PUBLIC REGULATION OF PRIVATE ENFORCEMENT: THE CASE FOR EXPANDING THE ROLE OF ADMINISTRATIVE AGENCIES

Matthew C. Stephenson

INTRODUCTION

I. PRIVATE ENFORCEMENT UNDER CURRENT LAW
   A. Express Private Remedies and Citizen Suits
   B. Judicially Implied Private Causes of Action
3. Article III: Congressional Control of Federal
   Jurisdiction................................................................. 146

IV. Implicit Delegation: Chevron Meets Cort v. Ash .......... 148
   A. Benefits of the Implied Delegation Presumption.......... 149
IV takes this prodelegation argument one step further, contending that courts should be willing to infer from ambiguous statutory language an implicit congressional delegation to agencies of the discretion to determine the nature and scope of private enforce-
mental citizen suit, the qui tam action seeks to strengthen the enforcement of federal law by, in effect, deputizing private parties to aid government enforcement efforts.\textsuperscript{19}

The power of Congress to authorize private lawsuits by plaintiffs who are clearly injured by a defendant’s statutory violation is generally unquestioned.\textsuperscript{20} Citizen-suit provisions may be more consti-

\footnotesize{torically been employed in a number of different statutes, several of which remain on the books. See, e.g., 28 U.S.C. § 201 (2000) (qui tam action against violation of Indian
tionally problematic when there is a question whether the citizen
that unclear statutes shall always be resolved in a particular direction—inevitably involves a judicial choice influenced by an assessment of the advantages and disadvantages of private enforcement. It is to these policy considerations that I now turn.

II. THE ADVANTAGES AND DISADVANTAGES OF PRIVATE
sands of individual citizens and interest groups to act as private at-
Virginia Law Review

2. Reducing Agency Slack
Though this justification for private enforcement is most often associated with legislative distrust of the executive branch,\textsuperscript{53} the agencies themselves may sometimes have reason to welcome this kind of external constraint. For example, an agency head may be concerned that subordinates will not be sufficiently zealous in enforcing the agency's mandate—that is, shirking may sometimes be a phenomenon that plagues lower levels of the agency hierarchy more severely than the upper echelons.\textsuperscript{54} If this is the case, then agency heads might want to authorize citizen suits, both because such suits ensure enforcement even when subordinates shirk and because monitoring the volume and success rate of citizen suits may be an economical way for agency heads to assess the performance of their subordinates.\textsuperscript{55} Additionally, agencies may sometimes have an interest in credibly committing themselves to aggressive enforcement of a statutory provision in order to induce rapid compliance by regulated entities or otherwise improve the agency's bargaining position.\textsuperscript{56} Citizen suits may address the attendant time

\textsuperscript{53} See Zinn, supra note 51, at 83–84 (noting that the environmental statutes' “anti-
consistency problem by taking some of the decision on specific enforcement actions out of the agency's hands. Similarly, the availability of private enforcement may reduce the incentives of regulated industries to lobby to cut the agency's budget in the hopes
B. Potential Disadvantages of Private Enforcement

The foregoing advantages notwithstanding, the authorization of private enforcement suits can also create serious problems and in many cases may be counterproductive for at least three reasons. First, private rights of action can lead to inefficiently high levels of enforcement, causing waste of judicial resources and leading to excessive deterrence of socially beneficial activity. Second, private enforcement actions can directly interfere with public enforcement efforts, distorting government enforcement priorities and disrupting the cooperative relationship between regulators and regulated entities that is often necessary to achieve compliance with statutory objectives. Third, private enforcement actions raise concerns about the democratic accountability of how enforcement is carried out.
may be insufficiently sensitive to the litigation costs of their suits (including the drain on judicial resources), especially if they are able to recover attorneys' fees or if they receive subsidies in the
fits to a private business of harassing or damaging the reputation of its competitors by bringing a private lawsuit. These incentives may lead some private plaintiffs to engage in "strike suits," seeking to extort from defendants a settlement offer that will enable the defendants to avoid the litigation costs and potential bad publicity associated with defending even nonmeritorious claims." In contrast, government regulatory agencies (it is often claimed) are better at bringing out enforcement actions that are either nonmeritorious.
not have the same incentives to exercise discretion in deciding which violations of the law are worth prosecuting, allowing private suits forces the government either to tolerate excessive enforcement of an overbroad rule or to narrow the rule in a way that allows many socially undesirable activities to escape regulation, unless the government is willing to invest substantial up-front costs to define the scope of the rule with greater precision. All of these choices may entail a substantial loss of social efficiency.

2. Interference with Public Enforcement

Private enforcement actions may also interfere with public enforcement efforts more directly. First, citizen suits may disrupt the cooperative relationship between regulators and regulated entities that many argue is essential for long-term compliance with statutory mandates. As Richard Stewart and Cass Sunstein put it, private enforcement actions may interfere with an agency’s ability “to negotiate with regulated firms and other affected interests in order to establish a workable and consistent regulatory system.” This is not to say that cooperation and negotiation can be effective with-

---

motivated by the President himself, is inconsistent with the system of separation of powers”).

81 See Cross, supra note 8, at 69–70; Greve, supra note 52, at 344; Stewart & Sunstein, supra note 26, at 1297.

82 Cf. Louis Kaplow, Rules and Standards: An Economic Analysis, 42 Duke L.J. 557 (1992) (discussing the relative over- and underinclusiveness of rules, which are given content ex ante, versus standards, which are given content ex post).

83 See Cross, supra note 8, at 67.

84 Stewart & Sunstein, supra note 26, at 1292–93; see also Jeannette L. Austin, The
out the credible background threat of coercive sanctions. Indeed,
This issue is sometimes thought to have a quasi-constitutional dimension, inasmuch as congressionally authorized citizen suits can interfere with the executive branch's efforts to "take Care that the
both especially good at ascertaining whether private enforcement would aid the pursuit of statutory objectives and especially sensitive to the risks that private enforcement might interfere with government regulatory strategy, it is the executive agency or department responsible for enforcing the relevant statute.\textsuperscript{100} Therefore,
show sufficient injury in fact, causation, and redressability to satisfy the Constitution's mandate that federal courts hear only actual "cases" as opposed to "generalized grievances." Similarly, the guarantees of the Equal Protection Clause and Due Process Clause would apply to agency-created private rights to the same extent that they would constrain legislatively created citizen-suit provisions.

Though this deterritorial approach to the authorization of private
against the constitutionality of delegating agencies the power to authorize private enforcement actions.

A. The Benefits of Delegation

Evaluating the benefits of delegating to agencies the authority to fashion private enforcement rights requires an assessment of how
There are two distinct sets of concerns about misaligned agency incentives, both of which have some plausibility even though the________
inaction and agency overzealousness critiques have merit in certain
might often want to create them. With regard to concerns about tunnel vision and overzealousness, the evidence that agencies at least in recent years have operated in the "public interest" - the fact
forcement. Alternatively, Congress could structure the delegation
Congress chooses to delegate despite the existence of agency pathologies is good evidence that for a majority of legislators the benefits of delegation outweigh the costs. This line of argument has in fact been frequently invoked to justify congressional delegation of other kinds of policy decision; the argument here is no different. So, if one takes congressional preferences as the normative baseline, the pathologies of agency decisionmaking are not a problem (except insofar as they deter some otherwise efficient delegations of legislative authority).
former inherently involves a greater degree of political accountability than decisionmaking by the latter. The executive, however, is ultimately accountable to a national constituency for its decisions regarding private enforcement, and Congress is also accountable for the decision to delegate in the first place. With regard to both of these institutions, informed voters will reward or
Private right of action is likely to focus the attention of organized groups and the interested public on the special issues surrounding private enforcement.
enforcement policy. Those who find the agency excessively lax can take it to task if it fails to authorize supplementary private enforcement, while those who object to draconian enforcement can
Though the agency rulemaking process is cumbersome, the agent-
ments. Second, the decentralized nature of legislative power and the need for a congressional majority makes it difficult to revisit and adjust legislative programs once they have been established. Third, this problem is exacerbated by the institutional structure of Congress and the legislative process, which is characterized by numerous gate keepers and veto-points.

Courts are in an even worse position than Congress to revise private enforcement policy in light of changing circumstances. Courts are likely to know considerably less than either the legislature or the executive about how well private enforcement is working in practice. Additionally, the stare decisis principle means that Courts are much more likely to be bound by prior judicial decisions than the legislature.
given the close relationship of private enforcement policy to traditional executive responsibility. Third, the proposed delegation of
gible principle” for the administrative agency to follow. This standard is easily satisfied in the private action context by the principle that the agency should adopt whatever rule would advance
IV. IMPLICIT DELEGATION: CHEVRON MEETS CORT V. ASH

I have argued that an express congressional delegation to an administrative agency of the power to fashion private enforcement policy would be constitutional and would often be preferable on policy grounds to having Congress or the courts make final decisions as to the nature and scope of private remedies. These arguments lay the necessary groundwork for my more radical claim that whenever a statutory provision is ambiguous as to whether it creates a private remedy, courts should infer an implicit delegation of authority over this question to the responsible administrative agency.

While this proposal is novel and runs against the current of recent Supreme Court opinions—which appear increasingly sympha-
factors does not yield a clear answer—that is, when one could make a good case either way—the court should invoke *Chevron*’s second prong and defer to the authoritative judgment of the responsible administrative agency. My proposal is also conservative in that, despite the tension with the tenor of certain recent Supreme Court decisions, extending the *Chevron* presumption to
ambiguity, it may improperly transfer power from Congress to the executive even in those instances where Congress made a conclusive decision about the desirability of private enforcement. Two
3. Superiority to an Anti-Private Enforcement Clear Statement Rule

Ultimately, the court must adopt some default rule to govern
second-related argument is that a strong clear statement rule de-
bigness should be read as an implicit delegation of power over private enforcement policy might raise constitutional problems that are not implicated by express delegation. In particular, the non-
on the question whether it creates a private right of action might conclude that interpreting the statute to delegate the decision to the executive would raise serious Article I concerns that could be avoided by interpreting the ambiguous statute as definitely creating, or definitely not creating, private remedies.

Despite the superficial plausibility of this argument, it suffers from two critical flaws. First, taken at face value, the argument suggests that whenever a statute is unclear, courts should avoid a nondelegation problem by interpreting the statute themselves rather than inferring an implied delegation to administrative agencies. Such an argument proves far too much: A principle that courts should construe ambiguous statutes to avoid finding a congressional delegation to agencies would entail a blanket rejection of most applications of the *Chevron* doctrine. The more sensible understanding of the principle that courts should avoid nondelegation problems is not that ambiguous statutes should be interpreted as nondelegative, but rather that extremely open-ended delegations, whether explicit or implicit, should be construed narrowly if
tional powers and duties, that there is simply no serious constitutional question that would arise if Congress delegated the power to define and delimit private enforcement actions.215 Though the Court has been known to invoke the avoidance canon even in cases where the constitutional “problem” to be avoided is dubious at best,216 the delegation here seems no more problematic from an Article I perspective than many of the numerous types of policy choices that Congress routinely leaves to administrative agencies.217
sumption that ambiguous language constitutes a delegation of au-
would therefore be upheld, though the reasoning would not. If a
in the case of habitual sleepers death. The Court is concluding that
delegation from an ambiguous statute is considerably more problematic. When a cause of action is implied rather than express, recovery of attorneys’ fees is virtually impossible because, as the Court explained in Key Tronic Corp. v. United States, “conclud[ing] that a provision that only impliedly authorizes suit nonetheless provides for attorneys’ fees with the clarity required by Atchison.
3. Interaction with Section 1983 Jurisprudence

A final issue to consider with respect to the proposals advanced
yet to address the issue. While addressing this knotty problem is beyond this Article's scope, this strand of Section 1983 jurispru-
a private remedy. While one might conceivably encounter a statute that unambiguously creates a private right but is ambiguous as to whether it also authorizes a private remedy (in which case one
cases: The question whether particular statutory language is "rights-creating" (or "remedy-creating") may involve just as much interpretive uncertainty as other questions that provoke *Chevron* deference. Similarly, a statute might make certain conduct illegal but provide for no explicit remedy, thereby suggesting, though not conclusively, that private enforcement might be appro-
to whether it creates private remedies is not that difficult—at least, it is no more difficult than determining when ambiguity exists under any other statute.
however, the courts will need to apply some kind of default rule to determine whether and to what extent private enforcement suits are viable.\textsuperscript{263} The need for the courts to establish default principles arises primarily in two contexts.

First, if the agency simply fails to act—that is, if the agency does not complete a private enforcement rulemaking—should the default rule be that the ambiguous statutory language creates a private right of action, or that no private action exists until the agency expressly creates it? Or should the courts, in the absence of final agency action, take their best guess as to what the statute means, using some version of the \textit{Cort} approach? In my view, the most sensible approach would usually be to presume no private en-
There are two ways of approaching this problem. The first would be for courts to use the same standards for determining the clarity of operative regulations that they use to determine the
The viability of my general proposal, though, does not depend on the choice of background default rules. One could easily and sensibly endorse my larger argument—that *Chevron* ought to apply
duties faithfully, while in other cases Congress may want to preclude private enforcement altogether, especially when administra-
ble administrative agencies than for them to be made, and made
difficult to undo. solely by Congress and the courts.