THE POLITICAL ECONOMY OF COURT-BASED REGULATION

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With the rise of the modern state came increasing demands on the state to provide justice—to regulate the risks individual citizens increasingly present to one another, to ensure that contracts are enforced, or to ensure that individual respect each others' fundamental civil rights—and much of law can be seen as political decisions about whether and how to satisfy these demands. Over the last two decades, political scientists and economists have become increasingly aware that courts have become active participants in this process. Rather than delegate enforcement to administrative agencies, which Congress may fear because of agency capture or agency drift, Congress has increasingly crafted statutes—especially those on controversial subjects—that create private rights of action. In so doing, Congress bypasses the traditional regulatory enforcement apparatus and instead makes individuals the enforcers of their statutory rights and courts the forum for enforcing regulatory rights. But the courts also act as regulators through the exercise of their traditional common law powers. Choices to adopt new theories of liability or relaxing causation requirements, for example, are driven by courts' perceptions about the gap between governmentally provided and socially demanded levels of risk regulation, and this demand is transmitted to the courts through individual decisions to litigate.

When courts act as a forum for rights-enforcement, they play a part of the role that an agency would normally play. Under this new model of regulation, courts use their normal interpretive role to fill in the gaps left in the statutes, a policymaking role that would traditionally be delegated by statute to an administrative agency. This role for the courts has evolved through a combination of push and pull pressures.

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Push pressures result from congressional desires to take enforcement powers out of the hands of administrative agencies, either because of conflicts between Congress and the executive, or because excluding the executive branch allows Congress to better insulate their policy choices against changes in future legislative sessions. Pull pressures, on the other hand, result from individual demands for risk regulation in the absence of favorable elected-branch policymaking on the topic, which can be explained by the multiple veto gates that confront lawmaking efforts, the phenomenon of capture, and also legislative or executive misdiagnosis of regulatory problems or poor regulatory implementation. Interest-group pressures lead to private interest legislation that neglects the policy demands of unorganized, disparate individuals in favor of small, organized groups. Additionally, hasty decisionmaking, inadequate information, changed circumstances, and complex problems all contribute to poor policymaking. Individuals therefore seek to pull their policy disputes into courts, where they have better access and more influence on the policy decisionmaker—in this case, the judge—than they would have were they to seek implementation of their policy preferences through legislative and executive channels.

I. LEGISLATIVELY DRIVEN REGULATORY LITIGATION

A. *Principal-Agent Problems in Enforcing Legislation*

The roots of legislatively driven regulatory litigation lie in the 'conflict between Congress and the president over control of the bureaucracy.'[1] The starting point of the conflict is the basic principal-agent problem that arises because the branch of government that sets the policy agenda (the legislature) is not the one that implements that policy (the executive). The means by which Congress transmits its policy agenda to the executive—legislation—is limited both by the inherent imprecision of language, and by the inability of Congress to plan for every contingency. To borrow a classic example, suppose Congress passes a statute that prohibits

[1] Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton 2010) 5.

vehicles in national parks.[2] It would not be clear from the statute alone whether it would be permissible, for example, to bring in motorcycles, bicycles, strollers, or helicopters. On the other hand, it might be obvious that an ambulance is a vehicle, but less clear whether it would nevertheless be allowed in the park in an emergency. Both situations—one demonstrating the imprecision of the word 'vehicle' and one the problem of unforeseen circumstances—present problems for parties charged with implementing Congress's policy choices. Additionally, in the course of drafting legislation there may be necessary political tradeoffs within Congress that can make it impossible as a practical matter to craft more specific policy. Inevitably, therefore, the executive will have to act in the fact of uncertainty about the meaning of the legislative policy choice. In response to this problem, Congress may attempt to decrease the slack that imprecise language creates by being more specific. For example, it may list the things (cars, trucks, boats, bicycles) that are not allowed in the park. But try as it might, Congress can never be specific enough to perfectly reflect its policy preferences. Thus, even a well-intentioned executive agent will be unable to perfectly capture the legislature's intent in all circumstances.

This initial principal-agent problem has been exacerbated as the platforms of the Democratic and Republican parties have moved from a continuum that more or less coalesced around a median point to a sharply bimodal distribution. When control of the elected branches is divided—when one party controls the legislature and the other controls the executive—the inevitable policy drift that accompanies any principal-agent relationship is exacerbated by the explicit desire of the executive to deviate from the policies expressed in legislation. In the face of an ambiguity in the legislation to be implemented, an executive whose policy preferences differ from those of the session of Congress that passed the bill has sufficient leeway to enforce the statute in a way that reflects

[2] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593.

the president's policy preferences, rather than Congress's.[3] Beyond its interpretive choices, the executive may also have the additional tool of simply refusing to implement a congressional policy choice at all; the refusal to enforce a statute is generally not reviewable.[4] Signing statements, which President George W. Bush used extensively and which in effect were statements that he would or would not enforce various portions of laws passed by Congress, are explicit examples of such refusals. Short of impeachment—which because it is limited to cases of treason, bribery, and other high crimes and misdemeanors is unlikely to be relevant to refusal to enforce legislative policy choices—it is not clear what if anything Congress could do in cases of executive refusal to enforce legislative actions. Administrative agencies themselves can also limit the scope of statutes through agenda setting,[5] and can hide behind the shield of budgetary or knowledge constraints in making a policy choice to frustrate congressional intent. Legislatures facing such problems therefore often seek to craft legislation in such a way that it is less dependent on a potentially intransigent executive branch.

B. *Addressing Principal-Agent Problems*

Congress can react to this policy drift by enacting new or modified legislation in response to particular executive courses of conduct, but doing so is costly in terms of both money and time, since doing so requires Congress to overcome the myriad veto points that can stall legislative activity. An attempt to modify existing statute or overrule an administrative regulation by statute can be stalled in committee, by the Speaker of the House, who can kill a bill, and by the members of Congress if the proposed legislation comes to a vote—the members can simply vote not to adopt a particular regulatory

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[3] Note that this may be true even where the ideologies of the president and contemporaneous legislative majorities are aligned; what is relevant is whether presidential ideology conflicts with that of the prevailing majorities of the session that passed the act to be executed.

[4] *Heckler v Chaney* 470 US 821 (1985).

[5] For example, through general statements of policy.

agenda.[6] Moreover, each chamber of Congress can block the other, and the same veto points exist in the other chamber as well. Finally, because of the Senate procedural rules on ending debate, forty-one determined Senators can effectively veto legislation by refusing to end debate and allow the pending legislation to go to a vote. In passing a bill to reign in the executive, the most potent obstacle to new lawmaking is the president, who can obstruct Congress through a straightforward veto. This power is tempered only by the ability of Congress to override a veto by a two-thirds majority of both chambers, but where the composition of the chambers of Congress are more or less equally divided, this last veto point can be the hardest to overcome. These various points at which the formulation of legislation can be thwarted means that once passed, legislation is relatively permanent policy instruments.

Moreover, as explained above, even more specific language will only imperfectly restrain executive agents, meaning that Congress may not wish to pass new legislation at any rate. Congress therefore will try to constrain executive discretion in other ways. For example, the creation of metarules like the Administrative Procedure Act ('APA')[7] or the Freedom of Information Act ('FOIA')[8] can limit policy drift. The default rules of the APA constrain executive discretion by mandating the ways that agencies go about rulemaking, the factors that the agencies must consider in adopting rules, and so forth. The procedures for administrative adjudication limit executive discretion by forcing agencies to hear certain information, limiting the bases for decision to the record compiled in the adjudication, and requiring a statement of the reasons for substantive decisions. Yet these tools are relatively weak. Procedural rules merely force the agencies to consider information, which can be rejected with little ceremony, and statement of the reasons for particular rules or adjudicative results are often pro forma. Similarly, FOIA constrains executive activity by forcing government activity to

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6 For a general discussion see Mathew McCubbins and Terry Sullivan (eds), *Congress: Structure and Policy* (CUP 1987).

7 5 USC § 500 et seq.

8 5 USC § 552.

take place 'in the open,' or at least provides the lingering threat that executive misdeeds will more easily come to light. As with the APA, however, FOIA is a limited mechanism for checking executive action. Its limitations are many, and delays in fulfilling FOIA requests are the norm.

Congress has responded to this quandary by empowering the judiciary to review executive implementation of legislative policy choices. But this merely allows litigants to challenge executive action, and is far from a guarantee of a favorable substantive result. At least on the federal level, courts have been loath to question the legal interpretations of executive agencies, and therefore have exercised little control over executive exercises of discretion both in interpreting and applying the law.[9] Absent procedural deficiencies in the rulemaking process (insufficient notice of the rule, for example), a court will only overturn an agency final rule if that rule is contrary to the clearly expressed intent of Congress, or if Congress has not "unambiguously" expressed its intent, if the rule is not based on a permissible interpretation of the statute.[10] In practice, this is a fairly deferential standard. And federal courts are even less likely to overturn the substantive conclusions agencies make in forming policy or distributing benefits. Ultimately then, Congress has limited means for constraining executive discretion.

C. *Creating Court-Based Enforcement*

As a result of these problems with restraining the executive, Congress has increasingly sought means of bypassing the executive entirely, especially when the subject to be regulated is controversial. One of the principal means of doing so is to create statutes containing private rights of action; that is, statutes that allow individuals to bring lawsuits alleging the rights created in the statute have been violated, thus shifting the situs of policy enforcement from the executive to the judiciary. However, litigation is dependent on private parties bring suit, so Congress must also structure the legislation so

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[9] *Chevron USA Inc v Natural Resources Defense Council* 467 US 837 (1984).

[10] ibid.

that it provides sufficient incentives for litigants (or their attorneys) to enforce their rights. Additionally, Congress will only delegate enforcement power to the judiciary if it believes courts are likely to be more faithful to their policy desires when compared with the executive. These two facets of delegation to courts are considered in turn.

Once Congress has decided to delegate enforcement to courts, it can tailor the amount of enforcement through the manipulation of three different factors: the expected costs of bringing litigation, the expected benefits of litigation, and the probability of succeeding.[11] The lower the expected costs, the greater the expected benefits, and the greater the probability of success, the higher the expected value of litigation and therefore the more likely it is that private parties will be induced to enforce their statutorily created rights. The expected value (EV) of a claim is equal to the probabilility (P) of success multiplied by the expected amount of recovery (B) minus the expected cost (C) of bringing the claim.

$$EV = P(B) - C$$

With respect to the expected costs of litigation, one of the most important means of limiting expected costs is to adopt the "American" rule of costs, in which each party pays its own costs and attorney's fees.[12] Congress can further lower expected costs by adopting a fee-recovery rule for victorious plaintiffs, as it has done in a number of civil rights statutes, while denying fee recovery to victorious defendants. Less obviously, Congress can lower expected costs by lowering barriers to information access, for example by relaxing discovery rules. In so doing, Congress lowers the amount of work required to produce information. Lowering filing fees and the like can also decrease expected costs.

Second, Congress can also incentivize private enforcement by increasing the expected benefit of the litigation. Initially, Congress sets a baseline on the expected benefit of litigation by its choice in defining the harm, and

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11 Farhang (n 1) 26–27.

12 On the federal level, the default rule is that costs are available but attorney's fees are not. Federal Rules of Civil Procedure 54(d).

relatedly, by deciding the remedies available for the statutory harm. For example, a civil rights statute might limit a plaintiff's potential recovery to actual damages, or it might also allow for punitive damages, the availability of which would increase the total potential recovery. In addition to or as an alternative to punitive damages, Congress may avoid the problem of proving actual damages by mandating minimum recoveries, or by providing fixed per-violation damages. This can also decrease the expected cost of litigation by removing the requirement to prove the amount of damages, which can be time consuming and therefore costly. Additionally, Congress can increase the expected benefit of litigation by granting double or treble damages, as it has done in many civil rights statutes.

Third, Congress can affect the expected value of a claim by influencing the probability of plaintiff success. Farhang identifies five factors that can affect probability of success: burdens of proof, standards of proof, rules of evidence, availability of a jury, and liability rules.[13] Both burdens of proof—rules about what plaintiffs and defendants are required to prove—and standards of proof—the degree of probability to which a party has to prove a required element or defense—allocate risks of uncertainty in litigation. The greater the uncertainty, the more difficult it will be for a party to prove a claim. In a civil rights case, for example, a rule mandating a rebuttable presumption that discrimination has taken place will be easier for a plaintiff to prove than a rule that requires proof beyond a reasonable doubt. Similarly, the types of evidence that is allowed in particular proceedings can make it easier or harder for a plaintiff to prove his claim, affecting the probability of success. Rules on the availability of juries can affect the probability of success if juries are more (or less) likely to find for a plaintiff for a particular type of case when compared to a judge. Finally, liability rules affect the probability of success by specifying certain elements that must or need not be proven. Especially with respect to intent-based elements—strict liability versus negligence—liability rules can

[13] Farhang (n 1) 28 tbl 2.2.

be particularly potent means of affecting the probability of litigant success.

Of course, Congress will delegate enforcement power to courts only if the courts will be more faithful than the executive to Congress's desires. This means that Congress will do so only to the extent that it expects courts to be less susceptible to the principle-agent problems present in executive branch enforcement.

D. *Courts as Agents*

Members of Congress are politically accountable to their constituents, as well as their party caucuses, which can give or take away committee assignments based on "good" behavior, and influence political advancement. Administrative agents are accountable to the executive, who appoints agency officers, and through the executive are indirectly politically accountable; and to Congress, which can enlarge or increase their spheres of influence, and perhaps more importantly, their budgets. In contrast, once confirmed federal judges are accountable only in that they can lose office for committing high crimes and misdemeanors. Failing that, federal judges are accountable only to the public opinion and their consciences.[14] This independence creates a double-edged sword. On the one hand, independent courts present Congress with a favorable forum for the enforcement of regulatory policy because they are presumably less subject to political pressures. Similarly, judicial independence means that short of changing a particular statute—which is difficulty for the reasons stated above—future sessions of Congress will have little control over court-based enforcement of regulatory policy. But this independence means that the decision to delegate enforcement to courts (and the individuals who will vindicate their statutorily created rights in courts) rather than the executive agencies is an act of faith. In light of this independence, then, why does Congress

[14] Admittedly, Congress can also punish the judiciary with budget cuts as well, but because the cuts will be part of more general appropriations decisions, this is a rather blunt tool for punishing particular judges for decisions with which Congress disagrees.

expect there to be less policy drift in courts when compared with the executive?

There are a number of reasons Congress could think that courts are more neutral in their enforcement role compared with the executive. First, because executive agencies are have limited subject matter jurisdiction and are populated by experts (or those who agency experience may become experts) in the fields they regulate, those administrators may be more likely to embrace a rule-articulation function. In contrast, because federal court judges are generalists, they are more likely to view their role as that of neutral arbiters. Similarly, because executive agents—especially those with policymaking roles—are often drawn from the industries they regulate, they may be less inclined to view issues neutrally when compared with generalist judges. Courts will likewise be more independent from regulated industries because of the one-off nature of litigation; they will not develop the relationships with regulated industries that executive agencies do. Perhaps most importantly, judicial decisionmaking norms are presumed to constrain the executive function of courts. Intent-based norms of interpretation consciously seek to implement the will of the legislature that passed the statute in question. Even if judges employ non-intent-based standards of interpretation, such as textualism, the vital focus is on something other than the policy preferences of the judges, which is a clear divergence from the executive agency norms that expect and even welcome policymaking.

Of course, Congress may well be wrong in believing that courts will be more faithful to their intent than the executive, and there are convincing reasons to believe that they are. Since the advent of the legal realist school of thought, the extent to which judges simply apply the law, without injecting their own desires into the process, has been cast into doubt. The attitudinal model of judicial decisionmaking, which grows out of legal realism's basic observations, concludes that judges decide how they decide based on their pure policy preferences, and a fair amount of data supports this conclusion.[15] This

[15] Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (CUP 2002).

model is based on three premises. First, courts—especially the Supreme Court—are subject to little or no oversight.[16] Second, because of the problems that accompany the drafting of statutes and Constitutions, and the inherent limitations of language, 'the law is ambiguous enough to permit multiple interpretations.'[17] Third, judges (again, especially Supreme Court justices) are only concerned with policy.[18] The strategic model of judicial decisionmaking takes the attitudinal model a step further. Under this model of judicial decisionmaking, judges attempt, as nearly as possible, to satisfy their policy preferences in making decisions, but they do so with the understanding that they must sometimes disguise or hide their preferences, or must ignore their preferences in the short term in order to satisfy their long-term policy preferences. Strategic judges may vote against their preferences either to trade votes for decisions they care more about, because of legitimacy concerns, or in order to avoid constitutional showdowns with the other branches. Judges may therefore be less reliable than Congress assumes.

Whether Congress is correct or not that courts will be more faithful executives of their policy preferences, it has resorted to court-based enforcement in an ever-increasing number of statutes over the last sixty years.[19] The trend of litigation enforcing these statutory rights has mirrored the rate of their creation, meaning Congress was certainly effective in incentivizing enforcement. Perhaps the most important area in which Congress has relied on court-based rights enforcement has been in the areas of civil and labor rights. Burke has explored the creation of private enforcement in the area of disability rights.[20] Likewise, Farhang has examined private enforcement rights in via a number of civil rights statutes.[21]

Admittedly, there are other possible explanations for the use of court-based enforcement regimes. One possible

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16 Michael Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton 2011) 5.

17 ibid.

18 ibid.

19 Farhang (n 1) 66 fig 3.1.

20 Thomas Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle Over Litigation in American Society* (University of California 2002) ch 2.

21 Farhang (n 1) ch 4–6.

suggestion is that when statutes have private enforcement provisions, it is because plaintiffs' lawyers were successful in lobbying for them, and not because Congress thought courts would be more hospitable to their policy visions. Another suggestion has been that Congress uses court-based enforcement to save agency resources, since using litigation means that private parties will bear much of the enforcement costs. However, the data show that these explanations are unconvincing.[22] In contrast, data analyzing levels of principal-agent conflict and the passage of private-enforcement statutes strongly supports the explanation provided above. Thus it appears that much of the growing role of the courts in the regulatory state is attributable to conflicts between the Congress and the executive, and the belief of Congress that the judiciary will be a more faithful forum for rights enforcement. As we will see in the following part, however, the role of the courts in the regulatory state also arises not because of executive failure as agents of the Congress, but because of various failures of Congress itself.

II. COURT-DRIVEN REGULATORY LITIGATION

Mismatches between statutory design and statutory implementation often result in regulatory gaps—differences between governmentally provided and socially demanded levels of regulation—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. Often, these gaps are the result of political failures in which private interests capture the elected branches (Congress and the executive). The elected branches may also fail to serve regulatory demands because Congress misdiagnoses the regulatory problem, or because the executive implements an appropriate regulatory program poorly. As we saw in the preceding part, legislatures can deal with citizens' demands for regulation by passing laws that are executed by administrative agencies, or by creating statutes that employ private-enforcement mechanisms. But when there are shortfalls between what the elected branches

[22] ibid. 79–81.

can provide and what society demands, the courts perform a gap-filling role—one that has become more prominent as the traditional sites of government policymaking have become increasingly ineffective.[23]

A. *Political Failures and the Demand for Regulation*

The demands on courts as regulators are the result of two features of the United States. First, U.S. political culture is particularly distrustful of centralized government. As a result, governmental power is decentralized both among the branches of the federal government and between the federal and state governments. This decentralization leads to the multiplicity of veto gates described in the preceding part at which the policymaking process can be thwarted. Second, the U.S. social and legal culture demands total justice. Individuals expect that 'somebody will pay for any and all calamities that happen to a person, provided only that it is not the victim's "fault." '[24] The first factor leads to a larger than usual number of regulatory gaps when compared with other western democracies, while the second creates a larger than usual demand for dealing with those gaps. In short, the demand for total justice plus the individualism-driven distrust of centralized institutions leads to a greater reliance on courts for governance, rather than from the elected branches, a 'legal style' termed adversarial legalism.[25]

The previous part discussed political failures attributable to the veto points that can obstruct legislation, but another problem can lead individuals to seek regulatory gap-filling in the courts: legislative and agency capture. The central idea of capture has to do with the dynamics of group organization. A small number of individual or entities with similar interests is more likely to organize with compared with

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[23] Patrick Luff, 'Risk Regulation and Regulatory Litigation' (2011) 64 Rutgers Law Review 73.

[24] Lawrence Friedman, *Total Justice* (Russel Sage Foundation 1985) 43.

[25] Robert Kagan, *Adversarial Legalism: The American Way of Law* (Harvard 2001) 15.

a larger number with diverse interests.[26] For example, compared the general public, an industry that will be affected by a particular regulatory policy or administrative agency has a greater incentive to organize and attempt to influence the policymaking process.

These small, organized groups are able to exercise disproportionate influence over the elected branches of government because they are better able to provide Members of Congress with two vital resources: votes and money. These resources ensure that organized interests have better access to policymakers, which allows them to provide the policymakers with information favorable to the group's interests, and often results in policymakers that will be more inclined to the interests' policy positions. Note too that this scenario does not rely on representatives voting for policies favoring interest groups *because* they provided the representative with votes and campaign contributions. An interest group may simply throw its support behind the candidate because he already supports the interest group's position, under the presumption that the representative would continue to support the group's policy preferences if elected. In combination, the resource and resultant access advantages that small, organized groups have in the elected branches leads to policies that favor those groups. When those policies do not also favor the public generally, the result is a shortfall between social demand for and government provision of regulation. Individuals seek to fill these gaps through litigation.

Consider the history of tobacco regulation in the United States. Despite the dangerousness of smoking, and the increasing public knowledge about the dangerousness of smoking, the elected branches have been hesitant regulators of tobacco. Even the halting efforts of administrative agencies to regulate smoking advertising in the 1960s were preempted by Congress under the influence of the tobacco industry's powerful lobby. The tobacco industry's powerful lobbying group was also able to ensure that later statutes, such as the Toxic Substances Control Act, specifically excluded tobacco as

[26] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard 1965).

a target of regulation, despite the fact that chemicals contained in tobacco and tobacco smoke were clearly more dangerous than many of the chemicals actually regulated. These lukewarm statutes did little to address the overwhelming public health problem attributable to tobacco consumption, leading to a gap between the level of tobacco demanded by society and the amount provided by the legislature and the executive. The response to this regulatory shortfall was decades of litigation, during which courts refashioned the law of products liability and contributory negligence in a way that ultimately led to substantial plaintiff victories. Taken together, the resultant remedies from these cases have deterred tobacco consumption[27] and forced tobacco companies to internalize the social costs of their production activities, both of which are characteristic of governmental regulatory activity.

B. *Other Factors Creating Pull Pressures*

Shortfalls between the levels of governmentally provided and socially demanded levels of regulation may also be created or exacerbated by other types of legislative failures.[28] Policymakers must act in the face of limited time and information; both factors decrease the number and quality of the regulatory decisions being made. Alternatively, as discussed in the preceding part, political opposition within Congress or with the president can block policymaking even in the absence of capture. Finally, it is unavoidable even under good regulatory schemes that some harms will occur for which citizens will seek redress. These factors all lead individuals to place demands on courts for policy formation and regulatory enforcement, which courts fulfill in their development of the common law, their interpretation of statutes, and their adjudication of claims using these legal instruments.

Consider for example the case of *Escola v Coca-Cola Bottling Co*.[29] Ms. Escola, a waitress, was severely injured

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[27] Henry Saffer and Frank Chaloupka, 'The Effect of Tobacco Advertising Bans on Tobacco Consumption' (2000) 19 Journal of Health Economics 1117, 1134.

[28] Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard 1990) ch 3.

[29] 150 P2d 436 (Cal 1944).

when a glass bottle she was holding exploded in her hand. There was no governmental agency in place charged with settings standards on the required structural integrity and the acceptable pressure tolerances for beverage bottles, and for ensuring that these standards were followed. Even if there had been, as discussed below some bottles would inevitably fail to meet these standards, and some number of these bottles would inevitably cause injury.[30] As a result, Ms. Escola turned to the courts and tort law for an adjudication of her rights. In deciding the case, the court had to decide between two theories of tort grounded in very different policy choices about risk allocation.

Although the court granted her recovery, it did so under a negligence theory, deciding that res ipsa loquitur applied. As a result, Ms. Escola was not required to allege or prove specific negligent acts, since the sort of injury she had suffered would not have happened in the absence of some negligent act on the part of Coca-Cola. In contrast Justice Traynor, who concurred in the judgment, would have imposed on manufacturers 'an absolute liability when an article that [they have] placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.'[31] In justifying this proposed change in the standard of care, Justice Traynor explained that 'public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.'[32]

To evaluate the policymaking role the court played in deciding this case, it is crucial to understand what the majority and the concurrence say about the proper allocation of risk, and the extent to which a manufacturer can place a consumer at risk. Had the court declined to apply res ipsa loquitur to the case, Ms. Escola would not have recovered, because she could not point to particular facts indicating that Coca-Cola had been negligent in producing, bottling, or shipping the bottles to the

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30 Note that the executive and the judiciary can work in tandem in regulating risk. For example, an agency might have set safety standards for the manufacture of glass bottles and for beverage bottling, but left it to the court to adjudicate any harms resulting from failure to meet these standards.

31 *Escola* (n 29) (Justice Traynor) 440.

32 ibid.

restaurant where Ms. Escola worked. Moreover, because a finding of negligence proceeds only when the court concludes that the defendant has failed to exercise *reasonable* care, it is possible that Ms. Escola would have been unable to recover even though it was apparent that bottles randomly broke from time to time. While such evidence might have been helpful to her cause, Ms. Escola would not have been able to recover under negligence (in the absence of the res ipsa loquitur doctrine) unless she should show that something about the manufacture, storage, or shipping of the product was in some way unreasonable. So, for example, if the court had been satisfied that particular quality controls (random sampling, particular shipping containers and techniques) were reasonable, she would not have had a recovery.

This sort of result would speak to the judges' views on the appropriate balance of risk in this situation, and can be represented by the formula made famous by Judge Learned Hand in which a party is only liable where the burden (B) of precautions sufficient to prevent injury is less than the product of the probability (P) of an injury occurring and the expected loss (L) attributable to that injury.[33]

$$B < PL$$

Put another way, negligence rules recognize that risk is a ubiquitous part of life, and that it would take an infinite amount of resources to make life 100% risk-free. Moreover, a foundational premise of negligence law is that is that a risk-free world is not worth the cost; rather, the ideal risk allocation between two parties is one in which a party need only answer for risks he creates that are unreasonable. Any other risks that come to fruition and cause another party damages are simply part of life, and the injured party in that case is responsible for his own injuries.

Justice Traynor's strict-liability standard for manufacturers represents a different policy choice about the proper risk allocation. Under a strict liability standard, Coca-Cola would be liable for injuries its bottles caused even if it delivered them individually on silk pillows, and we would

[33] United States v Carroll Towing, 159 F2d 169 (2d Cir 1947).

expect Coca-Cola to pay for whatever damages its exploding bottles caused, rather than trying to prevent injuries from its bottles at all costs. The importance of such risk shifting cannot be gainsaid. Once we recognize that no person or company can guard against all risks—and more importantly, that we do not expect or even desire that they do so—the true import of a strict liability system becomes apparent: the rule allocates the costs of injuries resulting from unpreventable risks. Moreover, it does so despite the recognition that society does not even *expect* the liable party to prevent against all the risks they create.

The basic premise of a negligence theory of liability is that parties should refrain from creating *unreasonable* risks, whereas strict liability places the cost of risks on parties regardless of the extent of their precautions. But comparing the two liabilities in such terms does not cast aside the idea of reasonableness; strict liability merely places the decision on reasonableness with the party creating the risk, rather than the court examining it after the risk has been realized. Strict liability allows the party to decide for itself the amount of risk regulation that is reasonable, taking into account the probable costs they will incur as a result of risks they create and the effect that additional precautions will have on these costs. [34] Under a negligence regime, the cost of any risk that is realized after the risk creator has taken reasonable precautions is allocated to the object of the risk. In a strict liability regime, that cost is still the responsibility of the risk creator. Thus, when a court adopts strict liability, rather than negligence, as the duty of care under a particular set of circumstances, what it has done is made a policy decision about how risk ought to be allocated. In addition to the normative, risk-allocative effect of such a decision, the resultant switch to strict liability may also have regulatory purpose. The question is empirical: whether the court is motivated by normative considerations about who ought to bear risk, or whether the decision is based on the conclusion that there would be less risk or more efficient resource allocation under a strict liability regime (or both).

[34] Richard Posner, *Economic Analysis of the Law* (8th edn, Aspen 2010) §6.5.

Regardless of the motivation for the switch from one standard of liability to another, the switch itself is inevitably grounded in policy choices attributable to the court about acceptable levels of risk.

CONCLUSION

This contribution has attempted to sketch out the forces that have led to the growth of the courts' regulatory policymaking powers, and the form these powers take. Since the push and pull pressures that have led to the courts' regulatory role are grounded largely in governmental structures and not in judicial desires to seize policymaking power, they are unlikely to abate in the future. Accordingly, rather than being a legitimate target of derision that should engender concerns about accountability and efficacy, the judicial role in regulation and risk allocation is an essential and unavoidable facet of the U.S. governmental framework. While this realization does not dispose of the concerns of legitimacy and efficacy that attend judicial policymaking, it allows us to examine these issues in a way that is impossible when we dismiss out of hand the entire judicial regulatory enterprise as illegitimate judicial activism.