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The Private Attorney General in a Time of Hyper-Polarized Politics

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With the enactment of the Federal Trade Commission Act ("FTC Act") in 1914 and the Wheeler–Lea Act in 1938, Congress sought to establish a brawny federal consumer protection regime to guard against the myriad unfair and deceptive practices that threatened harm to American consumers. But courts in this era interpreted these statutes to confer exclusive enforcement authority in the Federal Trade Commission ("FTC"), declining to infer a private right of action. For many decades, the resulting enforcement gap in consumer protection law was filled largely by state Unfair and Deceptive Practices Acts ("UDAPs"), which sanction litigation by both public and private enforcers. But while consumer-initiated litigation under UDAPs has traditionally played an important role in achieving consumer justice, recently, private UDAP enforcement is imperiled by powerful corporate opponents who have successfully lobbied for changes that make it more difficult for consumers to sue for relief. Furthermore, these "reform" efforts have led to greater variation between and among UDAPs, rendering multi-state consumer class actions under Rule 23(b)(3) far more difficult to certify.

Meanwhile, at the federal level, head-spinning fluctuations of political power and hardening partisanship reveal the weakness of an inconsistent FTC enforcement agenda. In light of growing constraints on state UDAPs and the increasingly erratic, politicized nature of federal enforcement, this Article revisits a simple idea: amending the Federal Trade Commission Act to add an unwaivable private right of action, allowing injured consumers to supplement the FTC's enforcement activities by bringing legal actions to remedy widespread harm. This application of the private attorney general is grounded in the reality that while politics may ebb and flow, citizens suffering injuries in the marketplace are a constant. Deploying these citizens to consistently enforce consumer protection laws—no matter the party in power or the Commissioner in charge—generates a more stable administration of laws and

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better ensures that corporate actors refrain from engaging in widespread misconduct.

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INTRODUCTION

Modern consumer protection policy is an amalgam of state and federal legislation and rules, enforced by a multiplicity of agencies and officials, operating alone and in tandem, applying different strategies to achieve a variety of goals. In other words, consumer protection is vast and varying—in keeping with the breadth of activity and the sheer number of people, products, and transactions it seeks to regulate. Within this broad umbrella of consumer protection policy reside state Unfair and Deceptive Practices Acts ("UDAPs").[1] State UDAPs prohibit unfair business practices in areas that greatly impact the everyday lives of many consumers, such as mortgage lending and servicing, debt collection, rent-to-own transactions, automobile financing, student lending, insurance, health care services, apartment rentals, data breaches, wrongful foreclosures, and just about all retail transactions for goods and services. And importantly, nearly all state UDAPs authorize consumers themselves to aid in the enforcement of these prohibitions by bringing lawsuits seeking damages or injunctive relief. The breadth of UDAP

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1. Some states prohibit "unfair, *abusive*, or deceptive trade practices," abbreviated as "UDAAP" laws. *See, e.g.*, MD. CODE ANN., COM. LAW § 13-303 (emphasis added). This Article will treat UDAPs and UDAAPs interchangeably. *See also* Matthew W. Sawchak & Troy D. Shelton, *Exposing the Fault Lines Under State UDAP Statutes*, 81 ANTITRUST L.J. 903, 904–05 (2017) (observing that "UDAP statutes follow a few different models," and offering general descriptions of each).

coverage and the liberality of enforcement has made these laws popular among both consumers and the lawyers that represent them.[2]

But popularity has a price. With the recent uptick in the volume of UDAP claims, critics have grown more vocal, warning that these "laws have somehow morphed from being consumer protection statutes into 'consumer litigation statutes' exploited by unethical attorneys."[3] Opponents assert that private UDAP enforcement leads to "unpredictable" results that are "unfair to businesses trying in good faith to obey the law," and rather than protecting consumers, these cases actually "increase the prices of consumer products."[4] As state legislatures have lurched to the right in recent years, corporations and trade groups challenging UDAPs have found receptive legislative partners willing to spearhead amendments to limit or eliminate private enforcement.[5] In other instances, opponents of UDAPs have filed lawsuits challenging the legitimacy of these statutes. Here, too, corporate interests have enjoyed some success, as a number of state courts "have narrowed the scope of UDAP laws or granted sweeping exemptions to entire industries."[6]

As legislative and common-law developments make it harder for injured consumers to sue in some state courts, growing disparities between state UDAPs hamper certification of multi-state consumer class actions brought in federal court. To wit: in determining whether to certify a nationwide consumer class action, federal courts must engage in rigorous choice-of-law analyses that require a close examination of state UDAPs governing class members' claims.[7] The greater the

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2. Notably, nearly all UDAP statutes authorize both the state (through its attorney general or other state agency) and private litigants to bring enforcement actions. Iowa is the only state whose statute does not authorize private enforcement. CAROLYN L. CARTER, CONSUMER PROTECTION IN THE STATES: A FIFTY-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 11 (Nat'l Consumer L. Ctr. 2009) [https://perma.cc/LTD7-T58E].

3. Dee Pridgen, *Wrecking Ball Disguised as Law Reform*, 39 N.Y.U. REV. L. & SOC. CH. 279, 295 (2015). *But see* Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 39 (2017) (observing that the uptick in UDAP litigation is due, not to an increase in private enforcement, but instead to state attorneys general "banding together [and] using their UDAP laws to police the marketplace and fill the gaps left by waning federal enforcement").

4. Pridgen, *supra* note 3, at 291.

5. *See, e.g.*, Michael Wines, *As Washington Stews, State Legislatures Increasingly Shape American Politics*, N.Y. TIMES (Aug. 29, 2021), https://www.nytimes.com/2021/08/29/us/state-legislatures-voting-gridlock.html [https://perma.cc/AL9C-AYRA]; *see also* Cox et al., *supra* note 3, at 40 (observing that "it comes as no surprise that critics have directed their sights on UDAP laws and the enforcers who wield them") (citing U.S. CHAMBER INST. FOR LEGAL REFORM, UNPRINCIPLED PROSECUTION: ABUSE OF POWER AND PROFITEERING IN THE NEW "LITIGATION SWARM" (2014)).

6. Carter, *supra* note 2, at 3.

7. *See* Phillips Petroleum v. Shutts, 472 U.S. 797, 818 (1985) (holding that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair").

variation between and among these state laws, the more difficult it becomes to meet the commonality and manageability requirements of Rule 23.[8]

Taken together, the campaign to "reform" state UDAPs, coupled with the obstacles facing multi-state class certification, suggest that private enforcement of state consumer protection laws is growing more precarious by the day. In response to declining private enforcement, public enforcers have stepped up their activities.[9] For example, in recent years, attorneys general ("AGs") of many states have "band[ed] together [to use] their UDAP laws to police the marketplace," forming multistate enforcement groups to adjudicate and settle consumer claims against Equifax, Johnson & Johnson, Uber, Wells Fargo, and other massive entities.[10] But here too, powerful corporate opposition threatens to neutralize AG authority over consumer protection in significant ways, while limited public resources and political realities require AGs to prioritize high-profile cases.[11]

In prior work, I have explored and endorsed efforts to ally public and private enforcers by hiring private attorneys to serve as temporary AGs[12] or adding qui tam provisions to UDAPs.[13] This Article examines a different approach: amending the Federal Trade Commission Act ("FTC Act") § 5 to create an express and unwaivable private right of action, allowing injured consumers to sue directly for enforcement of the statute's provisions, either individually or via class action litigation. This is not a new idea: as I show in Part I, legislators in 1914 debated

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8. *See, e.g.*, In re Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996) ("[i]f more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law"); In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002) (decertifying nationwide class alleging tire defects where applicable choice-of- law rules required that the law of each class member's place of injury should govern, stating that where "claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable"); Mazza v. Am. Honda Motor Co., 666 F.3d 581, 590 (9th Cir. 2012) (reversing class certification where there were material differences between California consumer protection law and the laws of other relevant states with respect to scienter, reliance, and remedies).

9. Most states' UDAP laws authorize enforcement by the state AG. Carter, *supra* note 2, at 6 (reporting that the "typical UDAP statute" allows the state AG to enjoin unfair or deceptive practices, or to seek "civil penalties of a certain dollar amount for violations"). Rhode Island is the only state that does not authorize the state agency to seek civil penalties when a business violates the UDAP statute. *Id.* at 28.

10. Cox et al., *supra* note 3, at 39; *see also Interjurisdictional Collaboration*, NAT'L ASSN. OF ATT'YS GEN., https://www.naag.org/issues/consumer-protection/interjurisdictional-collaboration/ [https://perma.cc/53DH-8884] (last accessed Feb. 11, 2023).

11. Cox et al., *supra* note 3, at 40 (observing that "it comes as no surprise that critics have directed their sights on UDAP laws and the enforcers who wield them"). The authors report that the Chamber of Commerce has lobbied to limit AG authority, charging that "state attorneys general employ these laws to achieve political goals," "devise novel theories of liability," and "usurp the legislative role with closed-door settlements." *Id.* (internal citations omitted).

12. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* ATT v. Concepcion, 79 U. CHI. L. REV. 623 (2012).

13. *See, e.g.*, Myriam Gilles & Gary Friedman, *The New Qui Tam: Enforcing Group Rights in a Hostile Era*, 98 TEX. L. REV. 489 (2020).

adding a private right of action to the FTC Act, and many in the enacting Congress may have understood the statute to do just that.

Nor is amending the statute to add such a right an especially radical concept. After all, the FTC Act has been amended over a dozen times as legislators work to ensure the law remains attentive to changes in the marketplace.[14] Moreover, providing a private cause of action is a preferred congressional device for maximizing the enforcement of statutory duties.[15] Various federal consumer protection statutes, including the Truth in Lending Act, Fair Credit Reporting Act, Consumer Credit Protection Act, and others, rely upon dual enforcement by injured consumers and public agencies.[16] That the FTC Act lacks an express private right of action is anomalous and, as shown in Part I, may have seemed superfluous to members of the 1914 Congress—many of whom seemed certain such a right was implied by the law's enactment.

Even if amending the FTC Act isn't an especially radical concept, some observers will surely object on the grounds that the FTC is doing a fine job of enforcing the statute all on its own. The agency and its current Chair, the modern-day trust-buster Lina Khan, are extremely active—launching investigations, issuing fines and warnings, and bringing enforcement actions at a steady clip.[17] But despite

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14. For example, in 1973, Congress added § 13(b) to give the FTC authority to seek preliminary injunctions to halt unfair conduct. Federal Trade Commission Act, § 13(b), tit. IV, § 408(f), Pub. L. No. 93-153, 87 Stat. 576, 592 (1973); *see also* Fair Credit Reporting Act of 1970, 15 U.S.C. §§ 1681–1681x; Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, 15 U.S.C. §§ 2301–2312; Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C. §§ 6101–6108.

15. *See, e.g.*, J.M. Glover, *The Structural Goal of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1148 (2012) (observing that "in the last five decades, Congress has put into place a number of private ex post enforcement mechanisms—often in the form of statutes creating private rights of action—to help effectuate its substantive aims").

16. *See, e.g.*, Truth in Lending Act (TILA) § 130, 15 U.S.C. § 1640(a)(2)(B) (regulates the disclosure of credit terms and discrimination in determining credit limits); Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681–1681a (regulates the way credit reporting agencies can collect, access, use and share consumer data); Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952 (codified in scattered sections of 15 and 20 U.S.C.) (providing consumers one free credit report a year from the credit reporting agencies); Consumer Credit Protection Act, 15 U.S.C. § 1601 (requires lenders to clearly explain the actual cost of borrowing money to consumers); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (prohibits credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age); Consumer Leasing Act of 1976, 15 U.S.C. §§ 1667–1667e (assures accurate disclosure of lease terms consumer leases of personal property).

17. *See, e.g.*, Chris Mills Rodrigo, *FTC, DOJ Launch Joint Inquiry Aimed at Blocking Illegal Mergers*, THE HILL (Jan. 18, 2022), https://thehill.com/homenews/administration/590176-ftc-doj-launch-joint-inquiry-aimed-at-blocking-illegal-mergers/ [https://perma.cc/33MA-DX2Q]; Anne D'Innocenzio, *Retailer Fashion Nova to Pay $4.2 Million in Settlement with FTC*, L.A. TIMES (Jan. 25, 2022), [https://perma.cc/7JUW-EB7B].

these efforts, the FTC is structurally constrained in numerous ways.[18] Critics of the agency have long complained that its remedial authority is "inadequate" to the herculean task "of dealing with unfair and deceptive conduct targeted at consumers"[19]—a critique that takes on greater resonance in the wake of the Supreme Court's unanimous decision in *AMG Capital Mgmt. v. FTC*, which found that the agency lacks authority to seek equitable monetary relief in federal court under § 13(b) of the FTC Act.[20] But even more troubling are the political lessons learned in the last administration—namely, that the federal Executive can easily weaken agencies by appointing directors intent on destroying the regulatory mission from within.[21] The FTC's commitment to consumer protection is especially vulnerable to wild political swings that are difficult to predict and impossible to prevent.

Rather than simply heap criticism upon the FTC (or upon right-leaning state legislatures, complicit state courts, and other institutions that fail to prioritize consumer protection), my claim is more ecumenical: today, our country is riven by distrust and disgust, manifested as disequilibrium in the operation of government and the policy agendas of its agencies. Scholars of administrative law warn that, in this period of extreme partisan shifts, one administration's enforcement priorities are easily dismantled by the next.[22] But lost amidst these wild political fluctuations, it seems, is the recognition that every day, citizens suffer injuries in the marketplace and have their statutory rights violated.[23] Consumer harm is a constant, even as the political will to combat these harms ebbs and flows. In moments such as these, I argue, the private enforcer and the plaintiffs' bar offer much-needed stability and consistency in the face of extreme political fluctuations. Deploying these citizens to continually enforce consumer protection laws—no matter the party in power or the Commissioner in charge—generates a more stable administration of laws, ensuring

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18. *See, e.g.*, Carter, *supra* note 2, at 18 ("[T]here are so many businesses, transactions, and practices, and the day-to-day economic activity of the country is so immense, that public enforcement [alone] cannot do the job.").

19. Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. L. REV. 1139, 1141 n.12 (1992) (citing EDWARD F. COX ET AL., THE NADER REPORT ON THE FEDERAL TRADE COMMISSION 66–73 (1969) (describing the agency's "cease and desist" remedy as inadequate and criticizing FTC enforcement as inconsistent and haphazard)); REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 62–64 (1969) (addressing inadequacy of then-existing sanctions for FTC Act violations).

20. AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S.Ct. 1341, 1344 (2021).

21. *See, e.g.*, Leah Nylen et al., *Trump Pressures Head of Consumer Agency to Bend on Social Media Crackdown*, POLITICO (Aug. 21, 2020), https://www.politico.com/news/2020/08/21/trump-ftc-chair-social-media-400104 [https://perma.cc/QG6Z-R2AH].

22. Amy Widman, *Inclusive Agency Design*, 74 ADMIN. L. REV. 23, 64 (2022) (observing that agency design "need[s] permanence to have the intended effect of creating an inclusive and responsive administrative apparatus for federal policy").

23. Ashraf Ahmed & Karen M. Tani, *Presidential Primacy Amidst Democratic Decline*, 135 HARV. L. REV. F. 39, 55 (2020) ("[I]t is not ideal for democracy when Congress declares rights only to have those rights ebb and flow with changes in political administrations.").

that corporate actors remain consistently deterred from engaging in widespread misconduct for fear of incurring liability.[24]

Part I offers a brief review of the origins of the FTC Act, focusing on the legislative battle over a private right of action—the rejection of which would later prompt states to enact UDAPs authorizing private enforcement. The statute's legislative history reveals that the FTC Act was created specifically to protect individual consumers from injury, and subsequent amendments have reinforced this aim. The most straightforward means of doing so is to allow consumers themselves to enforce the statutory prohibition against unfair practices. Part II describes the rise of state UDAPs in the 1960s and 70s, as well as the more recent political campaign against these statutes. In this Part, I examine how statutory vicissitudes inhibit both individual consumer claims and multi-state class actions. Part III examines the critical legislative choices at issue in creating a workable private enforcement regime—including knotty questions of Article III standing, the availability of class action procedures, and the problem of pre-dispute, mandatory arbitration. This final part concludes by advancing a novel justification for private enforcement as an antidote to hyper-polarized politics and wildly fluctuating enforcement efforts.

I. The Origins of Federal Consumer Protection Law

Tracing the origins of federal consumer protection requires an understanding that, by the late nineteenth century, competition policy and consumer welfare were inextricably linked in the minds of policymakers and the public. This is true for three reasons. First and most apparent, because anticompetitive conduct tended to raise prices on consumer goods, regulating unlawful business practices was seen as a means of protecting both consumers and competitors.[25] Second, the concept of "consumer protection," independent of other regulatory goals, was slow to emerge.[26] For most of the nineteenth century, "Americans considered themselves to be producers rather than consumers," so it wasn't until the 1920s and 30s that citizens began to present "as people who bought, wore, ate, and used items that they had not themselves produced . . . [and] to see things from a consumer's point of view."[27] To policymakers of that era, the regulation of anticompetitive conduct

24. *See* Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1148, 1164–65 (2010) (observing that, given the financial and political pressures on the FTC, it is "crucial to consumer protection that statutes . . . include provisions that facilitate individual lawsuits").

25. ROBERT MAYER, THE CONSUMER MOVEMENT: GUARDIANS OF THE MARKETPLACE 14 (1989) ("Consumers shared an interest with businesses and workers in having government policies that regulated the degree and nature of competition in various industries.").

26. *Id.* at 15 (asserting that while "the consumer stake in regulating competition was large, few of the people involved conceived of themselves as explicitly representing consumer interests").

27. Timothy J. McMannon, *Warren G. Magnuson and Consumer Protection* 16–17 (1994); *see also* Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 467 (1944) (Traynor, J., concurring) ("As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a

sufficed as a proxy for protecting the welfare of consumers.[28] Third, before 1900, citizens "generally relied on states to regulate business, protect public health, and ensure social order."[29] But at the dawn of the twentieth century, many industries had grown too large and complex for state regulation, requiring "the federal government [to] step[] into the void as the guardian of the people."[30]

As such, the history of federal consumer protection opens with efforts to regulate monopolistic conduct and unfair competition at the national level.[31]

A. The Pre-Regulatory Period

The United States in the late 1880s and early 1890s was deep in the throes of an economic depression unlike any that had come before.[32] High rates of unemployment and business failures were endemic as the economy sputtered. This extended financial slump coincided with "an extraordinary number of corporate consolidations," as nearly every major industry became dominated by one or two actors.[33] For example, having founded the Standard Oil Company in 1863, John D. Rockefeller spent the next two decades methodically acquiring his competitors. By 1890, Rockefeller controlled nearly 90% of the country's oil refining capacity and had reorganized Standard Oil as a trust to operate and manage this monopoly

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product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising….").

28. This idea would resurface in the 1970s in the work of Robert Bork and other economists. *See, e.g.*, ROBERT BORK, THE ANTITRUST PARADOX (1978).

29. MAYER, *supra* note 25, at 38. In addition, consumer transactions were governed by restrictive doctrines such as caveat emptor, and common law claims for fraud, misrepresentation, and breach of warranty imposed notoriously high burdens of proof. *See* Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Role Model*, 52 OHIO ST. L.J. 437, 439 (1991) (observing that common law fraud and breach of contract "claims are often difficult and expensive to prove").

30. MAYER, *supra* note 25, at 38.

31. All origin stories are contested, and this one is no different. For instance, some scholars have located the origin of federal consumer protection in early regulation of food and drugs, rather than antitrust regulation. *See, e.g.*, MAYER, *supra* note 25, at 16–17 (observing that "federal action pertaining to food safety can be traced back to 1862 when Charles Wetherill set up a laboratory in the newly created Department of Agriculture," and that the "antiadulteration movement" is the rightful precursor of the consumer rights movement).

32. Danny Allen Bring, The Origins of the Federal Trade Commission Act: A Public Choice Approach 27 (May 13, 1993) (Ph.D. dissertation, George Mason University) (ProQuest). While the country had experienced recessions in the 1870s and early 1880s, the long recession that began in the 1890s was more severe, and eventually led to "business failures and increasing violence associated with labor strikes and lockouts." *Id.* at 77.

33. *Id.* at 43; *see also id.* at 27 (reporting that "[r]oughly 3,000 independent firms were involved in mergers during this period"); S.N.D. North, *The Industrial Commission*, 168 N. AM. REV. 708, 717 (1899) (contemporaneously describing an epidemic of industrial reorganization and consolidation now sweeping over the country"); NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS: 1895–1904, at 2 (1985).

power.[34] Similar consolidations produced massive entities that controlled entire industries—including household names like U.S. Steel, the American Tobacco Co., and DuPont.[35] All told, the Great Merger Wave of the late nineteenth century created consolidations with "a total capitalization estimated at over $7 billion"—or, $235 billion in 2022 dollars.[36]

Initially, Americans applauded the rise of large corporations for their reparative potential to buoy the war-torn and unstable economy, but soon, "this golden age started to lose its luster . . . as [evidence mounted that] monopolists . . . used [their immense market] power to raise prices far above the marginal costs of production."[37] Trusts—the legal apparatus for maintaining monopolies—were blamed for first driving "competitors out of business by lowering prices [and then] victim[izing] consumers by raising prices."[38] And there was ample cause for concern: between 1897 and 1913, the consumer price index rose nearly 40%, a sure sign of unchecked inflation.[39] Worse yet, unemployment in this period rose to nearly 12%, as consolidated industries shed redundant workers and streamlined operations.[40] With wages depressed and prices high, fears of corporate feudalism were rampant. Animosity toward corporations "reached a feverish state" during this period,[41] fueled by newspaper articles detailing the "conspicuous consumption" of industry magnates and the exposés of "muckrakers"—all of which "served to fan public hostility."[42]

The country's protracted economic woes—and the public's suspicion that unfair corporate practices were largely to blame—forced policymakers of the era to

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34. Bring, *supra* note 32, at 43.

35. *Id.* at 46; *see also* Gerald Leinwand, A History of the United States Federal Bureau of Corporations (1903–1914) 10–11 (Dec. 21, 1961) (Ph.D. dissertation, New York University) (ProQuest) ("Standard Oil of New Jersey . . . merged about 400 companies into an oil empire that by 1904 controlled an estimated 85% of domestic sales and 90% of exports of refined petroleum products.") (internal citation omitted).

36. Leinwand, *supra* note 35, at 10 (internal citation omitted).

37. SFF-TIR, LLC v. Stephenson, 264 F. Supp. 3d 1148, 1238–39 (N.D. Okla. 2017); *see also* Bring, *supra* note 32, at 79 ("The huge new companies were considered ruthless, sinister and unnatural.").

38. Bring, *supra* note 32, at 46. A "trust" was an instrument that allowed shareholders of different companies to assign their shares to a single set of trustees. In exchange, they received a percentage of the total profits earned by the trust-managed conglomerate. Samuel Dodd, general counsel of the Standard Oil Company, is credited with pioneering the trust as a mechanism for enabling a "lawful" monopoly.

39. Stephen B. Reed, *One Hundred Years of Price Change: The Consumer Price Index and the American Inflation Experience*, BUREAU OF LAB. STATS.: MONTHLY LAB. REV. (Apr. 2014), https://www.bls.gov/opub/mlr/2014/article/one-hundred-years-of-price-change-the-consumer-price-index-and-the-american-inflation-experience.htm [https://perma.cc/S4UM-5LHA].

40. *Id.*

41. Bring, *supra* note 32, at 27–28.

42. *Id.* at 28 (internal citations omitted); *see also id.* at 54 ("The hostility toward big business stemmed from the belief that "'honest men' were driven out of business [and . . .] family-run small businesses went bankrupt trying to compete with the low prices offered by big businesses."); IDA TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY (1904); UPTON SINCLAIR, THE JUNGLE (1906).

question "the faith they had placed in unrestricted markets."[43] Even economists, traditionally "very much in alliance with the men of big business," grew skeptical of laissez-faire policies typified by the work of Adam Smith and John Stuart Mill.[44]

In response to the mounting public sentiment, several states enacted prohibitions against monopolies—but because these laws were limited to intrastate conduct, they were largely ineffective.[45] By the late 1880s, it grew clear that federal antitrust legislation was necessary.[46] In 1888, Ohio Senator John Sherman first introduced a bill prohibiting activity "in restraint of trade."[47] It took two years and extensive debate, but the Sherman Antitrust Act passed with near unanimity in both chambers of Congress in 1890[48]—giving vent to popular demand for antitrust legislation as a means of regulating consumer prices.[49] While the Act initially proved limited in effect, its passage revealed a burgeoning regulatory impulse—a federal legislature willing to intervene in the marketplace to protect American consumers from abuse at the hands of large conglomerates.[50] It was in this fertile,

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43. Bring, *supra* note 32, at 76; *see also id.* at 32 (explaining that as more citizens grew "convinced that open-market capitalism had led to an ever-increasing concentration of capital and wealth," cries arose for government intervention to curtail the power of big business); *id.* at 53 ("With increasing regularity government was called upon to protect the incomes of small enterprise from the 'rising tide of monopoly power.'").

44. *Id.* at 94–95. *See also* Leinwand, *supra* note 35, at 20–21 (noting that the 1885 formation of the American Economics Association signaled "a shift in the direction of economic thinking" away from laissez-faire and toward government intervention in the economy).

45. *See generally* James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918*, 135 U. PA. L. REV. 495 (1987); *see also* Peter Crawford, Business Proposals for Government Regulation of Monopoly, 1887–1914, at 85–86 (1963) (Ph.D. dissertation, Columbia University) (ProQuest) (describing laws prohibiting consolidation in Texas and Missouri), 136–37 (reporting that 20 states had passed antitrust laws between 1891–1897, but "by 1900, in only nine of these twenty states had the antitrust acts actually been used"); *infra* text accompanying notes 67–70 (discussing the success of private litigation brought under state antitrust laws).

46. Crawford, supra note 45, at 140–41 (reporting that over 100 bills "dealing with the trust problem" were introduced in Congress between 1890–1903, yet "all but one died in committee").

47. *See generally* Gibbons v. Ogden, 22 U.S. 1 (1824).

48. The Sherman Act passed the Senate on April 8, 1890, by a vote of 51-1, and in the House on June 20, 1890, by a unanimous vote. President Benjamin Harrison signed the bill into law on July 2, 1890.

49. 15 U.S.C. §§ 1, 2 (forbidding in § 1 "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations" and making it illegal in § 2 "to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations"); Crawford, *supra* note 45, at 87.

50. *See, e.g.*, U.S. v. E.C. Knight Co., 156 U.S. 1 (1895) (rejecting the application of the Sherman Act to intrastate conduct); *see also infra* text accompanying notes 92–97 (discussing how the limitations of the Sherman Act led to passage of the Clayton Act).

progressive, and increasingly interventionist soil that the seeds of the FTC Act were sown.[51]

B. The Legislative Lineage of the FTC Act

Initial efforts by turn-of-the-century legislators to regulate trade were tentative and halting. For instance, members of Congress gravitated toward the multi-member "independent commission" regulatory model that had become popular in England.[52] The idea was that such a commission would be staffed by experts in various fields "and be shielded from political pressures . . . by its multi-member, bipartisan composition."[53] Commissions, in other words, avoided the appearance of political interference in competitive markets. In 1887, Congress passed the Interstate Commerce Act which established a five-member Interstate Commerce Commission ("ICC"), the "nation's first independent regulatory agency," charged with controlling railroad rates.[54] The ICC was also tasked with protecting consumers from abusive pricing by "order[ing] the payment of refunds to customers who had been overcharged."[55] In order to maintain the ICC's role as an effective industry watchdog, Congress gradually expanded its regulatory and remedial authority.[56] Within a decade, the ICC had successfully implemented a number of important railroad regulations—stirring yet greater interest in federal regulation via the commission model.[57]

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51. Bring, *supra* note 32, at 60 (explaining that, by 1898, "[a] new, more 'progressive' ideology was emerging which would provide politicians with new opportunities to extend government control over the activities of interstate corporations").

52. *See, e.g.*, North, *supra* note 33, at 709 (noting that "[t]he most famous precedents for the establishment of such a commission of inquiry are those furnished by Great Britain [whose Parliament had appointed] [a]t least three Royal Commissions on labor . . . to inquire into the questions affecting the relations between employer and employee"). Congress itself had earlier established the Statutory Revision Commission to recommend uniformity across state laws. *Id.* at 712. Reliance on commissions may have reflected both the dominance of laissez-faire economics and "the reluctance of Congress to delegate its own function" to an agency. *Id.* at 708.

53. Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145, 154 (2010).

54. Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission,* 95 MARQ. L. REV. 1151, 1160–2 (2012) (observing that it made sense for Congress to start its regulatory project with railroads – an industry that had "dominated the U.S. economy and society in the 19th century"). The Supreme Court's decision in *Wabash, St. Louis & Pacific Railroad Company v. Illinois*, 118 U.S. 557 (1886), finding that states could not regulate commerce outside their boundaries, further necessitated the exercise of federal regulatory authority over railroads. *Id*. at 1160, n.31.

55. Ward, *supra* note 19, at 1154.

56. *See, e.g.*, Elkins Act, ch. 708, 32 Stat. 847 (1903) (authorized the ICC to impose civil and criminal penalties for intentional violations of published tariffs); Hepburn Act, ch. 3591, 34 Stat. 584 (1906) (gave the ICC jurisdiction over all rail companies and fuel pipelines, and authorized it to set maximum rates); Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910) (broadened the ratemaking powers of the ICC and created a "commerce court" to review ICC decisions).

57. The ICC would continue to oversee interstate commerce well into the 1990s, serving as a model for the commission-based regulatory bodies that are common today. The ICC was "laid to rest in 1995." Lemann, *infra* note 149.

In the 1890s, as the nation plunged into yet another economic depression, calls for federal regulation of "the trust problem" grew more insistent.[58] By the mid-1890s, even President McKinley—a stalwart supporter of business—was forced to acknowledge that "state antitrust legislation had proved inadequate" to protect consumers from abuses in the marketplace. Accordingly, in 1898, the President and Congress jointly established the 19-member Industrial Commission (the "Commission") to investigate "the growth of large corporations and trusts" and "recommend appropriate legislation."[59] By century's end, the Commission had "conducted several investigations, held numerous hearings, and ultimately issued 19 volumes' worth of official reports" on trusts, consolidations, and corporate activity.[60]

After McKinley's assassination in 1901, Teddy Roosevelt assumed the presidency, promising that his administration would "step in [to] supply the needed control" over the economy "on behalf of the people as a whole."[61] Roosevelt thus transformed the Commission into the Bureau of Corporations (the "Bureau").[62] Despite the name change, the Bureau retained the multi-member commission structure, led by a "Commissioner of Corporations" and staffed by members tasked with studying the problems confronting the U.S. economy.[63] And study they did: for the 11 years it was in operation, the Bureau compiled detailed reports and studies on the nation's largest industries, including the "beef industry, petroleum transportation, the Standard Oil Company, the cotton trade, the American Tobacco

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58. The Panic of 1893 further widened the wealth gap, highlighting the oversized role of industry barons in the nation's welfare. *See* U.S. DEP'T of COMMERCE, *Origins: 1776–1913*, *in* FROM LIGHTHOUSES TO LASERBEAMS: A HISTORY OF THE U.S. DEPARTMENT OF COMMERCE 3, 6 (1988) ("[T]he enormous growth of business, industry, commerce and banking between 1850 and 1900 had resulted in an increase of the national wealth from under $5 billion to $88 billion, 20 percent of which was in the hands of fewer than 4,000 men.").

59. *See* Act of June 18, 1898, 30 Stat. 476 (1898); *see also* Crawford, *supra* note 45, at 191; North, *supra* note 33, at 709–10 (reporting that the Commission had been given "an opportunity . . . to officially investigate and report upon the changed relations of capital and labor in the United States").

60. Camden Hutchison, *Progressive Era Conceptions of the Corporation*, 2017 COLUM. BUS. L. REV. 1017, 1041 (2017).

61. Sidney W. Graber, Economic Education of Roosevelt 74 (1949) (M.A. thesis, Wayne University) (ProQuest) (internal citations omitted). In addition to regulating monopolies, Roosevelt also supported important consumer protection bills. *See* Food and Drugs Act, 34 Stat. 768 (1906); Meat-Packing Act, 34 Stat. 669 (1906).

62. Act of Feb. 14, 1903, ch. 552, § 6, 32 Stat. 825 (charging the revamped agency with investigating the "organization, conduct, and management of the business of any corporation, joint stock company or corporate combination"). The Bureau was placed within the newly formed Department of Commerce and Labor, alongside a Bureau of Immigration, Bureau of Navigation, Light House Board, Steamboat Inspection Service, Bureau of Statistics, among other units. U.S. DEP'T OF COMMERCE, *supra* note 58, at 7–9. *See also* F.M. Sherer, *Sunlight and Sunset at the FTC*, 42 ADMIN. L. REV. 461, 462 (1990); Leinwand, *supra* note 35, at vii (observing that "the Bureau of Corporations was peculiarly Roosevelt's instrument for putting into effect his remedy for alleged corporate evils—namely, 'publicity to reveal corporate abuses, prosecution of the worst offenders, and general legislation to insure Federal supervision of the great industrial combinations'") (citation omitted).

63. Leinwand, *supra* note 35, at x.

Company, corporate income taxation, water transportation, the steel industry, the timber and lumber industries, waterpower development, and the International Harvester Company."[64] While the Bureau itself made few concrete legislative proposals, its work laid the groundwork for later prosecutions under the Sherman Act.[65]

C. The Emergence of Private Enforcement

In addition to these early Commission-based efforts at public regulation of private industry, the period between 1890 and 1914 also witnessed the emergence of private antitrust litigation as a tool for reform.[66] State courts had long ensured market competition by enforcing common law prohibitions against "restraints of trade," but by the early twentieth century, many states had also enacted statutes authorizing private civil suits for injuries resulting from antitrust violations.[67] The result was "a fairly steady incidence" of private litigation challenging "local collusive activity."[68] Indeed, private litigants in this period brought many more cases challenging unfair competition than their public counterparts. [69] Further, "[m]ost of these cases were won by the plaintiffs and consequently represented successful common and state law constraints on monopoly power."[70]

One of the reasons private litigants were more aggressive and more successful than their public counterparts may have been that they were largely

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64. Sherer, *supra* note 62, at 463 (citing Annual Report of the Commissioner of Corporations, at 37–43).

65. *Id.* (noting that several of the Bureau's reports "laid the groundwork for precedent-setting antitrust cases, and others instigated changes in regulatory mechanisms"); *see also* Leinwand, *supra* note 35, at ix (observing that the Bureau's investigations into the Standard Oil Company and the American Tobacco Company were "credited with supplying the Department of Justice with the main factual basis for the later dissolution suits against these companies").

66. To be clear, ex ante regulation of prices and unfair competition was still the primary form of regulatory activity in this period, but there were hints by the turn of the century that ex post compensation for damages resulting from illegal antitrust activity was slowly gaining traction. *See generally* Hutchison, *supra* note 60.

67. Laura Phillips Sawyer, *U.S. Antitrust Law & Policy in Historical Perspective*, 2, 5 (Harv. Bus. Sch., Working Paper No. 19–110, 2019) ("The antecedents of antitrust regulation lie in the common law doctrine of 'restraint of trade,' which was itself an aspect of the common law of contracts. This doctrine focused primarily on coercion—actions or agreements that affected the freedom of certain parties to act—and as such, was generally concerned with covenants, such as indefinite non-compete clauses, and price-fixing agreements.").

68. *Id.* at 5 ("Around the turn of the century, there was a significant rise in private litigation aimed at leveraging the common law on restraint of trade to challenge anticompetitive behavior."); *see also* Crawford, *supra* note 45, at 129.

69. By 1912, 31 states had enacted antitrust laws—but in 14 of those states, the laws had never been used by the public enforcer. *Anti-Trust Prosecutions: Cases Brought by Attorneys General*, N.Y. TIMES, Jan 7, 1912. ("[I]n fourteen states, important court proceedings are reported [while] in fourteen other states, the Attorneys General report that no antitrust litigation is in process.").

70. *Id. See also* Crawford, *supra* note 45, at 136 (observing that the business community in this period became increasingly "concerned about the possibility of judicially-imposed dissolution" as a remedy in a successful private antitrust suit).

impervious to political pressure. State AGs, for instance, were exceedingly vulnerable to political and economic threats made by corporate actors.[71] For example, Ohio AG Frank S. Monnett filed multiple lawsuits against Rockefeller's Standard Oil Co. in the late 1890s, alleging that the company had violated numerous provisions of the state antitrust law.[72] In an effort to dissuade Monnett from pursuing the case, Standard Oil threatened to pull up stakes in Ohio—a move that would cost the state millions in lost wages and taxes.[73] Monnett refused to budge, so the company made good on its threat, announcing in May 1899 that it was moving "its entire manufactory plants and oil refineries from Toledo, Ohio to Indiana, on account of the legal complications risen between the Attorney General of the state of Ohio and the oil company."[74] This move met with a "chorus of derision" in the press and "Monnett's public image sank."[75] In 1899, he failed to win renomination—and his example may well have convinced other public officials to back down from litigating antitrust and unfair competition cases against powerful economic actors.[76]

It wasn't just state AGs that ran into trouble—enforcement efforts under the federal Sherman Act also encountered difficulties.[77] Only three antitrust cases were initiated during President McKinley's tenure, "fewer than in any earlier period of corresponding length."[78] Even Teddy Roosevelt, the famous trust-buster who campaigned on the promise of enforcing "the Sherman Act far more vigorously than

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71. *Id.* at 185 (observing that some companies threatened to cease operations in unfriendly states). *See also* BRUCE BRINGHURST, ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES, 1890–1911, at 29 (1979) (reporting that Ohio AG David Watson "faced tremendous pressure from the business-dominated political hierarchy of the state," and was "offered bribes on six different occasions if he would drop the suit"); *id.* at 30 (reporting that a Rockefeller ally wrote to Watson that his lawsuit against the company was "politically . . . a very sad mistake, and I am sure will not result in much personal glory for you").

72. *See, e.g.*, *The Standard Oil Company: Suit Brought By Ohio's Attorney General*, N.Y. TIMES, May 9, 1890; *Ohio's Laws Against Trusts: Another Suit Entered in the Attorney General's Fight Against the Standard Oil Co.*, N.Y. TIMES, Nov. 10, 1898.

73. *See* Crawford, *supra* note 45, at 185 (reporting that Standard Oil ceased operation in Ohio because of that state's suits against the company). Notably, this threat seemed not to deter AG Monnett, but may have influenced other public officials to back down.

74. *Moving Standard Oil Plant: Leaving Ohio for Indiana Owing to Row with Ohio Attorney General*, N.Y. TIMES, May 30, 1899.

75. BRINGHURST, *supra* note 71, at 55.

76. *Id.* at 58 (Monnett publicly claimed that Rockefeller associates had "engineered his defeat"). *See also* Crawford, *supra* note 45, at 179–180 (describing losses suffered by AGs challenging trusts or consolidations in New York, New Jersey, Illinois, and Texas—and observing that "in states in which attorneys general were . . . active, the conviction record was not impressive").

77. Hutchinson, *supra* note 60, at 1033 n.51 (reporting that "industrial consolidation significantly *increased* in the decade following the Sherman Act") (internal citations omitted).

78. *Id.* at 181. *See also* Crawford, *supra* note 45, at 278 ("There also seems to have been a certain degree of general dissatisfaction with the [Sherman] Act as an effective guardian of public welfare.").

any of his predecessors," brought only six antitrust cases each year of his presidency.[79]

For these reasons, many observers warned that placing all consumer protection authority in the hands of government actors was unwise. Some worried that powerful industries would simply capture regulators in order to prevent harmful legislation or prosecution.[80] Others worried that placing so much power in the hands of elected officials might lead them to "threaten harassment of uncooperative firms."[81] And still, others pointed out that, because officials in "the Justice Department focused on large cases" with the potential to "change entire industries," the smaller injuries suffered by ordinary consumers as a result of monopolistic behavior were systematically ignored.[82]

In response, Congress considered various amendments to beef up Sherman Act enforcement. In 1901, for example, Congressman Charles Littlefield of Maine introduced an amendment authorizing, among other measures, private civil suits under the Act.[83] While the Littlefield amendment sailed through the House unanimously, it died in the Senate after "Republicans refused to vote on it."[84] Still, the debates over the Littlefield amendment brought the idea of private enforcement as a complement to public prosecutions to the fore, and as one historian notes, this bill "came far closer to achieving Congressional endorsement than any attempt to amend or supplant the Sherman Act made during the following decade."[85]

D. Legislative Battles Over Enforcement

Famously, in 1912, Roosevelt challenged Taft—his former protégé—for the Republican party nomination, and the candidates' views on the regulation of monopolies and the protection of consumers were central to the campaign.[86] After Roosevelt's nomination failed on the first ballot at the convention, a "large bloc of insurgent Republicans" left the GOP to form the Progressive Party, nominating

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79. Crawford, *supra* note 45, at 241, 281.

80. *See, e.g.*, Crawford, *supra* note 45, at 216 (reporting on a sentiment that "legislation attempting to control the trusts might only lead to control of Congress by the trusts"); *id.* at 218 ("[T]he need of political parties for funds was gradually creating a condition in which politicians were simply the pawns of large business interests.").

81. *Id.* at 248.

82. Marc Winerman, *The Origins of the FTC: Cooperation, Control and Competition*, 71 ANTITRUST L.J. 1, 68 (2003).

83. *See* H.R. 17, 57th CONG. (2d Sess. 1901).

84. Hutchison, *supra* note 60, at 1056–57. *See also* Crawford, *supra* note 45, at 189 (noting that the "Senate received the bill shortly before it was due to adjourn and quickly referred it to committee, where it was allowed to die"; and "an effort to require committee submission of the bill to the floor was voted down") (internal citations omitted).

85. Crawford, *supra* note 45, at 247.

86. By this time, there was great dissatisfaction with Sherman Act litigation. Some believed the DOJ's cases were politically motivated, while others worried that the Sherman Act was too weak because it did "not halt anticompetitive conduct until it had brought an industry to near monopoly." *See also* Thomas Dahdouh, *Section 5, the FTC and Its Critics: Just Who Are the Radicals Here?*, COMPETITION J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. B. CAL. 1, 7 (2011) (quoting Senator Francis Newlands, Chairman of the Senate Commerce Committee that more legislation was needed to "check monopoly in the embryo").

Teddy Roosevelt as their "Bull Moose" candidate. Predictably, this "Republican schism" paved the way for Democrat Woodrow Wilson to win the White House by a landslide.[87]

Wilson came to office determined to enact stronger antitrust legislation for the protection of consumers[88]—as did his close advisor, Louis Brandeis, who saw himself as an advocate for consumers and small business owners who "could not protect [themselves] from unfair practices."[89] Together, the two men promoted the Clayton Act and the FTC Act as a coherent legislative package—the former clarifying the scope of illegal antitrust activity,[90] and the latter prohibiting "unfair competition" that injures consumers, as well as designating a commission to enforce this prohibition.[91]

In many ways, the FTC Act was the more popular of the two Wilson-backed bills, as policymakers and businessmen had long supported the creation of an independent, nonpartisan commission to control monopolistic market behavior for the protection of unwary consumers.[92] But the precise enforcement authority to be conferred upon this commission was the subject of much debate.[93] Some "envisioned a slightly expanded Bureau of Corporations" charged only with

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87. *Id.* at 310–11. Wilson carried 40 out of 48 states, and 42% of the popular vote (compared to Roosevelt's 27% and Taft's 23%).

88. As governor of New Jersey, Wilson had promoted a set of forceful measures to rein in corporations—bills which became known as the "Seven Sisters." *See generally* Joseph F. Mahoney, *Backsliding Convert: Woodrow Wilson and the "Seven Sisters*,*"* 18 AM. Q. 71 (1966). This led some observers to predict that he would support similarly stringent policies at the federal level. *See, e.g.*, *Seven Sisters' Bills Signed by Wilson*, N.Y. TIMES, Feb. 20, 1913, at 20.

89. Winerman, *supra* note 82, at 32. Wilson and Brandeis met with early success in the passage of a federal banking law, the Federal Reserve Act, which promised to democratize the availability of credit, particularly for small businesses. *Id.* at 52 (internal citations omitted).

90. Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version in sections of 15 U.S.C.). The Supreme Court has explained the distinction between the antitrust laws of this period as follows: "The Sherman Act deals with contracts, agreements, and combinations which tend to the prejudice of the public by the undue restriction of competition or the undue obstruction of the due course of trade," while the "[t]he Clayton Act . . . was intended to reach in their incipiency agreements embraced within the sphere of the Sherman Act." Fed. Trade Comm'n v. Raladam Co., 283 U.S. 643, 647 (1931).

91. Federal Trade Commission Act, H.R. 15,613, 63d Cong. (1914).

92. Winerman, *supra* note 82, at 23 (internal citations omitted). For example, in hearings before the Senate Committee on Interstate Commerce, held between 1910 and 1912, dozens of prominent businessmen publicly advocated for a commission, albeit with differing views on authority and scope. *See, e.g.*, Crawford, *supra* note 45, at 367 (James Hill, who headed up the Great Northern Railway, proposed "the formation of a federal commission which would examine the financial structures of all corporations in interstate commerce," while Frank Trumball—another prominent railroad executive—supported the creation of an "information bureau" to "receive reports from corporations on their operations"). These hearings culminated in the "Cummins Report," which advocated for the creation of commission of "experts." *See* S. REP. NO. 1326, 62d Cong., 3d Sess. at 13 (1913).

93. Winerman, *supra* note 82, at 59–62 (describing congressional debates).

studying and publicizing abusive corporate activities.[94] Others wished to empower the commission "to issue orders against . . . forms of 'unfair or oppressive competition'"[95] and to "bring cases [to] vindicate rights that 'the individual, [who,] because of his poverty or of his insignificance, is often unable to assert against these great organized powers.'"[96] Still, other policymakers went further yet, recommending that the commission be granted broad authority to bring civil enforcement actions for "past transgressions" and "award damages to injured parties."[97]

For his part, President Wilson—worried that commissioners might too easily succumb to the wishes of big business—believed the FTC Act should also include a private right of action, enabling those directly injured by anticompetitive conduct to sue for damages.[98] Some in Congress agreed, and the debates in both chambers focused extensively on alleviating "the plight of the victim of unfair competition."[99] At the committee level, Senator Moses Clapp of Missouri sponsored an amendment to the commission act authorizing a "private treble damage cause of action for anyone injured by reason of 'unfair competition.'"[100] He was joined by Senator William Borah of Idaho, who argued that such a remedy was necessary to deter would-be monopolists and fraudsters.[101] Others, including Senators Newland, Norris, and Reed, also favored a private right of action but resisted the Clapp

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94. *Id.*; *see also* Crawford, *supra* note 45, at 485–86 (some recommended a "program of investigation and publicity, which would apparently have corresponded to the limited work being done by the Bureau of Corporations").

95. Winerman, *supra* note 82, at 61 (quoting Representative Victor Murdock of Kansas, who argued that a commission without any enforcement authority would merely be "hunting in the trust jungles with a camera") (internal citations omitted).

96. *Id.* at 79 (quoting Senator Francis Newlands, Democrat from Nevada and Chairman of the Senate Commerce Committee) (internal citations omitted).

97. Crawford, *supra* note 45, at 489 (citing *Chicago Association of Commerce: Hearings Before the S. Comm. on Interstate Commerce* 164, 166–67, 169 (1914).

98. Ward, *supra* note 19, at 1149.

99. *Id.*; *see also* Winerman, *supra* note 82, at 71 (observing that Senate Democrats wanted to help "the hundreds of thousands and millions of people[,]" who were regularly "compelled to pay arbitrarily fixed and unjustly high prices" for ordinary products) (internal citations omitted).

100. Ward, *supra* note 19, at 1149 (citing 51 CONG. REC. 13141 (1914) (remarks of Sen. Clapp)); 51 CONG. REC. 13065 (1914) (remarks of Sen. Clapp) (stating that punishment needs to be strong enough to be an effective deterrent for potential wrongdoers); *id.* at 13146 (remarks of Sen. Clapp) ("What I want to do is not to load this bill, but to put at least about a one-horse motor power somewhere in this legislation; and I believe the way to do it is to give the citizen who has been injured the right of action for threefold damages.").

101. Ward, *supra* note 19, at 1149 (citing 51 CONG. REC. 11598 (1914) (remarks of Sen. Borah) (arguing that without a private damages remedy, "[t]he monopolist . . . escapes without any treble damages, without any trouble of moment, and with no punishment and without any costs, or without anything commensurate with the wrong. All he gets is a reprimand from the Government; and he will go out to find other victims")); *see also* 51 CONG. REC. 11301 (1914) (remarks of Sen. Borah) (stating that a law prohibiting unfair competition can only be effective if it is vigorously enforced).

amendment's treble damages remedy as overly punitive and misaligned with the agency's forward-looking mission.[102]

On the other side of the aisle, skeptics of adding a private right of action to the FTC Act deemed such a provision superfluous for two reasons. First, some in Congress argued that the right to bring suit for injuries suffered as a result of unfair business practices already existed at common law or under state antitrust laws—neither of which was preempted by the commission bill.[103] If anything, these congressmen argued, the commission bill would *augment* private litigation because, once "the FTC found conduct to constitute unfair competition [or] an antitrust violation, those injured could take advantage" of the commission's decisions by bringing subsequent damages actions.[104] As one commentator has observed, "from a strictly antitrust point of view . . . it made good sense to deny private enforcement" under the FTC Act § 5 since private treble damages actions were already authorized under both the Sherman and Clayton Acts.[105]

Second—and more significant—many in the Senate apparently believed that by making unfair competition illegal and not granting the FTC exclusive jurisdiction to police violations, "Congress [was] automatically creat[ing] a private cause of action [for] compensation."[106] This group of Senators understood themselves to be enacting a "national law of unfair competition," akin to existing state laws, in which private claimants would be free to bring lawsuits seeking damages for illegal conduct and "would not be dependent solely on the FTC for

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102. Ward, *supra* note 19, at 1149 (citing remarks of Sen. Newlands favoring a private legal remedy but opposing treble damages); *id.* (citing 51 CONG. REC. 11533 (1914) (remarks of Sen. Norris) (commenting that "[t]here ought to be a provision somewhere in the bill . . . that would make it unprofitable" to defraud consumers)); *id.* (citing 51 CONG. REC. 14788 (1914) (remarks of Sen. Reed) (noting inadequacy of the commission's administrative remedies and supporting the addition of a private damages remedy)).

103. *Id.* at 1151 (citing 51 CONG. REC. 13120 (1914) (remarks of Sen. Reed) (asserting that there was no current limitation preventing a victim from suing in court)); 51 CONG. REC. 13115 (1914) (remarks of Sen. Brandegee) (stating that even prior to judgment by the commission, injured plaintiff could sue corporation for damages resulting from unfair practices); *id.* at 14937 (remarks of Rep. Stevens) (arguing that injured individuals must resolve their claims through private means, and that individual who is injured by "deception, substitution, or misrepresentation" would have cause of action for fraud); *id.* at 12208 (remarks of Sen. McCumber) ("In all cases of fraud there is a remedy in the courts of law at the present time."); *id.* at 14937 (remarks of Rep. Stevens) (asserting that the "commission is given authority to interfere on behalf of the public, and on behalf of the public only . . . . The proceeding must not concern any injured individual; he must care for himself, exactly as he now does").

104. Ward, *supra* note 19, at 1151 (citing 51 CONG. REC. at 13117 (1914) (remarks of Sen. Walsh) (stating that all victims of unfair competition have the right to sue based on the commission's findings)). But some in Congress worried that "with the prospect of a damages action following an FTC proceeding, a respondent would not cooperate with the agency . . . [but would] instead . . . dig in and fight to avoid the financial burden of paying private relief." *Id.* at 1152 (internal citations omitted).

105. William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 278 (1971).

106. Ward, *supra* note 19, at 1151.

relief."[107] Indeed, even Senator Clapp, the main sponsor of the amendment to add a private treble damages remedy, appeared convinced that private citizens could sue to "recover damages under [the] Act despite [the] absence of [an] expressly stated remedy in [the] statute."[108] A contemporaneous observer concurred, positing that a private right of action under § 5 was largely unnecessary because "federal courts had [already] developed a federal common law of unfair competition under which individuals had a private right of action."[109]

Ultimately, Congress rejected amendments that would have added an express treble-damage remedy or other private cause of action to the FTC Act.[110] Instead, § 5(b) of the 1914 Act provides that only the Commission may "prevent" companies from engaging in "unfair methods of competition," where doing so "would be to the interest of the public."[111] Soon after the FTC Act went into effect, "business competitors . . . sought to bring actions under section 5 to prevent unfair competition among themselves"—but courts were "unanimous in holding that Congress did not intend to afford these litigants any private relief."[112] Justice Brandeis foreclosed this argument once and for all in *FTC v. Klesner*, flatly stating that "Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs."[113]

As the only "cop on the beat," the FTC focused its early regulatory efforts on curtailing unfair competition practices between business rivals. Initially, the agency achieved some success challenging advertising practices "that allegedly had adverse effects on competition,"[114] and by 1925, "roughly seventy percent of the

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107. *Id.* (citing 51 CONG. REC. 13054 (1914) (remarks of Sen. Cummins) (noting that enforcement would be achieved through "personal actions" alongside public regulation)).

108. *Id.* at 1151 n.58 (internal citations omitted).

109. Allan Bruce Currie, *A Private Right of Action Under Section Five of the Federal Trade Commission Act*, 22 HASTINGS L.J. 1268, 1269 (1971) (citing Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987, 988 (1949)).

110. 51 CONG. REC. 13113-22, 13143-50 (1914) (treble damage amendment proposed, debated, and defeated: 18 yeas, 41 nays, 37 not voting). Instead, legislators added a private right of action provision to the Clayton Act.

111. In the Senate debates on § 5, Senator Cummins declared that the unfairness the FTC would prosecute "must be tinctured with unfairness to the public; not merely with unfairness to the rival or competitor . . . . We are not simply trying to protect one man against another; we are trying to protect the people of the United States, and, of course, there must be in the imposture or in the vicious practice or method something that has a tendency to affect the people of the country or be injurious to their welfare." 51 CONG. REC. 11105 (1914); *see also* Fed. Trade Comm'n v. Klesner, 280 U.S. 19, 28 (1929).

112. Currie, *supra* note 109, at 1269 (citing Moore v. N.Y. Cotton Exchange, 270 U.S. 593, 603 (1926) ("[R]elief in such cases under the [FTC Act] must be afforded in the first instance by the commission.")).

113. 280 U.S. at 25.

114. *See, e.g.*, Fed. Trade Comm'n v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922); *see also* Dale Pollak & Bruce Teichner, *The Federal Trade Commission's Deception Enforcement Policy*, 35 DEPAUL L. REV. 125, 127 (1985) (listing early false advertising cases brought by the FTC).

FTC's orders involved deceptive advertising."[115] But these enforcement actions did little to staunch mounting consumer concerns over unsafe or misrepresented goods.[116] In its earliest incarnation, the agency—dubbed "the little old lady of Pennsylvania Avenue" for its "lack of vigor in defending consumer interests"—simply did not identify as a consumer protection bureau.[117]

Later, the agency's halting efforts to develop a consumer portfolio were thwarted by the Supreme Court's decision in *FTC v. Raladam*, which found the FTC lacked statutory authority to engage in *general* consumer protection regulation.[118] Concerned that a weakened FTC would fail to "address a national crisis in the advertising and sale of drugs and devices that could endanger health," members of Congress worked to clarify the scope of the agency's power.[119] These efforts culminated in the 1938 Wheeler–Lea Act, which made clear that "unfair or deceptive acts or practices in commerce"—even when these acts have no discernible effect on competition—are unlawful.[120] The primary House sponsor of the amendment,

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115. Maureen K. Ohlhausen, *Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis?*, 83 GEO. WASH. L. REV. 1999, 2002 (2015).

116. Jack Crespin, A History of the Development of the Consumer Protection Activities of the Federal Trade Commission 163 (1975) (Ph.D. dissertation, New York University) (ProQuest) ("[T]he FTC was not motivated at that time to act on behalf of the consumer for the sake of consumers' protection as such."); *id.* at 188 ("[F]or the most part, any pro-consumer activities of the Commission were more of a spin-off from its efforts to foster fair competition under section 5 than deliberate actions on behalf of the consumer.").

117. Susan J. Tolchin, *Revolt Against Regulation*, 46 J. OF POL. 622, 623 (1984); *see also* RICHARD A. HARRIS & SIDNEY M. MILKIS, THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES 147 (asserting that the enacting Congress FTC did not consider consumer protection to be the FTC's responsibility); McMannon, *supra* note 27 at 39 n.66 (observing that "the FTC was not intended as a consumer agency when it was created, and it did not function as one at the outset"). *But see* Fed. Trade Comm'n v. Winsted Hosiery, Co., 258 U.S. 483 (1922) (challenge to deception aimed at consumers).

118. 283 U.S. 643, 654 (1931). In *Raladam*, the FTC sought a cease-and-desist order against plainly false claims made by a diet pill manufacturer of a medicine, but the Court rejected the agency's claim that false advertising amounted to unfair competition. Reading the FTC Act to only authorize actions aimed at harming competition, the Court observed that any greater agency authority to protect consumers rather than competition would require congressional amendment. *Id.* at 649–52.

119. Ward, *supra* note 19, at 1157–58 (explaining that "[t]he amendment was intended only to give the FTC authority to prohibit conduct that was unfair or deceptive to consumers without requiring the FTC to prove anticompetitive effect").

120. Wheeler–Lea Act of 1938, Pub. L. No. 75-447, 52 Stat. 111 (codified at 15 U.S.C. §§ 45–57). The Wheeler–Lea Act broadened the FTC's authority to enjoin "unfair *or deceptive acts or practices*." This change freed the agency from having to prove injury to competition, as injury to consumers was sufficient to initiate an enforcement action. *See also* H. REP. NO. 1613 (1937) ("[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor."); David W. Carpenter, *Implied Civil Remedies for Consumers Under the Federal Trade Commission Act*, 54 B.U. L. REV. 758, 762 (1974) ("The Wheeler–Lea Act of 1938 converted the Act into a consumer protection measure as well. . . . [T]he amendment to section 5 not only proscribed a new class of conduct but also extended the protection of the Act to a new class of persons—consumers.").

Representative Luke Lea (D-TN), explained that its intended purpose was to "afford a protection to the consumers of the country that they had not heretofore enjoyed."[121]

Passage of the Wheeler–Lea Act revived calls for courts to recognize a private right of action under § 5. Some commentators suggested that in the wake of the amendment, "the old reasons for not making Section 5 privately actionable no longer govern," and urged courts to give "new, separate and independent consideration" to finding an implied private right of action.[122] Others observed that, given Congress's clear intent to bolster consumer protection, there seemed to be "no valid reason why an injured consumer should not be entitled to the protection of the Act."[123] Still, others emphasized the inadequacy of FTC's resources to combat the endemic problem of consumer fraud.[124] But the 75th Congress's failure to explicitly provide for a private right of action rendered most courts in this era unwilling to engage in creative statutory interpretations.[125] By the early 1970s, there was near-unanimous consensus that "Congress intended enforcement of the Wheeler–Lea Amendments to rest wholly and exclusively with the Federal Trade Commission, following the pattern laid down in the 1914 Act."[126]

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In the 108 years since the FTC Act was enacted, there have been few legislative attempts to add a private right of action to aid in the enforcement of its

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121. 83 CONG. REC. 392 (1938) (remarks of Congressman Lea); *see also* Ward, *supra* note 19, at 1141 ("With [the Wheeler–Lea] amendment, the consumer, along with business competition, became the concern of the FTC.").

122. Lovett, *supra* note 105, at 278–79.

123. Stephen W. Gard, *Purpose and Promise Unfulfilled: A Different View of Private Enforcement Under the Federal Trade Commission Act*, 70 NW. U.L. REV. 274, 277 (1975).

124. *See, e.g.*, Carlson v. Coca-Cola, Co., 483 F.2d 279, 282 (9th Cir. 1973) (Solomon, J., dissenting) (observing the vast "disparity between need and resources" at the FTC, with only 27 staff attorneys tasked with resolving tens of thousands of consumer complaints).

125. *See, e.g.*, Atlanta Brick Co. v. O'Neal, 44 F. Supp. 39, 42 (E.D. Tex. 1942) (refusing to imply a private right of action under the FTC Act, finding that the "Act nowhere gives an additional right of action to persons injured by unfair trade practices"); Nat'l Fruit Prod. Co. v. Dwinell-Wright Co., 47 F. Supp. 499, 504 (D. Mass. 1942) ("[I]t cannot fairly be said that Congress [in § 5] . . . authorized federal courts to develop a rounded federal common law of unfair competition."); Marquette Cement Mfg. Co. v. Fed. Trade Comm'n, 147 F.2d 589, 594 (7th Cir. 1945) (finding the FTC is "the only tribunal clothed with the power and charged with the responsibility of protecting the public against unfair methods of competition"); Samson Crane Co. v. Union Nat'l Sales, 87 F. Supp. 218, 221 (D. Mass. 1949) (the FTC Act "gives no right of action to private litigants based on such unlawful acts").

126. *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 997–98 (D.C. Cir. 1973) (observing that "Congress, has not seen fit to alter the statutory plan established in 1938"); *see also Carlson*, 483 F.2d at 281 ("Section 5(a)(1) equips the Federal Trade Commission with a flexible tool with which to combat unfair trade practices. Consumers cannot transmute that tool into a crowbar for prying open door 1337 to the federal courthouse."). *But see* Lawson Fabrics, Inc. v. Akzona, Inc., 355 F. Supp. 1146, 1148 n.1 (S.D.N.Y. 1973). ("It is not clear that a private action can be brought in Federal District Court under the Federal Trade Commission Act.").

provisions.[127] This is somewhat surprising, given that a critical mass of 1914 legislators were under the false impression that such a right was implied because § 5 created a national law of unfair competition. One possible explanation for the century-long legislative silence is that Congress has assumed that state consumer protection laws sufficiently fill the enforcement gap left by § 5. As I discuss in the next Part, this longstanding belief is currently being tested—and disproved—in numerous states.

II. THE RISE (AND FALL?) OF STATE UDAPS

The need for stronger legal protection of consumer interests became apparent by the 1920s as Americans were beckoned by a marketplace chock-full of "shiny, new consumer products," like automobiles, washing machines, refrigerators, and vacuum cleaners.[128] These novel appliances could run on newly laid electric lines because by 1925 nearly 54% of households were electrified.[129] And while these products had once been out of reach for many Americans, higher wages along with access to new forms of financing and consumer credit helped to democratize consumption of consumer goods.[130] The average family income doubled between 1939 and 1945, and this "burgeoning middle class meant an expanded market for homes, cars, appliances and services."[131] It was an era of increasing affluence for many, as the population grew rapidly and urbanization "made consumers more concentrated and inexpensive to serve."[132]

There were, however, early signs of trouble: as easy access to credit and direct advertising to consumers grew more common, so too did complaints of growing product complexity, unfamiliar warranty disclaimers, and deceptive marketing practices.[133] Budding activists also warned of the proliferation of shoddy products foisted on an unsuspecting public, arguing that the "[f]ault lay with the ever-increasing influence of the machine in every area of American life, [and] the

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127. *See* Consumer Protection Act, S. 1823, H.R. 1078, 5368, 92d Cong. (1971) (proposing to allow consumers to sue for damages upon successful completion of FTC proceedings).

128. Crespin, *supra* note 116, at 116.

129. Mayer, *supra* note 25, at 19 (citing U.S. Bureau of the Census).

130. Winerman & Kovacic, *supra* note 53, at 157–58 (reporting that the "consumer economy expanded broadly" from 1920 to 1929, as "car ownership more than tripled over the decade" and "about 40 percent of households owned a radio" by 1930). *See also* Nigel Whiteley, *Toward a Throw-Away Culture: Consumerism, 'Style Obsolescence,' and Cultural Theory in the 1950's and 1960's*, Oxford Art Journal, vol. 10, No. 2 (1987) at p. 5 (reporting that "[f]rom 1946 to 1958, short-term consumer credit . . . rose from $8.4 million to almost $45 million, [a]nd in 1950, the credit card was introduced").

131. Whiteley, *supra* note 130.

132. Mayer, *supra* note 25, at 12 (reporting that "between 1870 and 1910, the gross national product increased fivefold," and by 1910, 46% of the population "resided in urban areas" (compared to 25% in 1870)).

133. *Id.* at 171. *See also* Mayer, *supra* note 25, at 19 (observing that in the 1920s, "consumer choices were further complicated by aggressive salesmanship, particularly in the form of advertising").

contingent growth in the power of producers to distribute, advertise and bring their products to the attention of large numbers of buyers."[134]

Consumer advocates found little relief in New Deal policies. While FDR lamented that the consumer was "the forgotten man," his Depression-era policies aimed more at "increasing purchasing power than in regulating labels or advertising."[135] Nor was the FTC much help, as the agency had gained a reputation for being "ineffective, politically captured, poorly managed, poorly directed, and fundamentally confused about its consumer protection mission."[136] Congress enacted some consumer protection legislation in this era, though many federal laws went unenforced.[137]

Perceiving the federal government's lack of interest in consumer protection, local and grassroots activism sprang up, seeking to remedy market ills in a variety of ways.[138] Some groups sought to counteract false advertising claims by providing more and better information to the buying public. In 1929, for instance, Consumer Research launched as the nation's first consumer-oriented product-testing facility;[139] six years later, a group broke off to form the Consumer Union, which used its popular publication, *Consumer Reports*, to educate buyers about product safety.[140] Other organizations tried to fill the enforcement gap by bringing lawsuits under the FTC Act—only to be halted by judicial unwillingness to find such a right implied in the statute.[141] And yet others organized protests, boycotts, and petition

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134. Norman Katz, Consumer's Union: The Movement and the Magazine, 1936–1957 38 (1977) (Ph.D. dissertation, Rutgers University) (ProQuest); *see also* Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436 (Cal. 1944).

135. *Id.* at 81. *But see* Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §§ 301–399g (authorizing the FDA to regulate product safety).

136. Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 47 n.1 (1969).

137. *See, e.g.*, Wholesome Meat Act (Meat Inspections Act) of 1967, Pub. L. 90-201, 81 Stat. 584; Wholesome Poultry Products Act of 1968, Pub. L. 90-492, 82 Stat. 791; Child Protection and Toy Safety Act of 1969, Pub. L. 91-113, 83 Stat. 187.

138. Jeanine Gilmartin, An Historical Analysis of the Growth of the National Consumer Movement in the United States 1947–1967, at ii (1969) (Ph.D. dissertation, Georgetown University) (ProQuest) (observing that "local and state groups mushroomed endlessly" in the 1930s and 40s); Budnitz, *supra* note 24, at 1150–51 (observing that "the first successful grassroots consumer organization was the Consumer Education and Protective Association," which "established a grievance process for handling individual consumer complaints").

139. Kathleen Browne Ittig, *The Consumer Movement in the United States*, 2 BRIDGEWATER REV. 7, 8 (1983) (noting that the goal of Consumer Research was to "provide consumers with technical information they needed to make decisions"); Katz, *supra* note 134, at 3 (Consumer Union was started by Arthur Kallet and F.J. Schlink, "two of the consumer movement's most active and prolific leaders").

140. Katz, *supra* note 134, at 13 (describing *Consumer Reports* as "the standard reference source for Americans seeking objective product information for ultimate consumer goods").

141. *See, e.g.*, Moore v. New York Cotton Exch., 270 U.S. 593 (1926) (finding no private right of action in the FTC Act); Samson Crane Co. v. Union Nat'l Sales, 87 F. Supp. 218, 221 (D. Mass. 1949) ("The Federal Trade Commission Act[,] while declaring certain

drives seeking to force companies to lower prices or increase transparency in product design.[142]

However, by mid-century, consumer advocates joined in what would become a lasting and consequential consumer protection project: lobbying state legislatures to enact laws modeled on the FTC Act § 5 that would authorize *both* state AGs and private litigants to sue for enforcement.[143]

A. The UDAP Movement of the 1960s

For many observers, the consumer rights movement of the 1960s unfolded on the national stage, beginning with President Kennedy's famous 1962 speech urging Congress to enact a consumer "bill of rights."[144] Indeed, many of the movement's successes were most visible at the federal level, in the bevy of pro-consumer laws enacted by Congress between 1967 and 1973.[145] Some of these laws embraced new enforcement strategies for the modern era, endowing private citizens with the right to seek monetary and injunctive relief;[146] others focused on novel injuries caused by modern products and services.[147] In this era, consumer activists

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acts and practices unlawful, gives no right of action to private litigants based on such unlawful acts."); Smith-Victor Corp. v. Sylvania Elec. Prods., Inc., 242 F. Supp. 302, 306 (N.D. Ill. 1965) (dismissing a claim brought by a private entity).

142. *See, e.g.*, ANN FOLINO WHITE, PLOWED UNDER: FOOD POLICY PROTESTS AND PERFORMANCE IN NEW DEAL AMERICA 148–150 (2014) (describing the Hamtramck protest against rising meat prices organized by Chicago housewives in the 1930s).

143. *See* James Cooper & Joanna Shepherd, *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis*, 81 ANTITRUST L.J. 947, 952 (2017) ("The public no longer viewed the Commission as an effective solution to deter fundamentally unfair business practices, and turned to states and local regulators with this now-familiar problem."); Cox et al., *supra* note 3, at 42 (observing that the "growing consumer movement and the absence of a private right of action in Section 5 [of the FTC Act] . . . fueled" the passage of state UDAPs).

144. *See* President John F. Kennedy, Special Message to Congress on Protecting Consumer Interest (March 15, 1962), https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/037/JFKPOF-037-028) [https://perma.cc/VU25-4MAS] ("[M]odern living is so complex that present laws on the statute books are inadequate to secure these rights.").

145. MICHAEL PERTSCHUK, REVOLT AGAINST REVOLUTION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 13 (1982) (asserting that in the 1960s, "the federal government was the acknowledged and accepted instrument of social justice"). In this period, Congress enacted the Truth in Lending Act, the National Traffic and Motor Vehicle Safety Act, the Consumer Credit Protection Act, the Fair Credit Reporting Act, the Consumer Protection Act, the Child Protection Act, and the Fair Packaging and Labeling Act—these consumer laws fit well within the broader legislative agenda of The Great Society, including Medicaid, the Occupational Safety and Health Act, the Clean Air Act, and the Civil Rights Act of 1964, among others.

146. For example, the Truth in Lending Act enacted in 1968 was the first federal law "regulating the consumer financial services industry that provided consumers with a private right of action." Budnitz, *supra* note 24, at 1149.

147. Take for instance the Consumer Credit Protection Act, Pub. L. No. 90-321, § 303, 82 Stat. 146 (1968), which limited the ability of creditors to initiate garnishment proceedings for repayment of consumer debt. Another example is the Fair Credit Reporting

became household names,[148] though few reached the heights of Ralph Nader—"the self-appointed, nationally-recognized leader of . . . consumer disquiet" in the 1960s and 70s.[149]

Less well-understood are activists' efforts directed at state legislatures during this period. Historian Robert Mayer suggests that after Nader's attempts to establish a federal consumer protection agency ran aground in 1964, consumer rights advocates "turned their full efforts to the state level."[150] This was a natural policy pivot. After all, the states had long taken the lead in consumer protection—some had enacted usury and food safety laws a half-century earlier, and as described above in Part I, state unfair competition and restraint of trade cases often proved more active and more successful than federal antitrust litigation in the 1920s and 30s.[151] Moreover, the travails of modern-day consumers were increasingly worrisome to state officials, who witnessed their citizens being "victimized by shoddy goods, unhonored warranties and cutthroat credit," yet often lacked the authority or resources to remedy these wrongs.[152] Low-income consumers were most vulnerable, and "proponents of measures to help the 'poor' [began to] align their message with

Act, which regulates the sharing, storing, and collection of a consumer's credit and financial information, and ensures the accuracy of this data when used by credit reporting agencies. *See generally* Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x.

148. *See, e.g.*, VANCE PACKARD, THE HIDDEN PERSUADERS (1957) (revealing the mind games played by advertisers on consumers); DAVID CAPLOVITZ, THE POOR PAY MORE (1963) (on class discrimination in the marketplace); JESSICA MITFORD, THE AMERICAN WAY OF DEATH (1963) (exposé on abuses in the funeral industry).

149. Nader's indictment of the auto industry in *Unsafe at Any Speed*—along with the revelation that General Motors had spied on him—made him "the star witness at sensational hearings about automobile safety conducted by Senator Abraham Ribicoff." Nicholas Lemann, *The Last Battle Over Big Business*, NEW YORKER, May 31, 2021. Nader later "sued G.M. for spying on him and used the proceeds of the resulting settlement" to establish the Center for the Study of Responsive Law. *Id.* The Center "served as a staging area of Nader's Raiders, typically idealistic students" who investigated industries or business practices to expose consumer abuses. MAYER, *supra* note 25, at 29. Before he became a Supreme Court Justice, Lewis Powell wrote in a memo to the Chamber of Commerce explaining that "the single most effective antagonist of American business is Ralph Nader, who—thanks largely to the media—has become a legend in his own time and an idol of millions of Americans." Lemann, *supra*.

150. MAYER, *supra* note 25, at 80. There is some mild disagreement on precisely when states began adopting UDAPs; Jeff Sovern asserts that this began in the 1950s, Sovern, *supra* note 29, at 446, while Mark Budnitz asserts that it began in 1965, Budnitz, *supra* note 24, at 1157.

151. *See, e.g.*, Kenneth E. Galchus, Charles G. Martin & Ashvin P. Vibhakar, *A History of Usury Law in Arkansas: 1836–1990*, 12 U. ARK. LITTLE ROCK L. REV. 695, 696 (1990) (reporting that Arkansas's first usury statute was enacted in 1836, and that other southern states had passed similar laws by 1868). In the 1950s, a number of states moved to regulate installment sales and other aspects of consumer contracting. *See, e.g.*, Warren Weaver Jr., *State to Control All Sales on Time*, N.Y. TIMES, Apr. 18, 1957, at 23 (describing New York statute regulating revolving credit and installment contracts).

152. Richard Walsh, *The New Economic Monarchy*, N.Y. TIMES, Oct. 16, 1970 (observing that "an examination of consumer protection activities . . . over the last few years in 20 states shows a clearly widening pattern of legislation").

consumer protection advocates."[153] While political power may have been concentrated in Washington for much of the 1950s and 60s, that power began to shift in the 1970s, as state governments began once again to "take an active interest in [consumer] troubles."[154]

For advocates, a unifying mission was the enactment of state legislation aimed at supplementing the FTC Act by authorizing private enforcement suits. The FTC, recognizing its limited remedial authority, was supportive of and deeply involved in these state legislative campaigns.[155] Indeed, as early as 1964, "the FTC proposed that states enact false advertising statutes, modeled after New York's 1963 statute."[156] And as Professor Dee Pridgen notes, "predominate model" legislation of this era resulted from "a collaboration between the FTC and Council of State Governments."[157] This model, the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), reflected an expanded vision of consumer protection in which consumers could sue businesses directly, either individually or via a class action, for treble damages and attorneys' fees.[158] Similar bills circulated among state capitols in these years, but all reflected an escalating interest in furnishing consumers with authority to seek relief by suing businesses directly.[159]

With activists working on the ground and the FTC pulling levers from Washington, states began to enact UDAPs at a rapid clip, with "increased mo[m]entum in the late 1960s."[160] By 1971, 32 states (constituting more than three-

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153. *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 275 (1971) (observing that "[a] baffling frustration in achieving simple consumer justice still constitutes one of the most demoralizing features of low-income life in America, since it undermines confidence and hope in the fundamental fairness of the marketplace").

154. *Id.*

155. Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 912 (2017) ("The FTC's leadership, instrumental in the development of the state UDAP statutes, pushed for both state and private enforcement of these new laws. The goals were to extend the reach of the FTC's consumer protection mission into the states and to provide a more productive legal tool for consumers to obtain compensation for injustices committed by unscrupulous merchants."); HARRIS & MILKIS, *supra* note 117, at 179 ("The transformation of the FTC was one element of the far-reaching institutional development that took place during the late 1960s and 1970s in the area of consumer protection.").

156. Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse By Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 15 (2006).

157. Pridgen, *supra* note 155, 912–13 (describing the Unfair Trade Practices and Consumer Protection Law ("UTPCPL") as a "collaboration" between the FTC and the CSG).

158. *See* Cooper & Shepherd, *supra* note 143, at 956 ("The UTPCPL authorized class actions for consumer protection violations, granted an individual right of action for the greater of actual damages suffered or $200, and provided attorneys' fees at the court's discretion against any violator, not merely knowing violators.").

159. *See id.* at 953–54 (describing the different approaches taken by state legislatures in this period—some modeling their statutes "directly on the FTC Act and the federal Clayton Act," while others adopted the Uniform Deceptive Trade Practices Act).

160. Lovett, *supra* note 105, at 275; *see also* Jeffrey Naimon et al., *Under the Microscope: A Brief History of UDAP Laws and Predictions for Post-Dodd Frank*

fourths of the nation's population) had enacted some version of a UDAP law;[161] three years later, that number had climbed to 47.[162] Some states even "established consumer protection agencies" to triage citizen complaints and spearhead investigations.[163] This whirlwind of legislative and regulatory activity inspired a 1975 observer to predict that "most of the country will soon be governed" by UDAPs.[164]

Yet, a number of these "early state UDAPs evinced some hesitation against consumer suits for money damages," granting only the state attorney general enforcement authority, akin to the FTC Act § 5.[165] The original Oregon UDAP, for example, did not "permit suit under the Act by the defrauded consumer himself, either individually or as a member of a victimized class," mirroring the approach of a dozen other states.[166] But the shortcomings of this approach quickly became apparent, as three trends converged to put pressure on unaided public enforcement. First, the nationwide recession of the 1970s hit states hard, forcing serious budget cuts and scaled-back public services.[167] Underfunded state consumer agencies and state AGs protested that severely "limited staff[s] and budget[s]" weakened their ability to enforce UDAPs.[168] Second, the pool of consumer lawyers grew as law schools began offering courses devoted to consumer law, with some graduating young lawyers hoping to center their practices on consumer protection. Many of these new graduates learned the ropes at the newly established National Consumer

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Developments, 14 NO. 11 CONSUMER FIN. SERV. L. REP. 2, 4 (Oct. 27, 2010) (observing that "it was really after the 1964 issuance of the Uniform Deceptive Trade Practices Act and the 1967 unveiling of the Model Unfair Trade Practices and Consumer Protection Law, that states rapidly began enacting consumer protection laws").

161. Lovett, *supra* note 105, at 275; *see also* Matthew W. Sawchak & Troy D. Shelton, *Exposing the Fault Lines Under State UDAP Statutes*, 81 ANTITRUST L.J. 903, 904–05 (2017) (observing that "UDAP statutes follow a few different models" and offering general descriptions of each).

162. Ralph James Mooney, *The Attorney General as Counsel for the Consumer: The Oregon Experience*, 54 OR. L. REV. 117, 117 n.1 (1975).

163. *Id.*

164. *Id.*

165. Cooper & Shepherd, *supra* note 143, at 956.

166. Mooney, *supra* note 162, at 119. The author notes that the Oregon statute was toothless for additional reasons: AGs could not "use discovery proceedings to gather evidence," the law "provided no civil or criminal penalty for [its] violation," and it left enforcement to state district attorneys—resulting in "a nearly complete lack of enforcement." *Id.* (internal citations omitted).

167. *See, e.g.*, STATE-LOCAL FINANCES IN RECESSION AND INFLATION: AN ECONOMIC ANALYSIS, ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATION 17–19 (1979) (reporting that "22 states [surveyed] had cut services, for a total expenditure reduction of $1.9 billion" in 1975); NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, STATE FISCAL SURVEY (1975–1979) (concluding that, over the period studied, "state governments are operating on a fiscal tight-rope" and "state officials are striving to maintain operations within existing sources and levels of available revenue").

168. Sovern, *supra* note 29, at 448 n.62 (internal citations omitted); Lovett, *supra* note 105, at 274 (reporting that efforts at "prosecuting [consumer claims] have not been strong or well financed in many states"); Mooney, *supra* note 162, at 119 n.12 (citing a "lack of personnel to research and to prosecute" violations).

Law Center or one of its local affiliates.[169] Soon, these "radical" young lawyers "began bringing cases that sought not only to gain redress for their clients' immediate problems, but also to change laws" and impact policy.[170] Third, a number of states in this era enacted legislation and promulgated rules authorizing class action procedures in state courts.[171] Oregon, once again, is paradigmatic: the state essentially prohibited class actions until 1973, when its legislature enacted a general class action statute and adopted rules governing certification of consumer class actions.[172] Unsurprisingly, the availability of class procedures generated increased interest in private consumer litigation.

These pressures gradually led states to expand their UDAPs to authorize private enforcement. In 1972, ten states amended their statutes to make deceptive practices "privately actionable to some degree,"[173] and by 1975, 40 states permitted private actions under their consumer fraud statutes.[174] Within the decade, all but one state (Iowa) would follow suit.[175]

In the intervening decades, state UDAPs have been amended in various ways to encourage private enforcement. California, for example, enacted both an Unfair Competition Law ("UCL") and a Consumer Legal Remedies Act ("CLRA") in 1970 as its primary consumer protection statutes.[176] A decade later, legislators greatly expanded the breadth of the UCL by authorizing suit by "any person acting for the interests of itself, its members or the general public."[177] (The statute was changed again in 2004 by referendum to eliminate the standing of uninjured plaintiffs to sue for enforcement of its provisions.) New York's UDAP statute was amended in 1981 to bestow upon judges a broad discretion to award attorneys' fees—a move followed by 45 other states and the District of Columbia.[178] Other

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169. Budnitz, *supra* note 24, at 1149 (observing that one of the first consumer law casebooks was published in 1970).

170. *Id.* at 1152.

171. *See, e.g.*, N.J. REV. STAT. § 56:8-19 (2001). New Jersey's first consumer protection statute, enacted in 1960, identified the state AG as its sole enforcer. But in 1971, the New Jersey legislature amended the law to provide for consumer class actions as a supplemental means of enforcement. Similar amendments went into effect in other states. *See, e.g.*, N.Y. GEN. BUS. LAW § 349(h) (amended in 1980); 73 PA. CONS. STAT. § 201-9.2 (amended in 1976); WASH. REV. CODE § 19.86.010 (amended in 1970).

172. Mooney, *supra* note 162, at 129 n.67 (citing OR. STAT. 13.210–.410 (1973)).

173. Lovett, *supra* note 105, at 275.

174. Mooney, *supra* note 162, at 128 n.66.

175. Cox et al., *supra* note 3, at 42. Iowa is the only state whose UDAP statute expressly denies consumers a private right of action. CARTER, *supra* note 2, at 11.

176. CAL. BUS. & PROF. CODE §§ 17200 & § 17800 ("Any consumer who suffers any damage . . . may bring an action . . . to recover or obtain any of the following: (1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000). (2) An order enjoining the methods, acts, or practices. (3) Restitution of property. (4) Punitive damages. (5) Any other relief that the court deems proper.").

177. CAL. BUS. & PROF. CODE § 17535.

178. Cooper & Shepherd, *supra* note 143, at 959 (observing that by 1987, 45 states and the District of Columbia had authorized the award of attorneys' fees upon success in a consumer case).

states amended their statutes in this era to authorize enhanced—i.e., double or triple—damages as an inducement to suit,[179] lower the consumer's burden of proof,[180] and extend the applicable statutes of limitations governing consumer protection claims.[181]

In addition, a number of states have, over time, reduced procedural obstacles to UDAP litigation. For example, nearly a third of states' UDAPs now "expressly allow class actions, even in the absence of concrete injuries."[182] In a few states where standing doctrine is less stringent than Article III, legislators have expanded the class of litigants authorized to sue under the UDAP in order to maximize its efficacy.[183] And finally, states like Florida have expanded the definition of activities prohibited under the state UDAP statute.[184] From the view of state legislators, empowering consumers to enforce these statutes ensures consistency in the face of fluctuations in both state budgets and the political will of the elected public enforcer. Given these statutory inducements, it is perhaps not surprising that the volume of state UDAP claims has steadily increased over time.[185] This uptick in UDAP claims sets the stage for lobbying efforts by business interests to scale back private consumer protection enforcement.

B. The Conservative Backlash

To be fair, the backlash to the consumer movement is about as old as the movement itself—and the movement's most outspoken critics in the 1970s and 80s have today become the greatest foes of state UDAPs. To provide some context on the development of an organized corporate opposition to state consumer protection laws, this Section first examines the development of the business lobby aimed at undercutting federal legislation and rulemaking, and then examines the inevitable spillover effects of these efforts on state legislators.

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179. Pennsylvania's UDAP statute, for example, authorizes treble damages. *See* 73 PA. CONS. STAT. § 201-9.2(a). *See also* Angiodynamics, Inc. v. Biolitec AG, 991 F. Supp. 2d 299 (D. Mass. 2014) (awarding treble damages under MA UDAP statute), *aff'd*, 780 F.3d 429 (1st Cir. 2015); Moulton v. Bane, 2016 WL 1091093 at *13 (D.N.H. 2016) (applying New Hampshire law, federal court awarded double damages for knowing misrepresentations). In addition, seven states authorize punitive damages instead of enhanced damages. *See* CARTER, *supra* note 2, at 23.

180. Cooper & Shepherd, *supra* note 143, at 958–59 (describing the legislative shift requiring that factfinders evaluate "consumer conduct from the perspective of the 'least sophisticated consumer' rather than a reasonable consumer") (internal citations omitted).

181. *Id.*

182. Sawchak & Shelton, *supra* note 1, at 908; Cooper & Shepherd, *supra* note 143, at 958 (asserting that "many state consumer protection acts" were amended to "eliminate[] the requirement, or greatly relax[] the burden of proof, that a consumer show any actual economic injury"). In addition, nine states—Alabama, Georgia, Iowa, Louisiana, Mississippi, Montana, South Carolina, Tennessee, and Virginia—deny consumers any right to bring a class action under their state UDAP statutes. *Id.*

183. TENN. CODE. ANN. §§ 47-18-109(a)(4)(A), (B), (D) (amending the statute to include "other persons" within the definition of those authorized to sue); *see also* FLA. STAT. § 501.211(1) (2002) (replacing the term "consumer" with the word "person").

184. 1993 Fla. Laws ch. 38.

185. Cooper & Shepherd, *supra* note 143, at 960–66.

1. The Growth of a National Business Lobby

As consumer activism took flight in the 1960s, pro-business groups became increasingly organized and effective opponents.[186] Take, for instance, the Business Roundtable—a somewhat mysterious fraternity made up of CEOs of major corporations that was established in 1972 as a counterweight to consumer activism.[187] The group "used the power and prestige of its members to aggressively influence federal legislation" and succeeded in blocking dozens of pro-consumer bills through its extensive lobbying apparatus.[188] By 1974, "about 100 top managers had joined the Roundtable," which was then "consciously reorganized to represent the interests of big business in Washington."[189] By 1978, "130 of its members were in the Fortune 500" and together "controlled $1.263 trillion in assets and produced $1.265 in revenues"—about half of U.S. gross national product that year.[190]

More powerful yet was the U.S. Chamber of Commerce (the "Chamber"), which was founded in 1912 to serve as a "barometer of business opinion" for government officials, but which experienced a revival in the 1970s and 80s.[191] From 1975 to 1985, the Chamber "doubled its membership and trebled its annual budget," in large part by working to upend consumer statutes.[192] The Chamber's "size and

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186. Patrick J. Akard, The Return of the Market: Corporate Mobilization and the Transformation of U.S. Economic Policy 82 (1989) (Ph.D. dissertation, University of Kansas) (ProQuest) ("Business leaders began a concerted effort to increase their political participation in the mid-1970s to reverse their perceived loss of power."); *id.* at 92 ("[T]he crucial factor behind the success of pro-market forces in this period was their renewed determination to present a unified front.").

187. *See id.* at 100 (noting the "secrecy of [the organization's] membership" which "serve[d] to mystify the extent of Roundtable influence"); *see also* Mary Williams Walsh & Claudia H. Deutsch, *Is True Reform Possible Here?*, N.Y. TIMES, July 14, 2002, at B1 (describing the Business Roundtable as "founded by a handful of power brokers bent on building a pipeline between the nation's corporate leaders and its top government decision makers").

188. Walsh & Deutsch, *supra* note 187, at B6; *see also* Akard, *supra* note 186, at 94 ("What made the group unique was that the member CEOs did their own lobbying in Congress and the Executive branch and did not rely on lower-level representatives. Their standing gave them special access not open to other lobbyists; very few public officials, at any level, refuse to meet with the head of a Fortune 500 corporation.").

189. Akard, *supra* note 186, at 97.

190. *Id.* at 100 (citing MARK GREEN AND ANDREW BUCHSBAUM, THE CORPORATE LOBBIES: POLITICAL PROFILES OF THE BUSINESS ROUNDTABLE AND THE CHAMBER OF COMMERCE 68 (1980)).

191. *Id.*; *see also* Myriam Gilles, *"A Force Created": The Chamber of Commerce and the Politics of Corporate Immunity*, 72 DEPAUL L. REV. (forthcoming 2023).

192. Michael DeCourcy Hinds, *The Consumer Movement: What Happened*?, N.Y. TIMES, Jan. 21, 1983, at A16 (observing that the Johnson administration supported a number of consumer protection bills, including "truth-in-lending, meat inspection, drug inspection and pesticide control" laws); *see also* ALYSSA KATZ, THE INFLUENCE MACHINE: THE U.S. CHAMBER OF COMMERCE AND THE CORPORATE CAPTURE OF AMERICAN LIFE 20 (2015) (describing "the Chamber's rise as the most fully realized political influence machine the nation has ever seen [as] a direct reaction not the stunning success of consumer, environmental and labor groups").

wide-ranging network" allowed it to mobilize broad-based support for its pro-business initiatives, rendering it a formidable adversary for consumer activists.[193]

These groups, along with "400 separate organizations, ranging from Proctor & Gamble to the Grocery Manufacturers of America," joined forces in the late 1960s to form the Consumer Issues Working Group ("CIWG") as a united front against federal consumer legislation.[194] The CIWG was waiting in the wings in 1969 when consumer groups began advocating for an independent federal agency to "represent consumer interests before the government and in court."[195] At each turn, the CIWG blocked progress on this initiative, helping defeat multiple Congressional bills with aggressive lobbying and high-impact campaign spending.[196] In 1977, after the CIWG had beaten back the final attempt to establish a federal consumer agency, policymakers took note that it was a "concerted and unified effort of the business lobby" that had killed the bill.[197] Fortune magazine praised the "newly unified business lobby," which had chipped away at the public's previously positive perception of a federal consumer agency until "it became known as a proposal for yet another 'super agency' and, of course, no one wanted that."[198]

In the wake of this legislative success, the CIWG rapidly built up its membership. By 1978, "it had over 400 corporate and trade association members."[199] The group's pan-industry approach soon became "the model for future lobbying efforts by the corporate community."[200] By consolidating their resources to combat a common foe, the national business lobby also grew more sophisticated and disciplined in their messaging.[201] For example, all branches of the lobby cohered around a handful of core ideas: namely, that regulations served only to raise prices

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193. Akard, *supra* note 186, at 106.

194. *Id.* at 102, 234 (describing the CIWG as "an important innovation" because "prior to that time, most business lobbying was done by individual firms promoting their own interests, or by trade associations for specific industries"; since a consumer protection agency would "affect all industries," the CIWG represented a rare instance of "pan-industry cooperation").

195. *Id.* at 231–32 (reporting that members of the coalition included "organized labor, the major consumer organizations, and a number of environmental and other public interest groups").

196. *Id.* at 233 (describing the staunch opposition to the Consumer Protection Act by the CIWG and other trade groups); *see also* Diya Berger, A Tale of Two Movements: Consumer Protection in the U.S. from 1969 to 2010, at 35–36, 117 (Apr. 1, 2013) (B.A. thesis, University of Pennsylvania) (observing that from 1969 to 1978, the CIWG helped to defeat twelve separate congressional bills seeking to establish a consumer protection agency).

197. Akard, *supra* note 186, at 237.

198. *Id.* at 236 (internal citation omitted).

199. *Id.* at 234; *see also id.* at 6 (observing that a turning point in the consumer movement occurred in 1978 "when the business lobby met the liberal coalition head-on to defeat several of their most cherished legislative initiatives").

200. *Id.* at 237.

201. *Id.* at 82 (observing that business leaders' "superior technical, organizational, and financial resources gave them a distinct advantage over the outgunned liberal coalition").

for consumers without conferring additional benefits,[202] gave large companies "competitive advantage[s]" over their smaller competitors,[203] and "would enlarge an already bloated federal bureaucracy."[204]

Soon, the resources of the business lobby easily trounced that of the consumer groups. By 1979, for example, corporations and trade associations spent nearly $1 billion in federal lobbying efforts, while the three major consumer groups—the Consumer Federation of America, Ralph Nader's Congress Watch, and the National Consumers League—together spent only about $350,000.[205] So vast were the business community's resources that by 1980, satisfied that President Reagan would build upon its free-market policy agenda, the national business lobby began to mobilize "from below," coordinating small businessmen, local leaders, and other pro-market groups to duplicate its federal strategy on the state level.

2. Taking the Fight to the States

By 1990, pro-business interests grew increasingly concerned over the "explosion in consumer protection litigation" at the state level, blaming this rise in "frivolous lawsuits" on indiscriminate and overbroad state consumer protection statutes.[206] According to these critics, by granting consumers the right to sue for

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202. *See, e.g.*, Ralph Winter, *Economic Regulation vs. Competition: Ralph Nader and Creeping Capitalism*, 82 YALE L.J. 890, 902 (1973) (asserting that the consumer protection movement was "largely the ideological handiwork of the liberal, upper-middle class . . . [b]ut such laws may also eliminate the even cheaper products the poor can now afford."); Frank McChesney, *Revolt Against Regulation: The Rise and Pause of the Consumer Movement*, 70 VA. L. REV. 339, 344–45 (1984) (book review) (asserting that "[i]t is questionable whether consumers as a whole are better off" as a result of consumer protection regulations).

203. McChesney, *supra* note 202, at 347.

204. Akard, *supra* note 186, at 233.

205. *Id.* at 92 (citing CONSUMERS UNION, THE RISE OF BUSINESS LOBBYING 254). Kathleen O'Reilly, executive director of the Consumer Federation of America, was blunt about the resource disparity in her 1977 testimony before Congress:

> As the largest consumer group in the country, [the Consumer Federation of America has] an annual budget of under $300,000 . . . By way of comparison with the Chamber of Commerce, their budget is about $20 million. The American Petroleum Institute has a budget of about $18 million.

Agency for Consumer Protection: Hearing on H.R. 6118 Before the Legis. and Nat'l Sec. Subcomm. of the H. Comm. on Gov't Operations, 95th Cong. 182 (Apr. 21, 1977) (statement of Kathleen O'Reilly, executive director, Consumer Federation of America).

206. *See* Cooper & Shepherd, *supra* note 143, at 947 (observing in 2017 that a rise in consumer litigation "in the recent decades" was caused by "damaging legislative and judicial overcorrections at the state level"); *id.* at 969 (presenting data "suggest[ing] a meaningful increase in UDAP litigation since at least 2000," and concluding that "this surge is likely to be directly related to the procedural and substantive expansions in state UDAPs"). As noted in the Introduction, some of the recent increase in UDAP litigation has less to do with private litigation and more to do with state AGs "banding together [and] using their UDAP laws to police the marketplace and fill the gaps left by waning federal enforcement." Cox et al., *supra* note 3, at 39. Covering all its bases, the Chamber has also come out against

enhanced damages via class actions—often without proving actual injury—state UDAPs had "radically expanded" interest in consumer litigation.[207] Gone was any semblance of restraint, as the plaintiffs' bar predictably adopted a maximalist approach that threatened large and small businesses alike.

In recent decades, these concerns have led to a concerted and organized effort to amend and weaken state UDAPs—a campaign that has achieved marked success. For example, after years of lobbying by the Chamber and local business groups, Arkansas amended its Deceptive Trade Practices Act ("ADTPA") in 2017 to impose a hard-to-meet requirement that consumers prove "an actual financial loss as a result of . . . reliance" on the allegedly unlawful practice.[208] More significant yet, the amended Arkansas statute now prohibits consumers from bringing private class actions as a means of enforcing the statute.[209]

Mississippi, long viewed "as an unfavorable legal forum for many civil defendants," was another focal point for pro-business lobbyists bent on rolling back state consumer protection laws.[210] In 2005, the Chamber and other business groups descended on Mississippi to lobby for changes to its UDAP statute.[211] These efforts resulted in a complete overhaul of the law, which is now one of the most restrictive

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public enforcement, charging that "state attorneys general employ these laws to achieve political goals," "devise novel theories of liability," and "usurp the legislative role with closed-door settlements." *Id.* at 40 (citing U.S. CHAMBER INST. FOR LEGAL REFORM, UNPRINCIPLED PROSECUTION: ABUSE OF POWER AND PROFITEERING IN THE NEW "LITIGATION SWARM" (2014)).

207. Cooper & Shepherd, *supra* note 143, at 956.

208. ARK. CODE ANN. § 4-88-113(f)(1)–(2) (requiring consumers to provide their injuries were "proximately caused by his or her reliance on the use of a practice declared unlawful under [the ADTPA]"). The Chamber submitted written testimony to the state legislature on the importance of these amendments and mobilized a number of Arkansas defense-side law firms to help persuade legislators. *See generally* Megan D. Hargraves, *Arkansas Legislature Passes a Bill to Limit Private Claims Under the State Deceptive Practices Act*, MITCHELL WILLIAMS L. FIRM: L. BLOG (Apr. 3, 2017), https://www.mitchellwilliamslaw.com/arkansas-legislature-passes-a-bill-to-limit-private-claims-under-the-arkansas-deceptive-trade-practices-act [https://perma.cc/HNB9-MXV8].

209. ARK. CODE ANN. § 4-88-113(f). On some level, the statutory ban on class actions is superfluous, as the new reliance requirement on its own would prevent certification of most class actions brought under Rule 23(b)(3). *See* Mazza v. Am. Honda Motor Co., 666 F.3d 581 (9th Cir. 2012), *overruled by* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 669 (9th Cir. 2022) (finding reliance requirement constitutes an inherently individualized inquiry, and therefore fails the predominance requirement of Rule 23(b)(3)). In 2011, Tennessee followed suit by eliminating class actions under the Tennessee Consumer Protection Act and limiting private rights of action to specifically enumerated categories of prohibited conduct. *See* Pub. Ch. 510, 107th Gen. Assemb. (Tenn. 2011).

210. Mark Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 MISS. C. L. REV. 393, 393, 396 (2005) (reporting that the state ranked as having "the worst overall legal system in the entire country" by the Chamber, and was widely mocked in the media for its "out of control" juries and lax laws) (internal citations omitted).

211. *Id.* (reporting that pro-business interests sought amendments to state law that would prohibit class actions and eliminate enhanced damages).

in the nation.[212] Today, Mississippi law makes it so difficult for consumers to sue under its UDAP law that it has effectively rescinded the private right of action.[213]

The business lobby has coupled its legislative efforts with equally aggressive court challenges to state UDAPs. Here again, corporate interests have successfully convinced courts to "narrow[] the scope of UDAP laws or grant[] sweeping exemptions to entire industries."[214] In recent years, state courts in Michigan, Rhode Island, Louisiana, New Hampshire, and Virginia have "exempt[ed] most lenders and creditors" from UDAP liability,[215] 16 state courts have broadly immunized public utility companies from liability to their consumers, and in 24 states, insurance companies have been judicially excused from UDAP coverage.[216]

Taken together, the rhetoric against UDAPs and the immense lobbying and litigation efforts directed at these statutes suggest that state consumer protection laws are in a precarious position and that the increasingly conservative, pro-business composition of many state legislatures may weaken them even further.[217] If more states follow the examples of Arkansas and Mississippi by diluting their UDAPs, the pressure to amend the FTC Act to provide consumers with a federal cause of action for adjudicating marketplace misconduct will grow stronger. The next Part considers what such an amendment might accomplish beyond greater enforcement—in particular, it makes the counterintuitive claim that resting a private right of action in the citizenry will immunize consumer protection enforcement from political caprice, generating much-needed stability and offering greater access to justice.

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212. CARTER, *supra* note 2; *id.* at 21 (observing that Mississippi's UDAP statute "allows the court to order the consumer to pay the business's attorney fees in some circumstances but does not allow the court to order the business to reimburse the consumer for attorney fees when the consumer wins"). *See also* Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 915–18 (2017).

213. CARTER, *supra* note 2, at 21 ("Mississippi's UDAP statute requires pre-suit notice, prohibits consumers from joining together in a class action, and does not offer multiple damages. It allows the court to order the consumer to pay the business's attorney fees in some circumstances but does not allow the court to order the business to reimburse the consumer for attorney fees when the consumer wins.").

214. CARTER, *supra* note 2, at 3.

215. *Id.* (citing Liss v. Lewiston-Richards, Inc., 732 N.W.2d 514 (Mich. 2007) (creating an exception for industries that are subject to any regulation or licensing by state agencies)).

216. *Id.*

217. *See, e.g.*, Michael Wines, *As Washington Stews, State Legislatures Increasingly Shape American Politics*, N.Y. TIMES (Aug. 29, 2021) https://www.nytimes.com/2021/08/29/us/state-legislatures-voting-gridlock.html [https://perma.cc/MLV4-MFBB].

III. MAKING THE CASE FOR ADDING A PRIVATE RIGHT OF ACTION TO THE FTC ACT

Savvy policymakers understand that laws "are only as effective as the mechanisms [a legislature] puts in place to enforce them."[218] Accordingly, the choice of whether to design a statute to provide public, private, or mixed enforcement is a meaningful one, which demands legislators consider a variety of regulatory goals, as well as the cost of attaining them.[219] Whenever Congress has confronted "the resource limitations of government agencies," it has tended to place greater reliance on the private attorney general model.[220] For this reason, dozens of flagship consumer protection statutes include express private causes of action, tapping the resources and expertise of "private attorneys general" to help police commercial misdeeds.[221] In each of these enactments, Congress has considered the "virtues and vices of private enforcement . . . as a regulatory tool" in determining the appropriate balance of power.[222] But occasionally, federal legislators don't get the balance exactly right on the first try, requiring subsequent amendments to fill the enforcement gaps that are revealed once the statute is implemented.

This isn't to say that it is easy to amend a statute. The revision to the FTC Act that this Article endorses would require a heavy political lift, and in this era of Congressional palsy, amending any statute to give lawyers more occasion to sue businesses may seem doomed from the start. But there is some cause for optimism, as Congress has (on occasion) recognized that private enforcement would improve an existing statutory regime and moved to amend its prior enactments to expressly provide for such actions. Take for example the Fair Credit Reporting Act ("FCRA"), the nation's first consumer financial privacy law. Enacted in 1970 to regulate the collection and use of consumer credit data and reporting, the FCRA originally designated the FTC as its sole enforcer.[223] But the rapid surge in data breaches and privacy violations made possible by new technologies soon overwhelmed the

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218. Alexandra P. Everhart Sickler, *The (Un)fair Credit Reporting Act*, 28 LOY. CONSUMER L. REV. 238, 241 (2016).

219. *See, e.g.*, Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 661–75 (2013) (describing the provision of a private right of action as an institutional design choice).

220. Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 664 (2008) (observing that "many consumer laws provide a private right of action so individual consumers also can litigate violations of these laws" and that many "also provide class actions and statutory damages which encourage consumers to act as 'private attorneys general'").

221. *See, e.g.*, Clayton Act § 4, 15 U.S.C. § 15 (authorizing private enforcement of anticompetitive conduct by offering a treble damages incentive); Truth in Lending Act § 130, 15 U S.C. § 1640 (a)(2)(A)(i) (authorizing private enforcement by offering double the amount of an illegal finance charge); Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x; Fair Labor Standards Act § 6(d)(1), 29 U.S.C. § 216(b).

222. David Engstrom, *Harnessing the Private Attorney General: Evidence From Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1325 (2012).

223. 15 U.S.C. §§ 1681–1681x.

agency.[224] Accordingly, in 1999, Congress amended the FCRA to provide consumers the right to sue for violations of credit bureaus' duty to investigate disputed financial information.[225] Modern legal history is littered with similar examples of statutory enforcement do-overs resulting from real-time evidence that an existing structure had failed to accomplish congressional goals.[226] Underlying the straightforward provision of a private cause of action lies a complex statutory architecture necessary to support the creation of a private enforcement regime—including questions of who may bring suit, the form of the action, and whether private litigation can be waived via mandatory, pre-dispute arbitration provisions. The first Section below addresses these foundational questions.

Beyond the complex legislative and political calculus involved in amending the FTC Act lies a deeper and more chilling reality: the whiplash caused by hyper-partisan shifts in political power that have come to define modern American governance has destabilized public enforcement authority, perhaps irrevocably. Accordingly, the second Section below advances a novel theory in support of private rights of action—one that seeks to position the private attorney general as a counterweight to the wild policy fluctuations of our modern politics.

224. *See generally* Tiffany George, *50 Years of the FCRA*, FEDERAL TRADE COMMISSION BUSINESS BLOG (Oct. 27, 2020) https://www.ftc.gov/business-guidance/blog/2020/10/50-years-fcra [https://perma.cc/HH54-Q3C2] (observing that "regular 'polishing'" of the FCRA has been "necessary to ensure that entities covered by the FCRA honor their legal obligations").

225. More recently, debates over the American Data Privacy and Protection Act ("ADPPA") center around the bill's provision of an express private right of action for consumers injured by data breaches. *See* H.R. 8152, 117th Cong. (2021–2022).

226. Take, for example, the Economic Stabilization Act of 1970, which authorized the President to institute emergency wage and price controls. Pub. L. No. 91-379, 84 Stat. 799–800 (1970). When Nixon began to deploy this new price-setting authority via executive order, private companies and individuals alleging injury sought to challenge the Act—but there was no provision for such actions. *See, e.g.*, Arthur Miller, *For Debate on Economic Policy*, N.Y. TIMES, Sept. 6, 1971 (arguing that the Act gives "the President . . . a blank check to regulate the economy [but with] no guidelines to canalize that authority . . . [and that] no such sweeping delegation has ever been upheld outside of wartime"). A year later, Congress amended the law to add an express private cause of action, enabling lawsuits by persons "suffering legal wrong because of any act or practice arising out of this title." Economic Stabilization Act Amendments of 1971 §210(a), Pub. L. No. 92-210, 85 Stat. 743 (1971). Another prominent example is "aiding and abetting" liability under § 10(b) of the Securities Exchange Act, which the Supreme Court deemed unavailable in private suits. *See* Central Bank v. First Interstate Bank, 511 U.S. 164 (1994). In response, Congress amended the statute to allow for a private right of action against those aiding and abetting. 15 U.S.C. § 78t(e) (amended 2000) ("any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided"). *See also* Richard A. Brisbin Jr., *The Politics of Private Rights of Action*, 11 WHITTIER L. REV. 111, 136 (1989) ("One of the reasons the federal courts have been willing to extend private rights of action in the area of securities regulation has been a recognition that the SEC could not alone police the securities industry for fraud and misrepresentation.").

A. Architecting a New § 5

Providing a private cause of action in the FTC Act is a relatively straightforward project of legislative drafting. Congress need only add language to § 5 specifying that: (1) "any individual alleging a violation of this Act may bring a civil action in any court of competent jurisdiction, State or Federal,"[227] and (2) that upon success, plaintiffs have the right to seek statutory or actual damages and reasonable attorneys' fees.[228] This additional language would leave the remaining section untouched, allowing private litigants to bring any cause of action that the FTC may currently bring.

Yet underlying this basic statutory language rests a set of policy choices that will determine the real-world availability and efficacy of private consumer litigation initiated under this provision. For instance, § 5 currently directs the FTC to proceed with an enforcement action whenever it "appear[s] to the Commission that a proceeding by it . . . would be to the interest of the public."[229] Should the private attorney general be subject to this "public interest" requirement or should legislators eliminate this filter when it comes to private litigation? On the one hand, one might argue that without the public interest criterion, consumers and their lawyers might use this newly created authorization to bring "frivolous" cases or cases that are of no benefit to anyone but themselves.[230] But on the other hand, Congress in 1914 inserted the public interest requirement solely to prevent the FTC from getting involved in "controversies of a private and personal nature"—a concern that has no relevance to private lawsuits, where litigants are expected to prioritize their own interests.[231] From a pragmatic viewpoint, requiring plaintiffs to establish that the complained-of misconduct is injurious to the public welfare is likely to chill rather than incent consumer protection litigation. One need only look to the group of six states whose UDAP laws impose such a requirement to observe this effect.[232] And if we assume that much of the litigation under our new § 5 will consist of consumer class actions, the numerosity and commonality requirements of Rule 23(a) ensure that the action is in the common interests of a large enough group of

227. Similar language appears in numerous federal consumer protection laws and bills. *See, e.g.*, Consumer Online Privacy Rights Act, S. 2968 116th Cong. (2019–2020).

228. While the FTC may only seek injunctive relief against unfair or deceptive practices, 15 U.S.C. § 45(l), a private cause of action would authorize injured consumers to seek monetary damages, as well recoup attorneys' fees and litigation costs.

229. 15 U.S.C. §45(b). *See also* Cooper & Shepherd, *supra* note 143, at 952 ("Congress recognized that some practices might occasionally harm individual consumers, yet prove broadly beneficial to consumers and commerce as a whole. Congress entrusted the FTC with this calculus through its enforcement discretion.").

230. Cooper & Shepherd, *supra* note 143, at 971–72.

231. Flynn & Emrich Co. v. FTC, 52 F.2d 836, 838 (4th Cir. 1931) ("Certainly, Congress never intended that the machinery of the Federal Trade Commission, severe as its operation can be, should be set in motion for the settlement of private controversies . . . It was never intended that the Commission should act the part of a petty traffic officer in the great highways of commerce.").

232. Cooper & Shepherd, *supra* note 143, at 971 n.99 (Colorado, Georgia, Minnesota, Nebraska, South Carolina, and Washington impose a public interest requirement, either via statute or judicial interpretation); *see also* Sovern, *supra* note 29, at 111 (observing that the public interest requirement is a "high hurdle" in some cases).

consumers to justify aggregation—a close approximation of the public interest requirement.

Another important statutory design question is whether, in addition to individual consumers, small businesses injured by unlawful business practices should also be authorized to seek redress in the courts.[233] Allowing these entities a cause of action acknowledges the realities of the modern marketplace, where business owners are just as likely as individual consumers to suffer harm from illegal practices.[234] Providing that a small business qualifies as "a person" or "a consumer" entitled to sue under the statute would also amplify the deterrent effects of our beefed-up § 5. Notably, the FTC has interpreted its statutory authority to encompass the protection of small businesses from scams and other fraudulent conduct, which offers a strong justification to extend this very same authority to private litigants.[235]

Beyond these definitional questions lie consequential and politically fraught matters involving the intended form and venue of private litigation brought to enforce § 5. First, federal legislators must decide whether to expressly authorize consumer class actions as a means of enforcing § 5. The shared wisdom has long held that consumer claims—i.e., small-value claims of a dispersed group injured by identical illegal conduct—form the paradigmatic case for class treatment.[236] Recognizing this, the bulk of federal consumer protection legislation contemplates class action litigation as a primary means of redress.[237] While debates over the

233. *See* Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1628–34 (1983) (identifying state UDAPs that extend protection to small businesses).

234. *See* Michael Flynn & Karen Slater, *All We Are Saying Is Give Business a Chance: The Application of State UDAP Statutes to Business-to-Business Transactions*, 15 LOY. CONSUMER L. REV. 81, 84 (2003) ("The consumer in the context of consumer protection laws is now not only the traditional consumer who purchases goods or services for personal use, but also includes the small business owner and entrepreneur who purchases goods and services for commercial use.").

235. *See, e.g.*, FTC v. IFC Credit Corp., 543 F. Supp. 2d 925 (N.D. Ill. 2008) (finding that the term "consumer" in § 5 includes businesses as well as individuals); FTC v. Starwood Consulting, LLC, No. 18-02368 (S.D. Tex. July 2018) (approving $8 million settlement in an action against three companies for § 5 violations against small business owners); FTC v. Production Media Co., No. 20-00143 (D. Or. Feb. 2020) (approving $22.2 million settlement in an action against two companies for § 5 violations against small business owners).

236. *See, e.g.*, Amchem Prods, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

237. *See, e.g.*, Truth in Lending Act (TILA), 15 U.S.C. § 1640(a)(2)(B) (specifically provides that plaintiffs may recover "in the case of a class action, such amount

legitimacy of the class device are deeply contentious in contemporary politics,[238] failing to legislate the availability of class relief would render a private right of action wholly ineffective in practice.

Authorizing class actions requires federal legislators to then clarify the question of class member standing to sue. This has been a hotly contested issue in the federal courts in the wake of the Supreme Court's decisions in *Spokeo, Inc. v. Robins*[239] and *TransUnion v. Ramirez*.[240] Together, these decisions require courts to assess the "concreteness" of plaintiffs' claimed injuries. To qualify as sufficiently concrete, the Court has held that a plaintiff's injury must bear "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[241] Many defendants have successfully relied on these decisions to contest class member standing at the certification stage.[242]

Certainly, drafting a statutory standing provision in the wake of *Spokeo* and *TransUnion* requires some care, given the Court's view that Article III is not automatically satisfied simply because Congress created a statutory cause of action.[243] But the Court's decisions do not render Congress powerless to determine how (or who) it wishes to enforce public law. Indeed, the amendment proposed here

as the court may allow"); Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681–1681x; *see also* White v. E-Loan, Inc., 2006 WL 2411420, at *9 (N.D. Cal. Aug. 18, 2006) ("[W]ithout class actions, there is unlikely to be any meaningful enforcement of the FCRA by consumers whose rights have been violated."). *See also* Budnitz, *supra* note 220, at 664 (observing that "many consumer laws . . . provide class actions and statutory damages which encourage consumers to act as 'private attorneys general'").

238. *See, e.g.*, Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017) (described by supporters as a "reform bill designed to curtail unmeritorious class action litigation" and critics as a "valentine to corporate interests," this controversial bill passed the House in 2017 by a 220–201 party-line vote but failed in the Senate).

239. 578 U.S. 330, 340–41 (2016) (explaining that a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right"; rather, to confer standing, a statutory violation must result in concrete injury").

240. 141 S. Ct. 2190 (2021) (finding that class members whose names mistakenly appeared on a terrorist watch list did not have standing to sue until their names had been provided to third parties).

241. *Spokeo*, 578 U.S. at 341; *TransUnion*, 141 S. Ct. at 2204 ("The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.").

242. *See, e.g.*, Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236 (11th Cir. 2022) (finding plaintiff lacked standing in a Fair Debt Collection Practices Act ("FDCPA") case alleging collection agency negligently disclosed private information to third parties).

243. *Spokeo*, 578 U.S. at 339 (quoting Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997)) ("Congress cannot erase Article III's standing requirements by granting the right to sue to a plaintiff who would not otherwise have standing."); *TransUnion*, 141 S. Ct. at 2204, 2207 (suggesting that the legislative creation of a private right of action does not suffice for Art. III because "[p]rivate plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law").

should result in a division of labor between the FTC and the private consumer class action bar that will inure to the benefit of both, as well as the consumers they represent. Specifically: the FTC should continue bringing claims for "unfair or deceptive practices in or affecting commerce," even where alleging that a defendant's representation is only "*likely* to mislead" consumers.[244] These sorts of consumer protection claims are made more difficult by the Court's recent standing jurisprudence, which holds that a risk of future harm that has not yet materialized cannot support *a private* litigant's standing to sue. But nothing in this decisional law prevents a *public* enforcer from adjudicating likely future harms. Indeed, the FTC has a long track record of successfully litigating precisely these sorts of issues under § 5 by establishing that defendants misrepresented the efficacy or safety of a product to the detriment of the marketplace as a whole.[245] The agency's authority is sufficiently broad to account for reasonable predictions of consumer injury, even if forward-looking and approximate. Furthermore, while the FTC operates as an independent agency, it serves executive functions.[246] As such, the separation-of-powers rationale for demanding "concrete" injury as a prerequisite to private litigants' standing to sue under Article III is entirely absent in the context of a federal agency bringing enforcement actions.[247]

Private consumer class actions, on the other hand, will require a showing of "concrete" injury, such as "a physical harm [or] monetary harm,"[248] or intangible injuries that were recognized at the Founding, such as "reputational harms, disclosure of private information, and intrusion upon seclusion."[249] The former should prove straightforward in the mine-run of consumer class actions alleging

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244. 15 U.S.C. § 45(a)(1). *See also* Fed. Trade Comm'n v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003) (to establish a violation of § 5, the agency must establish that: "(1) there was a representation, (2) the representation was likely to mislead customers acting reasonably under the circumstances, and (3) the representation was material").

245. *See, e.g.*, Fed. Trade Comm'n v. Direct Mktg. Concepts, Inc., 648 F. Supp. 2d 202 (D. Mass. 2009) (successful claim brought against infomercial maker who falsely represented that its product was an "effective treatment for cancer, Parkinson's disease, heart disease"); Fed. Trade Comm'n v. Partners in Health Care Ass'n, Inc., 189 F.Supp.3d 1356 (S.D. Fla. 2016) (successful claim brought against marketers whose falsely represented that a "Discount Card" was an insurance product); Fed. Trade Comm'n v. Johnson, 156 F. Supp. 3d 1202 (D. Nev. 2015) (successful claim brought against operators of websites that offered false "free or risk-free" information about government grants to pay personal expenses).

246. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (finding that Congress did not violate the separation of powers when it established the FTC and limited the President's removal power except for good cause).

247. *See TransUnion*, 141 S. Ct. at 2207 (explaining that a "regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law . . . would infringe on the Executive Branch's Article II authority" because "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)").

248. *Id.* at 2200.

249. *Id.* at 2204 (collecting cases); *see also* Spokeo Inc. v. Robins, 578 U.S. 330, 341 (2016).

monetary harm.[250] After all, the bulk of consumer cases allege that defendant's misconduct caused tangible, pecuniary harm to consumers of a product or service, and rarely is this a sticking point for class certification. Further, even data breach or identity-theft claims can avoid knotty standing problems where consumers are forced to incur costs in order "to monitor their credit or financial statements for fraudulent activity,"[251] or where plaintiffs have alleged "actual misuse or actual access to personal data."[252] Indeed, both the Second and Seventh Circuits have recently upheld standing in consumer data breach litigation where some plaintiffs reported fraudulent charges, while others had yet to suffer financial harm.[253] In these decisions, the courts of appeal found a "substantial risk" of harm suffices for Article III standing. So too are consumers on solid ground when they allege that "there was an explicit or implicit contract for data security, that plaintiffs placed value on that data security, and that [d]efendants failed to meet their representations about data security."[254]

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250. Take, for example, a case adjudicated by the FTC in which actual monetary damages were sought, F.T.C. v. Verity Int'l, Ltd., 443 F.3d 48 (2nd Cir. 2006). The case involved claims that a telephone billing system allowed line subscribers to receive bills for adult-entertainment access about which they had no knowledge. If such a claim were adjudicated by private class action litigants under the amendment proposed here, class members would have no difficulty establishing that they had suffered "concrete" injury in the form of fraudulent international phone charges.

251. *See, e.g.*, *In re* Practicefirst Data Breach Litig., No. 21-00790, 2022 WL 354544, at *6 (W.D.N.Y. Feb. 2, 2022) ("Where plaintiffs have shown substantial risk of future identity theft or fraud, any expenses they have reasonably incurred to mitigate that risk likewise qualify as injury in fact.") (quoting McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 301–02 (2d Cir. 2021)).

252. *In re* Mednax Servs., Inc. v. Customer Data Sec. Breach Litig., 2022 WL 1468057, at *6 (S.D. Fla. 2022) (citing Attias v. Carefirst, Inc., 865 F.3d 620, 626 n.2, 628 (D.C. Cir. 2017)) (holding that there was a "substantial risk" of future harm where an unauthorized party accessed PII from a healthcare company's servers); Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 693 (7th Cir. 2015) (finding a substantial risk of future harm where plaintiffs had already experienced fraudulent charges on their credit cards); Krottner v. Starbucks Corp., 628 F.3d 1139, 1142–43 (9th Cir. 2010) (holding that plaintiffs faced a "credible threat of harm" where a laptop was stolen containing their encrypted data and one plaintiff had a fraudulent bank account opened in his name); Tsao v. Captiva MVP Rest. Partners, 986 F.3d 1332, 1339 (11th Cir. 2021).

253. *See* McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 301–02 (2d Cir. 2021) (finding that courts have been more likely to conclude that plaintiffs have established a substantial risk of future injury where they can show that at least some part of the compromised dataset has been misused—even if plaintiffs' particular data subject to the same disclosure incident has not yet been affected); *In re* Zappos.com, Inc., 888 F.3d 1020, 1027–28, n.7 (9th Cir. 2018) (explaining that although some plaintiffs in the suit had not yet suffered identity theft, allegations that other customers whose data was compromised had reported fraudulent charges helped establish that plaintiffs were at substantial risk of future harm). *See also* Desue v. 20/20 Eye Care Network, Inc., 2022 WL 796367 (S.D. Fla. 2022) (finding plaintiffs plausibly alleged an injury in fact based on actual misuse and actual access of their data, which established that the threat of future harm posed a "substantial risk" or was "certainly impending").

254. *In re* Marriott Int'l, Inc., Customer Data Sec. Breach Litig., 440 F. Supp. 3d 447, 466 (D. Md. 2020) (finding these allegations sufficient to allege injury in fact).

More problematic are consumer data cases whose facts closely resemble those of *Spokeo* and *TransUnion*—i.e., cases where plaintiffs allege future injury might result from defendant's negligence in failing to protect private data, but cannot show that they have yet suffered harm from the misconduct.[255] In these scenarios, the Supreme Court has explained that the critical question is whether the future injury bears the necessary "close relationship" to a harm that was actionable at the time Article III was adopted.[256] While modern-day data breach or privacy claims need not be "an exact duplicate" of those found in "American history and tradition," they must be sufficiently similar to quell any concern that Article III is being skirted by "contemporary, evolving beliefs about what kinds of suits should be heard in federal courts."[257] A handful of lower federal courts have engaged in this comparative analysis, and the results are unsurprisingly chaotic: some courts have held that harms alleged under contemporary consumer protection statutes are incomparable to traditional torts,[258] while others have had little difficulty finding that violations of consumer protection statutes have close analogues to common law tort actions.[259] As the caselaw under *Spokeo* and *TransUnion* develops, however, the consumer class action bar is generating thoughtful and historically grounded arguments linking the present to the past in ways that prove difficult for defendants to credibly dispute. Therefore, there may be reason to hope that injured consumers will be able to argue that many of the injuries prosecutable under the FTC Act

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255. In *Spokeo*, the defendant operated an online search engine that aggregated data scraped from a myriad of online sources, allowing users to search for someone "by name, e-mail address, or phone number" and obtain information "such as the individual's address, phone number, marital status, approximate age, occupation, hobbies, finances, shopping habits, and musical preferences." Spokeo, Inc. v. Robins, 578 U.S. 330, 335–36 (2016). Plaintiff Robins claim alleged that if a user searched for him on the Spokeo site, it would display inaccurate information. *Id.* Robins claimed that this inaccurate information "ha[d] caused actual harm to [his] employment prospects," and as a result, he experienced "anxiety, stress, concern and/or worry." First Amended Compl. at ¶¶ 35–37, Robins v. Spokeo, Inc., No. 10-5306 (C.D. Cal. Feb. 17, 2011).

256. TransUnion v. Ramirez, 141 S. Ct. 2190, 2204 (2021) ("[T]he inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury.").

257. *Id.*

258. *See, e.g.*, Ward v. Nat'l Patient Acct. Servs. Sols., Inc., 9 F.4th 357, 361 (6th Cir. 2021) (finding that an alleged violation of the FDCPA was not comparable to the common law "tort of intrusion upon one's right to seclusion"); Ojogwu v. Rodenberg Law Firm, 26 F.4th 457 (8th Cir. 2022) (plaintiff's alleged injury of "nervousness" and "irritability" from defendant's misconduct fell "short of cognizable injury as a matter of general tort law").

259. *See, e.g.*, Persinger v. Southwest Credit Sys., L.P., 20 F.4th 1184, 1192 (7th Cir. 2021) (concluding that an unauthorized credit score inquiry was sufficiently analogous "in kind" to the common-law tort of intrusion upon seclusion"); Lupia v. Medicredit, Inc., 8 F.4th 1184, 1191–93 (10th Cir. 2021) (same for receipt of a single unanswered call and voicemail attempting to collect a medical debt in asserted violation of the FDCPA); Seale v. Peacock, 32 F.4th 1011, 1020–21 (10th Cir. 2022) (finding unauthorized access to a software account analogous to "trespass to chattels" or "invasion of privacy").

"exist[ed] in the real world before Congress recognized them to actionable legal status."[260]

Finally, we should expect that companies seeking immunity from newly authorized § 5 consumer class actions will redraft their standard-form contracts to demand that consumers waive their statutory right to sue and, instead, resolve all disputes in private, one-on-one arbitrations. We should also expect courts to enforce these provisions, as the Supreme Court's "liberal federal policy favoring arbitration" largely shields such waivers from legal challenge.[261] Consumers could therefore be blocked by private contract "from going to court as a group."[262] This might lead many to "drop[] their claims entirely," rendering the private cause of action nugatory.[263]

Accordingly, Congress should preempt this possibility by specifying that pre-dispute, contractual waivers of the right to bring suit under § 5 are flatly unenforceable. As the Court made clear in *Gilmer v. Interstate/Johnson Lane Corp.*, arbitration agreements are rendered unenforceable where Congress has clearly evinced an intention that the statutory entitlement at issue is inarbitrable.[264] Though Congress has employed this authority sparingly,[265] a recent bipartisan effort led to passage of the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021."[266] This law amends the FAA to provide that "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute."[267] This passage reveals that

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260. *TransUnion*, 141 S.Ct. at 2205 (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018)).

261. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (finding that the Federal Arbitration Act preempts state law efforts to prohibit pre-dispute, class-banning arbitration clauses).

262. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/PW6N-N286].

263. *Id.*; *see also* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2680, 2812 (2015) ("Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so—rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights.").

264. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

265. *See, e.g.*, 15 U.S.C. § 1639(e)(1) (barring arbitration clauses in residential mortgage loans); 18 U.S.C. § 1514A(e) (forbidding pre-dispute contracts requiring arbitration of whistleblower claims under the Sarbanes–Oxley Act not enforceable); 10 U.S.C. § 987(e)(3), (f)(4) (voiding arbitration clauses in payday loan or any consumer credit contracts—with the exception of residential mortgages and car loans—with members of the military or their families); 15 U.S.C. § 1226(a)(2) (prohibiting automobile manufacturers from imposing pre-dispute arbitration clauses in their franchise agreements with dealers).

266. Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified as amended in scattered sections of 9 U.S.C.).

267. 9 U.S.C. § 402(a).

legislators can find consensus on the types of legal disputes that belong in public courts, and should endeavor to do so in the context of consumer protection claims.

B. The Private Attorney General as Counterweight

Today, we find ourselves living through a highly divisive political period. As one measure, a 2019 survey found that 60% of Democrats regard the opposing party as "a serious threat to the United States"; for Republicans, that figure approaches 70%.[268] A Pew survey similarly found that over half of all Republicans and nearly half of all Democrats believe their political opponents to be "immoral."[269] With this sort of group polarization on the rise, politics has grown uglier and more rancorous as nearly every issue of modern living is "reduced to 'us' versus 'them'—that most basic (and dangerous) of human dynamics."[270] The January 6th attack on the Capitol and the ongoing attempts to discredit the 2020 election, efforts to make it more difficult for millions of people (particularly in communities of color) to vote, the battle over the right to abortion, and even the question of how to respond to a worldwide pandemic have divided the nation along stark party lines that often seem insurmountable.

The effect of hyper-polarized politics on actual governance is equally extreme. Consider the wide swing from the Trump Administration's goal of "deconstructing the administrative state," to the Biden White House's determined efforts to restore faith in the federal bureaucracy. The former engaged in a conscious campaign aimed at "cleaving and disrupting the federal government" by installing hostile agency heads, short-staffing agencies, relocating offices, scattering employees, and cutting budgets.[271] These hard-to-reverse tactics worked as intended, corroding agency morale and forcing mass departures of long-serving staff, and serving to derail ongoing regulatory actions and stymie new enforcement efforts.[272]

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268. *America's Political Parties Remain Polarized*, YOUGOVAMERICA (Mar. 28, 2019), https://today.yougov.com/topics/politics/articles-reports/2019/05/28/americas-political-parties-remain-polarized [https://perma.cc/H562-7DJH] ("Political polarization among the public may be at its highest point ever.").

269. *How Partisans View Each Other*, PEW RSCH. CTR (Oct. 10, 2019), https://www.pewresearch.org/politics/2019/10/10/how-partisans-view-each-other/ [https://perma.cc/HE6C-PV9T] ("Wide majorities in both parties—three-quarters of Democrats (75%) and 64% of Republicans—say those in the other party are more closed-minded than other Americans.").

270. Elizabeth Kolbert, *How Politics Got So Polarized*, NEW YORKER (Dec. 27, 2021), https://www.newyorker.com/magazine/2022/01/03/how-politics-got-so-polarized [https://perma.cc/ZNM2-Z9TX].

271. Lisa Rein, *The Federal Government Puts Out a "Help Wanted" Notice as Biden Seeks to Undo Trump Cuts*, WASH. POST (May 21, 2021), https://www.washingtonpost.com/politics/2021/05/21/biden-trump-government-rebuilding/ [https://perma.cc/P6G3-QBCT].

272. *Id.* ("As Trump rolled back regulations and aimed for a smaller, more targeted footprint, the government shed jobs in regulation, enforcement, civil rights, worker safety and other areas.").

When the Biden Administration entered office, it set out to repopulate decimated bureaus and bolster embattled staff.[273] But its greatest challenge was restoring agency missions and goals—reminding staff *why* they do what they do.[274] As one official put it: "[I]t was like [staffers] had PTSD after four years of working in a hostile environment [and we had to] reprogram them."[275] While the Trump–Biden scenario (hopefully) presents an extreme example of a political shift from the hard-right to the center-left, the dissonance generated by undulating political agendas is increasingly a feature of our system. Yet even as politics may ebb and flow, citizens suffering injuries in the marketplace are a constant. Deploying these citizens to steadfastly enforce consumer protection statutes generates a more stable administration of laws—a ballast against political storms and shifting enforcement priorities. Providing a private cause of action in § 5 may not depolarize politics, but devolution of authority to the citizenry can reduce the friction and conflict generated by pervasive factionalism.[276]

It is especially relevant that the FTC—the agency charged with the herculean task "of dealing with unfair and deceptive conduct targeted at consumers"—has itself weathered long bouts of political turbulence.[277] As an agency endowed with the power to disturb the nation's business interests (particularly those that donate heavily to presidential and congressional campaigns), the agency has regularly faced retaliation for taking politically unpopular positions. It has been, in the words of an ex-Commissioner, an agency where even "funeral directors and their allies in Congress just came after us with hatchets" when facing new rulemaking.[278]

Scott Budnitz has found that the FTC is especially vulnerable when Republicans—historically, the party most closely aligned with the interests of big business—control Congress or the White House; in these periods, the FTC is more likely to have its operating budget cut and face serious efforts to limit its authority than in Democratic administrations.[279] Budnitz traces this pattern of political

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273. *Id.*

274. *See, e.g.*, Joe Davidson, *Biden Urged to Rebuild the Relationship Between the Government and its Workers*, WASH. POST (Nov. 19, 2020), https://www.washingtonpost.com/politics/biden-federal-employees-trump/2020/11/18/b66ba798-2928-11eb-b847-66c66ace1afb_story.html [https://perma.cc/2DNA-6RT5].

275. *Id.*

276. *See* TAYLOR DOTSON, THE DIVIDE: HOW FANATICAL CERTITUDE IS DESTROYING DEMOCRACY 8–11 (2021) ("Depolarization requires citizens to release their death grip on party identity and embrace once again the identities that form a true community: family, student, worker, consumer.").

277. *See, e.g.*, CARTER, *supra* note 2, at 18 ("[T]here are so many businesses, transactions, and practices, and the day-to-day economic activity of the country is so immense, that public enforcement [alone] cannot do the job.").

278. *FTC at 100: Michael Pertschuk's Turbulent Years as FTC Chairman*, FTC WATCH (Jan. 15, 2015), https://www.mlexwatch.com/articles/1725/print [https://perma.cc/CMK8-HFT8] .

279. Budnitz, *supra* note 24, at 1164. Prof. Budnitz finds only one counterexample: the Nixon Administration's resuscitation of the agency in 1969, in an effort "to make it far more active in combating unfair and deceptive practices." *Id.*

retribution across a century. For example, as early as 1921—with the FTC still in its infancy—a new Republican majority in Congress held hearings on abolishing the FTC[280] and, after failing to achieve that outcome, expressed its extreme "displeasure with the FTC . . . by appropriating less money for the Commission."[281] Thirty years later, with Dwight D. Eisenhower in the White House and Republicans in control of both houses of Congress, the FTC was again made significantly "smaller, cheaper and less active."[282] This pattern repeated itself in the 1980s when Republican Congresses "fought the agency's efforts to regulate children's television advertising" by "limiting its rule-making authority and clapping a two-house legislative veto on future agency activities."[283]

These experiences have made clear that, "as political appointees, . . . FTC Commissioners are . . . subject to political pressure to pursue or not pursue certain types of actions."[284] In particular, transfers of power from one political party to another have proved extremely disruptive to the agency's stability.[285] These tectonic shifts have in recent years grown more extreme, as agencies like the FTC have become populated by ideologically oriented appointees rather than career officials.[286] The capacity to bring private claims would largely insulate enforcement

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280. *Id.*; *see also* Winerman & Kovacic, *supra* note 53, at 161 n.56 (reporting that the "farm bloc" in the Senate was said to have "guarded the agency from efforts to abolish it") (internal citations omitted).

281. Jack Crespin, A History of the Development of the Consumer Protection Activities of the Federal Trade Commission 97 (1975) (Ph.D. dissertation, New York University). A year earlier, in the wake of a damning FTC investigation into the meat-packing industry, Senator Watson, a Republican from Indiana, "introduced a resolution calling for a Senatorial investigation of the FTC. In the preamble of the resolution, he alleged that a number of the employees of the FTC were avowed socialists indulging in socialistic propaganda." *Id.* at 94.

282. McMannon, *supra* note 27, at 167–70 (observing that "Eisenhower's first step in turning [the FTC] from a Democratic stronghold to a body with a Republican philosophy was nominating attorney Edward F. Howrey," who "put his personal stamp" on the FTC by "acquiescing in a decreased budget allocation as suggested by the White House Bureau of the Budget and firing or demoting staff members").

283. Susan J. Tolchin, *Revolt Against Regulation*, 46 J. POL. 622, 623 (1984). *See also* Budnitz, *supra* note 24, at 1167 ("Under the Reagan administration . . . the FTC's budget was cut drastically and the FTC almost immediately stopped proposing new regulations.").

284. Henry N. Butler and Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 165 n.11 (2011)*; see also* Sovern, *supra* note 29, at 441 (observing that "at least some commissioners will remain sensitive to the winds of political life").

285. *See, e.g.*, Winerman & Kovacic, *supra* note 53, at 201 (observing that one of the biggest challenges faced by the FTC is "set[ting] priorities and execut[ing] them"—a challenge made more difficult "by political transition"). *See generally* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. L. REV. 471 (2015).

286. *See, e.g.*, David E. Sanger, *Biden Team Rushes to Take Over Government and Oust Trump Loyalists*, N.Y. TIMES (Jan. 27, 2021), https://www.nytimes.com/2021/01/27/us/politics/biden-government.html [https://perma.cc/Z4UN-9RC5] (describing "the blistering pace at which the new president has put his mark on what President Donald J. Trump dismissed as the hostile 'Deep State'

from these shifting political winds while preserving limited FTC resources for more complex cases.[287] And importantly, allowing a private right of action would further the 1914 Congress's original goal of consumer protection—a goal that was reiterated in 1938 with the passage of the Wheeler–Lea Act and one that has grown only more critical in the modern era.

CONCLUSION

Despite multiple attempts to reform or banish the private attorney general,[288] this quintessentially American construct has survived for nearly two centuries—and continues to occupy a central role in the evolving discourse on the optimal means of enforcing public law.[289] This discourse takes as a given that governmental agencies have neither adequate time nor resources to bring enforcement actions against all (or even most) wrongdoers; thus, positioning private actors as frontline enforcers effectively shifts the costs of investigation and litigation onto those parties. So, the argument goes, if society wants greater enforcement without expending greater resources, private litigation—flaws and all—presents our best option.[290]

Proponents of private enforcement regimes have long relied on these pragmatic, instrumentalist arguments to justify their policy preferences. And certainly, the capacity for private enforcement to serve a "structural, gap-filling role in regulatory governance" of consumer transactions is critical to my argument in favor of amending the FTC Act to add a private right of action.[291] But this Article goes a step further, offering a novel theoretical justification for deploying private litigants as a central enforcement corps: in this era of highly polarized politics, the

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and tried so hard to dismantle"); Emily Badger et al., *The Government Agencies That Became Smaller and Unhappier Under Trump*, N.Y. TIMES (Feb. 1, 2021), https://www.nytimes.com/2021/02/01/upshot/trump-effect-government-agencies.html [https://perma.cc/2F7T-F624].

287. Jeff Sovern observes that the FTC's budget and staffing has not increased since the Reagan Administration. Sovern, *supra* note 29, at 442.

288. *See also* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006).

289. *See, e.g.*, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 624 (2012) ("There is a deep tradition of private involvement in the enforcement of public laws in America.").

290. *See, e.g.*, Myriam Gilles & Gary Friedman, *Can John Coffee Rescue the Private Attorney General? Lessons From the Credit Card Wars*, 83 U. CHI. L. REV. 1101, 1031 (2019) (discussing the argument that the "private bar is not interested in calibrating to some optimal deterrence level; its disposition is always maximalist"; "[t]he politically accountable public enforcer, on the other hand, will tend to seek a point of equilibrium in the public interest").

291. Luke Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1488 (2022); *see also* Olatunde Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1346–48 (2012) (explaining that private attorneys general are lauded for "supplementing" state authority and helping to "cope with state incapacity," and also explaining how this form of enforcement is understood as "effectively delegat[ing] pursuit of the statute's public goals to private parties").

private enforcer acts as a ballast against extreme political fluctuations. Deploying private citizens to continually enforce consumer protection laws—no matter the party in power or the Commissioner in charge—generates a more stable, enduring administration of laws and helps to ensure that corporate actors remain firmly deterred from engaging in widespread misconduct. This theory intersects with other justifications offered in support of private enforcement—such as the claim that these regimes contribute to participatory and deliberative democracy[292]—but operates on a different register. My reasoning is borne of a deep anxiety that polarized politics threaten to undermine and disrupt future public enforcement at both the federal and state levels. The private attorney general, on the other hand, is largely immune to the rise and fall of electoral politics, and this steadiness may prove critical in the turbulent era that surely lies ahead.

292. *See* Burbank et al., *supra* note 219, at 666.