Check for updates

The Law

The Influence of the President in the Adoption and Enforcement of Private Rights of Action

PAUL J. GARDNER

Litigation by private parties is authorized by dozens of federal statutes, resulting in thousands of lawsuits every year. Recent scholarship has suggested that Congress authorizes litigation by private parties to enforce federal law in order to limit the ability of the president to influence enforcement. I argue, however, that the apparent influence of presidential partisanship on adoption of private enforcement regimes is spurious, resulting from the increased use of this enforcement mechanism beginning in the 1960s. Further, I show that presidents meaningfully influence the rate of private litigation. Specifically, for statutes with liberal policy goals, litigation rates are substantially higher when a Democratic president is in office and when agencies are more politicized. Therefore, if Congress desires to insulate policy from the president, private enforcement regimes are unlikely to be a useful policy tool.

Keywords: bureaucracy, litigation support, presidential control, private enforcement

There is no lack of research in political science documenting the conflicts and disagreements between the president and Congress over policy adoption and policy enforcement. Scholars have increasingly noted the tendency of these conflicts to spill into the courts, with one branch or both seeking review from the Supreme Court to resolve otherwise intractable policy conflicts (see, e.g., Whittington 2005). But what if Congress were able to deny the executive branch the power to enforce federal statutes altogether? Recently, political scientists have begun to investigate a common policy enforcement tool in which individuals are

---

Paul J. Gardner is assistant professor of Politics and Law in the Department of Political Studies at Queen's University in Kingston, Ontario. This article is part of a research agenda that aims to understand how under-resourced litigants are mobilized by political actors and the consequences of that mobilization. His other work examines the Supreme Court in a separation of powers context. **AUTHOR'S NOTE**: I would like to thank Mike Barber, Alex Bolton, Chuck Cameron, Ted Englehardt, Chuck Epp, Paul Frymer, Quinn Mulroy, Sharece Thrower, Keith Whittington, and anonymous reviewers for helpful advice and feedback on various drafts of this article. I also thank Sean Farhang for supplying data on private enforcement statutes. All remaining errors are my own.

Presidential Studies Quarterly
Vol. 51, No. 1, March 2021, 187–213

DOI: 10.1111/psq.12703
© 2021 Center for the Study of the Presidency and Congress

granted the right to bring lawsuits in order to ensure the law is followed. Typically, federal legislation is enforced by the executive branch, but under "private enforcement regimes," policy enforcement occurs when plaintiffs bring legal claims in federal courts. The prototypical example is Title VII of the Civil Rights Act, which prohibits employment discrimination. Under Title VII, if the Equal Employment Opportunity Commission (EEOC) fails to obtain voluntary compliance in mediation, complainants must file their claims in federal courts. Then, if judges decide for the plaintiff, legal damages serve as restitution, punishment, and deterrent in one. Congress has increasingly written this enforcement tool into law since the 1960s, though the origins of such statutes date back to the 1880s.

The use of this statutory enforcement tool by Congress presents a substantial puzzle. What incentive does Congress have to create an increasingly judicialized state? Burke (2004) suggests Congress adopts private enforcement in order to claim credit for creating statutory remedies to social ills without having to pay for those remedies. Other scholars have suggested that private rights of action are sought out by rent-seeking lawyers, to whom Congress happily supplies a steady flow of cases (Frymer 2003). Another prominent theory explaining the use of statutory private enforcement regimes is offered by Farhang (2008; 2010), who argues that Congress authorizes private enforcement in order to limit or eliminate the president's policy enforcement powers. Under traditional bureaucratic enforcement structures, the president retains significant authority to implement laws (Farhang 2010; Moe 1985), but in private enforcement regimes, executive enforcement gives way to enforcement by private parties, which Farhang argues is a desirable feature for Congress when it is not of the same party as the president, who therefore may enforce the law in ways inconsistent with the preferences of Congress. This theory should be attractive to institutionalists, given that scholars have often described an increasing legalization of the American state (see, e.g., Kagan 2001; Silverstein 2009), but have been more likely to offer cultural explanations for growth in legal claiming. I demonstrate, however, that conflict between Congress and the president fails to explain the adoption of private enforcement regimes.

Furthermore, even if Congress intends to limit presidential enforcement powers, as statements by some members of Congress indicate, that still leaves unexplored the question of whether presidential influence on enforcement is actually eliminated. While case studies have described some of the tactics used by executive branch officials to combat loss of enforcement powers (Lieberman 2005; Mulroy 2013; 2018; Pedriana and Stryker 2004), this approach has not allowed for broad investigation into the generation of litigation across diverse policy areas. Therefore, the impact of the presidency and executive branch actors on litigation under private enforcement regimes remains largely anecdotal.

These questions are all the more significant given that litigation under private enforcement regimes varies substantially across policy areas and over time, even as the statutes that created them share important features. Thus, changes in litigation rates cannot be explained by congressional action alone. Nor can scholars appeal to an increasingly litigious culture (Kagan 2001), as declines in litigation rates appear within a policy area as often as increases (see Figure 3). Instead, we must consider all stages of policy implementation, and look to the actions and actors that can affect litigation within a policy area, even absent statutory changes. I argue that some changes in litigation rates to enforce federal policy are the result of policy decisions and legal mobilization within the executive

branch. Therefore, I examine private enforcement regimes for nine federal policies. Using data on the number of cases filed in each policy area between 1993 and 2012, I show that liberal bureaucrats and Democratic presidents have a hand in encouraging the filing of a greater number of private statutory cases in U.S. district courts.

I draw on the law and society literature to argue that litigants must be supported with information and resources in order to recognize grievances and convert those grievances into legal claims. Despite congressional attempts to limit executive authority, the power of private enforcement regimes to insulate policy from presidential control is limited. Consistent with evidence offered by Pedriana and Stryker (2004), Lieberman (2005), and Mulroy (2013; 2018), I argue that even without cease and desist authority, the executive branch can influence enforcement efforts by supporting private litigants. Specifically, I show that Democratic presidents support higher levels of litigation in policy areas governed by more liberal agencies, while Republican presidents are associated with lower levels of litigation in policy areas with liberal executive agencies. Furthermore, these effects are more apparent when presidents are able to exercise greater control over agencies.

For this analysis, I expand the data previously used to examine the impact of private enforcement regimes. While previous work has used qualitative case studies to demonstrate the impact of support structures, and primarily with a focus on civil rights litigation, I expand the scope to nine federal policies with private enforcement regimes. This is important for two reasons. First, employment discrimination civil rights litigation is a clear outlier for private enforcement regimes with respect to the quantity of litigation. It is this feature, in part, that has drawn scholars to study litigation under Title VII. Expanding the scope of the analysis beyond employment rights can tell us something more about private enforcement as a tool, including the reasons it is so effective for employment discrimination, but less so in other areas. Second, examining these new policy areas introduces variation in the factors affecting litigation—most importantly for this analysis, executive branch ideology and politicization.

This article, then, answers two interrelated questions. First, does Congress attempt to strip the president of his statutory enforcement authority by authorizing private actors to enforce federal statutes in the courts? And second, would such an effort be successful? I answer both questions in the negative. In the next section, through a reanalysis of previous data, I show that partisan conflict between Congress and the president is not a compelling explanation for the adoption of private enforcement regimes. Then, in the following sections, I proceed to analyze an underutilized data set to demonstrate that, in private enforcement regimes, the president is able to offer or withdraw support for private litigation in order to increase or decrease levels of enforcement, conditional on features of executive branch agencies.

Reevaluating the Executive-Legislative Conflict Thesis

There are a number of reasons to be skeptical of the ability of what I will call the executive-legislative conflict thesis to explain the growth of private enforcement regimes. First, it is unclear why the president would sign legislation that would curtail her

enforcement powers. Farhang (2008) notes that presidents have limited influence on legislation through veto bargaining and may not be able to obtain bureaucratic enforcement. All else equal, however, we might still expect presidents to be hostile toward legislation that might threaten their enforcement prerogatives. Second, private enforcement regimes have been offered as a solution to both over- and under-enforcement of federal statutes. The argument suggests at once that private enforcement provides for an enforcement mechanism as a substitute when the executive branch drags its feet enforcing policy, and conversely, that private enforcement is also a solution to overzealous enforcement because private litigants are less ideological than impassioned bureaucrats. Yet, during debates on private enforcement, members of Congress regularly object that private enforcement will lead to an overabundance of lawsuits, which will burden both courts and defendants. While the magnitude of litigation in private enforcement regimes varies substantially across policy areas, if we take the concerns of members of Congress sincerely, it is difficult to imagine that Congress would regularly adopt private enforcement as a solution for overzealous enforcement.

Another troubling aspect of the executive-legislative conflict thesis from a legislative design standpoint is that many (even most) private enforcement regimes include robust provisions for executive branch enforcement. From environmental statutes to economic legislation, private enforcement statutes have been paired with bureaucratic enforcement by powerful federal agencies. For example, the Environmental Protection Agency shares enforcement power with private individuals on a number of statutes, but it is often considered an example of a strong agency. Therefore, I set out to reexamine the partisan separation of powers thesis for the creation of private enforcement regimes. I argue that the finding that legislative-executive conflict influences the enactment of private enforcement regimes is incorrect through a reexamination of Farhang (2008; 2010).

In order to explore the robustness of the separation of powers thesis, I rely on the most complete set of data on private enforcement statutes passed by Congress, collected by Farhang (2008; 2010). In an analysis of those statutes, Farhang finds that conflict between the executive and legislative branches leads to increased use of private enforcement statutes. I replicate this analysis and show the limits of the findings in this section. Farhang relies on an analysis of private enforcement laws authorized by Congress starting in the late nineteenth century. Specifically, Farhang argues that the number of private enforcement statutes adopted each year is influenced by a number of factors, including partisan conflict between the president and Congress. These annual counts are displayed graphically in Figure 1. As can be seen in the figure, adoption of private enforcement is common, though inconsistent, through the early twentieth century. In the late 1960s, however, there is a significant upturn in the use of private enforcement. The prominence of private enforcement regimes in civil rights and environmental legislation during this period has been extensively documented, and the uptick suggests possible changes in the underlying motivations for the use of private litigation as an enforcement tool.

Farhang argues that divided government explains the increased adoption of private enforcement regimes. Indeed, Figure 1 shows an increase in divided government in the 1970s and 1980s, as indicated by darker bars in the figure. The figure also indicates significant use of private enforcement regimes in years with unified government, however.

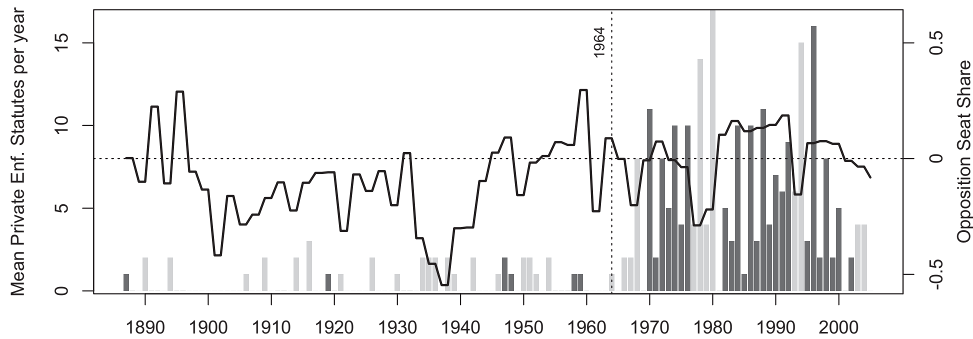

FIGURE 1. Private Enforcement vs. Opposition Seat Share.
Note: The plot displays the average number of private enforcement statutes passed per year, shown as bars, against the opposition seat share in each year, displayed as a line. Dark gray bars indicate divided government, while light gray bars indicate unified government. The plot suggests no correlation between divided government and average statutes passed, but the post-1964 period does show generally higher levels of opposition seat share and divided government.

Figure 2 provides another approach to visualizing the data. The figure shows the bivariate relationship between the adoption of private enforcement statutes and two measures of executive-legislative conflict. The divided government plots show kernel density plots with means with 95% confidence intervals. The opposition seat share plots are scatterplots with bivariate ordinary least squares regression lines. The leftmost two panels seemingly confirm the effect of the executive-legislative conflict thesis. The upper-left panel supports that private enforcement regimes have been adopted more often under divided government, while the lower-left panel supports that more statutes are passed as opposition seat share grows. But as we saw in Figure 1, there appears to be a significant shift in the adoption of private enforcement regimes in the 1960s, corresponding to the use of private enforcement in the Civil Rights Act of 1964.

Therefore, I split the data at 1964,[1] and show the pre- and post-1964 relationship between private enforcement statutes and each divided government and opposition seat share. As can be seen, in the middle and rightmost panels, the bivariate relationships for both opposition seat share and for divided government are reversed when treating the two periods separately. While the mean number of laws during divided government under the post-1964 period is lower than in unified government, the means are not statistically distinguishable, and the median remains higher under divided government.

This analysis may not be conclusive; dividing the sample reduces the amount of data available. Patterns in the data do suggest, however, that some of the identification

1. Though there is evidence that 1964 is a natural point at which the incentives around private enforcement change, I have not conducted any statistical analyses to confirm a change-point in that particular year. Additional regression analysis and Figure 7 in the supplementary materials demonstrate the lack of relationship without making assumptions about the particular year in which any change occurs.

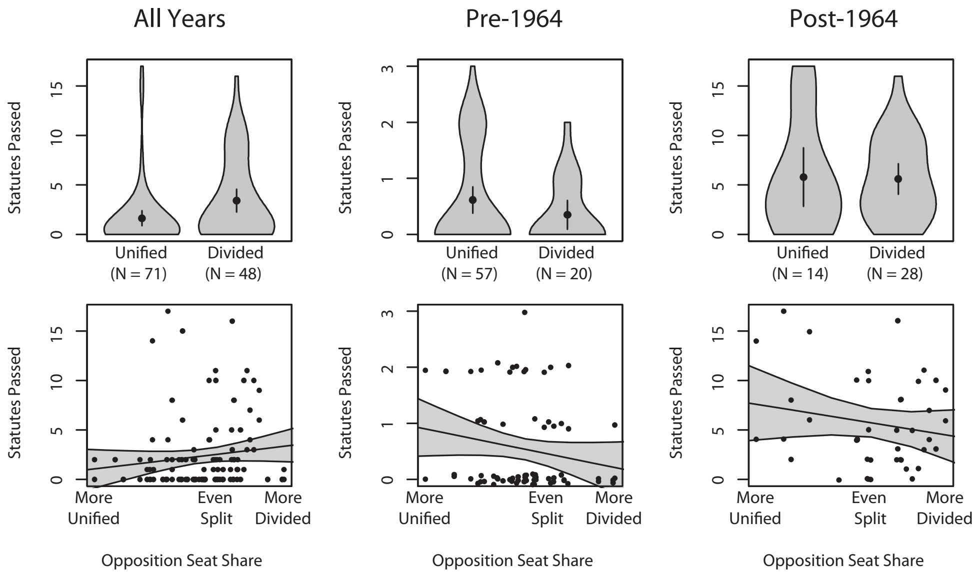

FIGURE 2. Separation of Powers and Private Enforcement, Divided by Time.
Note: The top row compares the number of private enforcement statutes passed per year in all years to the pre-1964 and post-1964 periods. Each panel shows the kernel density plot for statutes passed under unified and divided government, along with the means and 95% confidence intervals. Within periods, there is no association between divided government and private enforcement statutes passed. The bottom row is a similar representation of private enforcement statutes passed per year plotted against the share of seats in Congress belonging to the president's party. Again, the data display a positive relationship over the entire period, but the relationship is actually reversed when the data are split.

may be coming from differences in the prevalence of divided government in the latter period of the data. Figure 1 also plots the opposition seat share in Congress from 1887 to 2004 against the number of statutes passed for each year as an alternative way to visualize the data in Figure 2. The figure shows that there is more divided government and stronger opposition in the latter period, when private enforcement statutes are on average more frequent (in contrast, before 1960, the vast majority of private enforcement statutes were passed under unified government). The relationship, however, is only apparent at the macro level. Within shorter time periods, the upward shift in the use of private enforcement regimes is not mirrored in opposition seat share.[2]

Still, a more nuanced test is warranted. Therefore, I reproduce two of the regressions appearing in Farhang (2008; 2010) using the dependent variable as provided by Farhang.[3]

2. See Appendix A for more details.

3. The independent variables were collected as described in Farhang (2010). The results of the replication are substantially similar to the results presented by Farhang (2008; 2010). Without accounting for secular trends in executive-legislative conflict and use of private enforcement, the coefficients on divided government and opposition seat share are both positive and significant, suggesting that partisan disparities between Congress and the president increase the adoption of enforcement by litigation. The details of this analysis are presented in Appendix A. Table 4 also includes regression results with the sample split at 1964.

I argue, however, that it is necessary to account for changes in the political environment by using a time trend variable. Though not essential for time-series regression, a time trend can eliminate the potential for spurious correlations that result when the dependent variable and independent variables both exhibit clear upward or downward trends over time (Wooldridge 2002). Given the patterns in Figure 1, a time trend appears appropriate in this case. Models including time trend are presented in Table 1. The results show that the executive-legislative conflict thesis is not robust when accounting for the growing trend in the use of private enforcement regimes. There are a number of possible explanations for this pattern. One possibility lies in the concurrent rise in both polarization of the national government (McCarty, Poole, and Rosenthal 2006) and the legalization of American politics (Kagan 2001). The reasons for increasing polarization and increasing legalization are both complicated and contested. While the two phenomena have not been linked in the literature, the concurrent growth may encourage spurious correlations between variables representing the growth of the legal state and partisan conflict.

While the executive-legislative thesis may not be robust when accounting for broad trends, entrenchment of self-enforcing private litigation regimes may be motivating Congress's use of private enforcement regimes. In fact, Farhang's hypothesis that private enforcement regimes protect against the future fairs well under this analysis. *Electoral risk* refers to the expectation by a congressional majority that it will lose seats in the next election. Positive values, therefore, indicate that the party lost seats in the next period. This hypothesis is more consistent with how private enforcement is typically used in federal statutes. Given the combination of traditional bureaucratic enforcement and private enforcement in many statutes, it is likely that Congress includes private enforcement regimes to "hedge" against the possibility of tinkering by a future Congress with budgets or other mechanisms of control, consistent with Farhang's electoral risk hypothesis. By including dual enforcement mechanisms, Congress can ensure continued enforcement even if governmental priorities change. With the addition of a time trend, this variable remains strongly associated with the passage of private enforcement regimes.

The main theoretical difference between the executive-legislative conflict and electoral risk hypotheses is, essentially, one about time—does Congress seek to protect policy gains from their contemporary political actors, or do they seek to protect them from future political actors? Upon reevaluation, private enforcement as protection against future policy losses makes more sense in a political context where presidents have the power to veto bills that they do not wish to enforce, rather than empowering private attorneys general by signing nonpreferred legislation. In contrast, political science research has consistently shown the difficulty of repealing or revising statutes (Hacker 2004; Patashnik 2008). Moreover, the administration of private enforcement through the courts makes private enforcement regimes more immune to what Hacker calls "conversion" or "drift," because judges can respond to changing circumstances with changes in doctrinal law, at least as long as courts remain sympathetic to the goals of the statute. To the extent that courts tend to protect the interests of the governing regime after it leaves office due to the long tenure of judges (Dahl 1957; Whittington 2007), private enforcement should be more effective for protecting policy gains in the future than for protecting policy gains in the present.

TABLE 1
Replication of Farhang (2008; 2010) with Time Trend

	Model 1	*Model 2*
Divided Government	0.268	
	(0.203)	
Opposition Seat Share		0.258
		(0.541)
Electoral Risk	3.615***	3.114***
	(0.792)	(0.666)
Partisan Seat Share	0.618	0.403
	(0.588)	(0.598)
Lawyer Witnesses	0.056	0.058
	(0.048)	(0.048)
Issue Witnesses	0.029***	0.028***
	(0.005)	(0.005)
Business Witnesses	0.003	0.002
	(0.003)	(0.003)
Budget Constraint	0.547	0.493
	(0.590)	(0.588)
Social Regulation	0.000	0.000
	(0.000)	(0.000)
Economic Regulation	0.000	0.000
	(0.002)	(0.002)
Other Regulation	0.002	0.000
	(0.009)	(0.009)
Year Trend	0.024***	0.027***
	(0.003)	(0.004)
Constant	2.366***	2.395***
	(0.307)	(0.318)
Residual Lag 1	0.642***	0.652***
	(0.057)	(0.058)
Residual Lag 2	0.597***	0.623***
	(0.109)	(0.114)
AIC	232.560	231.785
BIC	271.110	270.335
Log Likelihood	102.280	101.893
Deviance	20.345	19.570
Observations	116	116

Note: Standard errors in parentheses.
***$p < .001$; **$p < .01$; *$p < .05$.

It appears, then, that conflict with executives is less important in understanding the use of private enforcement regimes than is uncertainty about the future. What does this mean for the use of private enforcement regimes over time? For one, it suggests that the politicization of private litigation likely occurred after their importance began to grow. One can trace the politicization of private enforcement to the Civil Rights Act of 1964, for which Republicans supported private enforcement, but would later characterize as overburdening business after they saw the prevalence of its use in employment

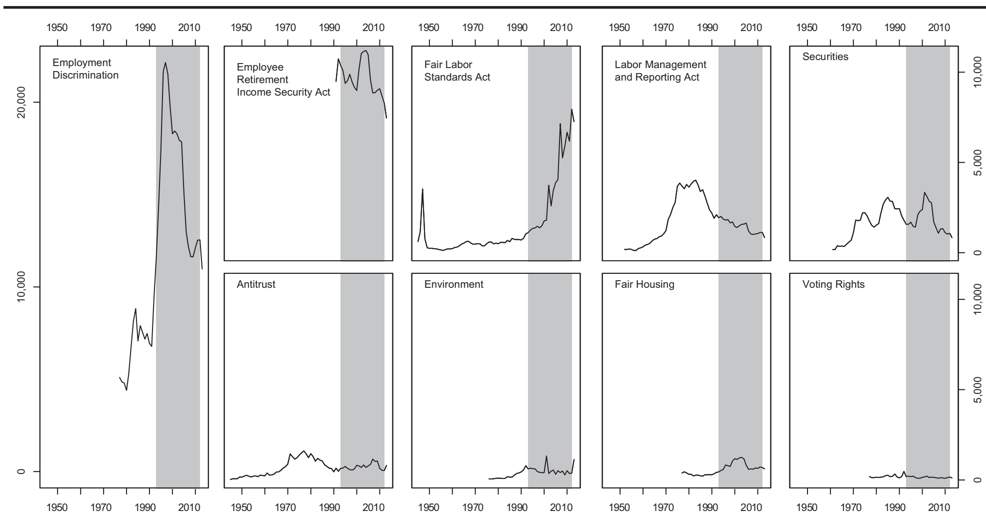

FIGURE 3. All District Court Cases Filed in Nine Policy Areas.
Note: Axis values for employment discrimination is double the other policy areas to allow for direct comparison. The years examined in this article are shaded in gray.

discrimination litigation. Prior to the Civil Rights Act of 1964, evidence indicates that members of Congress saw use of private litigation as a nonpartisan, nonpolitical continuation of historical practice prior to the growth of the administrative state (Gardner 2016). This is supported by the fact that prior to the New Deal, contrary to partisan-political explanations of the growth of private enforcement regimes, statutes empowering private litigants were passed by unified governments, with the exception of the Interstate Commerce Act in 1887 and the National Prohibition Act, both of which were passed by large bipartisan majorities and with substantial executive enforcement authority.

Executive Influence on Private Litigation

Having challenged the influence of the executive-legislative conflict in explaining the growth in use of private enforcement regimes, I now turn to the question of whether such use would be effective in preventing the president from influencing enforcement of federal law. Can presidents and bureaucratic agencies affect the magnitude of litigation that occurs under private enforcement regimes? What determines whether private litigants will make use of statutes created by Congress? There is little evidence to bear on these questions. Farhang offers that it is the presence of litigation incentives like provisions allowing winning plaintiffs to collect treble damages or attorney's fees from losing parties that predict how often they will be used. Other related research, however, frames the prevalence of litigation as specific to the potential litigants.

This research has sought to explain how individuals who experience, for example, harmful employment discrimination (Frymer 2007), asbestos exposure (Barnes 2008), police violence and playground injuries (Epp 2010), and sickness or death from tobacco (Derthick 2011) gain access to the courts in order to create social policy changes. But these investigations have been case studies focused on singular policy areas and have often examined tort law where presidents and bureaucracies have little formal authority. Still, this line of research suggests that Congress is not the only actor capable of creating robust litigation regimes. I extend this work to suggest that while Congress is the only actor that can *create* litigation rights, it is poorly situated to support a political and legal environment where lawsuits are likely to take place. Scholars have shown, however, that the president and executive agencies do have tools available to affect the likelihood of individuals to litigate private enforcement statutes.

The private enforcement literature has primarily focused on Title VII of the Civil Rights Act. A number of studies indicate that employment discrimination litigation is an effective deterrent to discriminatory behavior, at least for the firms at which litigation is directed (Leonard 1984; 1990; Skaggs 2008). The extent to which litigation has a general deterrent effect—that litigation can lead to less discrimination even among firms that are not sued—is much less clear. Frymer (2007) suggests at least one reason to be skeptical. He argues that it was the "mammoth caseloads" directed against unions that exerted sufficient pressure for organized labor to reduce racial discrimination. The financial pressure to discontinue illegal behavior had to be significantly high for change to take place. Further, Edelman (1990) shows that firm responses to adverse legal environments are highly formalized. Her evidence indicates that grievance procedures implemented by firms in the 1960s and beyond were a result of changes in the law, but that these "formal rules that comply with the law may be coupled only loosely with actual organizational practices" (Edelman 1990, 1436). Given the potential weakness of general deterrence, it appears that substantial litigation is required for private enforcement regimes to have the desired effect.

Therefore, the question of whether statutorily created private enforcement regimes can encourage high levels of litigation is essential to understanding their effectiveness as a policy tool. Other scholars have examined this question, primarily with in-depth case studies of high litigation areas. Farhang (2008; 2009; 2010; 2012) has argued that the statutes themselves are the key to creating private litigation. His analysis focuses, in particular, on two widely used statutory constructions—attorney's fee shifts, whereby successful plaintiffs can collect legal costs from defendants, and damage multipliers that typically allow plaintiffs to receive three times the actual damages in a successful lawsuit. These analyses examine isolated cases where statutory interventions have been successful, but similar statutory tools are often used with far less success in other policy areas, as will be discussed further in the next section. Executive influence on litigation has also been examined, with these scholars showing that weak bureaucracies are able to redirect resources to support private litigation when bureaucratic enforcement powers are inadequate (Lieberman 2005; Mulroy 2013). Again, however, these studies only address the effect of congressional and bureaucratic actors in a limited set of cases with the highest levels of litigation.

TABLE 2
Characteristics of Policy Areas Examined

Policy Area	*Statute*	*Agency*	*Ideology*	*Fees*	*Damages*	*Multiplier*
Employment Discrimination	CRA (Title VII)	EEOC	Liberal	✓	✓	✓
Retirement Insurance	ERISA	Labor	Liberal	✓	✓	
Labor Disputes	LMRA	NLRB	Moderate	✓	✓	
Securities Regulation	Securities and Exchange Act	SEC	Conservative	✓	✓	
Wage and Hour Regulation	FLSA	Labor	Liberal	✓	✓	
Antitrust	Sherman Act, Clayton Act	FTC/DOJ	Moderate	✓	✓	✓
Housing Discrimination	CRA (Title VI), Fair Housing Act	HUD	Liberal	✓		
Environment	CWA, CAA, NEPA, etc.	EPA	Liberal	✓		
Voting Rights	Voting Rights Act	DOJ	Conservative	✓		

Note: Private enforcement regimes are used across a diverse set of policy issues, of which most also have some level of concurrent agency enforcement. Almost all private enforcement regimes offer attorney's fees, but damage multipliers and requirements for plaintiffs without individualized harm to bring suits are less common. The agency ideology shown above is measured according to scores developed by Clinton and Lewis (2008). Agencies with positive scores are labeled conservative, negative scores are liberal, and moderate agencies are those with 95% confidence intervals crossing zero.

Motivating Litigants for Statutory Litigation

Congressional authorization is where private enforcement regimes must begin, but there are a number of steps required before a statutorily granted right of action can become a lawsuit.[4]

While congressional authorization of lawsuits is a necessary condition for cases to be filed, the ability of Congress to motivate lawsuits should vary substantially based not just on the legislative construction of the enactment, but also on the ability and desire of plaintiffs—with whom lawsuits must begin—to bring lawsuits. Farhang (2010) recognizes as much by focusing his investigation of private enforcement regimes on litigation incentives. In this section, I offer an argument that explains how the structure of private enforcement regimes allows presidents and executive agencies to influence the amount of private litigation that occurs under these statutes.

Figure 3 shows the variation in litigation rates that exists within single policies and across different policies. While employment discrimination litigation makes up the single greatest amount of litigation, it experienced substantial growth for several years after its introduction before falling substantially to current rates. In recent years, lawsuits brought under the Employee Retirement Income Security Act (ERISA) and the Fair Labor Standards Act (FLSA) have been nearly as common as those under Title VII. Few policy areas display patterns of litigation that have moved monotonically over time; rather, litigation rates seem to ebb and flow even in the absence of statutory changes to litigation incentives. This variation in litigation rates within and across policies with similarly designed private rights of action is common.

A look at the statutory and bureaucratic regime for each policy area suggests the variation that can occur in enforcement. Table 2 lists the policies to be analyzed here, along with their leading statutes and a summary of their statutory features. The policy areas are listed, in descending order, by the mean number of cases initiated each year. The table indicates that the use of attorney's fees in private rights of action is a near constant. The availability of damages and damage multipliers is less common, but they are distributed among policy areas with both high and low levels of litigation. Moreover, no policy area in the sample saw significant changes to its basic statutory incentive structure during the period examined. There is considerable variation, however, in the ideology of the agencies tasked with enforcing policy for these statutes. It should also be noted that each of these policies would commonly be considered "liberal" policies in that greater enforcement not only means increased regulation, but also protection of traditionally liberal causes of minority, labor, consumer, and environmental interests against the interests of businesses, in most cases.

Just because a private right action exists does not mean that there will be people moved to use it. Policy areas with statutorily created private rights of action vary greatly

4. There are exceptions where congressional action may not be required. Patent and copyright protections, for example, occur both in the Constitution and in the common law. Federal law provides additional protections and litigation incentives, but they are not strictly required to bring a claim. Tort law also provides avenues for similar kinds of litigation without congressional approval (see Barnes 2008; Derthick 2011; Epp 2010).

in the types of harms they seek to remedy and the policy goals they seek to achieve. While many private enforcement regimes are directed at creating remedies for individuals who have experienced legal harm, there are a number of private enforcement statutes that require no such harm to have taken place. Bringing these litigants into courts may come with a number of challenges.

Law and society scholars have noted that even in the presence of "perceived injurious experiences," those experiences must be "transformed" in order to become lawsuits (Felstiner, Abel, and Sarat 1980). Felstiner, Abel, and Sarat (1980) argue that the process actually begins earlier—that even the perception of the injury should not be assumed, and that people must first recognize injuries by "naming" them as such. Next, injuries must be transformed into grievances by holding a party responsible, or "blaming" them. Finally, in order for grievances to become lawsuits, the victim must seek a remedy, what Felstiner, Abel, and Sarat (1980) refer to as "claiming." It is only through this process of naming, blaming, and claiming that injuries can be transformed into lawsuits.

It may seem that this process should be self-fulfilling, especially in cases where Congress has done the legwork of explicitly spelling out a right of action. It could be argued that Congress has greatly increased the ability of victims to name their injuries by outlining what constitutes violations through statute. The reality, however, is rarely so simple. Felstiner, Abel, and Sarat (1980) use the example of a shipyard worker who experiences health problems but fails to recognize their symptoms are asbestosis resulting from materials used at work. Environmental pollution is often experienced this way by injured parties. But environmental plaintiffs experience another barrier—locating the origin of the pollutant and determining whether the emission of those pollutants constitutes a violation of the law under the appropriate statute. This requires substantial information.

The above discussion parallels arguments made by Galanter (1974) as to "why the haves come out ahead" in lawsuits. The ability to name lawsuits, gather information, and then front the resources necessary is a reason why litigants who are involved in more cases, whom Galanter calls "repeat players," are so successful against "one-shotters" who have little experience with legal matters and are rarely party to lawsuits. Since most private enforcement statutes provide private rights of action to "one-shotters," these same advantages should have the effect of reducing the number of lawsuits filed. Rational plaintiffs will view their odds of success as quite low. Rightly so: employment discrimination claims, the largest private enforcement regime in terms of lawsuit counts, are only successful in approximately 16% of cases (Clermont and Schwab 2004).

These procedural hurdles can be overcome. The importance of interest groups and political mobilization to court-centered social change has been noted before, most prominently by Epp (1998). Examining the increasing success of rights claims in courts, Epp argues that the "rights revolution" was a product of the increasing strength of rights and liberties-focused interest groups like the NAACP and American Civil Liberties Union. The Supreme Court's seeming bias toward business interests in the late nineteenth and early twentieth centuries was actually a result of the greater amount of organizational resources that businesses had at their disposal. In essence, businesses, Epp argues, were the only repeat players on the scene. As interest groups with specific rights-based political

goals grew, so did the success of rights claims in courts. In that sense, the rights revolution was primarily an organizational victory, where organized groups were able to move the agenda toward issues of social justice. The support structures that were provided by these new groups, Epp argues, were key to the success of rights-focused legal movements. McCann (1994) similarly shows how sustained efforts by women's rights groups across various legal and legislative arenas supported pay equity litigation. While pay equity reform efforts were not always successful, organizations played a critical role in legal mobilization.

Presidential Influence on Private Litigation

A key finding in the private enforcement literature is that Congress uses private enforcement regimes to insulate policies from presidential control. Stephenson (2006) argues that agency enforcement is more ideological compared to judicial enforcement, which may lead Congress to prefer private rights of action. Both Stephenson and Farhang emphasize the trade-offs between agency and court enforcement as influential on legislative choice of enforcement regime. While empirical evidence that Congress views the choice in this manner has been shown (Farhang 2008), the empirical fact of whether judicial private enforcement regimes can be insulated from the partisan tides inherent in executive enforcement remains in the realm of theory.

Recent work has questioned the extent to which legal enforcement regimes are fully insulated from presidential control. In their discussions of the importance of private litigation to employment discrimination enforcement, Frymer and Farhang have emphasized the weakness of the Equal Employment Opportunity Commission (EEOC). The weakness of the EEOC would seem to be a classic example of Congress's successful attempt to remove policy enforcement from presidential control, and in fact Frymer shows that changes to the law followed entrepreneurial judges because of the weakness of the EEOC. Pedriana and Stryker (2004) argue, however, that the EEOC broadened its capacity through creative statutory construction and legal interpretation that have been overlooked by scholars emphasizing traditional state capacity. Lieberman (2005) and Mulroy (2013) meanwhile claim that the EEOC was able to shape litigant and judicial behavior even in the absence of cease-and-desist authority by supporting and organizing litigant activity or by issuing agency opinions to which courts were often deferential. It was that lack of authority that led the EEOC to shift its attention to supporting private litigation activity through legal assistance in building cases and by commissioning amicus briefs in an attempt to influence judicial decision making. This is consistent with work by Carpenter (2001) arguing that agencies exercise a certain amount of independent authority in policy making.

It appears, then, that there exists a toolbox for executive agencies to achieve policy goals even in the absence of traditional bureaucratic enforcement tools. The weakness of the EEOC, however, is not typical in private enforcement systems—most policy areas with private enforcement regimes have executive agencies with varying levels of formal powers and institutional capacities. Concurrent enforcement is a common feature of

private enforcement regimes, often through U.S. plaintiff cases, but also through traditional bureaucratic enforcement measures. This sort of "mixed" enforcement means that the ability of plaintiffs to bring lawsuits is subject to numerous decisions in the executive branch.

The influence of executive agencies can take a number of forms. In addition to direct litigation support like that described by Lieberman and Mulroy, agency decisions about what kinds of enforcement actions to take and what kinds of regulations to promulgate can influence how private litigants will fare in the courts. An often discussed feature of private antitrust litigation, for instance, is that private litigants will "pile" onto U.S.-led antitrust cases, using judicial findings of fact from government-led cases to bolster their own private claims. Scholars studying environmental citizen suits note that the ability to bring private environmental claims begins with Environmental Protection Agency (EPA) rulemaking and permit ranting. EPA rules regulating legal amounts of toxic chemical emissions, either at the national level or in plant-level discharge permits, determine when a violation of the law occurs and, therefore, determine which and how many citizen suit claims can be sustained. That is, when permitted pollution levels are strict, violations will be easier for potential plaintiffs to detect and prove.

Where agency policy making matters, the political science literature on the bureaucracy suggests that presidents should also exert substantial control over outcomes. The most often cited method of presidential control over the bureaucracy is through appointments to bureaucracies. Moe (1985) argues that presidential control over executive agencies has increased as the bureaucracy has become more politicized and presidents seek "responsive competence" from bureaucrats. Wood and Waterman (1991) argue for a number of other avenues of presidential control, including authority over budgets through the Office of Management and Budget and changes in bureaucratic personnel. Conversely, Bonastia (2000) argues that presidential sanctions and delegitimation of agencies, especially "weak" agencies, can hinder the development of the kind of state capacity development described by Pedriana and Stryker (2004), using the Department of Housing and Urban Development (HUD) as a case study. Lamb and Wilk (2009) likewise argue that President Richard Nixon's lack of support for HUD prevented the growth of the kind of capacity essential for supporting litigation, whereas more positive or hands-off leadership led to strengthened enforcement.

With these tools, the president is able to gain some control over the bureaucracy. Given the concerns over executive control of bureaucracies sometimes cited by Congress as a reason for preferring private enforcement regimes, this should come as little surprise. Moe (1985) further argues, however, that presidential control will be "halting, highly imperfect, and nowhere near sufficient" because of institutional constraints that prevent presidents from overhauling the bureaucracy. The president's ability to direct agency activity is contingent on the political environment unique to each agency. Presidents use a number of tools—politicization, centralization, and the like—to exert greater control over the bureaucracy. Politicization of the bureaucracy may be associated with decreased performance (Gailmard and Patty 2007; Resh 2015; Wood and Lewis 2017), but it also enhances accountability to political principals, especially when presidents have greater control over staffing (Weko 1995). Presidents have historically favored less insulated

bureaucracies, in an effort to increase presidential control (Lewis 2004). Conversely, highly independent agencies can resist the pressures coming from presidential principals when ideologically inclined (Wood 1988). When agencies have more independent capacity to direct policy, presidential preferences are less influential. Where agencies are more politicized, however, we would expect the president's ideological preferences for enforcement to be more influential on levels of litigation.

Therefore, I expect that presidents will have an impact on litigation rates either through targeted litigation support or incidentally through traditional bureaucratic enforcement mechanisms, especially when agencies are ideologically aligned with the president and agencies are politicized. As presidents attempt to implement their preferred policies, this should affect the rates of private litigation either positively or negatively, depending on the executive action. As argued above, however, presidents are constrained, to some extent, by the character and ideology of executive agencies and the limits of presidents to create congruence in agencies. Therefore, presidential influence will also be mediated by the ideology of the bureaucratic agency responsible for enforcement of the policy or statute. That is, we should expect litigation rates to be highest for policies where Democratic presidents are aligned with liberal executive agencies. As alignment between the president and executive agencies decreases, litigation rates will also decrease, all else constant. Finally, Democratic presidents will be most influential when the target agency is subject to greater political control by the president.

Presidential control of the bureaucracy is now widely supported by the political science literature, but it is notable that legislative dominance of the bureaucracy was long the view of scholars (Whittington and Carpenter 2003). As private enforcement regimes seem to be a product of tenuous compromise, however, I expect congressional influence to be of minimal importance for influencing the number of cases initiated in federal courts. Moreover, legislation—the inclusion or multiplication of damages, inclusion of fees, changes to statutes of limitations—is a more recognized tool for Congress to use in motivating lawsuits. Finally, the rarity with which Congress exercises "police patrol" oversight authority suggests that, in this application, the effect of presidents will be much more important for outcomes (McCubbins and Schwartz 1984). I, therefore, expect no effect of congressional ideology on litigation rates. This leads me to offer four hypotheses:

> Presidential Hypothesis: Litigation rates will be higher under Democratic presidents than Republican presidents.

> Bureaucratic Hypothesis: Litigation rates will be higher when the ideology of responsible executive agencies is more liberal.

> Interaction Hypothesis: Litigation rates will be highest when Democratic presidents are aligned with liberal agencies.

> Politicization Hypothesis: Litigation rates will be highest when Democratic presidents intersect with more highly politicized agencies.

Data and Methods

In order to test the hypotheses outlined above, I collected the number of lawsuits each year for nine policy areas with both private and agency enforcement between 1993 and 2012. The data were collected from the Federal Judicial Center data on district case filings, housed at the Interuniversity Consortium for Political and Social Research. Cases are categorized according to a selection made by the plaintiff at the time of filing.[5] From the individual cases, I collect the number of cases filed in each federal judicial district, in each year, for each policy.

To test for the effect of executive politics, I categorize presidents according to their partisanship, with Democratic presidents taking the value 1, and Republican presidents, 0 (*Democratic President*). In order to test the interaction between presidential politics and executive agency ideology, I use measures of bureaucratic agency ideology developed by Chen and Johnson (2014) (*Agency Ideology*).[6] These measures of ideology are particularly appealing for this analysis for at least two reasons. First, they vary over time. Given the substantial amount of variation in litigation activity within presidential administrations, it is important that I be able to measure changes in agency ideology within presidential terms. Second, agency scores derived from campaign contributions have the additional benefit of separating the preferences of bureaucrats from those of their presidential and congressional principals that might otherwise influence the actions, and therefore perceived ideology, of a bureaucratic agency.[7] Smaller values indicate more liberal agencies.

Ideology alone may not sufficiently capture how supportive policies can bolster legal claiming. Therefore, I also adopt a measure of agency politicization (*Politicization*)—the percentage of the Senior Executive Service (SES) who are politically appointed (Bolton 2020; Resh 2015). This variable is important given the substantial variation in the policy areas and agencies examined, including independent commissions. This measure appears consistent with the expectation that independent commissions would be more insulated from presidential control (though see Lewis and Devins 2008). For example, the average percentage of politically appointed SES officials at the Securities and Exchange Commission and EEOC is less than 5, where in the cabinet Departments of Labor and Housing and Urban Development politicization is approximately 15%.[8]

Controls

The literature suggests the inclusion of controls. Frymer (2003; 2007) demonstrates the important role that judges can play in regulation through private enforcement regimes when deciding cases. Sympathetic judges make it easier for plaintiffs to sustain

5. Examination of available case filings and decisions suggests that the categorization of cases in this manner is relatively reliable, with the possible exception of environmental suits, for which the AO reports much higher estimates than those collected by scholars (see May 2003; Smith 2004).

6. Chen and Johnson (CJ) track campaign contribution activity by federal agency employees, using the DW-NOMINATE scores of recipients of campaign donations to determine the ideology of federal employees. Using employee ideology, the aggregate ideology of each agency in any given year can be calculated.

7. See the appendix for discussion of alternative measures.

8. See Appendix C for a discussion of alternative measures of agency independence.

their claims, and entrepreneurial judges can open new avenues for enforcement of the law through their decisions. District court judges presiding over cases have significant authority to assign damages, issue injunctions, and direct special masters to ensure enforcement of their decisions. Therefore, the political and legal leanings and preference of judges are a potentially important factor for the success of a plaintiff's case. To measure the effect of judicial ideology, I include two variables—the median ideology of the Supreme Court (*Supreme Court Median*) according to the commonly used Martin-Quinn scores (Martin and Quinn 2002) and the proportion of judges in each federal district appointed by Republicans in a given year (*Republican Judges*) (Kastellec 2011). While the Supreme Court, as the ultimate principal in the federal judiciary, may have some effect on the ability of plaintiffs to bring lawsuits, most lawsuits terminate at the district or appeals court stage, which makes the ideology of lower federal judges a more direct measure of judicial influence. But given the importance of the Supreme Court as the judicial principal in the federal hierarchy (Songer, Segal, and Cameron 1994) and the fact that the majority of cases terminate before reaching the Supreme Court, I include both measures.

I also include controls to proxy for interest group support. Similar to support structures for constitutional litigation discussed by Epp and McCann, in private enforcement litigation, when lawsuits to enforce federal statutes take place, we often observe similar support. Moreover, as Pedriana and Stryker argue, adoption of supportive agency policy in the EEOC was, in part, due to sustained pressure from civil rights groups. Lawsuits under labor statutes are substantially supported by unions. Employment law has become a niche for some lawyers who specialize in wage and hiring discrimination and work on contingency. Unions and specialized lawyers help plaintiffs to gain some of the characteristics of repeat players and increase their probability of success. In environmental litigation, relatively resource-rich interest groups often bring cases as the plaintiff. Following Gardner (2018), I proxy for interest group support by using campaign contribution data that have been widely used by political scientists recently (see, e.g., Bonica 2013). These data have the advantage of identifying interest group contributors by their mission, their location, and the date of the contributions. From these categories, I construct a measure of the number of campaign contributions by interest groups related to the policy areas examined for each state and year.[9]

Finally, there may be some concern that the causal story is actually reversed—that strategic litigants increase claiming during more sympathetic administrations in order to influence administration priorities. As argued above, these lawsuits are expensive for individual litigants, and therefore, only interest group–supported litigants are likely to be able to exercise this kind of costly signaling. Therefore, the inclusion of interest group measures should assuage some of those concerns. To further support my causal claim, however, I also collect the variable *Rules* in order to account for agency action that may result in increased or decreased rates of litigation. Specifically, this is all economically

9. I use state-level, rather than district-level, interest group measures because while I assume that interest groups are somewhat bound in their activities by state borders, the borders of judicial districts have little bearing on interest group activity.

significant rules adopted by the agencies investigated in the years 1994–2012.[10] Due to the complexity of the rulemaking process, it is implausible that rulemaking behavior is a response to strategic litigation activity, as discussed below.

Additionally, I include controls for congressional partisanship (*House Ideal Point* and *Senate Ideal Point*), and a year time trend (*Year Trend*). The year variable allows for secular trends in the data unrelated to the political variables, while the inclusion of the congressional variables allows for the possibility that legislative partisanship matters through means other than direct changes in litigation incentives, either through other statutory changes or congressional control of the bureaucracy, as discussed briefly above. I analyze the data using ordinary least squares regression with a logged dependent variable and fixed effects for policy area and judicial district in order to control for time-invariant policy- and district-specific confounders.[11]

Results

The results support each of the four hypotheses. Table 3 displays the model estimations described in the previous section. Model 1 focuses exclusively on executive branch ideology variables, Model 2 reports politicization, and Model 3 includes all hypotheses with full controls. The results provide support for the argument that executive branch actors can support litigation, both directly and indirectly, as the president and federal agencies implement federal law. As expected, the coefficients are positive and significant for both the Democratic President and Agency Liberalism variables. Additionally, the interaction between the two variables is positive and significant. The total effect of presidential partisanship with agency ideology, however, is more informative than examining the coefficients alone. The total effect of Democratic versus Republican presidents is shown in Figure 4. The controls behave largely as expected, providing additional support that the model has been appropriately specified. The judicial variables, in particular, affect the magnitude of litigation, consistent with the arguments of Frymer (2003; 2007).

Figure 4 shows the overall effect of presidents and agencies and, in addition, helps to show the magnitude of the effect. The first panel shows the predicted number of lawsuits initiated for both Democratic and Republican presidents across all values of agency ideology. As can be seen, the highest predicted number of lawsuits occurs under Democratic presidencies and liberal federal agencies. The second panel shows the predicted number of lawsuits under Democratic administrations less the predicted number of lawsuits under Republican administrations. On the left side of the graph, representing more liberal agencies, the predictions are above zero, meaning that Democratic presidents produce more lawsuits under liberal agencies than do Republican presidents. The 95% confidence intervals are also above zero, meaning that the difference between Democrats and Republicans is significant. Under moderate agencies, however, there are no

10. Collected through a search of the Federal Register (https://www.federalregister.gov/documents/search#advanced) with significance as defined by Executive Order 12866.

11. For more detail about the suitability of this modeling choice for the data, see Appendix B.

TABLE 3
Determinants of Litigation Models with and without Controls

	Agency Ideology	*Agency Politicization*	*Full Model*
	(1)	*(2)*	*(3)*
Democratic President	−0.14***	−0.10***	−0.13*
	(0.03)	(0.02)	(0.05)
Agency Ideology	0.57***		0.82***
	(0.07)		(0.12)
President × Agency	−0.58***		−1.08***
	(0.11)		(0.20)
Politicization		0.98***	0.05
		(0.20)	(0.23)
President × Politicization		0.01	1.76**
		(0.20)	(0.55)
Agency × Politicization			0.41
			(1.20)
President × Agency × Politicization			0.51
			(2.29)
Capacity			−0.02
			(0.01)
Interest Group Activity			0.02
			(0.02)
Republican Judges			−0.12**
			(0.04)
Supreme Court Median			−0.33***
			(0.03)
House Ideal Point			−0.27***
			(0.04)
Senate Ideal Point			0.05
			(0.06)
Year Trend	−0.02***	−0.02***	0.00
	(0.00)	(0.00)	(0.00)
Constant	41.81***	43.17***	−1.20
	(13.98)	(14.57)	(−0.20)
Observations	16,020	16,020	16,020
Policy Area Fixed Effects	✓	✓	✓
Judicial District Fixed Effects	✓	✓	✓
Cluster Robust Standard Errors	✓	✓	✓

Note: Figures are derived from Model 3 unless otherwise specified. Standard errors are in parentheses.
***$p < .001$; **$p < .01$; *$p < .05$.

differences between Democratic and Republican presidents. A policy associated with the most liberal agency in the sample, the EEOC, is predicted to produce about 19 more lawsuits under a Democratic president than under a Republican president in each district-policy-year, or nearly 1,700 cases nationally in any policy area.[12] The effect is reversed,

12. Recall, however, that the models control for the baseline levels of lawsuits in each policy area; therefore, this effect is not being driven by any one policy area.

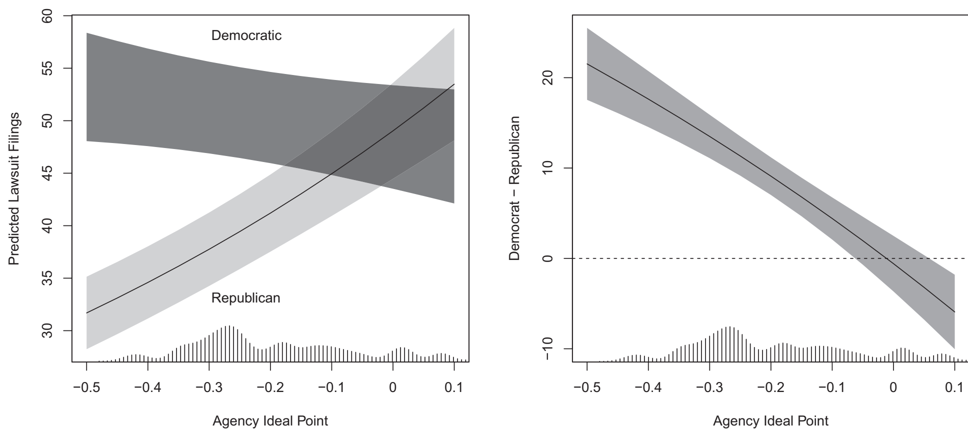

FIGURE 4. Effect of Presidential and Agency Partisanship on Lawsuits Initiated.
Note: The total effect of presidential and agency ideology with 95% confidence intervals is displayed. Panel 1 shows the separate effects of Republican and Democratic presidents. Panel 2 shows the difference between the two lines in Panel 1, with 95% confidence intervals indicating whether the difference is distinguishable from zero. Where the predictions fall below the dashed zero line, there is more litigation under Republican presidents. Above the dashed line, there is more litigation under Democratic presidents. Both graphs are shown with vertical bars along the x-axis representing the distribution of agency ideal points in the data.

however, for more conservative agencies. For policies governed by more conservative bureaucracies, the effect of a Democratic president drops, while Republican presidents show an uptick in predicted levels of litigation.

I have also argued that the effect of presidential partisanship should be conditional on the politicization of the enforcing agency. More independent agencies should see relatively little effect of presidential partisanship, while more politicized agencies will likely adjust their behavior significantly in response to presidential partisanship. And given that we expect Democratic presidents to desire more litigation in the areas studied, we should expect the highest levels of litigation when Democratic presidents are matched with more politicized agencies. Referring to Figure 5, this is precisely what I find. Presidential partisanship apparently has no effect when agencies are relatively independent, as measured by the percent of SES political appointees, but much more litigation follows when Democratic presidents have greater influence through politicization. The attendant rise of litigation with politicization does not occur, however, under Republican presidents.

Finally, there is a possibility that the empirical patterns presented here are the result of strategic choices made by litigants, and not executive branch support for litigation. In this formulation, litigants bring policy needs to the attention of sympathetic executive branch actors through litigation. Inclusion of interest group controls, as I argue above, should mitigate some of this concern. To further assuage these concerns, however, I also include a measure of agency rulemaking. As outlined above, changing rules is one important method by which bureaucrats can affect litigant claiming. Moreover, the rulemaking process is long and complex and, therefore, not likely to be influenced by short-term trends in litigation. If litigation rates change as agency rules change, we can

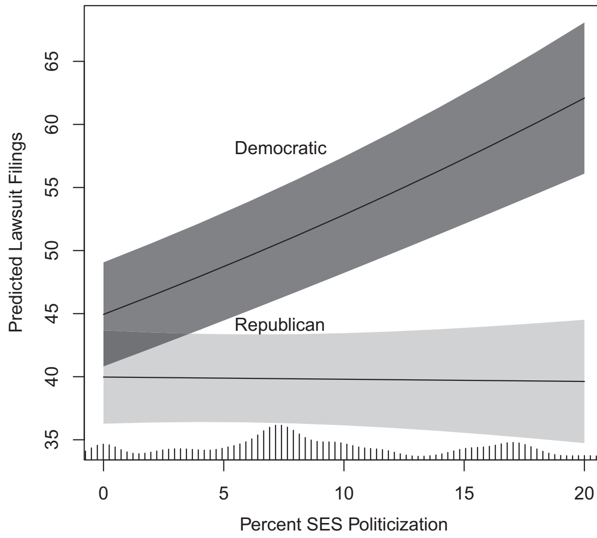

FIGURE 5. The Effect of Agency Politicization on Lawsuit Claiming.

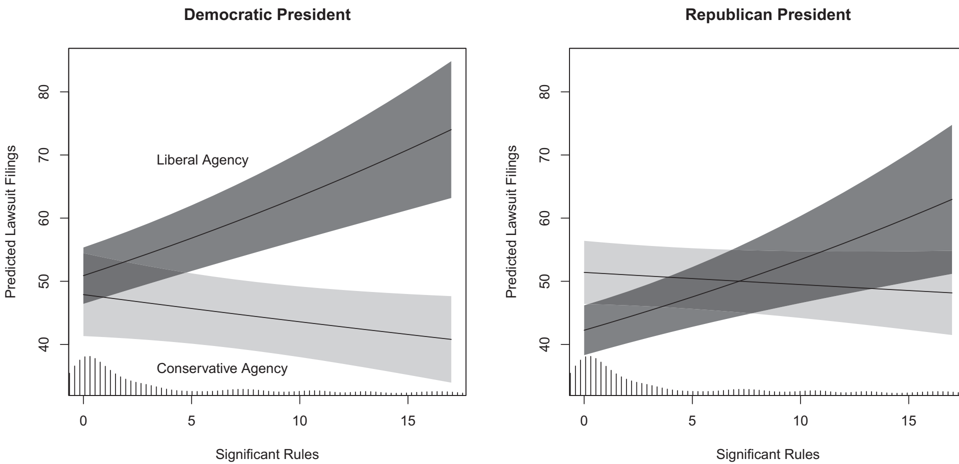

FIGURE 6. The Effect of Agency Rule Changes on Lawsuit Claiming.

be more confident that this is the result of executive branch creation of a more favorable litigation environment.

The results of this analysis are presented in Table 4. As expected, the promulgation of agency rules significantly affects litigation rates when the new rules are the product of a Democratic president and liberal agency. This can be most easily seen in Figure 6, which displays the interaction of presidential partisanship, agency ideology, and rule promulgation graphically. When liberal agencies promulgate more rules under Democratic presidents, litigation significantly increases. Under all other configurations, however, the

TABLE 4
Determinants of Litigation with Agency Rules

	(4)
Democratic President	−0.02
	(0.05)
Liberal Agency	0.46***
	(0.09)
President × Agency	−0.60***
	(0.16)
Rules	0.001
	(0.002)
Democratic President × Rules	−0.005
	(0.004)
Agency Ideology × Rules	−0.06***
	(0.02)
President × Agency × Rules	−0.01
	(0.02)
Capacity	−0.04***
	(0.01)
Politicization	−0.86***
	(0.19)
Interest Group Activity	0.02
	(0.02)
Republican Judges	−0.06
	(0.04)
Supreme Court Median	−0.20***
	(0.03)
House Ideal Point	−0.10**
	(0.04)
Senate Ideal Point	−0.25***
	(0.06)
Year Trend	−0.02***
	(0.00)
Constant	40.64***
	(5.96)
Observations	15,219

Note: Standard errors are in parentheses.
$^*p < .05$; $^{**}p < .01$; $^{***}p < .001$.

results are negligible. This suggests that “broad statutory construction” (Pedriana and Stryker 2004) in the form of agency rulemaking is more likely driving litigant behavior, rather than any strategic behavior of litigants.

The findings here indicate that presidents are able to use their executive power to influence the enforcement of federal law even under private enforcement regimes that some members of Congress expect to insulate policy from presidential control. Even without direct enforcement powers, Democratic presidents and liberal agencies can support robust litigation. These findings also have implications for the argument discussed above that private enforcement can insulate against executive agency enforcement by allowing private litigation to substitute for lax bureaucratic enforcement. The results here stand in stark

contrast with this theory and congressional expectations to that effect. Rather than substitution (or its weaker form, "autopilot," where litigation is sustained at base levels even under opposition administrations), the results indicate that private litigation is to some degree dependent on the actions of the executive branch. If Congress intends this private litigation to insulate policy from executive actions, that insulation is limited to where presidents are already limited by agencies with countervailing preferences. Indeed, the direct association between presidential partisanship and litigation rates is weak compared to the supportive effect of alignment between liberal agencies and Democratic presidents.

Conclusion

Private enforcement regimes have been described as a method for limiting the ability of the president to direct enforcement of federal statutes. This article rejects that claim on two fronts. First, I have shown that executive-legislative conflict is not a significant motivator for the adoption of the private enforcement regimes. Congress may, however, adopt private enforcement regimes to protect against future shifts in political control or policy content. Second, I have demonstrated that adoption of private enforcement regimes would not be an effective way to eliminate presidential influence on bureaucratic enforcement. This analysis demonstrates the importance that executive branch actors still have when Congress shifts enforcement power onto courts and private parties. Under private enforcement, the executive branch loses its monopoly on enforcement, but the president and executive agencies still maintain substantial ability to support greater levels of enforcement.

Though policy enforcement is not left to the executive branch alone, the power of the president to direct policy is not completely diminished. This may raise as many questions as it answers. As discussed above, the influence of the executive can take a number of forms, and this analysis does not help us to distinguish between the effect of direct litigation support by the executive branch and the more indirect support for litigation generated when bureaucracies create regulations that make for a more favorable litigation environment. Moreover, the analysis also suggests the possibility that actions by interest groups and judges also influence litigation efforts. Future research should embrace this multitude of influences—the confluence of factors affecting the decision of plaintiffs to bring lawsuits should be understood as an indelible feature of private enforcement systems, and not as afterthoughts or statistical noise.

The choice of how to enforce policy has consequences beyond simple effectiveness. Congress, in deputizing private individuals to enforce complicated federal statutes, has shifted the resources and information burden away from itself and traditional enforcement mechanisms and onto minimum wage workers, people experiencing race and gender discrimination in their jobs, small businesses and consumers threatened by collusion, and others. Even in the case of policies like Title VII employment discrimination that have led to high levels of litigation, this enforcement choice makes the process even more burdensome for individuals. The news, however, is not all bad. Presidents and executive agencies can still provide support for litigation, thereby ensuring that robust enforcement

continues. In the end, the decision to litigate is heavily influenced by the support of these executive institutions, which illuminates how plaintiffs make decisions about litigation. Given the important role that the executive branch plays in both bureaucratic and private enforcement, the decision by Congress of what enforcement mechanism to use should focus to a greater extent on how to achieve justice for those meant to be protected by legislation, and less on internecine disputes between Congress and the president.

References

Barnes, Jeb. 2008. "Courts and the Puzzle of Institutional Stability and Change Administrative Drift and Judicial Innovation in the Case of Asbestos." *Political Research Quarterly* 61 (4): 636–48.

Bolton, Alexander. 2020. "Ideology, Unionization, and Personnel Politics in the Federal Budget Process." *Journal of Public Administration Research and Theory*. https://doi.org/10.1093/jopart/muaa032

Bonastia, Chris. 2000. "Why Did Affirmative Action in Housing Fail During the Nixon Era? Exploring the 'Institutional Homes' of Social Policies." *Social Problems* 47 (4): 523–42.

Bonica, Adam. 2013. "Ideology and Interests in the Political Marketplace." *American Journal of Political Science* 57 (2): 294–311.

Burke, Thomas F. 2004. *Lawyers, Lawsuits, and Legal Rights: The Battle Over Litigation in American Society*. Vol. 2. Berkeley: University of California Press.

Cameron, A. Colin, and Pravin K. Trivedi. 2005. *Microeconometrics: Methods and Applications*. New York: Cambridge University Press.

Carpenter, Daniel P. 2001. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928*. Princeton, NJ: Princeton University Press.

Chen, Jowei, and Tim Johnson. 2014. "Federal Employee Unionization and Presidential Control of the Bureaucracy: Estimating and Explaining Ideological Change in Executive Agencies." *Journal of Theoretical Politics* 27 (1): 151–74.

Clayton, Cornell. 1992. *The Politics of Justice: The Attorney General and the Making of Legal Policy*. New York: M. E. Sharpe.

Clermont, Kevin M., and Stewart J. Schwab. 2004. "How Employment Discrimination Plaintiffs Fare in Federal Court." *Journal of Empirical Legal Studies* 1 (2): 429–58.

Clinton, Joshua D., and Lewis, David E. 2008. Expert Opinion, Agency Characteristics, and Agency Preferences. *Political Analysis* 16 (1): 3–20.

Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6: 279–95.

Derthick, Martha A. 2011. *Up in Smoke: From Legislation to Litigation in Tobacco Politics*. Washington, DC: CQ Press.

Devins, Neal, and David E. Lewis. 2008. "Not-So-Independent Agencies: Party Polarization and the Limits of Institutional Design." *Boston University Law Review* 88: 459–98.

Edelman, Lauren B. 1990. "Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace." *American Journal of Sociology* 95 (6): 1401–40.

Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.

Epp, Charles R. 2010. *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State*. Chicago: University of Chicago Press.

Farhang, Sean. 2008. "Public Regulation and Private Lawsuits in the American Separation of Powers System." *American Journal of Political Science* 52 (4): 821–39.

Farhang, Sean. 2009. "The Political Development of Job Discrimination Litigation, 1963–1976." *Studies in American Political Development* 23 (1): 23–60.

Farhang, Sean. 2010. *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* Princeton, NJ: Princeton University Press.

Farhang, Sean. 2012. "Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law." *Law & Social Inquiry* 37 (3): 657–85.

Felstiner, William L. F., Richard L. Abel, and Austin Sarat. 1980. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming." *Law & Society Review* 15 (3/4): 631–54.

Frymer, Paul. 2003. "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85." *American Political Science Review* 97 (3): 483–99.

Frymer, Paul. 2007. *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party*. Princeton, NJ: Princeton University Press.

Gailmard, Sean, and John W. Patty. 2007. "Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise." *American Journal of Political Science* 51 (4): 873–89.

Galanter, M. 1974. "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change." *Law & Society Review* 9 (1): 95–160.

Gardner, Paul J. 2016. "Private Enforcement of Constitutional Guarantees in the Ku Klux Act of 1871." *Constitutional Studies* 2 (1): 81–96.

Gardner, Paul J. 2018. "Mobilizing Litigants to Enforce Public Goods: Evidence from Employment, Housing, and Voting Discrimination Policy." In *The Rights Revolution Revisited: Institutional Perspectives on the Private Enforcement of Civil Rights in the U.S.*, ed. Lynda Dodd. New York: Cambridge University Press, 70–99.

Hacker, Jacob S. 2004. "Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States." *American Political Science Review* 98 (2): 243–60.

Kagan, Robert A. 2001. *Adversarial Legalism: The American Way of Law*. Cambridge, MA: Harvard University Press.

Kastellec, Jonathan P. 2011. "Hierarchical and Collegial Politics on the U.S. Courts of Appeals." *Journal of Politics* 73 (2): 345–61.

Lamb, Charles M., and Eric M. Wilk. 2009. "Presidents, Bureaucracy, and Housing Discrimination Policy: The Fair Housing Acts of 1968 and 1988." *Politics & Policy* 37 (1): 127–49.

Leonard, Jonathan S. 1984. "The Impact of Affirmative Action on Employment." *Journal of Labor Economics* 2 (4): 439–63.

Leonard, Jonathan S. 1990. "The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment." *Journal of Economic Perspectives* 4 (4): 47–63.

Lewis, David. 2004. *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946–1997*. Stanford, CA: Stanford University Press.

Lieberman, Robert C. 2005. *Shaping Race Policy: The United States in Comparative Perspective*. Princeton, NJ: Princeton University Press.

Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999." *Political Analysis* 10 (2): 134–53.

May, James R. 2003. "Now More Than Ever: Trends in Environmental Citizen Suits at 30." *Widener Law Review* 10. https://ssrn.com/abstract=1334221

McCann, Michael W. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press.

McCarty, Nolan, Keith T. Poole, and Howard Rosenthal. 2006. *Polarized America: The Dance of Ideology and Unequal Riches*. Cambridge, MA: MIT Press.

McCubbins, Mathew D., and Thomas Schwartz. 1984. "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms." *American Journal of Political Science* 28 (1): 165–79.

Moe, Terry M. 1985. "The Politicized Presidency." In *The New Direction in American Politics*, eds. John E. Chubb and Paul E. Peterson. Washington, DC: Brookings Institution Press, 235–71.

Mulroy, Quinn. 2013. *Public Regulation through Private Litigation: The Regulatory Power of Private Lawsuits and the American Bureaucracy*. PhD diss. Columbia University.

Mulroy, Quinn. 2018. "Approaches to Enforcing the Rights Revolution: Private Civil Rights Litigation and the American Bureaucracy." In *The Rights Revolution Revisited: Institutional Perspectives on the Private Enforcement of Civil Rights in the U.S.*, ed. Lynda Dodd. New York: Cambridge University Press, 27–45.

Patashnik, Eric M. 2008. *Reforms at Risk: What Happens After Major Policy Changes Are Enacted*. Princeton, NJ: Princeton University Press.

Pedriana, Nicholas, and Robin Stryker. 2004. "The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971." *American Journal of Sociology* 110 (3): 709–60.

Resh, William G. 2015. *Rethinking the Administrative Presidency: Trust, Intellectual Capital, and Appointee-Careerist Relations in the George W. Bush Administration*. Baltimore: Johns Hopkins University Press.

Selin, Jennifer L. 2015. "What Makes an Agency Independent?" *American Journal of Political Science* 59 (4): 971–87.

Selin, Jennifer L., and David E. Lewis. (2018). *Sourcebook of United States Executive Agencies*, 2nd ed. Washington, DC: Administrative Conference of the United States.

Silverstein, Gordon. 2009. *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*. New York: Cambridge University Press.

Skaggs, Sheryl. 2008. "Producing Change or Bagging Opportunity? The Effects of Discrimination Litigation on Women in Supermarket Management." *American Journal of Sociology* 113 (4): 1148–82.

Smith, Kristi M. 2004. Who's Suing Whom: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought under EPA-Administered Statutes, 1995–2000. *Columbia Journal of Environmental Law* 29 (2): 359–414.

Songer, Donald R., Jeffrey A. Segal, and Charles M. Cameron. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions." *American Journal of Political Science* 38 (3): 673–96.

Stephenson, Matthew C. 2006. "Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts." *Harvard Law Review* 119 (4): 1035–70.

Weko, Thomas J. 1995. *The Politicizing Presidency: The White House Personnel Office, 1948–1994*. Lawrence: University Press of Kansas.

Whittington, Keith E. 2005. "Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court." *American Political Science Review* 99 (4): 583–96.

Whittington, Keith E. 2007. *The Political Foundations of Judicial Supremacy*. Princeton, NJ: Princeton University Press.

Whittington, Keith E., and Daniel P. Carpenter. 2003. "Executive Power in American Institutional Development." *Perspective on Politics* 1 (3): 495–513.

Wood, Abby K., and David E. Lewis. 2017. "Agency Performance Challenges and Agency Politicization." *Journal of Public Administration Research and Theory* 27 (4): 581–95.

Wood, B. Dan. 1988. ""Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements." *American Political Science Review* 82 (1): 213–34.

Wood, B. Dan, and Richard W. Waterman. 1991. "The Dynamics of Political Control of the Bureaucracy." *American Political Science Review* 85 (3): 801–28.

Wooldridge, Jeffrey M. 2002. *Introductory Econometrics: A Modern Approach*. Toronto, Canada: Nelson Education.

Wooldridge, Jeffrey M. 2010. *Econometric Analysis of Cross Section and Panel Data*. Cambridge, MA: MIT Press.

Supporting Information

Additional supporting information may be found in the online version of this article at the publisher's web site: