

2020

The Other Half of Regulatory Theory

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Recommended Citation

Dagan, Hanoch and Kreitner, Roy, "The Other Half of Regulatory Theory" (2020). *Connecticut Law Review*. 471.

https://opencommons.uconn.edu/law_review/471

CONNECTICUT LAW REVIEW

VOLUME 52

JULY 2020

NUMBER 2

Article

The Other Half of Regulatory Theory

HANOCH DAGAN & ROY KREITNER

Theories of regulation conceptualize the task of the agencies of the modern state in terms of the public interest. Regulatory agencies, in this conventional view, should ensure the efficient allocation of scarce resources and secure distributive justice and democratic citizenship. Many agencies nicely fit this aggregative mold, but not all. A significant subset of the regulatory practice—the second half of the universe of regulation—deals with a different task: delineating the terms of our interpersonal transactions, forming the infrastructure for our dealings with other people, both private individuals and firms. This Article focuses on these relational regulators, which regulatory theory marginalizes or neglects.

Descriptively, we show that many agencies are best understood as devices that supplement or supplant the role of courts in addressing horizontal, rather than vertical or aggregative, concerns. In other words, many of the practices and operational codes and sensibilities of these agencies are best conceptualized as responses to the horizontal challenges of the creation of the infrastructure for just interpersonal relations in core social settings, such as the workplace or the market. Normatively, we argue that the seeming consensus among theorists of both regulation and private law, in which these tasks belong to judges rather than administrators, is misguided. In many contexts—increasingly prevalent in contemporary society—agencies, rather than (or in addition to) courts, may well be the appropriate institution, or at least an additional institution, for the articulation, development, and vindication of our interpersonal rights.

The analysis yields the initial steps towards a more complete theory of relational regulatory agencies that makes sense of their core practices. We demonstrate the regulatory implications—in both substance and form—of undertaking the role of establishing and maintaining the infrastructure for just interpersonal interaction, and we advance a preliminary account of the regulatory toolkit appropriate to this relational task.

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The Other Half of Regulatory Theory

HANOCH DAGAN & ROY KREITNER*

INTRODUCTION

Regulatory theory suffers from a fundamental misconception at its core. The misconception lies in an overly narrow idea of the purposes that regulatory agencies should pursue, and thus a constricted view of the very rationality of regulation. According to the misconceived but dominant view, regulatory agencies must advance the public interest which they can and should see only through aggregates. Attention to the relations among individuals, or relational justice, is considered beyond their purview. The corollary of this dominant view is that relational justice among individuals is a matter for courts, adjudicating traditional private law disputes. The institutional division of labor implied by such a view may be a convenient heuristic, but it is a serious mistake for anyone seeking a compelling account of how many regulatory agencies actually function. It is an even deeper mistake for a broad account of how law contributes to generating the infrastructure for just interpersonal interactions in modern states.

Correcting the common misconception requires a multi-level inquiry, which we pursue in the following pages. The inquiry yields, eventually, an enriched theory of regulation which recognizes that regulators rightfully pursue both collective goals and interpersonal justice. It overcomes an unrealistic vision of the institutional division of labor between courts and agencies, and it begins to develop the tools for improving regulatory practice. It points the way towards understanding the creation and development of the infrastructure for just relationships as a joint venture between legislatures, agencies, and courts. In particular, it highlights

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elements of the regulatory toolkit for participation in the creation of a just social infrastructure.

The ground level of our analysis relies primarily on straightforward empirical observation, and the discrepancy between such observation and the misconceived view of institutional division of labor. Concretely, this is simply a matter of searching out the sources of the norms that ground our routine interactions. Private law entitlements delineate the terms of interpersonal transactions, forming the infrastructure for our dealings with other people. Those rights have a range of sources; more specifically, the entitlements relevant to interpersonal relations comprise norms with different institutional pedigrees. Some are doctrines familiar from casebooks in first year private law courses: trespass; nuisance; the duty to pay damages upon breach, and the limitation of that duty by doctrines of foreseeability and mitigation; the requirement of returning mistaken payments; etc. Many more, however, are the products of regulatory agencies: the Occupational Safety and Health Administration (OSHA) defines the duties of employers to provide safe workplaces;¹ the Consumer Financial Protection Bureau (CFPB) determines which lending practices are unfair, deceptive, or abusive;² the National Labor Relations Board (NLRB) determines rights and obligations of collective bargaining;³ the Office of Fair Housing and Equal Opportunity (FHEO) and the Equal Employment Opportunity Commission (EEOC) determine prohibitions on discrimination;⁴ the Agricultural Marketing Service (AMS) establishes quality grading and a code of fair business practices, including dispute resolution;⁵ and the Food and Drug Administration (FDA) sets safety standards and labeling requirements for food and pharmaceuticals.⁶

This list is meant to be exhausting, not exhaustive. Examples of regulatory agencies acting to create or maintain the infrastructure of daily interaction in market societies are legion—we could not hope to offer a comprehensive list. We have limited our attention here to major administrative agencies; the claim of regulatory contribution to the infrastructure of interpersonal interaction could easily go further. For a simple example, consider the effect of zoning on both real property

¹ See *infra* text accompanying notes 127–33 (describing OSHA’s feasible risk reduction test).

² See *infra* text accompanying notes 167–70 (describing CFPB’s authority and definition for finding an act or practice abusive).

³ See *infra* text accompanying notes 205–07 (describing employees’ right to unionize and bargain with their employers).

⁴ See *infra* text accompanying notes 211–13 (describing the EEOC’s and FHEO’s interpersonal focus within their respective agencies).

⁵ See sources cited *infra* notes 186–87 (discussing horizontally oriented agencies including the USDA: specifically, the way in which the USDA as an agency takes care to address complaints, and how the PACA division of the USDA resolved approximately 3500 claims in the past three years).

⁶ See sources cited *infra* note 236 (discussing hybrid agencies (the FTC, SEC, and FDA) and their aggregative and horizontal features).

transactions and, even more straightforwardly, the reciprocal rights and duties of members of a local community. A similar point can be made, for example, regarding state housing codes that not only regulate building safety but set the baseline entitlements tenants have a right to expect when they rent apartments from landlords.⁷

In short, the system of entitlements that undergirds interpersonal transactions is a joint product of traditional common law rules and agency-developed regulatory norms. Our observation here is not a discovery, but more of a reminder. Whatever one thinks of its history, this is relatively obvious as a matter of *description*: modern market societies structure the interactions among individuals in thickly populated forests of legal norms. It is difficult to imagine a modern society without such infrastructure. And because of how pervasive regulatory norms are in this infrastructure, it seems to us unwieldy and unproductive to imagine them as mere appendages to the system of entitlements.

The next level of inquiry moves us from the descriptive to the normative realm. Some versions of private law theory claim that common law rules should be the exclusive backdrop for interactions among individuals. Those views place judges at the center of responsibility for interpersonal justice, and legislation or regulation on the distant periphery as alien add-ons or late-coming policy interventions.⁸ More importantly for our purposes, the same presupposition underlies the dominant voices in regulatory theory, which is our focus here. For the most part, regulatory theory views the task of regulatory agencies as serving a collective, as a collective: they should ensure the efficient allocation of scarce resources, or secure distributive justice, democratic citizenship, and the like. Thus, regulators have no business in securing relational justice; focusing on the horizontal dimension—the interactions among individuals—would distract them from the big picture and thus undermine their core responsibility.⁹

Taken to its logical limits, this view in regulatory theory questions the very rationality of some core instantiations of regulatory practice. To take one example that we develop at greater length below, consider OSHA's feasible risk reduction requirement, which is expressly based on a direct relation between particular employers and employees, and explicitly rejects aggregate cost-benefit analysis. Some theorists take this as evidence that

⁷ Cf. Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 571 (2017) (explaining the authority of local agencies and the type of functions these agencies have).

⁸ This conceptualization of the legal terrain is implicit in most private law casebooks as well as in prominent theoretical accounts that take the category of private law seriously (*viz.*, corrective justice and civil recourse). See *infra* text accompanying notes 46–47, 75–92 (discussing the conventional understanding of the domain of private law and Friedrich Hayek's critique of the regulatory state).

⁹ See *infra* text accompanying notes 20–24 (discussing the conventional, strictly aggregative, understanding of regulation).

OSHA's practice is normatively deficient and even unintelligible.¹⁰ Cass Sunstein, for example, argues that because "one OSHA regulation protects a large number of lives at relatively low cost, while another regulation protects a small number of lives at a relatively high cost," OSHA is probably unconstitutional.¹¹ When theory is at a loss to explain core features of practice, it is not necessarily a good sign for theory. In fact, once we develop a richer theory of the purposes of regulatory agencies and account for their role in generating an infrastructure for just relations among individuals, regulatory rationality is rescued, as theory and practice align.

Interestingly, much private law theory and most regulatory theory share a double mistake. First, they both assume that what they perceive as the core activity of each sphere (relational entitlements for private law theory; collective or aggregative conceptions of the public interest for regulatory theory) exhaust the types of reasoning that should govern these practices. Second, they both assume that different institutions (judges alone for private law theorists; regulators alone for regulatory theorists) always work with wholly different logics and without shared purposes. This conventional wisdom divides the world much too neatly, and ignores too much necessary complexity.

We proceed as follows. In Part I, we develop the argument that the conventional view, in which relational concerns are alien to the mission of the state's regulatory apparatus, is misguided. In many contexts—increasingly prevalent in contemporary society—agencies, rather than (or in addition to) courts, are appropriate institutions for the articulation, development, and vindication of our interpersonal rights. Administrative regulation is often useful and sometimes indispensable for establishing and maintaining the infrastructure for interpersonal interaction in complex societies.

This means that our relational infrastructure, often termed private law, is and should be a product of a joint venture of common law courts and administrative agencies. To the extent that private law theory tends to be court-centric, it will not be capacious enough. At the very least, a singular focus on courts limits the institutional and procedural imagination as to how law contributes to our interpersonal, horizontal relationships. Releasing private law theory from this stricture is an important task, but beyond our current concerns.¹² What is important for us here is another detrimental effect of this mistake. Presupposing that the regulatory apparatus should be dedicated solely to aggregative tasks impedes the vision of regulatory

¹⁰ See Jonathan S. Masur & Eric A. Posner, *Against Feasibility Analysis*, 77 U. CHI. L. REV. 657, 707, 709 (2010).

¹¹ Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1410 (2008).

¹² See Hanoch Dagan, *The Challenges of Private Law*, in PRIVATE LAW IN THE 21ST CENTURY 67, 82–84 (Kit Barker et al. eds., 2016) (introducing the challenge of incorporating regulatory means into private law).

theory, causing it to miss the potential that agencies wield in the interpersonal realm.

In Part II, we turn our attention to agencies with direct bearing on horizontal relations among individuals, including firms. These agencies fulfill indispensable tasks in sustaining many of our interpersonal interactions and securing their compliance with the injunctions of relational justice. Our particular focus is on the legal reasoning that guides these agencies when they create, develop, or apply the norms that shape entitlements. Working for the most part inductively, we show that regulatory practice has more in common with traditional private law reasoning than has been hitherto appreciated. Our analysis of these horizontally-oriented agencies reveals how many of their practices and operational codes and sensibilities are in fact adapted to their task of providing the infrastructure of just relations. One way to put this conclusion is that it offers a mirror-image of the familiar legal realist insight as to the public dimensions of private law.¹³

Certain aspects of both the substance and form of these agencies, which may seem off track from an aggregative perspective, become straightforward once conceptualized as responses to the horizontal challenges of participating in the creation of the infrastructure for just interpersonal relations in core social settings, such as the workplace or the market. Our evidence relies heavily on the way regulatory agencies (OSHA, EEOC, NLRB) generate and maintain the baseline for just work relationships.¹⁴ Indeed, much of the legal infrastructure of the employer-employee relationship in contemporary settings in which law takes certain contracting options off the table and uses other, more subtle techniques to empower employees is not judge-made, but rather the product of legislators and regulators.

These and other examples we discuss in Part II allow us to sketch a preliminary prototype of relational agencies, thus filling the gap between regulatory theory and the practice of agencies on the ground. Our account offers practical payoffs: as usual, reflection on what we already do is useful because articulating our premises can help organize our practice and push it better to deliver on its implicit promise. Elucidating the relational role of agencies refines its performance: if we better understand regulatory purposes, we can fine-tune practice to fit those purposes. In addition, the analysis has the potential to replace intuitive but sometimes loose discussions of regulatory attention to vulnerable populations with a better developed normative account of baseline entitlements required for interpersonal relations to proceed on a just basis. Furthermore, our survey of

¹³ Cf. Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 1–2 (1959) (emphasizing the prevalence and importance of public policy considerations in tort cases affecting group interests).

¹⁴ See *infra* text accompanying notes 119–34, 139–46, 148 (discussing OSHA as an example of an agency that pursues relational justice in the workplace).

the various techniques horizontally-oriented agencies utilize offers a preliminary account of a regulatory toolkit suited for this task, which may facilitate some cross-fertilization. Injecting these lessons into regulatory theory may also allow skeptics (and skeptical agencies)—who do not yet pay attention to the interpersonal dimension of regulation even where it arguably exists and exerts practical force—at least to consider taking this task seriously.

I. SITUATING THEORY: REGULATION, PRIVATE LAW, INSTITUTIONS

There are many institutions that engage in creating, applying, interpreting, and developing the law. In our less careful jurisprudential moments, we are liable to conflate three different features of this multiplicity: the type of norm in question; the institution paradigmatically responsible for making decisions about a given type of norm; and the kinds of considerations that ought to inform the decision making process. Simple examples may help clarify: norms of constitutional design (bicameralism or a unified legislature? federal or unitary structure? official religion or separation of church and state?) are promulgated by specialized procedures, typically constitutional conventions that aspire to express an idealized version of the will of the polity.¹⁵ Transnational soft law (e.g., Basel Accords on standards of capital adequacy for banking) is formulated by international bodies relying on expertise in coordination. Local land use norms (where can I park? at what hour will the bars close?) are created by local governments, animated by intimate knowledge regarding the preferences of the affected public.

Conflating the type of norm, the responsible institution, and the kinds of considerations to be weighed often supplies a convenient shorthand. At times, however, the shorthand undermines our sensitivity to the overlaps, crossovers, and possible mismatches between institutions and their bases for decisions. In private law theory, the issue usually surfaces as a conflict over whether courts deciding private disputes should consider distributive justice or community concerns of any kind.¹⁶ The jurisprudential concern, however, is more general. Comparative institutional analysis should certainly be

¹⁵ In their creation and subsequently in their interpretation and application by constitutional courts, the idealized will of the polity supplies the dominant considerations.

¹⁶ See, e.g., Hanoeh Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 742–43 (1999) (proposing that “progressive distributive considerations” be added to the regulatory takings doctrine); Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 FORDHAM L. REV. 1857, 1858–59 (2004) (arguing for cost distribution among those benefiting from underlying risk in accidental injury tort law); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 571–72 (1982) (describing how distributive rules of contract and tort systems are not always motivated by distributive intentions). Cf. Donal Nolan, *Tort and Public Law: Overlapping Categories?*, 135 L.Q. REV. 272 (2019).

mindful of the relative strengths and weaknesses of varied institutions in terms of both their legitimacy and their competence in evaluating different kinds of considerations. At the same time, we should remember that identifications between institutions and considerations are partial, contingent, and instrumental.

Our point is straightforward and descriptively not particularly original. Students of regulatory agencies have long been aware of the role agencies often play in creating the ground rules for market interaction and their intermediate enforcement functions that require adjudication-like consideration of private equities.¹⁷ However, the acknowledgment that at the level of thick description agencies form a crucial part of the private law system has not translated into a theoretical account of how aggregative and horizontal considerations interact, or how such interaction might affect our view of the task of the regulator.

Indeed, even if one assumes the usefulness of a shorthand that connects private law and courts, administrators should often weigh considerations of relational justice. There is no need to pitch battle over the proposition that courts are paradigmatically suited to adjudicating claims of interpersonal justice while regulators are paradigmatically geared toward aggregative visions of the public interest. It is enough to note that at times, agencies are a crucial instrumentality in laying the groundwork for relational justice. The input of administrative determinations into the interpersonal regime of tort law via the doctrine of negligence per se provides a straightforward example for that.¹⁸ When those conditions hold, regulators should weigh considerations of relational justice as animating features of their practice.

Relational regulators, who are the heroes of this Article, share with judges the common purpose of prescribing the legally acceptable terms of

¹⁷ This was a central theme of legal process scholarship of the late 1950s, which we take to be the modern starting point of comparative institutional analysis. For two central examples produced in the 1950s but published much later, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 9–12, 60–64 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) and Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 374–76 (1978).

¹⁸ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 14 cmt. d (AM. LAW INST. 2010) (discussing how the importance of negligence per se has increased with greater statutory and regulatory controls); see also, e.g., DAN B. DOBBS ET AL., *HORNBOOK ON TORTS* 253 (2d ed. 2016) (discussing “standard limits on application of statutory standards as negligence per se”); JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO US LAW: TORTS* 155–56 (2010) (describing “four qualifications” to negligence per se). The regulatory compliance defense and the federal preemption doctrine may also be related, but they raise further complexities that are beyond the scope of this Article. See, e.g., Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957, 996 (2014) (describing the relationship between the regulatory compliance defense and negligence per se); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 480–81 (2008) (discussing the theoretical considerations of negligence per se within the preemption debate).

interpersonal interaction.¹⁹ Rather than a strict division of labor, we believe that the institutional overlap between judges and regulators that typifies the law in action is normatively the more attractive route.

A. *Regulatory Theory and Aggregative Agencies*

1. *Regulation Without Relation*

Unfortunately, relational regulators have no place in current regulatory theory. Whereas there is no one canon of regulatory theory, the (oftentimes implicit) conventional wisdom underlying the otherwise competing accounts of the normative structure of the modern-state's regulatory apparatus is deeply aggregative. Law writ large, in this view, is not limited to the private law tasks of securing individual property and facilitating interpersonal transactions. Instead, our more general normative ordering extends beyond private law and resorts to "the collectivist alternative" offered by public law in order to secure "outcomes consistent with economic welfare" or more generally with "the public interest."²⁰ As this proposition suggests, theorists (like policymakers and practitioners) may not agree on the specific goals that the regulatory enterprise should pursue, but there is no disagreement that only "public interest goals" can legitimate the regulatory "collective measures."²¹

The least controversial set of justifications for regulation includes various types of market failures, that is: cases in which for reasons like monopolies or anti-competitive behavior, externalities or public goods, or informational inadequacies, an "uncontrolled marketplace" is likely to "fail to produce behaviour or results in accordance with the public interest."²² But at least some of the existing literature does not stop there. Regulation, in this view, should not be limited to address market inefficiencies and maximize consumer welfare. Rather, it should also seek to promote other social rationales, such as protecting rights, securing distributive justice, or facilitating social solidarity and deliberative citizenship.²³ Pluralist theorists

¹⁹ The responsibility to relational justice of these regulators does not imply of course that they are (or should be) free from the constraints of the statutory schemes that govern their operation and the democratic oversight and political compromises that typically accompany these schemes. We do not claim that the deference to the expertise of "relational justice professionals" should be different from that which is duly accorded to other agency professionals.

²⁰ ANTHONY OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 29 (1994).

²¹ *Id.*

²² ROBERT BALDWIN ET AL., UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 15 (2d ed. 2012).

²³ See, e.g., *id.* at 22–23 (discussing the purpose of "further[ing] social objectives"); TONY PROSSER, THE REGULATORY ENTERPRISE: GOVERNMENT, REGULATION, AND LEGITIMACY 18 (2010) (describing "four different rationales underlying regulation"); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 55–63 (1990) (discussing the "Functions of Regulatory

of regulation argue accordingly that although identifying the dominant rationale for a given regulatory measure is important in order to “choose the regulatory weapon best suited to the problem at hand,” many “regulatory programs rest upon not one but several different rationales.”²⁴ Importantly, many students of regulation recognize the constitutive or foundational role that regulation often plays in the creation and maintenance of markets: “It determines the shape and indeed the possibility of the market somewhat as DNA structures a life form and is prerequisite to such forms.”²⁵

None of what we argue in this Article should be read as challenging the obvious significance of the public interest—however it is defined—in any assessment of the legitimacy or the performance of regulatory agencies. But we nonetheless insist that this aggregative conception of the regulatory apparatus of the modern state is incomplete. Some theorists of regulation may, at least implicitly, realize the void which this Article seeks to fill. One, somewhat attenuated, version of such awareness is the reference—under the heading of “market failures”—to parties’ unequal bargaining power and to collective action problems as justifications for regulation.²⁶ However, these references don’t seem to take these phenomena as inherently problematic, but only as possible hindrances to the efficient operation of the market.²⁷ A more significant acknowledgment of the conceptual gap appears where authors recognize that regulation may be required not to address a failure of the market, but rather the absence of a market, or of an effective market. Regulatory law “often serves to constitute market relations, to provide the frameworks for rights and processes that allow markets to work, and to protect markets from fragmentation.”²⁸ Similarly, at times regulatory agencies are said to engage in “market-making, market-moving, market-levering, and market-preserving.”²⁹

2. *Public Interest Agencies*

The focus of the prevailing regulatory theories on the public interest nicely fits many agencies, whose mission is—at least in their current

Statutes,” including “Public-Interested Redistribution” and fulfilling “Collective Desires and Aspirations”).

²⁴ STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 34–35 (1982).

²⁵ Robert C. Hockett & Saule T. Omarova, “*Private*” Means to “*Public*” Ends: Governments as Market Actors, 15 *THEORETICAL INQUIRIES L.* 53, 55 (2014).

²⁶ See, e.g., respectively, BREYER, *supra* note 24, at 32; SUNSTEIN, *supra* note 23, at 49–52 (discussing unequal bargaining power and collective action problems).

²⁷ A vivid demonstration of this is at times manifested where the adjective *unequal* or the term *unequal bargaining power* appear in quotation marks. See, e.g., BREYER, *supra* note 24, at 32.

²⁸ See, e.g., BALDWIN ET AL., *supra* note 22, at 15, 22 (discussing the effects of regulatory law on markets).

²⁹ Hockett & Omarova, *supra* note 25, at 56.

incarnation³⁰—clearly aggregative. The previous mission of the Environmental Protection Agency (EPA), for example, was “to ensure that: all Americans are protected from significant risks to human health and the environment where they live, learn and work.”³¹ The current EPA website has replaced that sentence with a stated mission to ensure that “Americans have clean air, land and water,” which portrays a similar public interest role, albeit less directly.³² Likewise, “the mission of the Antitrust Division [of the Department of Justice] is the promotion and maintenance of competition in the American economy”;³³ the Internal Revenue Service (IRS) helps “fund national priorities ranging from education to defense”;³⁴ and the Office of the Comptroller of the Currency (OCC) is in charge of ensuring the safety and soundness of banks and savings associations in order to “promote[] a vibrant and diverse banking system that benefits consumers, communities, businesses, and the U.S. economy.”³⁵

The public missions of these, and other,³⁶ agencies explain—as canonical regulatory theory prescribes—the significance of aggregating social costs and benefits, and thus their heavy reliance on “a thorough and careful economic analysis” as “an important component” of their rulemaking process.³⁷ They likewise justify the public-regarding focus on distributive justice so that, for example, “everyone enjoys: the same degree of protection from environmental and health hazards, and equal access to the

³⁰ As will become clear by the end of this Article, the remainder of this Section should not be read as an endorsement of the purely aggregative self-understanding of these agencies.

³¹ *U.S. Environmental Protection Agency*, 2020 NAT’L ENVTL. JUST. CONF. & TRAINING PROGRAM, <https://thenejc.org/?sponsor=u-s-environmental-protection-agency> (last visited Oct. 25, 2019). For an archived version of the EPA website from January 19, 2017, see *Our Mission and What We Do*, ENVTL. PROTECTION AGENCY, https://19january2017snapshot.epa.gov/aboutepa/our-mission-and-what-we-do_html (last visited Oct. 25, 2019).

³² *Our Mission and What We Do*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Oct. 25, 2019).

³³ U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION MANUAL I-2 (2012), <https://www.justice.gov/atr/file/761166/download> [hereinafter ANTITRUST DIVISION MANUAL].

³⁴ *Financial Services and General Government Appropriations for 2016: Hearings Before the Subcomm. of Fin. Servs. & Gen. Gov’t Appropriations of the H. Comm. on Appropriations*, 114th Cong. 156 (2016) (statement of Jacob J. Lew, Secretary of the Treasury, in the form of a report titled “Congressional Justification for Appropriations and Annual Performance Report and Plan FY 2016”).

³⁵ *About Us*, OFF. COMPTROLLER CURRENCY, <https://occ.treas.gov/about/index-about.html> (last visited Oct. 8, 2019).

³⁶ Such as the Federal Communications Commission whose public mission is to “make available . . . to all the people of the United States . . . rapid, efficient, Nation-wide, and world-wide wire and radio communication service.” FED. COMM’NS COMM’N, STRATEGIC PLAN: 2015–2018, at 1 (2015), <https://transition.fcc.gov/Reports/strategic-plan-2015-2018.pdf>.

³⁷ *Overview of Economic Analysis at the EPA*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/environmental-economics/overview-economic-analysis-epa> (last visited Oct. 3, 2019). See also, e.g., Hester Peirce, *Economic Analysis by Federal Financial Regulators*, 9 J.L. ECON. & POL’Y 569, 569 (2013) (discussing the role of economic analyses in financial regulation).

decision-making process to have a healthy environment in which to live, learn, and work.”³⁸

The concentration of these aggregative agencies on the public interest dictates their more specific goals as well as their priorities. Thus, the EPA’s strategic plan declares that “[w]e must focus on the environmental and public-health issues that matter most to the American people,” and accordingly mentions five strategic goals: “Addressing Climate Change and Improving Air Quality”; “Protecting America’s Waters”; “Cleaning up Communities and Advancing Sustainable Development”; “Ensuring the Safety of Chemicals and Preventing Pollution”; and “Protecting Human Health and the Environment by Enforcing Laws and Ensuring Compliance.”³⁹ The EPA channels “federal enforcement resources” along similar lines, so as to maximize “the level of public health protection,” which means that it is committed “to the largest most complex cases that have the biggest impact,” even though that necessarily implies “doing fewer cases overall.”⁴⁰ Similar aggregative thinking underlies the priorities of other agencies, such as the Antitrust Division and the OCC.⁴¹

Finally, the public missions and goals of this type of agencies⁴² also explains the dominance of their vertical perspective. This perspective, in turn, explains the heavy reliance of these agencies on criminal enforcement.⁴³ It also implies the ancillary, indeed strictly instrumental role, of individual complaints: aggregative agencies typically⁴⁴ do not seek to resolve specific disputes but rather use complaints as merely one source of information that can help identify major trends or systemic problems.⁴⁵

³⁸ *Funding for Communities*, ENVTL. PROTECTION AGENCY, <http://www3.epa.gov/environmentaljustice/> (last visited Oct. 3, 2019).

³⁹ ENVTL. PROT. AGENCY, FY 2014–2018 EPA STRATEGIC PLAN 1, 4 (2014), https://www.epa.gov/sites/production/files/2014-09/documents/epa_strategic_plan_fy14-18.pdf [hereinafter EPA STRATEGIC PLAN].

⁴⁰ *Id.* at 38.

⁴¹ See ANTITRUST DIVISION MANUAL, *supra* note 33, at I-2 (promoting “competition in the American economy”); OFFICE OF THE COMPTROLLER OF THE CURRENCY, BANK SUPERVISION PROCESS 1 (2019), <https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/pub-ch-ep-bsp.pdf> (promoting “fair access to financial services,” among other goals).

⁴² See *supra* notes 31–41 and accompanying text.

⁴³ See, e.g., ANTITRUST DIVISION MANUAL, *supra* note 33, at I-2 (discussing purpose including “[g]eneral criminal . . . enforcement of the Federal antitrust laws”); EPA STRATEGIC PLAN, *supra* note 39, at 38–40 (discussing an objective to “pursue vigorous . . . criminal enforcement” for environmental safety); *Criminal Investigation (CI) At-a-Glance*, INTERNAL REVENUE SERV. (Oct. 4, 2019), <https://www.irs.gov/uac/criminal-investigation-ci-at-a-glance> (discussing mission of “investigating potential criminal violations of the” Internal Revenue Code).

⁴⁴ The OCC is an exception. See *HelpWithMyBank.Gov*, OFF. COMPTROLLER CURRENCY (Aug. 2019), <https://www.helpwithmybank.gov/index.html> (discussing how the OCC addresses each individual complaint).

⁴⁵ See, e.g., *Consumer Complaint Center*, FED. COMM. COMMISSION, <https://consumercomplaints.fcc.gov/hc/en-us> (last visited Oct. 3, 2019) (explaining how individual complaints are used to “identify trends and track the issues”); *Report Violations*, DEP’T JUST.,

B. *Private Law Theory and the Contingency of Adjudication*

1. *Private Law Considerations*

One popular view of private law presents a mirror-image of this conventional association of regulation with the public interest. Private law, in this view, is defined as concerning “the rights which, one against another, people are able to realise in courts.”⁴⁶ This court-centric view of private law is a direct manifestation of the conventional equation of private law with common law adjudication. It implies, for example, that workers’ compensation schemes, which substitute administration for adjudication, should not be deemed extensions of tort law; the shift from the domain of one-to-one litigation before a judge to the administrative apparatus implies, in other words, a jurisdictional transfer of authority from private law to public law.⁴⁷

Indeed, like the prevailing theories of regulation, this account of private law conflates types of norms, legal reasoning, and institutions. But the feature that makes private law a meaningful legal category is not institutional.⁴⁸ Rather, it lies in the types of considerations that supply the justifications of its substantive norms. Thus, the conception of private law that guides us here appreciates the significance of having a body of law that specifically governs our interpersonal, horizontal relationships, as opposed to our interactions as subjects of the state or as co-citizens. The orientation of our law toward us is qualitatively salient: it makes a difference whether we are addressed as bearers of material needs, as parts of a comprehensive unit of joint responsibility, or—as it is with private law—as persons with projects.

Recognizing the significance of private law along these lines need not be confused with an exercise of separation, which looks for necessary and sufficient differences between private and public law that would make them

<https://www.justice.gov/atr/report-violations> (last visited Oct. 3, 2019) (explaining how violation reports are handled).

⁴⁶ Peter Birks, *Introduction to 1 ENGLISH PRIVATE LAW*, at xxxv, xxxvi (Peter Birks ed., 2000).

⁴⁷ John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 919 (2010). See also, e.g., Nathan B. Oman & Jason M. Solomon, *The Supreme Court’s Theory of Private Law*, 62 DUKE L.J. 1109, 1119 (2013) (contesting the conflation of private law with regulations of the Occupational Safety and Health Administration or the Federal Trade Commission).

⁴⁸ Conceptualizing private law as a distinct legal category may seem normatively empty and a mere distraction for scholars, such as lawyer-economists, who perceive private law as just one option for the state to enact and administer rules that incentivize people to act in line with the general welfare. When posed at a level of theoretical purity, this yields a reductionist view of private law that marginalizes or completely ignores private law’s distinctive value, thus rendering the subject-matter of our inquiry *a priori* hollow. But as is often the case, the lawyer-economists have things half-right. They miss the boat by assuming that there are no normatively significant features that ground private law; on the other hand, they touch on an important insight in recognizing that there may be varied institutional tools geared toward common outcomes.

mutually exclusive. Some private law theories pursue this strategy, but we find it unsatisfying. That strategy assumes that law can and should structure our interpersonal relationships with no account for our collective goals, such as distributive justice (which focuses on justice in holdings), democratic citizenship (which seeks to eradicate hierarchies in our relationships *qua* citizens), or efficiency (which is concerned with the size of our welfarist pie).⁴⁹

A different conception of private law, which one of us has elaborated and defended elsewhere,⁵⁰ is dramatically different. Its point is neither doctrinal separation nor strict division of labor. Rather, the importance of private law relies on the freestanding significance of the social, a realm always in interaction with, but not reducible to, the public.⁵¹ Recognizing the value (and potential threat) of our horizontal interactions in the array of social spheres governed by private law—such as family, work, home, community, and commerce—implies that goals like efficiency, democratic citizenship, and distributive justice, while always potentially relevant, should not exhaust private law’s normative concerns. Private law is a meaningful legal category quite apart from its contribution to these public purposes. That meaning lies in delineating what people owe each other in the framework of social interaction. Private law undergirds our interpersonal obligations as private individuals rather than our obligations as co-citizens.⁵² It supplies a set of considerations that focus precisely on such social contact, and the dominance of those considerations is private law’s distinguishing feature.⁵³ More than any other part of the law, private law sets the conditions of legitimate interaction among individuals; it underpins (an important subset of) our quotidian horizontal relationships as persons.⁵⁴

Resisting private law’s reductionist understanding as exhausted by public considerations does not imply that it ought to be analyzed solely as a stronghold of individual independence and formal equality, while leaving the task of realizing the commitments to individual self-determination and substantive equality to public law. This understanding of private law seems conventional, but the division of labor on which it relies cannot withstand

⁴⁹ Hanoch Dagan & Avihay Dorfman, *Postscript to Just Relationships: Reply to Gardner, West, and Zipursky*, 117 COLUM. L. REV. ONLINE 261, 268–69 (2017).

⁵⁰ See Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1397 (2016) [hereinafter Dagan & Dorfman, *Just Relationships*] (distinguishing private law as governing interpersonal relationships, whereas public law governs the relationships of individuals with the government); Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 LAW & PHIL. 171, 173–74 (2018) (arguing that, charitably interpreted, private law vindicates relational justice); Dagan & Dorfman, *Postscript to Just Relationships*, *supra* note 49, at 261 (elaborating upon the distinction between public and private law through a focus on the normative status of private law).

⁵¹ Dagan & Dorfman, *Just Relationships*, *supra* note 50, at 1398.

⁵² *Id.* at 1397.

⁵³ *Id.* at 1399.

⁵⁴ *Id.* at 1398.

critical scrutiny.⁵⁵ Any polity that takes seriously the commitment to individual self-determination (and not merely independence) and to substantive (rather than merely formal) equality cannot make these values irrelevant to our interpersonal relationships. Quite the contrary: these values are just as crucial to our horizontal interactions as they are to our vertical ones, although they entail different implications in these different dimensions.

Private law is actually committed to enhancing a capacious vision of autonomy, rather than merely to safeguarding independence; and it does not content itself with formal equality, but rather aims at positively establishing our substantive equality.⁵⁶ Numerous doctrines of private law—including veteran common law rules that require potential tortfeasors to accommodate the relevant constitutive features of their victims,⁵⁷ help solve collective action problems,⁵⁸ or oblige recipients of mistaken payments to reverse mistakes for which they have no responsibility⁵⁹—are straightforward implications of the injunction of reciprocal respect to self-determination and substantive equality. These and many other examples support the interpretation of private law as the realm of *relational justice*.⁶⁰

This charitable reading of private law is controversial, but that controversy does not undermine our point here. Critics may offer competing interpretations of the interpersonal responsibilities entrenched in private law.⁶¹ Fortunately, arbitrating such controversies is unnecessary for our purposes because nothing in what follows hangs on the endorsement of this particular account. All that is needed for the purposes of this Article is the modest, quite banal, proposition that private law includes much more than duties of abstention; that the law of our interpersonal interactions as individuals is also the law of our interpersonal responsibilities towards one another.⁶²

2. *Beyond Adjudication*

Courts are often useful for the development and implementation of private law. Common law judges indeed carried much of this burden historically. Friends of the common law tradition celebrate its “Grand Style,” described by Karl Llewellyn as “a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose,

⁵⁵ *Id.* at 1408.

⁵⁶ *Id.* at 1397.

⁵⁷ *Id.* at 1431–38.

⁵⁸ *Id.* at 1445–51.

⁵⁹ *Id.* at 1456–58.

⁶⁰ *See id.* at 1430–59 (applying principles of relational justice in the fields of property and contracts).

⁶¹ *Id.* at 1401.

⁶² *See, e.g.,* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 69–70 (2020).

of measure with need,” mediating between “the seeming commands of the authorities and the felt demands of justice.”⁶³ This mode of decision making renders adjudication a particularly hospitable arena for the complex task of fashioning and refashioning the legal infrastructure of interpersonal relationships. It invites judges to engage in what Benjamin Cardozo called an “endless process of testing and retesting.”⁶⁴ It encourages them to shape and reshape law “close and contemporary” to the human problems they deal with, taking benefit from “the discrimination necessary for intimacy of treatment.”⁶⁵ And at the same time, its typical piecemeal, gradual mode of operation retains the common law’s loyalty to the two important aspects of the rule of law: the requirement that law be capable of guiding its subjects’ behavior, and the prescription that law not confer on officials the right to exercise unconstrained power.⁶⁶

There is another reason the connection between private law and adjudication seems natural. While the ultimate result of a system of private law is a comprehensive scheme of entitlements governing our interpersonal interactions that prescribes our primary rights and duties, private law’s straightforward means of enforcement entails the arming of rights-holders with the power to decide how to respond to infringement of their rights as well as the standing to instigate a complaint.⁶⁷ Court proceedings are sensibly perceived as the obvious venue for this exercise: adjudication as a forum is specifically designed to assess the parties’ behavior vis-à-vis their interpersonal rights and obligations as well as to refine the rules that delineate these rights and obligations to begin with.⁶⁸ Furthermore, even though the yield of the process does not perfectly mirror these rights,⁶⁹ these gaps do not undermine the sense in which courts’ rulings and orders serve

⁶³ KARL L. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 37–38 (1960).

⁶⁴ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 179 (1921).

⁶⁵ Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 74 (1928).

⁶⁶ See Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. PA. L. REV. 1889, 1898–1905 (2015) (conceptualizing Legal Realism as accepting the stabilizing force of doctrinal categories while allowing for judges and legislators to occasionally rethink conventional doctrine).

⁶⁷ This point is (over-)emphasized by proponents of both corrective justice and civil recourse theories. See, e.g., respectively, ARTHUR RIPSTEIN, *PRIVATE WRONGS* 271–75 (2016) (detailing the need for rights-holders to actively pursue corrective justice through adjudication; GOLDBERG & ZIPURSKY, *supra* note 62, at 111–46 (defending the principle of civil recourse).

⁶⁸ This in any event does not imply that adjudication by aggrieved parties is the signature of private law, since it also typifies large swaths of public law. See Avihay Dorfman, *Private Law Exceptionalism? Part I: A Basic Difficulty with the Structural Arguments from Bipolarity and Civil Recourse*, 35 LAW & PHIL. 165, 177–85 (2016) (discussing adjudication by aggrieved parties for infringement upon their constitutional rights).

⁶⁹ See, e.g., Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 HARV. L. REV. 1727, 1727 (2012) (delineating two types of damage awards: those that confirm existing duties to others, and those that create duties to others).

as focused responses to plaintiffs' complaints given remedies' participation in the constitution of rights and not only their enforcement.⁷⁰

These are weighty reasons for the association of private law with adjudication, and more generally, of the importance of our access to courts. But they do not imply that private law only appears, thrives, or survives when run by judges. Quite the contrary, these advantages of adjudication are contingent upon a certain adjudicatory tradition and upon a set of background empirical assumptions and normative conjectures. Court-centric private law may thus be suboptimal in its own terms, namely, judged vis-à-vis its ideal of relational justice. This may be the case for the obvious, but practically important, reason that the existing private law institutions of adjudication (alternative dispute resolutions included) fail to respond effectively enough to the demand for dispute resolution,⁷¹ or that their response is disturbingly affected by the respective parties' ability to pay or other asymmetrical limitations of the access to justice.⁷² It may also derive from more general considerations.

Complying with private law's underlying commitment to structure our interpersonal relationships so that they are governed by reciprocal respect to individual self-determination mandates the provision of an infrastructure for a secure marketplace within which effective choices can be made. This is a mission that often requires private law to recruit an administrative apparatus, supplementing or even supplanting courts.⁷³ The fundamental institutional

⁷⁰ See HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 144–60 (2013) (positing, through a discussion of the relationship between rights and remedies, that legal realism views remedies as a core component of rights).

⁷¹ See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 129, 131 (2002) (“A recent study utilized state court data to demonstrate that the use of particular processes, such as alternative dispute resolution (ADR), does not correlate with shortened disposition times, while the factors that do so correlate, such as forum locale and case category, are simply beyond the reach of process-oriented reform.”); George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 527, 529–30, 557–58 (1989) (detailing the various measures used to respond to the problem of litigation delay and noting that ADR rules do not have significant effect).

⁷² See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 3–5 (2004) (highlighting the gap between rhetorical commitments concerning access to justice and the true reality that millions of Americans lack equal access); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 98, 103–04, 121–22 (1974) (describing how the advantages of “haves” over “have-nots” is perpetuated and augmented by wealth and power).

⁷³ See WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 1–2 (1996) (discussing “the pervasiveness of regulation in early American versions of the good society”); William E. Forbath, *Politics, State-Building, and the Courts, 1870–1920*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 643, 643 (Michael Grossberg & Christopher Tomlins eds., 2008) (explaining that, in nineteenth-century America, at the state level, “America had little ‘administration’ beyond local officials; not high administrators but judges supervised the work of local officialdom”); Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705, 1706–07, 1710, 1734, 1739 (2016) (arguing that administrative agencies have emerged as a fourth branch of government, which has had widespread impacts on tort law); see also, e.g., Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory*

limitations of the judiciary in a complex and interconnected environment imply that fulfilling private law's relational task may necessitate regulatory underpinning. Such regulation may be necessary for ensuring the generality of legal prescription, for maintaining the required technological expertise for legal decision making, and for the targeting of systemic market failures that can hardly be addressed on the transactional level. It may also be necessary in order to establish effective tools for proactive (as opposed to reactive) *ex ante* guarantees of just interpersonal relationships in various social settings and to ensure that they are sufficiently predictable so as to effectively guide people's behavior as required by the rule of law. Finally, these reasons for handing over part of private law's mission to regulators are augmented once we recall that the challenge of private law is not to resist the influence of our public commitments (that is, of values such as distributive justice, democratic citizenship, or aggregate welfare), but rather to respond to the injunctions of the maxim of just relationships, while remaining sensitive to these important public concerns.⁷⁴

Indeed, although adjudication is often a perfectly sensible mechanism for private law to employ, private law can be, is, and sometimes should also be made, applied, interpreted, and developed in other arenas.

C. Hayek's Objections

Our main focus in this Article is on the implications of this proposition on the theory and practice of certain agencies, those that are properly analyzed as indeed responsible, at least in part, for carrying out private law tasks. But before we proceed in this direction, it may be advisable to consider possible objections to the placement of such authority in the hands of regulators, as opposed to judges. While such objections may come from various directions, they all converge into the powerful critique of the regulatory state by one of the most enthusiastic advocates of the common law, Friedrich Hayek.

Hayek insisted that private law (or law more generally) properly so called is judge-made law, and is thus distinct from both statutes and "special commands or permissions by administrative agencies."⁷⁵ His argument for this conceptual distinctiveness and normative superiority of the common law is broad and complex; but for our purposes it is helpful to disentangle it into three separate propositions (which he combines). *First*, the common law

State, 41 J. ECON. LITERATURE 401, 401–03 (2003) (proposing a new economic theory that addresses how private litigation, government regulation, and a combination of the two are used to secure property rights).

⁷⁴ See Dagan, *supra* note 12, at 83 (noting that the purpose of autonomy-based private law is to refine interpersonal concerns, not to eliminate all public concerns).

⁷⁵ 1 F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER* 127, 132–33, 136 (1982); 2 F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 34 (1982).

enjoys a form of *generality* unavailable to the regulator.⁷⁶ Judge-made law, on this account, is not “invented or designed” in order to serve a specific purpose; rather, it is a set of abstract and universal “rules of just conduct,” sharply contrasted with the “discrimination and discretion” that the operation of administrative agencies necessarily involves.⁷⁷ These rules govern the behavior of persons towards others; they are applicable “to an unknown number of future instances”;⁷⁸ and they contain “prohibitions delimiting the boundary of the protected domain of each person (or organized group of persons).”⁷⁹ They thus “enable an order of actions to form itself wherein the individuals can make feasible plans” and effectively pursue them.⁸⁰

Second, the common law, in sharp contrast to legislation or regulation, is *spontaneous* and *organic*. It is neither “the product of anyone’s will,”⁸¹ nor is it “something the mind could deliberately create”;⁸² rather, it “spring[s] from the articulation of previously existing practices” or “customs.”⁸³ The common law is a product of a “spontaneous process of growth”⁸⁴ of a set of “practices on which the everyday conduct of the members of the group [is] based,”⁸⁵ resting on “a diffused opinion of what is right.”⁸⁶ Judge-made law is based on “the experience gained by the experimentation of generations,” which “embodies more knowledge than was possessed by anyone”; and it is “*discovered* either in the sense that [judges] merely articulate already observed practices or in the sense that [it includes] required complements of the already established rules.”⁸⁷

Finally, judge-made law is *independent* of the capricious will of legislators, regulators, or the interest groups that drive them. The common law is “determined by courts independent of the power which organize[s] and direct[s] government.”⁸⁸ Judges “are not normally concerned with relations of command and obedience, only such actions of individuals as affect other persons.”⁸⁹ They serve to “maintain and improve a going order

⁷⁶ 1 HAYEK, RULES AND ORDER, *supra* note 75, at 86 (“[L]aw which . . . emerges from the judicial process is necessarily abstract . . .”).

⁷⁷ *Id.* at 85, 86, 138.

⁷⁸ 2 HAYEK, MIRAGE OF SOCIAL JUSTICE, *supra* note 75, at 35.

⁷⁹ 1 HAYEK, RULES AND ORDER, *supra* note 75, at 122.

⁸⁰ *Id.* at 85–86; *see also* 2 HAYEK, MIRAGE OF SOCIAL JUSTICE, *supra* note 75, at 36–37 (describing the function of rules of just conduct).

⁸¹ 1 HAYEK, RULES AND ORDER, *supra* note 75, at 85.

⁸² *Id.* at 97.

⁸³ *Id.* at 85–86.

⁸⁴ *Id.* at 88.

⁸⁵ *Id.* at 96–97.

⁸⁶ *Id.* at 95.

⁸⁷ *Id.* at 119, 123.

⁸⁸ *Id.* at 85.

⁸⁹ *Id.* at 101.

which nobody has designed, an order that has formed itself without the knowledge and often against the will of authority.”⁹⁰ Thus, their product—the common law—can serve “as a barrier to all power,” rather than “an instrument for the use of power.”⁹¹ It is again the mirror image of the product of legislation and regulation, whose “whole history” is one “of continuous struggle to prevent particular groups from abusing the governmental apparatus for the benefit of the collective interest of these groups.”⁹²

* * *

We are far from willing to sign on to Hayek’s depiction of the law, which has little basis in history and strikes us as vulnerable to compelling critique, both logical and normative. Nonetheless, Hayek’s drawing of sharp analytical boundaries between regulation and adjudication proves useful in clarifying thought regarding the relative place of these institutional mechanisms.⁹³ Each of these three propositions involves an important lesson for the making of private law, but none of them implies the exclusivity or even hegemony of judges in carrying out this enterprise.⁹⁴

Hayek’s first proposition echoes to some extent our conception of private law as the law of just interpersonal relationships conducive to self-determining individuals. But it misleadingly tightens the connection between private law and judge-made law by offering two indefensible oppositions between adjudication and administrative agencies regarding abstraction, on the one hand, and pure prohibition on the other.

Regarding abstraction, Hayek presents the products of adjudication as universal, abstract rules and the workings of administration as necessarily about particularistic purposes. But this must be wrong, because the distinction between general rulemaking and the pursuit of particular purposes does not track the institutional divide between judges and administrators.⁹⁵ The rule of law requirement of generality, on which this first opposition relies, means that legal rules must be applicable to all their addressees equally rather than singling out particular groups for special

⁹⁰ *Id.* at 118–19.

⁹¹ *Id.* at 92.

⁹² 2 HAYEK, *MIRAGE OF SOCIAL JUSTICE*, *supra* note 75, at 6.

⁹³ Our critique of Hayek’s rigid distinctions will become clear presently. For an account with deep alliances to Hayek’s own, but which draws many of the same distinctions as matters of degree, see WALTER LIPPMANN, *AN INQUIRY INTO THE PRINCIPLES OF THE GOOD SOCIETY* 282–93 (1937). For an analysis of the affinities between Lippmann and Hayek and of Lippmann’s influence on German ordoliberalism, see ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* 57–78 (2012).

⁹⁴ *Cf.* Sharkey, *supra* note 73, at 1733–34 (noting that courts must oversee a newer common law regime that utilizes input from federal regulatory agencies).

⁹⁵ To be fair, Hayek elsewhere acknowledges as much, in a discussion of administrative bodies that exercise limited discretion and apply general rules, with examples drawn from the supply of a monetary system, the setting of weights and measures, land registration (including building codes), and education. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 222–28 (1960).

treatment.⁹⁶ This entails that there should be rules that are more abstract than their particularistic instantiations,⁹⁷ and is thus, as Hayek himself acknowledges, “a matter of degree.”⁹⁸ Identifying the right degree of abstraction is a complex question, whose answer may well change across legal fields. In any event, there is no *a priori* reason to suppose that administrative agencies are less likely than judges (or constitutionally unable) to respect the requirement of generality or are more amenable than their brethren and sistren on the bench to the ad hoc application of unbridled discretion. In fact, there are good contextual reasons to suppose that agencies are usually more sensitive to the requirement of generality. Beyond particular and contingent examples, both forms of law-making include constraining institutional doctrines—such as the requirement that judges justify their decision in universalizable terms or the due process prescriptions of agency fair procedure—that seek to ensure this important aspect of the rule of law.

Regarding the negative or prohibitory character of private law rules, Hayek’s purported opposition between adjudication and administrative agencies is no more convincing. Common law rules, like many rules set by administrative agencies, often lay out general requirements for anyone interested in pursuing a given activity.⁹⁹ Further, as we have indicated above, the common law, *pace* Hayek, is not only about prohibitions, but rather includes positive duties of interpersonal accommodation. These duties, as we further clarified, are essential if private law is to fulfil the role Hayek ascribes to it of facilitating people’s ability to be the authors of their own lives.¹⁰⁰

⁹⁶ *Id.* at 226.

⁹⁷ See LON L. FULLER, *THE MORALITY OF LAW* 48 (1964) (noting the need for general principles in legal systems).

⁹⁸ 1 HAYEK, *RULES AND ORDER*, *supra* note 75, at 140. See also HAYEK, *supra* note 95, at 226 (explaining that rather than making distinctions between different people, there should be more general rules).

⁹⁹ For a simple example, consider the requirement that one undertaking a dangerous activity employ due care. But even common law rules as basic as those of contract formation impose positive requirements on those seeking to perform legally valid acts. See HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 37–39, 45–46 (2017) (exploring the modest affirmative interpersonal duties at the foundation of contract law). The characterization of the common law as inherently prohibitory in nature is untenable.

¹⁰⁰ See *supra* Section II.B.1 (discussing relational justice and the idea that significant representation is a step on the way to helping people view the system as one of their own authorship). If one assumes, as Hayek sometimes does, that the only legitimate aim of the law is to “ascertain the boundary of the protected domain of each [person] and thus to distinguish between the *meum* and the *tuum*,” 1 HAYEK, *RULES AND ORDER*, *supra* note 75, at 107–08, then private law (or law more generally) might include only prohibitions. But this assumption presupposes a private law limited to the protection of property, with no substantive account of the power-conferring aspect of private law without which the law of contract—and, in fact, of property—is scarcely imaginable. See, e.g., HANOCH DAGAN, *Markets for Self-Authorship*, 27 CORNELL J.L. & PUB. POL’Y 577, 580–83 (2018) (noting how markets contribute to self-authorship and recognizing property and contract law as “power-conferring legal doctrines”). Such

Hayek's second proposition also contains a grain of significant truth, insofar as it emphasizes the role of experience in the development of law. At least since Holmes's famous quip that experience is the life of the law, it would be difficult to argue otherwise.¹⁰¹ Hayek correctly claims that learning from experience is one of the pillars of the common law tradition, which perceives law as a great human laboratory continuously seeking improvement,¹⁰² and his turn to custom as a source of law has romantic appeal as well as some genuine common law pedigree.¹⁰³ It pays, however, to distinguish between the appeal to experience on the one hand, and the reliance on custom and especially spontaneous order, on the other.

As far as reliance on experience is concerned, there is little reason to think it is the exclusive province of adjudication. Administrative regulation is generally as much a product of experience as judge-made law, and often built upon more comprehensive reflection on such experience. It is particularly salient for sophisticated administrative apparatuses, which include complex mechanisms of experimentalism and learning.¹⁰⁴ In short, if we emphasize the experiential aspect of Hayek's second proposition, it is supportable on its own, but not as an argument to distinguish adjudication from administrative regulation.

Hayek's appeal to custom and spontaneity may have a tighter link to adjudication,¹⁰⁵ but it is unattractive normatively, for a number of reasons. First, custom is limited in its capability to adapt, while, as Hayek recognizes, sometimes the common law needs "to deal with altogether new problems," or start anew reversing its path after reaching "an impasse" or realizing "undesirable consequences."¹⁰⁶ But even with regard to problems that are

a conception cannot plausibly serve as private law's foundation not only due to its normative failures, but also, as we argued above, because it is simply too distant from existing doctrine to supply a plausible account of the practice.

¹⁰¹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

¹⁰² See *supra* text accompanying notes 63–64 (describing the common law tradition as one that invites fashioning and refashioning).

¹⁰³ See KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790-1900: LEGAL THOUGHT BEFORE MODERNISM* 25 (2011) (noting that there are two "temporalities" in thinking about law: the historical and the customary).

¹⁰⁴ See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (exploring how democratic experimentalism increases administrative efficiency and heightens administrative accountability); see also IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 4–5 (1992) (describing the positive qualities of responsive regulation); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 55, 79, 83 (2011) (discussing experimentalism's similarities to responsive regulation and its mechanisms for achieving learning and coordination).

¹⁰⁵ There is, of course, some debate on the question whether and to which degree the common law follows custom. See, e.g., John Hasnas, *Hayek, The Common Law, and Fluid Drive*, 1 N.Y.U. J.L. & LIBERTY 79, 94 (2004) (agonizing over the departure of the common law from custom).

¹⁰⁶ 1 HAYEK, *RULES AND ORDER*, *supra* note 75, at 88, 100.

not new, it always pays to be cautious about custom, notwithstanding the rhetorical appeal of what is portrayed as “bottom-up” law.¹⁰⁷ Preliminarily, custom is notoriously difficult to pin down as a source of law, especially as an independent source of law distinct from reason.¹⁰⁸ Additionally, customary norms are often prone to inefficiency owing to pervasive information problems and strategic behavior.¹⁰⁹ More importantly, Hayek’s Darwinian “evolutionary functionalism” is normatively odious: many “stable tyrannies” are “ideal-typical instances of Hayekian spontaneous social order,” and it is bewildering why these, and other similarly unjust but both spontaneous and stable orders, deserve to be celebrated and entrenched.¹¹⁰ Indeed, the appeal to the supposed spontaneity of custom betrays a deafness to the typical ways power cloaks itself in tradition, naturalizing relations whose basis is arbitrary or violent.

Finally, like Hayek’s first two propositions, his third is also important, but again does not justify the conceptual separation he seeks to establish. Hayek’s concern that administrative agencies and legislatures are subject to pressure from interest groups seeking to capture private benefits at the expense of the public good has by now become conventional wisdom for students of regulation and legislation.¹¹¹ But most of them do not give up on the idea that administrators and legislators can properly pursue public interests. The reasons vary. Some point to the contribution of administrative law, which evolved dramatically since Hayek’s skeptical account was written, in curbing such influences.¹¹² Others remind us that questions of

¹⁰⁷ Hayek himself expressed skepticism about customary communities which have been celebrated in recent times by authors such as Robert Ellickson and Robert Cooter. See Robert W. Gordon, *Hayek and Cooter on Custom and Reason*, 23 SW. U. L. REV. 453, 454 (1994) (contrasting Hayek’s views about customary communities with those of Cooter).

¹⁰⁸ See James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1322 (1991) (discussing the “somewhat unclear mingling” of custom and reason as sources of law).

¹⁰⁹ See Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1713, 1725–26 (1996) (exploring the problem of inefficient norms that result from information problems and strategic behavior).

¹¹⁰ John Gray, *Hayek on Liberty, Rights, and Justice*, 92 ETHICS 73, 83 (1981).

¹¹¹ For classic formulations, see MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1, 144 (1965); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 4 (1971) (advancing the argument that “regulation is acquired by the industry and is designed and operated primarily for its benefit”). For a review of the field, see David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. & PUB. POL’Y 31, 31–32 (2013) (seeking “more rigor in how we think and talk about the idea of . . . [the] process by which policy is directed away from the public interest and toward the interests of a regulated industry”).

¹¹² See generally STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* (2007) (discussing the decision making environment of government agencies and arguing that the regulatory government can advance general interests); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 26 (2001) (defending administrative law due to the requirements placed on administrators to “be both transparent and contemporaneous”); Edward H. Stiglitz, *Delegating for Trust*,

institutional competence (and thus of expected performance) as well as of institutional legitimacy are always comparative,¹¹³ and that Hayek himself acknowledged occasions in which “whole sections of the established system of case law” turn out to be “unjust” and must be dramatically revised given “the greater influence that certain groups like landlords, employers, creditors, etc., had wielded on the formation of the law.”¹¹⁴

We do not purport to resolve these comparative institutional questions here of course, partly because we doubt that they are amenable to one right answer across the wide range of thematic variation and the broad spectrum of institutional cultures of the judiciary and the public administration in different jurisdictions. Fortunately, no such answer is needed for our purpose. Hayek’s concerns of bias and capture are valid *vis-à-vis* *all* the carriers of law’s power. So, nothing in our account implies that the regulatory schemes that supplement or supplant courts in carrying out private law’s interpersonal mission should be exempt from these concerns.

II. TOWARD A THEORY OF RELATIONAL REGULATORS

A. *Relations for Regulation*

Establishing and maintaining a just scheme of interpersonal relationships has never been a simple matter. Modern societies are complex, and setting up an effective legal infrastructure that vindicates mutual obligation is a daunting challenge. It is thus increasingly difficult to expect courts, whose *modus operandi* is reactive and whose perspective and information on key categories of relationships we have—with employers, landlords, banks, and the like—are framed by specific disputes they encounter, to face these challenges on their own. Given the comparative institutional advantages of legislatures and administrative agencies on these fronts, it should be neither surprising nor objectionable to observe their heavy participation in these core tasks of private law, either in supplementing or in supplanting courts.¹¹⁵

The responsibility of securing just social relationships is different from the responsibility of serving the interest of the public as a whole. “[I]t is one thing for the state to respect its constituents as genuinely free and equal

70 U. PA. L. REV. 633, 649 (2018) (analyzing how administrative lawmaking “is more responsive to public interests”).

¹¹³ See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3 (1994) (advancing the argument that “comparative institutional analysis” is predicated on a comparison of decision making alternatives).

¹¹⁴ I HAYEK, RULES AND ORDER, *supra* note 75, at 89, 141.

¹¹⁵ See JOSEPH W. SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS 74, 125 (2015) (noting that “minimum standards” for relationships are based on several lawmaking procedures including: court interpretations, statutes, administrative rules, and state regulations).

persons; it is quite another to live in a society that expects individuals themselves to comply with the ideal of just relationships between free and equal agents.”¹¹⁶ Taking this responsibility seriously requires the pertinent legal actors—such as the regulators that we study here—to think horizontally and to adjust their substantive, structural, and procedural features to the task at hand.

Indeed, regulation often plays an important role in supplying the infrastructure for just relations among individuals. In so doing, it does not and need not rely exclusively on aggregative considerations. As we have seen, regulatory theory typically assumes such an exclusive aggregate focus, which fits a subset of the administrative apparatus: the agencies which carry a predominantly public task.¹¹⁷ Our goal in what follows is to show that other agencies—the other half of the regulatory universe—are better analyzed differently.¹¹⁸ We do not deny that they may also be justified in public law terms; we do not argue, in other words, that the original justifications for their establishment, which are mainly aggregative,¹¹⁹ are sheer cover-up triggered by the need to justify federal jurisdiction in compliance with the Commerce Clause. Rather, we claim that this aggregative perspective accounts for only part—and not necessarily the most significant part—of the picture. Therefore, if not supplemented with a developed horizontal perspective, the aggregative account generates a partial, even distorted, understanding of this important subset of our regulatory universe.

We begin with a sketch of two agencies: the Occupational Safety and Health Administration (OSHA) and the Consumer Financial Protection Bureau (CFPB). Our aim is not to offer a comprehensive account of these complex agencies, but rather to show that at least some of their tasks and the means they use in order to attain them are best understood in relational terms. The main—or at least one important—goal of both agencies is the construction and maintenance of just interpersonal relationships in the respective social spheres they regulate. Accordingly, quite a few of the features of their *modus operandi* are attuned to this relational mission.

¹¹⁶ Dagan & Dorfman, *supra* note 50, at 1460.

¹¹⁷ See *supra* Section I.A.2.

¹¹⁸ We thus share the critique—premised on different reasons from ours—of existing regulatory theory for being insufficiently attuned to the heterogeneity of observed regulatory practice. See Cary Coglianese, *Bounded Evaluation: Cognition, Incoherence, and Regulatory Policy*, 54 STAN. L. REV. 1217, 1219, 1235–37 (2002) (arguing that cognitive limitations impact regulatory policies and judgments about regulatory policies); Steven P. Croley, *Beyond Capture: Towards a New Theory of Regulation*, in HANDBOOK ON THE POLITICS OF REGULATION 50, 57, 59–60, 64 (David Levi-Faur ed., 2011) (arguing that capture theory might be too general to provide practical insight for real-world policy issues).

¹¹⁹ See, e.g., Occupational Safety and Health Act, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. § 651 (2012)) (referring to aggregative justifications and purposes for federal workplace health and safety policies).

We use these two examples to venture a preliminary account of horizontal agencies, which take their responsibility to relational justice seriously. One takeaway of this account is to resist the “public law reductionism” that increasingly strict and not sufficiently discriminating cost-benefit analysis requirements of administrative agencies may generate.¹²⁰ To reiterate: we do not imply that cost-benefit analysis should be irrelevant to the more relational agencies we study; the aggregative effect of *all* agency regulations surely implies that their welfarist implications are pertinent even with respect to these agencies. But we insist that the closer we come to the pole of the relational agency, the more troubling it is if cost-benefit analysis overshadows or even erases the private law sensibilities we identify.

B. *Two Examples*

1. *OSHA*

Abstractly analyzed, there is nothing unique in job-related injuries. Like other types of harms, some of these injuries are properly analyzed as violations of relational duties, which means that the responsibility for their prevention and the costs of their occurrence should not be allocated to the worker, but rather to another person, notably her employer. The adjudicatory process, namely, the common law of torts, offers a straightforward way to implement this proposition. Of course, this conclusion is merely a shorthand for a slightly subtler point. The costs of injury are not allocated to the particular worker injured on the job, but rather spread among the stakeholders in the activity more generally: employers or insurers cover the immediate costs of an injury that befalls the particular worker; workers (by sacrificing some of their wages) or consumers (by paying higher prices) or shareholders fund the coverage. Losses are shared among a group of people who benefit from the activity.¹²¹

But tort law is not essential for this task, and the shift to other means of securing compliance with these duties—for pragmatic or other reasons of the kind we have discussed earlier—does not imply a repudiation of this

¹²⁰ For a (rather modest) attempt to ameliorate this concern, see Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1866–68 (2016).

¹²¹ The underlying point here is that the duties of the employer to the employee are part of a wider net of interpersonal justice claims. A web of benefitting parties shares responsibility for the costs of injuries. But the collective responsibility for the ultimate cost does not undermine the special role of the employer, as the person in control of the conditions of work, in attending to care for the prevention of injury. Creating an economic incentive for the employer to generate safe working conditions is one way of making her focus on an interpersonal duty, but it is not necessarily the most effective way to ensure that focus. More direct duties that solve information uncertainties might be better suited to the task, and their accompaniment by insurance schemes would not undermine the core responsibility at stake in relational terms.

injunction of relational justice. Indeed, relational justice need not object to alternative schemes, such as workers' compensation schemes, as long as they make some room for the types of legal doctrines—for example, injunctive relief and punitive damages for intentional misconduct—that ensure compliance with the employer's duty of care.¹²²

Our analysis of OSHA falls within this broad framework. To be sure, our point is *not* that the scheme prescribed by the Occupational Safety and Health Act of 1970 mimics the results of traditional negligence law. Quite the contrary, part of the point of this Act is to generate measures that strengthen employers' *ex ante* compliance with this interpersonal duty, a duty that instantiates a legitimate relation between particular employers and particular employees.¹²³ Indeed, the common law of torts, with its traditional requirement of a completed wrong, is inapt for the task because it cannot properly respond to the irreparable harms at hand and workers' compensation schemes do not obviate this difficulty. In particular, no award of money damages can restore victims of wrongful death their lost means (life), and that is also true of injuries such as mangled limbs or blindness. *Ex ante* regulation of risk is, at least in principle, the proper response to this predicament.¹²⁴

Accordingly, the OSHA regime structures the relationships between employers and employees by ensuring the foundational status of employees' right to safety and health.¹²⁵ These deviations from the common law of torts do not imply that the OSHA regime is divorced from private law's relational focus. Rather, they mean that even though its form is regulatory, this regime is in tune—in fact, more in tune than its adjudicatory counterpart—with a focus on what relational justice requires.¹²⁶

¹²² See Dagan & Dorfman, *Just Relationships*, *supra* note 50, at 1436–37 (noting the continued applicability of traditional legal doctrines—like injunctive relief and punitive damages—in workers' compensation cases, which count as relationally just in terms of the employer-employee interaction).

¹²³ See U.S. DEP'T OF LABOR, OSHA FIELD OPERATIONS MANUAL 6-1 (2015), https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-159.pdf [hereinafter OSHA FIELD OPERATIONS MANUAL] (regarding the General Penalty Policy, noting penalties to employers as incentive for preventing or correcting violations voluntarily); NICHOLAS A. ASHFORD & CHARLES C. CALDART, TECHNOLOGY, LAW, AND THE WORKING ENVIRONMENT 458 (rev'd ed., 1996) (discussing the OSH Act's goal in providing safe workplaces, by establishing and enforcing standard governing the work environment).

¹²⁴ The qualified language of the text derives from the fact that a comparative institutional analysis may show that an *ex post* workers' compensation (or tort) approach is in fact more effective in securing employees' fundamental right to safety and health.

¹²⁵ See CHARLES NOBLE, LIBERALISM AT WORK: THE RISE AND FALL OF OSHA 94 (1986) (“[OSHA] promised all workers a minimum level of health and safety regardless of the extent to which they were politically and economically organized, their income, or their market position.”).

¹²⁶ This does not imply, of course, that OSHA works perfectly. Indeed, like many (most) other complex bureaucracies, it suffers both from delays and from distortions, due to the influence of interest groups. See *id.* at 205 (discussing the failure of OSHA, including susceptibility to business groups' mobilization); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-330, WORKPLACE SAFETY AND HEALTH:

This relational perspective is key to important aspects of both the substance and the form of the OSHA regime. It is most clearly manifested substantively in OSHA's prescription of feasible risk reduction.¹²⁷ OSHA "requires the elimination of 'significant' risks, when [those risks] can be eliminated without threatening the long-run health of the activity to which the risks belong."¹²⁸ As Gregory Keating explains, such feasibility analysis "looks to achieve the lowest level of risk practically"—that is: technologically and economically—"attainable, not the level of risk that minimizes the combined costs of injuries and their prevention."¹²⁹ This analysis renders intelligible what Sunstein and other spokespersons of the conventional accounts of regulatory theory find so puzzling.¹³⁰ Indeed, OSHA's feasibility test makes perfect relational sense. Private law's normative underpinnings of reciprocal respect for self-determination and substantive equality entail an *asymmetrical* treatment of physical harms and financial costs.¹³¹ This means that where "the essential conditions of effective agency"¹³² of the employees are at stake, risk creators should indeed be required to "press precaution beyond the point of marginal cost-justifiability."¹³³

Another way to view this situation is to shift attention momentarily away from an individualized risk creating decision. What is at stake is a regime level rule, a baseline of the interpersonal interaction between employers and employees. OSHA's baseline of relational justice reflects a commitment regarding what kinds of considerations can actually enter the aggregate

MULTIPLE CHALLENGES LENGTHEN OSHA'S STANDARD SETTING 4, 7–9, 12, 37–38 (2012), <http://www.gao.gov/assets/590/589825.pdf> (noting the involvement of various interest groups in the rulemaking process, and reporting on the protracted time periods of developing and issuing new or updated health and safety standards).

¹²⁷ 29 U.S.C. § 655(b)(5) (2012) ("The Secretary . . . shall set the standard which most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity . . ."). There are, to be sure, also aggregative concerns that affect OSHA's regime, as—for example—where it incorporates concerns of the economic burden on small businesses. See Occupational Safety & Health Admin., *Small Business*, DEP'T LAB., <https://www.osha.gov/smallbusiness/> (last visited Oct. 8, 2019) (demonstrating availability of resources and information, specifically for small business employers).

¹²⁸ Gregory C. Keating, *Is Cost-Benefit Analysis the Only Game in Town?*, 91 S. CAL. L. REV. 195, 231, 233 (2018).

¹²⁹ *Id.* at 231.

¹³⁰ See Masur & Posner, *supra* note 10, at 658, 668, 679, 704, 706-07, 709; Sunstein, *supra* note 11, at 1410–11.

¹³¹ See Dagan & Dorfman, *Just Relationships*, *supra* note 50, at 1397, 1418, 1424, 1432 (contrasting private law's valuing of self-determination and substantive equality that implies the *asymmetrical* treatment of physical harms and financial costs with their *symmetrical* treatment under the economic analysis of law).

¹³² Keating, *supra* note 128, at 200.

¹³³ Dov Waisman, *Reasonable Precaution for the Individual*, 88 ST. JOHN'S L. REV. 653, 670 (2014).

welfarist analysis in the first place,¹³⁴ and it also recognizes that relational justice need not imply that concerns of general welfare are irrelevant. This is why its feasibility requirement does not apply to insignificant risk: such a “background level of risk” is “worth bearing,” as Keating notes, because eliminating all discernible risk “requires the elimination of all discernible activity,” which would be “a cure worse than the disease it treats.”¹³⁵

Furthermore, although OSHA does not establish a regime of one-to-one litigation,¹³⁶ the relational foundation of the OSHA regime can easily be traced in many features of its form. OSHA defines its “general” mission as the assurance of “safe and healthful conditions for working men and women,” where its own role is one of “setting and enforcing standards and providing training, outreach, education and compliance assistance,” while “employers are responsible for providing a safe and healthful workplace for their workers.”¹³⁷ This division of labor is not one whereby the state commandeers the support of employers to enhance its public goals; rather, it rests on the typical private law relational logic:¹³⁸ “Because employers control the conditions of employment, the onus of protecting workers from occupational disease and injury was to rest with them as well.”¹³⁹

Indeed, as the “general duty” clause of the OSH Act prescribes, each employer is obligated “to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”¹⁴⁰ This relational emphasis accounts for the rough correspondence between the list of employers’ responsibilities and that of

¹³⁴ A capacious view of cost benefit analysis would seek to limit this type of consideration to a bare minimum, insisting that only harms/benefits that are unquantifiable in principle escape the analysis. Unsurprisingly, such a view often accords with the (philosophically dubious) claim that values such as “equity” or “dignity” are quantifiable in principle. For an analysis that usefully distinguishes between what may be impossible and what is merely difficult to quantify, see Jonathan S. Masur & Eric A. Posner, *Unquantified Benefits and the Problem of Regulation Under Uncertainty*, 102 CORNELL L. REV. 87, 104–08 (2016).

¹³⁵ Keating, *supra* note 128, at 248–49.

¹³⁶ To be sure, complaints by workers or their representatives are important triggers for inspections, in which case they also have some rights of participation and information. See, e.g., OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, ALL ABOUT OSHA 16 (2018), https://www.osha.gov/publications/all_about_osh.pdf [hereinafter ALL ABOUT OSHA] (“Workers only have the right to challenge the deadline by which a problem must be resolved.”). But the process is administrative and “[w]hen an inspector finds violations of OSHA standards or serious hazards, OSHA may issue citations and fines. A citation includes methods an employer may use to fix a problem and the date by when the corrective actions must be completed.” *Id.*; see also OCCUPATIONAL SAFETY & HEALTH ADMIN., WORKERS’ RIGHTS 13 (2014), <https://www.osha.gov/Publications/osh3021.pdf> (describing OSHA protocol for violations).

¹³⁷ ALL ABOUT OSHA, *supra* note 136, at 4.

¹³⁸ ASHFORD & CALDART, *supra* note 123, at 184.

¹³⁹ *Id.* at 92. See also PAUL A. ERICKSON, PRACTICAL GUIDE TO OCCUPATIONAL HEALTH AND SAFETY 3 (1st ed.1996).

¹⁴⁰ 29 U.S.C. § 654(a)(1) (2012).

employees' rights, as well as for the fact that the OSHA regime does not cover self-employed workers.¹⁴¹

In addition, the pursuit of relational justice is not limited to the substance of its safety standards. OSHA's focus on constructing just workplace relationships implicates the way it complies with the Administrative Procedure Act's requirement of stakeholders' participation in its rulemaking procedure:¹⁴² both employers and labor representatives may recommend that OSHA initiate standards,¹⁴³ and, in any event, OSHA conducts public hearings or roundtables in which representatives of both parties can provide their input.¹⁴⁴ Furthermore, two representatives of each side sit on the National Advisory Committee on Occupational Safety and Health (NACOSH), which advises the secretaries of labor and health and human services on occupational safety and health programs and policies.¹⁴⁵

The connection between process considerations and relational justice is complex, and the democratizing element of OSHA's advisory committee may be seen as a mediating feature. On the one hand, if one believed that relational justice could be deduced from pure reason, the advisory board could comprise a single philosopher. But under modern industrial conditions, safety policy seems more like a hybrid category where a range of arrangements that *might* accord with relational justice merit consideration. Reasoning about those arrangements is not a mere exercise in expressing preference or exerting interest group power, but situated perspectives will make a difference for choices. Under these conditions, allowing some significant representation is a step toward allowing participants to understand the system as one of their own authorship. This is also part of the infrastructure of just relations.

The same relational justice rationale also explains "OSHA's priority system for conducting inspections" which "is designed to allocate available OSHA resources as effectively as possible to ensure that *maximum* feasible protection is provided to working men and women."¹⁴⁶ It also nicely explains, indeed justifies, OSHA's authority to seek a restraining order if it finds "conditions or practices" which "could reasonably be expected to cause death or serious physical harm before normal enforcement procedures

¹⁴¹ ALL ABOUT OSHA, *supra* note 136, at 8–10.

¹⁴² 5 U.S.C. § 553 (2018).

¹⁴³ ALL ABOUT OSHA, *supra* note 136, at 12.

¹⁴⁴ *Id.* at 12–13.

¹⁴⁵ *National Advisory Committee on Occupational Safety & Health*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dop/nacosh/nacosh.html> (last visited Oct. 2, 2019).

¹⁴⁶ OSHA FIELD OPERATIONS MANUAL, *supra* note 123. Specifically, inspections are initiated without advance notice, and based on the following priorities: imminent danger, catastrophes, worker complaints and referrals, and follow-up inspections. See *Occupational Safety and Health Administration (OSHA) Inspections*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Aug. 2016), https://www.osha.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf.

could eliminate the hazard.”¹⁴⁷ Perhaps the starkest example of this rationale is the regulation providing workers a right to refuse hazardous work if “the condition clearly presents a risk of death or serious physical harm, there is not sufficient time for OSHA to inspect, and, where possible, a worker has brought the condition to the attention of the employer.”¹⁴⁸ While its applications are not necessarily straightforward, the principle is a clear case of taking a particular activity off the bargaining table. In that sense, it establishes a relational justice baseline that structures the rest of the parties’ interaction.

Finally, the relational rationale underpins OSHA’s outreach priorities, that is: its focus on “vulnerable, hard-to-reach workers in dangerous jobs to enhance their knowledge about their rights and the hazards they face” as well as on “temporary workers” and “limited English proficiency workers—a population that typically experiences a higher rate of injuries, illnesses, and fatalities in the workplace.”¹⁴⁹ OSHA’s mission of constructing just workplace relationships is also clear from the extension of its reach to foreign workers who are thereby also encouraged “to exercise their rights under occupational safety and health laws.”¹⁵⁰ Outreach has rarely been the focus of scholars dealing with OSHA.¹⁵¹ It is, however, a telling example for our claim. When people affected by the ground rules of interaction are unaware of their rights, the very basis of just relationships is threatened. Outreach is crucial for establishing the basic conditions for just work relationships. Further, it is particularly inaccessible to courts; it may be a byproduct of sensational litigation now and then, but it cannot be systematically pursued except by an administrative agency. OSHA’s

¹⁴⁷ ASHFORD & CALDART, *supra* note 123, at 96.

¹⁴⁸ ALL ABOUT OSHA, *supra* note 136, at 20. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 1 (1980) (supporting OSHA’s attempt to force accommodation of workplace conditions to workers’ known susceptibilities); ASHFORD & CALDART, *supra* note 123, at 425–26, 441 (discussing “employees who face exclusion from the workplace . . . because of their presumed susceptibility to health hazards known to be present in the workplace”).

¹⁴⁹ U.S. DEP’T OF LABOR, STRATEGIC PLAN, FISCAL YEARS 2014–2018, at 31, 33–34, <https://archive.org/details/Department-of-Labor-Strategic-Plan-2014-2018> (last visited Oct. 22, 2019).

¹⁵⁰ OCCUPATIONAL SAFETY & HEALTH ADMIN., LETTER OF ARRANGEMENT BETWEEN THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION OF THE DEPARTMENT OF LABOR OF THE UNITED STATES AND THE DEPARTMENT OF FOREIGN AFFAIRS OF THE PHILIPPINES CONCERNING WORKPLACE SAFETY AND HEALTH PROTECTIONS APPLICABLE TO FILIPINO WORKERS IN THE UNITED STATES 1 (2012), https://www.osha.gov/international/docs/loa_philippines.pdf. OSHA signed similar agreements with Mexico, Costa Rica, Nicaragua, The Dominican Republic, El Salvador, Guatemala, Honduras, Peru, Ecuador, Brazil, The Philippines, and China. *OSHA International*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/international/index.html> [<https://perma.cc/YHA7-F78Y>] (last visited Mar. 25, 2020). These agreements contain no commitments of the other countries regarding American workers. They thus lack any statist rationale and can best be explained as a manifestation of the foreign workers’ interpersonal human rights. *See generally* Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights*, 51 CORNELL INT’L L.J. 361 (2018).

¹⁵¹ For the exception that proves the rule, see Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479 (2009).

outreach regime recognizes the importance of creating the conditions for just relationships by taking on the responsibility for generating an informed workforce.

3. CFPB

Our second example, the Consumer Financial Protection Bureau (CFPB), was only recently established as part of the 2010 Dodd-Frank Act reforms of the financial services regulatory system¹⁵² (and currently occupies some news headlines).¹⁵³ Title X of the Dodd-Frank Act creates the CFPB within the Federal Reserve System and assigns to it “rulemaking, enforcement, and supervisory powers over many consumer financial products and services, as well as the entities that sell them.”¹⁵⁴

The CFPB is a perfect example for our purposes because the financial institutions over which it has authority were actually regulated and supervised prior to its establishment. But both the attention and the expertise of the banking regulators, who had the statutory powers to protect consumers at that time, were focused on their other mission, which they perceived to be primary,¹⁵⁵ namely “ensuring that institutions are managed in a safe and sound manner so as to maintain profitability and avoid failure.”¹⁵⁶ Safety and soundness regulation is of course justified from the perspective of the general welfare. However, the dominance of this public perspective implied the “subordination of consumer protection to bank profitability,” which meant that except in the “most egregious” cases, regulators tended to look favorably upon even “unfair, deceptive, and abusive” bank practices as long

¹⁵² Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. § 5491 (2012).

¹⁵³ See Ian Wren, *Clash for Control of Consumer Financial Protection Bureau Heads to Court*, NAT’L PUB. RADIO (Apr. 12, 2018), <https://www.npr.org/2018/04/12/601965298/legal-battle-over-who-runs-consumer-bureau-continues> (describing the 2018 controversy over who got to run the CFPB).

¹⁵⁴ DAVID H. CARPENTER, CONG. RESEARCH SERV., R42572, THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL ANALYSIS 1 (2014), <https://www.fas.org/sgp/crs/misc/R42572.pdf>. To be sure, with respect to large depository institutions, the CFPB now has the primary consumer compliance supervisory, enforcement, and rulemaking authorities. Regarding smaller ones, the prudential banking regulators hold a significant portion of the supervisory and enforcement powers. On the other hand, the CFPB may also regulate nondepository financial institutions: providers of private student loans; providers of payday loans; entities that engage in mortgage-related activities; and other institutions, which it considers to be large participants in a consumer financial market or ones that engage in conduct that pose risks with regard to the provision of consumer financial products or services. *Id.* at 13, 16.

¹⁵⁵ See Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 330–31 (2013) (describing how the primary motivation of bank regulators was profitability over protecting consumers).

¹⁵⁶ CARPENTER, *supra* note 154, at 2. The Federal Trade Commission (FTC) “did have a consumer focus,” but it had no “deep expertise in consumer finance.” *Id.* at 8; Levitin, *supra* note 155, at 331. Furthermore, its statutory authority “prevented it from conducting *ex ante* supervision of nondepositories and from regulating depositories altogether.” CARPENTER, *supra* note 154, at 8.

as they were indeed profitable.¹⁵⁷ This failure, which triggered the establishment of the CFPB,¹⁵⁸ can be interpreted simply as mistaken application of welfarist criteria by underestimating costs that are widely spread; and it was probably also that. But it also meant that prior to the CFPB, there was no room to consider concerns of relational injustice.

The CFPB, to be sure, does not (and should not) eliminate the obvious significance of public concerns in the regulation of financial institutions.¹⁵⁹ But it does give center stage to relational considerations,¹⁶⁰ and in this respect it is similar to OSHA. Although its focus is on financial products, rather than health and safety, and its beneficiaries are consumers,¹⁶¹ rather than workers, its conceptual starting point is very close to OSHA's: the inadequacy of the traditional adjudicatory means—the tort and contract suits that remain available—for the horizontal task of consumer financial protection. These traditional means are especially constricted given the “procedural limitations on class actions coupled with the expanded use of binding mandatory arbitration.”¹⁶²

Indeed, the foundation of the CFPB was driven by the insight that sellers of financial products “have learned to exploit . . . consumers in ways that put [their] economic security at risk,” and that a structural solution to this predicament requires “the creation of a single regulatory body that [is] responsible for evaluating the safety of consumer credit products and policing any features that are designed to trick, trap, or otherwise fool the consumers that use them.”¹⁶³ As the CFPB declares in its website, “[t]he Consumer Financial Protection Bureau is a U.S. government agency that makes sure banks, lenders, and other financial companies treat you fairly.”¹⁶⁴

¹⁵⁷ Levitin, *supra* note 155, at 331; *see also* CARPENTER, *supra* note 154, at 2 (noting the public perspective prior to the CFP Act).

¹⁵⁸ This was not the only flaw in the pre-CFPB consumer financial protection regime. Another important problem was “the diffusion of regulatory responsibility [that] created regulatory arbitrage opportunities that fueled a race to the bottom.” Levitin, *supra* note 155, at 329.

¹⁵⁹ Notably, the establishment of the Financial Stability Oversight Council (FSOC), and its authority to veto a CFPB regulation if it unduly risks the safety and soundness of the U.S. financial or banking system, are aimed exactly at ensuring these aggregative concerns. CARPENTER, *supra* note 154, at 22; Levitin, *supra* note 155, at 353.

¹⁶⁰ *Cf.* SINGER, *supra* note 115, at 92 (“We choose laws that set the minimum standards for market relationships.”).

¹⁶¹ The proposition of the text should not be read to imply that there are no remaining difficulties. One particularly important difficulty in our context is that the CFPB is quite vague as to whether its goal is to improve consumer financial outcomes, improve consumer welfare, or empower consumers. *See* Talia B. Gillis, *Putting Disclosure to the Test: Toward Better Evidence-Based Policy*, 28 LOY. CONSUMER L. REV. 31, 39–40 (2015).

¹⁶² Levitin, *supra* note 155, at 334.

¹⁶³ Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 6 (2008) (alteration in original).

¹⁶⁴ CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov> (last visited Oct. 8, 2019) (alteration in original).

This role is indeed central to CFPB rulemaking activity, which relies on a set of eighteen preexisting federal statutes—including the Truth in Lending Act, the Truth in Savings Act, the Fair Credit Billing Act, and the Fair Debt Collection Practices Act.¹⁶⁵ Authority over those acts has been transferred to the CFPB from several other regulators.¹⁶⁶ In addition, the Bureau enjoys an “organic authority under the Consumer Financial Protection Act,” which deals with “defining certain acts and practices as unfair, deceptive, or abusive; mandating disclosures; requiring registration of certain non-banks; and restricting predispute arbitration.”¹⁶⁷

As might be expected, some of the CFPB’s rules—such as the prescription that “[d]eception is not limited to situations in which a consumer has already been misled,” but rather covers also acts or practices which are “*likely to mislead* consumers”¹⁶⁸—can be accounted for from *both* an aggregative and an interpersonal perspective. The significance of this rule to the interpersonal perspective is, of course, in supplementing the *ex post* adjudicatory model with a regulation that may more effectively prevent the consumer’s predicament. But other rules seem to focus on the relational wrong.¹⁶⁹

Thus, the CFPB defines an act or practice as abusive—a category that is the creation of the Dodd-Frank Act—if it “materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service” or if it “takes unreasonable advantage” of the consumer’s “lack of understanding . . . of the material risks, costs, or conditions of the product or service,” her “inability” to protect her “interests . . . in selecting or using a consumer financial product or service,” or her “reasonable reliance” on an intermediary “to act in the interests of the consumer.”¹⁷⁰ A similar (indeed, more obvious) relational justice rationale

¹⁶⁵ See Levitin, *supra* note 155, at 344 (listing consumer laws relied upon by CFPB).

¹⁶⁶ CARPENTER, *supra* note 154, at 9; Levitin, *supra* note 155, at 330, 344.

¹⁶⁷ Levitin, *supra* note 155, at 344 (citations omitted).

¹⁶⁸ CONSUMER FIN. PROT. BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL 5 (2012) [hereinafter CFPB SUPERVISION AND EXAMINATION MANUAL], http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf (emphasis in original). CFPB’s interpretation is based on FED. TRADE COMM’N, POLICY STATEMENT ON DECEPTION (1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

¹⁶⁹ The cautious language of the text is deliberate. We do not imply that aggregative concerns are irrelevant even in these contexts. Indeed, insofar as its rulemaking—as opposed to supervisory and enforcement—activity is concerned, the CFPB is obligated to take into account net benefit (or cost effectiveness) as one of its considerations. See Levitin, *supra* note 155, at 352–53 (discussing CFPB cost-benefit analysis requirements); Howell E. Jackson & Paul Rothstein, Cost Benefit Analysis in Consumer Protection Regulation 29 (2005) (unpublished manuscript) (on file with authors). Furthermore, at times the CFPB may be unsuccessful in its attempt to vindicate relational justice, as the recent congressional resolution canceling its Arbitration Agreements Rule demonstrates. *New Protections Against Mandatory Arbitration*, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/arbitration-rule/> (last visited Mar. 25, 2020).

¹⁷⁰ 12 U.S.C. § 5531(d) (2012).

underlies the Equal Credit Opportunity Act (ECOA)¹⁷¹—one of the sources of the CFPB’s transferred powers—that authorizes the CFPB to ensure that creditors do not “discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age”¹⁷²

CFPB’s relational focus is no less significant insofar as its supervision, enforcement, and education activities are concerned. Thus, unlike the Federal Trade Commission, which dealt with these matters prior to its establishment, complaints to the CFPB do not serve merely as a means to “detect *patterns* of wrong-doing.”¹⁷³ Rather, they are taken seriously as such, so that “companies are expected to close all but the most complicated complaints within 60 days.”¹⁷⁴ Moreover, the CFPB’s supervision priorities also reflect a focus on risk to consumers,¹⁷⁵ and the very same focus is also the first principle guiding its supervisory process.¹⁷⁶

CFPB’s enforcement authority (via litigation in a federal district court or administrative adjudication before an administrative law judge)¹⁷⁷ may yield a wide-ranging set of remedies, many of them—such as refund of money, return of real property, and payment of damages—follow the traditional forms of redress to the pertinent victims.¹⁷⁸ The recent Wells Fargo scandal supplies an excellent case in point. Wells Fargo Bank, one of the biggest banks in the United States, secretly opened two million unauthorized accounts, transferred funds from consumers’ accounts without

¹⁷¹ 15 U.S.C. § 1691 (2006).

¹⁷² *Id.* On anti-discrimination laws as means of relational justice, see *infra* note 215 and accompanying text.

¹⁷³ *Solving Consumer Problems*, FED. TRADE COMMISSION (July 2012), <https://www.consumer.ftc.gov/articles/0228-solving-consumer-problems> (emphasis added).

¹⁷⁴ *Consumer Financial Protection Bureau Monthly Complaints Snapshot Spotlights Bank Account and Service Complaints*, CONSUMER FIN. PROTECTION BUREAU (Aug. 30, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-monthly-complaints-snapshot-spotlights-bank-account-and-service-complaints/>.

¹⁷⁵ See generally CONSUMER FIN. PROT. BUREAU, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT (2016), http://files.consumerfinance.gov/f/201602_cfpb_report_strategic-plan-budget-and-performance-plan_FY2016.pdf (describing consumer-focused plan and strategy).

¹⁷⁶ CFPB SUPERVISION AND EXAMINATION MANUAL, *supra* note 168, at Examinations 3 (other principles described are that it should be data driven and consistent). Consumer complaints are important triggers for CFPB examinations and enforcement (as well as rulemaking). *Id.* Other than that, CFPB’s complaint process is designed to help the consumer and the financial entity reach a just settlement. See generally CONSUMER FIN. PROT. BUREAU, CONSUMER RESPONSE ANNUAL REPORT JANUARY 1 – DECEMBER 31, 2015 (2016), http://files.consumerfinance.gov/f/201604_cfpb_consumer-response-annual-report-2015.pdf (using, overall, consumer-focused language).

¹⁷⁷ See Levitin, *supra* note 155, at 357–58 (describing remedies for violation of consumer financial law).

¹⁷⁸ Others—such as public notification regarding the violation and limits on the activities or functions of the person against whom the action is brought—are more public in nature. See CFPB SUPERVISION AND EXAMINATION MANUAL, *supra* note 168, at Overview 7 (providing a full list).

consent, and often racked up fees and charges in the process.¹⁷⁹ An investigation by the CFPB led to a \$100 million fine,¹⁸⁰ in addition to penalties to the Office of the Comptroller of Currency and the City of Los Angeles.¹⁸¹ Further, Wells Fargo was forced to pay restitution to any of its customers who were charged unauthorized fees.¹⁸²

The civil monetary penalty is a particularly instructive regulatory tool for CFPB's horizontal task of ensuring just outcomes in particular cases: these penalties—as of the end of September 2017 the Bureau collected some \$566 million¹⁸³—must be deposited into the Consumer Financial Civil Penalty Fund, where they are “pooled” and used primarily for compensating “victims who haven't received full compensation for their harm through redress paid by the defendant in their case.”¹⁸⁴

Finally, analogously to OSHA, the CFPB focuses its efforts of improving consumers' financial capability by “addressing the unique financial challenges faced by four specific populations”: students and young consumers, the elderly, service members, and low-income and economically vulnerable consumers.¹⁸⁵ The CFPB's creation in the wake of the global financial crisis has given it something of a bully pulpit. High profile investigations often accompanied by congressional hearings (as in the case of Wells Fargo, and previously with other high-profile cases of banking impropriety) allow the CFPB to educate the public through publicity. The Bureau creates salience for the norms of fair banking, helping to bring consumers of financial products closer to an awareness of their rights that could form the substrate of a just banking relationship.

* * *

These two examples do not exhaust the real-life manifestations of the hitherto obscured relational dimension of regulatory agencies: there are additional agencies that are similarly relational in nature and others that are best characterized in hybrid terms, having significant public law *and* private

¹⁷⁹ Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Fines Wells Fargo \$100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, CFPB NEWSROOM (Sept. 8, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/>.

¹⁸⁰ *Id.*

¹⁸¹ See L.A. City Attorney, *Protecting Consumers - Wells Fargo*, L.A. CITY ATT'Y MIKE FEUER, <http://www.lacityattorney.org/allegations-against-wells-fargo> (last visited Mar. 25, 2020) (announcing result of Wells Fargo lawsuit and linking to the *Los Angeles Times* report).

¹⁸² Consumer Fin. Prot. Bureau, *supra* note 179.

¹⁸³ CONSUMER FIN. PROT. BUREAU, CIVIL PENALTY FUND: FREQUENTLY ASKED QUESTIONS (2017), https://files.consumerfinance.gov/f/documents/CPF_FAQ_2017.12.14.pdf.

¹⁸⁴ *Civil Penalty Fund*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/about-us/payments-harmed-consumers/civil-penalty-fund/> (last visited Oct. 8, 2019).

¹⁸⁵ CONSUMER FIN. PROT. BUREAU, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT, *supra* note 175, at 5.

law elements. Analyzing this important subset of the apparatus of the modern administrative state vindicates the main claim of this Article: that regulatory theory should follow regulatory practice and think not only in aggregative terms but also horizontally. Our analysis further generates a preliminary account of what it means to be a relational regulator: it helps articulating the normative vocabulary with which such agencies should be evaluated and distilling a preliminary taxonomy of their characteristic toolkit.

C. *Thinking Horizontally*

OSHA and CFPB are only two examples of a significant subset of the modern administrative apparatus. But they are not outliers. Indeed, the easy case for horizontally oriented agencies would begin with the agencies that set default terms of trade for large swaths of standardized commercial dealing.¹⁸⁶ The regulatory apparatus of the modern state is heavily implicated in regulating interpersonal relationships. Because their actions shape interpersonal relations, these agencies should be (and happily, often are) thinking horizontally.

One manifestation of this emphasis is straightforward and can be briefly stated despite the minimal attention we have given it thus far. Regulators with private law functions take individual complaints seriously,¹⁸⁷ even though most of them also have proactive enforcement powers.¹⁸⁸ The

¹⁸⁶ For just one example, consider the role of the Department of Agriculture's *Agricultural Marketing Service*. The Agency establishes quality grading and conducts inspections dealing with safety, but is also responsible for "establishing and enforcing a code of fair business practices and . . . helping companies resolve business disputes" under the Perishable Agricultural Commodities Act. *Perishable Agricultural Commodities Act (PACA)*, U.S. DEP'T AGRIC., <https://www.ams.usda.gov/rules-regulations/paca> (last visited Oct. 8, 2019). Examples like this could be multiplied.

¹⁸⁷ Again, an illustrative indication from the Department of Agriculture:

The PACA Division, which is part of USDA's Agricultural Marketing Service (AMS), regulates fair trading practices of produce businesses that are operating subject to PACA including buyers, sellers, commission merchants, dealers and brokers within the fruit and vegetable industry. In the past three years, USDA resolved approximately 3,500 PACA claims involving more than \$58 million. Our experts also assisted more than 8,000 callers with issues valued at approximately \$140 million. These are just two examples of how USDA continues to support the fruit and vegetable industry.

USDA Files Action Against K & A Produce in New York for PACA Violations, U.S. DEP'T AGRIC. (Apr. 12, 2017, 11:30 AM), <https://www.ams.usda.gov/press-release/usda-files-action-against-k-produce-new-york-paca-violations>. Some say that these agencies take complaints too seriously. *See, e.g.*, Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1263 (2010) (proposing to redefine the EEOC's role so that it only investigates and litigates significant claims, reducing the overall number of discrimination complaints the Agency processes).

¹⁸⁸ The exception to this rule is the National Labor Relations Bureau (NLRB), whose proceedings must "originate with the filing of charges or petitions by employees, labor unions, employers or other private parties." NAT'L LABOR RELATIONS BD., NLRB STRATEGIC PLAN FY 2014 – FY 2018, at 5

implications of this proposition vary: the proceedings these “horizontal agencies” offer for dealing with complaints can either serve as (partial) substitutes to private lawsuits, or run in parallel to potential such lawsuits.¹⁸⁹ Most (but not all) of these agencies prefer to settle disputes through an agreement between the parties involved, namely: via mediation, facilitation, conciliation, or in an informal resolution.¹⁹⁰ These differences notwithstanding, the simple point is that when a significant part of an agency’s role is to secure relational justice, it naturally aspires to provide satisfactory responses to relational wrongs.¹⁹¹

(2014), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1709/NLRB%20Strategic%20Plan%20FY2014-18.pdf>.

¹⁸⁹ See, e.g., *Filing a Lawsuit*, U.S. EQUAL OPPORTUNITY & EMP. COMM’N, <https://www.eeoc.gov/employees/lawsuit.cfm> (last visited Oct. 8, 2019) (noting that if an individual plans to file a federal lawsuit “alleging discrimination on the basis of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, genetic information or retaliation, [the individual] first [has] to file a charge with the EEOC”); U.S. DEP’T OF LABOR, FAQs ABOUT RETIREMENT PLANS AND ERISA, EMPLOYEE BENEFITS SECURITY ADMINISTRATION, <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-for-workers.pdf> (last visited Oct. 8, 2019) (“The Department of Labor enforces the law by informally resolving benefit disputes, conducting investigations, and seeking correction of violations of the law, including bringing lawsuits when necessary.”).

¹⁹⁰ See *What You Can Expect After You File a Charge*, U.S. EQUAL OPPORTUNITY & EMP. COMMISSION, <https://www.eeoc.gov/employees/process.cfm> (last visited Oct. 8, 2019) (explaining the pre-investigation mediation process); *Investigate Charges*, NAT’L LAB. RELATIONS BD., <https://www.nlr.gov/what-we-do/investigate-charges> (last visited Oct. 8, 2019) (describing how NLRB makes “every effort to facilitate a settlement between parties” if an investigation finds evidence to support a charge); U.S. DEP’T OF HOUS. & URBAN DEV., LEARN ABOUT THE FHEO COMPLAINT AND INVESTIGATION PROCESS, https://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/enforcement/conciliations (last visited Oct. 8, 2019) (describing how throughout the investigation the FHEO “will make efforts to help the parties reach an agreement”); *What We Do*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/what-we-do> (last visited Oct. 8, 2019) (“EBSA’s goal in responding to requests for interpretations and other rulings is to facilitate compliance with ERISA, and the department’s regulations through useful and timely interpretive guidance to plan participants, plan sponsors and other members of the employee benefits community.”). But see U.S. DEP’T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., WORKERS’ RIGHTS 3–4, 16 (2017) <https://www.osha.gov/Publications/osh3021.pdf> (indicating OSHA is the clear exception, where mutual agreement is less important due to the dimension it regulates—safety and health—and there are some working environments that—even if workers agree to them—are too dangerous and would be prohibited by the Agency). As the booklet explains to workers:

If you believe working conditions are unsafe or unhealthful, we recommend that you bring the conditions to your employer’s attention, if possible. You may file a complaint with OSHA concerning a hazardous working condition at any time. However, you should not leave the worksite merely because you have filed a complaint. If the condition clearly presents a risk of death or serious physical harm, there is not sufficient time for OSHA to inspect, and, where possible, you have brought the condition to the attention of your employer, you may have a legal right to refuse to work in a situation in which you would be exposed to the hazard.

Id. at 16.

¹⁹¹ A particularly clear manifestation of this commitment transpires where an agency seeks temporary relief in order to prevent an interpersonal irreparable harm. See *supra* text accompanying note

This is of course hardly surprising. What may seem more surprising—at least to theorists who think about the administrative state from the dominant public law paradigm—is the continuity between the common law and these horizontal agencies. Even where they set up policies—by prescribing rules or setting up priorities for their supervision and enforcement efforts—these agencies are profoundly guided by relational considerations, which is of course what can be expected given their significant role in shaping important categories of interpersonal relationships.¹⁹² Indeed, the relational perspective typifies both the form and the substance of the norms horizontal agencies produce and follow as well as their characteristic toolkit of techniques.

Regulatory agencies are often central in creating or maintaining the baseline entitlements that structure relationships.¹⁹³ While courts often engage in such baseline setting as a byproduct of particularistic litigation, agencies do this work overtly in a manner more exposed to public accountability. Their rules are not side effects of settling disputes, but rather geared directly to setting the foundations of relationships.¹⁹⁴ Importantly, administrative agencies are positioned to make structural decisions that courts would have difficulty formulating. In this sense, agencies have a wider scope in setting up the infrastructure of just relations, which courts typically address interstitially.

After considering a range of agency operations, we are willing to hazard a preliminary classification of three modes of horizontal agency. A first mode of relational regulation is often oriented towards bringing participants into a market, which resembles that of economic models. Whenever regulators engage in education initiatives, publicize the rights of consumers or workers,¹⁹⁵ or force firms to make information available to their

147 (discussing OSHA's approach). *See also, e.g., File a Complaint: Types of Complaints Investigated by FHEO*, U.S. DEP'T HOUSING & URBAN DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/online-complaint#_Types_of_Complaints (last visited Oct. 8, 2019).

¹⁹² *See supra* note 171 and accompanying text (discussing how the OSHA "Hazard Communication Standard" and the SEC's "Strategic Goal 3" are fundamentally about forcing exchanges of information between individuals).

¹⁹³ *See supra* text accompanying note 7 (introducing the concept of "regulatory contribution to the infrastructure of interpersonal interaction").

¹⁹⁴ *See supra* notes 160–63 and accompanying text (giving examples of how the EEOC, EBSA, NLRB, FHEO, and OSHA can set such foundations).

¹⁹⁵ *See, e.g., U.S. DEP'T OF LABOR, STRATEGIC PLAN FISCAL YEARS 2014-2018*, at 12–13, <https://www.dol.gov/sites/default/files/documents/agencies/osec/stratplan/fy2014-2018strategicplan.pdf> (last visited Mar. 25, 2020) (describing how the Department is securing "safe and healthy workplaces, particularly in high-risk industries," and improving "health benefits and retirement security for all workers" through OSHA and EBSA, respectively); *Serving Economically Vulnerable Consumers*, CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/empowerment/> (last visited Oct. 8, 2019).

employees or trading partners,¹⁹⁶ the agencies engage in a type of empowerment. But this is an empowerment only to participate in a market with full information, without affecting its content.¹⁹⁷

In a second mode of horizontal agency, the regulatory work changes the baseline in order to take certain contracting options off the table.¹⁹⁸ When regulators set minimum terms for interaction, they override (if the regulations have any bite) some party preferences, making at least some voluntary transactions unavailable (e.g., employment below safety standards).¹⁹⁹ Here, the motivations may be framed in various terms; we have argued that a normative commitment to just interpersonal relationships is often the proper motivating force. Indeed, we think that there is a continuity between the statutory regimes on which we focus in these pages and classical common law doctrines like misrepresentation, mistake, duress, undue influence, and unconscionability.²⁰⁰

Finally, the third mode of agency action lies somewhere in between the first two: it entails establishing mechanisms for participation in setting the terms of trade (especially employment). These mechanisms do not mandate particular minimum standards, but they do set up a bargaining venue that guarantees some level of representation of different interests, whose significance may be either intrinsic or instrumental (that is: as a means to affect the parties' consensual equilibrium without directly prohibiting certain outcomes).²⁰¹

¹⁹⁶ See, e.g., U.S. SEC. & EXCH. COMM'N, STRATEGIC PLAN FISCAL YEARS 2014-2018, at 37, <https://www.sec.gov/about/sec-strategic-plan-2014-2018.pdf> (last visited Mar. 25, 2020) (citing "Strategic Goal 3" as "Facilitat[ing] Access to the Information Investors Need to Make Informed Investment Decisions"); *Hazard Communication Guidelines for Compliance*, U.S. DEP'T LAB., <https://www.osha.gov/Publications/osha3111.html> (last visited Oct. 9, 2019) ("OSHA's Hazard Communication Standard (HCS) is based on a simple concept—that employees have both a need and a right to know the hazards and identities of the chemicals they are exposed to when working.")

¹⁹⁷ Disclosure, outreach, and publicity are examples. The goal in these instances is to prevent the type of exploitation liable to occur when contractors are faced by severe information asymmetries. For some analysts, these types of agency action may be viewed rather directly as corrections of market failures. Thus, while we have argued that their basis is best understood in the framework of relational justice, we recognize that there is a great deal of potential overlap between this consideration and an aggregative efficiency perspective.

¹⁹⁸ See SINGER, *supra* note 115, at 2, 19–20, 23–24, 47, 65, 68, 72, 155, 182.

¹⁹⁹ See, e.g., ASHFORD & CALDART, *supra* note 123, at 99–100; see also *supra* note 189 and accompanying text.

²⁰⁰ See EMMANUEL VOYIAKIS, PRIVATE LAW AND THE VALUE OF CHOICE 82, 85, 178, 195, 198, 200–01 (2017). This mode raises important concerns of impermissible paternalism and illiberal normalization, which we cannot address here. See Hanoch Dagan & Avihay Dorfman, Justice for Contracts § II.B (2020), <https://ssrn.com/abstract=3435781>.

²⁰¹ See, e.g., 15 U.S.C. § 78pp (2012) (establishing the Investor Advisory Committee, whose mission is to present the views and experience of a wide variety of investors and to advise the SEC on regulatory priorities and practices); *National Advisory Committee on Occupational Safety & Health Charter*, U.S. DEP'T LAB., <https://www.osha.gov/dop/nacosh/nacosh.html> (last visited Oct. 8, 2019).

As may be expected, the relational form—namely: the correspondence between the responsibility of the regulated party and the rights of the agency’s class of beneficiaries—is particularly conspicuous with agencies that regulate, and thus participate in constructing, the employment relationship.²⁰² We have mentioned this feature while describing OSHA,²⁰³ but it appears elsewhere also.²⁰⁴ Indeed, it is even more conspicuous regarding the National Labor Relations Board (NLRB), given the correlative relationships between its lists of employees’ rights and of employers’ obligations.

Employees have the right to join together to advance their interests as employees and to unionize and be represented by a union of their choice.²⁰⁵ Correspondingly, it is unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of these rights or to discourage (or encourage) union activities or sympathies.²⁰⁶ The attention to maintaining just work relationships makes sense of employers’ legal duty to bargain in good faith with their employees’ representative and to sign any collective bargaining agreement that has been reached. While the good faith standard does not mandate the content of the agreement, it announces, informs, and backs up a vision of relationships of mutual duty.²⁰⁷

²⁰² The reason why it is not surprising is threefold: *first*, work is one of the core horizontal relationships in modern societies; *second*, the fact that the work relationship involves some entitlement of one person over another’s labor power makes it a particularly challenging arena for a legal system that seeks to ensure just relationships; *finally*, the categories of employers and employees are also distinctive *sociological* categories, which means that the pursuit of relational justice in this type of relationship largely overlaps the pursuit of democratic equality.

²⁰³ See *supra* text accompanying note 141.

²⁰⁴ See, e.g., *Employee Rights*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employers/smallbusiness/checklists/employee_rights.cfm (last visited Oct. 8, 2019); *Small Business Requirements*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employers/smallbusiness/requirements.cfm> (last visited Oct. 8, 2019). This emphasis on the relational form of the parties’ rights and obligations is not the only horizontal common denominator of agencies that deal with the employment relationships. They also—unsurprisingly given their horizontal, as opposed to vertical, or statist, emphasis—tend to extend their coverage to vulnerable *foreign* workers. We mentioned this feature while describing OSHA. See *supra* text accompanying note 150. It also applies to both the NLRB and the EEOC. See *Collaboration with Foreign Embassies*, NAT’L LAB. RELATIONS BOARD, <https://www.nlr.gov/news-outreach/fact-sheets/collaboration-foreign-embassies> (last visited Oct. 8, 2019); *Memorandum of Understanding (MOU) Between the U.S. Equal Employment Opportunity Commission, and the Ministry of Foreign Affairs of the United Mexican States*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/mous/eeoc_mexico_mou.cfm (last visited Oct. 8, 2019) (providing examples of how these agencies extend coverage to foreign workers).

²⁰⁵ *Employee Rights*, NAT’L LAB. RELATIONS BOARD, <https://www.nlr.gov/rights-we-protect/employee-rights> (last visited Oct. 8, 2019).

²⁰⁶ *Employer/Union Rights and Obligations*, NAT’L LAB. RELATIONS BOARD, <https://www.nlr.gov/rights-we-protect/rights/employer-union-rights-and-obligations> (last visited Oct. 8, 2019).

²⁰⁷ See *Employee Rights*, NAT’L LAB. RELATIONS BOARD, <https://www.nlr.gov/rights-we-protect/employee-rights> (last visited Oct. 8, 2019); *Employer/Union Rights and Obligations*, NAT’L LAB.

Even more important for our purposes is that the interpersonal focus of horizontal agencies affects their actual operation. It explains, and indeed justifies, their priorities;²⁰⁸ and it underlies some of their foundational substantive norms. Recall that the touchstone of OSHA's regime—its feasibility test—is best understood as the entailment of private law's typical commitment to relational justice.²⁰⁹ The same commitment underlies, as we have also seen, the CFPB's expansive understanding of abusive practices and its authority to ensure that credit applicants do not suffer discrimination.²¹⁰ And again, OSHA and CFPB are representative of a much larger family of horizontally oriented agencies, which participate in the construction of the most fundamental rights and obligations of important types of interpersonal relationships.

This feature is most visible with regard to two major agencies that deal with discrimination: the Equal Employment Opportunity Commission (EEOC) and the Office of Fair Housing and Equal Opportunity in the Department of Housing and Urban Development (FHEO). The EEOC, whose vision is to secure a “respectful and inclusive workplace[] with equal employment opportunity for all,” enforces “federal laws that make it illegal to discriminate against a job applicant or an employee,”²¹¹ and furthermore works “to prevent discrimination before it occurs through outreach, education and technical assistance programs.”²¹² The FHEO “administers federal laws and establishes national policies that make sure all Americans have equal access to the housing of their choice.”²¹³

Discrimination in the context of the workplace and of residential dwelling is a relational wrong. The public law dimensions of discrimination as a wrong exist alongside, but do not replace, the interpersonal aspect. As explained elsewhere, refusing to consider a would-be buyer of a dwelling merely because of her skin color, for example, fails to respect the individual on her own terms, in violation of the most fundamental injunction of relational justice. Buying and renting a dwelling (a major decision of self-determination) exposes people to discriminatory practices at the hands of some homeowners and landlords. Thus, regardless of whether the state takes care of its obligations—in terms of supplying sufficient housing

RELATIONS BOARD, <https://www.nlr.gov/rights-we-protect/employerunion-rights-and-obligations> (last visited Oct. 8, 2019) (discussing the issue of the duty to bargain in good faith).

²⁰⁸ See *supra* text accompanying notes 146, 175 (describing OSHA and CFPB's priority systems).

²⁰⁹ See *supra* text accompanying notes 131–33 (describing private law's valuing of relational justice).

²¹⁰ See *supra* text accompanying notes 170–72 (describing the CFPB's expansive definition of abusive practices).

²¹¹ *About the EEOC: Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/index.cfm> (last visited Oct. 8, 2019).

²¹² *Id.*

²¹³ *About FHEO*, U.S. DEP'T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/aboutfheo (last visited Mar. 25, 2020).

options to all, and sustaining integrative residential communities—private law, being the law of our interpersonal rights and obligations, must not, and does not, authorize social relationships that proceed in defiance of the equal standing and the autonomy of the person subject to discrimination.²¹⁴ The same analysis applies of course to the context of the workplace and to other forms of discrimination.²¹⁵

It is therefore not surprising that the regulatory apparatus of both the EEOC and the FHEO is dedicated to reconstructing these two crucial realms of interpersonal interaction so as to *eliminate* forms of unjust relationships. These regulations include both prohibitions and affirmative obligations, and they are aimed at shaping the pertinent parties' rights and obligations in a way that complies with the injunctions of relational justice. The EEOC guidelines include, along these lines, a presumption that “[p]rohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably” is discriminatory,²¹⁶ as well as a requirement, subject to certain exceptions, that employers “make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability” and to “the religious practices of an employee or prospective employee” (e.g., by way of creating “a flexible work schedule”).²¹⁷ Similarly, one FHEO rule prohibits “imposing different sales prices or rental charges for the sale or rental of a dwelling upon any person because of race, color, religion, sex, handicap, familial status, or national origin,”²¹⁸ and another prescribes that it is unlawful to “refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.”²¹⁹

We do not deny, of course, the important public law justifications for these rules. Both workplace and housing integration are crucial components of any sustainable, let alone viable, democratic ideal of equal citizenship.²²⁰ But the importance of these public elements does not erase the relational significance of discrimination. Appreciating the normative significance of the horizontal relation is key to articulating the difficulty where these two dimensions clash, as in cases where discriminatory practices are used in a

²¹⁴ See Dagan & Dorfman, *supra* note 50, at 1440.

²¹⁵ *Id.* at 1438–45.

²¹⁶ 29 C.F.R. § 1606.7(a) (2018).

²¹⁷ 29 C.F.R. §§ 1630.9(a) & 1605.2 (2018).

²¹⁸ 24 C.F.R. § 100.60 (2016).

²¹⁹ 24 C.F.R. § 100.204 (2018).

²²⁰ See ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* chs. 6–7 (2010); JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 79–88 (1991).

way that arguably promotes, rather than undermines, integration.²²¹ It is even more important if it turns out that the public goal is increasingly being achieved. Thus, it has recently been reported that there is a sharp decline in residential segregation, which would significantly destabilize some aspects of the fair housing regime that rely on its integration rationale.²²² But even if this development happily materializes, appreciating the significance of its other, relational, rationale vindicates the continuous importance of this regime—and thus of the FHEO. Whereas integration may be underway each year, according to the most recent HUD survey, “hundreds of thousands of FHA violations [still] take place,” which means that “[t]he struggle against discrimination has not yet been won.”²²³

Finally, as may be expected, the relational focus affects the regulatory toolkit of horizontal agencies (beyond the obvious impact regarding their attention to individual complaints noted earlier). Our two case studies offered a few examples, such as: enhanced stakeholders’ participation in the rulemaking process;²²⁴ the availability of response in cases of imminent or serious breach;²²⁵ the effort to empower the typically vulnerable side to the relationships, in terms of both enforcement priorities²²⁶ and education engagement²²⁷ (including for noncitizens);²²⁸ and the availability of

²²¹ See, e.g., *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir. 1988) (discussing a complaint against an owner of a large apartment complex who reserved a number of units exclusively to white applicants in order to guard against “white flight” and maintain integrated housing conditions).

²²² See Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1339 (2016) (noting that there has been a decline in residential segregation, which represents one of the most important sociological developments in the last half century).

²²³ *Id.* at 1375–76.

²²⁴ See *supra* notes 142–45 and accompanying text.

²²⁵ See *supra* note 147 and accompanying text. See also *File a Complaint*, U.S. DEP’T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/yourrights (last visited Mar. 25, 2020) (explaining the process of filing a complaint if an individual believes the individual’s rights may have been violated).

²²⁶ See *supra* text accompanying notes 146, 175–76, 178, 196 (explaining how different agencies use enforcement priorities in empowering vulnerable parties during dispute resolution). See also U.S. EQUAL EMP’T OPPORTUNITY COMM’N, FISCAL YEAR 2017 CONGRESSIONAL BUDGET JUSTIFICATION 29–38 (2016), <https://www.eeoc.gov/eeoc/plan/upload/2017budget.pdf> (showing the EEOC’s plan to implement programs for private sector enforcement).

²²⁷ See *supra* text accompanying note 149 (explaining OSHA’s outreach to vulnerable workers by educating them about their rights); see also U.S. DEP’T OF LABOR, STRATEGIC PLAN FISCAL YEARS 2014–2018, at 6, <https://www.dol.gov/sites/default/files/documents/agencies/osec/stratplan/fy2014-2018strategicplan.pdf> (explaining how the Department of Labor plans to advance workers’ rights, particularly for vulnerable workers); U.S. EQUAL EMP’T OPPORTUNITY COMM’N, STRATEGIC PLAN FOR FISCAL YEARS 2012–2016, at 3, https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf (last visited Mar. 25, 2020) (demonstrating how EEOC has implemented educational programs to inform vulnerable employees).

²²⁸ See *supra* text accompanying note 150 (explaining how OSHA has implemented programs specifically for protecting and informing foreign employees of their rights); see also *supra* note 204 (examples of other agencies’ approaches to protecting foreign employees).

remedies—such as OSHA’s self-help and the CFPB’s Civil Penalty Fund²²⁹—which are specifically tailored to the relational task at hand.

CONCLUSION

One goal of this Article is to challenge the conventional wisdom according to which regulators should be guided solely by the collective perspective of the public interest (however defined). Prevalent as it is, this view is descriptively wrong: a significant subset—the other half of contemporary administrative apparatuses—is best explained according to an (at times implicit) relational logic that responds to these agencies’ interpersonal tasks. The conventional wisdom is furthermore normatively misguided: although there are good reasons to associate private law with private litigation, many contexts of our complex social environment suggest that supplementing—and sometimes supplanting—private law judges with private law regulators would better serve the normative commitments underlying private law.²³⁰

Our second purpose is to offer a tentative account of the profile of relational regulators, namely: of what is entailed by a commitment to think horizontally. We have no pretense that our account is exhaustive; indeed, we assume that it is partial and that further research is required to enrich and refine it as well as to address related topics we haven’t covered here.²³¹ But we believe the beginnings mapped out here make a first substantial step in a promising direction.

Part of its promise lies in the “naming” of the relational task of the existing horizontal agencies.²³² Agencies that embrace this characterization of their task may improve their horizontal performance by consulting the preliminary relational toolkit we compiled.²³³ They can also inform themselves with substantive theories of private law—such as the one we

²²⁹ See *supra* text accompanying notes 148, 183–84 (explaining OSHA’s self-help and the CFPB’s civil penalty fund).

²³⁰ One can imagine a purist theoretical position that laments these features of the modern administrative state. But this revisionist approach would need to acknowledge the existing horizontal dimensions, and thus could not purport to offer an account of the regulatory apparatus as we know it.

²³¹ The most immediate substantive issues that come to mind are preemption on the one hand and implied rights of action on the other hand. Another interesting puzzle is why conventional wisdom (popular and academic) has relied for so long on the incomplete and thus inadequate basis of public law values for justification. The puzzle might be one for intellectual historians (and on that level we have nothing to contribute), but it might also have a conceptual element. That conceptual element could be related to the challenge of thinking sufficiently abstractly about the conditions for just relations. We leave this somewhat philosophical reflection for another day.

²³² Cf. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . . , 15 LAW & SOC’Y REV. 631, 631 (1980) (describing the concept of “naming”).

²³³ To be sure, in many cases expanding an agency’s tools would require further legislation.

briefly restated earlier on²³⁴—in order to incorporate their more specific prescriptions into their decisions regarding the areas in which they already think horizontally.²³⁵

Another possible payoff of this effort may come about in the context of agencies that do not easily fit into our prototypical aggregative or horizontal agencies, such as the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC). These hybrid, or intermediate, agencies have both aggregative and horizontal features.²³⁶ Articulating the pertinent putative horizontal tasks of agencies of this category can again help optimize the appropriate means for their realization.²³⁷

Finally, appreciating the potential role of agencies in structuring just interpersonal relationships may justify revisiting the hegemony of the public law perspectives of some agencies that currently do not share the orientation toward private law we study in this Article. Indeed, even agencies that are properly conceptualized as aggregative may well benefit from a reconsideration of the absence (or marginality) of relational attention in their operation. A full-blown theory of relational regulation may suggest, for example, that fostering competition should not only be considered from a result-oriented perspective geared to efficiency, but also from a process-oriented perspective, in which competition is understood as a means to equal opportunity that entails important elements of relational justice.²³⁸ This and

²³⁴ See *supra* text accompanying notes 50–51 (explaining the substantive theory of private law earlier discussed).

²³⁵ Another potential direction may relate to the training of the pertinent personnel, although one may assume that the recruitment and training practices of horizontal agencies—or, rather, the particular horizontal departments of these agencies—are already adjusted to the task at hand.

²³⁶ Thus, the FTC, in addition to its mission to promote competition, is empowered to protect consumers by defining acts or practices as unfair or deceptive. See U.S. FED. TRADE COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2014 TO 2018, at 3, 6 (2014), <https://www.ftc.gov/system/files/documents/reports/2014-2018-strategic-plan/spfy14-fy18.pdf>. Likewise, the SEC is responsible for both maintaining “fair, orderly, and efficient markets” and protecting investors. See U.S. SEC. & EXCH. COMM'N, STRATEGIC PLAN FISCAL YEARS 2014-2018, at 3, <https://www.sec.gov/about/sec-strategic-plan-2014-2018.pdf> (last visited Mar. 25, 2020). Another agency that may fit this category is the Food and Drug Administration (FDA), which in many ways resembles aggregative agencies. See U.S. FOOD & DRUG ADMIN., STRATEGIC PRIORITIES 2014-2018, at i (2014), <http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/UCM416602.pdf>; cf. Keating, *supra* note 128, at 202, 231 (discussing how the “safe-level standard” the Agency applies to food security can hardly be justified in aggregative terms).

²³⁷ See U.S. FED. TRADE COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2014 TO 2018, at 6–7 (2014), <https://www.ftc.gov/system/files/documents/reports/2014-2018-strategic-plan/spfy14-fy18.pdf> (noting how one possible “horizontal deficit” of both the SEC and FTC is that neither aims at resolving individual complaints; rather, they both use complaints primarily to detect patterns of wrongdoing); *How Investigations Work*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/News/Article/Detail/Article/1356125787012> (last modified Jan. 27, 2017) (discussing the sources from which the SEC “obtains evidence of possible violations of the securities laws”).

²³⁸ See Hanoch Dagan, *Between Regulatory and Autonomy-Based Private Law*, 22 EUR. L.J. 644, 644 (2016) (explaining how this may be the *raison d'être* of the EU principle of access justice, which underlies a significant subset of the European regulatory private law).

other potential reformist implications of our effort in these pages²³⁹ must wait for another day (and maybe other authors).

²³⁹ The full reconstructive potential of a theory of private law agencies should question also the basic structure of the regulatory apparatus. It may imply that insofar as this subset of the administrative state is concerned, one should design the architecture of the universe of agencies based on a taxonomy of our interpersonal relationships.