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Who Owns Rights: Waiving and Settling Private Rights of Action

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WHO OWNS RIGHTS: WAIVING AND SETTLING PRIVATE RIGHTS OF ACTION

JUDITH A. McMORROW*

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I. INTRODUCTION

BUYING and selling goods and services—commodification—has always been an active practice in the United States. As commodification has extended into non-traditional areas, the law has followed. Congress actively regulates the buying and selling, and even the gratuitous transfer, of information in the course of stock trading.\(^1\) State courts and legislatures are currently struggling with the legitimacy of commodifying surrogate motherhood services.\(^2\) In a less dramatic, but equally important, context the Supreme Court recently considered the propriety of buying and selling a private right of action granted by federal law.\(^3\) In *Town of Newton v. Rumery*, the Supreme Court allowed commodification of a federal private right of action when it upheld an agreement in which a state prosecutor agreed to drop criminal charges on the condition that the criminal defendant agree to waive his right to sue for the claimed wrongful arrest under the generic federal civil rights statute of 42 U.S.C. § 1983.\(^4\)

The Supreme Court's affirmation of the buying and selling of private rights of action has consequences beyond section 1983. The United States Congress regulates private conduct not only through the administrative state but also by empowering private citizens to sue for acts that Congress declares violative of public policy. Hundreds of federal statutes expressly provide private rights of action\(^5\) and the courts have implied private rights of action under numerous others.\(^6\) Through these private rights of ac-

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5. A LEXIS search revealed over 600 federal statutes which allow for an aggrieved party to sue. LEXIS, Genfed Library.

PRIVATE RIGHTS OF ACTION

Congress empowers individual aggrieved persons to sue if certain acts or omissions are committed by another. When the prospective defendant commits a wrongful act under the statute, the statute permits, but does not require, the prospective plaintiff to sue. By giving the prospective plaintiff the power—but not the duty—to sue, Congress creates a volatile relationship between these prospective plaintiffs and defendants. These parties may seek agreements about when, if ever, a prospective plaintiff will bring or follow through with a lawsuit.

Agreements not to proceed with private rights of action occur in two generic forms. When these agreements occur before the statutory wrongful act has taken place, or when the prospective defendant requires the agreement not to sue in order to stop the claimed wrongful act, the plaintiff waives his or her right to sue. In these instances the prospective plaintiffs and defendants are not disputing over actions already taken, but are bargaining about future conduct by the statutory defendant. For example, if an employer asks an employee to waive all protections under nondiscrimination laws in exchange for higher wages, a waiver occurs. The employer has not yet committed any claimed wrongful act, unless the offer itself is a statutory violation. If valid, the agreement protects the employer from any private rights of action by that employee should the employer commit violations. Similarly, in Rumery the defendant claimed that his arrest on criminal charges was unlawful. If true, then the state’s decision to drop the criminal charges in return for the criminal defendant’s agreement not to sue under section 1983 was a form of waiver. Because the pending charges were a harm arising out of the arrest, the state was saying that it would alter its conduct and stop the claimed wrongful act only on condition that the criminal defendant agree to waive his civil action. Both prospective waiver and

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353 (1982) (Commodity Exchange Act); Cannon v. University of Chicago, 441 U.S. 677 (1979) (Title IX of the Education Amendments of 1972); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (Securities Exchange Act of 1934, Section 10(b), and Securities and Exchange Commission Rule 10b-5). See also Curran, 456 U.S. at 408-09 n.17 (Powell, J., dissenting) (computer search showed that in decade before Curran there had been “at least 243 reported Court of Appeals opinions and 515 District Court opinions dealing with the existence of implied causes of action under various federal statutes”).

7. Refusal to stop wrongful conduct unless the prospective plaintiff (who is also the criminal defendant) agrees to waive any civil suit is a simultaneous waiver if the private right of action gives the plaintiff a right to damages. If the prospective civil plaintiff is only entitled to an injunction, then the distinction between waiver and settlement in this context collapses.
simultaneous waiver have the effect of directly altering the prospective defendant's conduct.

More frequently, these agreements take place after the claimed wrongful act, in which case the plaintiff (either prospective or actual) is settling the underlying dispute. With settlement, the operative acts over which the parties will dispute have already occurred. Rather than focusing on the defendant's future conduct, the dispute focuses on how to discover, characterize or label the past events.

Both waiver and settlement have in common the limited commodification of the dispute created by public law, despite the fact that the public law was often passed to interfere with the private market. Settlement is an endemic part of our dispute resolution system and is generally embraced warmly by courts. Waiver is much more problematic, sometimes treated as if it were a settlement of an ongoing dispute and other times treated with much less deference by courts. The purpose of this article is to examine the complex relationship created by private rights of action in order to better understand when commodification of private rights of action—through waiver and settlement—is appropriate.

This article focuses on federal positive law, those "reassuring" rights created by statute. In this article "private right of action" refers to an express or implied grant by Congress to an individual to sue if certain acts or omissions are committed by another. Because this article focuses on federal statutory causes of action, the issue of waiver and settlement is always governed

8. Courts often use the terms "settlement" and "waiver" interchangeably. See, e.g., Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 713-14 (1945) (Court uses term "waiver" to describe what is defined in this article as "settlement").

9. See Fed. R. Civ. P. 16(a) (judge may order pretrial conference to facilitate settlement); Fed. R. Civ. P. 68 (offer of judgment), infra Section IV D. But see O'Neil, 324 U.S. at 713-14 (where there is no bonafide dispute as to liability of employer, employee's release of rights to minimum wages and liquidated damages under Fair Labor Standards Act, for sum less than statutory minimum wages due, is void).

10. See infra Section III.

11. J. WALDRON, THEORIES OF RIGHTS 4 (1984). I am, therefore, talking about primary rules—those that grant rights and impose obligations. The underlying question, however, is over a secondary rule, how these primary rules are to be created or changed. H. HART, THE CONCEPT OF LAW 89-96 (1961). For purposes of this article I do not question whether Congress was correct in creating these private rights of action.

and determined by congressional intent. This hardly settles the issue, however. With some constitutional limitations, Congress could allow or disallow waiver or settlement, as it sees fit. Congress rarely states expressly that statutory causes of action can or cannot be waived or settled, leaving the question open under most statutes. As the virulent debate over both constitutional and statutory interpretation has shown, interpreting the meaning of words either from the words themselves, the perspective of the drafters, or the perspective of the implementors of the statutes is not an easy task. Courts, as interpreters of the text, have latitude in answering the interstitial questions, such as whether waiver or settlement is allowed. Whatever interpretive philosophy the decision maker uses, the interpreter must rely on some principles of construction. The goal of this article is to develop a framework for statutory construction for waiver and settlement of federal private rights of action.

Private rights of action can be part of a complex enforcement scheme or can stand alone as a relatively simple statutory state-

13. See O'Neil, 324 U.S. at 704-05 (“With respect to private rights created by a federal statute, . . . the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute.”). How to interpret the settlement agreement once it has been reached presents a very different question. See Solimine, Enforcement and Interpretation of Settlements of Federal Civil Rights Actions, 19 Rutgers L.J. 295, 318-39 (1988) (arguing that state law and not federal common law should govern civil rights settlement agreements).


17. See, e.g., Abraham, supra note 16, at 677-90; Grey, supra note 16 (discussing many methods of interpretation); Levinson, supra note 16, at 378-84 (same).

18. Hence, this article is not about a “first order” question of who is entitled to compensation or whether Congress should have passed a particular statute, but rather a “second order” question concerning the manner of protection. See Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1092 (1972). The ultimate goal of this article is to attempt to use alternative language to describe this phenomenon of waiver and settlement. Cf. Calabresi, Thoughts on the Future of Economics in Legal Education, 33 J. Legal Educ. 350, 363-64 (1983) (proper choice of language may highlight similarities and differences between terms).
Section II of this article gives three examples of private rights of action and by analogizing to concepts of property ownership, describes the attributes of private rights of action. In analyzing private rights of action as property, with the United States Congress as grantor, we can better articulate some of the public components of private rights of action. Section III then looks at the two paradigms used by courts to determine the validity of waivers. Courts usually start their statutory construction analysis for waiver from either a private contract model or a right-duty perspective. With a private contract model, waiver is treated as simply a private agreement and is allowed, absent congressional indication or public policy to the contrary. With a “right-duty” model, the courts begin their analysis by focusing on the rights and duties imposed by the statute, rather than a presumptive validity of the waiver. With these models in mind, Section IV discusses the complex interests involved in private rights of action, including those of the holders of the causes of action and the government as grantor of the private cause of action. Both compensatory and deterrent goals are present in private rights of action and each of these goals has interdependent public and private components. Using the interests analysis developed in Section IV, Section V discusses why courts should construe federal private rights of action to be presumptively unwaivable absent clear congressional indications to the contrary. By indicating how rights and interests change over time, Section V also sets out reasons why settlement is presumptively valid.

II. CHARACTERISTICS OF PRIVATE RIGHTS OF ACTION

Private rights of action can be given in many forms, from generic causes of action that contain few non-substantive limitations to highly contingent causes of action that require the statutory plaintiffs to take numerous procedural steps before the right to sue arises. Occasionally, Congress sets out the wrongful act and the private right of action in a single, efficient paragraph. For example, the grandparent of both private rights of action and modern civil rights statutes, 42 U.S.C. § 1983, provides a generic private right of action by incorporating other substantive rights. Section 1983 provides:

Every person who, under color of . . . [state law] subjects, or causes to be subjected, any . . . person within the jurisdiction [of the United States] to the depri-
vocation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.19

The statutory plaintiffs are potentially every person within the United States. The class of statutory defendants is much smaller, comprising "every person" who, in the interpretations of the courts, engages in state action.20 In a separate provision the government is given penal authority to prosecute for violation of these same "rights, privileges, and immunities."21 Prospective plaintiffs are not required to file any notice with the government or satisfy any specific requirements beyond the generic limitations of jurisdiction and the statute of limitations.

In contrast, the Fair Labor Standards Act (FLSA) creates a more complex scheme for enforcement.22 The FLSA, which is the grandparent of modern economic regulation of the workforce, issues an affirmative command to employers to pay a minimum wage and overtime.23 In a separate provision the FLSA imposes liability and sets out specific remedies, again as a command: "Any employer who violates the provisions [requiring minimum wage and overtime payments] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."24 An action to recover these amounts due "may be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."25 As with section 1983, the aggrieved employees are not required to meet any filing requirements before filing suit. Unlike section 1983, however, if the government acting through the Secretary of

23. Id. §§ 206-207.
24. Id. § 216(b).
25. Id. Under the FLSA the statutory plaintiffs and defendants are limited to employees and employers, except as exempted. Id. § 213.
Labor elects to file suit in the wage and hour dispute, the individual's private right of action terminates. This distinction, however, is understandable since only one back wage and liquidated damages remedy will be awarded to an employee under the FLSA. The termination of the private suit therefore prevents duplicative suits for the same violation which seek the same remedy for the same parties.

Title VII of the Civil Rights Act of 1964 sets up an even more complex method of creating a private right of action. The prohibitions of Title VII also impose a duty upon prospective defendants by stating that "[i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire . . . or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." In a separate provision, Title VII requires the plaintiff to file an administrative charge stating the claimed wrongful act within a set statutory period before filing suit. If the Equal Employment Opportunity Commission (EEOC), which is charged with enforcing Title VII, files suit or refers the case to the United States Attorney General to file suit, the aggrieved persons have the right to intervene in the suit. If the EEOC takes no action within a set period of time, the aggrieved person has ninety days to file suit. The EEOC or the United States Attorney General can "intervene in such civil action upon certification that the case is of general public importance."

These three statutes exemplify the range of interactions between private and government enforcement of a statute. Regardless of whether the private action is completely unmonitored by a

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26. Id. § 216(b) ("The right provided by this subsection to bring an action . . . shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title . . . .") The Secretary of Labor may bring suit for injunctive relief under 29 U.S.C. § 217 (1982).


30. Id.

31. Id.

32. Id.
governmental agency, as with section 1983, or is monitored by notice requirements, as with Title VII, each of these private rights of action is the product of congressional largess. Through the Constitution we, "the People," gave broad power to Congress to regulate. Through legislation, Congress confers on certain classes of people private rights of action that these individuals would not have been able to assert otherwise. In one sense private rights of action can be characterized as a "gift" by Congress. However, this "gift" is not purely altruistic, for the grantor expects to derive some benefit, often indirect, from the "gift." Although there may be many variable purposes for granting these private rights to sue, in each example the existence of a private right of action has the consequence, and in most instances we can infer the purpose, of widening the statute's enforcement at a low cost to the government.

The relationship between plaintiffs and defendants under each of these statutes is far more complex than simply stating in Hohfeldian terms that because defendant has a duty, plaintiff has a right, or vice versa. To begin with, we are often talking about two related rights created by statute. For example, under Title VII, employees have a right to the underlying statutory protection (not to be discriminated against on the basis of race, creed, color, sex or national origin) and a conditional right to bring a civil action if that underlying statutory protection is violated and if the procedural requirements set out in the statute are met.

The relationship between the statutory plaintiffs, defendants and the government can be better understood by describing private rights of action—this congressional "gift"—in property terms. As the Supreme Court has recognized, "a cause of action is a species of property." Property is no longer conceptualized

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33. U.S. Const. preamble.
35. An interesting variation of this "gift" concept was utilized in seventeenth century England by judges who analyzed taxes as if they were a private gift from the taxpayer to the government. Horwitz, The History of the Public/Private Distinction, 130 U. Pa. L. Rev. 1423, 1423-24 (1982).
36. Calabresi & Melamed, supra note 18, at 1093. Cf. General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 324-25 (1980) (expanded enforcement for EEOC designed to bring about more effective enforcement of private rights); Galanter, The Radiating Effects of Courts, in Empirical Theories About Courts 136-37 (K. Boyum & L. Mather ed. 1983) ("All legal agencies have more authoritative commitments to do things than resources to carry them out.").
37. See Hohfeld, supra note 12, at 30-32.
38. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (employee claiming wrongful discharge had state created entitlement to use state's adminis-
as simply a "thing," or even rights over a "thing," but rather property represents legal relationships. Property can represent maximum ownership interests, such as the right to possess, use, manage, derive income and capital, have, secure, and transmit at will. Or, as in the case of private rights of action, the interests contained in the private right of action may be limited.

We begin with the obvious point. Because the private right of action is a creation of congressional policy, an individual empowered to sue does not inherently possess the cause of action in its entirety. Just like any grantee of property, an individual takes subject to the limitations of the grantor. And just as a grantor can give a non-vested interest rather than a fee simple absolute, Congress may impose (within constitutional limitations) conditions precedent, such as administrative filing requirements, and make

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the cause of action dependent on the status of others.\textsuperscript{41} The idea of possession of its entirety is inevitably limited by the underlying statement of who may sue and under what conditions.\textsuperscript{42}

Under each of these causes of action, the statutory plaintiff’s interests are limited not only by any procedural requirements, but also by the limitations inherent in the substantive right. For example, a common attribute of property is the incidence of transferability or alienation.\textsuperscript{43} To the extent that private rights of action are tied to the underlying substantive right, they are not subject to transfer in the same way that a parcel of land is. A person within the jurisdiction of the United States cannot give or sell the right to sue under section 1983 to a non-citizen who lives abroad. Nor can a non-management employee covered by the FLSA give or sell his or her right to minimum wage to an exempt employee.\textsuperscript{44} In other words, the ability to alienate is limited by the definition of the private right to sue. When we discuss whether an individual may waive his or her private right of action, we are speaking of a form of transfer. It is not a radical notion that transfer in the form of waiver, or even settlement, is limited in the same way that the transfer of the right to sue is limited.

We can also examine private rights of action from the perspective of the grantor. Just as a grantor carves out a portion of its property to give away, the grantor can retain an interest in that property. When the government is the grantor, that retained interest can loosely be identified as representing the public interest. Congress creates a \textit{limited} interest in a private right of action and there is nothing conceptually difficult about the idea that those limits include limits on the ability to buy, sell or give away that private right of action. Just as a co-owner in property cannot uni-


\textsuperscript{42} I recognize the slipperiness of this analysis since property rights exist only because the government recognizes them. When Congress creates a private right of action, it is stating that if the statutory requirements are met, the courts are directed to recognize that property interest.

\textsuperscript{43} A.M. Honore, \textit{supra} note 40, at 120-21 ("incident of transmissibility"). Honore uses the term "incident" rather than "right" of transmissibility because transmissibility does not depend upon the individual's choice. \textit{Id.}

\textsuperscript{44} Other common attributes of property are present in some private rights of action. For example, some private causes of action are transmissible and therefore survive the death of the holder. Many statutory private rights of action are deemed survivable. For example, an action for minimum wage under the FLSA is survivable. Mitchell v. Lancaster Milk Co., 185 F. Supp. 66, 71 (M.D. Pa. 1960). Whether a cause of action under § 1983 is survivable is determined by reference to state law under 42 U.S.C. § 1988 (1982). Robertson v. Wegmann, 436 U.S. 584, 593-94 (1978).
laterally sell the property, an owner of a private right of action is limited by its co-owner's interests. For this reason, we look back to congressional "intent" to identify the interests of the government.

Just like a holder of land with the power to sue to exclude trespassers, under all three of these statutory private rights of action an individual has a right to sue if a violation has occurred, but no duty to do so. It is a "right" to sue because the individual empowered to sue exercises a personal choice. Although some individuals may institute suit because they feel a "moral or political dut[y] related to a community's normative life," others do not see instituting suit, with its concomitant personal burdens, as a moral obligation. More importantly, there is no legal sanction for the failure to institute suit even when an individual has been the victim of a statutory violation. Neither employers nor the government has a right to demand that the employee either file suit or refrain from filing suit. These statutory plaintiffs consequently have a privilege-right, in Hohfeldian terms, to institute suit. It is this attribute of ownership that creates the possibility of both waiver and settlement.

III. Paradigms of Waiving Statutory Rights

Courts have taken two distinct approaches to waiver and settlement of statutory causes of action. Courts seldom articulate why they choose one approach over the other. The approach selected, however, largely governs how the case is decided.

A. Contract-Commodification Model

A more recent example of the contract-commodification model of statutory causes of action was presented by the Supreme

45. See J. WALDRON, supra note 11, at 8 (where "invocation of a sanction or the effective implementation of a requirement depend on the initiation of a certain procedure" then "the concept of duty already seems to involve those of power and liability").
47. See infra Section IV A.
48. The statutory language is generally permissive. See supra Section II.
49. See Hohfeld, supra note 12, at 33-44; see also B. LEISER, CUSTOM, LAW AND MORALITY 140-44 (1969).
50. Hohfeld, supra note 12, at 33-34.
51. For one author's view of why this might be so, see Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773 (1987).
Court's decision in *Town of Newton v. Rumery*. In *Rumery* the Supreme Court upheld the validity of an agreement in which a local prosecutor agreed to drop criminal charges against a criminal defendant, Bernard Rumery, on the condition that Rumery agree not to bring a section 1983 claim against the town of Newton, New Hampshire. Rumery had been arrested and charged with tampering with a witness based on two telephone conversations that he had had with the main witness in a felonious sexual assault charge being brought against one of Rumery's friends. Rumery's attorney contacted the local prosecutor and stated that the prosecutor "had better [dismiss] these charges, because we're going to win them and after that we're going to sue." Rumery's attorney and the local prosecutor negotiated and agreed that the prosecutor would dismiss the criminal charges if Rumery would agree not to sue the town, its officials, or the complaining witness for any harm caused by the arrest. Rumery signed the agreement. Ten months later he filed an action under section 1983 alleging that the town and its officers had violated his constitutional rights by arresting, defaming, and imprisoning him falsely. The district court granted the defendant's motion to dismiss based on the release-dismissal agreement. The Court of Appeals for the First Circuit reversed, finding that such release-dismissal agreements were *per se* invalid, and the Supreme Court granted certiorari.

The Supreme Court began its analysis by stating that because the agreement purported to waive a right to sue conferred by a federal statute, the validity of the waiver was to be governed by federal law. The Supreme Court's point of reference was not

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53. *Rumery*, 480 U.S. at 390. The local prosecutor was the Deputy County Attorney for Rockingham County. *Id.*

54. *Id.* at 391.


57. *Rumery*, 480 U.S. at 392. For an analysis of jurisdictional and choice-of-law issues involved in the enforcement of civil rights settlement, see Solimine, *supra* note 13, at 295. Professor Solimine argues that state law should govern the interpretation of settlement agreements. *Id.* at 298. His analysis does not apply to questions of whether waiver, as opposed to settlement, should be allowed and what law should apply in considering the validity of waivers.
the federal law of section 1983, however, but rather common law contract doctrine. Citing the *Restatement (Second) of Contracts*, the Court concluded that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." By presuming the validity of the agreement absent a contrary public policy, the Court immediately placed contract law as the point of reference. With this model, the public interest has to be affirmatively shown and any failure of proof results in contract interests taking precedence. By using a contract doctrine as the point of reference, the Court naturally focused on contract concepts of consideration. In refusing to adopt a *per se* rule invalidating such release-dismissal agreements, the Court explained in detail why this criminal defendant might very rationally decide that it was a good deal to give up his right to a civil rights suit in return for having the criminal charges dropped. The Court, however, failed to examine fully the consideration. In this case, the criminal action and the threatened civil action were not independent suits. Rather, the civil action was a challenge to the ongoing criminal charge. The consideration for dropping the criminal charge was not a reduced plea in the criminal case, as is typically the case with plea bargaining. Rather, if Mr. Rumery's claims were true, the consideration for not bringing a civil suit was to cease the ongoing unconstitutional activity. Infused through the bargain is the possibility that the state would have *continued* the alleged unconstitutional activity if Mr. Rumery had refused to sign the release-dismissal agreement. If Mr. Rumery's claims were true, the offer was attractive to Mr. Rumery not because the prosecutor could make the defendant better off than he had been before the state's arrest, but rather because the prosecutor was offering to place the defendant in the position he had been in before the state's intervention. If

59. *Id.* at 392 & n.2 (citing *Restatement (Second) of Contracts* § 178(1) (1981)).
60. *Cf.* *Snepp v. United States*, 444 U.S. 507, 509 & n.3 (1980) (where former CIA employee breached contract to submit manuscript for publication review, valid remedies included enjoining future breaches and imposing constructive trust on profits; first amendment concerns dismissed in footnote).
62. *See id.* at 393 & n.3, 409 (Stevens, J., dissenting); *Note, supra* note 52, at 1119.
63. *See Rumery*, 480 U.S. at 408 (Stevens, J., dissenting). There had been no findings on the merits of Mr. Rumery's § 1983 claim. *Id.* at 411 n.13 (Stevens, J., dissenting). There was evidence, however, that the state's witness tampering
Mr. Rumery's claim that the arrest was illegal were true, then the state's act was similar to stealing a car and then using it as consideration to force other concessions from the owner.  

The Court identified what seemed like randomly-selected public interests that were involved in its decision to allow waiver of a section 1983 claim. The Court first noted a public interest based on traditional contract limitations that the process of reaching agreement not be coercive. There is a public interest, the Court observed, in "opposing involuntary waiver of constitutional rights." The Court found that the interest was not impinged in this case, however, because it concluded that Rumery had "voluntarily" waived his right to sue. The Court carefully pointed out the rationality of Rumery's decision to support the claim that his actions were voluntary: "The benefits of the agreement to Rumery are obvious: he gained immunity from criminal prosecution in consideration of abandoning a civil suit that he may well have lost." The Court used a market methodology by engaging in a cost-benefit analysis from the perspective of the criminal defendant.

By using rationality as a synonym for voluntariness, the Court lost an important perspective. One might rationally give up the right to free speech in order to stop a beating, but that does not make the decision voluntary in the sense of offering meaningful and lawful alternatives. Justice O'Connor did not join the final section of the opinion and, consequently, a plurality of the Court was left to skirt this issue and attempt to diffuse a strong dissent by asserting that in this case the only evidence of prosecutorial misconduct was the agreement itself. There was case against Mr. Rumery was very weak. See id. at 404-06 (Stevens, J., dissenting).

64. See id. at 408 (Stevens, J., dissenting).

65. Justice O'Connor concurred separately in the portion of the opinion in which the Court discussed the various public interests, making this discussion a plurality view. Id. at 394-97.

66. Id. at 394.

67. Id.

68. Id.

69. See, e.g., Radin, supra note 46, at 1861. Although the Court was evaluating the exchange of a quasi-monetary interest (bringing suit) for a non-monetary interest (dropping charges), the opinion leaves little basis to distinguish a monetary valuation.


71. Rumery, 480 U.S. at 397.
no comment on possible police misconduct.72

The plurality in Rumery then discussed whether some “external” public interests were present to render release-dismissal agreements void.73 In effect, the plurality used a cost-benefit analysis from the perspective of section 1983. Although the plurality acknowledged that these agreements might “tempt prosecutors to trump up charges in reaction to a defendant’s civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights,”74 the plurality summarily dismissed the claim that these agreements might encourage violations of federal civil rights as too diffuse a public interest. Instead, the plurality minimized any public character of section 1983 and emphasized Rumery’s personal interest:

It is true, of course, that § 1983 actions to vindicate civil rights may further significant public interests. But it is important to remember that Rumery had no public duty to institute a § 1983 action merely to further the public’s interest in revealing police misconduct. Congress has confided the decision to bring such actions to the injured individuals, not to the public at large. Thus, we hesitate to elevate more diffused public interests above Rumery’s considered decision that he would benefit personally from the agreement.75

The plurality made a significant leap in logic by stating that because there is no public duty, the public interest is too diffuse. There is no public duty to report the commission of a crime, but there is an enormous public interest in having crime reported. This statement also fails to consider a significant function of private rights of action under section 1983: to deter constitutional violations by public officials.76 Concluding its analysis, the plurality then found that other “important public interests”—avoiding the burden of defending “marginal” and “unjust” suits, deferral

72. It was the possibility of a broader abuse of “the criminal process” that led Justice O’Connor to concur in this portion of the opinion, although she concluded in this case that there had been no abuse. Id. at 399-402 (O’Connor, J., concurring).
73. Id. at 394-97.
74. Id. at 394 (quoting Rumery v. Town of Newton, 778 F.2d 66, 69 (1st Cir. 1985), rev’d, 480 U.S. 386 (1987)).
75. Id. at 394-95. Ironically, the Court acknowledged that the state’s benefits from release-dismissal agreements are not as “tangible” as those the state obtains from plea bargains, yet dismissed this fact. Id. at 393 n.3.
76. See infra note 82.
PRIVATE RIGHTS OF ACTION

to the presumptive good faith decisions of prosecutors—would be harmed by a *per se* rule that such release-dismissal agreements are invalid. These other secondary public interests were given greater weight than the "diffuse" public interest contained in section 1983. With this approach, the plurality uses a "simple contractual metaphor, as if constitutional rights are bushels of wheat and the Constitution itself the Restatement (Second) of Contracts." The contract-commodification model gives maximum weight to the decisions of presumptively autonomous individuals to elect to waive a statutory protection. By using a contract model the *Rumery* Court creates a presumption of "waiveability" which usually can be overcome only by some policy reason expressed in the statute, couched in terms of congressional purpose or intent, prohibiting waiver. Traditional market methodology would disallow waiver—making the cause of action inalienable—only if there were a market failure. But as *Rumery* demonstrates, market failure is often inadequately considered by the courts. For example, the most common form of market failure analysis would be that commodification imposes external, large-scale social costs on the public, and the only way to minimize these costs would be to limit alienability. The court in *Rumery* quickly dismissed one significant external cost—the diminished enforcement of the deterrent goals of section 1983—and never discussed the external costs of diminished enforcement of the compensatory goals of section 1983.

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78. I call these other "important public interests" secondary because they derive not directly from § 1983, but rather exist as generic interests largely grounded in expediency.

79. Leaman v. Ohio Dep't of Mental Retardation & Dev. Disabilities, 825 F.2d 946, 958 (6th Cir. 1987) (Keith, J., dissenting) (objecting to court's conclusion that state law provision for waiver of "any cause of action" by filing suit against state in state court prohibited plaintiff from bringing § 1983 action in either state or federal forum), *cert. denied*, 108 S. Ct. 2844 (1988). See also *Cange v. Stotler & Co.*, 826 F.2d 581, 596 (7th Cir. 1987) (Easterbrook, J., concurring) (*Rumery* and other cited decisions "start from the premise that people may strike such bargains as they please."). *Rumery* is not the only example in which the Supreme Court has approached issues with the implicit assumption that a particular right is a private commodity. See, e.g., *Harris v. McRae*, 448 U.S. 297, 316-17 (1980) (woman's right to abort fetus for health reasons); Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 336 (1985) (same).

80. See *Radin*, supra note 46, at 1859.

81. See id. at 1864; see also Calabresi & Melamed, supra note 18, at 1111 (inalienability may be justified where cost to third parties is significant); Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985). These external costs are the absence of the benefit. See infra Sections IV & V.
1983. Nor did the Court fully consider the possible normative aspect of section 1983; the statute sets out appropriate behavior for public officials. In other words, the Court was using market analysis without rigorously applying market theory to determine whether there had been market failure.

In addition, using a contract-commodification model immediately diminishes the public component of the cause of action by elevating the private component. A contract analysis treats the statutory cause of action as a “personal possession[], entirely defined and controlled by the person authorized to invoke [it].” Implicit in a contract-commodification analysis is the idea that the person contracting has the power to contract concerning the subject matter. This may be an appropriate approach where the individuals contracting have created the underlying right, such as allowing waiver of a privately negotiated contract requirement. As noted in Section II, however, this is not necessarily applicable where the right is created by public law. This commodification model creates an atmosphere in which only the strongest and most aggressive public interest will be protected.

Also, any statutory private right of action is a governmental act interfering with the market. In many instances this entry into the market was justified because of inequality of bargaining power. If inequality of bargaining power were a reason for creating the statutory right to sue, then “so long as the party with the greater bargaining power can force the other to waive whatever liabilit[ies] [are created], he [or she] can easily restore the original imbalance” the statute was designed to correct.

Finally, even the process of negotiation may create a coercive environment, making “free choice,” whatever that is, more difficult than it is where there are less coercive surroundings. For ex-

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83. See Calabresi & Melamed, supra note 18, at 1111-12 (“moralisms” may justify inalienability); Radin, supra note 46, at 1868-89 (normative rationales for inalienability); Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 COLUM. L. REV. 931, 932-33 (1985) (“certain specialized distributive goals” may justify inalienability).


85. Just as I have freedom to contract to sell my car, I do not have freedom to contract unilaterally to sell a car that is owned jointly by myself and another.

ample, the *Rumery* Court considered the fact that the criminal defendant was not in jail at the time of the negotiation. But as the dissenters pointed out, the majority opinion did not consider the coercive power of criminal prosecution. Even rules of professional responsibility, notorious for setting bare minimum standards of conduct for lawyers, recognize the inherently coercive nature of threatening criminal prosecution to gain advantage in a civil suit and expressly forbid such threats. 87

B. "Right-Duty" Model

Rather than start from a strong presumption that bargains over statutory rights are proper, the Supreme Court on other occasions has focused immediately upon the nature of the rights created or the duties imposed by the statute. For example, in *Alexander v. Gardner-Denver Co.*, 88 the Supreme Court invalidated a provision of a collective-bargaining agreement that required all claims by employees arising out of their employment to be submitted to arbitration. The Court found the agreement invalid to the extent that it attempted to waive the employee's right to bring suit under Title VII. *Alexander* involved a prospective waiver of the forum; in other words, whether the employee could waive his or her statutory right to a trial *de novo* by agreeing to submit any claims, including discrimination claims, to arbitration. The Court gave short shrift to the argument that the employee could waive his Title VII cause of action:

To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. . . . Title VII . . . stand[s] on plainly different ground [than certain statutory rights related to collective activity, which are granted to foster the process of bargaining and properly may be exercised or relinquished by the union to obtain economic benefits for union members]; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process

87. *Model Code of Professional Responsibility* DR 7-105(A) (1979) ("A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.").
since waiver of these rights would defeat the paramount congressional purpose behind Title VII.89

By using this rights-as-trump-card model, the Court escaped the necessity of explaining why prospective waiver is inappropriate under Title VII.90 Rather, the Court cited the "congressional command" that each employee be free from discriminatory practices. All private rights of action, however, are connected to a "congressional command." Section 1983 contains a "congressional command" that each person be free to use the rights, privileges and immunities of the Constitution and laws. By focusing on the concept of "right," the Court immediately elevated the private right of action as presumptively embodying a public interest that cannot be waived. This result may be correct, but this analysis does not show how the Court got there.

In at least one instance the Supreme Court has provided a more developed justification for finding settlement invalid. In Brooklyn Savings Bank v. O'Neil,91 the Supreme Court prohibited settlement of liquidated damages provisions of the FLSA. Under the FLSA, if an employer fails to pay minimum wage and overtime, the employer becomes liable not only for the unpaid wages but also for an equal amount in liquidated damages.92 In O'Neil, the employer settled an overtime wage dispute with an employee by tendering the wages due on the condition that the employee abandon his right to liquidated damages. In a subsequent suit to recover the liquidated damages the Court found the agreement invalid, concluding that to allow this type of agreement would nullify the purpose of the FLSA: to protect certain groups from sub-standard wages that they could not obtain due to unequal bargaining power.93 The Court also noted the competitive advantage that an employer would gain "by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitor."94 The Court began its analysis by looking to the rights and duties given and imposed under the FLSA. When confronted with a case in the context of familiar market commodities (money), the Court readily saw that

89. Id. at 51.
90. For a discussion of the "Rights as Trumps" concept, see R. Dworkin, TRUMPS AS RIGHTS, in THEORIES OF RIGHTS, supra note 11, at 153.
91. 324 U.S. 697, 713-14 (1945). The Court in O'Neil used the word "waiver," but as defined here the proper term would be settlement.
93. O'Neil, 324 U.S. at 706-07.
94. Id. at 710 (footnote omitted).
market failure (unequal bargaining power) would be perpetuated by allowing settlement.

Elevating the rights and duties imposed by the statute emphasizes the usually undefined public interest in the statute. It at least puts the risk of erroneous interpretation on the side of protecting the public interest in the statute. But it also allows the courts to ignore a private interest in the cause of action. As the following section discusses, there is a significant private interest in private rights of action.

IV. IDENTIFYING INTERESTS WITH FEDERAL STATUTORY CAUSES OF ACTION

As discussed above, there are public interests in private rights of action that are easily lost in a market-commodification model of waiver. But similarly, there are private interests in private rights of action that go unarticulated in a pure “rights” based approach. By setting forth in greater detail those interests, we can identify why a presumption of non-waiver is the best approach to private rights of action.

A. Private Interests—Or Why Aggrieved Individuals Do and Don’t Sue

The technique of granting a privilege to institute suit appears to stem from two characteristics of private rights of action. First, private causes of action assume some private enforcement, which will ease administrative costs of enforcing statutes. The EEOC has authority to institute action under Title VII and the Department of Labor is charged with enforcing the FLSA. And, as noted below, these private actions inevitably influence government enforcement. Even section 1983, whose closest governmental counterpart is a statute making it a crime to violate civil rights, influences and complements its governmental counterpart. Under each statute enforcement is heavily supplemented by private actions. As discussed below, this supposition, that pri-
vate rights of action will increase enforcement of statutes, seems well borne out.

Second, implicit in granting a right to sue is an assumption that aggrieved individuals will have a distinct personal interest that will motivate the aggrieved person to file a private right of action. Congress assumes that "those in the protected class can and will accept" the burden "to identify violations, report them to public authorities [if Title VII violations], and participate in enforcement proceedings." This assumption is only partially true. Taken as a whole, only a small portion of the civil disputes that could be brought to the courts actually come to the attention of a lawyer, even fewer result in a lawsuit, and far fewer go to trial. This pattern of non-use of private rights of action is particularly noticeable in employment discrimination suits.

If there were reason to believe that the decisions not to invoke a private right of action were based on an assessment of the merits of the suit as compared to the benefits to be gained by the statutory remedy, then private choice would be little different from an administrative agency's or prosecutor's decision that resources would be better spent on other endeavors. Unfortunately, these are not the only factors that cause individuals to bypass an opportunity to institute a private right of action. An individual's willingness, and even ability, to invoke the power of the state are heavily influenced by personal values, which in turn are formed by cultural values. To sue may go against the individual's socially constructed view of what is "normal behavior, respectability, responsibility" and being a "good person." Not everyone resolves conflict through an adversary model of positive rights. Indeed, resort to litigation may be a public announcement


100. The decision to initiate a formal dispute through litigation appears to vary with the types and perceived seriousness of the problems. Miller & Sarat, Grievances, Claims, and Disputes: Assessing the Adversary Culture, 15 LAW & SOC'Y REV. 525, 562-63 (1980-81). Taken as a whole, however, there is a striking amount of non-enforcement of potential claims.


102. Bumiller, supra note 99, at 424; Galanter, supra note 101, at 19; Miller & Sarat, supra note 100, at 544-45.

that one's ability to reason and compromise has failed. Consequently, it is not surprising that the level of disputing varies with economic class and religion.\textsuperscript{104}

Even those who have a social concept that encourages them to bring a private right of action face impediments. To assume that the particular legal problem is a "bipolar, rights-oriented, isolated dispute" is inaccurate.\textsuperscript{105} The choice granted by a statute for many aggrieved persons is to make big waves or no waves, a choice between "rebellion and submission"\textsuperscript{106} often after a situation has deteriorated beyond repair. In addition, one attribute of each of the three statutory examples is that there is usually a striking disparity in bargaining power between the employee and employer in the case of the FLSA and Title VII, and between the individual and the state in the case of section 1983.\textsuperscript{107} A mere statement by Congress that an aggrieved individual is now empowered to sue does not change this power relationship but simply superimposes the statutory right over the underlying relationship. Because of these power disparities, individuals with private rights of action often face significant hurdles in winning a suit. "Plaintiffs bring lawsuits, and push them to trial, after assessing the chances and amount of recovery."\textsuperscript{108} The chances of success include variables such as "the hurdles posed by the law, the bias of the judge, [and] the nature of the defendant."\textsuperscript{109} The perceived difficulty of fighting the dragon inevitably affects whether an individual litigant will invest the time, money, and energy in fighting.

Even if an aggrieved individual decides to sue, there are emotional, financial and social costs to that decision. To sue places a

\textsuperscript{104} Id. at 176. See also C. Greenhouse, Praying for Justice 155 (1986) ("[B]y refusing to engage in open dispute, [Baptist] church members reaffirm the power of their own faith and simultaneously believe they are witnesses to the potential defendant.").

\textsuperscript{105} Bumiller, supra note 99, at 429.

\textsuperscript{106} Id. at 429, 437.


\textsuperscript{108} Id. at 37.

\textsuperscript{109} Id. As the Schwab and Eisenberg study notes, if the law is more random toward constitutional torts than other suits, risk aversion may also impede plaintiffs from filing suits. Id. at 37 n.68.
label on the individual. That label may be positive in the eyes of some, but is often starkly negative in the eyes of others. To sue means making a fuss, labeling oneself as a "victim,"\textsuperscript{110} exposing oneself to non-statutorily regulated methods of harassment\textsuperscript{111} and to the expensive, disruptive and, often painful, process of litigation.\textsuperscript{112} With private rights of action the individual is asked to bear all the costs yet, as noted below in identifying the public interest in private rights of action, the individual receives only part of the benefit.\textsuperscript{113}

All these reasons indicate why individuals who believe that they have been aggrieved nonetheless elect not to institute suit. Conversely, those who do invoke suit may do so for many reasons, some of which may correspond to Congress’ reasons for passing the statute, but others may not.\textsuperscript{114} Some sue to vindicate principle,\textsuperscript{115} others to vent anger and frustration.\textsuperscript{116} Incarcerated prisoners are notorious for filing suit, frequently marginal, in part for principle, but often just to fill up their time.\textsuperscript{117}

Recognizing the multiple variables for why people sue is important in determining how courts should react to private rights of action. As seen above, neither courts nor Congress can assume

\begin{itemize}
\item \textsuperscript{110} Bumiller, \textit{supra} note 99, at 433.
\item \textsuperscript{111} \textit{Id.} at 436.
\item \textsuperscript{112} Galanter, \textit{supra} note 101, at 9.
\item \textsuperscript{113} See \textit{infra} Sections IV B & C.
\item \textsuperscript{114} This sentence is written on the generous assumption that Congress’ intent can be ascertained.
\item \textsuperscript{115} See Galanter, \textit{supra} note 101, at 18; Trubek, Sarat, Felstiner, Kritzer & Grossman, \textit{The Costs of Ordinary Litigation}, 31 UCLA L. Rev. 73, 76 n.9, 79 (1983).
\item \textsuperscript{116} Merry & Silbey, \textit{supra} note 108, at 157 (going to court over personal problems seems to be characteristic of people with more chaotic, unstable personal lives). It is my anecdotal opinion that many employment discrimination suits, particularly age discrimination actions, are at their heart alienation of affection suits. For an interesting discussion of why this might be so, see M. Glen-don, \textit{supra} note 38, at 200-05.
\item \textsuperscript{117} Schwab & Eisenberg, \textit{supra} note 107, at 110-11 ("[n]ationally, prisoners bring many more constitutional tort actions than do nonprisoners, a much higher fraction of the cases brought are unsuccessful, and counsel bring relatively few of the actions"); Note, \textit{Controlling and Detering Frivolous In Forma Pauperis Complaints}, 55 \textit{Fordham L. Rev.} 1165, 1166 (1987). \textit{Cf.} \textit{Town of Newton v. Rumery}, 480 U.S. 386, 387 (1987) ("[m]any [§ 1983 suits] are marginal and some are frivolous"); \textit{Procup v. Strickland}, 792 F.2d 1069, 1071 (11th Cir. 1986) (recent explosion of prisoner litigation in federal courts). The Schwab and Eisenberg study indicates that prisoner cases in which the plaintiff has counsel have a comparable success rate to nonprisoner cases. If the meritorious cases had counsel, these disparities would be unproblematic. Their data indicate, however, that the private market in their study fails to supply counsel for many meritorious prisoner constitutional tort suits. Schwab & Eisenberg, \textit{supra} note 107, at 116.
\end{itemize}
that aggrieved individuals will invoke private rights of action in most cases in which a statutory violation has occurred. The giving of a right, but not the duty, to file a private right of action when a statutory violation occurs reflects implicitly Congress' understanding that filing a suit imposes costs on the individual that society should not force upon the person. To impose a duty to institute suit would be to ask a person to accept potentially high personal cost for a personal benefit that the person may not value highly. By giving a right, but not a duty, the government and the public will receive the benefits of enforcement by those who do sue. For the remaining cases unsatisfied by private rights of action, the alternative method of enforcing the public interest is by administrative enforcement through such entities as the EEOC, the United States Attorney General, or the Department of Labor.

But, to say that one will not be forced to bring suit is quite different from saying one may sell that right to bring suit. The difference is reflected largely in the public interest underlying federal statutory private rights of action.

B. The Public Interest

There is a generic public interest in all civil litigation, at least to the extent that governmental resources—the courts—are used to resolve the dispute. But federal statutory causes of action involve a far more significant public interest. The mere fact that Congress uses its constitutional authority to regulate private interactions indicates some effect or consequence of those private acts on the public at large. For example, in the statutory examples set forth above, the FLSA and Title VII were passed using the authority of the commerce clause. Section 1983 was passed pursuant to the fourteenth amendment of the Constitution.

118. Imposing a duty to sue would also pose enormous enforcement problems. Would it be a crime not to pursue a private suit? If so, at what point is the violation sufficiently obvious to trigger this duty? If imposing a duty is not a crime, who will enforce this duty? Certainly few defendants will complain if a potential plaintiff fails to fulfill her duty to file suit.


120. U.S. CONST. art. I, § 8, cl. 3. See also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964) (Congress passed Civil Rights Act of 1964 on authority of § 5, equal protection clause of the fourteenth amendment and commerce clause, art. 1, § 8, cl. 3).
The mere presence of federal positive law indicates _ab initio_ that there are interests—however slight—involved in the statute beyond the private interactions of the parties regulated. This public interest, being the least common denominator of all federal legislation, may not be sufficient to override private interests, but it nonetheless exists.

The public character is strongly reflected in administrative enforcement mechanisms. Under each of these statutes there are governmental mechanisms for instituting suit which can be invoked without the cooperation of the right-holder. For example, under Title VII a claimant is required to file a charge with the EEOC as a precondition to filing suit. The purpose of this charge is to notify the EEOC that the filer believes that an employer has violated the statutory requirements. Consistent with this purpose of filing a charge with the EEOC, a charge can be filed by any person, including one who is not personally affected. The EEOC can institute suit at its own initiative. A settlement can waive the employee’s right to recover in a suit brought by the EEOC on the employee’s behalf, but cannot waive the EEOC’s distinct interests in having conduct declared unlawful. Consequently, each cause of action is not purely an individual one, but has a clear public component that can be enforced by someone other than the right-holder.


123. EEOC v. Shell Oil Co., 466 U.S. 54, 68 (1984); EEOC v. Cosmair, Inc., L’Oreal Hair Care Div., 821 F.2d 1085, 1089 (5th Cir. 1987).

124. 29 C.F.R. § 1626.4 (1988) (EEOC “[s]hall also receive information concerning alleged violations of the [ADEA] including charges and complaints from any source”).

125. 42 U.S.C. § 2000e-5(b) (1982) (charge can be filed by member of Commission); 42 U.S.C. § 2000e-5(f) (1982) (Commission may bring civil action). Because there is no single listing of statutes providing private rights of action, it is difficult to state categorically that all statutes granting private rights of action have a similar government enforcement mechanism. We know that a great many federal commissions, such as the Securities and Exchange Commission, the Commodities Futures Trading Commission, the Consumer Product Safety Commission, the Interstate Commerce Commission, and Executive Departments, such as the Department of Justice, the Department of Housing and Urban Development, and the Department of Education, exist to enforce statutes that also have private rights of action.

126. Cosmair, 821 F.2d at 1091 (employee can waive right to recover in own suit or in suit brought by EEOC but cannot waive right to file charge with EEOC) (citations omitted). See also EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1543 (9th Cir. 1987) (backpay claim by EEOC on behalf of employee who settled Title VII claim is moot).
But administrative enforcement is not the only voice representing the public interest. As the Supreme Court has acknowledged, when the EEOC acts upon a complaint, "albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." When a private litigant initiates a private cause of action, that litigant also acts not only to serve a private interest, but necessarily "also vindicates the important congressional policy" behind the underlying statute. This occurs because the substantive right usually does not distinguish between public or private enforcement. The underlying cause of action is the same, only the parties empowered to sue are distinct. Consequently, when a court issues a momentarily determinative interpretation of a federal statute, both public and private enforcers are bound. For example, a private litigant under Title VII may sue, but the Supreme Court’s interpretation of the statute will bind the EEOC. It is simply impossible to keep the public and private components of federal causes of action distinct.

Without any articulated justification, the Court in Rumery concluded that initiating a private cause of action under section 1983 vindicates primarily private interests. While it is true that section 1983 does not have a direct civil governmental enforcement counterpart, like Title VII and the FLSA, section 1983’s public character may be even stronger than those statutes because it acts to regulate the relationship between citizens and government. Thus, "by the very nature of a section 1983 action, the government is an interested party and the interests affected are of constitutional magnitude." The Supreme Court’s actions to discount the public interest in section 1983 may be due to the

127. General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 326 (1980) (footnote omitted); Cosmair, 821 F.2d at 1090; Goodyear Aerospace, 813 F.2d at 1542-43.


129. The government may be entitled to broader remedies than damages. See, e.g., 18 U.S.C. § 242 (1982) (criminal penalties imposed upon individuals who discriminate against or deprive others of their constitutional rights under color of state law); 29 U.S.C. § 217 (1982) (permits suits for injunctive relief for all affected employees without requiring that employees be named in the complaint).

Court's fairly consistent restrictive interpretation of section 1983. Whatever the cause, ignoring the public interest of section 1983 is imprudent.

C. Joint Interest: Deterrence and Enforcement

It is impossible to keep public and private interests distinct in one other very significant way. At the heart of most command statutes is a deterrence goal. Congress wishes to stop particular conduct either because the conduct itself directly causes harm, or because secondary consequences of the conduct cause harm. When a defendant is sued by either the government itself or a private litigant suing under a private right of action, there is an obvious effect on that defendant. As noted by observers of the deterrent effect of law, this specific deterrence may take four forms. The defendant may be deterred by fear of being caught again, or may be deprived of resources with which to commit violations, or may increase surveillance which in turn reduces the unlawful conduct, or may actually change his or her underlying attitudes so that the defendant is convinced that it is no longer right to do the acts that violate the statute. The individual plaintiff is an obvious beneficiary of each of the deterrent effects if the plaintiff stays in any type of relationship with that defendant. But the more likely beneficiaries of the deterrence effect of an individual plaintiff's enforcement are other potential plaintiffs. And that deterrent effect works to a greater or lesser extent whether it is the government or the private litigant who sues. In some cases a class action private suit may have a greater deterrent effect than a government sponsored suit. In other cases the government may on average strike more fear in the hearts of statutory violators. Because there is both public and private enforcement, they act together to deter violators.

These specific deterrent effects on actual defendants ripple out to affect all potential defendants, presenting an often powerful deterrent effect on others. Termed "general deterrence," this results when information about the consequences of suit to a defendant provides others in the class with information about the

132. Galanter, supra note 101 at 32-33 & n.105 (citing J. GIBBS, CRIME, PUNISHMENT AND DETERRENCE (1975) and Feeley, The Concept of Laws in Social Science: A Critique and Notes on an Expanded View, 10 LAW & SOC'Y REV. 497, 517-21 (1976)).
133. Galanter, supra note 101, at 33.
consequences of committing a violation. For example, the business journals extensively publicize suits brought by both the government and private individuals under the securities laws. Newspapers, too, often devote significant space to publicizing lawsuits. The most significant aspect of this deterrent effect is that it occurs largely outside the courtroom and therefore outside the control of judges. When courts create rules, such as a rule that a waiver is presumptively lawful absent congressional indications to the contrary, its effect will occur largely outside the courtroom. Against this backdrop, private parties will naturally adjust their relationships accordingly.

Similarly, potential defendants may actually change how they assess the correctness of their conduct by observing lawsuits that expose defendants engaging in statutory violations. A private suit that exposes a statutory violation has that same effect of publicizing the defendant's conduct. For some, the application of the law may affirm a potential defendant's assessment that the statutory violation is indeed wrong.

This latter aspect of deterrence—the possibility of "reformation," changed attitudes or adaptive preference—is particularly

134. Id. See also R. Labunski, Libel and the First Amendment 225-27 (1987) (reports results of survey of reporters, editors, producers, and other journalists in which 80% surveyed had at least moderate level of concern about being sued); Galanter, supra note 36, at 124-42 (comparing general and specific deterrent effects).


137. See Galanter, supra note 36, at 121 ("The principal contribution of courts to dispute resolution is the provision of a background of norms and procedures, against which negotiations and regulation in both private and governmental settings takes place.").

138. See Feeley, supra note 132, at 515 ("the law is most often set in motion by people who apply it to themselves and to each other without benefit of explicit mobilization of legal institutions").

139. Galanter, supra note 101, at 33. In the words of Professor Galanter: "[C]ommunication of the existence of a law or its application by a court may change the moral evaluation by others of a specific item of conduct. To the extent that this involves not the calculation or the probability of being visited by certain costs and benefits, but a change in moral estimation, we may call this general effect enculturation." Id. (emphasis in original).

140. This is called "normative validation." See J. Gibbs, Crime, Punishment and Deterrence (1975); Galanter, supra note 101, at 34.

important. Few seriously contend that people's attitudes remain unchanged in the face of the law.\textsuperscript{142} As William Muir concluded in his study of attitude changes in the face of the Supreme Court's prohibition of prayer in public schools, the law is unlikely to save attitudes if it is opposed by all other social institutions.\textsuperscript{143} But where "there is no monolithic trend . . . where the population is ambivalent or indecisive or divided . . . then legal institutions can and apparently do shore up the partisans (or detractors) of that attitude."\textsuperscript{144} Can law change attitudes?

Of course it can. It has done so—in reshaping in less than a generation this nation's views about racism; in altering in even a shorter time police attitudes toward criminal behavior; in ennobling the city dweller as the backbone of American democracy; in imparting an understanding of poverty; in recasting our ideas about leisure; in maintaining certain attitudes of good sportsmanship apparently essential to a competitive market economy; in stemming religious prejudice; in establishing heightened standards of honesty and public service.\textsuperscript{145}

Even if Muir is overly optimistic about the scope of attitude changes in the face of the law, a public recognition that formerly held attitudes are not the only way to conceive of a problem has the effect of promoting a greater degree of tolerance.

Each of these deterrent effects, however, requires application of the statute by either government or private litigants. Even in a complex model of the relationship between law and behavior, any behavioral benefits will not accrue unless there is some punishment or ill-effect from engaging in the prohibited behavior.\textsuperscript{146} To the extent that the law has any moral force, that effect also cannot occur if the law is not applied.

\textsuperscript{1129, 1146} (individuals may adapt their preferences if they believe they cannot get original desires).

\textsuperscript{142} "There is suggestive evidence to indicate that at least some segments of the population are subject to [enculturation]." Galanter, supra note 101, at 33 & n.107.

\textsuperscript{143} W. Muir, Prayer in the Public Schools 135 (1967).

\textsuperscript{144} Id.

\textsuperscript{145} Id. at 138.

Successful application of a statute not only deters defendants, but encourages plaintiffs. When a statutorily-protected class sees a statute being enforced, that evidence of the vitality of the cause of action inevitably affects potential plaintiffs. Tort grievances provide a good example. Tort grievances are much more likely to result in claims than are discrimination claims.\textsuperscript{147} Most tort claims are not formally resisted and when court action is required lawyers are readily accessible.\textsuperscript{148} Successful resolution of tort claims, with widespread acceptance of the validity of bringing such claims, encourages others to pursue similar remedies.\textsuperscript{149} Repeated claims also inevitably develop known, regularized mechanisms and procedures for dealing with such claims, which in turn encourage aggrieved persons actually to seek redress either formally or informally.\textsuperscript{150} Unsuccessful enforcement, or the absence of enforcement, inevitably discourages aggrieved persons from pursuing statutory remedies.\textsuperscript{151} Actual enforcement by either the government or private citizens provides not only information about how to sue, but also a powerful symbol for enforcement.\textsuperscript{152}

Any deterrent effect is determined by what the enforcers—public and private—do or fail to do. Any decision to ignore a statutory violation has a small radiating consequence. Hence, rules that discourage parties from suing have a similar radiating consequence.

D. Waiver versus Settlement

The prior discussion has focused largely on the interests in private rights of action. There are also distinct interests in the process of dispute resolution. There is a public interest in encouraging settlement of disputes, both as a cost-effective method of resolving disputes and because our judicial system is incapable of bringing to trial all lawsuits filed.\textsuperscript{153} There is also a widespread

\textsuperscript{147} Miller & Sarat, \textit{supra} note 100, at 545.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 563.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 563-64; see also Galanter, \textit{supra} note 101, at 34; Schwab \& Eisenberg, \textit{supra} note 107, at 37 (discussing the "interactive nature of litigation"; "plaintiffs need not base the decision whether to file suit on a Platonic sense of the 'goodness' of the claim, but rather on the likelihood of success given the law, the decisionmaker, and the defendant").
\textsuperscript{152} Galanter, \textit{supra} note 101, at 34.
\textsuperscript{153} See Trubek, Sarat, Felstiner, Kritzer \& Grossman, \textit{supra} note 115 at 122 ("One of the most striking aspects of our study of litigation was that bargaining
acceptance by lawyers, judges and the American public that the primary role of American courts is to resolve disputes.\textsuperscript{154} If these were the sole principles governing waivers and settlements, then courts would automatically structure rules to encourage resolution and avoidance of disputes.

Other interests, however, are present to temper the laudable goal of dispute resolution. The very fact that we have a system of \textit{stare decisis} indicates that courts serve a valid, independent function in issuing dispositive public judicial pronouncements.\textsuperscript{155} This allows not only for public resolution of disputes (which in turn supports a normative view of the law), but it also serves to satisfy a public notice interest in having public announcement of the interpretation of laws. Our legal system also has a substantive justice goal. At least one purpose of our legal system is "to provide fair and just results to the individual disputants and to society."\textsuperscript{156} This is implicitly recognized in common law limitations on settlements.\textsuperscript{157}

The courts also play a normative role even with settlements in which they take no active part. When parties negotiate over facts that have already occurred, they will use as a backdrop the court's anticipated resolution of the dispute if it were to go to trial. The parties will use as bargaining chips likely court outcomes, jury verdicts, and chances on appeal.\textsuperscript{158} In other words, the parties bargain "in the shadow of the law."\textsuperscript{159}

Even acknowledging a very strong interest in settling disputes does not justify undifferentiated suit avoidance. Potential defendants can avoid having suits brought against them by a number of means. Potential defendants can act so that they do not violate a statute, which significantly reduces their chances of


\textsuperscript{155} Fiss, \textit{Against Settlement}, \textit{93 YALE L.J.} 1073, 1087 (1984) (one advantage of judicial decision is that it may meet "a genuine social need for an authoritative interpretation of law"); McThenia & Shaffer, \textit{For Reconciliation}, \textit{94 YALE L.J.} 1660, 1664 (1985) (summarizing Fiss' reasons for preferring adjudication to settlement).

\textsuperscript{156} Menkel-Meadow, supra note 154, at 489.

\textsuperscript{157} For example, to be enforced as a contract, settlements cannot be the product of fraud or duress. \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 7 (1981).

\textsuperscript{158} \textit{See} Galanter, supra note 36 at 121.

having suits brought against them. Potential defendants can also avoid having lawsuits brought by settling an impending suit, often because the statutory violation is obvious. Potential defendants can also avoid suit by "buying off" potential plaintiffs before the claimed wrongful act is taken or completed. In this latter form of suit avoidance the parties move away from "the shadow of the law" cast by the underlying statute.

V. RECONCILING THE PUBLIC AND PRIVATE INTERESTS

A. Why It Makes a Difference When Aggrieved Individuals Don't Sue and Why It Makes Even More of a Difference When Aggrieved Individuals Don't Sue Because They've Sold Their Privilege-Right

As discussed above, a decision not to sue may be motivated by many factors not directly related to the statute. Yet each decision not to sue has a small, but incremental, effect on the underlying statute. If that personal aspect of the lawsuit predominates, then the private right of action should be left as a purely personal decision, subject to no interference, even if the individual wishes to sell that right prior to the accrual of the cause of action. At least three reasons argue against wholly privatizing the cause of action. First, as mentioned above, private acts have public consequences. Every federal statutory cause of action has a public component, albeit some more than others. Encouraging a policy of commodification sets up an environment that diminishes, rather than enhances, the public component of a right created by public law. This diminution of the public component is subtle and difficult to give an objective and non-arbitrary cost value. The very inability to determine an objective value indicates that the market is incapable of taking into account this diminution of value.

Similarly, commodification will occur in situations in which the same cause of action may have widely different values to the prospective plaintiffs. The plaintiff who is dependent upon the defendant for a job, or for allowing the plaintiff to get out of jail, or for income from a stock will not value a cause of action as

160. For example, Title VII requires the EEOC to attempt to conciliate any disputes it concludes have merit. 42 U.S.C. § 2000e-5(b) (1982) ("If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.").

161. See Calabresi & Melamed, supra note 18, at 1111.
much as one who has severed the relationship with the defendant.162 This widely fluctuating valuation also inhibits creation of any meaningful market in private rights of action.163

Second, commodification does more than simply allow the defendant—by paying off the potential plaintiff—to pretend that the statute does not exist. When a statutory right is created, with a correlative private right of action, the common law is changed. The legal relationship between the statutory plaintiffs and defendants has been altered and statutory plaintiffs as a class have—at least in theory—been given a power that they did not have before. These statutory plaintiffs may have also lost other rights or powers of which they are not aware in return for the private cause of action. When a statutory plaintiff prospectively or simultaneously waives a private right of action, it may appear initially that the relationship has simply been returned to the pre-statute relationship. There is a material difference, however. Courts now have a duty to refrain from applying the statute (when brought by the private plaintiff) by the force of the private contractual agreement.164 The courts will enforce the contract and thereby condone the conduct allowed by it. By executing a waiver, these prospective plaintiffs have, in effect, given permission to the statutory defendant to violate the statute. These statutory defendants are now privileged to discriminate and the law will be in a position of saying not only that “we will not stop you from discriminating” but that “there is an agreement that the defendant is privileged to discriminate.” The statute’s normative effect is therefore undermined.165 The substantive law that was waived no longer casts any shadow over those parties to the initial agreement.

Finally, as part of each of these reasons, the starting point of the analysis itself sends a message. A starting point that emphasizes the private nature of the cause of action—a presumption for commodification—creates a frame of reference.166 By presuming commodification, it implies that there is a ready market value, that the private component is more important than the public compo-

162. See id. at 1094 & n.10.
163. The likely response to this argument is that the market will weed out inefficient laws by allowing parties to privately order their relationship.
165. Cf. Rubin, supra note 84, at 483 (most general definition of waiver is “relinquishment of the right”).
166. “We may buy or sell ourselves into the opposite direction, but we must start somewhere.” Calabresi & Melamed, supra note 18, at 1100-01.
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ent. All these in turn send a message to both plaintiffs and defendants. Defendants have a clear message that the statutory duties may be bought and sold, thus buying a private repeal, and hence have little normative value. Any ancillary goal of changing attitudes is completely undermined, for allowing such an easy "out" will inevitably arouse the contempt of those whose conduct was to be regulated. 167 If one thinks the statutory goal is unim-
portant, one can simply buy his or her way out of it. Conversely, if one can easily buy his or her way out of a public law, it must not be very important.

Given the inherent public nature of private rights of action, then, private rights of action should not be privatized. The private interest in causes of action continues to be reflected in the individual's choice not to sue. 168 The only limitation is that the choice not to sue cannot be based on agreements that will alter defendants' conduct. Because prospective waivers always create an environment that alters defendants' conduct, these prospective waivers should be disallowed as a matter of statutory interpretation. Hence, the better rule of statutory construction is to create a presumption of inalienability of a cause of action, which would be rebutted by a clear statement or indication in the congressional history that the private aspects of the cause of action predominate.

B. Rights Changing Over Time—Settlement Versus Waiver

As noted above, settlement embodies interests distinct from waiver. These interests become more distinct by considering how both the public and private interests in causes of action change over time. Property has a temporal dimension; time alone can alter property interests. 169 In some instances there is a clear cause and effect relationship. 170 With statutory private rights of action, defendants' acts cause the creation of the private rights of action. As noted above, there is also an interactive temporal dimension to causes of action. Successful use strengthens the cause of action, which in turn encourages more use. This temporal di-

168. Private ordering, then, continues to play a significant role. It cannot supplant, however, the normative guidelines. Cf. Galanter, supra note 36, at 131-32; Mnookin & Kornhauser, supra note 159, at 986.
mension can also reach backwards due to the lapse in time between the wrongful act and resolution of the claim. Changes in judicial interpretations, larger or smaller jury awards, and even changes in attitudes can reach back to make the present assessment of the cause of action stronger or weaker, despite the inability of all parties to relive the past facts. The courts and parties will debate the significance of these past operative facts. However, what is important is not the past facts but the rereading and recharacterization of events as judicial facts.171 “The judicial process thus acts to create the reality” of the facts.172

A statutory plaintiff’s interest in the cause of action alters with time in step with both of these aspects of the temporal dimension of the cause of action. Before any wrongful act has occurred, persons listed as potential plaintiffs have an inchoate right. If certain acts occur, that potential plaintiff will be empowered to sue for a remedy. Even without a wrongful act, that individual has an interest in the protections of the statute, for a well-working statute will, through its deterrent effect, discourage statutory wrongful acts. In other words, the mere possibility that one can sue if a wrongful act is committed discourages commission of the act. Because the cause of action is inchoate, however, it is often difficult to point to a specific individual benefit. This very point justifies noncommodification of waiver. The government’s interest is very strong, for a proper tension of inchoate rights to sue discourages wrongful acts. The government is receiving a low-cost benefit. No wrongful acts have occurred and the government therefore avoids picking up the pieces if a violation occurs. For example, as long as employers feel the deterrent effect of the FLSA, employers will pay their employees the minimum wage. If they do not pay the minimum wage, they know that they will be subject to an effective enforcement action by either the government or the aggrieved workers. The government has the best possible scenario: statutory goals of regulating conduct are achieved without individual harm to the prospective plaintiff.

Once the claimed wrongful act has occurred, however, the potential plaintiff is transformed into an empowered plaintiff. His or her interest is no longer inchoate, for that plaintiff has suffered specific harmful effects. Just as the individual’s interest has been transformed from being one of millions of workers to a worker

172. Id. at 75.
who has been harmed, the state's interest—although strong—is now focused as well on the individual. The state can no longer hope for deterrence in this case; it is too late. The state then hopes for enforcement, which will in turn deter future violations. Hence, there is the much greater acceptability of settlement; it serves as a form of enforcement.

Although settlement continues to have a public interest dimension, its private elements are much stronger than waiver. The defendant can not undo the wrongful act, but can only make the plaintiff whole. The plaintiff is no longer considering speculative benefits, but has facts to read, evaluate and characterize. Similarly, the defendant is no longer able to completely deny the force of the law. Even a common settlement provision stating that settlement is not an admission of liability is not the same as a judicial pronouncement that the defendant is not obligated to meet the requirements of the statute. With settlement, then, courts properly presume the ability to settle, absent indications to the contrary under the statutory scheme. Settlement would be inappropriate, of course, where Congress expressly disallows it. But as with most questions of waiver and settlement, Congress seldom addresses the issue. The presumption of commodification after the wrongful act—settlement—can be rebutted by classic market failure as related to the purpose of the statute. Consequently, under the FLSA the Court quite properly found that the inequality of bargaining power was the reason for imposing minimum wage and overtime requirements on employers and that the statute would fail if the parties could settle statutory liabilities by using economic pressures on vulnerable plaintiffs.173

Congress, as well as the courts, should be aware of the dangers of waivers. For the reasons noted above, Congress should reflect strongly before allowing waiver. Waiver is not simply a tipped hat to the free enterprise system. It is allowing private ordering to undermine the congressionally granted cause of action.

VI. Conclusion

Because of the public interest inherent in all private rights of action and the interactive effect of use or non-use of the underlying cause of action, courts should approach private rights of action with a presumption of inalienability. In other words, holders of rights of action may elect not to use the cause of action, but

should not be free to make prior enforceable agreements to waive their right to bring a cause of action. With this as the operative presumption, courts can then look to the underlying statute that creates the cause of action to see if the statute indicates that that presumption should not attach.

After the claimed wrongful acts have occurred, however, the private interest in compensation arises, shifting the balance of interests. Consequently, courts should approach settlement of private rights of action with a rebuttable presumption of alienability. With this as the operative presumption, courts can then look to the underlying statute that creates the cause of action to see if the statute indicates that the presumption should not attach.