

**RISK REGULATION AND  
REGULATORY LITIGATION**

*Patrick Luff\**

*“We can never insure one hundred percent of the population  
against one hundred percent of the hazards and vicissitudes of  
life . . . .”*

*- Franklin D. Roosevelt, speech upon signing the Social Security  
Act, delivered August 14, 1935<sup>1</sup>*

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1. Presidential Statement upon Signing the Social Security Act, 4 PUB. PAPERS 324 (Aug. 14, 1935).

## INTRODUCTION

The appropriate scope of regulation has been a ubiquitous policy debate in the United States since the nation's founding.<sup>2</sup> For some time now,<sup>3</sup> a unique phenomenon has been developing in the world of litigation—litigation has become a regulatory device as a result of courts more frequently issuing decisions with widespread regulatory effects.<sup>4</sup> This use of the judiciary as a forum for regulatory policy developed partly through congressional design<sup>5</sup>—the civil rights statutes, for example, were designed with private regulatory enforcement in mind<sup>6</sup>—and partly through necessity.<sup>7</sup>

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2. See Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 11 (2011) (“Since the nation’s founding, jurists and scholars have debated the roles that the three branches of government should play in interpreting the constitutional promise of federalism.”).

3. The tradition of using litigation to regulate, which we might expect to be a modern legal phenomenon, is actually much older. Thomas F. Burke, *The Rights Revolution Continues: Why New Rights Are Born (and Old Rights Rarely Die)*, 33 CONN. L. REV. 1259, 1259-60 (2001) (“[T]hrough the origins of regulation by litigation are usually traced to avaricious trial lawyers and ambitious attorneys general, in fact, regulation by litigation has deep roots in the structure of American government and American political culture.”).

4. See *id.* at 1265-66 (internal citation omitted) (“Faced with the difficulties of redirecting thousands of localities, police reformers turned to the Supreme Court, which expanded old constitutional rights and developed new ones in such areas as search and seizure, right to counsel, and interrogation of suspects. These rights became the mechanism by which the practices of police were brought under control.”).

5. For a general discussion of legislative reliance on private enforcement, see SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 19-59 (2010).

6. *Id.* at 8 (“Senator Abourezk . . . characterized Title VII’s enforcement provisions as designed to provide for enforcement ‘by enlisting private citizens as law enforcement officials.’”).

7. The sharp upswing in what I term “regulatory litigation”—litigation with regulatory effects—began during the civil rights era and the litigation explosion that followed shortly on its heels. See WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 1-4 (1991) (noting that the litigation explosion “in the late 1960s and 1970s” was brought about in part by the idea that lawsuits serve “as a policy opportunity”). The phrase “litigation explosion” itself came into use in the legal scholarship of the late 1960s. See Clarence A. Guittard, *Court Reform, Texas Style*, 21 SW. L.J. 451, 452 (1967) (“[P]erhaps the reformers would do well to consider more modest alternatives to make sure that our judicial structure is capable of dealing with the new problems which an expanding population and the litigation explosion will inevitably bring.”); Joseph D. Tydings, *Helping State and Local Courts Help Themselves: The National Court Assistance Act*, 24 WASH. & LEE L. REV. 1, 1 (1967) (“In the midst of the current ‘litigation explosion,’ courts throughout the United States are being subjected to sharp criticism because of delays in the judicial process.”). Professor Henry Monaghan places the beginning of the litigation explosion in the latter part of the 1970s. Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1155 (1998). The phrase’s use in law review articles and bar journals grew from once between 1970 and 1979 to 178 times between 1980 and 1989, and then ballooned to 807 times between 1990 and 1999. See, e.g., LEXIS search for “litigation explosion,”

Whereas premeditated regulatory litigation arose out of a legislative desire to expand the regulatory capacity of the state,<sup>8</sup> the part of regulatory litigation that arose out of necessity has to do with the state's ability to address latent social risks.<sup>9</sup> As society developed,

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LEXISNEXIS, <http://www.lexisnexis.com> (follow "Secondary Legal" hyperlink; follow "Law Reviews, CLE, Legal Journals & Periodicals, Combined" hyperlink; then search for "litigation explosion" using appropriate date restrictions). By the 1990s, the phrase "litigation explosion" had achieved such ubiquity that it was used as the title of a book chronicling the historical differences between U.S. and European civil justice systems, WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991). Judging from the title of one article, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003), by the 2000s the term has lost any utility it once may have had.

At least in the area of toxic torts, this litigation explosion was an empirical reality, although it can be attributed largely to asbestos claims. Deborah R. Hensler, *Reading the Tort Litigation Tea Leaves: What's Going on in the Civil Liability System?*, 16 JUST. SYS. J. 139, 141 (1993). However, Hensler also observes that "[l]egislated tort reforms, changes in case law, and the widespread belief in a litigation explosion may all have affected filing rates and jury verdicts in the mid- to late 1980s." *Id.* at 152 (citations omitted). While the changes to the law likely decreased case filings and verdicts, perceptions about the litigation explosion may have increased filings by encouraging people to get on the litigation bandwagon, so it is unclear how attitudes about the perceived litigation explosion affected the phenomenon itself. For skeptical views about the litigation explosion, see MORTON KELLER, *AMERICA'S THREE REGIMES: A NEW POLITICAL HISTORY* 241 (2007) (suggesting that the harm companies experienced as a result of "the liability explosion" is sometimes exaggerated); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 37-39 (1986) (doubting whether the United States was experiencing a litigation explosion); Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319, 320 (1985) (expressing skepticism regarding "the litigation explosion hypothesis"). For a general empirical study of litigation rates, see DEBORAH HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* 6-7 (1987) (finding that the existence of a litigation explosion depends on the area of tort law being examined).

8. See FARHANG, *supra* note 5, at 4-10, 32-54 (suggesting various reasons why Congress creates private-enforcement regimes that produce regulatory outcomes, including legislative-executive conflict, coalition and bureaucratic drift, and dissatisfaction with compromised administrative agency results). *But see* ANDREW P. MORRIS ET AL., *REGULATION BY LITIGATION* 5-7 (2009) (attributing regulatory litigation to conscious legislative decisions but explaining the regulatory motive in terms of capture theory, which is discussed in more detail later in this Article, *see infra* notes 102-110 and accompanying text).

9. See Richard A. Epstein, *Implications for Legal Reform*, in *REGULATION THROUGH LITIGATION* 310, 314 (W. Kip Viscusi ed., 2002) ("Most of the difficulties of [tort and administrative law] arise because of the *imperfections* found in the operation of the obvious tort remedy of damages after the fact."); David Rosenberg, *The Regulatory Advantage of Class Action*, in *REGULATION THROUGH LITIGATION* 244, 247 (W. Kip Viscusi ed., 2002) ("All [products liability mass torts] arise from the mass production processes and goods (products and services) of business enterprise that often, as an unavoidable cost of their benefits, systematically place some population of workers, consumers, and others at risk of incurring personal injury and property

citizens began to look more and more to the government to deal with risk.<sup>10</sup> At the same time, the industrialization of society meant that citizens were exposed to both new risks and increased probabilities of old risks.<sup>11</sup> The governmental response to these risks resulted in the regulatory state we have today.<sup>12</sup> But as the epigraph that begins this Article recognizes, governments cannot deal with all the risks that an individual faces on a daily basis. This observation may be as obvious as it is uncontroversial, at least when we take a moment to reflect upon it. But the problem is that the government is also unable to deal with all the risks that society *would like it* to deal with. In such cases, gaps arise between the socially demanded and governmentally provided levels-of-risk regulation. This Article argues that regulatory litigation developed—and persists—because it fills these gaps.

An example of regulation and regulatory gap filling will make the distinction more clear. Consider the way that coal miners with pneumoconiosis,<sup>13</sup> on the one hand, and people exposed to asbestos, on the other hand, bring claims for compensation. Coal miners diagnosed with pneumoconiosis are entitled to compensation from their employers or, when their employers are no longer in business, the federally administered Black Lung Disability Trust Fund, which is funded by a tax on coal mine operators based on their output.<sup>14</sup> In

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damage . . .”).

10. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 12-31 (1990) (providing historical overview of governmental use of regulatory programs to protect society). With respect to economic risks, see Karen Yeung, *The Regulatory State*, in *THE OXFORD HANDBOOK OF REGULATION* 64, 72 (Robert Baldwin et al. eds., 2010) (“[With the New Deal,] the US federal government assumed a far greater responsibility for the nation’s economy in response to the profound sense of insecurity created by the crippling impact of the Great Depression. It comprised a raft of public works and social insurance programmes that effectively placed the federal government squarely in the position of employer and insurer of last resort. “[T]he New Deal . . . transformed the earlier “weak” associational impulse [of the Progressive era] into a commitment to permanent market stabili[s]ation activity by the federal government.”) (quoting Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189, 1192 (1986)).

11. Although modernization did allow the state to deal more effectively with some risks, the increased number and severity of other risks presents a common dilemma for risk regulators: how to close the door on one risk without opening the window for another. SUNSTEIN, *supra* note 10, at 229.

12. See *id.* at 2 (noting that governmental regulatory initiatives have covered many areas, including toxic substances, employee safety, and consumer products).

13. Also known as black lung disease, pneumoconiosis “results from breathing in dust from coal, graphite, or man-made carbon over a long period of time” and is characterized by a cough and difficulty breathing. *Coal Worker’s Pneumoconiosis*, PUBMED HEALTH (June 10, 2011), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001187>.

14. 26 U.S.C. § 4121 (2006) (authorizing tax); *id.* § 9501 (establishing trust fund).

order to receive benefits under the Black Lung Benefits Act,<sup>15</sup> the coal miner first files a claim form with a federal agency—the U.S. Department of Labor, Division of Coal Mine Workers’ Compensation (“DCMWC”).<sup>16</sup> The miner is entitled by law to a free pulmonary examination, consisting of a series of tests designed to detect the presence or absence of pneumoconiosis.<sup>17</sup> Based on the claim form and the medical examination, the DCMWC will then issue a ruling regarding the presence or absence of pneumoconiosis,<sup>18</sup> which the miner or defendant company may appeal—first to an administrative law judge, then to a federal court of appeals, and ultimately to the Supreme Court.<sup>19</sup> If successful, the miner is entitled to medical expenses and lost wages attributable to coal-mine-dust exposure, from either the miner’s employer<sup>20</sup> or, in the case of default, from the Disability Trust Fund.<sup>21</sup> In most cases, the process is handled completely within the U.S. Department of Labor, but courts may become involved when asked to clarify a point of law relating to the DCMWC’s enabling legislation.<sup>22</sup>

A worker suffering from an asbestos-related illness must take a different route to receive compensation for his injuries. Rather than communicating with a federal agency, the injured party’s primary contact will be a personal injury lawyer.<sup>23</sup> If the injured party has not gone straight to a plaintiffs’ firm that is in the business of resolving asbestos claims, the party’s lawyer will usually liaise with one of these firms.<sup>24</sup> And although efforts to achieve judicial settlement of future asbestos claims on a global scale have been unsuccessful, plaintiffs and defense firms have enough information on hand that once the potential plaintiff has obtained a medical examination of the alleged injuries—the two sides can usually achieve a fairly quick

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15. Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (2006).

16. 20 C.F.R. § 725.304 (2011).

17. *See id.* § 725.406(a).

18. *See id.* § 725.418(a).

19. 28 U.S.C. § 1254 (2006) (right of appeal to U.S. Supreme Court); 20 C.F.R. §§ 725.421(a) (right of review by administrative law judge), 725.482(a) (right of review by U.S. court of appeals).

20. 20 C.F.R. §§ 725.490(a), 725.701(b).

21. *Id.* § 725.605(c).

22. *See Nat’l Mining Ass’n v. Dep’t of Labor*, 292 F.3d 849, 860, 875 (D.C. Cir. 2002) (holding that some revisions to the Black Lung Benefits Act were invalid or impermissibly retroactive); *see also* Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 68 Fed. Reg. 69,929, 69,930 (Dec. 15, 2003) (implementing the *National Mining Ass’n v. Dep’t of Labor* decision).

23. *See* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 16 (2007) (discussing introduction of asbestos suits into tort system and involvement of plaintiffs’ lawyers in the process).

24. *See id.* at 16-17 (noting that plaintiffs’ law firms had franchise-like relationships allowing them to refer clients with asbestos claims to those asbestos firms).

agreement on the settlement value of the potential claim based on prior claims alleging similar injuries.<sup>25</sup>

Despite the similarity between these examples in which workers suffer illnesses due to exposure to harmful materials at work, they show two divergent governmental paths that have been developed for addressing and compensating the harms. One involves an administrative agency specifically created to deal with the exposure to coal mine dust, while the other relies heavily on the judiciary and a series of lawsuits, since the judiciary is the only avenue for achieving compensation for asbestos-related injuries.

Ultimately, the government enacted widespread regulations relating to the use and removal of asbestos,<sup>26</sup> but declined to regulate the effects of exposure to asbestos in the way it does exposure to coal mine dust or radiation.<sup>27</sup> There are several possible reasons that such divergent regulatory paths developed.<sup>28</sup> For example, in the case of asbestos, it may be that the federal government was not politically motivated enough to issue prospective rules governing asbestos that would have prevented injuries to individuals exposed to asbestos particulates. On the other hand, it may simply be that the agencies in charge of regulating products like asbestos lacked the technology, in terms of scientific knowledge, or even the budget necessary to perceive the problem. For our purposes, however, the effect of these regulatory shortfalls is more important than their etiology.

This Article accomplishes three goals. First, it provides a new theory, anchored by the concept of regulatory gaps, of why regulatory litigation has developed. This theory concludes that regulatory litigation emerged not because of greedy lawyers or plaintiffs, but

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25. Settlement grids created privately may reflect tradeoffs necessary to effect the settlement; therefore, they may be more watered down than grids created by an administrative agency. *See id.* at 65 (“When agency rulemaking generates a grid for a public benefit program with no common-law precursor, the design of the grid will turn principally upon pragmatic considerations. By contrast, when a gridlike system stands to operate within the backdrop of a preexisting, common-law regime for compensation, the design of the grid will turn not just on pragmatics but also on the compromises needed to bring about the adoption of the grid in the first place.”).

26. *See, e.g.*, 40 C.F.R. § 61.145 (2011) (specifying requirements for asbestos removal in construction).

27. *See, e.g.*, *Kraciun v. Owens-Corning Fiberglas Corp.*, 895 F.2d 444, 447-48 (8th Cir. 1990) (“Because public awareness of the hazards of asbestos is of relatively recent origin, virtually no steps were taken to protect du Pont workers from asbestos exposure prior to the early 1980s.”).

28. For a general discussion of types of regulatory failures, see SUNSTEIN, *supra* note 10, at 74-110. Generally speaking, regulatory failures can be classified as either statutory or implementation failures. *Id.* at 84, 97. Statutory failures result from faulty policy analysis, complex systemic effects, lack of coordination with other statutes, and altered circumstances, among other things. *Id.* at 84-97. Implementation failures are usually related to poor execution by agencies or agency capture by industry. *Id.* at 97-102.

rather because of unaddressed social demands for risk regulation. Second, this Article provides an overview of the key works in regulatory litigation theory with the hope of identifying useful insights as well as the shortcomings of the existing scholarship in this nascent field. Finally, this Article examines the nature of regulatory litigation and determines what regulatory litigation is. It is hoped that these three contributions will serve as foundational scholarship for the still young area of regulatory litigation scholarship.

Part I of this Article discusses the development of regulatory litigation by identifying the types of risk that tort, contract, and civil rights law address and describing these risks as regulatory gaps that litigation fills. Part II identifies some attempts to define regulation generally and the inherent difficulties in trying to define regulatory litigation—the need to address the regulatory nature of precedent and injunctions and the problem of unintentional regulation. Next, this Part presents and analyzes current scholarship that attempts to define regulation in the narrower field of regulatory litigation, dividing the literature into scholarship that focuses on conscious legislative efforts to produce regulatory litigation and efforts on the part of judges and litigants to regulate. Finally, Part III presents the theory of regulatory litigation by examining possible indicia of regulatory litigation by borrowing from Abram Chayes' iconic discussion of public- and private-law litigation.<sup>29</sup> Having discussed these indicia in light of the problems of defining regulatory litigation introduced in Part II, Part III concludes by distinguishing between top-down regulation through statutory design and bottom-up judge- and litigant-driven regulation through remedial design, and identifying the necessary conditions for regulatory litigation.

Before moving any further, two issues must be dealt with. First, in this discussion I have chosen to exclude criminal law, even though it is predominantly regulatory in nature. This is done in part because we need to limit the study, and there is a strong logical break between criminal and civil law. Second, the regulation that is used as both a starting point and a main point of reference is the civil side of administrative law. It therefore makes sense to keep the focus on the civil side of regulatory litigation. Additionally, one main factor of regulatory litigation that makes it different from regulation is that it can be initiated and controlled by private parties (even in cases where state attorneys general bring tort suits and the like, they bring them on behalf of their citizens, so they are more like class

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29. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (highlighting emergence of public-law litigation, where constitutional and statutory policies are adjudicated and the judge administers complex types of relief).

counsel than a state regulating on its own),<sup>30</sup> whereas criminal cases cannot.<sup>31</sup>

Second, the idea of using courts to achieve regulatory ends that have traditionally been the province of regulatory agencies is alternatively called “regulation-through-litigation,” “regulation-by-litigation,” or “litigation-as-regulation.” In this Article, I will use the term “regulatory litigation” to encompass the situations that these three terms are used to describe. There are two reasons for this. First, as I argue below, the scholars who use the terms “regulation-through-litigation” and “regulation-by-litigation” have captured an incomplete and imperfect picture of the concept I refer to as regulatory litigation. These scholars have missed at least half of the conceptual field by focusing merely on litigation that produces prospective commands, which at least one group of authors argues must additionally result in industry-wide commands. As the pneumoconiosis and asbestos examples discussed above show, retrospective regulation that looks to remedy the effects of legal harms occurring in the past is the province of both regulatory agencies and litigation. Second, the phrase regulation-by-litigation has developed a negative connotation because of its use by scholars deriding the use of litigation to achieve regulatory ends. Because this Article takes no stance on the normative issues involved in regulatory litigation, I have chosen to avoid what has become a charged term.

#### I. WHY HAVE THE DIVERGENT SYSTEMS COME ABOUT?

Individuals face risks around every corner in their daily lives. The decision to drive or walk to work, to eat fish, red meat, or vegetables, or to buy Brand X instead of Brand Y toaster all result in a package of risks to the decision-maker. The overwhelming majority of law (and perhaps even the development of government) can be

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30. Distinguishing between states acting or not acting on behalf of their citizens may seem to suggest states are not always doing just that. Even if the cynic says that this rarely occurs, the standard theory of the modern liberal state is that states are agents of citizens, who retain ultimate autonomy, and therefore, any state action is (or should be) taken on behalf of its citizens. However, there is a difference, I believe, between a state attorney general bringing *parens patriae* cases on behalf of citizens and the state performing its normal functions on behalf of its citizens—the citizens themselves can do the former and not the latter. There is still some blurriness in cases involving, for example, state pensions. But in bringing such cases, the state acts in essence as a trustee, which is still a different relationship than what normally exists between citizens and the state. As a result, even though the state might keep the recoveries in these cases, it is essentially holding them in trust for the injured parties or reimbursing itself for payments made to the injured parties before or during the course of the litigation.

31. See MORRISS ET AL., *supra* note 8, at 93 (“Private parties as well as government actors can regulate through litigation.”).

seen as political decisions about the proper balance between these different types of risk.<sup>32</sup> For example, the fellow-servant rule, which barred recovery from an employer when an employee was injured by a coworker, can be described as a governmental decision to situate some of the risk of workplace injury on employees, thereby allowing increased employer capital for industrial development.<sup>33</sup> Likewise, we can understand the growth of products liability as a different set of choices regarding who should bear the risk for unsafe consumer products.<sup>34</sup> Even budgetary issues, like defense spending, are functions of the amount of risk we are willing to accept. But mismatches between statutory design and statutory implementation can result in regulatory gaps, leading individuals, nongovernmental organizations, and governmental entities working on their behalf to look for other risk-regulation devices, the most prominent of which is the regulatory lawsuit. This Part discusses the risks that tort, contract, and civil rights laws have developed to address the presence of regulatory gaps in each area and the role of regulatory litigation in filling those gaps. Having addressed these issues, this Part concludes with a brief exploration of the limits of risk regulation.

#### *A. Risk in Tort, Contract, and Civil Rights Law*

The welfare state developed in large part to address the new risks that individuals faced in the modern world.<sup>35</sup> As risks piled up,

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32. See generally ELIZABETH FISHER, *RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM* (2007) (analyzing the role of public administration in standard setting and risk appraisal in the area of technological risks); see also Julia Black, *The Role of Risk in Regulatory Processes*, in *THE OXFORD HANDBOOK OF REGULATION* 302, 302 (Robert Baldwin et al. eds., 2010) (observing that “[r]isk is becoming a significant organising principle of government” and noting sources advancing the argument that “society is orientated towards managing the risks that it has itself created”); FARHANG, *supra* note 5, at 14 (“Modern economic activity also entails the proliferation and wide dispersal of risks that result in increases in the kinds of harm for which legal redress is sought . . .”). For a general history of the social struggle against risk, see PETER L. BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* (1996). For the evolving state responses to risk, see *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY* (Tom Baker & Jonathan Simon eds., 2002).

33. See DAVID A. MOSS, *WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER* 162-79 (2002) (describing the development of workers’ compensation insurance).

34. See CHRISTOPHER HOOD ET AL., *THE GOVERNMENT OF RISK: UNDERSTANDING RISK REGULATION REGIMES* 1-9 (2001) (discussing how risk regulation regimes evolved from living in a “risk society” characterized by technological advances); JENNY STEELE, *RISKS AND LEGAL THEORY* 75-81 (John Gardner ed., 2004) (discussing how “contractual alternative[s]” to tort law in responding to products liability” can better allocate risks between consumers and manufacturers); see also MOSS, *supra* note 33, at 216-52 (discussing how modern products liability law evolved from the idea that “producers, not consumers, were best positioned to manage product injury risk”).

35. For example, in an industrial society,

[s]trangers are in charge of important parts of our lives . . . [I]f these people

regulation addressing those risks lagged behind, either because sheer numbers overwhelmed the current risk-regulatory system or because of political considerations or governmental apathy.<sup>36</sup> This resulted in a gap between the level of social need for risk protection and the level of governmentally provided protection from risk.<sup>37</sup> The result was that another mechanism—regulatory litigation—developed to fill the void.<sup>38</sup>

Consider a preliminary difference between tort law and administrative agency action. In order for tort law to address a risk, a court must find duty, breach, causation, and damages.<sup>39</sup> As a result, there must be a completed act or, in the case of an injunction, an imminent threat of an act before a private individual can attempt to do anything about the risk;<sup>40</sup> we might say that the risk must have been realized or be imminent.<sup>41</sup> The state, on the other hand, can attempt to shape behavior *ex ante*, either through changing an individual's opportunities to act (mandating speed limiters on cars, outlawing cars, or separating sidewalks from roads with car-proof barriers) or through changing the tort laws (altering acceptable theories of causation or increasing potential damages).<sup>42</sup> In this example, the risk is motorists driving their cars dangerously. But suppose instead the theory is not that individual drivers are driving dangerously but that there is something about the cars themselves

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are careless in their work, their mistakes can kill us. We cannot control the processes *personally*, cannot influence the outcomes. Yet the processes *can* be controlled. Hence we demand norms from the state, from the collectivity, to guarantee the work of those strangers whose work is vital to our lives, which we cannot guarantee by ourselves.

Lawrence M. Friedman, *Legal Culture and the Welfare State*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 13, 19 (Gunther Teubner ed., 1986).

36. See MORRISS ET AL., *supra* note 8, at 37-38 (noting that regulation created by rulemaking is slow due to public participation and input).

37. *Id.* at 41-43.

38. As I have mentioned previously, this development can be attributed to both conscious choices by legislators and to regulation through piecemeal decisions of litigants and judges in individual cases. See *supra* notes 5-9 and accompanying text.

39. RESTATEMENT (SECOND) OF TORTS § 328A (1965).

40. RESTATEMENT (SECOND) OF TORTS § 936 (1979).

41. Here I use the word "risk" in its most common-sense definition: the possibility that something bad will happen. See, e.g., Black, *supra* note 32, at 309 (agreeing with the basic definition but noting that even this "beguilingly simple" concept is the source of several "latent questions, each of which is a source and site of socio-political contestation"). But this is neither an exclusive nor a historically required definition. For discussions of the evolution of the social meaning of risk, see DEBORAH LUPTON, *RISK* 5-13 (1999), and Mary Douglas, *Risk as a Forensic Resource*, 119 *DAEDALUS* 1, 1-13 (1990).

42. For an accessible account of state risk-architecture, see RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 83-100 (2008) (discussing principles that allow for systems to produce better outcomes for society).

that is unsafe.<sup>43</sup> In such a case, the risk is not limited to just one person. These sorts of widespread risks are often dealt with through class action litigation.

In instances like those involving unsafely designed products, individual litigation may be insufficient to provide a socially demanded, level-of-risk protection because individual lawsuits are often insufficient to produce behavioral changes in manufacturers. Additionally, administrative agencies may fail to provide the desired protections, either because of insufficient information or imperfect implementation. Class action litigation steps in to fill the gap left by agency action by performing a role similar to that of the government in issuing black lung benefits—it coordinates individuals and exerts sufficient pressure on industry both to compensate for past injuries and to produce future behavioral changes.

What about the risks that arise from contract cases? In a private-law contract case, the risk may be straightforward—that one party will not live up to the agreement. Of course, it would be odd to see a regulatory agency attempt to deal with this sort of risk *ex ante*, which would seem to require a system of looking over each contract for indicia of reliability, levels of risk, and so forth, although some risks would have been dealt with through the use of default rules and statutes limiting certain types of contracts. But even if a state reviewed every contract, it would still be odd to see a regulatory agency barring run-of-the-mill contracts between two companies bargaining at arm's length.<sup>44</sup>

Contracts for consumer goods involve the same risk of nonfulfillment but may carry additional risks based on the nature of the harm. For example, consider the case of negative-value consumer class actions—aggregated claims too small to be brought economically on an individual basis. A manufacturing defect in a

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43. This could involve, for example, the fact that the cars do not have speed limiters, which itself leads to a different question about legal innovation. A legislature might make a law that allows injured parties to sue car manufacturers on this basis, assuming constitutional issues like the Dormant Commerce Clause or regulatory preemption are not raised. But courts could bring about the same result by allowing a case on the theory that car manufacturers had a duty to pedestrians to produce safe cars, knew that cars capable of going more than X miles per hour were unsafe, and knew or should have known that their cars would injure pedestrians precisely because their speed was not limited. It may seem outlandish to spin out this scenario, but it does not seem any less outlandish than what happened to asbestos manufacturers, who were on the hook for damages even where there was no way to show whether their products caused the injuries in question. *See* NAGAREDA, *supra* note 23, at 23-24. This was a significant departure from the normal rule in tort requiring actual causation. *See id.*

44. However, as the complexity of the contracts increase in terms of both the nature of things being contracted for and the relative bargaining powers of the parties, we see something like this level of regulation. Sales of stock, despite being nothing more than transfers of ownership, are heavily regulated.

mass production world can result in a large group of people that has purchased the same systematically defective item. But if less formal means of redress are unsuccessful and the individuals, unaware that anyone else is having the problem, are unable to put much pressure on the company to remedy the situation, most if not all of them will be hesitant to sue because the cost of bringing a lawsuit would be greater than the cost of replacing the broken or defective item.<sup>45</sup> In these defective-product cases, class actions address two risks—one primary and the other secondary. The primary risk is the one mentioned at the beginning of the previous paragraph—that the producer is not upholding its part of the bargain to provide a working item that will continue to function for a reasonable length of time.<sup>46</sup> The second risk is related to the nature of the harm—because the expected payoff of bringing a lawsuit against the manufacturer is small compared to the cost of bringing such a suit, the individual will have no practical recourse when the primary risk is realized.

These risks are dealt with in three ways. First, we do see examples of informal regulatory bodies that have developed in the absence of formal, state regulation—organizations like the Better Business Bureau and Consumers Union—that are likely to exert strong influence on producers of household goods and can thus alleviate some of the strain on consumers when producers create the risks I have discussed. Additionally, administrative agency regulation deals with some of the risks that can come from defective products, although these are usually in the realm of tort risks rather than nonperformance risks. Third, these risks are regulated through class action litigation, which serves to fill the gap of insufficient regulation through the first two channels. Of the risks we have identified, nonperformance is dealt with through litigation or much more commonly through private agreement, while nonprosecution can be dealt with through a combination of regulatory litigation,

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45. This would likely be true in most cases even if courts granted costs and attorneys' fees to successful litigants or if there were a mechanism for bringing pro se suits without court costs. Most people with jobs, families, and other obligations will not pursue a lawsuit until some threshold is reached above the cost of suing alone. The potential rewards would have to be seen as sufficient to justify a sole litigant's opportunity costs. This becomes even more true when the cost of bringing suit includes discovering the defect. If the problem is one requiring some technical expertise, such as shoddy electrical soldering, a legally cognizable defect may not even be recognizable.

46. One might argue that a typical manufacturer's warranty gives sufficient and exclusive protection against defects. That may be true, but if a product like a television has a one-year warranty and the majority of those produced last for only eighteen months, I suspect that a class action suit will be forthcoming. But this might not happen because people would instead buy televisions from other manufacturers and eventually the company making the shoddy televisions would go out of business. However, this result might not occur when the issue is a shoddy toaster or kettle, possibly because they are so cheap to replace.

governmental regulation, and informal regulation.

Finally, we can consider the risks that civil rights law addresses. Some civil rights cases are similar in nature to private, regulatory tort or contract suits, such as those brought pursuant to the Civil Rights Act by workers against their employers. These civil cases are brought by private parties against other private parties and are based on the Commerce Clause, although many private regulatory cases are brought on the basis of the common law or on the terms of the contract forming the basis of the suit.<sup>47</sup> They are also similar to tort cases in that this type of civil rights protection deals with risks to what we might think of as generalized, background guarantees; tort law protects a general right of personal bodily integrity and property, while civil rights law can be explained as protecting a general right of personal dignity.<sup>48</sup> Moreover, these sorts of civil rights cases protect against the economic harms that an individual receives when he is denied a job based on his race or religion.

We might categorize the risks by saying that tort law protects

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47. See Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 329-44 (2004) (providing detailed history of decisions in landmark civil rights cases).

48. I am willing to grant that this may be a controversial assertion on two levels. First, the Civil Rights Act of 1964 and similar civil rights laws obtain their authority from the Commerce Clause, and thus, it may be technically inaccurate to characterize them as acts meant to prevent dignitary harms rather than harms to interstate commerce that arise out of the unequal denial of civil rights. See *id.* at 351 (discussing reliance of constitutional lawyers and civil rights-related statutes on Commerce Clause). But Congress' motive was clearly to ensure fairness and dignity rather than to regulate the economy, so this objection may be invalid. Second, it may be disputed whether the nature of a civil rights harm is, in fact, a dignitary harm. Theoretically, victims of workplace discrimination could have brought tort suits alleging dignitary harms at common law, but the legal realist in me says that courts would have dismissed any such case. Thus, civil rights harms were either never considered dignitary, tort-like harms by nature, or rising consciousness changed public perception of what constituted a dignitary harm so that it is now proper to consider workplace discrimination both a dignitary and potential economic harm, either because jobs are not granted due to discrimination or because workers face the choice of quitting or enduring a discriminatory environment. The previous point about possible legal innovation in the realm of dignitary torts leads me to also consider the nature of legal attitudes toward the workplace prior to the New Deal. These attitudes, reflected in the decision in *Lochner v. New York*, were that people were free to contract for their labor on essentially unrestricted terms, so if harassment or discrimination were a condition of or bar to employment, it was the contracting parties' choice to accept those terms. See 198 U.S. 45, 57-58 (1905) ("There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."). And I wonder whether what could otherwise be held to be a dignitary harm (e.g., slander) might have been acceptable in a workplace environment but not in a public place between strangers or antagonistic acquaintances. I would think that a battery at one's workplace would not be a condition of employment that could be assumed as implied in the contract or even agreed to explicitly. If this were true, then why would it not be the same for other dignitary harms?

individuals from the background social risk of injuries created by individual negligence or by individual malice (for intentional torts). Moreover, the requirement of damages in tort reminds us that it is not the acts themselves we care about, but the injuries they produce—tort law protects us from the risk of *injury*.<sup>49</sup> Civil rights laws are similar, though not exactly the same. Some civil rights laws act to protect individuals from the risk of economic injuries arising out of discriminatory practices when the issue is workplace, hiring, or promotion discrimination.<sup>50</sup> But workplace discrimination is only one small part of the overall system of laws that protects civil rights. For example, other civil rights laws ensure that schools are integrated<sup>51</sup> or that equal amounts of money are spent on men's and women's athletic programs.<sup>52</sup> Still, the fact that we are taking about *harms* rather than whether an individual can be a racist means that we are concerned with (1) risk (2) of harm (3) to individuals or entities.

Some civil rights risks, however, are of a different kind. Rather than addressing risks created by private actors (either other citizens or those citizens acting as agents of companies, so that the companies are creating the risks), this category of civil rights law speaks to risks of the state denying constitutionally mandated protections to its citizens, such as cases against states or the federal government alleging violations of the Eighth Amendment's protection against cruel and unusual punishment.<sup>53</sup> This sort of civil rights risk implicates oversight in a way that preventing privately created risk does not, even if the latter does produce types of regulatory litigation precisely because the state has failed in its oversight function. With respect to private risks, the state ultimately can exercise only so much oversight but should certainly exercise enough oversight over

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49. This is another interesting point. Regulators would seem in many cases to be more interested in the acts than the injuries, at least when they are performing the *ex ante* part of their jobs. But by the time tort law gets involved, whether an act occurred or not is irrelevant if the act has not produced an injury. At the same time, we might interject here that cases alleging defamation per se assume damages, but that may be only because of the difficulty of proving damages in a way that satisfies the normal, common law requirements, not because we do not think there are injuries arising from the acts. That is, presuming damages may be more about the lack of specificity of the damages rather than about the desire to punish (and perhaps to deter) some negligent or antisocial act.

50. See 42 U.S.C. § 2000e-2 (2006) (barring employment discrimination based on "race, color, religion, sex, or national origin").

51. See *id.* § 2000d (barring discrimination based on "race, color, or national origin" in federally funded programs).

52. See 20 U.S.C. § 1681 (2006) (barring sex discrimination in federally funded programs).

53. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 339-40, 351-52 (1981) (holding that housing two prisoners in a cell with double ceilings does not violate Eighth Amendment prohibition against cruel and unusual punishment).

its branches so that it does not violate constitutional requirements (provide integrated schools) and injunctions (do not punish cruelly or unusually).

### *B. Limitations on Regulation*

Having identified the nature of regulatory gaps and the types of litigation that have arisen to fill them, it is necessary to make some observations about the limitations on state regulatory ability. Describing an unaddressed risk as a regulatory gap assumes that the state has the ability to address the problem.<sup>54</sup> Nevertheless, the realm of regulation includes the issues that the state thinks it can deal with, even if it is ultimately ineffective in doing so.<sup>55</sup> We want to exclude, however, events like unpreventable natural disasters. Here, I make a distinction between the regulation of greenhouse gas emissions on the one hand, and a hypothetical regulation that seeks to regulate earthquakes on the other hand. The state may choose to regulate emissions of greenhouse gases under the theory that the emissions lead to global warming, which in turn increases the average ocean temperature, melts polar ice caps, and so forth, until we get to the point that the government concludes that greenhouse gas emissions result in natural disasters and thus decides to regulate them.<sup>56</sup> But it is unlikely that the government will attempt to limit earthquakes through regulation, at least not until there is a reasonable scientific connection linking some human activity to earthquakes.<sup>57</sup>

Second, this formulation excludes nonstate actors as agents of regulatory influence. While I acknowledge the role that nonstate actors have in affecting regulation—especially since the theory I espouse here depends on private actors and states acting on their

54. See Friedman, *supra* note 35, at 21, 23-25 (noting that technological advances, both in terms of physical items and ideas, allow states to intervene in new areas of risk); cf. FARHANG, *supra* note 5, at 14 (“[A]t the same time citizen expectations, fueled by the growing capacities of technology and the state, demand redress for all harms suffered.”).

55. See Friedman, *supra* note 35, at 20 (noting that over time states regulated more areas because of the expectation that they would do so).

56. See, e.g., Cal. Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE §§ 38550-38599 (West 2011) (setting California limits on greenhouse gas emissions). It appears that no congressional action on climate change has been taken recently. See *State Climate Change Laws Resource Center*, COLUMBIA LAW SCHOOL, CENTER FOR CLIMATE CHANGE LAW, <http://www.law.columbia.edu/centers/climatechange/resources/state> (last visited Nov. 11, 2011).

57. As we will see *infra* Part III, a necessity for regulatory litigation is some activity that can be the target of regulation. The government could act to *limit* the effects of earthquakes through building codes, for example, but this sort of regulation is different in kind from an attempt to regulate the underlying risk that an earthquake will occur. See, e.g., CAL. BLDG. CODE REGS. § 1613 (2010) (requiring all connected structures in California to be built to withstand earthquakes).

behalf—I wish to separate out the field of regulation that is backed by the state’s threat of force from other forms of social control. I also do this because the state is often the regulator of first resort and always the regulator of last resort, and it therefore assumes a preferential place as the touchstone against which to compare less traditional forms of regulation.<sup>58</sup>

So far, we have seen why regulatory litigation developed—it arose to fill the gap between the state provision of risk regulation and a socially demanded level of risk. But the discovery of *why* leaves a more fundamental question unanswered—what regulatory litigation *is*, and perhaps even more importantly, what regulatory litigation *is not*.

## II. HOW DO WE KNOW WHEN WE ARE SEEING REGULATORY LITIGATION?

Based on the discussion of law and risk above, it is presently difficult to distinguish between the category of litigation that is regulatory and the category that is not. For example, even if we agree that a particular class action is regulatory, we might still question whether it is regulatory by virtue of the number of participants,<sup>59</sup> the size or nature of the remedy,<sup>60</sup> or the presence or absence of some other factor. In addition, in confronting the spectrum of definitions with respect to regulation generally, we might conclude that attempting to define regulatory litigation is a fool’s errand, especially since every lawsuit has the potential to produce behavioral effects,<sup>61</sup> which is certainly a necessity for anything to be called regulatory.<sup>62</sup> This Part examines these concerns in more depth. First, the attempts to define regulation outside of the litigation context are explored. Second, particular issues relevant to the definition of regulatory litigation are presented. Finally, the previous scholarly attempts to

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58. See MOSS, *supra* note 33, at 164-69 (discussing the centrality of the government’s role as a risk regulator and its involvement in creating workers’ compensation law).

59. See MORRIS ET AL., *supra* note 8, at 48 (stating that an indicator of regulation-by-litigation is that the agency is pursuing actions against the vast majority of the regulated community).

60. See *id.* at 51-53 (noting that settlements in regulation-by-litigation cases can result in unequal treatment of participants in the regulated activity, such as where tobacco and diesel-engine producers paid billions of dollars to state and federal governments).

61. See Stanley L. Brodsky & Robert J. Cramer, *Concerns About Litigation: Conceptualization, Development, and Measurement*, 36 J. PSYCHIATRY & L. 525, 526-27 (2008) (noting that Louise Nash et al., *The Psychological Impact of Complaints and Negligence Suits on Doctors*, 12 AUSTRALASIAN PSYCHIATRY 278 (2004), found that medical professionals experienced behavioral changes from incoming lawsuits).

62. See MORRIS ET AL., *supra* note 8, at 22-23 (highlighting how regulations are promulgated by considering their effects on the regulated entity’s behavior).

define regulatory litigation are analyzed but ultimately dismissed as either incorrect or incomplete.

#### *A. Difficulties in Defining Regulation*

The label of “regulation” can be applied to a wide spectrum of governmental and private activity. Definitions of regulation in the wider field of regulatory theory have spanned the gamut from state-sponsored efforts to command and control individual behavior through the use of targeted rules<sup>63</sup> to any form of social control, regardless of the actors involved.<sup>64</sup> A narrow definition of regulation might be some formulation along the lines of “any governmental effort to control behavior by other entities, including business firms, subordinate levels of government, or individuals.”<sup>65</sup> We might therefore take as our starting-point definition of regulation some variation of the following: “the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules.”<sup>66</sup> This basic definition places the locus of behavioral changes squarely within the state by presenting the set of rules as *authoritative*.<sup>67</sup> We might modify this basic formulation by adding the phrase “by federal administrative agencies that govern interstate economic behavior” to restrict our definition to those governmental activities relating to agency regulation of interstate commerce,<sup>68</sup> based on the observation that “[governmental] capacity is not exhausted by the actions of state

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63. For a critical discussion of command and control regulation, see Terence Daintith, *The Techniques of Government*, in *THE CHANGING CONSTITUTION* 209 (Jeffrey Jowell & Dawn Oliver eds., 3d ed. 1994). For a general overview of command and control regulation, see ROBERT BALDWIN & MARTIN CAVE, *UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE* 35-39 (1999).

64. See Robert Baldwin et al., *Introduction*, in *A READER ON REGULATION* 3-4 (Robert Baldwin et al. eds., 1998) (citing Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77, 78 (1994) (observing that “European scholars tend to identify regulation with the whole realm of legislation, governance, and social control”)); Philip Selznick, *Focusing Organizational Research on Regulation*, in *REGULATORY POLICY AND THE SOC. SCI.* 363, 363 (Roger G. Noll ed., 1985) (“Within the framework of public policy and administration, [the] central meaning [of] regulation refers to sustained and focused control exercised by a public agency over activities that are valued by a community.”) (emphasis omitted).

65. C. H. Foreman, Jr., *Regulatory Agencies*, in *INT’L ENCYCLOPEDIA OF SOC. AND BEHAV. SCI.* 12982, 12982 (Neil J. Smelser & Paul B. Baltes eds., 2001).

66. Baldwin et al., *supra* note 64, at 3.

67. I will grant that any voluntary organization with even a modicum of formality will have the ability to issue an authoritative set of rules within its sphere of influence. However, I use “authoritative” here to indicate the availability of the state’s power to coerce through the use of force.

68. See Baldwin et al., *supra* note 64, at 3 (“[W]hile rule-making and application through enforcement systems would come within such a definition, a wide range of other governmental instruments based on government authority such as taxation and disclosure requirements might also be included.”).

personnel or the expenditure of state resources”<sup>69</sup> and a desire to limit the scope of what we consider to be regulation. Under either formulation, however, the definition seems deficient because the words “monitoring” and “compliance” limit the world of regulation to restriction<sup>70</sup> and “an important aspect of regulation may be *enablement*—the creation not merely of incentives but those conditions that allow activities to take place,” such as radio-frequency allocation.<sup>71</sup> Moreover, these definitions ignore governmental attempts to influence behavior by encouraging desired behavior, such as tax credits for first-time home buyers,<sup>72</sup> rather than deterring undesired behavior.

However, “it has become widely accepted that regulation can be carried out by numerous mechanisms other than those commonly typified as ‘command and control.’ Thus, scholars of regulation will see emissions trading mechanisms or ‘name and shame’ devices as being well within the province of their concerns.”<sup>73</sup> These latter conceptions of regulation draw into its definition attempts at social control coming from nonstate actors.<sup>74</sup> In light of this realization, we might therefore want to broaden our definition of regulation. It is tempting say that regulation is simply “the promulgation of some set of norms, with the purpose of influencing behavior.” This revision captures a wide range of circumstances that can be thought of as regulation. It captures not just rules (governmental expressions of norms with legal consequences) but also trade union actions, parenting, peer pressure, and a seemingly endless list of other activities. Note that “authoritative set of rules” is omitted, which allows us to conceive of regulation that occurs through the acts of nonstate actors. But note also that this definition of regulation ignores both facilitative regulation and regulation that is meant to encourage activity.<sup>75</sup>

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69. FARHANG, *supra* note 5, at 7 (explaining how regulatory litigation serves as a legislative policy instrument). A fuller discussion of FARHANG is contained *infra* Part II.C.1.

70. See BALDWIN & CAVE, *supra* note 63, at 97 (noting that compliance can be used to define the limits for particular actions through the “insistent” strategy).

71. Baldwin et al., *supra* note 64, at 4; see 47 C.F.R. § 2.106 (2010).

72. See 26 U.S.C.A. § 36 (West 2008).

73. Robert Baldwin et al., *Introduction: Regulation—The Field and the Developing Agenda*, in THE OXFORD HANDBOOK OF REGULATION 5-6 (Robert Baldwin et al. eds., 2010).

74. See *id.* at 9 (noting that private, public, and increasingly hybrid organic actions are becoming involved with regulatory authority).

75. By “facilitative regulation,” I mean the set of state actions that “offers a set of formalized arrangements with which individuals can ‘clothe’ their welfare-seeking activities and relationships.” ANTHONY I. OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 2 (1994). Contract law, as discussed *supra* Part I, decreases risks by providing these state-sponsored arrangements.

Perhaps surprisingly, given the wide range of activities to which this definition can apply, the formulation of regulation as a set of norms with the purpose of influencing behavior is also narrower than our starting-point definition. That first definition mentioned only rules, not norms, so things like taxes and disclosure requirements are included in the first definition but not the “broad” one.<sup>76</sup> This brings up a notable distinction between governmental and nongovernmental regulation—we can think of the former as encompassing both prospective (do not pollute in the future) and retrospective (you polluted and here is the amount you are required to pay to clean it up) rules and norms,<sup>77</sup> whereas the latter usually regulates only by the expression of norms that are intended to shape future action.<sup>78</sup> Even where this formulation fails to hold true and nongovernmental organizations attempt to influence behavior retrospectively (that is, to remedy past harms rather than deter future ones), a fundamental difference between state and nonstate actors holds true: only the state can issue a rule<sup>79</sup> and enforce the rule with the power of the state,<sup>80</sup> whereas nonstate actors can express only norms.<sup>81</sup> This seemingly obvious fact is mentioned because it is subject to the major exception of regulatory litigation, through which private actors can use the courts to issue rules.

The problem with attempting to define regulation, then, is that any definition may resolve an issue only at the expense of presenting new ones. In the context of regulatory litigation, these issues are made more complicated by difficulties emanating from the nature of law.

### *B. Factors Complicating Attempts to Define Regulatory Litigation*

Given that “[r]egulation is a phenomenon that is notoriously

76. Baldwin et al., *supra* note 64, at 3.

77. See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998) (noting how laws issued by government affect the behavior of individuals).

78. As always, there are exceptions to this general expectation. Antidefamation groups often seek to expurgate some slight to their interests from the public consciousness as part of their “regulatory” activities, while legal defense organizations naturally deal with the past actions of the clients they take on, even as they deal with future behavior and consequences as well. See Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 365 (1997) (defining norms as rules that are not from “an official source, such as a court or a legislature”). Even environmental-pressure groups often advocate reparation for past harms.

79. In this case, I understand “rule” to mean an order backed by the force of law, even where that binding order is an expression of some norm endorsed by the state.

80. See MORRISS ET AL., *supra* note 8, at 37-38 (noting how states can promulgate rules and use courts to determine how broad state regulation of an entity can be).

81. See Posner, *supra* note 78, at 365 (noting how norms are rules that are not from official sources and giving examples of what norms may be).

difficult to define with clarity and precision,”<sup>82</sup> we might despair of finding a coherent theory of regulatory litigation—defining what litigation is regulatory and what is not. This task is further complicated by the following considerations.

First, any working theory of regulatory litigation should account for precedent. The issue is this: every lawsuit results in precedent, either because it confirms a rule of law, changes a rule of law, or applies a preexisting rule to a new set of facts.<sup>83</sup> Because we expect future cases to be decided in ways congruent to previous ones, we expect that the relevant actors, so long as they are aware of precedent, will act in accordance with that precedent and thus any instance of precedent (and thus any case that announces a judgment) should have some influence on future action. Under definitions of regulation that use social control as a touchstone, every lawsuit might be thought of as regulatory so long as we agree that an influence on future action is a type of social control. Under the broad, any-form-of-social-control definition of regulation, precedent—by influencing future behavior—seems to always count as regulation, making all litigation regulatory. But even under a narrower definition of regulation that is restricted to governmental use of targeted rules to control behavior, all litigation might still be regulatory, since precedent can then be viewed as the effort of a government agent (the judge) to flesh out the rules of behavior themselves—what the rules require. If we refuse to accept such a broad universe of regulatory litigation—where anything that influences (or even theoretically could influence?) future behavior is regulatory—and thus every lawsuit is regulatory,<sup>84</sup> we then face the problem of drawing the line between cases that are regulatory because of their forward-looking nature and those that are not.<sup>85</sup>

Second, a theory of regulatory litigation must deal with another common, forward-looking litigation outcome—the injunction. In order to obtain an injunction, a party must clearly demonstrate that the injunction is necessary to prevent irreparable harm.<sup>86</sup> More

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82. BRONWEN MORGAN & KAREN YEUNG, AN INTRODUCTION TO LAW AND REGULATION: TEXT AND MATERIALS 3 (2007); *see also* Baldwin et al., *supra* note 64, at 2 (“There is no single agreed meaning of the term [regulation], but rather a variety of definitions in usage with are not reducible to some platonic essence or single concept.”).

83. Even though many cases result in unpublished, nonprecedential opinions, individuals and firms still use them to predict future rulings. Therefore, even these cases regulate conduct.

84. *See infra* Part III.

85. This conundrum will be discussed further in Part III.B.

86. *Humble Oil & Ref. Co. v. Harang*, 262 F. Supp. 39, 42 (E.D. La. 1966); *see also* JAMES M. FISCHER, UNDERSTANDING REMEDIES § 21 (2d ed. 2002) (explaining the connection between rightful position and irreparable injury); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 235 (3d ed. 2002) (“When the

importantly, a party seeking an injunction “must demonstrate in addition that there is real danger that the acts to be enjoined will occur.”<sup>87</sup> If a judge decides to issue an injunction, it means that the judge has identified some future act that is reasonably likely to occur and issued an order forbidding that act—in other words, an order has been issued with the purpose of affecting future conduct.<sup>88</sup> Additionally, the issuance of an injunction can have the effect of placing the court in a protracted supervisory role, which was especially common in constitutional cases involving structural injunctions.<sup>89</sup> The structural reform cases also had major effects on third parties.<sup>90</sup> The forward-looking nature of the injunction, plus the potential for a future supervisory role for the issuing court, blurs the line between litigation and regulation. Therefore, any theory of regulation should distinguish when courts issuing injunctions are regulating, when they are not, and the reason for drawing a distinction between the two.

A third problem that any theory of regulatory litigation must deal with is “unintentional” regulation—that effect on behavior<sup>91</sup> that comes about as a result of regulation but is not a desired effect of the regulation.<sup>92</sup> The importance of dealing with unintentional regulation

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party who seeks an injunction shows potential irreparable injury, he has established merely one essential condition for relief.”)

87. *Humble Oil*, 292 F. Supp. at 43.

88. *See id.* at 42 (noting that merely “alleg[ing] that, in the absence of judicial prohibition, an event may occur, the consequences of which cannot be reversed,” does not meet the requirement that an injunction’s necessity “be demonstrated clearly”).

89. It is true that even where an injunction might otherwise be forthcoming, “judges may refuse specific performance if they fear that the court will be repeatedly drawn into further controversies in attempting to enforce the decree.” DAN B. DOBBS, *LAW OF REMEDIES* § 12.8(3) (2d ed. 1993). But the judges adjudicating the school desegregation cases nonetheless issued structural injunctions, which by their nature required heavy involvement by the courts. *See, e.g.*, *Bradley v. Milliken*, 338 F. Supp. 582, 594-95 (E.D. Mich. 1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F. Supp. 265, 270 (W.D.N.C. 1970).

90. Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 *CORNELL L. REV.* 270, 279-80 (1989) (stating that structural litigation, also known as institutional reform, has allowed plaintiffs to “pursue relief that could affect numerous people not before the court”).

91. We may already be getting ahead of ourselves by suggesting that regulation must affect behavior. While it seems uncontroversial to say that regulation affects behavior, the presence of behavioral change in response to some influence may be neither necessary nor sufficient for us to call some influence regulatory.

92. For a thorough account of the ways in which regulation can fail, see SUNSTEIN, *supra* note 10, at 74-110. Sunstein identifies two main groups of regulatory failure: failures in writing a statute, so that faithful implementation of the statute will not achieve the statute’s regulatory goal(s); and failure in implementation, where for whatever reason the public officials charged with achieving the statutory goals have chosen ineffective means of doing so. *Id.* at 84-100.

Along with regulatory failures in the form of countervailing risks, where the

is that administrative agency actions, which will serve as our paradigm and can safely be called regulations,<sup>93</sup> often produce unintentional behavioral changes through their regulatory efforts. That is, if we decide that regulation is about behavioral changes, the changes that a particular agency action or judicial decree bring about may be different from the changes the relevant actor desired. One of the most famous examples is the suggestion that seat belt laws, when adjusted for other factors, have had no net effect on traffic fatalities because the increased safety that drivers feel knowing they have seatbelts (and airbags and crumple zones, for example) causes them to drive faster and more recklessly.<sup>94</sup>

Still, because the focus is on regulation arising out of litigation, we can concern ourselves less with informal regulatory actors—interest groups, trade unions, grassroots campaigns, and the rest of the universe of nongovernmental regulation. While it is true that all of these actors can play essential roles in particular instances of regulatory litigation, they still do so within a formal governmental framework (the judiciary) by attempting to co-opt the government's power to command and serve their interests. For example, interest groups submitting amicus curiae briefs or acting as the litigants themselves may be nongovernmental actors, but rather than acting to achieve behavioral changes through informal means, they are trying to convince the state to use its authority to command in order to achieve their regulatory goals. Even where suits result in negotiated settlements rather than final adjudications, the actors

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reduction of one risk results in an increase of another, there is also the possibility that reducing one risk will reduce another; in the technical literature, such risks are called "coincident risks." John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, in *RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT* 1-2 (John D. Graham & Jonathan Baert Wiener eds., 1995). Either scenario can cause unintended behavioral changes, even if such changes are not necessarily for the worse from the regulator's point of view. *See id.* (noting that regulators must consider the net effect of risk-reduction campaigns, which can be difficult to predict).

93. At least when those actions are directed at third parties, I mean to exclude, for example, agency actions dealing with setting internal budgets and the like, even though these too will influence behavior and indeed are often actions undertaken with the intent of influencing behavior.

94. *See* John G.U. Adams, *The Efficacy of Seat Belt Legislation*, SAE TECHNICAL PAPER SERIES, 1, 10 (1982) (analyzing car accident data and finding no net decrease in highway fatalities resulting from seat-belt requirements); Wiel Janssen, *Seat-Belt Wearing and Driving Behavior: An Instrumented-Vehicle Study*, 26 ACCIDENT ANALYSIS & PREVENTION 249, 259-60 (1994) (concluding that drivers wearing seatbelts engage in riskier behaviors, such as driving faster and tailgating more frequently). The seminal work is Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677, 677 (1975), which contends that regulation has not decreased the number of highway fatalities due to offsetting effects. The general phenomenon of risk compensation, whereby people change their behavior based on the perceived changes in risk, is explored in JOHN ADAMS, *RISK* (1995).

still use the *threat* of state action to achieve regulatory ends. As a result, their actions should not be separated analytically from state action, and we can limit our definition of regulatory litigation to cases of state influence. Moreover, because we are concerned with judicial decrees, we can limit our view of regulation to state actions that control behavior without having to worry about including other types of regulation.<sup>95</sup>

### *C. Theories of Regulatory Litigation*

So far, the study of litigation as a distinct regulatory mechanism has developed out of two disciplines—political science and law. In the former category, political scientists have focused on statutory designs that evince a conscious choice on the part of the legislators to vest regulatory enforcement authority in private parties.<sup>96</sup> In the latter category, commentators have mainly used public-choice theory and economic concepts such as market failure to explain regulatory litigation.<sup>97</sup> But what is missing from the literature is an explanation of what regulatory litigation *is*—what distinguishes regulatory from nonregulatory litigation.<sup>98</sup> First, however, it will be useful to examine the current conceptions of regulatory litigation.

#### 1. Regulatory Litigation through Conscious Legislative Design

In the field of political science, the limited studies of regulatory litigation have focused exclusively on conscious legislative attempts

95. For example, this Article does not consider self-regulation through an internally developed set of rules that is self-enforced, incentive-based regulation seeking to induce desired behaviors through the provision of carrots, rather than sticks, and direct action through public infrastructure-ownership. For a discussion of these and other types of regulation, see BALDWIN & CAVE, *supra* note 63, at 39-62.

96. See FARHANG, *supra* note 5, at 3 (emphasis omitted) (“It is a legislative choice to rely upon private litigation in statutory implementation.”).

97. MORRIS ET AL., *supra* note 8, at 5, 17-18; W. Kip Viscusi, *Overview*, in *REGULATION THROUGH LITIGATION* 19-20 (W. Kip Viscusi ed., 2002). The public-choice-theory proponents attempt to explain *why* regulatory litigation occurs and *why* it developed as it has, but do little to tell us what regulatory litigation actually *is*.

98. Other than the scholarship mentioned below, the few existing discussions of regulatory litigation have not attempted to define regulatory litigation. See generally JOHN FUND & MARTIN MORSE WOOSTER, *THE DANGERS OF REGULATION THROUGH LITIGATION: THE ALLIANCE OF PLAINTIFF'S LAWYERS AND STATE GOVERNMENTS* (2000); WALTER K. OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW* (2003); Viscusi, *supra* note 97; Burke, *supra* note 3; Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215 (2001); see also Eric A. Posner, *Tobacco Regulation or Litigation?*, 70 U. CHI. L. REV. 1141, 1155-56 (2003) (noting W. Kip Viscusi's failure to distinguish between regulatory and nonregulatory tort litigation in W. KIP VISCUSI, *SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL* (2002)).

to achieve regulatory goals through statutory design. For example, Sean Farhang sees regulatory litigation only in terms of positive legislative choices to circumvent regulation-by-administrative agency.<sup>99</sup> In comparing administrative agency action and private action through litigation, Farhang notes that

[t]he American civil discovery process effectively confers upon private litigants and their lawyers the same investigatory powers as federal agencies to *compel* sworn testimony and to disgorge documents; they can obtain the same court orders commanding a violator to cease its unlawful conduct and pay for its violations; and the court orders are backed by the same federal police powers.<sup>100</sup>

Unfortunately, this description applies to all litigation and, as a result, lacks any potential to allow us to distinguish between regulatory and nonregulatory litigation.

Another definition of regulatory litigation comes from the recent book *Regulation by Litigation*.<sup>101</sup> According to the authors, “regulation-by-litigation,” as they term the phenomenon of courts doing something that in effect looks regulatory, “uses litigation and the courts to achieve and apply regulatory outcomes to entire industries.”<sup>102</sup> Note two aspects of this part of the definition. First, it assumes some actor *using* the litigation system to achieve regulatory ends, and it thus requires the intent of some actor to achieve a regulatory goal, rather than a purely personal end. Second, this definition restricts the ambit of regulatory litigation to that portion of litigation having industry-wide effects.

In noting the emergence of regulatory litigation, the authors observe that “[l]awyers, both private and public, were bringing suits and achieving ends that could be and traditionally had been achieved by regulatory agencies using rulemaking procedures.”<sup>103</sup> This groups public lawyers (presumably, attorneys general, members of the Civil Division of the U.S. Department of Justice, and the like) with private lawyers, but it does not discuss whether cases are regulatory simply because they are brought by public lawyers, or whether, as defined previously, a particular case is regulatory because of its result (presumably, based on their definition of regulation-by-litigation<sup>104</sup> and their failure to distinguish between private and public lawyers, it is necessary—but not sufficient<sup>105</sup>—for the result to be regulatory).

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99. FARHANG, *supra* note 5, at 8.

100. *Id.*

101. MORRISS ET AL., *supra* note 8, at 1. As these authors expend more effort attempting to define what regulatory litigation actually *is*, I will spend more time analyzing their ideas.

102. *Id.*

103. *Id.*

104. *See id.*

105. Result is a necessary but not sufficient condition because according to Morriss

The authors attempt to address the regulatory/nonregulatory distinction by further definition:

We recognize that successful private and public litigation does bring about changes in the behavior of defendants through injunctions and the payment of damages and might therefore be thought of as being regulatory. But although the outcome of one controversy at law may generate voluntary changes in behavior beyond the parties to a controversy, perhaps even across an industry, the litigation itself and the related court rulings cannot mandate prospective changes to an entire industry. By contrast, regulation-by-litigation can and does impose forward-looking regulatory constraints on an entire industry.<sup>106</sup>

Under this definition, behavioral changes that occur as the result of a judgment are not alone sufficient to be considered the result of regulation-by-litigation, even if they are industry wide. It appears that the authors have in mind two different scenarios: (a) changes of behavior that force the enjoined party to change its behavior under threat of being held in contempt of court; and (b) changes of behavior that third parties undertake in order to avoid a fate similar to that of the losing party to the suit that may be alleged to be regulatory. Second, the definition requires that a given lawsuit mandate “forward-looking regulatory constraints on an entire industry,”<sup>107</sup> so that a conscious, prospective effect is a necessary condition of regulatory litigation. I suspect that the authors think by announcing their standard they are dividing litigation that is backwards-looking from that which is forward-looking.<sup>108</sup> It is a tempting thought, but as discussed above, precedent is binding on future conduct—not just of entire industries, but of everyone—so something more is required for a useful distinction between regulatory and nonregulatory litigation.<sup>109</sup>

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et al., it is also necessary that the regulatory effect reaches an entire industry. *See id.* at 1-2, 41.

106. *Id.* at 2.

107. *Id.*

108. *See* discussion *infra* Part III.A.

109. Additionally, the problem with excluding some cases that are not forward-looking (at least not in the sense that there is a conscious plan to influence future behavior) is that it ignores half of the universe of regulation: the half that deals with ex post effects of discouraged behavior. Discussing agency regulation, Professor Samuel Issacharoff notes that “both ex ante and ex post review are essential parts of the regulatory model.” Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 380 (2007). As the asbestos example suggests, class actions, even when they have no effect on future behavior, can be seen as regulatory litigation. The authors’ definition is also imprecise with respect to how we decide whether a case is forward-looking. Clearly, they exclude cases that are merely forward-looking in effect. Otherwise, some cases resulting in injunctions, or any cases that could be said to be precedential, would be regulatory. What seems to be necessary, therefore, is some intent to bind future action, but the authors are silent with respect to whose intent

On a more theoretical level, the problem with this account of regulatory litigation is that the authors explain regulatory events purely in terms of public-choice theory, while giving only lip service to other theories about the generation of regulation.<sup>110</sup> Put simply, public-choice theory explains political decision making in economic terms, viewing “regulatory . . . institutions as an economy in which the relevant actors—including ordinary citizens, legislators, agencies, and organized interest groups most affected by regulatory policies—exchange regulatory ‘goods,’ which are ‘demanded’ and ‘supplied’ according to the same basic principles governing the demand and supply of ordinary economic goods.”<sup>111</sup> Because interest groups are well informed about matters directly concerning them, whereas the general public is not,<sup>112</sup> and because smaller interest groups (industry groups, for example) will have similar goals and lower organizing costs, public-choice theory predicts that politicians will “engage in activities that provide well-identified concentrated benefits to special-interest groups” as a result of the influence that these smaller interest groups are able to exert.<sup>113</sup> The result is that Congress creates legislative schemes that produce regulation

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matters—the parties’ or the judges’.

110. For a general overview of public-choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). Public-choice theory is a subset of private-interest theories of regulation, which stress the “[r]ole of private economic interests in driving regulation” and the “[i]ncentives of firms to secure benefits and regulatory rents by capturing regulator[s].” BALDWIN & CAVE, *supra* note 63, at 33. But this is only one of five theoretical explanations for regulation. Public-interest theories emphasize the importance of publicly desired goods in motivating regulatory actions; interest-group theories explain regulation as the result of interactions between both the groups themselves and the groups and state, often but not necessarily as a struggle for power rather than in the public interest; force-of-ideas theories highlight the ideological justifications behind regulatory decisions; and institutional theories explain regulation through the interaction of institutional structures and social processes. *Id.* at 18-33.

111. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34 (1998); see generally George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (analyzing “[t]he potential uses of public resources and powers to improve the economic status of economic groups . . . to provide a scheme for the demand for regulation”) (emphasis omitted).

112. MORRIS ET AL., *supra* note 8, at 3-4; see also Croley, *supra* note 111, at 35 (explaining that according to public-choice theory, “the regulatory interests of the individual voter (or the consumer) are dominated by the regulatory interests of organized subgroups of the citizenry because the latter have incentives to influence regulatory decisionmaking which the former lacks”); Ralph K. Winter, Jr., *Economic Regulation vs. Competition: Ralph Nader and Creeping Capitalism*, 82 YALE L.J. 890, 893-94 (1973) (noting that “one should anticipate that executive or independent agencies will respond most favorably to those with the greatest ability and incentive to organize and press their claims” and that “[m]uch has been made of the consumer’s . . . lack of product information”).

113. MORRIS ET AL., *supra* note 8, at 4.

(through litigation or an administrative agency) favorable to these organized interest groups.

The literature is replete with criticisms of public-choice theory, and the laundry list of critiques will not be repeated here.<sup>114</sup> Instead, I will focus on two points that are of particular relevance to the question of defining regulatory litigation. First, as suggested previously, any understanding of regulation and thus of regulation litigation must account for “unintentional regulation.”<sup>115</sup> Public-choice theory, which concludes that regulation comes about through the conscious efforts of interest groups,<sup>116</sup> fails to account for the disconnect between the argued-for regulatory capture and the unanticipated (from the point of view of public-choice theory’s predictions) phenomenon of unexpected regulation. Second, public-choice theory focuses purely on externalities as the driving force of regulation to the exclusion of not only other types of market failures but also other regulatory motivations not based on economic considerations at all.<sup>117</sup> By focusing exclusively on externalities, Morriss and others ignore not only other market failures that motivate regulation, such as monopoly power or information inadequacies, but also other types of regulation, such as public-interested redistribution or regulation that seeks to address social

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114. For a general overview of public-choice-theory criticisms, see Croley, *supra* note 111, at 41-56.

115. See *supra* notes 91-94 and accompanying text.

116. See Croley, *supra* note 111, at 35.

117. STEPHEN BREYER, *REGULATION AND ITS REFORM* 23 (1982). Regulation of externalities is “justified on the ground that the unregulated price of a good does not reflect the true cost to society of producing that good.” *Id.* The classic example of an externality is pollution. Consider a producer who makes some good and whose manufacturer produces toxic waste, carbon monoxide, or sparks that threaten nearby fields. If the manufacturer disposes of the waste in a way that produces no harm to third parties, assume that the retail cost of the product will be \$10. If the producer instead dumps the waste in the river behind its plant, however, the retail cost of the product will be \$9. In this example, the \$1 difference in retail price represents the social cost—the amount of harm to society through increased incidence of cancer, damage to fishing interests, and all of the other scenarios we can imagine to be affected by the dumping—that the production of that one unit produced. Absent any regulation, the producer has the incentive to dump the waste in the river, rather than in a safe manner, because doing so will allow the producer to sell its products more cheaply and therefore sell more of the same product. As long as society would prefer to pay more than \$1 per unit to induce the producer to dispose of its waste safely, then the dump-it-in-the-river method of disposal is socially wasteful—society values (in terms of willingness to pay) reduced pollution over the cheaper product. However, collective action problems make it impossible for society to band together and find a practical way to pay the producer not to pollute, and thus government intervention is suggested as a means of dealing with this waste. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2 (1965) (stating that “the customary view that groups of individuals with common interests tend to further those common interests appears to have little if any merit”).

subordination.<sup>118</sup>

In focusing only on conscious legislative attempts to produce regulatory litigation, these theories ignore the world of regulatory litigation that results from the regulatory designs of judges, litigants, and third parties attempting to influence litigation results. It is to theories addressing these actors that we now turn.

## 2. Regulation as a Litigation Aim

Other scholars have more often discussed the haphazard regulatory effects of litigation that occur both from the efforts of judges and litigants to achieve regulatory goals and as a result of the regulatory side effects of litigation. For example, Kenneth Abraham has suggested two possible conceptions of regulatory litigation.<sup>119</sup> The first draws the distinction between retrospective and prospective litigation.<sup>120</sup> The former deals with “injuries resulting from activities that have ceased altogether by the time a suit ends up in court” and is nonregulatory, whereas the latter is “concerned with activities that not only have caused (or are alleged to have caused) injuries in the past but that continue to occur.”<sup>121</sup> However, because Abraham recognizes that liability determinations about even discontinued products can have prospective effects, “[i]n [a] sense, every lawsuit is potentially regulation by litigation.”<sup>122</sup>

Abraham also put forward a narrower definition of regulatory litigation, which focuses on “the explicit motive of the plaintiffs . . . to change defendants’ behavior, rather than merely to create an incentive on the part of the defendant to consider whether to change.”<sup>123</sup> As with Morriss and others, the focus on purely prospective regulatory effects ignores half the world of administrative agency regulation: regulation that results in compensation for prior transgressions, regardless of their future regulatory effect. “Ex ante . . . regulation sets standards[, while] ex post regulation uses the threat of liability to force an internalization of potential damage payments [(although the latter might be better

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118. For a fuller account of these motivations for regulation, see SUNSTEIN, *supra* note 10, at 47-73.

119. Kenneth S. Abraham, *The Insurance Effects of Regulation by Litigation*, in REGULATION THROUGH LITIGATION 212, 231-32 (W. Kip Viscusi ed., 2002). It is important to note that in his essay, Abraham does not focus on defining regulatory litigation and merely suggests the two definitions mentioned as possibilities. Because the definitions themselves are unnecessary to his thesis, Abraham declines to address the theoretical issues or the weight of the definitions.

120. *Id.* at 231.

121. *Id.* Abram Chayes’ discussion of the distinction between public and private law, discussed *infra* Part III.A, makes a similar distinction between prospective and retrospective litigation.

122. See Abraham, *supra* note 119, at 232.

123. *Id.* at 232.

expressed as the forcing of internalizing externalized costs), with the result that] ex ante and ex post [provisions are both] essential parts of the regulat[ion] model . . . .”<sup>124</sup>

Another, more comprehensive discussion of the meaning of regulatory litigation limited the definition to “(1) tort claims brought by a (2) government plaintiff (3) based on a mass subrogation theory.”<sup>125</sup> As with Farhang’s definition and Abraham’s narrow definition, I agree that this definition describes one *type* of regulatory litigation but not that it describes the universe of regulatory litigation. It should be clear from the discussion of risks in Part I that the ambit of regulatory litigation, as a regulatory gap filler, goes beyond tort law. Civil rights suits and negative-value consumer class actions produce judgments that approximate administrative agency actions as closely as mass tort cases. Moreover, mass torts brought by individuals through class actions can certainly produce results with regulatory effects similar to those brought by states.

While these attempts to define regulatory litigation have failed to capture the entire picture of regulatory litigation, they are certainly useful for their descriptions of particular *instances* of regulatory litigation. Part III concludes the discussion by attempting to draw out the common threads of these theories and adding supplemental analysis to complete the regulatory litigation picture.

### III. THE THEORY OF REGULATORY LITIGATION

The various types of regulatory litigation discussed tend to distinguish between regulatory and nonregulatory litigation along fairly uniform lines. The theories distinguish between the types of remedies imposed and between the various actors involved in the litigation. These various distinctions are captured by Abram Chayes’ iconic article *The Role of the Judge in Public Law Litigation*,<sup>126</sup> in which he laid out the differences between what he termed private-law and public-law litigation and which challenged the “received tradition [that] the lawsuit is a vehicle for settling disputes between private parties about private rights.”<sup>127</sup> After analyzing these characteristics, which encompass the various factors contained in the previously discussed theories, we will be able to draw some conclusions about the nature of regulatory litigation.

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124. Issacharoff, *supra* note 109, at 380.

125. Edward T. Schroeder, Note, *A Tort by Any Other Name? In Search of the Distinction Between Regulation Through Litigation and Conventional Tort Law*, 83 TEX. L. REV. 897, 900 (2005).

126. *See generally* Chayes, *supra* note 29.

127. *Id.* at 1282.

*A. Chayes and the Public/Private Law Distinction*

Chayes identified the following as indicia of this traditional, private-law type of litigation:

- (1) The lawsuit is *bipolar*. Litigation is organized as a contest between two individuals or at least two unitary interests . . . .
- (2) Litigation is *retrospective*. The controversy is about an identified set of completed events . . . .
- (3) *Right and remedy are interdependent*. The scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty . . . .
- (4) The lawsuit is a *self-contained* episode. The impact of the judgment is confined to the parties . . . .
- (5) The process is *party-initiated* and *party-controlled*. The case is organized and the issues defined by exchanges between the parties.<sup>128</sup>

This more or less conforms to what we think of as a "normal" contract or suit. A plaintiff sues a defendant, the judge issues a decision, and the parties go on their way.

Chayes' contribution was in his identification of the new sort of litigation that had begun to develop in the 1960s. In contrast to the more traditional suits, this new litigation was characterized by the fact that

- (1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.
- (2) The party structure is not rigidly bilateral but sprawling and amorphous.
- (3) The fact inquiry is not historical and adjudicative but predictive and legislative.
- (4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties . . . .
- (5) The remedy is not imposed but negotiated.
- (6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.
- (7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.

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128. *Id.* at 1282-83 (emphasis in original) (internal citations omitted).

(8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.<sup>129</sup>

The appeal of adapting Chayes' public/private distinction to the realm of regulatory litigation is that it provides several categories with opposing characteristics (there is a single plaintiff and a single defendant versus one or both sides composed of sprawling, amorphous groups), allowing us to draw a line between nonregulatory (private-law) and regulatory (public-law) litigation. The problem with using the indicia of traditional, private-law adjudication as indicators of nonregulatory litigation, however, is that even lawsuits bearing these indicia often approximate the results that would be reached had the lawsuits been handled by administrative agency action rather than litigation.

### 1. Bipolar/Multipolar Interests

Consider first Chayes' distinction between lawsuits that are bipolar, with two diametrically opposed interests (but not necessarily two parties composed of one individual each), "decided on a winner-takes-all basis,"<sup>130</sup> and lawsuits with sprawling, amorphous party structures.<sup>131</sup> We can imagine a simple contract claim of failed performance as exemplifying the former. Mr. X agrees to paint my fence for \$10 but fails to do so. There are two interests involved. With regard to the contract, the interests are (1) my interest in having my fence painted and (2) Mr. X's interest in receiving \$10. In the breach of the contract, the interests are still two: (1) my interest in having my fence painted and (2) Mr. X's interest in not having to paint my fence (or possibly, his interest in getting more than \$10). The situation becomes complicated, however, when the sum at stake is substantially increased. Suppose that instead of a contract for \$10, the contract is for \$1,000,000,000.

This change in sum has several effects, other than making the reader observe that I am paying way too much for my fence to be painted or that it had better be the best paint job ever. First, because the value of the contract is so high, its payment will have large effects on third parties. The state will garner a substantial sum in taxes. Additionally, whether Mr. X deposits, invests, or spends the money, there will be a strong effect on whatever industry he graces with his wealth, and the negative is true of the industries I would have supported with the money I instead decided to invest in my fence. The increase in wealth will also have an effect on Mr. X's family. We can assume that, when Chayes developed the

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129. *Id.* at 1302.

130. *Id.* at 1282.

131. *Id.* at 1284.

public/private distinction, he did not have such things in mind; surely even the resolution of a simple contract or tort claim will have ripple effects on those otherwise involved with the parties (e.g., the characteristic that the impacts of private-law adjudication are restricted to the parties), and we might say that this is why he specifies “interests” rather than “parties.”<sup>132</sup>

More importantly, the interests of third parties might be substantial, as might the interests of Mr. X himself. What if Mr. X avoided the contract because he found someone who would pay \$20 for the same amount of fence painting, rather than because he preferred to play golf?<sup>133</sup> If Mr. X sought the \$20 fence-painting contract because he needed that amount to feed, clothe, and shelter his family,<sup>134</sup> and that amount represents the difference between sustaining a family and not, the court might be swayed by policy considerations that favor sustaining families above the normal policy consideration that contracts must be obeyed. We could also say the same of executing a will, as in the classic case of the man denied his inheritance because he murdered the testator.<sup>135</sup> That should be a simple case; the will merely needed to be executed. The purpose of this admittedly stylized example is to show that public policy considerations thus interject themselves into otherwise straightforward cases in the presence of certain facts or states of the world. The result of such considerations is to turn simple, bipolar disputes into instruments of public policy.

Even aside from public policy considerations, the mere value of the claim can greatly alter the nature of the interest at stake. Thus it

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132. This assumes, however, that the interests of Mr. X's family are the same as those of Mr. X. They might wish for him to perform the contract and bring home \$10, whereas he might prefer to play golf in the time that he would have spent painting the fence. Moreover, Chayes notes that “the courts defined the concept of ‘interest’ narrowly to exclude those without an independent legal right to the remedy to be given in the main dispute.” *Id.* at 1289 (citing CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 57 (2d ed. 1947)).

133. Suppose further that the market value of that amount of fence painting was in fact \$20 and that I cannot find substitute performance for any less than the market rate. I might seek damages of \$10 to pay for the cost of covering, if I had not yet paid Mr. X, or \$20 (the amount paid for unperformed services plus the cost to cover) if I had paid in advance. Mr. X would have been equally well off if he had performed either contract: he would have ended up with \$10 in either case.

134. Leave aside for now whether he ought to have known that before making the \$10 contract, or assume that he decided that \$10 was better than nothing, and that the \$20 contract came along between the time of making the original contract and the time when he was to perform.

135. See *Riggs v. Palmer*, 22 N.E. 188, 191 (N.Y. 1889). In this case, the dispute between the majority and the dissent was between the principle of affording legal instruments their plain meaning and the equitable principle that no one should profit from their own wrong. *Id.* at 191-92. The tension between these two principles is explored in RONALD DWORKIN, LAW'S EMPIRE 15-20 (1986).

seems that what makes litigation private—and therefore, presumably, nonregulatory—is not the number of the parties or interests but rather how we characterize them, or the *nature* of the interests. When the nature of the interest is small (or insignificant relative to the party’s other interests; a \$1,000 contract is worth more to me than to a multinational conglomerate), Chayes’ category is useful, and bipolar litigation of this nature is not regulatory. However, where the nature of the interests is so circumstantial, focusing on whether a case is bipolar or multipolar distracts from the true issue that warrants emphasis—the nature of the interests.

## 2. Prospective/Retrospective Litigation

The second distinction that Chayes announces is that private-law litigation is, in fact, retrospective, concerning a set of concluded events and their legal consequences,<sup>136</sup> whereas public-law litigation is forward-looking.<sup>137</sup> It will be useful to explore first what Chayes means by retrospective. Chayes explains that “[t]he controversy is about an identified set of completed events: whether they occurred, and if so, with what consequences for the legal relations of the parties.”<sup>138</sup> The completed-events distinction seems to separate those cases—like breach of contract cases, which concern themselves with the occurrence or nonoccurrence of an event specified in the contract—from cases like those involving prison or school reform, which deal with ongoing wrongs. But even a simple tort case—the resolution of which seems to depend merely on whether there was a duty, whether there was a breach of that duty, whether the defendant was the actual and proximate cause of the breach, and whether the damages arise out of the breach—becomes complicated if the injury suffered is not completed by the time of the litigation.<sup>139</sup> As long as there are future harms like medical bills and lost wages, we can no longer consider the litigation as concerned simply with past events and thus deserving the label of retrospective. The same is true of contract cases as soon as, for example, there is any discussion of covering for nonperformance where cover has not been effected by the time of the litigation, or when the court is asked to recognize future consequential damages. Neither the tort nor contract cases can be called retrospective if the consequences are ongoing.

Chayes’ categorization seems to present two possible types of

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136. Chayes, *supra* note 29, at 1282.

137. *Id.* at 1302; see Abraham, *supra* note 119, at 231 (noting that different effects may result from litigation related to activities that have ended versus activities that continue); MORRISS ET AL., *supra* note 8, at 2 (discussing retrospective versus prospective results of litigation).

138. Chayes, *supra* note 29, at 1282.

139. In other words, it is impossible to conclude with certainty the extent of the damages when the suit is brought.

litigation: litigation where the set of events leading to the litigation is completed and litigation where there is ongoing wrongdoing. But the discussion of consequences above means there are really at least three categories: (1) the *truly* retrospective, where both the set of events giving rise to the dispute *and* the consequences of the breach of whatever duty, whether tort or contract,<sup>140</sup> are in the past (the important part being Chayes' use of the conjunction "and" in his formulation "completed events . . . and, if so, the consequences"); (2) those cases where the acts or omissions<sup>141</sup> giving rise to the litigation are complete, but the consequences are ongoing, or will not manifest themselves until some point in the future (toxic torts, for example); and (3) those cases where the wrong is ongoing, so that the consequences are necessarily ongoing as well.<sup>142</sup> The latter two would seem to constitute a much larger category than the former, and thus it would seem that there are very few cases that can be described as purely retrospective. Therefore, if we wish to exclude those cases that are truly and completely retrospective from the world of regulatory litigation, we will cordon off only a negligible number of cases.

### 3. Nature of the Remedy

Third, Chayes separates litigation where the right asserted and the remedy sought are interdependent, such that the remedy flows logically from the substantive harm suffered and the remedy

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140. I exclude from here any litigation brought by the state under the assumption that any such litigation (enforcement actions, for example), even if concerning both acts and consequences that are completed, will be considered public and hence regulatory, specifically because it is brought by the state. This requires the assumption that all public-law litigation is regulatory, which I am happy to assume, since I expect that whatever characteristics I use to describe regulatory litigation, any public-law litigation will have those characteristics. What is more important is to identify what it is about non-regulatory "private" litigation that makes it nonregulatory.

141. We might think that there should be a separate category for those cases where the cause of the dispute is an omission of an act that has not been performed by the time of the litigation but is capable of performance, and we could be tempted to characterize this breach as ongoing rather than completed. This category is ultimately unsatisfying, however, because the fact of bringing suit "completes" the omission, making it a past event. But a further question is whether we should characterize those cases where performance is no longer desired, and those where performance is still required (meaning the omission can be corrected) and the suit is brought for the consequences of the delay. In the former case, if we think that bringing suit completes the omission, the suit becomes one for the damages arising from the delay (assuming there is an agreement to complete performance at some time in the future). But the cause of action is the same in this case as in the latter, since there is just a different remedy sought. So we need not think of the two cases as different in a relevant way.

142. A further note on this point is that the consequences themselves are bifurcated—the past consequences are treated differently depending on whether the consequences of the past act are found to be ongoing and whether the future consequences are prevented through an injunction or structural reform.

attempts to place the plaintiff in the status quo ante,<sup>143</sup> from litigation that is “fashioned ad hoc on flexible and broadly remedial lines.”<sup>144</sup> This dichotomy can be rejected on two separate grounds.

The first and simpler one is that a class action based in tort, where thousands are injured in the same way with claim relief under the same theory of liability, can be described as having an interdependent right and remedy, where the remedy (damages for medical bills, and pain and suffering) flow from the substantive harm (the tort that is the basis of the action). Yet there seems to be something inherently regulatory about class actions that makes us suspicious of using this characteristic as a distinguishing factor between regulatory and nonregulatory regulation.<sup>145</sup> It could merely be the simple fact that aggregating the claims puts more pressure on the company or industry—the increased potential damages an industry faces gives the class greater bargaining power over an individual claimant seeking a pro rata share of the total potential liability. As the class’ bargaining power grows, so does its ability to change an industry’s behavior in exchange for ceasing the action and/or decreasing the damages the industry is or could be required to pay. Therefore, the regulatory nature of a case may rest not on a retrospective/prospective line but rather on whether a defendant faces one plaintiff or a class, and whether the number, type, and size of the claims aggregated are sufficient to give the class enough bargaining power to exercise influence on the defendant company or industry.<sup>146</sup> As a result, we cannot say that a suit does not take on a public or regulatory character (if indeed the two be separate concepts) simply because of the retrospective nature of the theory of the case.<sup>147</sup>

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143. Chayes, *supra* note 29, at 1282.

144. *Id.* at 1302.

145. Chayes himself recognizes that “[w]hatever the resolution of the current controversies surrounding class actions, I think it unlikely that the class action will ever be taught to behave in accordance with the precepts of the traditional model of adjudication.” *Id.* at 1291.

146. As we will see below, the ability to exercise influence is probably one of the necessary elements of any definition of regulation. We will have to consider whether bargaining power, which is the means of acquiring the ability to influence, is necessary to regulatory litigation. I suspect that it is a necessary but not a sufficient condition, as I have stated.

147. What is less clear is whether we want to say that it is the large monetary value or the amount of bargaining power that is the necessary condition—it may be that they ultimately come to the same thing. On the one hand, monetary value qua value is irrelevant without context; a \$1,000,000 class action suit could be pocket change to a large corporation like Dow Chemical and have no real ability to pressure a company to change its habits. However, with respect to a company for whom that would be a devastating judgment to pay, a class claiming that sum would have considerable bargaining power to change the habits of the company, at least where that company would rather modify its behaviors and lessen its profits rather than face the possibility

A deeper problem with characterizing a particular lawsuit as retrospective or not and deciding whether the remedy logically follows from the substantive wrong is that positing that some cases are (and do) and some are not (and do not) is to make a false distinction. Chayes might have meant that the retrospective cases he had in mind were damages cases, and perhaps there is some class of cases that are “truly” private.<sup>148</sup> But even a contract case seeking consequential damages can be forward-looking, in that the judge or jury may be asked to look into the future, decide whether a particular damage the plaintiff foresees will come to pass, and decide whether that damage will be the result of the breach claimed, whether it would have been foreseeable that the harm would arise from the breach, and other similar considerations.

Here again, we can consider the case of a court issuing an injunction. The injunction will be granted only if the court is satisfied that there is a reasonable probability that the complained of conduct will happen again in the future *and* the court believes that the claimant will be irreparably injured as a result of that conduct.<sup>149</sup> Both of these considerations are necessarily forward-looking, as is the consequential-damages claim in the contract case just mentioned. Therefore, whether a case is retrospective or prospective does not dictate whether it is regulatory or not.<sup>150</sup>

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of paying potentially crippling judgment. On the other hand, bargaining power initially seems to be purely a function of real-world claim value, where we would expect there to be a linear (or possibly exponential) relationship between the expected value of a claim (amount of damages sought multiplied by the probability of success) and the amount of influence the class would exercise. But defendants may also attach value to nonmonetary aspects of resolving a claim (appearance of goodwill or contrition, for example, which we could expect in the case of a spill of some known carcinogen, or as I expect to see in the settlement of claims arising out of the Deepwater Horizon oil spill). See Cutler Cleveland, *Deepwater Horizon Oil Spill*, ENCYCLOPEDIA OF EARTH (Sept. 9, 2011, 10:02 p.m.), [http://www.eoearth.org/article/Deepwater\\_Horizon\\_oil\\_spill?topic=5036](http://www.eoearth.org/article/Deepwater_Horizon_oil_spill?topic=5036) (detailing history of spill). Here, we could either call this nonmonetary consideration a separate factor that contributes to the bargaining power of the claimants—which may be under the control of the claimants, since they would have the power to reject potential settlements, which could result in additional negative publicity for a company if it is perceived rightly or wrongly to be “fighting to the bitter end” rather than attempting to admit its fault and make good on the responsibilities it has incurred as a result of its fault—, or we could attempt to monetize it. Again, it may come to the same result. But these various considerations suggest to me that it is more correct to speak of an attempt to discern bargaining power when we talk about a lawsuit’s regulatory potential, even if in assessing that potential bargaining power we consider primarily the monetary value of the claim.

148. See *supra* Part III.A.2.

149. See *supra* notes 86-89 and accompanying text.

150. Distinguishing between orders for specific performance and injunctions, Chayes notes that an injunction

is a presently operative prohibition, enforceable by contempt, and it is a much

What about the second distinction—that the remedy logically follows from the wrong, rather than being fashioned on ad hoc and flexible grounds and has important consequences for third parties? The latter, we have already addressed; the consequences for third parties (which we can express more accurately as third-party interests) depend less on the type of claim than on value and the ex ante interests of the third parties (or the preexisting relationships between the parties and third parties). When Chayes mentions ad hoc, flexible remedies, he seems to have structural reform cases in mind.<sup>151</sup>

First, by accepting the prospective aspects of these cases (which I do not deny), Chayes seems to ignore the retrospective nature of these cases.<sup>152</sup> Recall the problem we had with deciding whether ongoing but remediable contract breaches were really ongoing. We could say that there is nothing retrospective about prison reform cases, because if the harm had been removed in the past, there would be no case other than possibly damage claims for past constitutional harms. But if we did that, we would have to say the same thing about contract cases where the issue was lack of performance. If the contract had been performed in the past, there would be no case, but the nonperformance of the contract is what makes the case and what may require the court to look at the potential future consequences of nonperformance. So again, we see that the prospective/retrospective category does not work as a dividing line between regulatory and nonregulatory litigation.

In describing ad hoc and flexible remedies as not flowing logically from the substantive harm,<sup>153</sup> Chayes is mistaken because he has mischaracterized the status quo ante. In remedies, we speak of status quo ante, but sometimes it is helpful to consider (or remember) what the status quo ante embodies—the party’s rightful

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greater constraint on activity than the risk of future liability implicit in the damage remedy. Moreover, the injunction is continuing. Over time, the parties may resort to the court for enforcement or modification of the original order in light of changing circumstances. Finally, by issuing the injunction, the court takes public responsibility for any consequences of its decree that may adversely affect strangers to the action.” Chayes, *supra* note 29, at 1292 (internal citations omitted). Chayes views specific performance as “structurally little different from traditional money-damages,” since such an order “is a one-time, one-way transfer requiring for its enforcement no continuing involvement of the court.

*Id.*

151. *See id.* at 1293-94. For an overview of structural reform litigation in the prison context, see MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (2000).

152. *See* Chayes, *supra* note 29, at 1292-94.

153. *See id.* at 1293-94.

position.<sup>154</sup> This is an especially important consideration in constitutional cases, where plaintiffs often have never occupied their rightful positions, so it is difficult to describe remedies as restoring them to their status quo ante, even if that is what the remedies seek to do. The problem is that when the status quo ante—in other words, the properly understood baseline—is a counterfactual situation, talking about status quo antes becomes awkward. As soon as we look at remedies in the sense of rightful position, we can see why the structural reform remedies look ad hoc and flexible: there is no rightful position that can be restored as easily as can a rightful position where I have \$300 more and the defendant has \$300 less. In structural reform cases, parties have to spin rightful positions out of broad, abstract constitutional or statutory provisions, resulting in the much-discussed questions like what minimum level of prison cell space is required for inmates under the Eighth Amendment.<sup>155</sup> But Chayes' formulation fails because it suggests that remedies that are so fashioned do not spring logically from the substantive harm suffered.<sup>156</sup>

#### 4. Impact of the Remedy

Next, consider Chayes' assertion that in private-law litigation, “[t]he lawsuit is a *self-contained* episode. The impact of the judgment is confined to the parties . . . [and the] entry of judgment ends the court’s involvement” with the case.<sup>157</sup> As discussed above, the limitation or not of the effects of the judgment to the parties does not serve as a useful way of distinguishing between regulatory and

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154. A basic rule in remedies is that the remedy should return the injured party, as nearly as possible, to the position he occupied prior to his injury—the status quo ante. The rightful position is usually the status quo ante, as when my property is wrongfully taken by another. *See* *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867) (“The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury . . . . The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.”); *United States v. Hatahley*, 257 F.2d 920, 923 (10th Cir. 1958) (“The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party.”); *Park v. Moorman Mfg. Co.*, 241 P.2d 914, 920 (Utah 1952) (“[T]he measure of damages is such sum as will compensate the person injured for the loss sustained . . . .”); *see also* DOBBS, *supra* note 89, § 1.1 (“The damages remedy is a money remedy aimed at making good the plaintiff’s losses.”); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 15 (3d ed. 2002) (“*Hatahley’s* rule . . . is the essence of compensatory damages.”). Occasionally, the rightful position is not the claimant’s status quo ante. When a defendant interferes with the plaintiff’s ongoing efforts to improve his position, his rightful position is to receive lost profits or lost wages that, but for the wrong, he would have earned but which he never had before.

155. *See* *Rhodes v. Chapman*, 452 U.S. 337, 343 (1981).

156. *See* Chayes, *supra* note 29, at 1292.

157. *Id.* at 1283 (emphasis in original).

nonregulatory litigation and so will not be discussed again here. But the question of whether the entry of judgment ends the court's involvement in the case deserves further inquiry. Here again, we can consider a case for nonperformance of a contract. Assume that we have some case that we agree to be nonregulatory. Also assume that in this case the court grants damages for the delay, and the parties agree not to dissolve the contract with the defendant to perform within some reasonable period of time. But then assume that there is an identical claim that is settled on exactly the same terms as the judgment in the previous case, and the court gives its imprimatur by granting a consent decree, so that if the defendant fails to perform within a reasonable amount of time, he will be in contempt of court.<sup>158</sup>

If a consent decree is entered, then the court's involvement in the suit may not end, at least where the target of the decree continues to be intransigent. If regulatory litigation is about state-sponsored control over behavior, the question is not whether the change in the resolution of the case makes the case regulatory,<sup>159</sup> since a nonregulatory settlement has the potential to become regulatory if a consent decree is issued, but rather what it is about the entry of a consent decree that can make a case regulatory.

### 5. Judicial Involvement

We can conclude by examining the distinction between those cases where the process is party initiated and party controlled, and those cases in which the judge takes an active part in shaping the scope of the proceedings. In elaborating further, Chayes mentions that in the former category, responsibility for fact and issue development lies with the parties, and the judge sits as a neutral

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158. Consent decrees are similar to permanent injunctions, but rather than being dictated by a court as part of a judgment, they are agreed to between the parties and backed by the contempt power of the court. For a discussion of consent decrees, see *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992); DOBBS, *supra* note 89, §2.8.

159. We could also view this as a question of whether a case has to be regulatory at the beginning or whether it can become regulatory over time, since if it can be regulatory based only on how it looks at its beginning, then the nature of the remedy would not matter. If a case must be regulatory at the start of the proceedings, then the entry of the decree will not affect whether it is regulatory. The previous discussion of scale, however, suggests that litigation can indeed become regulatory over time, as would be the case if a class action began and both parties assumed that only 100 people would be affected, and then it later came to light that there actually would be 100,000 class members. If we view regulatory litigation in part as resting on the influence the plaintiff is able to exercise against the defendant, then that change would make the case regulatory. Additionally, in some cases it may not be the claim that makes the case regulatory at all, but rather the remedy. An example is in cases where the remedy is the instantiation of the plaintiffs' bargaining power, such as where the remedy comes in the form of a settlement that requires behavioral changes on the part of the defendant.

arbitrator who decides questions of law only if a party presents them.<sup>160</sup> While I will not dispute the increasing involvement of judges in regulatory litigation, I would note that this distinction downplays the role that parties play in shaping the result. Although the complexity of some class actions certainly necessitates an increased judicial involvement in some instances (Judge Jack Weinstein's handling of Agent Orange cases come to mind<sup>161</sup>), large-scale litigation with regulatory effects is also completed with relatively little judicial involvement, especially those that settle relatively early in the proceedings.

Possibly, the ultimate problem with using Chayes' indicators of both public and private litigation as indicators of regulatory litigation is that none are necessary or sufficient conditions for making a particular case regulatory. As a result, we will ultimately have to look to other considerations, rather than those embodied in Chayes' public and private law distinction, in order to have a working theory of regulatory litigation. The problem with defining regulatory litigation, however, flows from the same problems that attempt to define regulation and the problems specific to litigation,<sup>162</sup> as well as the variegated functions of administrative agencies.

### *B. Factors of Regulatory Litigation*

One of the main sources of confusion in attempts to distinguish regulatory from nonregulatory litigation has been the failure to appreciate the difference between top-down, legislative regulation from bottom-up, judge- and litigant-motivated regulation. As discussed above,<sup>163</sup> commentators have defined regulatory litigation either in terms of conscious legislative efforts or litigants' and judges' attempts to alter future behavior. But these efforts fall short because they fail to appreciate two different instrumental uses of law. On the one hand, much of statutory law<sup>164</sup> comes from an attempt to

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160. Chayes, *supra* note 29, at 1296. Moreover, Chayes draws a distinction between adjudicative and legislative fact-finding. *Id.* at 1297. In the latter, which characterizes public-law litigation, the judge's inquiry is not focused on what happened but rather on "[h]ow can the policies of a public law best be served in a concrete case?" *Id.* at 1296-97. This view of fact-finding is likened to the question of whether a remedy is prospective or retrospective.

161. A collection of citations to cases and opinions by Judge Weinstein are contained in JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995). This book contains Judge Weinstein's account of how his involvement in Agent Orange, DES, asbestos, and other mass tort cases shaped his view on ethical issues in mass tort law. *Id.*

162. Both are discussed *supra* Part II.

163. See *supra* Part II.C.

164. I say most because some types of law, such as those that facilitate behavior or that tax individuals and businesses, are at least partly about something other than

influence behavior in order to decrease some sort of risk.<sup>165</sup> When the courts enforce these laws, courts become regulatory instruments because that they are essential to the operation of this type of risk regulation. It is for this reason that some authors have suggested that all litigation is regulatory and, in this sense, they are correct.<sup>166</sup> This top-down regulation also allows the government to address risks that have already come to pass. In such instances, the law fills the regulatory gaps by providing individuals the means to achieve compensation for their injuries.<sup>167</sup> As we saw in the introduction, the legislature can do so either through the establishment of administrative agencies or through the use of substantive law.

It is the bottom-up instrumental use of law by judges and litigants, however, that has been the wellspring of controversy. Like legislative efforts to regulate, bottom-up regulatory litigation aims to address risk, albeit in a different way. This type of regulatory litigation uses the legal remedy or the settlement equivalent in order to influence future, risk-producing behaviors. In cases properly described as regulatory, the remedy is structured either by a party or by the judge with the intent of altering future behavior. This bottom-up regulation has been controversial with some commentators, who view the presence of regulatory gaps as policy decisions on the part of agencies and the legislature, and who prefer the decisions on the appropriate scope of regulatory protection to be left to these politically accountable actors.<sup>168</sup>

We can ultimately draw three conclusions regarding the nature of regulatory litigation and its effect on risk. First, regulatory litigation requires intent. This intent is not only the desire to influence behavior as the conscious object of the one who would regulate, but also the desire to prevent some future, risk-producing behavior.<sup>169</sup> Second, regulatory litigation requires the presence of a norm to enforce.<sup>170</sup> This requirement is linked with the notion of

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attempting to decrease social risk through the influence on behavior.

165. *See supra* Part I.

166. *See, e.g., supra* note 122 and accompanying text.

167. It is in this way that courts are instruments of both prospective risk regulation and retrospective risk regulation. *See supra* note 109.

168. *See* sources cited *supra* note 98.

169. Even when statutes and remedies mean to do one thing but end up doing something else, there is still intent to change behavior; there is merely some disconnect between intent and execution. *See* discussion *supra* Part II.B. A trickier question is whether to consider tax-like remedies and settlements as regulatory. *See* W. Kip Viscusi, *Tobacco: Regulation and Taxation through Litigation*, in *REGULATION THROUGH LITIGATION* 22, 46 (W. Kip Viscusi ed., 2002) (characterizing the proposed settlement between the tobacco industry and the individual states as “not so much a settlement but rather a combination of an excise tax coupled with extensive regulatory provisions”).

170. *See* Selznick, *supra* note 64, at 363 (placing emphasis on state control over

intent. The actor—be it the litigant, the judge, or the two acting in concert—must intend to produce some action on the part of the target of regulation because of the risk (and the litigant’s or judge’s apprehension of the risk) that the target actor’s future behavior will fall short of the relevant norm.<sup>171</sup> Finally, risk regulation through litigation requires a rule that expresses the norm to the world and attempts to limit the threats (risk) to that norm. In the case of top-down regulatory, the rule is the statute(s) that particular cases are based on. In the case of bottom-up regulation, that rule takes the form of the remedy that attempts to influence future behavior.

As a consequence of these factors, the issue of precedent does not affect whether a particular case is regulatory, but the issuance of an injunction does.<sup>172</sup> In order for us to conclude that the issuance of precedent makes a case regulatory, we would have to agree that precedent issues because the judge intends to influence future behavior that poses a risk to some norm. But precedent is useful because it reflects a determination of what the substantive law is, with the consequence that it falls into the category of top-down, legislative regulation. An injunction, however, issues precisely because the judge is convinced that (1) some harm will occur; (2) the harm is imminent; and (3) the injury the harm produces will be irreparable.<sup>173</sup> In risk terms, an injunction is unavailable as a remedy unless there is an imminent risk that some harm will occur and there is a risk that the injury produced from that harm will be irreparable. Therefore, in issuing an injunction, a court is acting to regulate the risk of target actor’s future behavior, so injunctions should be considered as a type of regulatory litigation.

#### CONCLUSION

We can now see why previous attempts to define regulatory litigation have failed. By focusing on distinctions between the prospective and retrospective natures of the remedy or the interests of the parties involved, commentators have missed the forest for the trees. In order to understand what regulatory litigation is, it is necessary first to understand how it functions—as a stopgap that acts to protect individual citizens from risk. Having come to this realization, it is then possible to distinguish between two distinct types of regulatory litigation, and in doing so, we can understand why it has previously been so difficult to discern what regulatory

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“valued activities” because “it is the effort to uphold public standards [i.e., norms] or purposes without undue damage to activities we care about that generates the persistent dilemmas of regulation”).

171. Even where the norm is not served—that is, when there is unintentional regulation—there is still the attempt, and therefore the intent, to serve it.

172. *See supra* Part II.B.

173. *See supra* notes 86-89 and accompanying text.

litigation is. The failure to realize that regulatory litigation can be divided into top-down uses of law and bottom-up uses of remedy to influence behavior and address realized risks has led to piecemeal and jumbled attempts to define the phenomenon. The concepts of regulatory gap filling, and top-down and bottom-up regulation, should be useful in addressing the issues of accountability and efficacy that persist in the study of regulatory litigation.