²²³ See generally *id.*

²²⁴ ALA. CODE § 6-5-60 (2021).

²²⁵ IND. CODE § 24-1-1-5 (2021).

²²⁶ MASS. GEN. LAWS ch. 93, § 12 (2021).

actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees."²²⁷

TN "Any person who is injured or damaged by any such arrangement, contract, agreement, trust, or combination described in this part may sue for and recover, in any court of competent jurisdiction, from any person operating such trust or combination, the full consideration or sum paid by the person for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust."²²⁸

In addition to their similar wording, state antitrust laws typically invoke a hybrid model that empowers both private litigants and state attorneys general. For instance, the Colorado Antitrust Statute of 1992 prohibits a variety of anticompetitive conduct.²²⁹ Colorado gives the attorney general power to enforce the law on behalf of the state as well as *parens patriae* on behalf of individuals.²³⁰ The statute also empowers "[a]ny person injured in its business or property by reason of any violation of this article" to sue for injunctive relief and damages.²³¹ In the case of civil damages, private parties may receive fees or treble damages.²³² It is this damages provision that gives significant heft to the antitrust private right of action. Other state statutes adopt a more complex structure. For example, in California, the Unfair Competition Law (UCL)²³³ prohibits unfair competition generally,²³⁴ which it defines as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" along with certain activities prohibited by other statutes.²³⁵ This capacious definition sweeps in a variety of behavior, including anticompetitive conduct.²³⁶ The California statute adopts a hybrid enforcement, but its language is not as explicit as Colorado's statute.²³⁷ Again, this single private right of action implicates vast regulatory and economic authority.

227 MINN. STAT. § 325D.57 (2021).

228 TENN. CODE ANN. § 47-25-106 (2021).

229 See COLO. REV. STAT. § 6-4-104 (2021) ("Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce is illegal.") (amended 2023).

230 See *id.* §§ 6-4-111 to -112 (current versions at §§ 6-4-112 to -113).

231 See *id.* §§ 6-4-113 to -114 (current versions at §§ 6-4-114 to -115). Note that the current version says "[a]ny person injured, either directly or indirectly, in its business or property by reason of a violation of this article" may sue for injunctive relief or damages. *Id.* (emphasis added).

232 See *id.* § 6-4-114(1-2) (current version at § 6-4-115(1-2)).

233 See CAL. BUS. & PROF. CODE §§ 17000-17210 (West 2021).

234 See *id.* § 17206(a).

235 *Id.* § 17200.

236 See *Cel-Tech Comm'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 539-40 (Cal. 1999) (describing the broad scope of the UCL).

237 See CAL. BUS. & PROF. CODE § 17206(a) (West 2021).

2. Measuring Growth in the Last Twenty Years

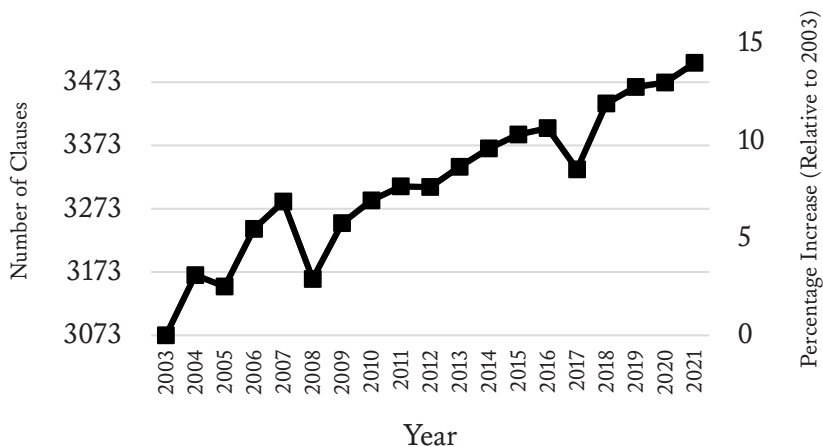
We present findings on the annual growth of private rights in state codes, as measured by the number of clauses containing a private right. Figure II-4 presents annual counts for our pessimistic queries over all states annually between 2003 and 2021. The number has been trending upwards since 2003, barring dips in 2005, 2008, and 2017.²³⁸ Between 2003 and 2021, the number of private-rights clauses increased from 3,073 to 3,503, a growth rate of 14%. In other words, the states altogether added an average of 22.6 new private rights per year. When ignoring clauses that may be codifications of common-law claims (UCC or property), our queries find a similar growth rate of between 11% and 15%.

We additionally count the number of private rights which are accompanied by either a fee-shifting provision or a multiple-damages clause.²³⁹ Under our pessimistic queries, we observe the number of private rights grew from 1,260 in 2003 to 1,495 in 2021 (a growth rate of 19%). Under optimistic queries, we observe the number of private rights grew from 4,869 in 2003 to 6,077 in 2021 (a growth rate of 25%).

²³⁸ These dips generally coincide with dips in the total number of clauses we count across all state codes. We therefore believe this is a result of states reorganizing and consolidating codes.

²³⁹ This matches Farhang's approach of first identifying sections of the U.S. Code with either multiple-damages or fee-shifting provisions.

Figure II-4: Number of Private Rights Over Time (Pessimistic Estimate)

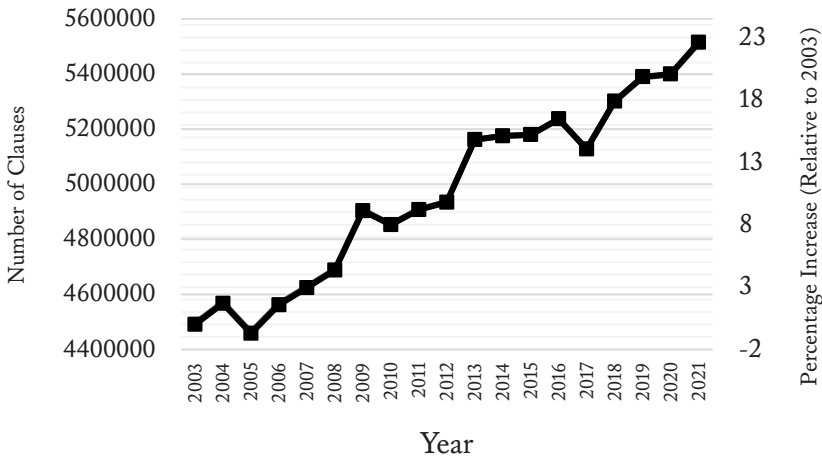


For our optimistic queries, we find similar trends to our pessimistic results. Between 2003 and 2021, the number of private rights increased from 15,989 to 18,751, for a relative growth of 17.3%. We observe steady increasing growth, barring dips in 2005 and 2017. Over this time period, legislators across the fifty states added an average of 145 new private rights per year.

Absolute differences in our pessimistic and optimistic estimates should not be a cause for concern. We observe that despite their absolute differences, the estimates from both queries broadly track each other. Both indicate steady growth between 2003 and 2021, at a rate between 14 and 17%.

To further contextualize the growth in private rights, we compare with the overall growth in state codes between 2003 and 2021. We focus on two measures: (1) the growth in the number of state clauses and (2) the growth in the number of subsections. Figure II-5 presents the number of clauses across all state codes annually between 2003 and 2021. We observe that the number of clauses across all states grew from 4,495,241 clauses to 5,512,152 clauses—a growth rate of 23.6%. From year to year, we find variation in the rate of growth. In some years, the number of clauses across all states appears to *reduce* relative to the previous year. These dips coincide with observed dips in the number of private rights identified by our queries. There are two potential explanations. First, for individual states, our dataset for certain years may be incomplete. But we performed a manual examination of samples of our data, and largely did not find this to be the case. Our second explanation is that state codes may be consolidated and re-edited from year to year, and local downward trends reflect this consolidation.

Figure II-5: Total Number of Clauses Over Time



These numbers suggest that private-enforcement clauses are being added at a rate that is slower than the general expansion of state codes. While the number of private-enforcement clauses grew by 14 to 17% between 2003 and 2021, the number of clauses in state codes grew by 23.6%. According to our optimistic estimates, the fraction of state clauses containing a private right of action decreased over this time period—from 0.35% in 2003 to 0.34% in 2021.

However, we caution against the conclusion that reliance on private enforcement is decreasing. Comparisons to the overall size of state codes can be misleading, as the vast majority of state-code clauses do not pertain to private or public enforcement. High levels of growth for these clauses—possibly driven by factors entirely unrelated to private enforcement—would have the effect of making it seem like states are growing less reliant on private enforcement. As a brief illustration of this point, we find that the number of clauses defining key terms in a statute grew from 419,368 in 2003 to 629,573 in 2021—a relative increase of nearly 50%.²⁴⁰

3. Disaggregating Growth by State

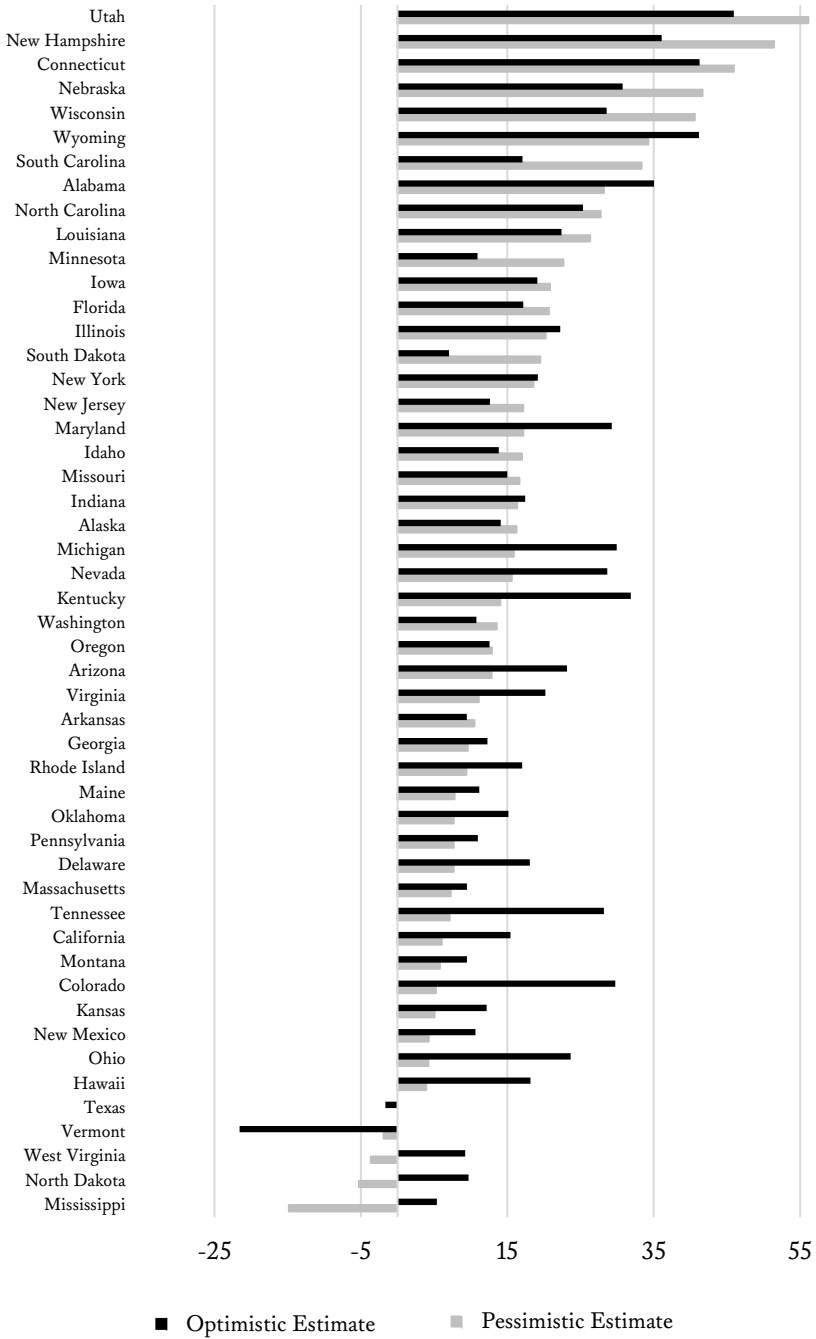
To gain additional perspective on where new private rights are arising, we compare the relative growth in private rights clauses across the fifty states. For each state, we compute the percentage increase in private-rights clauses between 2003 and 2021, using both our pessimistic and optimistic queries.

²⁴⁰ We measured this by counting the number of clauses belonging to a section containing the term “definition” in its title.

Figure II-6 presents the results for all fifty states. We observe that our pessimistic and optimistic estimates largely correlate in their relative ordering of states. At both extremes of the spectrum—states which experienced the largest and smallest relative growths—our pessimistic and optimistic estimates produce similar rankings. There are, however, some states for which our estimates differ significantly. For Tennessee, Colorado, Ohio, and Hawaii, our optimistic estimates indicate significantly larger relative growth than our pessimistic estimates do.

Our primary finding is that there is considerable variation across states in terms of the relative growth of private rights clauses. Some states—like Utah, New Hampshire, and Connecticut—have increased the number of private rights contained in their code by over 30% between 2003 and 2021. On the other hand, other states—like Mississippi, North Dakota, and West Virginia—have experienced negligible growth over this period. Somewhat stunningly, our analysis suggests that certain states have actually lost private rights. According to our pessimistic queries, Mississippi lost 14% of its private rights—dropping from fifty-four clauses in 2003 to forty-six clauses in 2021. Vermont, moreover, appears to have lost 27% of its private rights—dropping from 399 in 2003 to 313 in 2021.

Figure II-6: Percent Change in Private Rights by State (2003-2021)



C. Change in the Categories of Private Rights

To gain additional perspective on the evolution of private enforcement in the states, we sought to identify the topical areas in which new private rights were emerging. We applied our topical mapping protocol to private rights identified in 2003 and 2021 and measured the relative difference between the two years for each topic.

Under both our pessimistic and optimistic queries, we observe that the rate of growth differs across topical areas. Though there is considerably more disagreement between our optimistic and pessimistic queries here, the largest relative growths appear to come in areas relating to communication, civil rights, and securities. Under communication, we observe that added private rights largely reflect the growth of the Internet, pertaining to issues spanning privacy,²⁴¹ broadband accessibility,²⁴² electronic communications,²⁴³ and online criminal activity.²⁴⁴ The reliance on private enforcement for these issues is stark given the lack of equivalents at the federal level. As we further discuss in Part IV, this suggests that private enforcement in the states is more dynamic, responding to issues arising from the introduction and proliferation of novel technologies.

For civil rights, we find that state clauses are considerably more expansive in subject matter than their federal counterparts, which mostly pertain to discrimination on the basis of protected class. In the states, private enforcement for civil rights includes protections against law-enforcement violence,²⁴⁵ discrimination on the basis of health-related quarantines,²⁴⁶ employer retaliation for reporting of child trafficking,²⁴⁷ and the summoning of police officers for the intent to perpetuate unlawful discrimination.²⁴⁸ Here, some clauses go so far as to create a private right for any violation of a state bill of rights.²⁴⁹

²⁴¹ See, e.g., CAL. GOV'T CODE § 6218.05 (West 2021) (reproductive patient privacy on the Internet); MINN. STAT. § 13.825 (2021) (privacy to data collected by recording devices worn by police officers); N.H. REV. STAT. ANN. § 193-E:5 (2021) (educational privacy).

²⁴² See, e.g., TENN. CODE ANN. § 65-25-134 (2021).

²⁴³ See, e.g., TEX. BUS. & COM. CODE ANN. § 321.104 (2021) (electronic mail); N.D. CENT. CODE § 51-28-08.1 (2021) (telephone solicitations).

²⁴⁴ See, e.g., ARIZ. REV. STAT. ANN. § 18-543 (2021).

²⁴⁵ See, e.g., 740 ILL. COMP. STAT. 24/5 (West 2021).

²⁴⁶ See, e.g., MINN. STAT. § 144.4196 (2021).

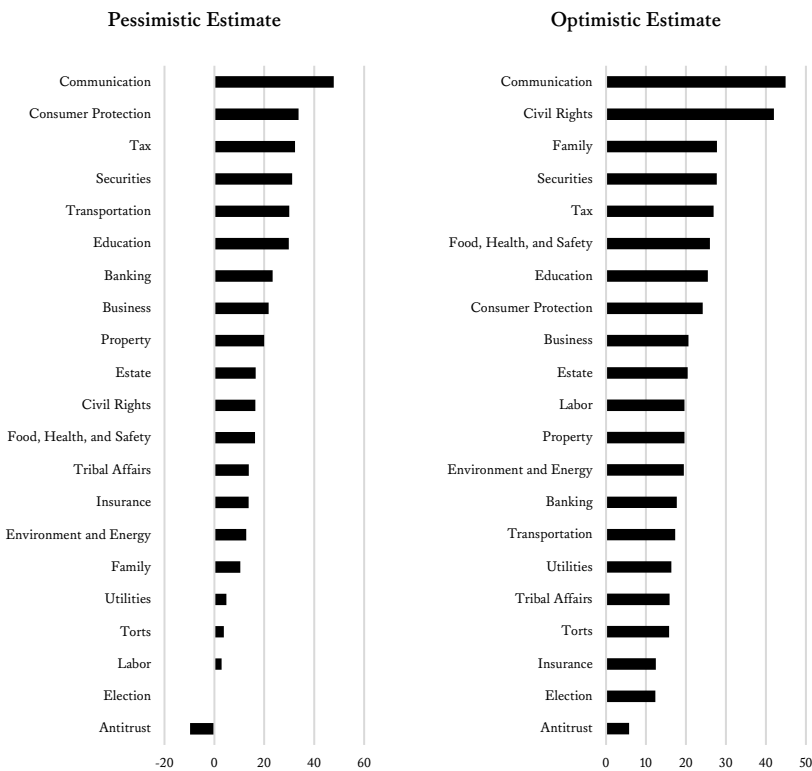
²⁴⁷ See, e.g., OKLA. STAT. tit. 21, § 870 (2021).

²⁴⁸ See, e.g., WASH. REV. CODE. § 4.24.345 (2021).

²⁴⁹ See, e.g., N.M. STAT. ANN. § 41-4A-3 (2021); see also Jay Schweikert, *New Mexico Enacts Landmark Qualified Immunity Reform Legislation for All Public Officials*, CATO INST.: CATO AT LIBERTY (Apr. 7, 2021, 4:56 PM), <https://www.cato.org/blog/new-mexico-enacts-landmark-qualified-immunity-reform-legislation-all-public-officials> [<https://perma.cc/E7XJ-WJJV>] (“This landmark piece of legislation creates a state-law cause of action against any public official who

We also observe significant growth in private rights in the area of securities law. Here, many new rights seem to overlap with existing federal securities laws.²⁵⁰ However, we observe that for some states, the growth in private enforcement appears to have been spurred by the adoption of model statutes like the 2002 Uniform Securities Act.²⁵¹ Between 2003 and 2021, we find that a number of states that added securities private rights—including Hawaii, Michigan, and Wyoming—also passed portions of the original model statute.

Figure II-7: Percent Change in Number of Private Rights



violates someone's rights under the New Mexico State Constitution . . ."). We intend to test specific areas in future empirical analyses.

²⁵⁰ See, e.g., VA. CODE ANN. § 6.2-203 (2021) (purchases with illegal currency); MICH. COMP. LAWS § 451.2509 (2021) (broker liability); WYO. STAT. ANN. § 34.1-8-404 (2021) (wrongful registration).

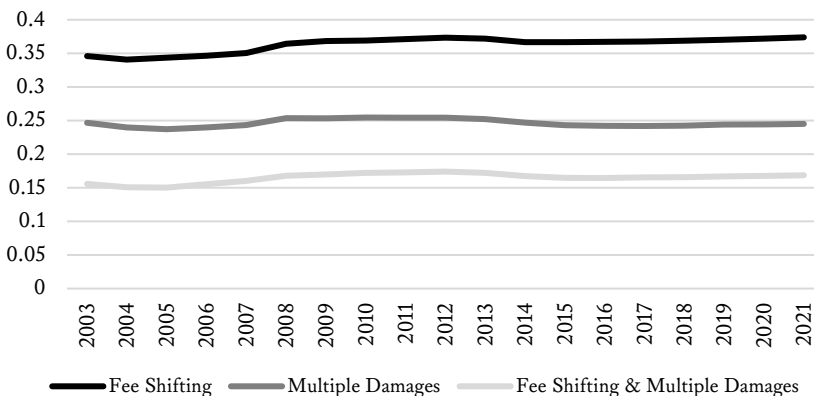
²⁵¹ See UNIF. SEC. ACT (UNIF. L. COMM'N 2002).

D. Change in Multiple-Damages and Fee-Shifting Clauses

We next investigate whether the rate at which private rights co-occur with attorney fee-shifting and multiple-damages clauses has changed since 2003. Figure II-8 provides the results for pessimistic queries respectively. The three trend lines in the figure denote the fraction of subsections that year which contain a multiple-damages clause (dark grey), a fee-shifting clause (black), and both multiple-damages and fee-shifting clauses (light grey).

Both our pessimistic and optimistic estimates find stability in the percentage of fee-shifting and multiple-damages provisions. Although these clauses accompany a sizeable fraction of private rights—between 15 and 30% depending on the estimate used—the majority of private rights appear to stand alone. Second, we find that fee-shifting clauses are more common than multiple-damages clauses. Importantly, we observe that the fraction of private rights associated with fee-shifting or multiple-damages clauses has remained nearly constant between 2003 and 2021. The fraction of private rights with multiple-damages clauses decreased for our pessimistic queries (from 24.6% to 24.9%) and for our optimistic queries (from 18.5% to 18.2%). The fraction of private rights with fee-shifting clauses slightly increased for our pessimistic queries (from 34.6% to 37.4%) and optimistic queries (from 25.4% to 27.7%). Given that the number of private rights clauses grew by between 14 and 17% during this period, these statistics suggest that multiple-damages and fee-shifting clauses also grew at commensurate rates. In short, the balance of such provisions has not substantially changed over the last eighteen years.

Figure II-8: Proportion of Private Rights Clauses Occurring in Sections with a Fee-Shifting Clause, Multiple-Damages Clause, or Both (Pessimistic Estimate)



III. TESTING THE SEPARATION-OF-POWERS THEORY

When do state states adopt private-enforcement provisions? As a first step toward understanding when and why states adopt private-enforcement provisions, we explore whether our novel data supports the separation-of-powers theory. If the theory explains political behavior in the states, we should—all else equal—expect to see a correlation between divided government and private-enforcement adoption. As a preview, our bottom line is that we fail to find empirical evidence in favor of the separation-of-powers theory. In short, it appears the political dynamics explaining private enforcement might be fundamentally different in the states compared to that in the federal government. We hope future work will use this null finding as a jumping-off point for further theory building and empirical testing. With an eye toward such work, we highlight several theories as possible pathways for future research in Part V.

A. Explanatory Variables

Our main explanatory variables for testing the separation-of-powers theory are various measures of divided government. A standard measure for divided government is tracking partisan control over different branches of government.²⁵² Accordingly, we collected detailed data describing party control in the states from Ballotpedia.²⁵³ Using this data, we constructed three variables capturing different forms of divided government.²⁵⁴ *Divided Any* is a binary variable taking a value of one when one party controls the governorship and another party controls at least one legislative chamber.²⁵⁵ *Split Legislature* indicates when Democrats and Republicans each control one

²⁵² See, e.g., Ash et al., *supra* note 68, at 91 (applying a similar measure for divided government). Following existing literature, we compare divided government in the given year and compare this to our private-enforcement outcomes in that year. A more dynamic model of separation of powers might incorporate overtime shifts in political uncertainty. For instance, we might analyze how a party's control in a year compares to their previous ten-year average. Although our data provides the most comprehensive study of state private enforcement to date, our limited number of years of study (2003-2021) would make it difficult for us to pick up these effects, if they existed at all. Studying the interaction between political uncertainty and separation appears to be a promising area for future research. We thank Shirin Sinnar for this comment.

²⁵³ See, e.g., *Party Control of Oregon State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Oregon_state_government [https://perma.cc/BP22-AMN9] (last visited Jan. 16, 2023) (describing Oregon government control by party). Ballotpedia does not have legislative party-control information for Nebraska, so we omit this state from our analyses. See *Party Control of Nebraska State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Nebraska_state_government [https://perma.cc/YGF6-JCMP] (last visited Jan. 16, 2023).

²⁵⁴ See Ash et al., *supra* note 68, at 91 (using similar variables).

²⁵⁵ *Id.* This measure is equivalent to the “Divided Government” variable studied by Farhang. See FARHANG, *supra* note 7, at 72.

legislative chamber.²⁵⁶ Finally, *Divided Governor* is equal to one when one party control the governor's mansion and the other party has unified control of the legislature.²⁵⁷

Although political scholarship on divided government often focuses on party control, ideological distance might also explain differences in private-enforcement adoption.²⁵⁸ Following Farhang, we incorporate variables that measure the ideology of critical actors in the political system.²⁵⁹ To measure ideology, we use CF scores—ideology measures derived from campaign finance records.²⁶⁰ Positive scores indicate conservative ideology and negative liberal ideology. *Governor Distance* captures the ideological distance between the governor and the median member of the legislature.²⁶¹ *Court Distance* is the ideological distance between the median legislative member and the median of the supreme courts. We include information about the courts to test for the possibility that ideological control of the courts might shape legislatures' incentives to use private enforcement.²⁶² One implication of the separation-of-powers theory is that legislatures may be especially likely to use private enforcement when they share ideological priorities with the courts.²⁶³

²⁵⁶ Ash et al., *supra* note 68, at 91.

²⁵⁷ *Id.*

²⁵⁸ We view Farhang's empirical chapter as a contribution to both the divided-government and separation-of-powers scholarship. Whereas the former has tended to focus on party control of government, *see* FARHANG, *supra* note 7, at 60-84, the latter often involves theoretical claims better tested by ideological measures, *see generally, e.g.*, Adam Bonica & Maya Sen, *A Common-Space Scaling of the American Judiciary and Legal Profession*, 25 POL. ANALYSIS 114 (2017) (tracking ideology across all tiers of the federal judiciary and the legal profession); Adam Bonica & Michael J. Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 J.L. ECON. & ORG. 472 (2014) (measuring the ideology of state Supreme Court justices based on campaign finance records). Following Farhang, we use both approaches.

²⁵⁹ FARHANG, *supra* note 7, at 72-73.

²⁶⁰ *See* Bonica & Woodruff, *supra* note 258; Adam Bonica & Maya Sen, *Judicial Reform as a Tug of War: How Ideological Differences Between Politicians and the Bar Explain Attempts at Judicial Reform*, 70 VAND. L. REV. 1781 (2017) (explaining and predicting judicial reform based on ideology). CF scores have been used to study a range of political actors, including legislators. *See generally, e.g.*, Adam Bonica, *Inferring Roll-Call Scores from Campaign Contributions Using Supervised Machine Learning*, 62 AM. J. POL. SCI. 830 (2018).

²⁶¹ This is roughly equivalent to Farhang's *Presidential Distance Variable*. The only difference is that our measure is the median of all legislators, whereas Farhang measures the mean of the chamber medians. Notably, either representation is a simplification. A more formal separation-of-powers model would likely need to include theory about the placement of the two legislative chambers vis-à-vis the court median and governor. Since our main goal is to test Farhang's theory, we omit this complex analysis.

²⁶² *See* FARHANG, *supra* note 7, at 73 (employing a similar method).

²⁶³ Instead of measuring court-of-appeals ideology like Farhang, *see id.*, we measure the median of that of the state supreme court. Although Farhang makes good points about how the appeals court might measure the ideology of the everyday judiciary better, the standard approach in the separation-of-powers literature is to use the supreme-court median. *See* Bonica & Woodruff, *supra*

One complication of studying the states is that many have separately elected attorney generals' offices.²⁶⁴ In theory, these positions have significant power over law enforcement in states. Following the separation-of-power theory, this may affect state policymakers' strategic calculus. In particular, the separation-of-powers theory predicts that legislatures are more likely to adopt private enforcement when at least one chamber is controlled by a political party different from that of the attorney general. To account for this possibility, we also collected information on the political affiliation of state attorneys general.²⁶⁵ Our variable *Divided AG* is equal to one when the attorney general is from a different political party from at least one legislative chamber.²⁶⁶

Finally, we test for three non-separation-of-powers arguments as alternative explanations. All three of these are grounded in alternative theories discussed and tested by Farhang.²⁶⁷ First, we test the budget-constraint theory.²⁶⁸ This theory posits that private enforcement is particularly attractive to legislators when there is a lack of resources available for public enforcement.²⁶⁹ To measure state capacity, we follow Farhang and include *Budget Surplus*, a measure of total revenues minus total expenditures.²⁷⁰ Another hypothesis discussed by Farhang is the so-called "rent-seeking lawyer hypothesis."²⁷¹ This hypothesis suggests that lawyers lobby for private enforcement because it increases economic demand for legal work. To measure lawyers' potential influence over the legislative process, we collected data on the number of lawyers in each state (*Lawyers Per Capita*).²⁷² Third, some argue, as discussed above, that Democrats are more likely to favor private enforcement.²⁷³ In Farhang's terminology, this is the "party alignment hypothesis." Accordingly, we used our party control data to create

note 258, at 490-491 (discussing how they use CF scores to test separation-of-powers models). Moreover, data availability counseled in favor of this approach.

²⁶⁴ Seifter, *supra* note 65, at 1551-55 (discussing elected positions in state government, including AGs).

²⁶⁵ We collected this information from a battery of sources, including election returns and secretaries of states' websites.

²⁶⁶ In other words, it is equivalent to *Divided Any* but analyzing the legislature's party vis-à-vis that of the attorney general, not that of the governor.

²⁶⁷ See FARHANG, *supra* note 7, at 69-70 (explaining the budget-constraint theory).

²⁶⁸ See *id.* at 71-72.

²⁶⁹ *Id.*

²⁷⁰ Revenue and expenditure data was pulled from *Annual Survey of State and Local Government Finances*, U.S. CENSUS BUREAU (August 09, 2022), <https://www.census.gov/programs-surveys/gov-finances.html> [<https://perma.cc/3MN7-G4QP>].

²⁷¹ See FARHANG, *supra* note 7, at 69.

²⁷² This data was pulled from *Occupational Employment and Wage Statistics*, U.S. BUREAU LAB. STAT. (May 2021), <https://www.bls.gov/current/oes231011.htm> [<https://perma.cc/FJ7V-2MYN>].

²⁷³ See FARHANG, *supra* note 7, at 71.

Democratic Legislature which is equal to one when Democrats control both chambers of the legislature.

B. *Bivariate Evidence*

As a first step in our empirical investigation, we present visual evidence describing the bivariate relationship between our explanatory variables and private-enforcement adoption. Figure III-1 offers a series of box plots and scatter plots describing the relationship between our explanatory variables and private-enforcement provisions. The underlying data for the plots is measured at the state-year level. The y-axis is the change in private enforcements per year and the x-axis of each plot is a level of explanatory variables under study for a given year. For binary variables (*Any Divided*, *Divided AG*, and *Democratic Legislature*), we present box plots summarizing the data spread.²⁷⁴ The box describes the middle 50% of observations, while the solid indicates the median of the data.²⁷⁵ The plots displaying continuous variables (*Governor Distance*, *Court Distance*, *Budget Surplus*, and *Lawyers Per Capita*) are scatter plots.²⁷⁶ In these plots, we also include loess smoothers to capture the underlying trends in the data.²⁷⁷

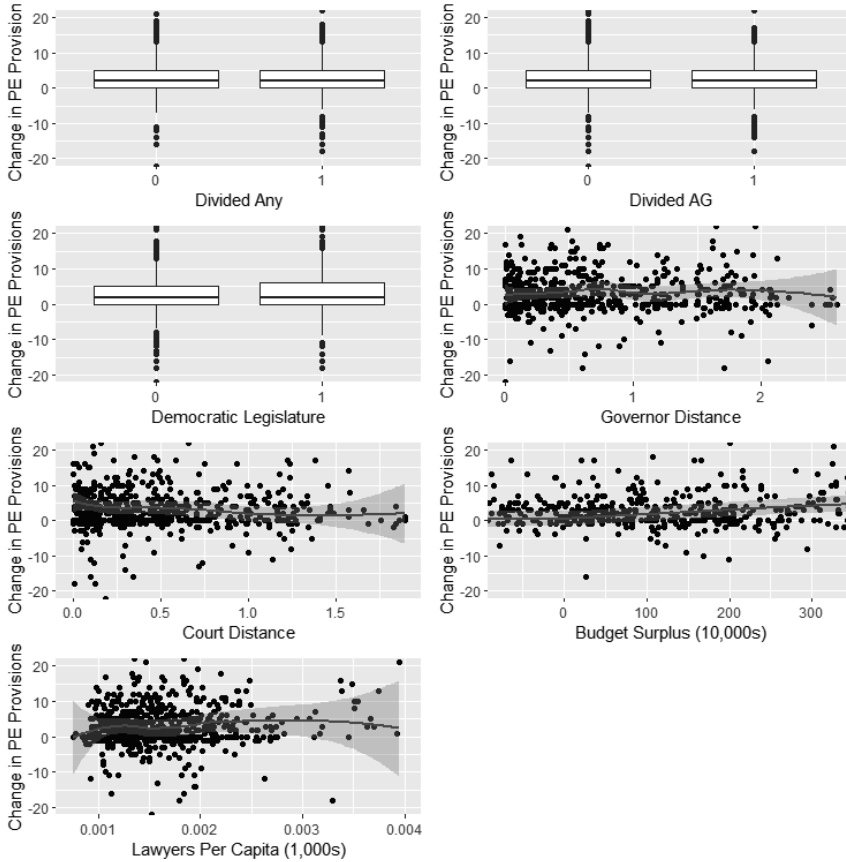
²⁷⁴ For simplification, we only include one box blot in each figure measuring divided government (*Divided Any*).

²⁷⁵ See *A Box and Whiskers Plot (in the Style of Tukey)*, GGLOT2, https://ggplot2.tidyverse.org/reference/geom_boxplot.html [<https://perma.cc/3TMQ-RM45>] (last visited Jan. 16, 2023) (explaining box and whiskers plots).

²⁷⁶ See Rudy Guerra & David M. Lane, *Introduction to Bivariate Data*, in INTRODUCTION TO STATISTICS 167 (David M. Lane ed.), https://onlinestatbook.com/Online_Statistics_Education.pdf [<https://perma.cc/KE8H-STNT>] (last visited Sept. 9, 2023) (explaining scatter plots).

²⁷⁷ See WILLIAM S. CLEVELAND, THE ELEMENTS OF GRAPHING DATA 168-73 (rev. ed. 1994) (describing LOESS).

Figure III-1: Bivariate Relationships Between Independent Variables and Yearly Change in Private Enforcement Provisions



A simple visual inspection of the plots suggests there is very little to no relationship in support of the separation-of-powers theory. For both the optimistic and pessimistic data, it appears states adopt private-enforcement rates at similar rates under divided government. We reach the same conclusion when looking at *Divided AG*. Likewise, greater ideological distance between the legislative median and governor does not seem to have a positive relationship with private-enforcement adoption. Finally, it does not appear that private-enforcement adoption is especially likely in states where the state supreme court median and legislature are closer.

These plots similarly do not provide evidence in favor of the alternative explanations discussed above. State governments under the control of Democrats do not appear to adopt more private-enforcement provisions.

Similarly, the loess lines for *Budget Surplus* and *Lawyers Per Capita* are mostly flat, suggesting there is no strong correlation between these variables and private-enforcement adoption. To be sure, *Budget Surplus* might, under closer inspection, slightly point upward as we move to greater surplus levels. This trend, though, is small. And, significantly, the opposite of what we would expect under the budget-constraint hypothesis.

Overall, the evidence presented thus far does not seem to support the separation-of-powers theory. But there remains the possibility that the relationship between the explanatory variables and private enforcement exists once we account for conditional relationships among the variables. To test whether these variables conditionally predict higher enforcement, we turn to regression analyses.

C. Regression Analyses

We employed a series of fixed-effect ordinary least squares (OLS) regression models to test whether our explanatory variables of interest (i.e., the various measures of divided government) predict differences in private rights of action adopted in a given year.²⁷⁸ Our main outcome measure is the total number of private rights of action per year in each state—in other words, the same measures we analyze in Figure II-6. As a complementary outcome, we also use the number of *clauses* with fee-shifting or damages provisions. This outcome captures a narrower subset of the spectrum of private rights discussed above. It also aligns our tests with the measure studied by Farhang.²⁷⁹

Each regression model also includes a series of covariates. These include state-fixed effects, which control for non-time-varying differences among states. Put another way, our models account for the fact that states may have different baseline averages of private rights of action. All models also include time-fixed effects, which control any time trends in private enforcement common to all states. These time-fixed effects, for example, control for a general societal trend toward more private enforcement, perhaps arising due to changes in the community or legal academy. We also include measures representing the alternative explanations discussed above, including *Tax Per Capita*, *Lawyers Per Capita*, and *Democratic Legislature*.

Our regression approach comes with a noteworthy limitation. In order to be interpreted “causally,” we need to satisfy the “selection-on-observables” assumption. Given our choice to use year and state fixed-effects models, this

²⁷⁸ See Ash et al., *supra* note 68, at 91 (discussing empirical strategy using OLS).

²⁷⁹ See FARHANG, *supra* note 7, at 60 (emphasis added) (presenting an empirical model that analyzes “congressional enactment of private enforcement regimes”).

assumption is satisfied if we are confident we have accounted for all time-varying state-level variables that might correlate with our explanatory variables and themselves cause private-enforcement adoption.²⁸⁰ We have attempted to address this possibility by including additional variables as “alternative theories,” some of which might correlate with divided government and explain private-enforcement adoption. But since we have not extensively searched for time-varying omitted variables and do not think our explanatory variables are “randomly assigned,” our results should be interpreted with appropriate caution.

All that said, it is worth reiterating that our study is the most extensive and stringent test of the separation-of-powers theory to date. Farhang’s pathbreaking study analyzed one government;²⁸¹ we build on this classic work and analyze nearly all the states. Analyzing multiple states is especially helpful because it allows us to statistically engage in counterfactual analysis not possible when analyzing only one government. Crucially, we can compare states with a divided government with those without it, holding other variables in our regression constant. We view our empirical tests as a novel contribution to legal scholarship and political science research on the separation of powers.²⁸²

The first set of regression results are presented in Table III-1. The first four columns are run on the optimistic data and the last four represent model results for the pessimistic data. We include optimistic data in our regressions as a conservative robustness check. Given the wide range between the two, it may be the case that the separation-of-powers thesis explains private enforcement better in one over the other.²⁸³ For each data source, there are four columns representing four different regression specifications. Each of these specifications contains different combinations of our divided-government measures. It is not advisable to include them all in one model because several are highly correlated and may cause multicollinearity.²⁸⁴ For

²⁸⁰ See JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST’S COMPANION* 59 (2009) (explaining the selection-on-observables assumption).

²⁸¹ See FARHANG, *supra* note 7, at 60 (emphasis added) (presenting an empirical model that analyzes “congressional enactment of private enforcement regimes”).

²⁸² *E.g.*, de Figueiredo et al., *supra* note 77, at 199.

²⁸³ As shown below, there is no difference in our results when using the optimistic or pessimistic data.

²⁸⁴ JOHN FOX, *APPLIED REGRESSION ANALYSIS AND GENERALIZED LINEAR MODELS* 341 (2008). As a standard diagnostic test, we also inspected the correlations among the variables in each model. *See id.* at 348. We also ran VIF tests for each regression model. *See id.* at 342. At bottom, our estimates for our main explanatory variables—in other words, our divided-government measures—appear unaffected by multicollinearity. None of the pairwise correlations among variables in the regression models surpassed .4. *Cf. id.* at 348 (showing examples of highly correlated variables). The only explanatory variable in any of the models with a VIF score higher than .4 was our *Lawyers Per*

example, adding together *Split Legislature* and *Divided Governor* equals *Divided Any*.

Table III-1: Predicting Yearly Change in Private Enforcement Provisions

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Divided Any	-1.078 (2.044)				0.541 (0.393)			
Split Legislature		-0.082 (2.353)				0.332 (0.615)		
Divided Governor		-1.996 (2.305)				0.486 (0.425)		
Divided AG			-0.350 (1.991)				0.165 (0.624)	
Governor– Legislature Distance				-2.316 (1.721)				-0.023 (0.379)
Court–Legislature Distance				4.168 (2.657)				0.302 (0.550)
Democratic Legislature	-3.707 (3.048)	-3.063 (3.100)	-3.253 (2.792)	-2.436 (2.785)	0.575 (0.709)	0.454 (0.815)	0.347 (0.692)	0.436 (0.730)
Lawyers Per Capita	7060.427 (8370.568)	7266.085 (8396.914)	6900.989 (8318.255)	4493.792 (7896.512)	725.379 (1643.759)	745.700 (1657.414)	806.415 (1676.222)	420.743 (1618.900)
Budget Surplus	0.001** (0.000)	0.001** (0.000)	0.001** (0.000)	0.000 (0.000)	0.000*** (0.000)	0.000*** (0.000)	0.000*** (0.000)	0.000*** (0.000)
Dataset	Optimistic	Optimistic	Optimistic	Optimistic	Pessimistic	Pessimistic	Pessimistic	Pessimistic
Time FE	Dummy	Dummy	Dummy	Dummy	Dummy	Dummy	Dummy	Dummy
State FE	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
N	829	829	829	638	829	829	829	638

Notes:

1) SEs clustered at state level.

2) *** = $p < .01$, ** = $p < .05$, * = $p < .1$

The evidence emerging from Columns 1-8 of Table III-1 is consistent with the bivariate evidence. We fail to find evidence that our separation-of-

Capita variable. See JOHN FOX & SANFORD WEISBERG, AN R COMPANION TO APPLIED REGRESSION 433-34 (3d ed. 2019) (providing examples of high and low VIF figures). This measure suggests our estimation for *Lawyers Per Capita* may be impacted by multicollinearity, making the standard errors larger for this specific coefficient. Since we are primarily interested in estimating the coefficients for the divided government variables, the possible presence of collinearity for *Lawyers Per Capita* (which we include primarily as a control variable) is less concerning.

powers-related variables significantly predict private enforcement. In statistical terminology, we fail to reject the null hypothesis that these variables do not affect private-enforcement adoption at any conventional level of statistical significance ($p < .10$, $p < .05$, $p < .01$).²⁸⁵ In fact, the only variable estimated with any level of notable precision is *Budget Surplus*. In magnitude, however, the estimated effect is small. According to Column 1, for example, a \$10,000 increase in the budget surplus is correlated with the adoption of 1/1,000th of a private-enforcement provision. And, significantly, the positive sign on the coefficient is not the expected sign of the coefficient under the budget-constraint theory.

The null results in Table III-1 might be due to the aggregate nature of the outcome variables. It seems possible that *Divided Government* is especially predictive of a narrower subset of private-rights provisions—specifically, fee and damage provisions. Indeed, these provisions are commonly associated with private rights of action in the existing literature, and importantly for our purposes, the main outcome studied by Farhang.²⁸⁶ With this in mind, Table III-2 presents results from the same regressions with the number of fee-shifting or damage-enhancement clauses as the outcome variable.

²⁸⁵ *Id.* at 114.

²⁸⁶ See FARHANG, *supra* note 7, at 66 (summarizing process for measuring private-enforcement regimes in the U.S. Code).

Table III-2: Predicting Yearly Change in Fee or Damages Clauses

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Divided Any	0.422 (1.484)				0.822* (0.462)			
Split Legislature		-0.172 (1.503)				0.319 (0.411)		
Divided Governor		0.332 (1.561)				0.931* (0.555)		
Divided AG			0.072 (0.957)				0.080 (0.305)	
Governor– Legislature Distance				-0.788 (0.891)				0.294 (0.379)
Court–Legislature Distance				2.548* (1.312)				0.296 (0.370)
Democratic Legislature	-1.527 (1.795)	-1.828 (1.661)	-1.705 (1.529)	-1.177 (1.573)	0.083 (0.456)	-0.214 (0.498)	-0.263 (0.416)	-0.009 (0.422)
Lawyers Per Capita	-1419.741 (4054.526)	-1423.855 (4093.539)	-1351.746 (4056.349)	1125.861 (3581.863)	-745.844 (1928.244)	-766.371 (1952.249)	-607.863 (1916.213)	-450.688 (1482.588)
Budget Surplus	0.000** (0.000)	0.000** (0.000)	0.000** (0.000)	0.001*** (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000*** (0.000)
Dataset	Optimistic	Optimistic	Optimistic	Optimistic	Pessimistic	Pessimistic	Pessimistic	Pessimistic
Time FE	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
State FE	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
N	829	829	829	638	829	829	829	638

Notes:

1) SEs clustered at state level.

2) *** = $p < .01$, ** = $p < .05$, * = $p < .1$

The results in Table III-2 tell a more nuanced story. For the results based on optimistic queries, we fail to find evidence that our primary measures of divided government are associated with the greater adoption of private rights of action plus fee or damages clauses. That said, one of our alternative divided-government measures based on ideological distance (*Court–Legislature*) distance appears statistically significant at conventional levels ($p < .05$) and positively signed. This result suggests that states with greater ideological distance between the supreme court and legislature may be more likely to adopt such clauses. However, we do not interpret this evidence as firmly cutting in favor of the separation-of-powers thesis. For one, this theory focuses on dynamics between the executive and legislative branches. And, what's more, the separation of powers predicts that greater ideological

distance between the judicial and legislative branches is negatively associated with private enforcement.

By contrast, Table III-2 does suggest our preferred measures of divided government (*Divided Any* and *Divided Governor*) likewise predict greater adoption of fee or damages clauses for the pessimistic queries ($p < .05$). While we report these results, we think they should be interpreted with caution. In a nutshell, when estimating fee-shifting or damage-enhancement provisions, we are more confident in the optimistic queries. In the optimistic queries measuring all private rights of action, we have a known false positive rate of 25%. We believe this known false positive rate is lowered significantly when filtering down to the fee-shifting or damage-enhancement clauses. As a result, the optimistic queries are more accurate when analyzing fee-shifting or damages clauses. For this reason, they remain our preferred measure when interpreting the results in Table III-2.²⁸⁷

At bottom, our empirical evidence provides little to no support for the separation-of-powers theory. Nor does it provide any evidence for the budget-constraint, rent-seeking-lawyers, or party-alignment hypotheses. We interpret this evidence as suggesting private enforcement in the states is more nuanced and complex than the political dynamics explaining adoption at the federal level. The following sections build upon these empirical findings. Part IV presents further qualitative evidence about how private enforcement in the states diverges from private enforcement at the national level. Part V concludes by offering several possible explanations for why we see so much divergence between the states and federal government in private-enforcement adoption.

IV. FURTHER DIVERGENCE BETWEEN STATE AND FEDERAL PRIVATE ENFORCEMENT

Given the lack of predictive power by the separation-of-powers theory, in this Part we explore other potential differences between state and private enforcement regimes. Sections IV.A and IV.B provide evidence—using state environmental law, among other areas—that state private-enforcement regimes indeed behave in radically different ways from that of the federal system. We specifically review evidence that state legislation is sprawling and chaotic and includes instances in which private rights disappear. These

²⁸⁷ Another reason we do not interpret these results as persuasively supporting the separation-of-powers thesis is that our analyses in Table III-1 and Table III-2 test many hypotheses. In this setting, caution about multiple-hypotheses testing and possibilities of false “significant” results is warranted. Although we omit formal corrections for this possibility, we would want to see smaller standard errors (or, in other words, a lower p-value) before placing too much weight on these estimates.

dynamics support the idea that the states and federal systems are operating under different institutional and perhaps political pressures.

An important consideration is that states wield wide-ranging power to order private-private relations (e.g., tort and contracts). This area of law has traditionally been governed by the common law. But many examples of state private enforcement are states using the positive law to supplement, codify, or amend these relationships. We view this decision as noteworthy and our efforts to measure these decisions as a contribution. Still, where the state is outsourcing responsibilities traditionally associated with public enforcement by the executive, state private enforcement might strike at institutional considerations different from those of federal private enforcement. That said, many examples of private enforcement in the states *do* look like federal examples. We start with one such example: developments in state environmental law. We then shift our discussion to highlighting examples where state and federal approaches to private enforcement further diverge.

A. *The Chaos of State Private Enforcement: The Case of State Environmental Law*

One major divergence between federal and state private enforcement is that the former is concentrated in a few statutes while the latter is diffused in a sprawling and almost endless web of provisions. We focus here on a major example—environmental law. As we explain below, while federal private rights of action are concentrated in a few environmental statutes, the state litigation state is dispersed in hundreds of separate provisions. And while the federal system is static and has been almost frozen since the 1970s, the states are constantly adding and subtracting rights. This is strong evidence that the state and federal governments have qualitatively distinct litigation states.

Scholars have long noted that federal private enforcement in contexts like civil rights or environmental law relies on tentpole legislation like the Civil Rights Act of 1964.²⁸⁸ Congressional adoption of private enforcement in federal statutes is carefully considered, deliberate, and federal private rights have lasted indefinitely. As far as we can tell, no federal private right of action has been abrogated.

Private enforcement of environmental law is a paradigmatic example of the federal approach. The environmental regime is concentrated in a few super statutes: the National Environmental Policy Act of 1969,²⁸⁹ the Clean Air Act of 1963,²⁹⁰ Clean Water Act of 1972,²⁹¹ and Endangered Species Act

²⁸⁸ See FARHANG, *supra* note 7, at 3.

²⁸⁹ 42 U.S.C. § 4321.

²⁹⁰ 42 U.S.C. § 7401.

²⁹¹ 33 U.S.C. § 1251.

of 1973.²⁹² The Clean Air Act, for instance, provides that “any person may commence a civil action on his own behalf . . . against any person . . . who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation”²⁹³ The private rights of action in environmental legislation “were explicitly justified as a mechanism that would deputize ‘private attorneys general’ to assist the Environmental Protection Agency (EPA) . . . in the enforcement of environmental regulations.”²⁹⁴ To be sure, all of these statutes have a hybrid model that also empowers agencies. But the legislative history “reveals that the primary goal of Congress . . . was to protect the public interest by allowing private actions, a policy which it considered a necessary supplement to administrative action.”²⁹⁵ The entire statutes came as one package, carefully balancing public and private enforcement.²⁹⁶ Debates over the bills were public, prominent, and extensively covered in the press. And after several decades, the regime is static: almost no new environmental statutes have been enacted.²⁹⁷

The states look nothing like this. One obvious difference is that states rely on private lawsuits in a range of areas that do not have federal analogs—veterinary care, pet services, gravedigging, etc.²⁹⁸ But beyond that, states constantly tinker with the language of existing rights and sometimes shoehorn new rights into previous legislative enactments.²⁹⁹ Unlike the federal system, state private enforcement is spread out and full of reversals. Sometimes a state legislature adopts a private-enforcement provision in one context only to amend the exact language a few years later, either to expand or abrogate it.³⁰⁰

Return, again, to environmental law, a key area of difference between the federal system and the states. In contrast to the federal approach—carefully considered, public, and static—state legislatures have empowered private citizens through a sprawling web of statutes, mixing both menial provisions along with tentpole legislation. In total, we found more than 748 statutes that

²⁹² 16 U.S.C. § 1531; see Mance, *supra* note 49, at 1497–98 (noting legislatures devised an environmental enforcement regime that relied in part on private enforcement).

²⁹³ 42 U.S.C. § 7604.

²⁹⁴ Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 99 (2005).

²⁹⁵ Edward J. Little, *The Aftermath of the Clean Air Amendments of 1970: The Federal Courts and Air Pollution*, 14 B.C. INDUS. & COM. L. REV. 724, 745 (1973).

²⁹⁶ Mance, *supra* note 49, at 1558.

²⁹⁷ *Id.* at 1517.

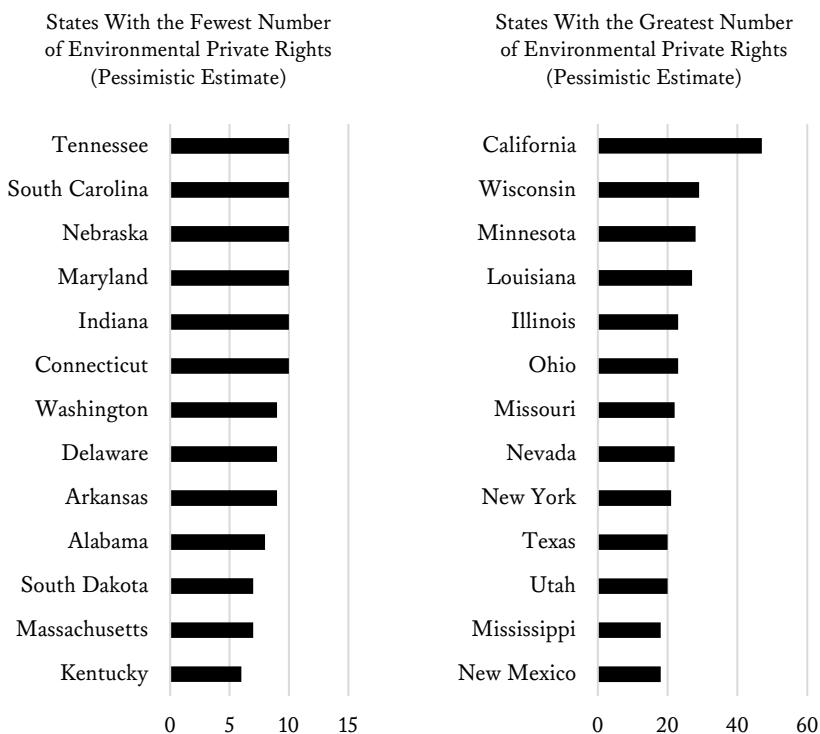
²⁹⁸ See *supra* notes 2–4 and accompanying text.

²⁹⁹ See *supra* note 51 and accompanying text.

³⁰⁰ See *supra* notes 54–58 and accompanying text.

contained a private right of action related to the environment. The ten states with the most and least common use of private environmental enforcement are in Figure IV-1.

Figure IV-1: Environmental Rights of Action Per State



Of these statutes, some are extraordinarily broad, authorizing any civil action that seeks to protect “the air, water, land, or other natural resources located within the state . . . from pollution, impairment, or destruction”³⁰¹ Others are more subject-area specific. Ohio has a specific private right of action for those injured by hazardous waste.³⁰² Massachusetts’s private right of action focuses even more specifically on “hazard[s] related to oil.”³⁰³ Texas has one authorizing private rights of action

301 See MINN. STAT. § 116B.03 (2021); see also HAW. CONST. art. 11, § 9 (“Each person has the right to a clean and healthful environment . . . including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings . . .”).

302 OHIO REV. CODE ANN. § 3734.101 (West 2021).

303 MASS. GEN. LAWS ch. 21E, § 15 (2021).

against persons who fail to follow rules regarding surface mining.³⁰⁴ And still others are just niche. Nevada provides a private right of action imposing liability on any person that kills livestock by failing to safeguard a “poisonous or injurious liquid.”³⁰⁵ New York allows a person to recover a statutory minimum of \$5 per tree killed by a “fire wilfully[sic] caused.”³⁰⁶ And California has one authorizing lawsuits against manufacturers that create tableware with “the potential to release [excessive] amounts of lead or cadmium”³⁰⁷

Contrast the specific nature of these statutes with the sprawling nature of environmental laws in New Jersey and Michigan. Enacted in 1974, the New Jersey Environmental Rights Act (NJERA) provides that “any person” may sue to enforce an existing environmental statute, ordinance, or regulation.³⁰⁸ The NJERA sets forth a hybrid enforcement regime: private enforcement actions may not be commenced unless the person seeking to sue has provided thirty-days’ notice to the Attorney General, the Department of Environmental Protection, the local governing body, and the intended defendant.³⁰⁹ Private enforcement was an important piece of the legislative scheme. The bill’s sponsor declared that the statute “will enable citizens to have ready access to the courts to resolve environmental disputes.”³¹⁰ Further, the legislature noted that several other states had adopted statutes that allowed private enforcement with favorable results.³¹¹ Indeed, a committee report from the New Jersey State Bar Association concluded that the statute would “effectively grant to interested citizens the right to sue polluters without having to prove special injury to the plaintiffs. It would thus remedy what its supporters believe to be an unnecessary and obsolete impediment to enforcement of antipollution laws.”³¹²

Similarly, the Michigan Environmental Protection Act (MEPA)³¹³ allows “any person” to bring an action “against any [other] person for the protection of the air, water, and other natural resources” against “pollution, impairment, or destruction.”³¹⁴ MEPA is particularly notable because it empowers any

304 TEX. NAT. RES. CODE ANN. § 134.182 (West 2021).

305 NEV. REV. STAT. § 575.040 (2021).

306 N.Y. ENV’T CONSERV. LAW § 71-0711 (McKinney 2021).

307 CAL. HEALTH & SAFETY CODE § 108905(a)-(d) (West 2021).

308 N.J. STAT. ANN. § 2A:35A-4 (West 2021).

309 N.J. STAT. ANN. § 2A:35A-11 (West 2021).

310 Gen. Assemb. 1245, 196th Leg., 1st Sess. (N.J. 1974), <https://repo.njstatelib.org/bitstream/handle/10929.1/5886/L1974c169.pdf?sequence=1&isAllowed=y> [<https://perma.cc/Q6C5-564A>].

311 *Id.*

312 N.J. STATE BAR ASS’N, *supra* note 23, at 3.

313 MICH. COMP. LAWS §§ 324.1701–.1706 (2021).

314 *Id.* § 324.1701.

citizen, including non-residents, to bring environmental enforcement suits, leading some to deem it “the progenitor and high mark of state environmental citizen suit laws”³¹⁵ For Professor Joseph Sax, an instrumental proponent of MEPA, the inclusion of a private right of action was key because, not only should the public have “a right to a decent environment,” the state “must recognize that the right is enforceable by the public.”³¹⁶ Indeed, other supporters “proclaimed the necessity of the citizen lawsuit provision to ensure the enforcement of regulatory statutes on industry and thus to preserve the state’s natural resources.”³¹⁷ MEPA and NJERA show that state environmental law can resemble their federal analogs, even if most of state private enforcement does not.

B. *The Disappearance of Private Rights of Action*

Another major difference between state and federal private enforcement is that state legislatures sometimes abrogate private rights of action. In order to look for this possibility, we searched for states that appeared to lose private rights. We used our queries to track clauses, focusing on instances where a private right appeared to disappear from a subsection in a state’s code. As mentioned above, Congress almost never abrogates private rights of action.³¹⁸ We were therefore not sure whether the states would replicate this approach or, instead, take a different path. We found that private rights do indeed disappear from state statutory texts. This means that trends in state private enforcement are not a uniform march toward more codification. Instead, it is oftentimes a push and pull between adopting private rights and retrenchment.³¹⁹

³¹⁵ See James R. May, *The Availability of State Environmental Citizen Suits*, 18 NAT. RES. & ENV’T. 53, 55 (2004).

³¹⁶ *Michigan Environmental Protection Act*, MICH. WORLD, https://michiganintheworld.history.lsa.umich.edu/environmentalism/exhibits/show/main_exhibit/1970s_activism/mepa [<https://perma.cc/84S4-QF7A>] (last visited Jan. 16, 2023).

³¹⁷ *Id.*

³¹⁸ To be sure, Congress has curtailed private rights of action without limiting them entirely. The Prison Litigation Reform Act, for example, arguably limits prisoners’ ability to bring suits enforcing civil rights law. 42 U.S.C. § 1997e. And Congress’s choice to alter damages in the Fair Debt Collection Practices Act likely affects a litigant’s willingness to bring such claims. 15 U.S.C. §§ 1692–1692p. But we are unaware of a single example of Congress eliminating an entire private enforcement provision, as we show occurs in the states. *But see* FARHANG, *supra* note 7, at 66 (discussing the repeal of some statutes while also noting that private enforcement provisions tend to “endure”).

³¹⁹ On a related note, we again emphasize that this study does not assess private enforcement utilization. Instead, we analyze how many private rights are “on the books.” It would be incorrect to interpret our results as suggesting that the sprawling world of private rights has necessarily led to more litigation.

Indeed, it turns out that states sometimes eliminate private rights of action without any fanfare, deep legislative debates, or even media coverage. Consider, for instance, section 63-11-3 of the Mississippi Code which, according to our queries, lost its private right in 2013. The statute broadly pertains to DUIs by minors (Mississippi has among the most stringent laws in this domain). Prior to 2013, the statute explicitly provided that “[a]ny person whose confidential record has been disclosed in violation of this paragraph shall have a civil cause of action against the person and/or agency responsible for such disclosure.”³²⁰ This provision was important because the DUI-related statute allowed a court to rule that a first offense shall be “nonadjudicated.”³²¹ Under the statute, the Department of Public Safety was to maintain a confidential registry of all nonadjudicated cases.³²² Judges and prosecutors were permitted to access the registry in order to determine a potential offender’s eligibility for nonadjudication.³²³ The private right then allowed any person to protect this confidentiality, by making officers associated with breaches liable in a civil claim.

By all accounts, this private-enforcement clause typified the form and function of private enforcement. The original language could have empowered the Mississippi Attorney General or a local district attorney to bring a claim. Instead, it directly empowers the minor harmed by the breach to bring an action in court. The clause is also socially and politically meaningful. It empowers a vulnerable population (minors) over a right that is socially significant (privacy) and is intended to be used against a powerful entity (the state).

But, after 2013, the provision disappeared, apparently in response to a Mississippi Court of Appeals case. Specifically, in 2012, the Mississippi Court of Appeals heard *Baker v. State*.³²⁴ Baker was a minor arrested and charged with a DUI under section 63-11-30(3) of the Mississippi Code. After the justice court agreed to Baker’s petition for nonadjudication, the Department of Public Safety deemed that nonadjudication was improper, as Baker’s failure to agree to a breathalyzer test rendered her ineligible for nonadjudication. The Court of Appeals agreed with the Department of Public Safety. In 2013, the Mississippi state legislature then made substantial amendments to section 63-11-30(3), seemingly in response to *Baker*. The amendments largely pertained to nonadjudication, adding guidance for when and how nonadjudication may occur. In the context of *Baker*, the bulk of these changes

³²⁰ MISS. CODE ANN. § 63-11-30(3)(g) (2010).

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Baker v. State*, 99 So. 3d 241 (Miss. Ct. App. 2012).

seem like a natural example of a legislature responding to judicial interpretation of a statute. However, even though the *Baker* decision was not related to private lawsuits, the Mississippi legislature eliminated the private right of action.³²⁵

The disappearance of section 63-11-30(3)(g) was, as far as we can tell, not covered in press coverage at the time. Thus, it is difficult to determine why Mississippi decided to remove this private right. However, *Baker* suggests a causal chain of events leading to its removal. The Mississippi legislature decided to reexamine section 63-11-30(3) in response to *Baker*. In doing so, they noticed a portion of the statute which—though not at issue in *Baker*—was undesirable as a matter of policy preferences. Hence, *Baker* became a pretext under which the legislature could remove a private right.

The disappearance of a private right of action in Mississippi is no outlier; our searches find dozens of apparently disappearing rights. We attempted to calculate the cumulative number of private rights that disappeared by examining changes to the code citations associated with detected private rights. Unfortunately, we realized that citations in state codes are highly unstable for many reasons.³²⁶ Structural modifications to state codes mean that examining when citations disappear can at best offer a measure of “legislative tinkering” and the extent to which legislatures tinker with aspects of their code encompassing private enforcement. Using our pessimistic queries, we find a total of 587 clauses for which a private right was associated with the clause prior to 2021, but for which no such clause (with that citation) existed in 2021. For instance, in 2019, Wyoming repealed the Hospital’s Record Act of 1991, which predated HIPAA.³²⁷ In doing so, they eliminated a state private right that empowered patients to sue hospitals for confidentiality breaches.³²⁸

³²⁵ See generally MISS. CODE ANN. § 63-11-39(3) (2015). Our queries do not detect the addition of a new private right anywhere else in Title 63, suggesting that this isn’t a case of the Mississippi legislature merely moving the right to another part of the title. Searches for similar language elsewhere in Mississippi’s code also return no matches, additionally suggesting that the right was not redundant.

³²⁶ States frequently revise and reorganize their statutes in ways that alter the location and citation for a private right without meaningfully modifying substantive law. As a body of state law grows in substance or size, state legislatures may elect to reorganize the hierarchical structure of this section, adding new subdivisions or defining a new citation scheme.

³²⁷ See S. SF0096, 65th Leg., Gen. Sess. (Wyo. 2019); see also Jessica Davis, *Wyoming Seeks to Repeal Hospital Privacy Regulation for HIPAA Clarity*, HEALTH IT SEC. (Feb. 6, 2019), <https://healthitsecurity.com/news/wyoming-seeks-to-repeal-hospital-privacy-regulation-for-hipaa-clarity> [<https://perma.cc/HTR5-TRJM>].

³²⁸ The Wyoming Supreme Court noted the effect of this repeal in *Wiese v. Riverton Memorial Hospital, LLC*, a case in which the plaintiffs brought claims under section 35-2-616 prior to Wyoming eliminating the provision. 520 P.3d 1133 (Wyo. 2022).

We find that private rights “disappear” in different ways. Sometimes private rights are replaced by administrative remedies. For instance, prior to the Tim Cole Act in 2008, Texas law empowered wrongfully imprisoned individuals to recover compensation by filing suit in a court of compensation.³²⁹ The act replaced a judicial remedy with an administrative one—wrongfully imprisoned individuals may now only recover damages by filing an application with the comptroller’s judiciary section.³³⁰ In other instances, private rights disappear through legislative amendments which appear to narrow their scope or immunize certain behaviors. In 2020, for example, Utah amended section 78B-6-2103, which created a private right of action for minors against distributors of pornography, to foreclose liability when a defendant can demonstrate reasonable efforts to avoid violating the statute through the use of warning labels.³³¹

C. *State Legislation and Model Codes*

One final difference between state and federal private enforcement is that model codes exert a powerful influence on state legislation, leading to the adoption of private enforcement in a non-partisan manner. There is no analogous influence on federal statutes—no exogenous source of legislative language that may shape when and how the federal government adopts private-enforcement clauses. This divergence, again, underlies how federal and state private enforcement co-exist within radically distinct institutional dynamics.

Model codes are sets of standardized guidelines or principles that are intended to serve as a basis for state legislation.³³² Professional organizations, advocacy groups, or other expert stakeholders often develop model codes and promote them in state legislatures.³³³ Many state legislators look to model codes as a source of inspiration or guidance when drafting legislation. By adopting a model code, legislators can save time and effort in the legislative process and ensure that their laws are based on best practices or established standards. Additionally, model codes can promote consistency and uniformity

³²⁹ TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001–.154 (West 2005); *see also* State v. Oakley, 227 S.W.3d 58 (Tex. 2007) (discussing then-Chapter 103, which provided either an administrative or judicial remedy).

³³⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 103.051 (West 2021).

³³¹ Compare UTAH CODE ANN. § 78B-6-2103 (West 2019), *with* UTAH CODE ANN. § 78B-6-2103 (West 2021).

³³² *See* 28 C.F.R. § 36.601 (2023) (defining model codes).

³³³ Deanna Barmakian, *Uniform Law and Model Acts*, HARV. L. SCH. LIBR. (Sept. 12, 2023), <https://guides.library.harvard.edu/law/unifmodelacts> [<https://perma.cc/AAD4-MXXR>] (explaining Uniform Laws).

in laws across different states, which can be especially useful in areas where states share common interests or face similar challenges.

More relevantly for our purposes, we found that model codes often come with private-enforcement clauses. For example, the model Athlete Agents Act—adopted by more than forty states—provides student-athletes with a private right of action against agents who violate a provision of the act.³³⁴ The model Securities Act—adopted by more than twenty states—provides numerous private rights empowering shareholders and investors to recover damages for fraud and other violations.³³⁵ There are many other examples, spanning controlled substances,³³⁶ animal welfare,³³⁷ and tele-health.³³⁸

The popularity and diffusion of model codes could influence state adoption of private rights. For instance, legislators may adopt a model code to align their state's laws with those of neighboring states in order to promote interstate commerce or the ability for local judges to borrow precedent from other jurisdictions.³³⁹ The adoption of a model code may also depend on whether the issues it addresses are perceived to be of urgent social or political importance.³⁴⁰ Importantly, it seems that whether or not states adopt model acts is influenced by whether legislators are even aware of the model law's existence.³⁴¹

The existence of model codes could influence the lack of a meaningful relationship between state political control, divided government, and private-enforcement adoption. The reasons for the adoption of model codes provided above are exogenous to state political climate: organizations create and diffuse

334 ATHLETE AGENTS ACT § 16 (UNIF. L. COMM'N 2019); *Athlete Agents Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?communitykey=cef8ae71-2f7b-4404-9af5-309bb70e861e> [<https://perma.cc/QM98-DLAD>] (last visited Sept. 23, 2023).

335 UNIF. SEC. ACT § 509 (UNIF. L. COMM'N 2002); *Uniform Securities Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=8c3c2581-ofea-4e91-8a50-27eee58da1cf> [<https://perma.cc/K4HQ-88S2>] (last visited Sept. 12, 2023).

336 *See, e.g.*, DRUG LIAB. ACT (AM. LEGIS. EXCH. COUNCIL 2013).

337 ANIMAL WELFARE ACT OF 2004 (ANIMAL LEGAL & HIST. CTR. 2004).

338 TELEHEALTH ACT § 10(b) (UNIF. L. COMM'N 2022).

339 *See, e.g.*, Glenn G. Morris, *Model Business Corporation Act as Adopted in Louisiana*, 75 LA. L. REV. 983, 983-85 (2015) (describing ways in which Louisiana elected to adopt or modify the Model Business Corporation Act for its purposes and mentioning the fact that all other southeastern states had adopted the Model Business Code as a motivating reason for Louisiana's adoption).

340 *See* Sean Rossman, *Stand Your Ground, Right to Work and Bathroom Bills: 5 Model Bills That Spark Controversy*, USA TODAY (Dec. 11, 2019, 6:06 AM), <https://www.usatoday.com/in-depth/news/investigations/2019/04/03/stand-your-ground-bathroom-bill-right-to-work-sharia-alec-nra-model-bills-article-v/2883534002/> [<https://perma.cc/YCV2-Z3PP>] (describing how various controversial laws began as model bills).

341 *See* *March 8, 2004 Public Hearing Before the Judiciary Comm.*, 2004 Leg. Sess. (Conn. 2004) (statement of Larry Katz), <https://www.cga.ct.gov/2004/juddata/chr/2004judo0308-r001300-chr.htm> [<https://perma.cc/Z75V-4GD2>] (“Education about the [model] act and its availability for use in appropriate cases has been slowly occurring.”).

model codes and, in that sense, set the legislative agenda for many states. If the majority of private rights are passed as part of model laws—and the passage of model laws is driven by networks of influence and information amongst state legislators and lobbyists—then the actual impact of state political orientation and governmental control would be difficult to measure. Measuring the significance of these endogenous variables would require controlling for the exogenous nature of model codes. Given that this dynamic has no analog at the federal level, it again underlies the difference between state and federal private enforcement.

V. THE COMPLEXITY OF STATE PRIVATE ENFORCEMENT AND THREE ACCOUNTS OF DIVERGENCE

In this section, we explore several potential accounts and complications that may explain why the state model differs from the federal model. The discrepancy in private enforcement between the states and federal government calls out for an explanation. We offer several accounts: the differences in structure between the state and federal governments, the role of state attorneys general, the quality of state administrative agencies, and potential differences in partisanship patterns. A combination of these accounts, working together or individually, would explain why the separation-of-powers theory has no predictive value in the states.

To be clear, the accounts we offer are not meant to be an exhaustive or even causal account of the states' divergence from the federal government. Instead, we aim only to analyze the most salient institutional differences between the states and federal government that we expect are connected with state–federal divergence. That means that we are not interested here in conventional distinctions between state and federal legislation, including differences in geographic scope, the supposedly more democratic and responsive nature of state governments, and differences in tax or other legislative powers. Perhaps legislators' considerations about whether judges are elected might shape their decision to use private enforcement. In other cases, private enforcement might emerge from disputes between state governments and localities or sources other than the legislature, such as ballot referenda. Nonetheless, we focus on important institutional differences that should, in theory, be connected with the legislative choice of private enforcement in the states. We acknowledge that there may well be a host of other motivations and differences that we do not address here.

A. *The First Account of Divergence: The Structure of State Governments and Attorneys General*

One significant difference between the states and federal government is that state executive power is divided between governors and state attorneys general.³⁴² Beyond that, some states divide the executive even further, with offices like Secretary of State.³⁴³ This division can be important: states attorneys general have significant authority to enforce statutes without gubernatorial approval.³⁴⁴ Not only are state attorneys general the chief legal officers of their states, they also provide legal counsel to state agencies. State attorneys general have the power to initiate *parens patriae* proceedings on behalf of citizens. And they are active in areas like consumer-protection and antitrust law.³⁴⁵ To be sure, the quality and funding of state attorney-general offices vary. Given the well-known variation in state budgets and different constitutional approaches to executive power, it stands to reason that some offices are likely well-funded and formally independent from governors and legislatures, while others face constrained resources and, in some cases, likely function as appendages to the governor's office.³⁴⁶

Either way, taking state attorneys general into account complicates the story of private enforcement. A simple account of this complication would go as follows: The separation-of-powers theory posits that political divisions between the legislature and executive encourage legislators to vest enforcement power in private litigants. Subsumed in this theory is the assumption that a federal legislator can make a straightforward prediction—that placing enforcement power in a president of a different political party will weaken a statutory regime. In deciding whether to adopt private or public enforcement, Legislator A takes into account the political affiliation of President B. Adding a third actor into the mix that also shares executive power complicates the theory. In the states, Legislator A must take into account the political affiliation of Governor C and State Attorney General D. A simple prediction would be that this more complicated calculus muddies up the picture. Therefore, this account would expect that the separation-of-powers theory does not operate as cleanly in state governments.

³⁴² See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 n.3 (2006) (explaining that state attorney generals are independently elected in forty-three states); Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008) (highlighting that most states directly elect state attorney generals and other executive officers).

³⁴³ Marshall, *supra* note 342, at 2448.

³⁴⁴ See Lemos, *supra* note 150, at 492-98.

³⁴⁵ See *id.*

³⁴⁶ See Lemos & Young, *supra* note 154, at 120-21 (describing limited budgets and the willingness of state attorneys general to team up with private attorneys).

While this explanation is appealing, it also runs into one difficulty: it assumes political differences between state attorneys general and governors and even the power of state attorneys general to act independently. As an initial matter, state attorney-general power should not be overstated—Miriam Seifter has argued that, in most states, state attorneys general and governors “share the same political party affiliation, and not all state courts (or governors) regard separately elected officials as free from a governor’s control.”³⁴⁷ The data bears this out: most state attorneys general do share the political party of the governor.³⁴⁸ Perhaps most importantly, this first divergence assumes that state attorneys general have sufficient enforcement authority to affect the statutory regimes that legislators care about. While state attorneys general do have significant litigation power, they have little influence on state administrative agencies. By some accounts, most governors have “substantial control . . . over the majority of state agencies.”³⁴⁹ This means that when a legislator considers different enforcement mechanisms, public or private, they can almost always predict the political inclinations of state administrative agencies.

Taking this first divergence into account does slightly weaken the predictive value of the separation-of-powers theory. It does appear that splitting the executive power may muddy up the story.

B. *The Second Account of Divergence: The Quality of State Administrative Agencies*

A second potential difference between the states and federal government is that state administrative agencies may be weaker than their federal counterparts. In particular, they may have less capacity to engage in public enforcement. This account goes as follows: Because state administrative agencies remain underfunded and relatively unsophisticated vis-à-vis the federal government, private enforcement is a better alternative in the states than at the federal level. Therefore, given the relative weaknesses of public administrative enforcement, we should expect state legislators to choose private enforcement more often than federal legislators. If this account is right, the separation-of-powers theory would lose significant explanatory value.

The world of state administrative governance is complex and difficult to generalize. Every state has an analog to the federal administrative state: agencies empowered by state legislation to regulate environmental pollution,

³⁴⁷ See Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 490 (2017).

³⁴⁸ See Appendix at tbl.A-2.

³⁴⁹ Seifter, *supra* note 347, at 490.

business competition, employment, and so on. But the size and sophistication of state agencies vary. As far as we can tell, there are no systematic studies of agency quality. But we see several reasons to suspect they may be, on average, less well-positioned to engage in public enforcement than the federal government is.

First, the level of funding and resources available to state agencies is generally lower than that of federal analogs. Compared to the federal government, state agencies have a lower share of total tax revenue produced in the United States.³⁵⁰ And a bulk of this goes to providing services, such as healthcare and education.³⁵¹ Moreover, states often require balanced budgets.³⁵² All of this likely leads to fewer resources for public enforcement, which likely curtails states' ability vis-à-vis the federal government to hire quality staff and implement effective programs.

Second, and relatedly, the federal government may enjoy an advantage in attracting and retaining talented employees. This may be related to higher salaries, as discussed above, or other factors like the importance of federal work as compared with the states. The chief law-enforcement entity in the federal government system—the Department of Justice—is widely seen as a highly desirable place to work for well-credentialed lawyers.³⁵³ Although we are unaware of systematic study of state attorney-general lawyers, conventional wisdom suggests they tend to be from less elite backgrounds. In turn, if lawyer quality impacts public-enforcement outcomes, then we might expect states to have lower capacity, especially in enforcement.³⁵⁴

Third, the federal government may be able to ensure a relatively high level of agency independence vis-à-vis the executive that some states do not. State agencies' uncertain standing in state constitutional law—particularly those nominally “independent”—might compound this problem. On paper, many state agencies are independent.³⁵⁵ Such independence could, in theory, make working at state agencies an attractive proposition for public-interest

350 See Gordon, *supra* note 64 (noting the federal government began to raise significantly more revenue than the states after the Great Depression and World War II).

351 *Id.*

352 *What Are State Balanced Budget Requirements and How Do They Work?*, *supra* note 63 (noting Balanced Budget Requirements are now a pillar of state budgeting practice).

353 See *The Fast Track to a U.S. Attorney's Office*, HARV. L. SCH., <https://hls.harvard.edu/bernard-koteen-office-of-public-interest-advising/opia-job-search-toolkit/career-and-application-guides/the-fast-track-to-a-u-s-attorneys-office/> [<https://perma.cc/8DK7-T6B5>] (last visited Aug. 15, 2023) (discussing steep competition for Assistant United States Attorney positions).

354 Note that state agencies have a record of regulatory slippage—and sometimes outright regulatory failure—in implementing federal (as well as state) programs.

355 See Seifter, *supra* note 65, at 1551-58 (describing the constitutional origins of state agency independence).

lawyers.³⁵⁶ But some scholars also argue that this *de jure* independence is a mirage in many states. Instead, many agencies appear to be *de facto* dependent on other branches of government.³⁵⁷ Adding to the challenge, states occasionally tinker with their civil-service system,³⁵⁸ which might make state agencies an even less attractive place to work. ³⁵⁹ By contrast, the federal government has, for now, maintained some semblance of agency independence through its formal approach to agency independence and well-developed system of norms.³⁶⁰ It also has a highly stable civil-service system for government employees dating back to at least the early 20th century.³⁶¹ This may contribute to the federal government's comparative advantage in recruiting talented lawyers and, as a result, increase their comparative capacity to utilize public enforcement.

Finally, other factors may weaken the monitoring of state agencies, reducing their quality relative to their federal counterparts. Miriam Seifter has argued that relative to federal analogs, state agencies are less constrained by "civil society oversight," leading to a fear that state agencies may be unfaithful to legislative goals.³⁶² At the federal level, administrative agencies are held accountable by "countless watchdogs within civil society [that] work to monitor, expose, and impede executive misdeeds."³⁶³ Such oversight has the effect of ensuring that agencies are complying with Congress's legislative goal when wielding enforcement power.³⁶⁴ In particular, civil-society oversight may stave off regulatory capture, as the combination of "required transparency and public monitoring" deters egregious agency behavior.³⁶⁵ However, civil-society oversight is weak when it comes to state agencies. Public-interest groups, which play an essential role as watchdogs at the federal level, appear to be outnumbered, outspent, and outgunned by private

³⁵⁶ See Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 873-74 (2007) (arguing that civil service increases policy expertise by giving employees more control over policy).

³⁵⁷ See Seifter, *supra* note 65, at 1544 (discussing how state courts' approach to administrative law likely undermines independence).

³⁵⁸ See Ash et al., *supra* note 68, at 90-91 (noting that civil-service outcomes go up and down in states).

³⁵⁹ JOHNSON & LIBECAP, *supra* note 69, at 14 (arguing that the federal government adopted meritocratic civil-service reforms to improve the quality of bureaucracy); Ting et al., *supra* note 69, at 367 ("While we do not accord civil servants any competence advantage over patronage appointees, a wide range of empirical research generally supports the notion that civil service improves bureaucratic performance.").

³⁶⁰ Seifter, *supra* note 65, at 1550 (arguing a mix of law and norms makes the federal government's approach to agency independence stable).

³⁶¹ Ash et al., *supra* note 68, at 83-84 (discussing history of United State civil-service reform).

³⁶² Seifter, *supra* note 72, at 115.

³⁶³ *Id.* at 108-09.

³⁶⁴ *Id.* at 124-26 (describing the legal compliance of agencies).

³⁶⁵ *Id.* at 126.

lobbyists at the state level.³⁶⁶ Media outlets, also major watchdogs at the federal level, are less focused on state governments as a result of “plummeting advertising revenues and evolving consumption habits” focused on national politics.³⁶⁷ State agencies themselves also collect less data and are less transparent about their enforcement practices, meaning state-level watchdogs simply have less to watch.³⁶⁸ Together, the absence of sufficiently robust civil societies in the states may make state legislatures more reluctant to delegate enforcement power to agencies, as there is a greater risk of regulatory capture and diversion from the legislatures’ policy intentions.

A combination of these factors may weaken the quality of state agencies and, therefore, make a state legislature more hesitant to delegate enforcement to state agencies. Taking agency quality into account complicates the story of private enforcement. In deciding whether to adopt private or public enforcement, a legislator theoretically has a simple choice: administrative agency or private litigants (setting aside hybrid enforcement). The quality of the relevant administrative agency is an important consideration—the higher the quality, the more attractive it may be to a legislator, and the lower the quality, the less attractive the choice. A simple prediction would be that if state agencies are generally lower in quality than their federal counterparts, private enforcement is a more attractive choice to state legislators as compared to federal legislators.

The legislative history behind California’s PAGA is illustrative. PAGA’s powerful private right of action arose against the backdrop of an ill-equipped Department of Industrial Relations (DIR) that was “failing to effectively enforce labor law violations.”³⁶⁹ California legislators were exasperated that, despite vast increases in staffing and funding, the DIR was issuing “fewer than 100 wage citations per year for all industries throughout the state.”³⁷⁰ Their solution: private enforcement. As in the section above, this account of state agency quality would predict that the separation-of-powers theory does not operate as cleanly in state governments.

³⁶⁶ *See id.* at 135-39 (finding that private interest composed 70% of state lobbying entities and 86% of state lobbying expenditures in 2007).

³⁶⁷ *Id.* at 141-42 (finding that local journalism in the states has been on a consistent downward trend, as measured by number of reporters, newspapers, and readers).

³⁶⁸ *Id.* at 131-34 (describing the difficulties for states’ data collection and disclosure).

³⁶⁹ SENATE RULES COMM., SENATE FLOOR ANALYSIS SB 796, 2003-2004 Reg. Sess., at 4 (Cal. Sept. 10, 2003).

³⁷⁰ *Id.* The legislature estimated that there were “33,000 serious and ongoing” wage violations in the garment industry alone. *Id.*

C. *Third Account of Divergence: Polarization, State Politics, and the Vertical Separation of Powers*

A final possible point of state–federal divergence is that partisanship dynamics might operate differently in the states. Farhang’s separation-of-powers theory emerged out of the study of the federal government,³⁷¹ where partisanship has grown since the 1980s and 1990s.³⁷² As discussed above, clear partisan differences between political parties yield straightforward predictions about the tradeoff between public and private enforcement.³⁷³ But whether state governments are similarly polarized is an open question in political science scholarship.³⁷⁴ If state politics are less polarized or polarized at a later date, this might explain why we fail to find evidence that the separation-of-powers hypothesis explains state behavior.

Although extensive research has studied polarization in the federal government for decades, scholarship is just starting to scratch the surface in the states. Some of this work suggests that state politics and policy might be less polarized than federal politics. For instance, one recent study of ticket-splitting (a phenomenon in which voters cast their ballots for multiple candidates of different parties in the same election) finds that it is more common in state elections than in federal elections.³⁷⁵ Other related work shows that changes in party control in the states leads to very small changes in policy.³⁷⁶ Other scholars disagree. In their view, state politics have nationalized and, as a result, polarized in a fashion similar to federal politics.³⁷⁷

371 FARHANG, *supra* note 7, at 60 (emphasis added) (presenting an empirical model that analyzes “congressional enactment of private enforcement regimes”).

372 Gary C. Jacobson, *Partisan Polarization in American Politics: A Background Paper*, 43 PRESIDENTIAL STUD. Q. 688, 690 (2013).

373 See *supra* Section I.A and accompanying text.

374 Cassandra Handan-Nader, Andrew C. W. Myers & Andrew B. Hall, *Polarization and State Legislative Elections* 1 (Stan. Inst. Econ. Pol’y Rsch., Working Paper No. 22-05, 2022), https://stanforddpl.org/papers/handan-nader_myers_hall_polarization_2022/handan-nader_myers_hall_polarization_2022.pdf [<https://perma.cc/PVG3-BJZU>] (discussing the obstacles to studying polarization in the states).

375 See Shiro Kuriwaki, *Ticket Splitting in a Nationalized Era* 1 (Mar. 2023) (unpublished article) (on file with author), <https://osf.io/preprints/socarxiv/bvgz3/> [<https://perma.cc/2CAA-2X9G>].

376 See Devin Caughey & Christopher Warshaw, *Policy Preferences and Policy Change: Dynamic Responsiveness in the American States, 1936–2014*, 112 AM. POL. SCI. REV. 249, 261 (2017) (finding that shifts in policy outcomes are “weakly related to shifts in party control”).

377 See, e.g., DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED* 2 (2018) (explaining that “many of the same voters, candidates, parties, and interest groups” are now active at both the state and national levels); Steven Rogers, *National Forces in State Legislative Elections*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 207, 208 (2016) (illustrating the similarities between state and federal elections to demonstrate the nationalization of state politics).

Who is right in this debate has a direct bearing on the separation-of-powers theory and how we interpret our empirical results. If state politics is less polarized than federal politics, then we might not expect the separation-of-powers theory to apply. If state politics is relatively polarized, then our null finding is even more perplexing.

Even if state politics and policy are polarized similarly to federal politics, issue-level research might help us square this puzzle. One well-cited study finds that state politics has polarized, but there is significant variation by policy issue.³⁷⁸ For example, this work finds that policy in healthcare is highly predicted by party control of government, while education is not.³⁷⁹ One possible explanation for this trend is that areas with clear analogs in national political debates (e.g., healthcare and abortion) have nationalized, while areas falling mostly under state control (e.g., education and crime) have not. Many of the subject areas in which we find private enforcement do not have natural analogs in national politics because they are uniquely areas of state control.³⁸⁰ As a result, issue-specific polarization may explain why the separation of powers does not garner empirical support in our study.

Timing might also matter. Recent work studying legislative elections in depth suggests polarization has indeed increased, but its onset may be more recent than polarization at the federal level.³⁸¹ That particular study pegs 2012 as a critical turning point in legislative elections.³⁸² If polarization in state politics has been concentrated in recent years, it is possible more predictable political divides over private enforcement have emerged in recent years. Unfortunately, this trend may be masked in our dataset and empirical analyses, which essentially focus on averages from 2002 to 2020. While we could in theory test whether the separation-of-powers theory is stronger in later years, we are hesitant to assign a year cutoff when the political-science scholarship is still so uncertain.

While we do not test whether recent polarization affects the separation-of-powers theory, there are plenty of avenues for future scholarship. Scholars might consider looking into the voting records of recently passed private-enforcement provisions and compare this with the political coalitions supporting earlier legislation. Future empirical work might consider breaking

³⁷⁸ See Jacob M. Grumbach, *From Backwaters to Major Policymakers: Policy Polarization in the States, 1970-2014*, 16 PERSPS. ON POL. 416, 416-17 (2018).

³⁷⁹ See *id.*

³⁸⁰ See, e.g., TENN. CODE. ANN. § 43-15-104 (2021) (contracting); KY. REV. STAT. ANN. § 362.1-308 (West 2021) (partnerships).

³⁸¹ See Handan-Nader et al., *supra* note 374, at 3 (finding that the advantage moderate candidates have traditionally had in state general elections has been reduced to zero since 2010).

³⁸² See *id.* at 27 (analyzing how the ideological effects in state legislative elections change after 2012).

down private-enforcement provisions by issue area and seeing if the separation-of-powers theory holds in more nationalized policy domains. Finally, all this work would be bolstered by future work taking our method and applying it to a longer span of years. More data yields more empirical leverage, making it more possible to test the several theories of divergence we have laid out.

Yet another possibility is that the relevant separation-of-powers axis in state politics is vertical, not horizontal. In this study, we focused on the horizontal conflict between the legislative and executive branches. But in recent years, conflicts between state and local governments have emerged as a fault line in state politics.³⁸³ It seems possible that state-level officials may use private enforcement as a way to check local officials declining to enforce laws. This also seems like another promising avenue for future research.

CONCLUSION

The Article demonstrates that private enforcement is a ubiquitous feature of state law. There are more than 3,500 private rights of action in state law, ranging from traditional areas like antitrust and employment, all the way to grave-digging and waste disposal. The trends are sobering: the states have been adding new private rights of action at a rapid pace over the past two decades. In areas like business regulation, communications, civil rights, and securities law, growth has been especially rapid.

Most importantly, focusing on the states sheds new light on existing theories explaining private enforcement at the federal level. We find no empirical support for the leading theory, Farhang's separation of powers, as applied to the states. States do not appear to adopt private-enforcement provisions more under periods of divided government. And this result is robust to different measures of divided government. We likewise find no evidence for the "rent-seeking lawyer" hypothesis—that Democratic legislatures are more likely to adopt private enforcement provisions—or that private enforcement is used primarily as a cost-saving measure. Our findings are eye-opening: none support Farhang's theory or any other leading explanation.

At bottom, our results show that state private enforcement is strikingly different than the federal system; it is messier and even chaotic. While federal private enforcement relies on tentpole legislation, the states have sprawling regimes spread across dozens or hundreds of statutes. Moreover, the states

383 Jonathan Mattise, *District Attorneys Refuse to Prosecute Some GOP-Led Laws*, ASSOCIATED PRESS (Oct. 19, 2021), <https://apnews.com/article/crime-tampa-tennessee-nashville-787cae9774f5fa36797ce89bb25932a7> [<https://perma.cc/94Z8-TPMJ>] (describing local progressive prosecutors' decisions not to enforce certain state laws).

tinker with their statutes continuously. We have laid out several explanations for why trends in private enforcement in the states diverge from the federal model. A promising place for future investigation is the role elected attorneys general play in public enforcement, the potential that lower state agency quality might influence state legislatures, and finally, that polarization of state politics might follow a distinct trajectory. If true, this might explain why the separation theory fails in our study. Intriguingly, it might also explain why we might expect it to gain descriptive power in the future.

Reaffirming the central role that private enforcement plays in our system reveals the need to reorient civil procedure and incorporate state private rights of action more explicitly into its core teachings. Digging into state law discloses the shocking ubiquity of private enforcement in nearly every area of human affairs.

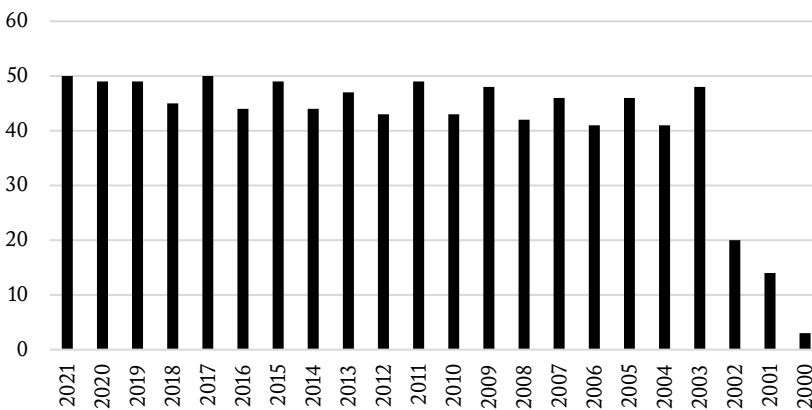
APPENDIX

Data Availability

We observed that data coverage was non-uniform. For instance, codes were available for less than half of the states between the years of 2000 and 2002. In addition, many states do not publish codes every year, opting instead to release updates every other year.

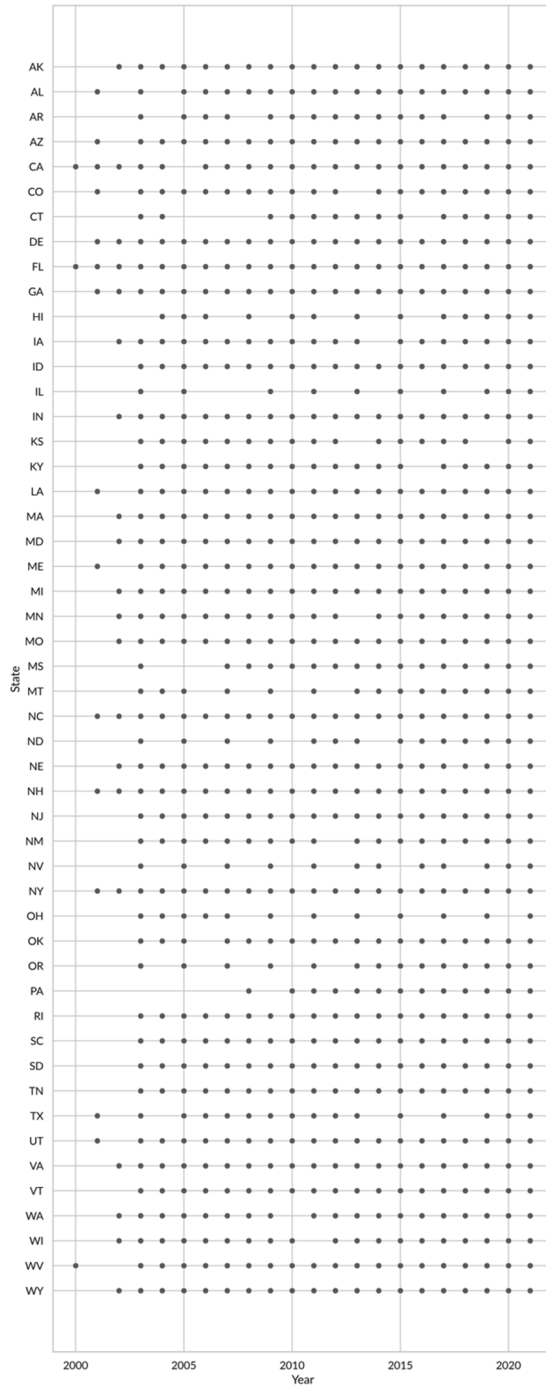
We therefore decided to restrict our analysis to the years spanning 2003 to 2021. When a state's code is missing for a particular year, we used the latest code available prior to that year. For instance, because we lack the Minnesota state code for 2015 but do have access to the Minnesota state code for 2014, we naively assume that Minnesota's state code in 2015 was identical to its state code in 2014 and use the 2014 version for our analysis. This is an application of the Last Observation Carried Forward (LCOF) imputation strategy, which is common in many applications. We note that while other imputation strategies are available, many require imposing structural assumptions on the distribution of the variable being imputed.

Figure A-1: Number of States for Which Codes Are Available for Each Year



In general, we observe that most imputations entail successive years. During the time-period of interest, only four states (CT, PA, IL, MS) are missing codes for multiple consecutive years. For twenty-seven states, we have data available for each year of our window.

Figure A-2: Years of Availability by State



Methodology: Detecting Private Rights

Our first goal is to identify which clauses in our dataset contain a private right of action. We define a clause as containing a private right whenever that clause contains statutory language empowering a private individual or entity to file a legal claim against an identified defendant.

For obvious reasons, manually examining each of the clauses in our corpus is logistically impossible and would require extraordinary resources. Critically, manually examining even a random sample of clauses is infeasible. Per our calculations, the prevalence of private and public rights in state codes is so miniscule—less than .1%—that a random sample would require manual annotators to sort through hundreds of clauses to identify even a single relevant clause.

Our approach combines machine learning with keyword search to identify private rights. Numerous prior works have relied on keyword search to measure the frequency of certain types of language in corpora of rules, contracts, or legal opinions.³⁸⁴ Authors will typically construct such search terms to capture as many instances as possible of the clauses of interest (“true positives”), while minimizing the number of clauses returned that are inapposite (“false positives”).

The conventional approach is to apply search terms on large legal search engines like Westlaw or LexisNexis. However, there are several challenges with this approach. In particular, the use of these search engines creates two measurement problems due to their lack of transparency. One is a problem of aggregation. In short, we are not sure what the unit of analysis is when counting a “private right.” It’s possible, for instance, that search engines intentionally limit the number of results displayed for queries with numerous results. Additionally, search results will only return documents that contain language matched by the query. If a document corresponds to a section of a state code—which may contain numerous private rights spanning different types of claims—that document will only be counted as a single private right. Second, and most importantly, the number of results returned by this method is highly dependent on the actual queries constructed, and we do not know the search terms used in the query. While our approach is also sensitive to the search terms utilized, we lay out our measurement approach for others to inspect and if they wish, replicate.

Our work addresses the first concern by independently applying queries to the corpus, without the need to rely on black-box legal search engines. To address the second concern, we draw inspiration from the methods that e-discovery practitioners use to identify relevant documents in large corpora.

³⁸⁴ See *supra* note 167.

There, too, practitioners must negotiate the fact that (1) corpora are extremely large and (2) the prevalence of relevant documents is very small. The central insight of e-discovery practitioners is that manual methods for identifying relevant documents can be augmented with machine-learning methods. Specifically, practitioners use documents that have been manually identified as relevant to train a machine-learning model to learn which documents are relevant. In doing so, practitioners find that models often learn attributes of these documents which make them relevant. By applying these models to the larger corpus, practitioners can then identify other documents which contain these features, and thus, are also likely to be relevant.

We apply a similar approach here. We began by collecting well-known federal private rights of action. Using these collected rights, we constructed a set of keyword search terms designed to return similarly worded private rights. Examples of these search terms include “anyone may file suit” and “any individual may bring a claim.” To account for the fact that these terms may be underinclusive, we then performed the following iterative procedure:

1. We applied these search terms to our corpora of state clauses and collected the clauses returned by our queries. We refer to these as the “positive clauses.”
2. We sampled a collection of random clauses which were not returned by our queries. We refer to these as the “negative clauses.” Given the low prevalence of private rights in our corpus, the negative clauses are extremely unlikely to contain any private rights.
3. We trained a simple machine-learning model to distinguish the positive and negative clauses. Because our positive clauses mostly contain private right rights, this model will learn textual attributes associated with a private right. The specific machine-learning model used was a “bag-of-words” model. This model is appealing because it is computationally inexpensive, easy to understand, and very predictable. For a given clause, the bag-of-words model will generate an estimated probability that the clause contains a private right.
4. We applied this model to clauses in the corpus that were not returned by our queries. We manually sampled a collection of the clauses which the model estimated as having a high probability of corresponding to a private right (i.e., a probability greater than 90%). We manually examined these clauses. Where a clause actually contained a private right, we constructed a new query designed to return that clause and added the query to our list of search terms.

In addition, every time we altered the set of search terms, we performed a validation check by sampling the set of positive clauses returned by those terms and manually counting the number that actually contained private rights. In total, we performed the iterative process enumerated above (and validations) eight times over the course of one year. At each validation step, we sampled and annotated 300 clauses.

Ultimately, this process produced two sets of queries, which we termed our *optimistic* and *pessimistic* sets. These queries represent different tradeoffs on over- and under-inclusivity. Our optimistic queries are intended to be overinclusive. As a result, a higher fraction of the clauses returned by these queries do not actually contain a private right. In contrast, our pessimistic queries are intended to be underinclusive. Thus, while most of the clauses returned by these queries contain a private right, these queries also fail to return a number of clauses which do contain private rights. Through manual validation, we determined that the accuracy of our pessimistic queries is 99%, and the accuracy of our optimistic queries is 75%.

We note several limitations of our approach. For one thing, it can only measure express rights of action, because implied rights of action by definition cannot be measured by phrases which traditionally create a right of action. And even among express rights of action, the algorithm presumably either undercounts or overcounts the true number, and the extent to which it does so will vary depending on whether one uses the optimistic or pessimistic data.

The dataset also is also limited because it measures the number of private rights of action. The theories we use the data to test are generally not concerned with the number of private rights of action but rather when governments prioritize private-enforcement regimes. A single private right of action in an important regulatory area—such as antitrust or environmental law—easily outweighs ten innocuous private rights of action which few litigants will ever use. Yet, our data emphasizes the latter.

Of course, any proxy a researcher chooses will have its limitations. If we measured the number of private suits brought in a given year, a variety of economic or sociological factors would distort our data—not to mention interference by judge-made law.

Despite these imperfections, our data offers insight into how the prominence of private rights of action varies relative to other factors. The data cannot prove causation by their own force, but they add detail to our understanding of the private-enforcement landscape and help evaluate existing theories.

Methodology: Identifying Fee-Shifting and Damage-Enhancement Clauses

In his analysis of federal private enforcement, Farhang counts clauses that contain damage enhancements or shift attorneys' fees using keyword terms.³⁸⁵ We reuse Farhang's terms when measuring damage enhancing and fee shifting clauses in the states.

Methodology: Topical Analysis

We determine the topic of private-rights clauses using a keyword-based approach. The table below enumerates our topics, and lists the keywords used for each topic. A clause is assigned to a topic when the keyword is found in the text of the clause or in the titles of any of the sections it is located in. Clauses may be in multiple topics.

Table A-1: Keywords Used By Topic

Topic	Keywords
Antitrust	"monopol", "antitrust", "competition",
Banking	"bank", "loan", "savings", "debt", "credit", "mortgage", "fund"
Business	"sale", "contract", "commercial", "commerce", "trade", "business", "financ", "investment", "partnership", "corp", "hotel", "fraud", "trademark", "registration", "licensing", "ucc", "indemnity", "patent", "copyright"
Civil rights	"civil rights", "discrimin"
Communication	"communication", "data", "tele", "internet"
Consumer Protection	"occupations", "unfair", "consumer", "professions"
Education	"education", "university", "college", "school", "libraries"
Election	"election", "vote", "ballot"
Environment and Energy	"water", "environment", "fish", "animal", "conservation", "natural", "agricultur", "livestock", "mine", "mining", "land resources", "gas", "drainage", "public resources", "public lands", "lands", "forest"
Estate	"estate", "probate", "wills", "uniform trust", "trust"
Family	"child", "family", "domestic", "cemeteries", "husband", "wife", "welfare", "juvenile", "divorce", "guardians", "public assistance", "marriage", "seduction", "minor"

³⁸⁵ FARHANG, *supra* note 7, at 82.

Food, Health, and Safety	“health”, “food”, “social”, “alcohol”, “liquor”, “mental”, “infants”, “grain”, “sanitary”, “substances”, “safety”, “fire”, “human services”, “human resources”, “hospital”, “abortion”, “disability”, “disabilities”, “sanitation”, “aging”, “care facility”
Tribal Affairs	“indian”, “tribal”
Insurance	“insur”
Labor	“labor”, “employ”, “work”, “job”, “retirement”
Property	“property”, “lien”, “eminent domain”, “land use”, “fence”, “land titles”, “zoning”, “park”, “escheats”, “nuisance”, “deeds”, “hous”, “landlord”, “tenant”, “condominium”, “common interest”, “upkeep”, “rent”
Securities	“securi”
Tax	“tax”
Torts	“defamation”, “wrongful”, “tort”
Transportation	“motor”, “vehicle”, “road”, “highway”, “transport”, “aviation”, “navigation”, “aeronautics”
Utilities	“utilit”

Table A-2: State Governor and Attorney General Political Affiliations as of February 2023

State	Governor	Governor's Party	AG	AG's Party
Alabama	Kay Ivey	Republican	Steve Marshall	Republican
Alaska	Mike Dunleavy	Republican	Treg Taylor	Republican
Arizona	Katie Hobbs	Democratic	Kris Mayes	Democratic
Arkansas	Sarah Huckabee Sanders	Republican	Tim Griffin	Republican
California	Gavin Newsom	Democratic	Rob Bonta	Democratic
Colorado	Jared Polis	Democratic	Phil Weiser	Democratic
Connecticut	Ned Lamont	Democratic	William Tong	Democratic
Delaware	John Carney	Democratic	Kathy Jennings	Democratic
Florida	Ron DeSantis	Republican	Ashley Moody	Republican

Georgia	Brian Kemp	Republican	Chris Carr	Republican
Hawaii	Josh Green	Democratic	Holly Shikada	Democratic
Idaho	Brad Little	Republican	Raúl Labrador	Republican
Illinois	J. B. Pritzker	Democratic	Kwame Raoul	Democratic
Indiana	Eric Holcomb	Republican	Todd Rokita	Republican
Iowa	Kim Reynolds	Republican	Brenna Bird	Republican
Kansas	Laura Kelly	Democratic	Kris Kobach	Republican
Kentucky	Andy Beshear	Democratic	Daniel Cameron	Republican
Louisiana	John Bel Edwards	Democratic	Jeff Landry	Republican
Maine	Janet Mills	Democratic	Aaron Frey	Democratic
Maryland	Larry Hogan	Republican	Anthony Brown	Democratic
Massachusetts	Maura Healey	Democratic	Andrea Campbell	Democratic
Michigan	Gretchen Whitmer	Democratic	Dana Nessel	Democratic
Minnesota	Tim Walz	Democratic –Farmer– Labor	Keith Ellison	Democratic
Mississippi	Tate Reeves	Republican	Lynn Fitch	Republican
Missouri	Mike Parson	Republican	Andrew Bailey	Republican
Montana	Greg Gianforte	Republican	Austin Knudsen	Republican
Nebraska	Jim Pillen	Republican	Mike Hilgers	Republican
Nevada	Joe Lombardo	Republican	Aaron D. Ford	Democratic
New Hampshire	Chris Sununu	Republican	John Formella	Republican
New Jersey	Phil Murphy	Democratic	Matt Platkin (acting)	Democratic
New Mexico	Michelle Lujan Grisham	Democratic	Raúl Torrez	Democratic
New York	Kathy Hochul	Democratic	Letitia James	Democratic

North Carolina	Roy Cooper	Democratic	Josh Stein	Democratic
North Dakota	Doug Burgum	Republican	Drew Wrigley	Republican
Ohio	Mike DeWine	Republican	Dave Yost	Republican
Oklahoma	Kevin Stitt	Republican	Gentner Drummond	Republican
Oregon	Tina Kotek	Democratic	Ellen Rosenblum	Democratic
Pennsylvania	Josh Shapiro	Democratic	Josh Shapiro	Democratic
Rhode Island	Dan McKee	Democratic	Peter Neronha	Democratic
South Carolina	Henry McMaster	Republican	Alan Wilson	Republican
South Dakota	Kristi Noem	Republican	Marty Jackley	Republican
Tennessee	Bill Lee	Republican	Jonathan Skrmetti	Republican
Texas	Greg Abbott	Republican	Ken Paxton	Republican
Utah	Spencer Cox	Republican	Sean Reyes	Republican
Vermont	Phil Scott	Republican	Charity Clark	Democratic
Virginia	Glenn Youngkin	Republican	Jason Miyares	Republican
Washington	Jay Inslee	Democratic	Bob Ferguson	Democratic
West Virginia	Jim Justice	Republican	Patrick Morrisey	Republican
Wisconsin	Tony Evers	Democratic	Josh Kaul	Democratic
Wyoming	Mark Gordon	Republican	Bridget Hill	Republican

* * * * *