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Private Power and Public Policy: Rights Enforcement in the Modern Litigation State

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CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE (Univ. of Chi. Press 2009). Pp. 368. Cloth. $72.00. Paperback. $24.00.

SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (Princeton Univ. Press 2010). Pp. 302. Cloth. $75.00. Paperback. $27.95.

DONALD G. GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION (Univ. of Mich. Press 2010). Pp. 318. Cloth. $80.00.

The familiar narrative of the American administrative state stresses its weakness in authority and capacity. As a product of both cultural and institutional forces — widespread fear of centralized, bureaucratic authority, and the existence of constitutional checks and balances and separation of powers that lead to pervasive institutional fragmentation — state building in the United States has consistently been considered laggard in comparison to the European model of a strong, centralized government that administers a wide range of social welfare programs. The judicial branch in particular has often been cast as a structural roadblock to the growth of an administrative state. In this executive-centered understanding of state regulatory capacity, courts serve more often than not to check the exercise of centralized state power and to inhibit the ability of the state to implement policy choices. The burgeoning regulatory state of the early 20th century is commonly juxtaposed with the resistance of the Supreme Court; only once the Court backed down in its famous 1937 confrontation with Franklin Roosevelt could the regulatory state begin its growth. Even still, in a society persistently skeptical of strong government, "the state" continues to fall short of the Weberian template, as courts continue to veto the work of the elected branches.[1] In this narrative, in other words, courts are an institutional obstruction to the goals of the modern state.

There is another story, however, one that has been increasingly developed in political science, policy, and law literatures, and to which three recent volumes

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1. *See* MAX WEBER, ECONOMY AND SOCIETY 212-45 (Guenther Roth & Claus Wittich eds., 1978).

excellently contribute. In this narrative, courts are far from easily disentangled from state authority. The developments of the rights revolution and the propensity of Americans to prefer law over politics have led to an extensive reliance on the courts to address questions of politics and policy, constituting a "juridification" of American politics in which the law is called upon to supplement state power.[2] In a system of separated but shared powers where Congress and the president struggle to control the administrative state, politicians frequently rely on courts to step in and fill the vacuum when political leaders either cannot agree or are heavily confined by a variety of veto points.[3] This leads to a different form of state building in which courts and judges—sometimes even the mere existence or threat of them—play a crucial role. While the choice to rely on private litigation as a means of enforcing or even establishing government policy—famously described by Robert Kagan as "adversarial legalism"—may result from the relative weakness of classic bureaucratic alternatives for pursuing policy goals, the end result is a "litigation state" where the courts feature as a central player not only in interpreting the law, but in the complex policy making and enforcement process.[4] In other words, by understanding regulatory state capacity and institutional change as the product of complex negotiations between multiple governing institutions with overlapping authorities, "private litigation is state power exercised *through* society."[5] From this perspective, what at first appears to be the pervasive weakness of the American state becomes its strength.

The recent books by Charles Epp, Sean Farhang, and Donald Gifford illustrate the centrality of law and courts to the state, as well as the value of situating them in this broader institutional context. In aggregate, the authors examine the origins and effects of private litigation as a means of enforcing policy as the product of, as Epp puts it, "the ongoing conflict over the practical meaning of the civil rights revolution."[6] While public law scholars often focus primarily on judicial decision making and developments in constitutional doctrine in their analyses of this debate, the authors focus on the effects of

2. Gordon Silverstein recently employed the term to describe this phenomenon. GORDON SILVERSTEIN, LAWS ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 1-11(2009).

3. *See* Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 117 (Ronald Kahn & Ken Kersch eds., 2006); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511 (2002); Mark Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV.35 (1993).

4. *See* CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (2000); PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (2008); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001); R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994); GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS (2009); Frank Dobbin & John R. Sutton, *The Strength of the Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions*, 104 AM. J. SOC. 441 (1998); John D. Skrentny, *Law and the American State*, 32 ANN. REV. SOC. 213 (2006).

5. SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 9 (2010).

6. CHARLES EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 14 (2009).

an enduring institutional choice; the choice of elected officials to enlist citizens to enforce the law and resolve policy conflicts through private litigation. Epp, Farhang, and Gifford further develop the existing literature cited above by studying private enforcement regimes as the outcome of interbranch negotiations and explaining the various ways in which these regimes have (and sometimes have not) led to profound reform of both policy and administrative capacity. In so doing, the authors could not make clearer the explanatory value of situating law and courts into the broader policymaking process in which a confluence of actors produce, enforce, and interpret policy; of examining the way in which courts subsequently contribute to our understanding of the administrative state; and of illustrating the ways in which entrenched legal rules and procedures become instruments that exert influence on politics and decision making.

In *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State*, Charles Epp seeks to explain the recent law-driven reform of bureaucracy in the U.S., in turn providing a series of excellent case studies that contribute to all three of these points. As he describes, over the course of the past quarter-century "activists and bureaucratic reformers pushed through law-modeled reforms that radically reframed the core assumptions and tools of government administration."[7] In response to pressure from activists working to see rights policies made "real" in practice, reformers internal to administrative agencies elected to adopt written rules, formal training programs, and internal oversight procedures to ensure compliance and to bring them closer in line with policy commitments and legal norms. These changes were not required by law or judicial mandate—nor were they necessarily sold as efforts to better comply with the law—but rather stemmed from the fear of lawsuit and liability threatened by activists seeking to solve the problem of inconsistently or incompletely applied policies. As activist groups continued to pressure resistant bureaucracies, who in turn feared that liability lawsuits would deeply threaten their professional legitimacy, administrators came to believe that adopting and applying legal norms through managerial mechanisms were valuable contributions to the profession itself.

Epp details the rise of this framework, which he calls legalized accountability, through local level administrative reform in three policy areas: police brutality (in both the U.S. and U.K.), workplace sexual harassment, and playground safety. He illustrates through these cases how real bureaucratic reform was driven by a complex dynamic between divided sources. In the area of sexual harassment policy, for example, as activists pressed the issue of sexual harassment onto the public agenda (both in the public and private sector), they framed it as a problem of organizational responsibility, going as far as to craft and recommend concrete proposals to solve the problem. While professional personnel administrators initially resisted adopting the formal policies and grievance procedures promoted by activists, the increasing threat of liability—along with the Supreme Court and the EEOC's endorsement that sexual harassment was a problem—drove them to act quickly. Subsequently, as Epp describes, by the new millennium these policies had spread widely through city governments (and were most

7. *Id.* at 1.

substantive where the threat of lawsuit was most acute, and the connections of activists to managerial professionals deep), influencing policies later adopted in the private sector as well. As such, legalized accountability was the joint creation of activists and administrators, leading to reforms that were ultimately substantive, not merely symbolic.

Epp's finding — that law-inspired bureaucratic reform was in fact a joint creation of activists and professional administrators — is a crucial addition to the literature on administrative reform and institutional change more broadly. As he notes, these developments are most often explained as the response of resistant administrators dealing with the threat of liability by begrudgingly adopting policies that they believed were against their best interest,[8] or as symbolic responses leveraged to deal with a litigation-driven society.[9] True reform is lacking, it is often argued, because the distorted narrative of lawsuits in the media stresses the "sue-happy American" story, thereby downplaying the need for change.[10] Neither narrative, however, deals effectively with the reality of the bureaucratic reform that has occurred, nor does it explain the "professionalization" of administrative agencies. While reform initiatives aimed on the one hand to deal with the "bad apples" in places like the local police force, they also aimed at "thoroughly changing organizational cultures and practices from top to bottom in the name of individual rights and safety."[11] Although Epp does note that the thoroughness of these reforms certainly varies from time to time and place to place, he does a major service to our understanding of this ongoing dilemma by pointing to the ways in which activists shaped bureaucrats' understanding of the threat of liability, leading to a professionalization of administrators in response to this threat.

The relationship here between law and bureaucratic reform/professionalization provides an important addition to the literature in public policy on the processes of entrenchment and path dependence as well. With the "juridification" of the 20th century came a wide variety of institutional and doctrinal developments granting access to courts for suits against government actors. The entrenchment of those mechanisms has led, as evidenced in Epp's cases, to the widespread expectation of lawsuit. What is perhaps most striking about Epp's analysis is the degree to which the mere *threat* of lawsuit, most often without any actual legal action, prompted administrators to adopt such legalistic rules and procedures of their own accord. This goes beyond administrators simply responding to judicial mandates[12] and beyond the role that the growth of the liberal legal network played in supporting the threat of litigation.[13] And while this may still be cast as administrators simply acting in their own perceived best interest, it is difficult to downplay the way in which the presence of "the law" shaped administrators' understanding of what would constitute real reform, or to leave the book unconvinced of

8. *See* KAGAN, *supra* note 4.

9. *See* Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999).

10. *See* WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004).

11. EPP, *supra* note 6, at 14.

12. *See, e.g.*, FEELEY & RUBIN, *supra* note 4.

13. EPP, *supra* note 4; *see also* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2008).

the need to incorporate court-led bureaucratic reform into our understanding of the administrative state.

In *The Litigation State: Public Regulation and Private Lawsuits in the United States*, Sean Farhang directly challenges the same narrative that stresses the weakness of the American state. While the institutional fragmentation inherent in our system of government leads to a lack of executive-centered "bureaucratic power," these very same characteristics, he argues, are "generative of a different form of state-building;" one that relies fundamentally on private litigation.[14] Farhang examines private enforcement regimes—in which policies are enforced by lawsuits brought by private parties—in the case of civil rights policy, and job discrimination policy in particular. He argues that the decision to institute a system of private enforcement was fundamentally a product of the ongoing conflict between Congress and the president over control of administrative state. The author uses both empirical models and process-tracing evidence in order to weigh competing explanations for enhanced reliance on private enforcement in this policy area. This approach allows him to thoroughly and persuasively argue that the evidence "strongly links polarization between Congress and the president since the late 1960s to the steep growth of private enforcement regimes during the same period, and correspondingly to the growing empowerment of private litigants, lawyers, and courts in the implementation of American policy."[15]

Farhang considers several competing explanations in his analysis, which involve the role that rent-seeking lawyers, changing party alignments, issue-oriented citizens groups, judicial ideology, veto points, policy drift, and budgetary concerns played in the decision to institute private enforcement regimes in the Civil Rights Acts of 1964, 1991, and the various related legislative enactments of the period, among them the Equal Employment Opportunity Act and the Civil Rights Attorneys' Fees Awards Act. In addition to rendering his findings particularly persuasive, his analysis of these competing explanations produces several illuminative conclusions that challenge the inherited wisdom regarding the origins, use, and effects of these now-common private enforcement regimes. For example, while the Civil Rights Act of 1964 certainly created a private civil rights bar that did not previously exist (and that benefits considerably from the legislative choice to rely on private litigation), trial lawyers were not a significant force in adopting these provisions. They subsequently mobilized to entrench opportunities for attorneys' fee producing litigation; but the original pressure came primarily from conservative Republicans that sought to avoid bureaucratic regulation of business, as well as from civil rights groups that believed private enforcement was necessary for any of the benefits of civil rights legislation to be realized in practice.

It is not the case that private enforcement regimes simply stem from Democrats acting as "the party of trial lawyers," either. In fact, far from acting as "monopoly producers of legislation fostering private litigation,"[16] Farhang finds no statistical evidence of the strong version of this claim. Rather, he finds instead that the variation between the two parties' use of private enforcement regimes are "differences in degree

14. FARHANG, *supra* note 5, at 214.
15. *Id.* at 18.
16. *Id.* at 229.

and not kind." It is true that Democrats are more likely to rely upon private litigation, but major civil rights legislation passed with overwhelming Republican support, with Republicans often specifically promoting the private enforcement provisions. Another prominent competing theory—that the distance between the reigning judicial ideology and Congress prompts legislators to enact systems of private enforcement—is also found statistically insignificant. While the process-tracing evidence suggests that the reality may be somewhat more ambiguous, neither the judiciary's distance from Congress, nor whether the judiciary is moving toward or away from Congress ideologically, explains the frequency with which legislators enact private enforcement regimes.

As Farhang notes, more often than not policy enforcement through private litigation falls outside the purview of state-centered scholarship. But as scholars such as Thomas Burke and Shep Melnick also stress, "it is a *legislative choice* to rely upon private litigation in statutory implementation" and fundamentally a product of our fragmented state structure.[17] That choice is influenced by a variety of factors; but a private enforcement regime is particularly attractive under conditions of divided government and increased party polarization. By relying on private litigation, legislators put policy implementation on autopilot, protecting it from erosion from future congresses or resistant bureaucrats. By seeking to ensure implementation and protect policy commitments in this way, legislators explicitly use the courts as a vehicle for buttressing state power.

Where Farhang examines the concerted legislative choice to rely upon private litigation as a means of enforcing civil rights legislation, in *Suing the Tobacco and Lead Pigment Industries: Government Litigation as Public Health Prescription*, Donald Gifford addresses recent and ongoing lawsuits aimed to fill a perceived "vacuum" due to legislative *in*action. Late in the twentieth century, in the face of what had become an unprecedented public health problem, victims of tobacco-related diseases, childhood lead poisoning, and diseases caused by asbestos exposure found themselves without legislative support or the ability to sue manufacturers in court and recover damages. Because, for example, it was nearly impossible to identify the manufacturer of lead pigment contained in the paint applied to the walls of a child's home nearly a century earlier, and because historic conceptions of tort injury in the U.S. require that plaintiffs directly link their alleged injury to a specific action or product of the defendant, victims faced a nearly insurmountable barrier to recovery. In a thorough, clear, and most importantly accessible account of this transformation in tort and product liability law, Gifford examines the ways in which the plaintiffs bar (and state attorneys' general in particular) stepped in to fill this void in a creative way, employing novel interpretations of tort law to bring victims' cases to court through *parens patriae* litigation.

Gifford roots his analysis in the familiar case of state suits against tobacco manufacturers, beginning in the mid 1990s and culminating in the Master Settlement Agreement (MSA), before moving on to the public nuisance claims subsequently filed by several state attorneys general against former manufacturers of lead pigment. Crucial to understanding both how these claims made it to court and why they were ultimately

17. *Id.* at 3. *See also* THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002); MELNICK, *supra* note 4.

rejected, he begins with a detailed overview of the legal developments that laid the foundation for these cases. Specifically, as part of the development of environmental law in the 1970s and 1980s, courts began to allow for mass product torts that were not limited solely to individuals suffering a discrete injury, but that were conceived as collective harms that could be governed by other areas of the law (namely public nuisance). During the same period, personal injury lawyers began to frame product liability cases as efforts to remedy major public health issues, as with the proliferation of claims against asbestos manufacturers. Together, these changes allowed for states to sue, as *parens patriae*, on behalf of their residents to recover damages from tobacco and lead pigment manufacturers, successfully giving victims the potential of government redress for their injuries, arguably for the first time.

Gifford argues, however, that these developments in legal doctrine "would make alchemists proud,"[18] and that the expansion of public nuisance and *parens patriae* litigation for these products cases was ultimately misguided. The crux of his critique rests on two assertions. First, he notes that while it may be tempting to look to courts to solve these public health problems (given their heightened role in the policy process since the civil rights era), remedial efforts from the courts are unlikely to be successful. Second, he argues that the use of these suits by states attorneys are at base undemocratic in light of our system of separation of powers. In support of his first claim, he cites the MSA as both a disappointment and a lost opportunity for obtaining lasting change, one that stemmed from the error of pursuing a judicial solution. To the second, he argues that states like Rhode Island not only failed to achieve their goals through litigation, but also "inflicted intangible, but important, harm to the constitutional allocation of powers among the three coordinate branches of government" by allowing state attorneys general to use the courts in order to take on "responsibilities constitutionally assigned to the legislative branch."[19] While the author's assertion that judicial remedies will necessarily be insufficient is mostly conjectural, he deepens our understanding of this policy problem by weighing the pros and cons of a judicial solution against the possibility of alternate institutional responses. In so doing, he also elucidates how much is missed by studying judicial decision making in insolation from the wider policymaking process. This locates him alongside scholars like Jeb Barnes who seek to bring courts into our understanding of "policy drift," or the ways in which stable institutions adapt to changing political and policy circumstances.[20] Courts are certainly active participants in this process, and viewing them as such allows Gifford not only to critique these particular judicial innovations, but also to make concrete policy prescriptions.

All three of these books fit squarely into a growing cohort of scholars that bridge the fields of law and public policy in the pursuit of explaining administrative, legal, and

18. DONALD GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION 5 (2010).

19. *Id.* at 218-19.

20. *See* Jeb Barnes, *Bringing the Courts Back In: Interbranch Perspectives on the Role of Courts in American Politics and Policymaking*, 10 ANN. REV. POL. SCI. 25 (2007); Jeb Barnes, *Courts and the Puzzle of Institutional Stability and Change: Administrative Drift and Judicial Innovation in the Case of Asbestos*, 61 POL. RES. Q. (2008).

policy change. The books meaningfully advance that scholarship in a variety of ways. Scholars in these subfields have increasingly stressed the value of studying the law not just as courts, constitutional doctrine, and judicial decision making, but as active participants in the policymaking process. These scholars therefore situate questions of law and policy in an interbranch context, where institutional actors interact in complex ways and weigh in—based on the tools at their disposal—at different moments in the policymaking process. It may be that we could understand the development of a private enforcement regime, for example, as the product of rent-seeking lawyers, or lead pigment litigation as a manifestation of American litigiousness. But these explanations capture just one aspect of the picture. For example, the decision by victims of lead paint poisoning to litigate their claims was based not merely on a general propensity to sue, or on some strongly held belief that the judicial branch was necessarily the "right" venue for their grievances. It was a product of their belief that the other branches of government had failed them. And while Gifford argues that their subsequent failure in court was at some level to be expected, his interbranch analysis draws attention to the moments of choice inherent in the policy process where inaction on the part of legislators or innovation on the part of lawyers and judges is just one phase in a much longer process. By situating the evolution of *parens patriae* litigation or attorneys' fee-shifting legislation in the context of alternate responses from other governing institutions, the authors capture the complexity of these policy problems and show that judicial policymaking is best understood not just as activist innovation on the part of judges, but as a product of this institutional arrangement.

The propensity on the part of public law scholars to study the law and courts in isolation comes with another cost. Each of the authors demonstrates, either implicitly or explicitly, the role that the courts play in American state building and policymaking. This is most recognizable when courts and judges step in to fill a policy vacuum, as in Gifford's analysis. But the role of the judicial branch in American state building is even more foundational. As Farhang and others show, relying on courts to carry out the policy-related duties of the other branches of government is often a self-conscious legislative or executive choice. Choosing to institute a private enforcement regime, however, does more than simply empower the courts to play a bigger role in the administrative state; it bolsters and transforms the state itself and the manner in which government actors understand and carry out public policy. The massive private enforcement regimes implemented by Congress have, as Farhang puts it, "penetrated and controlled spheres of the economy and society spanning the waterfront of federal civil regulation."[21] In this way, state building is not just a government project, but also a societal one; by incentivizing private litigation,

> a great deal of American regulatory state control has taken the form of radically decentralized intervention by an army of litigants and lawyers licensed by the state and paid bounty by defendants at the state's command. Because of the distinct structure of American political institutions, America's regulatory state has taken a distinct form — one

21. FARHANG, *supra* note 5, at 214

importantly dependent upon private litigation.[22]

This is perhaps clearest in Epp's work. The legalistic rules and procedures implemented by local police forces and city governments were more than symbolic gestures. The law—or the threat of the law—was a key component that led administrators to adopt formal practices that would put teeth into the promises of major rights revolution legislation. These practices served the interest of administrators in allowing them to protect themselves from lawsuits, but they also created true bureaucratic reform. The reason that Epp's analysis so nicely illustrates the role that the law plays in public policy and the state is because of how clearly necessary the threat the litigation was to realize these reforms. Yet change did not come at the hands of judicial decree. Instead, reform was the joint creation of activists and administrators (itself a strong case for the importance of studying the legal developments in an inter-branch, policy-specific context), and "each was necessary to the development, but neither was sufficient alone."[23]

Law and politics scholars can continue to fruitfully engage with state development scholars in exploring the complex relationship between the judicial branch and the American state. As historical institutional scholars such as Karen Orren, Stephen Skowronek, and Paul Pierson argue, the roles played by our governing institutions are not static, nor do they remain closely delimited by their constitutional mandates.[24] Rather, they change over time, not only as an outcome of interactions with other governing institutions, but also in response to the particular temporal moment in which they become involved in matters of politics and policy. Courts may be entrenched as a potential avenue to state building, as these three books illustrate; but courts, like other institutions, are constantly developing in response to politics and policy, transforming in ways that entrench, but may alternatively retrench the ability of the state to rely on the law. To understand courts as political actors, then, is also to recognize their temporal instability.

22. *Id.*

23. EPP, *supra* note 6, at 195.

24. KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT (2004); PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS (2004).