

A PUBLIC CALLING FOR PRIVATE EMPLOYEES

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Two of society's most important institutions face a crisis of legitimacy: regulatory agencies and corporations. Regulators are on the front lines guarding against climate change, technological upheaval, economic disasters, and other large-scale threats to society. Yet they are under siege from all branches of government and derided as ineffective, inefficient, and undemocratic. Corporations develop life-saving medical innovations, dramatically lower the costs of everything from food to transportation, and provide free information to people at a scale unimaginable thirty years ago. Yet they are commonly viewed as unethical, exploitative, and destructive. It is fair to wonder whether administrative agencies and corporations are poised to tackle the existential challenges that they are arguably best situated to address.

This Article unites these two institutional crises by a common thread: the link between corporate employees and public servants. As a descriptive matter, corporate and administrative employees are more related than they may at first appear. Administrative agencies have long sought the help of corporate employees, many of whom now perform similar tasks to those of regulatory inspectors. Compliance officers, auditors, and other law-related employees within corporations are now at least as numerous as police officers patrolling the streets.

From a policy perspective, corporate employees could serve the public better if they had more power and motivation to act for the public good. To illustrate what increased power might look like, if public-minded employees had more confidential avenues to communicate problematic conduct to regulatory enforcers, they would have a greater ability to influence corporate conduct. A more ambitious agenda for increasing motivation and power would be to encourage a societal shift toward

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viewing private employees as having a duty not only to shareholders, but also to society. Whether through these or other options, it is important to pay greater attention to the part of the corporation where legal scholars have focused the least: its core, or the low- and mid-level employees who are not engaged in law-related work. Reorienting governance around these core employees offers promise to enhance regulatory effectiveness, cut corporate costs, make work more fulfilling, and lessen the institutional mistrust eroding the foundations of democracy.

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INTRODUCTION

Private sector employees have become “the single most significant source for detecting and preventing crime—more so than government regulators, law enforcement personnel, and program auditors combined.”¹ Private employees exposed many of the most prominent corporate scandals, including Theranos’s life-threatening biotechnology blood testing practices,² Wells Fargo’s creation of millions of fake accounts in customers’ names,³ and Meta’s knowledge that its algorithms fed children dangerous content with the potential to promote self-harm and eating disorders.⁴ The private employee is arguably the single most important regulatory agent guarding against pressing challenges, such as climate change, consumer exploitation, and disinformation.⁵

Despite society relying heavily on private employees to govern, the law mostly forsakes them. An ethical employee’s main option is to become a whistleblower. But whistleblower protections are strongest when employees help shareholders, such as by reporting securities fraud or embezzlement of company funds.⁶ In contrast, when employees raise ethical concerns about profitable environmental degradation or consumer manipulation, they risk being perceived internally as harming shareholders. If employees instead choose to go public, weak whistleblower protections mean that their careers are routinely ruined.⁷

¹ Jonathan P. West & James S. Bowman, Whistleblowing Policies in American States: A Nationwide Analysis, 50 *Am. Rev. Pub. Admin.* 119, 120 (2020).

² John Carreyrou, *Bad Blood: Secrets and Lies in a Silicon Valley Startup* 195, 281–82 (2018).

³ See, e.g., J.S. Nelson, Disclosure-Driven Crime, 52 *U.C. Davis L. Rev.* 1487, 1498, 1533 (2019); Leslie Scism, Prudential Fires Back Against Three Former Employees, *Wall St. J.*, <https://www.wsj.com/articles/prudential-fires-back-against-three-former-employees-1485437572> (last updated Jan. 26, 2017, at 14:44 ET).

⁴ See Hillary A. Sale, Monitoring Facebook, 12 *Harv. Bus. L. Rev.* 439, 441 (2022).

⁵ See *infra* Part I.

⁶ See *infra* Section II.A. Reporting such misconduct internally is more organizationally acceptable because doing so arguably increases shareholder wealth. This means that the conduct upholds shareholder primacy—the influential norm that corporations should prioritize maximizing shareholder wealth. See, e.g., Donald C. Langevoort, The Effects of Shareholder Primacy, Publicness, and “Privateness” on Corporate Cultures, 43 *Seattle U. L. Rev.* 377, 382–84 (2020) (summarizing the origins and influence of shareholder primacy and linking it to compliance).

⁷ Aaron S. Kesselheim, David M. Studdert & Michelle M. Mello, Whistle-Blowers’ Experiences in Fraud Litigation Against Pharmaceutical Companies, 362 *NEJM* 1832, 1836 (2010) (describing the resulting personal toll of whistleblowing). In select areas with strong whistleblower protections, however, whistleblowers fare better. See *infra* Section III.A.

Even among whistleblowers who are ultimately vindicated, “most of them pay a horrible price with lifelong scars.”⁸ Additionally, corporations use trade secret laws, nondisclosure agreements, and company policies to scare employees away from sharing information with regulators.⁹ To enforce the law, employees must too often take on powerful corporate pressures from an isolated position of weakness.

This Article sketches private workers’ place at the center of the regulatory architecture, identifies weaknesses in that structure’s design, and proposes reforms that would enable workers to govern from a position of greater power. As a descriptive matter, corporate employees are connected to public servants in part because they often perform functions similar to those of administrative agency employees. Moreover, regulatory agencies often monitor, shape, and even informally manage the compliance systems within large companies.¹⁰ Agencies are thus one of the sources of external pressure that have made lawyers, compliance officers, and risk-management employees in the corporate sector about as numerous as police officers patrolling U.S. streets.¹¹ Although a

⁸ See Tom Devine & Tarek F. Maassarani, Gov’t Accountability Project, *The Corporate Whistleblower’s Survival Guide: A Handbook for Committing the Truth* 18 (2011); see also C. Fred Alford, *Whistleblowers: Broken Lives and Organizational Power* 1 (2001) (“[One whistleblower] put it this way: . . . ‘I stood up against the big corporation and I lost. I didn’t just lose my job. I lost my house, and then I lost my family.’”). In one study of False Claims Act lawsuits, employers retaliated against the employees in the vast majority of all cases. Aiysha Dey, Jonas Heese & Gerardo Pérez-Cavazos, *Cash-for-Information Whistleblower Programs: Effects on Whistleblowing and Consequences for Whistleblowers*, 59 *J. Acct. Rsch.* 1689, 1692 (2021).

⁹ See *infra* Subsection III.A.1.

¹⁰ Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 *Colum. L. Rev.* 369, 369 (2019).

¹¹ See *infra* Section I.A (showing how large regulators have sought to enlist the help of corporate employees for decades). For data on the number of law-related personnel in the private sector, see William S. Laufer, *A Very Special Regulatory Milestone*, 20 *U. Pa. J. Bus. L.* 392, 393–94 (2017) (“There soon will be as many enterprise-wide risk, audit, legal, and compliance professionals on the payroll of corporations in the United States as municipal police officers keeping our streets safe.”). Since Laufer’s estimate that the two figures were close, the number of compliance officers alone has increased by over forty percent, while the number of police officers has decreased by nearly two percent. See *id.* at 393 n.1 (citing Press Release, Bureau of Lab. Stat., U.S. Dep’t of Lab., Occupational Employment and Wages—May 2016 (Mar. 31, 2017) [hereinafter 2016 Employment and Wages Press Release], https://www.bls.gov/news.release/archives/ocwage_03312017.pdf [https://perma.cc/Z9ZD-BQFU]) (providing a 2016 estimate for compliance officers as 273,000); Bureau of Lab. Stat., U.S. Dep’t of Lab., Occupational Employment and Wages, May 2023: 13-1041 Compliance Officers, <https://www.bls.gov/oes/2023/may/oes131041.htm> [https://perma.cc/FF27-2ZZS] (last updated Apr. 3, 2024) (providing a 2023 estimate for compliance officers as 383,620);

substantial workforce of such *law-related employees* may be unavoidable, they are normatively less desirable for enforcing regulations than *core employees*.¹² Relying as much as possible on core employees—such as pharmaceutical scientists, computer engineers, or sales agents—to enforce laws from within the corporation has the most potential to regulate costs effectively while improving legitimacy.¹³ Instead, the current regulatory architecture inverts the normative hierarchy by leaning heavily on law-related employees.¹⁴ Moreover, for core employees to promote the public interest, too often they must do so from a position of weakness unless they come forward publicly as whistleblowers, which is perhaps the least desirable outcome for both them and their employers.

This Article explores two main ways to improve the framework for enlisting private employees as public servants. Even with existing statutory authority, administrative agencies can extend greater power to core employees and thereby better align private enforcement with public norms. Alternatively, even without any administrative agency action, a societal shift to viewing frontline workers as having a public calling could itself lead to meaningful progress.

By situating private employees at the center of the regulatory state, this Article connects three vibrant strands of legal scholarship: administrative law, corporate law, and social movements. In recent years, administrative law scholarship has begun “crack[ing] open the black box of agencies to peer inside,”¹⁵ which has shown that administrative agency inspectors and other monitors lie at the heart of regulatory power.¹⁶ These sub-organizational examinations have been motivated partly by the notion that conversations about administrative law “are incomplete because agencies

2016 Employment and Wages Press Release, *supra* (putting a 2016 police and sheriff’s patrol officer estimate at 657,690); Bureau of Lab. Stat., U.S. Dep’t of Lab., Occupational Employment and Wages, May 2023: 33-3051 Police and Sheriff’s Patrol Officers, <https://www.bls.gov/oes/2023/may/oes333051.htm> [<https://perma.cc/BX4B-BLZB>] (last updated Apr. 3, 2024) (reporting a 2023 police and sheriff’s patrol officer estimate of 646,310).

¹² See *infra* Part II. These are not mutually exclusive categories in the sense that both law-related employees and core employees can become whistleblowers.

¹³ See *infra* Part I.

¹⁴ See *infra* Part I.

¹⁵ Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 *Yale L.J.* 1032, 1035 (2011).

¹⁶ Van Loo, *supra* note 10 (chronicling “the statutory rise of regulatory monitors . . . to situate them empirically at the core of modern administrative power”).

are typically treated as unitary entities.”¹⁷ Conceptualizing corporate employees as regulatory agents means cracking open the black box of agencies, which requires understanding how agencies leverage corporate employees. Despite paying considerable attention to businesses as regulatory actors, however, administrative law scholars have rarely paid sustained attention to mapping corporations’ internal actors playing a regulatory role.¹⁸

Consequently, the task of mapping the internal enforcement apparatus within the firm has largely fallen on corporate law scholars. Scholars have conceived of the rise of compliance departments as a transformation in corporate culture, governance, and organizational structure.¹⁹ Yet these corporate law literatures tend to pay limited attention to agencies or treat

¹⁷ Magill & Vermeule, *supra* note 15, at 1032 (“Standard questions in the theory of administrative law involve the allocation of power among legislatures, courts, the President, and various types of agencies.”).

¹⁸ The “religion” of privatization has sometimes drawn administrative and constitutional law scholars to examine businesses more closely. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 *Harv. L. Rev.* 1229, 1229–30, 1247 (2003). Privatization, however, concerns the government moving traditionally public services, like operating prisons, toward private businesses. *Id.* at 1229–30. Of greater relevance is the early literature identifying a panoply of regulatory models, including a new governance era in which agencies and firms collaborate to solve problems rather than act as adversaries, which provides valuable foundations for the agency-firm connection on which this Article builds. See, e.g., Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 *Law & Soc’y Rev.* 691, 725 (2003) (analyzing a regulatory model in which government “regulators outline criteria for private sector planning and conduct varying degrees of oversight to ensure that firms are engaging in effective planning and implementation that satisfies the stated criteria”); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. Rev.* 1, 30 (1997); Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* 4–7 (Donald R. Harris, Keith Hawkins, Sally Lloyd-Bostock & Doreen McBarnet eds., 1992); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *Minn. L. Rev.* 342, 345–47, 376–78 (2004). Finally, scholars have increasingly examined agencies’ intersections with firms’ compliance officers. See Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 *Yale J. on Reg.* 165, 204–05, 271 (2019) (concluding that compliance officers sometimes implement agency guidance). Compliance officers are, however, merely one subset of employee enforcers. See *infra* Section I.B.

¹⁹ Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 *Hastings Bus. L.J.* 71, 72 (2014) (“What might have been thought of twenty years ago as a basic corporate governance function is now being ceded to compliance departments.” (footnote omitted)); *id.* at 74–75; James A. Fanto, *Surveillant and Counselor: A Reorientation in Compliance for Broker-Dealers*, 2014 *BYU L. Rev.* 1121, 1139–42, 1163–67; Donald C. Langevoort, *Cultures of Compliance*, 54 *Am. Crim. L. Rev.* 933, 940–41 (2017).

them as unitary entities.²⁰ These literatures also overwhelmingly focus on white-collar crime and the Department of Justice (“DOJ”), and only secondarily on the Securities and Exchange Commission (“SEC”), which is the main agency dedicated to protecting investors.²¹ These entities do not conduct the bulk of enforcement activity, which occurs through Environmental Protection Agency (“EPA”) engineers, Federal Reserve examiners, Food and Drug Administration (“FDA”) inspectors, and other regulatory monitors.²² The Environmental, Social, and Governance (“ESG”) literature is also disconnected from regulatory agencies and revolves around public duties at the top of the organization rather than the bottom.²³

Unlike administrative law or corporate law conversations, social movement scholarship sometimes situates frontline employees as the main object of study. In the technology industry in particular, scholars have observed that rather than remaining “on the sidelines, employees are taking a stand”²⁴ to engage in “governance . . . from the bottom up.”²⁵ Yet those important conversations are mostly disconnected from administrative law and corporate law conversations at the heart of this Article. Missing from administrative law, corporate law, and social movement accounts is a mapping of the systematic sub-organizational links between administrative agencies and the broader set of actors within businesses working toward related goals.

In integrating the internal laws of administrative agencies and corporations, this Article also connects the distinct “crisis of legitimacy”

²⁰ See *infra* Part I.

²¹ See, e.g., Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. Rev. 949, 959 (2009) (focusing on the DOJ and, to a lesser extent, the SEC).

²² See Van Loo, *supra* note 10, at 373–74, 435 (demonstrating the centrality of monitors to regulatory agencies and linking them to compliance departments).

²³ For an important account of ESG and its limits, see Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 Colum. L. Rev. 2563, 2563, 2566, 2615 (2021). Although certainly of a similar spirit, scholarly calls for reforming shareholder primacy tend to see core employees mostly as beneficiaries of reforms rather than, as this Article does, central actors bringing about societal change. See, e.g., Oliver Hart & Luigi Zingales, *The New Corporate Governance*, 1 U. Chi. Bus. L. Rev. 195, 196–97 (2022) (calling for “shareholder welfare maximization” to replace “shareholder value maximization” as the guiding norm for the corporation (emphasis omitted)).

²⁴ Jennifer S. Fan, *Employees as Regulators: The New Private Ordering in High Technology Companies*, 2019 Utah L. Rev. 973, 1026.

²⁵ Hannah Bloch-Wehba, *Algorithmic Governance from the Bottom Up*, 48 BYU L. Rev. 69, 69 (2022).

facing each of these institutions.²⁶ All branches of government have recently assailed administrative agencies. Presidents have led systematic “administrative sabotage”²⁷ that has damaged agency resources, expertise, and reputation.²⁸ Lawmakers have dismantled years of agency rulemaking under the Congressional Review Act.²⁹ And the Supreme Court has chipped away at agency authority while warning of “a ruling class of largely unaccountable ‘ministers.’”³⁰ Private governance has not, however, provoked the same backlash, and a greater reliance on private employees to govern is less likely to violate the more restrictive principles of the Court’s recent cases shrinking administrative authority.³¹ Indeed, leaning more heavily into cultivating help from private employees could

²⁶ This is not a new issue for either field. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 545 (2000) (“Since the New Deal explosion of government agencies, administrative law has been defined by the crisis of legitimacy and the problem of agency discretion.”); Roland Marchand, *Creating the Corporate Soul: The Rise of Public Relations and Corporate Imagery in American Big Business 2* (1998) (“[M]ajor corporations expanded at a bewildering pace at the end of the nineteenth century This momentous shift in the balance of social forces created a crisis of legitimacy for the large corporations.”).

²⁷ David L. Noll, *Administrative Sabotage*, 120 Mich. L. Rev. 753, 753 (2022).

²⁸ Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 Harv. L. Rev. 585, 586, 588 (2021).

²⁹ Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 Minn. L. Rev. 1, 3 (2019).

³⁰ See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (citation omitted) (“[T]he framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable ‘ministers.’” (citation omitted)); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overturning *Chevron* deference); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 3 (2017) (“Justice Thomas, with Chief Justice Roberts, Justice Alito, and now Justice Gorsuch sounding similar complaints, . . . have attacked the modern administrative state as a threat to liberty and democracy and suggested that its central features may be unconstitutional.”).

³¹ Private governance actors have historically withstood due process and nondelegation challenges. Freeman, *supra* note 26, at 665. Although the legal standards for administrative agency authority are in flux, the main implication for this Article is that wherever the Supreme Court establishes the administrative authority boundaries, Congress will need to write and enforce employee enforcement rules accordingly. The recent cases adjusting the lines do not infringe on agencies’ ability to work with industry to implement whatever authority remains. For examples of cases restricting formal authority without infringing on agencies’ ability to rely on private actors, see, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023) (striking down student loan forgiveness by applying the major questions doctrine to find the statute did not permit the Secretary of Education to make such modifications to the loan forgiveness program); *Loper Bright*, 144 S. Ct. at 2273 (overturning *Chevron* deference and requiring that Article III judges independently determine a statute’s best meaning).

enable the administrative state to operate more forcefully despite judicial curtailment of its authority. Moreover, relying on core employees' moral compasses to regulate responds to arguably the central critique of agencies: regulation infringes on private autonomy.³² After all, core employees are the heart of the private sector. Thus, increasing their ability to voluntarily enforce the law from within the corporation could strengthen the administrative state's legitimacy in the eyes of some of its chief critics.

Corporations' legitimacy crisis stems from perceptions that they are responsible for climate change, economic inequality, the erosion of democracy, and other major threats to the social fabric.³³ Yet Congress is too divided, too influenced by industry lobbying, and too poorly designed to provide regulatory agencies with sufficient power or pass all regulatory legislation that society needs to constrain harmful corporate conduct.³⁴ With public enforcement limited, private employees become more important for pushing corporations to follow the law. Moreover, although not the focus of this Article, if core employees gain power, some may succeed in pushing their firm to act above the environmental or social minimum.³⁵ Private employees thus offer an option for filling part of the democracy gap between gridlocked legislatures and public preferences.

Several policy implications flow from this description of the private employee architecture at the center of public governance. Even if employee enforcers never push corporations beyond legal compliance, they are key to current reform efforts that aim to tackle some of the world's most high-stakes problems. Once whistleblowers are recognized as the endgame of a larger regulatory apparatus within the corporation, supporting them becomes even more important because doing so heightens the consequences for corporate executives ignoring core employees. Support should not only include, but also exceed, the scholarly focus on protecting whistleblowers from retaliation. Ideally, ethical employees would be able to stay in the corporation to continue to guide it, rather than have to leave it as whistleblowers. Regulatory

³² See *infra* Part II.

³³ See Marchand, *supra* note 26, at 2.

³⁴ Jonathan S. Gould & Rory Van Loo, *Legislating for the Future*, 92 *U. Chi. L. Rev.* 375, 386–88, 390 (2025); Robert G. Kaiser, *Act of Congress: How America's Essential Institution Works, and How It Doesn't* 127–41 (2013).

³⁵ Employee advocacy beyond legal compliance has benefits and drawbacks that are beyond the scope of this Article. They include the potential economic benefits of addressing externalities and the potential costs of more difficult management. See *infra* Section III.B.

agencies should therefore build more confidential and easily accessible communication channels that core employees who are ignored within the corporation can use to communicate problems to an actor with public power.

A more ambitious reform would be to shift the societal norms for what it means to be an employee in a large corporation. If more private employees viewed themselves as having a public calling, it should increase the chances that they advocate for the public interest from within the corporation. It would be true to history and the modern regulatory architecture to view private employees as having both a private and a public calling. Viewed through a broader paradigm, employees within agencies and firms comprise an extensive administrative infrastructure that—if leveraged effectively—has the potential to move the private sector toward greater public service.

The Article begins in Part I with five examples of administrative agencies that have long sought to enlist private employees as enforcers: the SEC, the Federal Trade Commission (“FTC”), the Equal Employment Opportunity Commission (“EEOC”), the EPA, and agencies in heavily regulated industries. These agencies reveal the architecture of employee enforcers. Part II takes up normative questions about how to design the system of public-private agents to enhance the regulatory goals of effectiveness, efficiency, autonomy, and legitimacy. Part III turns to the policy question of how to strengthen the employee enforcement architecture. With more public power and purpose, private employees will be better positioned to take on the incredible responsibility that society has entrusted to them.

Before proceeding to the main discussion, a caveat is in order. Leveraging the employee enforcer is only one piece of the broader regulatory system. The discussion below should not be taken to suggest that regulation should rely as much as it does on private employees or can rely only on them. This Article is instead focused on how to maximize private employees. Other potential avenues for reform include providing more resources and power to administrative agencies, eliminating regulations that harm competition, and increasing liability to promote deterrence—many of which I have proposed elsewhere.³⁶ When major

³⁶ See, e.g., Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 *UCLA L. Rev.* 232, 244 (2018) (criticizing the licensing barriers holding back fintech and consumer finance competition); Kathryn E. Spier & Rory Van Loo, *Foundations for Platform Liability*, 100 *Notre Dame L. Rev.* 1137, 1187 (2025) (proposing increased tech platform

regulatory reform opportunities arrive, the statutory blueprint tends not to limit itself to simply one regulatory tool.³⁷ Reforms related to employee enforcers are complementary to other reforms, and producing the most robust regulatory system possible requires getting all of its components right. Whether from Congress, the president, state governments, or the private sector, future regulatory reforms should include a more comprehensive view of how to best leverage employee enforcers. It is hard to imagine an effective regulatory architecture in the future without substantial involvement, if not leadership, by frontline employees throughout the corporate sector.

I. THE INSTITUTIONAL DESIGN OF EMPLOYEES REGULATING THE CORPORATION FROM WITHIN

The relationship between the administrative agency and the corporation is at the institutional nexus for managing the environment, public health, and the economy.³⁸ This Part briefly sketches how key administrative agencies have systematically tried to enlist employees to assume public duties on behalf of the corporation's main stakeholders. These examples provide a sense of the long-standing interconnections between private employees and public regulators in the regulatory architecture. Understanding the origins and design of this administrative-corporate governance architecture provides valuable institutional foundations, explored in later Parts, for charting a path toward a more effective relationship between the public interest and the private sector. Since private employees have more of a public role than is commonly realized, it becomes less of a stretch to shift toward viewing them as having a public calling.

liability for third-party harms to consumers); Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 *Vand. L. Rev.* 1563, 1617 (2019) (“[P]olicymakers should consider building new monitoring programs for the increasingly digital economy.”); Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 *Tex. L. Rev.* 285, 287–89, 292–94 (2021) (showing empirically the problem of insufficient penalties); J.S. Nelson, *Paper Dragon Thieves*, 105 *Geo. L.J.* 871, 872–73 (2017) (“When the behavior of these agents is coordinated to commit large-scale wrongdoing and to inflict damage on members of the public, the law should return to the traditional position of penalizing the behavior of the agents as individuals.”); Kaiser, *supra* note 34, at 127–41 (explaining the influence of industry lobbying on legislation).

³⁷ Kaiser, *supra* note 34, at 378–80.

³⁸ See generally Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (2001) (summarizing the relationship between regulation, business activity, and society).

A. Corporate Employees as Regulatory Agents

The discussion below begins with arguably the three most important agencies that protect the corporation's most immediate constituents.³⁹ The SEC protects shareholders, the EEOC protects employees, and the FTC protects consumers. The focus then turns to the EPA, an agency that safeguards the broader public interest in its protection of the environment,⁴⁰ before closing with a brief overview of agencies in heavily regulated industries, such as banking and pharmaceuticals. These agencies were selected among large regulators of businesses⁴¹ to illustrate how an array of regulatory agencies with diverse missions have approached the role of corporate employees.

The focus on administrative agencies here aims to fill a gap in the literature and thereby—at least potentially for some readers—to correct a misperception. Legal scholars have paid considerable attention to how the typical large public corporation now employs hundreds or thousands of compliance staff, often situated under a Chief Compliance Officer reporting directly to the CEO, and rivaling in-house attorneys in terms of resources and power.⁴² The dominant scholarly narrative attributes this explosive growth of compliance primarily to the DOJ and the 1991 U.S. Sentencing Guidelines,⁴³ which incentivized the hiring of compliance professionals by offering leniency in criminal prosecutions to companies with extensive compliance systems.⁴⁴ Although some legal scholars recognize regulatory agency influences on compliance, with the scholarly focus overwhelmingly on courts, the DOJ, and criminal prosecutions,

³⁹ This importance is indicated by these agencies' being the largest federal agencies focused on these stakeholders broadly across the economy. See *infra* Subsections I.A.1–3.

⁴⁰ The EPA mostly protects a generalized public interest by safeguarding the environment, even if its individualized actions are often focused on specific geographies or injured parties. See *infra* Subsection I.A.4.

⁴¹ There are about nineteen federal administrative agencies with over a thousand employees whose mission is focused on regulating businesses. See Van Loo, *supra* note 10, at 383 (listing the large regulatory agencies).

⁴² Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 *Wm. & Mary L. Rev.* 2075, 2078, 2084 (2016); Miriam H. Baer, *Confronting the Two Faces of Corporate Fraud*, 66 *Fla. L. Rev.* 87, 134, 151 (2014).

⁴³ U.S. Sent'g Guidelines Manual § 8B2.1 (U.S. Sent'g Comm'n 2012).

⁴⁴ The point here is not that regulatory agencies have had a bigger influence than the DOJ, which is an empirical question to which we may never know the answer. Instead, the point is that the regulatory agency side of this development receives limited attention.

much of the story of business regulators' enlistment of employee enforcers has been left untold.⁴⁵

With so many actors involved—courts, legislatures, administrative agencies, and businesses themselves—there are empirical limitations to establishing the relative contribution of these actors to changes in corporate practices.⁴⁶ At a minimum, the examples below show that long before the DOJ's Sentencing Guidelines and related focal points for scholars, many large business regulators sought to use their power to enlist private sector employees in the project of upholding the law. Importantly, these efforts also extend beyond corporate compliance officers and other law-related personnel to recruit regulatory assistance from core employees.

1. Investors and the SEC

The SEC's mission is to “protect investors by vigorously enforcing the federal securities laws to ensure truth and fairness.”⁴⁷ In a momentous 1974 speech, an SEC Commissioner foreshadowed the compliance era by observing that the corporate lawyer is the “keeper of the stop and go

⁴⁵ See, e.g., Veronica Root, *Coordinating Compliance Incentives*, 102 *Corn. L. Rev.* 1003, 1010 (2017) (examining the “piecemeal fashion” of “various statutory and regulatory dictates that have led to many corporate compliance priorities”); Langevoort, *supra* note 19, at 934 (“Other federal agencies are part of this campaign as well, in their civil enforcement efforts . . .”). Even for scholars who recognize that regulatory agencies have played a role, however, the emphasis of study and main driver of compliance is usually on the DOJ and criminal prosecutions. See, e.g., Veronica Root Martinez, *Complex Compliance Investigations*, 120 *Colum. L. Rev.* 249, 258–59 (2020) (“While organizations have employed a variety of strategies, a principal feature of the government’s efforts to incentivize firms to create and implement corporate compliance programs comes from the Organizational Sentencing Guidelines . . . , which were promulgated in 1991. . . . Over time, . . . the real power of the Organizational Guidelines to incentivize self-policing within firms came from their influence over the enforcement strategies of regulators and prosecutors.”).

⁴⁶ To elaborate, if an administrative agency acts at a specific point in time and businesses subsequently adopt practices accordingly, it cannot be conclusively established that the agency’s actions led to the subsequent business conduct. Another possibility is that the administrative agency was simply calling for or codifying practices that they were already witnessing within businesses. Indeed, some businesses may have sought to influence the administrative agency into pushing certain standards, for various reasons. Nonetheless, since businesses generally want to reduce costs, when an administrative agency is calling for corporate employees to play more of a role and they subsequently do so, it is a sensible hypothesis, worthy of further study, that the administrative agency played a role in creating the subsequent investment in law-related employees.

⁴⁷ Mission, U.S. Sec. & Exch. Comm’n, <https://www.sec.gov/about/mission> [<https://perma.cc/SNS2-3299>] (last updated Aug. 9, 2023).

signal” who decides which securities reach the marketplace and with what information.⁴⁸ Those practices came to be known as governance through private “gatekeepers,”⁴⁹ a role that Congress codified and expanded in the 2002 Sarbanes-Oxley Act.⁵⁰ Under that Act, the SEC mandated that supervising attorneys ensure their subordinates comply with securities laws,⁵¹ and required that subordinate attorneys report known wrongdoing to their bosses.⁵² Furthermore, supervising attorneys must report securities fraud internally to the Chief Legal Officer of their firm, who has a duty to investigate the allegations.⁵³ But if the Chief Legal Officer’s response is inappropriate, then the supervising attorney must go to the Board of Directors.⁵⁴ These highly directive rules require in-house attorneys of all levels to report knowledge of securities violations up the chain of command.⁵⁵

Corporate employee help for the SEC does not stop with lawyers. The SEC has also long sought the assistance of nonlawyers throughout the corporation. As early as the 1970s, the SEC publicly called for companies to have independent audit committees on their boards of directors.⁵⁶ The Sarbanes-Oxley Act not only required that each publicly traded company have an independent audit committee, but also mandated that the committee serve as the collector and investigator of internal whistleblowing for “questionable accounting or auditing matters.”⁵⁷

⁴⁸ A.A. Sommer, Jr., Comm’r, U.S. Sec. & Exch. Comm’n, *The Emerging Responsibilities of the Securities Lawyer*, Address to the Banking, Corporation and Business Law Section, New York State Bar Association (Jan. 24, 1974), *as reprinted in* Larry D. Soderquist & Theresa A. Gabaldon, *Securities Regulation* 617, 619 (4th ed. 1999).

⁴⁹ See John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 *Colum. L. Rev.* 1293, 1298 (2003). Whether gatekeeper laws improve compliance is subject to much debate. See Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 *Fordham L. Rev.* 983, 1037–40 (2005).

⁵⁰ 15 U.S.C. § 7245.

⁵¹ 17 C.F.R. § 205.4 (2025).

⁵² *Id.* § 205.5(c)–(d).

⁵³ *Id.* § 205.3(b).

⁵⁴ *Id.*

⁵⁵ For a critique of this, see Kim, *supra* note 49, at 1041–42.

⁵⁶ See, e.g., William W. Wommack, *The Board’s Most Important Function*, *Harv. Bus. Rev.* (Sep. 1979), <https://hbr.org/1979/09/the-boards-most-important-function> (noting how the SEC had called for corporate boards to have audit committees comprised of independent directors).

⁵⁷ 15 U.S.C. § 78j-1(m)(4). Congress had previously established the audit committee as the vehicle for auditors’ internal whistleblowing. See *Private Securities Litigation Reform Act of 1995*, Pub. L. No. 104-67, § 10A, 109 Stat. 737, 762–63 (codified as amended at 15 U.S.C. § 78j-1(b)).

The most significant SEC enlistment of employees began in 2010 when Congress authorized a generous bounty program for employees providing information about fraud.⁵⁸ The SEC now receives thousands of tips per year, with the average successful whistleblower obtaining a \$6.2 million payment.⁵⁹

The SEC's public characterization of its relationship with employee enforcers is also revealing. In that same 1974 speech, the SEC Commissioner called for securities lawyers to be "acutely cognizant of [their] responsibility to the public who engage in securities transactions."⁶⁰ In 2015, the head of SEC enforcement publicly thanked compliance officers for their diligence, called them "essential partners," and pledged, on the SEC's behalf, that "we will do all we can to help you perform your work."⁶¹ The former SEC Chair has declared that "[t]he assistance that whistleblowers provide is crucial to the SEC's ability to enforce the rules of the road for our capital markets."⁶² The agency thus openly describes various firm actors as administrative agency allies and uses its legal authority to push those allies to advance its mission of ensuring investors are told the truth.

2. *Employees and the EEOC*

The EEOC's mission is to "[p]revent and remedy unlawful employment discrimination and advance equal opportunity for all" in the workplace.⁶³ Most of its legal cases begin with a tip from an employee.⁶⁴ Moreover, the EEOC cultivates employee enforcers not only by

⁵⁸ 15 U.S.C. § 78u-6(b).

⁵⁹ Alexander I. Platt, *The Whistleblower Industrial Complex*, 40 *Yale J. on Reg.* 688, 721, 723 (2023). For other valuable treatments of the whistleblower program, see Jennifer M. Pacella, *Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd-Frank Act and Internal Revenue Code*, 17 *U. Pa. J. Bus. L.* 345, 355–58 (2015); Usha R. Rodrigues, *Optimizing Whistleblowing*, 94 *Temp. L. Rev.* 255, 258–59 (2022).

⁶⁰ Sommer, *supra* note 48, at 618.

⁶¹ See Andrew Ceresney, Dir., Div. of Enf't, U.S. Sec. & Exch. Comm'n, *Keynote Address at the 2015 National Society of Compliance Professionals, National Conference* (Nov. 4, 2015), <https://www.sec.gov/news/speech/keynote-address-2015-national-society-compliance-prof-ceresney.html> [<https://perma.cc/U3B8-BHAW>].

⁶² U.S. Sec. & Exch. Comm'n, *2021 Annual Report to Congress: Whistleblower Program 1* (2021) (alteration in original) (citation omitted), <https://www.sec.gov/files/owb-2021-annual-report.pdf> [<https://perma.cc/7Q8S-Q4TM>].

⁶³ Overview, U.S. Equal Emp. Opportunity Comm'n, <https://www.eeoc.gov/overview> [<https://perma.cc/ENK2-Q8PB>] (last visited Dec. 29, 2025).

⁶⁴ Interview with EEOC Attorney (Apr. 7, 2017) (on file with author).

protecting workers who report mistreatment, but also by encouraging a broader set of actors within the firm to play a greater regulatory role.

In highly influential works, scholars have chronicled how, in the 1970s and 1980s, many human resource (“HR”) professionals began to issue “ominous warnings” within their companies to “magnify the threat” posed by employment laws.⁶⁵ In so doing, they elevated their “professional status and prestige” and helped to significantly expand HR departments across the private sector.⁶⁶ This literature thus shows the important role played by law-related employee enforcers. The pivotal public institutions in these scholarly accounts, however, are the legislatures that pass ambiguous employment laws and the courts that interpret those laws by sometimes looking to how HR and other workplace professionals have responded to the laws.⁶⁷

Since the administrative agency is not the focus of that literature, its relationship to the enlistment of employees to advance employment law is not well known. In 1978, the EEOC and other federal agencies issued guidance pushing companies to develop personnel trainings, recordkeeping, and validation procedures,⁶⁸ which presumably would require corporate employees to assume those responsibilities. In 1980, the EEOC issued guidelines for employers to actively prevent sexual harassment, calling on them to “inform[] employees of their right to raise and how to raise the issue of harassment.”⁶⁹ In 1986, the Supreme Court observed that corporate policies might offer businesses a legal defense when employees sue them for allowing harassment.⁷⁰ The Court later affirmed that stance and explained it as advancing “the EEOC’s policy of encouraging the development of grievance procedures.”⁷¹ Grievance

⁶⁵ Lauren B. Edelman, Steven E. Abraham & Howard S. Erlanger, Professional Construction of Law: The Inflated Threat of Wrongful Discharge, 26 *Law & Soc’y Rev.* 47, 68, 74 (1992).

⁶⁶ *Id.* at 74–75.

⁶⁷ Lauren B. Edelman, Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law, 97 *Am. J. Socio.* 1531, 1538 (1992).

⁶⁸ See Uniform Guidelines on Employee Selection Procedures, 43 *Fed. Reg.* 38295, 38295–98 (Aug. 25, 1978) (codified at 29 C.F.R. § 1607.2–.5) (setting standards for personnel testing, validation, and recordkeeping).

⁶⁹ 29 C.F.R. § 1604.11(f) (1997).

⁷⁰ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 71–72 (1986).

⁷¹ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (reasoning that reducing liability would advance “the EEOC’s policy of encouraging the development of grievance procedures”); accord *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (holding that employers may assert an affirmative defense in a harassment claim).

procedures must be designed and managed by employees, meaning that the new legal requirements pushed companies to hire more HR professionals in response.⁷² The EEOC thus contributed to the rise of employment law-related positions throughout the private sector.

The timing of these developments in the 1970s and 1980s is noteworthy because scholarly narratives about the growth in compliance tend to omit HR professionals.⁷³ Yet HR departments serve related functions as compliance departments, in that they both internally monitor and manage a company's adherence to laws.⁷⁴ The EEOC thus played an active role in creating a large category of compliance-related employees long before scholars' more familiar landmarks of the compliance boom, such as the DOJ's 1991 U.S. Sentencing Guidelines.⁷⁵ Understanding the full extent of administrative agencies' roles in enlisting private employees as enforcers thus requires looking beyond legal and compliance departments as well as beyond the DOJ and SEC.

Although the extent to which HR professionals helped workers or shareholders is actively debated, HR professionals pushed many corporations to treat worker safety with greater caution than was required by law.⁷⁶ The result was widespread business adoption of organizational changes, such as sexual harassment policies, complaint procedures, and training for all employees.⁷⁷ The EEOC ultimately would mandate such organizational changes through official guidelines⁷⁸ and enforcement actions.⁷⁹ For example, in 2019, the EEOC brought a lawsuit against an International House of Pancakes franchise owner for creating a hostile work environment for female servers through repeated sexual comments,

⁷² Edelman et al., *supra* note 65, at 76.

⁷³ See, e.g., *supra* note 19 (compiling sources that discuss the compliance boom).

⁷⁴ Compare *supra* note 19, with *infra* Section III.B.

⁷⁵ See *supra* Section I.A.

⁷⁶ Edelman et al., *supra* note 65, at 73, 75 (identifying the conflicted role of HR professionals).

⁷⁷ See Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 *Am. J. Socio.* 1203, 1215–16, 1230–31 (2007); Lauren B. Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* 168–77, 197–213 (2016) (showing how symbolic practices adopted by businesses can become enshrined in employment law through judicial decisions).

⁷⁸ See, e.g., 29 C.F.R. § 1604.11 (2025) (providing EEOC guidelines on sexual harassment); *id.* §§ 1614.102–.110 (providing EEOC complaint procedures); *id.* § 1614.102(a)(5) (providing EEOC training for managers).

⁷⁹ See, e.g., Consent Decree at 5–12, *EEOC v. Nat'l Food Corp.*, No. 12-cv-00550, 2013 BL 129995 (E.D. Wash. May 15, 2013).

touches, and requests.⁸⁰ The consent decree required the franchise owner to implement trainings, an internal whistleblower hotline, and complaint procedures.⁸¹

Thus, through rulemaking, guidelines, and enforcement, the EEOC has sought to impose business organizational structures that HR professionals also had implemented through internal advocacy.⁸² Even if not in coordination, corporate employees and administrative agency employees sometimes advance related regulatory projects.

3. *Consumers and the FTC*

The FTC is “the only federal agency that deals with consumer protection and competition issues in broad sectors of the economy.”⁸³ Although the agency oversees industries ranging from hotels to brick-and-mortar grocery stores, this Subsection focuses on its approach to privacy and tech companies. These companies comprise four of the ten most valuable U.S. businesses, and privacy is the area of law that the FTC has most actively pursued in the tech industry.⁸⁴ The FTC’s attention to actors within the firm can be seen in both its rulemaking and enforcement.

The FTC has clarified that tech companies can comply with its rule on children’s privacy by producing “a clear statement of employee responsibilities and sanctions, as well as employee training to ensure that privacy and security policies are implemented effectively.”⁸⁵ The agency also specifies that children’s privacy protections “may include . . . designating an individual in the organization to be responsible for maintaining and monitoring the security of the information.”⁸⁶

⁸⁰ Plaintiff EEOC’s Complaint and Demand for Jury Trial at 3–4, *EEOC v. Swami Pancake, LLC*, No. 19-cv-60714, 2019 WL 7987528 (S.D. Fla. Mar. 19, 2019).

⁸¹ Consent Decree at 5–7, 10–11, *Swami Pancake*, No. 19-cv-60714, 2020 WL 999150 (S.D. Fla. Jan. 23, 2020).

⁸² The results of trainings, policies, and other organizational reforms are debatable. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 *Calif. L. Rev.* 1, 4, 29 (2006) (finding some evidence of positive impact and some studies that questioned efficacy).

⁸³ Mission, Fed. Trade Comm’n, <https://www.ftc.gov/about-ftc/mission> [<https://perma.cc/WBV5-DCB9>] (last visited Dec. 29, 2025).

⁸⁴ *Global 2000: United States*, *Forbes* (June 12, 2025, at 06:30 ET), <https://www.forbes.com/lists/global2000-united-states/>; Rebecca Lipman, *Online Privacy and the Invisible Market for Our Data*, 120 *Penn. St. L. Rev.* 777, 789–90 (2016).

⁸⁵ *Children’s Online Privacy Protection Rule*, 64 *Fed. Reg.* 22750, 22758 (proposed Apr. 27, 1999).

⁸⁶ *Id.*

Although that provision is technically optional, subsequent industry standards—reinforced by the FTC’s safe harbor protections—have essentially codified the designation of an internal employee to implement and report on these compliance responsibilities.⁸⁷ Thus, the FTC’s rulemaking on children’s privacy has sought to enlist actors inside the firm to promote privacy.

The FTC has also demonstrated its emphasis on employee involvement through its enforcement actions. Although it lacks explicit authority to provide whistleblowing bounties, the FTC has nonetheless sought to impose internal whistleblower processes in some of its large settlements. One example is the settlement order against Equifax for allowing hackers to access hundreds of millions of consumers’ social security numbers and financial information.⁸⁸

The agency’s largest lawsuit ever, a five-billion-dollar settlement order against Facebook for privacy violations, reveals an even more ambitious regulatory vision for private employees.⁸⁹ Cambridge Analytica had accessed tens of millions of Facebook users’ account data, without authorization, in an effort to influence voters to support Brexit and the election of Donald Trump.⁹⁰ In its settlement order for the incident, the FTC required Facebook to set up an elaborate “Privacy Program” run by internal employees and overseen by a new privacy committee consisting of independent members of Facebook’s Board of Directors.⁹¹ This internal compliance group is charged with all of the tasks that one might

⁸⁷ See, e.g., Letter from Dona J. Fraser, Vice President, Ent. Software Rating Bd., to Donald S. Clark, Sec’y, Fed. Trade Comm’n (June 23, 2013), https://www.ftc.gov/system/files/attachments/press-releases/entertainment-software-rating-board-awarded-safe-harbor-status/sh_130701esrb_application.pdf [<https://perma.cc/6X4A-ECNV>]; 16 C.F.R. § 312.11(a) (2025).

⁸⁸ See Stipulated Order for Permanent Injunction & Monetary Judgment at 17, *FTC v. Equifax Inc.*, No. 19-cv-03297 (N.D. Ga. July 23, 2019) (requiring Equifax to establish an accessible process for employee complaints).

⁸⁹ Lesley Fair, *FTC’s \$5 Billion Facebook Settlement: Record-Breaking and History-Making*, Fed. Trade Comm’n: Bus. Blog (July 24, 2019), <https://www.ftc.gov/business-guidance/blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-history-making> [<https://perma.cc/Z4V5-K5KM>]. As another example, in a lawsuit charging Google with violating the Children’s Online Privacy Protection Rule, the FTC settlement order required Google to implement annual trainings. Stipulated Order for Permanent Injunction & Civil Penalty Judgment at 2, 10–11, *FTC v. Google LLC*, No. 19-cv-02642 (D.D.C. Sep. 10, 2019).

⁹⁰ See, e.g., Elizabeth R. Pike, *Defending Data: Toward Ethical Protections and Comprehensive Data Governance*, 69 *Emory L.J.* 687, 702 (2020) (summarizing the scandal).

⁹¹ Stipulated Order for Civil Penalty, Monetary Judgment & Injunctive Relief attach. A at 8, 14–15, *United States v. Facebook, Inc.*, No. 19-cv-02184 (D.D.C. Apr. 23, 2020) [hereinafter Stipulated Order attach. A].

expect FTC employees to undertake if the agency were inspecting Facebook: monitoring privacy compliance, assessing risks, and reporting back to the FTC on any violations.⁹² Facebook managers must also conduct an annual review of the Privacy Program.⁹³ The settlement order further seeks to enlist all employees in the regulatory process by requiring annual privacy training for all Facebook employees “that includes training on the requirements of th[e] [o]rder.”⁹⁴ In a sense, the FTC’s lawyers thereby drafted a set of compliance duties pushed on *all* Facebook employees.

Of special note is the settlement order’s requirement that employees enforce Facebook’s privacy policies against third parties.⁹⁵ Facebook compliance officers must ensure that other technology companies that use Facebook’s data—companies ranging from Amazon to small app developers—abide by Facebook’s privacy policies.⁹⁶ Additionally, Facebook’s lawyers are conscripted to write quasi-regulatory rules because Facebook must “contractually require service providers to implement and maintain [privacy] safeguards.”⁹⁷ Facebook’s contracts with third parties thereby become a kind of public-private statute governing the business relationship. These activities enlist Facebook employees as regulators in the sense that they are writing rules and enforcing notions of privacy—the domain of FTC enforcement—against separate organizations.⁹⁸

Thus, private employees sometimes assume public duties by regulating not only their employer, but also external businesses. In this scenario, Facebook becomes like an allied administrative agency whose employees must monitor an industry for the FTC. Other administrative agencies have imposed similar third-party monitoring mandates on other large corporations, including oil companies, pharmaceutical manufacturers, and financial institutions.⁹⁹ Recognizing both internal and external

⁹² *Id.* at 8–9.

⁹³ *Id.* at 15.

⁹⁴ *Id.* at 12.

⁹⁵ *Id.* at 8–9.

⁹⁶ See *id.*; Nicholas Confessore, Michael LaForgia & Gabriel J.X. Dance, Facebook Failed to Police How Its Partners Handled User Data, *N.Y. Times* (Nov. 12, 2018), <https://www.nytimes.com/2018/11/12/technology/facebook-data-privacy-users.html>.

⁹⁷ Stipulated Order attach. A, *supra* note 91, at 12.

⁹⁸ Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 *Va. L. Rev.* 467, 482–83 (2020).

⁹⁹ *Id.* at 485–94.

regulatory duties is necessary to grasp the full potential of private employees as public enforcers.

4. *The Public Interest and the EPA*

The EPA's mission is to ensure that "Americans have clean air, land and water."¹⁰⁰ Unlike the above agencies, the EPA inspects regulated entities through regular in-person contact.¹⁰¹ Thus, the EPA provides a window into how agencies approach employees in a more involved regulatory relationship.

By the 1980s, the EPA had already begun using enforcement actions to ensure adequate "environmental management systems" to prevent environmental harms.¹⁰² These expectations, still in effect today, describe adequate systems as those that ensure managers are monitoring and punishing violations of "environmental requirements."¹⁰³ Thus, for decades, and well before the DOJ's sentencing guidelines, the EPA enlisted employees within the firm to detect and punish violations.

The relationship between these internal systems and external whistleblowing is instructive. The EPA expects companies to develop internal processes to hear the concerns of all employees.¹⁰⁴ If a company ignores those concerns, numerous whistleblowing statutes protect

¹⁰⁰ Our Mission and What We Do, U.S. Env't Prot. Agency, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> [<https://perma.cc/79Q6-V6FK>] (last updated Oct. 20, 2025).

¹⁰¹ Note that the SEC does have regular in-person contact with one subset of the firms it regulates, registered funds, but it does not conduct regular examinations of the vast majority of publicly traded companies whose securities filings it oversees—such as Facebook, General Motors, and Bank of America. See Van Loo, *supra* note 10, at 436–40 (summarizing the regulatory monitoring approach of large regulators, such as the EPA, SEC, FTC, and EEOC).

¹⁰² *United States v. Browning-Ferris Indus. Chem. Servs., Inc.*, 704 F. Supp. 1355, 1374 (M.D. La. 1988) (requiring private audit of an environmental management system); see also Steven W. Sisk, U.S. Env't Prot. Agency, EPA-330/9-97-002R, *Compliance-Focused Environmental Management System—Enforcement Agreement Guidance 3* (2005).

¹⁰³ This language reflects the practices as later codified in a guidance statement. Sisk, *supra* note 102, at 6. The first release of the guidance document, which summarized the long-standing practice, was in 1997. See *id.* at 1; see also *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66706, 66711 (Dec. 22, 1995).

¹⁰⁴ Sisk, *supra* note 102, at 5.

employees who report violations from retaliation, including the Clean Air Act,¹⁰⁵ the Clean Water Act,¹⁰⁶ and the Toxic Substances Control Act.¹⁰⁷

It is worth noting that EPA employees conduct thousands of on-site inspections each year to prevent businesses from violating environmental regulations.¹⁰⁸ Consequently, a business employee who internally reports a violation is playing an enforcement role akin to an administrative agency inspector. In this regard, the EPA's policies seek to incentivize private employees to assume public responsibilities.

Moreover, when violations occur, the EPA begins to manage these systems more actively. When Daimler, which owns Mercedes, installed devices in cars to hide the level of pollutants released, the EPA's settlement order required the company to increase the Board of Management's involvement in managing compliance, strengthen its internal whistleblowing by making anonymous internal reporting more available to all employees, and extensively train all relevant employees about the importance of a modified internal policy code that emphasizes reducing emissions.¹⁰⁹ The EPA's settlement with BP Oil following the Deepwater Horizon offshore oil spill contained a similar array of mandates, such as "code-of-conduct training" and "the operation of an employee concerns hotline."¹¹⁰ These mandates seek to enlist core employees, especially oil engineers, in the task of enforcement.

Even when not subjected to any enforcement action, businesses' compliance departments are expected to communicate regularly with EPA inspectors.¹¹¹ Thus, the EPA assumes a more active ongoing role in overseeing employee enforcers than does the SEC, FTC, or EEOC.¹¹²

¹⁰⁵ 42 U.S.C. § 7622.

¹⁰⁶ 33 U.S.C. § 1367.

¹⁰⁷ 15 U.S.C. § 2622. On the inadequacy of these protections, see, e.g., Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 *Am. Bus. L.J.* 665, 674–75 (2018) (proposing statutory protections for job applicants with a whistleblowing history).

¹⁰⁸ Off. of Enf't & Compliance Assurance, U.S. Env't Prot. Agency, *Enforcement and Compliance Assurance Annual Results for Fiscal Year 2023* (2023), <https://www.epa.gov/system/files/documents/2025-03/eoy2023.pdf> [<https://perma.cc/R224-YGRE>].

¹⁰⁹ Consent Decree at 42–43, 49, *United States v. Daimler AG*, Nos. 20-cv-02564, 20-cv-02565 (D.D.C. Mar. 9, 2021).

¹¹⁰ Consent Decree Among Defendant BP Exploration & Production Inc. et al. at 33, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, No. 10-mdl-02179, 2021 WL 6053613 (E.D. La. Oct. 5, 2015).

¹¹¹ See Sisk, *supra* note 102, at 4, 6.

¹¹² Mandates can also be extensive in less high-profile cases, such as one against a construction company that polluted waters near its Utah home building sites. Consent Decree at 15–19, 26–27, *United States v. Ivory Homes, Ltd.*, No. 14-cv-00460 (D. Utah June 23,

5. *Other Heavily Regulated Industries*

The SEC, EEOC, FTC, and even the EPA have jurisdiction over large swaths of the economy—reaching almost any business that is, for example, violating consumer protection laws or polluting the environment.¹¹³ In contrast, many of the largest regulatory agencies’ jurisdictions are limited to specific industries, known as heavily regulated industries.¹¹⁴ For instance, the FDA is focused on food manufacturers and pharmaceutical companies, while the Federal Reserve oversees bank holding companies.¹¹⁵ For two straightforward reasons, heavily regulated industries are generally the easier case for showing a strong relationship between administrative agencies and private employees.

First, in part because heavily regulated industries have more legal rules, they also have a significantly larger body of law-related employees.¹¹⁶ For instance, in banking, compliance-related professionals comprise between fifteen percent and twenty percent of the company’s workforce.¹¹⁷ Note that businesses in heavily regulated industries, such as banks, are also generally subject to the same laws as those enforced by the SEC and EEOC, meaning that they have both industry-specific and general regulatory agencies recruiting their employees as enforcers.¹¹⁸

2014) (requiring Ivory Homes to create a new compliance structure, implement extensive training of employees about their environmental responsibilities, and regularly submit compliance reports to the EPA).

¹¹³ See the descriptions of these agencies’ missions and accompanying sources *supra* Subsections I.A.1–4.

¹¹⁴ See generally Van Loo, *supra* note 10 (providing an overview of large regulators).

¹¹⁵ What We Do: FDA Mission, U.S. Food & Drug Admin., <https://www.fda.gov/about-fda/what-we-do> [<https://perma.cc/AGW9-KQEZ>] (last updated Nov. 21, 2023); U.S. Fed. Rsv. Sys., *The Fed Explained: What the Central Bank Does* 64 (11th ed. 2021), <https://www.federalreserve.gov/aboutthefed/files/the-fed-explained.pdf> [<https://perma.cc/A2QA-KXDL>].

¹¹⁶ See Laufer, *supra* note 11, at 393–94.

¹¹⁷ See, e.g., Citigroup, *Citigroup Annual Report 2019*, at 55 (2019), https://www.citigroup.com/rcs/citigpa/storage/public/ar19_en.pdf [<https://perma.cc/6ZPA-QAXV>] (reporting an estimated 14.7% of employees in “risk, regulatory and compliance” compared to an estimated 4.3% in 2008); Matthias Memminger, Mike Baxter & Edmund Lin, *Bain & Co., Banking Regtechs to the Rescue? Fintech Specialists Can Help Improve Compliance, but Banks Should Proceed Cautiously* 1 (2016) (“We estimate that governance, risk and compliance (GRC) costs account for 15% to 20% of the total ‘run the bank’ cost base of most major banks.”).

¹¹⁸ See, e.g., U.S. Fed. Rsv. Sys., *Audits—Audit Committee Duties and Responsibilities*, <https://www.federalreserve.gov/aboutthefed/directors/PDF/audits-audit-committee-duties-and-responsibilities.pdf> [<https://perma.cc/7S7D-NSSH>] (last visited Dec. 31, 2025) (providing guidance to banks on how to implement the Sarbanes-Oxley Act’s independent audit committee requirement).

Second, agencies in heavily regulated industries tend to have much more significant in-person contact with employees than agencies with broader missions.¹¹⁹ For example, the Nuclear Regulatory Commission has “resident inspectors” at nuclear power plants, and “the Federal Reserve maintains a continuous supervisory presence” at the biggest banks, with “dedicated teams of full-time examiners.”¹²⁰ These frontline inspectors, examiners, and others with similar functions are collectively referred to as regulatory monitors below.¹²¹

The large presence of both regulatory monitors and corporate compliance officers in heavily regulated entities is significant in part because one of the jobs of corporate compliance officers is to regulate or “police” their noncompliance colleagues’ conduct.¹²² Thus, in heavily regulated industries, more of the companies’ internal employees are performing somewhat overlapping functions with regulatory monitors.

Moreover, regulatory monitors are often checking not only for individual violations, but also to ensure that the regulated entities’ compliance structure is sufficient.¹²³ Thus, due to the frequent in-person contact and ability to sanction businesses for inadequate compliance

¹¹⁹ See, e.g., Cheryl D. Block, *Overt and Covert Bailouts: Developing a Public Bailout Policy*, 67 *Ind. L.J.* 951, 1023 (1992) (referring to the heavy agency monitoring of businesses in heavily regulated industries).

¹²⁰ U.S. Nuclear Regul. Comm’n, *Assessment of Efficiencies to Be Gained by Consolidating or Eliminating Regional Offices*, <http://www.nrc.gov/docs/ML0314/ML031470121.pdf> [<https://perma.cc/QW8P-8XU7>] (last visited Dec. 31, 2025); U.S. Fed. Rsrv. Sys., *The Federal Reserve System Purposes & Functions* 83 (10th ed. 2016), <https://fraser.stlouisfed.org/title/federal-reserve-system-5298?page=91> [<https://perma.cc/GH4B-UNHF>] (last visited Feb. 15, 2026).

¹²¹ Van Loo, *supra* note 10, at 373–74, 436.

¹²² See Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard’s Pretexting Scandal?*, 77 *U. Cin. L. Rev.* 523, 555 (2008) (theorizing about “the government’s delegation of the police function to the corporate compliance program”); Tamar Frankel, *Using the Sarbanes-Oxley Act to Reward Honest Corporations*, 62 *Bus. Law.* 161, 173 (2006) (“Regulators include not only government regulators and examiners but also the internal police within large organizations—that is, compliance officers, comptrollers, and accountants.”).

¹²³ See Coglianesse & Lazer, *supra* note 18, at 699, 715 (providing examples of and describing the strategy of inspecting businesses’ managerial processes); Langevoort, *supra* note 19, at 974 (“More and more, regulatory agencies are getting into the business of assessing compliance without waiting for the kind of failure that makes the matter one for enforcement in the first instance.”).

structures in these industries, the compliance departments come closer to being informally managed by the administrative agency.¹²⁴

Heavily regulated industries further challenge the influential scholarly narrative of DOJ-driven and criminal prosecution-driven compliance. For instance, Congress directly mandated that banks adopt compliance systems at least as far back as the Bank Secrecy Act of 1970.¹²⁵ Pharmaceutical companies and medical device manufacturers often had “regulatory affairs” personnel in the early 1990s, who tended to “urge caution” from inside the firm.¹²⁶ Thus, a heavy administrative agency presence, rather than mostly DOJ prosecutions, is a plausible driver of the growth in compliance personnel in at least some of these industries.

Heavily regulated industries also demonstrate one of the most ambitious regulatory agency efforts to enlist core employees in enforcement: the push for a corporate culture of compliance. The idea is for businesses to set an organizational tone by sending the message that the company expects all employees to advance compliance. Beginning around 2015, and again most commonly linked to the DOJ and criminal prosecutions, “[t]he phrase ‘culture of compliance’ . . . made its way into common legal discourse as describing both a goal and a marker.”¹²⁷ Yet as early as the 1990s, the FDA began focusing on whether a company has “a ‘corporate culture’ of poor compliance practices.”¹²⁸ The FDA also issues some guidance targeted at employees who are not directly working in compliance, legal counsel, or regulatory affairs.¹²⁹ The primary regulator of large banks, the Office of the Comptroller of the Currency, also made a similar early push, exemplified by a 1997 guidance document issued to banks, with the following declaration: “Senior management and the board should periodically assess whether employees’ understanding of the bank’s credit culture, and their resulting behavior, conform with the

¹²⁴ Van Loo, *supra* note 10, at 399–401 (describing regulatory agencies as managing companies’ internal processes and stating that “the firm’s compliance team essentially serves as the regulatory monitors’ agents”); cf. Coglianesse & Lazer, *supra* note 18, at 691 (describing “management-based regulation” as requiring more interaction with regulators).

¹²⁵ Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 12 U.S.C. §§ 1829b, 1951–1959 and 31 U.S.C. §§ 5311–5314, 5316–5322).

¹²⁶ See, e.g., Jeffrey N. Gibbs, *Medical Device Promotional Activities and Private Litigation*, 47 *Food & Drug L.J.* 295, 295 (1992) (discussing the regulatory affairs function in the 1980s and early 1990s).

¹²⁷ Langevoort, *supra* note 19, at 935.

¹²⁸ Siemens Consent Decree Affirms CDRH Corporate-Wide Enforcement Strategy, *FDA EnFt Manual Newsl.* (Food & Drug Admin., Rockville, Md.), Apr. 1994, at 1.

¹²⁹ See Parrillo, *supra* note 18, at 206–07.

desired standards and values for the bank.”¹³⁰ These regulatory efforts to influence culture move beyond law-related corporate positions, seeking to push all employees to play an active role in steering their company away from wrongdoing.¹³¹

B. A System of Corporate and Agency Employees

The above examples indicate a long-standing administrative blueprint for enlisting regulatory agents inside the firm. They also begin to illuminate how the main categories of employee enforcers are interconnected within a system. Core employees who internally report wrongdoing often do so to law-related personnel, especially compliance officers.¹³² And the overwhelming majority of external whistleblowers begin by advocating for change within the organization.¹³³ Additionally, both law-related employees and core employees can become external whistleblowers if those internal channels fail.¹³⁴ Whistleblowing can thus be seen as a potential endgame of corporate employees’ participation in their companies’ internal regulatory structure. These various quasi-regulatory roles within the firm are further connected to the regulatory agency. To illustrate, consider again the EPA’s efforts to enlist agents within the firm. The EPA encourages all employees to report violations through its guidance documents and whistleblower laws, regularly inspects the performance of those internal employee systems, and exerts its enforcement authority when necessary to impose more detailed structures on the firm.¹³⁵ Functionally, firms’ internal compliance systems

¹³⁰ Advisory Letter 97-3 from Jimmy Barton, Chief Nat’l Bank Exam’r, Off. of the Comptroller of the Currency, to Chief Exec. Officers of all Nat’l Banks, Dep’t & Div. Heads & all Examining Pers. (Mar. 11, 1997), <https://www.occ.gov/static/rescinded-advisory-letters/advisory-letter-1997-3.pdf> [<https://perma.cc/Q4ET-7PUE>].

¹³¹ As another example of this, in 1989, the Nuclear Regulatory Commission forbade nuclear reactors from purchasing their employees’ silence, and a few years later, wrote rules more broadly prohibiting the silencing of employees. Matthew L. Wald, *Agency Bars Paying Whistle-Blowers for Silence*, N.Y. Times, May 4, 1989, at A25; *Whistleblower Protection for Employees of NRC-Licensed Activities*, 58 Fed. Reg. 52406, 52408–09 (Oct. 8, 1993).

¹³² See *supra* Section I.A.; *infra* Part II.

¹³³ Karie Davis-Nozemack & Sarah J. Webber, *Lost Opportunities: The Underuse of Tax Whistleblowers*, 67 Admin. L. Rev. 321, 329–30 (2015); U.S. Sec. & Exch. Comm’n, *supra* note 62, at 24.

¹³⁴ Statutes do not remove law-related employees, for instance, from whistleblower protections. See, e.g., 42 U.S.C. § 7622.

¹³⁵ See *supra* Subsection I.A.4.

thereby operate almost as a private branch of the EPA.¹³⁶ To some extent, the EPA could increase oversight by activating its various agents within the firm to do more to protect the environment.¹³⁷ Other agencies, including the SEC, have prosecuted compliance officers.¹³⁸

An important feature of this system is that regulatory actors within the firm and within the administrative agency can be substitutes. This substitutability is evidenced by the policies themselves, such as EPA guidance advising companies to establish internal processes for engaging in “ongoing internal compliance monitoring to ensure that facility activities conform to applicable environmental requirements.”¹³⁹ In theory, if businesses operate more efficiently than the government, as has long been argued,¹⁴⁰ it is possible that compliance mandates increase overall efficiency compared to administrative agencies performing those functions. For instance, the Theranos whistleblowers were core employees—scientists.¹⁴¹ They sought to convince first their managers and then the company’s CEO, Elizabeth Holmes, that the company was pursuing an unethical and illegal path.¹⁴² Had they succeeded, no external whistleblowing would have been necessary. But those same employees could have instead skipped the internal advocacy step and simply gone to regulators, which they might have done if they had known the extent to which Holmes and her managers engaged in unethical conduct.¹⁴³ In the alternative, the company’s compliance officers could have performed a similar role as those core employees by advocating for change internally or themselves blowing the whistle externally. Finally, if inspectors at the responsible regulatory agency, the Centers for Medicare and Medicaid Services (“CMS”), had caught the wrongdoing in one of their lab inspections, they could have potentially put an end to the wrongdoing without any private employee action.¹⁴⁴

¹³⁶ On this point for large regulators more broadly, see Van Loo, *supra* note 10, at 399–401.

¹³⁷ This idea is expanded upon in Part III.

¹³⁸ See, e.g., Meredith A. Simmons at 3–6, Exchange Act Release No. 90061, 2020 WL 5820435 (Sep. 30, 2020) (prosecuting a Chief Operating Officer for aiding their employer’s evasion of an SEC investigation).

¹³⁹ Sisk, *supra* note 102, at 6.

¹⁴⁰ Jonas Prager, *Contracting-Out: Theory and Policy*, 25 N.Y.U. J. Int’l L. & Pol. 73, 74 (1992).

¹⁴¹ Carreyrou, *supra* note 2, at 195, 281.

¹⁴² *Id.* at 195–97.

¹⁴³ See, e.g., *id.* at 279–82 (summarizing the extent of Holmes’s unethical conduct).

¹⁴⁴ See *id.* at 94–96.

Observers often fail to grasp how core employees, law-related employees, whistleblowers, and administrative agency monitors interconnect to form the broader public and private administrative architecture. Indeed, whistleblowers tend to not be seen as internal to the regulatory project, but instead as evidence of regulatory failure. When a whistleblower reports misconduct to an administrative agency, such as Erika Cheung to CMS, the regulator is often criticized for not finding the problem itself.¹⁴⁵ Or the regulator's essential role in the solution is overlooked, such as when CMS rapidly responded to Cheung's tip with a surprise inspection and immediately shut down the Theranos lab.¹⁴⁶ Conceptually framing such whistleblowers as a core part of regulation is a more accurate way to view both the agency-firm relationship and these incidents. By preferring regulatory agents within the firm to heavier administrative agency inspections,¹⁴⁷ policymakers have designed a regulatory system in which society must rely on whistleblowers rather than solely on regulatory monitors. Indeed, once it is recognized that whistleblowers are one of many tools in the employee-enlistment regulatory toolkit, the case of Erika Cheung could be viewed as the regulatory architecture catching wrongdoing—simply with its backup plan.

This view does not mean that regulators have nothing to learn from having missed the problems in their prior inspections of Theranos.¹⁴⁸ Instead, the point is that seeing the full public and private administrative structure is crucial for diagnosing its flaws and identifying its full potential. Yet one cannot see that full structure without first recognizing the rich interconnections between corporate and administrative agency employees.

These interconnections have several implications for the design of regulation. First, corporate employees have more of a public role than is typically assumed. They are part of a broader regulatory infrastructure, whether as potential whistleblowers or as part of the internal compliance system that often feeds information to and is significantly shaped by a regulator. To the extent they act in ways influenced by administrative

¹⁴⁵ See Editorial, *An Outdated Loophole Is Letting Faulty Lab Tests Hit the Market*, 28 *Nature Med.* 215, 215 (2022).

¹⁴⁶ See *id.* (failing to acknowledge CMS's helpful actions).

¹⁴⁷ See, e.g., Van Loo, *supra* note 10, at 430–32 (exploring how limited resources may favor utilizing internal measures to regulate over external oversight).

¹⁴⁸ On those inspections, see Carreyrou, *supra* note 2, at 277–79.

agencies or required by regulatory laws, corporate employees arguably act as regulatory agents. In some industries and areas of law, this is more aspirational, inconsistent, and informal. In other contexts, such as banking, these connections are stronger. Note that this broader regulatory structure expects employees not only to obey the law themselves, but also to actively aid government officials in preventing and detecting legal infractions.¹⁴⁹ Second, once it is recognized that these various corporate and administrative agency employees are all to some extent regulatory substitutes, it raises a fundamental question of how to best design the regulatory architecture to allocate responsibility among these key actors.

II. DIAGNOSING EMPLOYEE ENFORCERS WITHIN THE FIRM

Since the enlistment of workers is a central tool of the regulatory state, it is important to evaluate these efforts. This Part considers employee enforcers along four criteria commonly emphasized in evaluating regulatory policies: how effective they are, how much they cost, the level of private autonomy they preserve, and whether they are perceived as legitimate.¹⁵⁰ The purposes are to better understand the current structure, to begin to compare it to alternatives that might better maximize these criteria, and to generate testable hypotheses for how to improve the existing system by altering the use of private actors.¹⁵¹ Ultimately, the diagnosis of corporate employees must proceed through a systems lens: future studies must analyze how groups of employee enforcers interact with one another and the broader set of public regulatory actors.

¹⁴⁹ This is true, at least in part and arguably over significant portions of the private sector, once the reach of the agencies discussed above in Section I.A is considered.

¹⁵⁰ See, e.g., J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 *Geo. L.J.* 757, 759 (2003) (“[W]hile rules promulgated by agencies have created obvious benefits, they have equally generated economic and liberty costs to regulated parties and society at large.”); Freeman, *supra* note 26, at 675 (emphasizing legitimacy in assessing private governance).

¹⁵¹ Empirical assessments are important but will require careful sustained study of individual policies in specific industries—how well the whistleblower framework performs in consumer financial protection, for instance, or how well the environmental compliance system mandates work. Moreover, some of the most important considerations, such as autonomy and legitimacy, defy quantification. Finally, assessing employee enforcers overall would involve a systems analysis that faces methodological challenges, preventing such an assessment from being done in a rigorous manner. See Megan T. Stevenson, *Cause, Effect, and the Structure of the Social World*, 103 *B.U. L. Rev.* 2001, 2003 (2023) (explaining that “the ability to engineer” a social change is “hard” (emphasis omitted)).

A. Effectiveness: The Missing Endgame

For at least two decades, scholars have criticized compliance departments as “cosmetic”¹⁵² and little more than “window-dressing mechanisms implemented by corporate management”¹⁵³ to “buy their way out of liability.”¹⁵⁴ Part of the broader problem with employees as enforcers, according to some observers, is that employees in many firms are under the influence of an “attack-dog general counsel willing to do whatever it takes to win.”¹⁵⁵ For corporate executives, winning usually means maximizing profits.¹⁵⁶ One of the few areas of consensus on regulatory matters is that the existing design is insufficient.¹⁵⁷

It is difficult to know the merits of these critiques because the empirical data about compliance is so limited.¹⁵⁸ Even many of the most commonly deployed regulatory strategies lack convincing evidence in either direction about their effectiveness.¹⁵⁹ A recent study took an important step in filling that vast empirical void, finding that corporate crime has been on the rise since the 2008 financial crisis.¹⁶⁰ That period also corresponds with the start of an intense boom in compliance departments

¹⁵² William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 *Vand. L. Rev.* 1343, 1407–10 (1999).

¹⁵³ Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 *Wash. U. L.Q.* 487, 542 (2003); accord Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 *Ann. Rev. L. & Soc. Sci.* 453, 466 (2019) (observing that “there is little evidence that the structures put in place are more than expensive window dressing”).

¹⁵⁴ William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 *Am. Crim. L. Rev.* 1307, 1316 (2007); see also *id.* at 1316–17 (seeing the DOJ’s leniency policies as allowing large businesses to invest in compliance to avoid liability).

¹⁵⁵ Donald C. Langevoort, *Gatekeepers, Cultural Captives, or Knaves?: Corporate Lawyers Through Different Lenses*, 88 *Fordham L. Rev.* 1683, 1698 (2020) (questioning this view but noting its prevalence “especially in the zeitgeist of today’s ill-spirited political economy”).

¹⁵⁶ *Cf. id.*

¹⁵⁷ *Cf. Diamantis & Laufer, supra note 153, at 466* (observing that “[n]o one seriously argues” that existing sanctions are sufficient to deter business misconduct).

¹⁵⁸ Cary Coglianese, *Building Better Compliance*, 100 *Tex. L. Rev. Online* 192, 214 (2022) (“Only with better empirical analysis can we foster the kind of policy learning needed to make smarter regulatory decisions.”); Cary Coglianese & Jennifer Nash, *Compliance Management Systems: Do They Make a Difference?*, in *The Cambridge Handbook of Compliance* 571, 581–84 (Benjamin van Rooij & D. Daniel Sokol eds., 2021) (reviewing the empirics on compliance management systems).

¹⁵⁹ Coglianese & Nash, *supra note 158, at 586–89*. Like in many other regulatory domains, such as antitrust law, it is often simply hard to know the full impact of complex systems. See Stevenson, *supra note 151, at 2003, 2031–33* (noting that the causal processes of cascades are complex and context dependent).

¹⁶⁰ Lund & Sarin, *supra note 36, at 289–90*.

within corporations, which indirectly supports the widespread scholarly criticism of compliance departments.¹⁶¹ Thus, based on structural analyses and the limited empirics, there is reason to think that parts of the existing regulatory architecture have produced disappointing results.¹⁶²

Despite this preliminary evidence of shortcomings, it is difficult to imagine an effective regulatory architecture that does not rely heavily on employees. The task of identifying wrongdoing has become far more substantively challenging in recent decades as the level of highly specialized scientific, technological, and financial knowledge within most businesses has increased.¹⁶³ Oil companies now drill miles deeper than they did twenty years ago using cutting-edge remote control and radar technologies,¹⁶⁴ industry exposes the environment to at least hundreds of new chemicals each year,¹⁶⁵ and most large businesses now deploy algorithms so advanced that the computer coders themselves often do not completely understand them.¹⁶⁶ Administrative agencies do not pay as high of salaries to attract the leading experts, and even if regulators did have comparable talent, businesses keep trade secrets from regulators that would be necessary for regulators to fully understand the latest technologies.¹⁶⁷ It is possible that advanced regulators might shrink some of this sophistication gap by leveraging AI,¹⁶⁸ but that possibility remains

¹⁶¹ See Laufer, *supra* note 11, at 393.

¹⁶² It would be premature to conclude that the project of leveraging employees to regulate the firm is doomed, particularly given how complex a system must be studied and the political impediments to lawmakers acting. Indeed, leading legal scholars critical of the existing regulatory structure tend to propose strengthening regulation rather than weakening it. See, e.g., Lund & Sarin, *supra* note 36, at 345–50 (empirically demonstrating compliance policy shortcomings and proposing greater prosecution of individuals, among other reforms).

¹⁶³ See Joelle Evans & Susan S. Silbey, Co-Opting Regulation: Professional Control Through Discretionary Mobilization of Legal Prescriptions and Expert Knowledge, 33 *Org. Sci.* 2041, 2043 (2022).

¹⁶⁴ Jin Yang, The Development and Prospect of the Offshore Oil and Gas Industry, *Advances Res. Rsch.*, Oct. 2021, at 1, 3–7, https://www.jstage.jst.go.jp/article/arr/1/1/1_1/_pdf/-char/ja [<https://perma.cc/VTS6-RRJG>].

¹⁶⁵ Daniel C. Esty, Environmental Protection in the Information Age, 79 *N.Y.U. L. Rev.* 115, 162–63 (2004); Tracey J. Woodruff, Thomas A. Burke & Lauren Zeise, The Need for Better Public Health Decisions on Chemicals Released into Our Environment, 30 *Health Affs.* 957, 958 (2011) (“Approximately 700 new industrial chemicals are introduced each year.”).

¹⁶⁶ See, e.g., Charlotte A. Tschider, Beyond the “Black Box,” 98 *Denv. L. Rev.* 683, 683 (2021) (observing that for many algorithms “even their creators cannot easily explain how they work”).

¹⁶⁷ See Evans & Silbey, *supra* note 163, at 2041.

¹⁶⁸ Cary Coglianese & David Lehr, Regulating by Robot: Administrative Decision Making in the Machine-Learning Era, 105 *Geo. L.J.* 1147, 1222 (2017); see also *id.* at 1166 (providing

speculative. For now, the increasingly technical and complex nature of business activities has widened the expertise gap between administrative agencies and most companies.

In light of these developments, relying on core employees offers expertise advantages over compliance officers. Core employees are already the leading technical experts—they write the computer code, design the latest financial innovations, and create new polluting chemicals. Thus, a regulatory system that relies on core employees has the potential to fill much of the technical expertise gap between agencies and corporations.

This raises the possibility that some of the failures in the compliance era may be about the faulty regulatory design of relying too heavily on law-related employees rather than core employees. To explore this hypothesis further, it helps to break down the two main elements needed for an employee to advance the public interest. First, the employee must be motivated to push the business toward the public interest. Second, the employee must have the power to alter the corporation's conduct.

On the topic of motivation, there is strong evidence that many corporate employees are inherently disposed to want to correct wrongdoing. Individuals have varying baseline levels of moral tendencies, but a healthy subset of people are highly morally attentive.¹⁶⁹ Highly morally attentive individuals are more likely to speak up about wrongdoing, even in the face of abusive supervisors.¹⁷⁰ According to the leading business ethics survey, eighty-six percent of employees who saw misconduct in 2020 reported the matter.¹⁷¹ As mentioned above, internal employees are the leading source for corporate crime identification, more so than government inspectors, third-party auditors, and other actors.¹⁷²

One nuance to these statistics is important to mention. Employees tend overwhelmingly to report issues internally, within the firm, rather than

as an example the possibility of “an extension of the SEC’s cloud computing program that would eventually allow agency computers to monitor trading activities in real time, predicting in milliseconds whether a financial transaction is the result of insider trading and then automatically stopping or reversing trades based on those predictions”).

¹⁶⁹ See Scott J. Reynolds, *Moral Attentiveness: Who Pays Attention to the Moral Aspects of Life?*, 93 *J. Applied Psych.* 1027, 1027 (2008).

¹⁷⁰ Erik G. Helzer, Taya R. Cohen & Yeonjeong Kim, *The Character Lens: A Person-Centered Perspective on Moral Recognition and Ethical Decision-Making*, 182 *J. Bus. Ethics* 483, 496 (2023).

¹⁷¹ See Ethics & Compliance Initiative, *2021 Global Business Ethics Survey Report: The State of Ethics & Compliance in the Workplace* 6, 19 (2021).

¹⁷² West & Bowman, *supra* note 1, at 120.

externally.¹⁷³ This evidence of high motivation and internal reporting indirectly suggests that compliance systems well-designed to leverage existing ethical employee motivation would have the potential to produce meaningful compliance results.

Empirical research provides more direct support for this hypothesis. One study looked at the SEC Whistleblower Program, authorized by the Dodd-Frank Act of 2010, which provided generous bounties and confidentiality for whistleblowers.¹⁷⁴ It found that firms were less likely to commit fraud following the implementation of this program.¹⁷⁵ Moreover, the data suggested that the reduction in fraud was driven by companies with poor compliance systems making improvements, such as by offering better internal employee hotlines to report wrongdoing and by hiring board members who were more capable at auditing.¹⁷⁶

These findings are important in part because they suggest that stronger whistleblowing policies make it more likely that businesses will invest in internal structures elevating the voices of ethical employees. This research also illustrates the link between compliance systems and whistleblowers. Whistleblowing is typically seen as something separate from compliance, but the two activities are part of the same broader corporate employee regulatory system.

Viewing compliance processes and whistleblowing as connected makes the concept of leveraging corporate employees as regulators more promising overall. In contrast to the widespread skepticism about compliance departments, scholars are mostly positive about the contributions of whistleblowers to holding corporations accountable.¹⁷⁷ Connecting whistleblowers to compliance thus makes employee

¹⁷³ Ass'n of Certified Fraud Examiners, Report to the Nations on Occupational Fraud and Abuse 21–22, 26 (2016), <https://www.acfe.com/-/media/files/acfe/pdfs/rtnn/2016/2016-report-to-the-nations.pdf> [<https://perma.cc/XGF3-XQM4>].

¹⁷⁴ Christine Wiedman & Chunmei Zhu, The Deterrent Effect of the SEC Whistleblower Program on Financial Reporting Securities Violations, 40 *Contemp. Acct. Rsch.* 2711, 2712 (2023).

¹⁷⁵ *Id.* at 2738–39.

¹⁷⁶ *Id.* at 2711, 2721, 2739.

¹⁷⁷ The main concern in the whistleblower literature is not whether whistleblowers have sufficient power to steer corporate behavior, which most agree they do, but rather how to strengthen protections of whistleblowers once they come forward. See, e.g., Jeffrey R. Boles, Leora Eisenstadt & Jennifer M. Pacella, Whistleblowing in the Compliance Era, 55 *Ga. L. Rev.* 147, 157 (2020).

enforcers more intellectually appealing and is supported by robust empirical evidence of effectiveness in reducing legal violations.¹⁷⁸

Whistleblowers are effective because they leverage strong external power.¹⁷⁹ When ethical employees do not feel comfortable whistleblowing, they must instead rely on internal power.¹⁸⁰ Internal power is often weaker because it is subject to influence by executives and the board, all of whom have tremendous profit motives.¹⁸¹ Those profit motives can incentivize powerful internal actors to ignore ethical employee concerns. Stated otherwise, without external pressure, self-regulation risks being subjugated by shareholder primacy.¹⁸²

To illustrate, consider four commonly mentioned scandals in the compliance literature: Wells Fargo opening millions of fake accounts in customers' names to boost sales;¹⁸³ Volkswagen installing a cheat device to dupe regulators into thinking that its cars met emissions standards, causing the cars to emit over forty times the legal amount for seven years;¹⁸⁴ Theranos engaging in dangerous science while lying to investors;¹⁸⁵ and Boeing hiding the need for additional pilot training on its new plane, which ultimately led to fatal plane crashes.¹⁸⁶ In all of those incidents, HR and compliance departments worked actively to prevent information from reaching regulators and made employees afraid to raise ethical or legal concerns.¹⁸⁷

Regulations tend to be imagined as external power exerted directly on wrongdoers. Yet regulations can also redistribute power within an organization so that internal actors can directly pressure wrongdoers.¹⁸⁸

¹⁷⁸ This evidence is explored *supra* notes 174–77; *infra* Section III.A.

¹⁷⁹ See, e.g., Platt, *supra* note 59, at 702 (discussing the power of whistleblowers).

¹⁸⁰ This view can be inferred from the assumptions that whistleblowers will be co-opted by the attack-dog general counsel or shareholders. Cf. Langevoort, *supra* note 155, at 1698 (summarizing this skepticism).

¹⁸¹ See, e.g., Frank Dobbin & John R. Sutton, The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions, 104 *Am. J. Socio.* 441, 441 (1998) (analyzing 279 human resource departments); Langevoort, *supra* note 155, at 1697–98 (referring to the venality accusations against corporate lawyers).

¹⁸² More on the topic of shareholder primacy is offered below. See *infra* Section II.C.

¹⁸³ See, e.g., Nelson, *supra* note 3, at 1498.

¹⁸⁴ *Id.* at 1494.

¹⁸⁵ Carreyrou, *supra* note 2, at 195, 287–89.

¹⁸⁶ Mutsa Malunga, Raabiah Ahmed, Astrid Raynard, Magi Stoyanova & Kaseya Chisala, Key Lessons from the Boeing 737 MAX 8 Accidents, 287 *Loss Prevention Bull.* 24, 25 (2022).

¹⁸⁷ See Nelson, *supra* note 3, at 1544; Carreyrou, *supra* note 2, at 194–98.

¹⁸⁸ To illustrate, consider how judges, through *In re Caremark* and its progeny, became more open to shareholder lawsuits for “failure of the board to act.” *In re Caremark Int’l Inc.*

Resulting lawsuits mean that when compliance departments notify the board of wrongdoing, those paper trails expose the board to liability.¹⁸⁹ External liability thereby arguably gives compliance officers “hidden power” to steer the corporation toward lawful behavior.¹⁹⁰ Ignoring compliance officers becomes more risky in a world of strong liability.

Importantly, the degree of hidden power that compliance gains from this arrangement depends on the power dynamics between the board and external actors. To the degree the board can shield itself through liability insurance or believes legal and reputational repercussions are unlikely, board members will be less personally concerned about a paper trail tying it to some compliance issues.¹⁹¹ The weaker the monetary penalties and reputational risks are for the business, the less power well-meaning compliance officers will have to convince a resistant board to act.¹⁹² These challenges indicate the limits of relying solely on compliance officers acting internally.

Where whistleblowers come into this equation is that leaders in the company also must weigh the likelihood of being detected. By making it more difficult to hide legal violations, strong external whistleblowing programs for core employees make it less attractive for senior executives to ignore or co-opt employees who argue against wrongdoing, since the conduct has a greater chance of being later discovered, regardless of any internal pressure put on compliance to remain silent.

In theory, all employees have some amount of latent external power should they choose to pursue that endgame, especially in the social media

Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996) (emphasis omitted); accord *In re Abbott Lab’s Derivative S’holders Litig.*, 325 F.3d 795, 805–06 (7th Cir. 2003) (quoting *In re Caremark*, 698 A.2d at 967); *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006) (en banc).

¹⁸⁹ Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 *Minn. L. Rev.* 2135, 2139 (2019) (seeing compliance strength in the ability to alter board incentives).

¹⁹⁰ *Id.*

¹⁹¹ This is not to say that monetary liability is overall desirable. For a broader sense of the trade-offs, see Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, 8 *J. Legal Analysis* 337, 355, 358 (2016).

¹⁹² External pressure is highly dependent on context. For instance, shareholders will have higher motivation to bring lawsuits against the board for practices that lower profits, such as many types of corporate fraud, than when managers are engaging in likely profitable practices, such as exploiting consumers or the environment. Moreover, the board can use its internal authority to pressure compliance officers to not report incriminating information to it in the first place. Cf. Gadinis & Miazad, *supra* note 189, at 2139 (“We agree with existing scholarship that in-house legal and compliance experts rarely have the means or bargaining power to command top management or board members to stop violating the law.”).

era.¹⁹³ The path to becoming a whistleblower is, however, fraught. Protections from retaliation are inadequate and uneven.¹⁹⁴ The level of bounties for whistleblowers is limited or nonexistent in many important areas of law, such as consumer protection.¹⁹⁵ Whistleblowers face immediate retaliation and long-term career barriers, and their mental health tends to suffer.¹⁹⁶ The legal system thus weakens the power provided by whistleblowing, at least compared to a system that provided more significant protections.

Additional insights can be gained by adding regulatory agencies to this systems diagnosis. Since regulators conduct in-person inspections in most industries, private employees sometimes have a line of communication to an external source of power.¹⁹⁷ The more the company fears that an employee might find a way to communicate concerns to regulators confidentially, the more weight any given employee's voice will carry. Consequently, public-oriented employees' internal power can be increased by confidential access to regulators.¹⁹⁸

The power that regulatory access provides to private employees varies across industries, but is likely limited in many companies. Compliance officers are the main point of contact for regulatory monitors,¹⁹⁹ but that contact is infrequent in most companies given that agencies must police large universes of regulated entities.²⁰⁰ Moreover, corporate managers can orchestrate which employees come into contact with government inspectors and typically instruct employees to limit information

¹⁹³ The digital era has enhanced that latent power because “one tweet or social media post can go viral and make or break the reputation of a corporation seemingly overnight.” Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 *Harv. Bus. L. Rev.* 441, 494 (2019).

¹⁹⁴ See, e.g., Boles et al., *supra* note 177, at 155–57.

¹⁹⁵ See, e.g., *supra* Subsection I.A.3.

¹⁹⁶ See *infra* Section III.A.

¹⁹⁷ Van Loo, *supra* note 10, at 435.

¹⁹⁸ This idea is explored *infra* Section III.A.

¹⁹⁹ Cf. Van Loo, *supra* note 10, at 435.

²⁰⁰ See Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 *Admin. L. Rev.* 93, 94 (2016) (explaining that “[w]ith finite resources and a greater number of problems to deal with than those resources could possibly support, all agencies’ choices at the agenda-setting stage can have a major impact on the agencies’ ultimate regulatory performance”); Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 *Notre Dame L. Rev.* 1517, 1519–20 (2018) (“Agencies have finite resources; it is impossible for them to investigate and punish every potential violation of the law.”).

sharing.²⁰¹ For example, U.S. manufacturing facilities for large brands such as Oreo, Gerber baby food, and McDonald's confined migrant child laborers to the night shift because they knew inspectors came during the day.²⁰² In short, the firm's success in controlling regulatory contact deprives employees of a potential external source of power.

In terms of effectiveness, one major takeaway from this discussion is that many of the shortcomings of using employee enforcers are not necessarily inevitable. To know how well private employees might perform in governing corporate misconduct, we would need to assess a system in which the employees with the most potential for detection, core employees, also have sufficient power to correct misconduct. Instead, legal authorities have for decades recruited the help of various employees within the firm,²⁰³ but too often without backing up those who help.

Why is there inadequate support for external whistleblowers, given the evidence of effectiveness and long-standing administrative agency efforts to enlist corporate employees' help? Businesses hold outsized influence over the legislative process, accounting for over eighty-four percent of total interest group lobbying.²⁰⁴ Regulations adopted tend to be those supported during notice-and-comment rulemaking by industry.²⁰⁵ Thus, the existing regulatory architecture is not one of comprehensive design by lawmakers or agency leaders for effectiveness. Any failures are in part the result of successful business pressure on lawmaking rather than some deficiency inherent to relying on corporate employees to regulate.

²⁰¹ See, e.g., John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 Mich. L. Rev. 1466, 1468 (1982) (summarizing pharmaceutical manager instructions to employees on handling FDA inspectors).

²⁰² Hannah Dreier, *Private Auditors Have Failed to Detect Migrant Children Working for U.S. Suppliers of Oreos, Gerber Baby Snacks, McDonald's Milk and Many Other Products.*, N.Y. Times (Dec. 28, 2023), <https://www.nytimes.com/2023/12/28/us/migrant-child-labor-audits.html> (revealing that for years, auditors, who conducted inspections during the day, failed to uncover that there were children working at well-known companies like Walgreens during the night).

²⁰³ See *supra* Section I.A.

²⁰⁴ John M. de Figueiredo & Brian Kelleher Richter, *Advancing the Empirical Research on Lobbying*, 17 Ann. Rev. Pol. Sci. 163, 165 (2014) (analyzing lobbying influence).

²⁰⁵ See, e.g., Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 Wis. L. Rev. 1097, 1103–04 (summarizing the evidence about congressional inaction); Shikhar Singla, *Regulatory Costs and Market Power* 8 (LawFin, Working Paper No. 47, 2023), <https://ssrn.com/abstract=4368609> [<https://perma.cc/8PNY-ZHEF>] (finding that large firms tend to support rules that increase market power and disadvantage small firms, which is consistent with public choice theory).

This discussion also underscores the value of analyzing private employees and administrative agency employees through a systems lens that considers how different types of organizational actors interact. For instance, once the administrative agency is reframed as a potential source of power to employee enforcers, it raises the question of how to improve the connections between regulatory monitors and corporate employees.²⁰⁶ Note that this requires a sub-organizational unit of analysis for both public and private entities, reaching ultimately to individual roles. This interconnectedness of corporate employees and administrative agency employees also helps explain why the crises of legitimacy facing corporations and administrative agencies are to some extent ultimately linked to how well the private employee functions in a public role.

In short, whistleblowing is the most powerful source of external power for many employees in many contexts, but it comes at the risk of destroying their professional and personal lives. When legal authorities provide employees with support, there is evidence that employees respond to calls for them to help steer firms toward more lawful conduct. Importantly, these results are not just about the whistleblowing itself; the whistleblowing pressure can also make internal compliance systems more effective.

B. Efficiency: The Overreliance on Compliance

Compliance mandates are expensive, costing the private sector billions of dollars annually.²⁰⁷ Critiques that compliance mandates impose significant costs on businesses thus have some merit as an absolute matter.²⁰⁸ Cost-focused critiques of compliance mandates are usually incomplete because they fail to inquire whether compliance departments are replacing work that administrative agency employees would otherwise need to undertake.²⁰⁹ This analytic incompleteness is the result

²⁰⁶ See *infra* Part III (proposing reforms to increase interconnections).

²⁰⁷ See, e.g., Hui Chen & Eugene Soltes, *Why Compliance Programs Fail and How to Fix Them*, *Harv. Bus. Rev.*, Mar.–Apr. 2018, at 117, 118, <https://hbr.org/2018/03/why-compliance-programs-fail> [<https://perma.cc/Z347-8ZSH>] (summarizing the high costs of compliance for most large companies).

²⁰⁸ See *supra* Section I.A.

²⁰⁹ See, e.g., Interview with Former EPA Employee (Apr. 12, 2017) (on file with author) (stating that regulated entities typically have internal inspections of their own that relate to and are used in EPA inspections); Interview with Former Federal Deposit Insurance Corporation Employee (Jan. 23, 2023) (on file with author) (explaining that some portion of what bank examiners previously did is now undertaken internally by banks).

of not viewing compliance through a systems lens, or at least not adopting one sufficiently comprehensive to consider the sub-organizational actors within corporations and administrative agencies.

Broadly speaking, much of administrative agencies' enlistment efforts outlined in Part I sought to get corporate employees to detect and correct potential legal violations—or to provide the information that agencies need to determine wrongdoing.²¹⁰ These functions are central to the exercise of administrative agency power and comprise the bulk of enforcement personnel in large regulators.²¹¹ For example, EPA guidance advises companies to establish processes for engaging in “ongoing internal compliance monitoring to ensure that facility activities conform to applicable environmental requirements.”²¹² One main alternative would be for the EPA to undertake these compliance tasks itself through inspectors, which would cost taxpayers a considerable amount.²¹³ Additionally, regulatory inspections impose costs on businesses whose employees must locate, transfer, and often explain the information requested.²¹⁴ The other main alternative would be to remove the laws that necessitate compliance officers. That would amount to returning to a less regulated era and risking a repeat of the failed self-regulation that prompted those regulations.²¹⁵ Criticism of compliance-mandated costs is incomplete unless it considers the risks and downsides of these alternatives.

One of the animating principles behind regulation relying on employee enforcers is that it would be prohibitively expensive for regulatory agencies to recreate the corporate sector's significant expertise in finance, technology, and science.²¹⁶ For instance, the primary regulator of big tech,

²¹⁰ See *supra* Part I. Indeed, agencies often regulate through guidance and other informal channels, which could be analogized to the work that compliance officers do internally. See generally Parrillo, *supra* note 18 (studying the variety of guidance agencies use to regulate).

²¹¹ See, e.g., Van Loo, *supra* note 10, at 385–86, 389–95 (summarizing some major historical crises leading to increased regulations).

²¹² Sisk, *supra* note 102, at 6.

²¹³ Another alternative would be to require the firm to hire a private third-party inspection firm, but that would also be expensive and give the regulated entity even less ability to manage costs. Lesley K. McAllister, *Regulation by Third-Party Verification*, 53 B.C. L. Rev. 1, 26–28 (2012).

²¹⁴ Cf. Nielson, *supra* note 200, at 1546–47 (“[I]t is costly to force regulated parties (i) to figure out in the first instance whether their intended conduct comports with the law and (ii) if not, to figure out how to prompt nonenforcement by the agency.”).

²¹⁵ See, e.g., Van Loo, *supra* note 10, at 385–86, 389–95 (citing the various crises that prompted increased regulatory oversight).

²¹⁶ See *supra* Section II.A (discussing the expertise gap).

the FTC, has just over 1,000 employees, fewer than 50 of whom are computer engineers.²¹⁷ Meta, which runs Facebook and Instagram, alone has over 70,000 employees, most of whom are computer engineers or have some other technical skills.²¹⁸ Yet the FTC must enforce consumer protection and antitrust regulations against many other large and small tech companies in addition to Meta, along with diverse industries ranging from pharmaceuticals to oil.²¹⁹ It would be cost-prohibitive to either recreate the private sector's expertise or to have government employees monitoring over one hundred million private sector employees.²²⁰

The empirical data does not exist to definitively determine the extent to which compliance functions are overall cutting the costs of regulation, but a theoretical hierarchy can be identified. Although all employee enforcers impose costs on businesses, regulation can lower costs the most by relying on core employees to advocate for obeying the law from within their team. Compliance officers are more expensive in part because they are not contributing to delivering the company's core product—such as developing life-saving drugs or better electric cars.²²¹ A significant portion of compliance officers are devoted to the policing function—ensuring that employees do not misbehave in ways known or suspected to be wrong.²²² If core employees could lessen the need for such policing

²¹⁷ U.S. Fed. Trade Comm'n, Annual Performance Report for Fiscal Year 2022 and Annual Performance Plan for Fiscal Years 2023 to 2024, at 2 (2023) (estimating the workforce to be 1,119); Workforce Size & Composition, U.S. Off. of Pers. Mgmt., <https://data.opm.gov/explorer-data/analytics/workforce-size-and-composition> [<https://perma.cc/M85P-GXVN>] (last updated Dec. 2025) (breaking down number of employees and occupations by agency).

²¹⁸ Number of Full-Time Meta Platforms Employees from 2004 to 2025, Statista, <https://www.statista.com/statistics/273563/number-of-facebook-employees/> (last updated Feb. 3, 2026) (listing Meta as employing 78,865 full time employees as of 2025); Sofia Ramirez, How Many People Work at Meta 2026: Employee Count & Growth Trends, SQ Mag., <https://sqmagazine.co.uk/how-many-people-work-at-meta/> [<https://perma.cc/2RCQ-8ND7>] (last updated Sep. 7, 2025).

²¹⁹ What the FTC Does, U.S. Fed. Trade Comm'n, <https://www.ftc.gov/news-events/media-resources/what-ftc-does> [<https://perma.cc/DF3X-WXAM>] (last visited Jan. 4, 2026).

²²⁰ Employment by Industry, Bureau of Lab. Stat., U.S. Dep't of Lab., <https://www.bls.gov/charts/employment-situation/employment-levels-by-industry.htm> [<https://perma.cc/6J9D-ZGGE>] (last visited Jan. 4, 2026) (stating that as of January 2024, there were approximately 133,896,000 private sector employees in the United States).

²²¹ The compliance officer can nonetheless save a business money by avoiding legal or reputational penalties, but the point here is that if core employees can perform that same function while also contributing to the company's profits, it would be a less expensive option for promoting compliance.

²²² See, e.g., Robert L. Nelson & Laura Beth Nielson, Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations, 34 *Law & Soc'y Rev.* 457,

through internal advocacy, companies would save compliance costs. After all, core employees can observe wrongdoing on their own teams with minimal, if any, information transfer costs.²²³ They already have the relevant financial, scientific, or technological expertise, thereby avoiding costly investments in duplicative learning or sizeable sophistication gaps.

There are limits to this cost-savings hierarchy. Core employees typically do not have the same level of compliance expertise as do law-related employees, so in some contexts core employees may simply be unable to identify legal violations.²²⁴ Consequently, for some subset of complex laws and involved legal responsibilities, compliance officers may be cheaper corporate employees to regulate internally. Yet companies often must teach core employees the law to ensure they do not break it inadvertently, meaning that they often already have some relevant expertise.²²⁵ Thus, overall, relying more on core employees could theoretically lower expenditures by either taxpayers on administrative agency inspections or business owners on compliance officers.

C. Autonomy: Shareholder Primacy and the Search for Purpose

The level of private autonomy preserved by regulation has historically proved to be one of the most influential considerations in deciding among

463 (2000) (describing in-house counsel as “cops”); DeStefano, *supra* note 19, at 72–73 (describing compliance roles).

²²³ Cf. William E. Kovacic, Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting, 29 *Loy. L.A. L. Rev.* 1799, 1821–22 (1996) (“The chief efficiency advantage of *qui tam* bounty hunting is that it gives oversight and enforcement powers to those closest to the relevant information.”); Sung Hui Kim, Do Lawyers Make Good Gatekeepers?, in *The Cambridge Handbook of Investor Protection* 283, 284 (Arthur B. Laby ed., 2022) (concluding that “imposing gatekeeping obligations on lawyers would be meaningfully efficient” (emphasis omitted)).

²²⁴ An alternative would be to train core employees to spot such violations, or perhaps how to know when to consult law-related employees. At a minimum, any such investments would involve an opportunity cost in that the core employee could otherwise be investing that time in training or other activities that would be more core to the business. Note, however, that any such time spent on training would need to be weighed against the time that core employees would otherwise need to spend interacting with compliance officers monitoring for wrongdoing—including explaining the basic activities to the compliance officers. Thus, adding law-related responsibilities to core employees may or may not involve less time spent by core employees on compliance, depending on the alternative.

²²⁵ The role of the reduced law-related workforce would then be to focus less on policing and more on counseling, helping core employees to determine the right course of action in the face of sometimes complex legal rules. This relates to Jim Fanto’s concept of the differing roles of surveillant and counselor. See Fanto, *supra* note 19, at 1163–67.

regulatory options.²²⁶ It has also become more important in recent years, with the Supreme Court viewing agencies as a “threat to liberty.”²²⁷ Some limits to autonomy are inherent in laws because once someone has broken the law, the state must have a means to enforce it. But given the choice between two comparably effective options, the least intrusive one is preferable.

History, however, has repeatedly made lawmakers and the public see excess regulatory autonomy as risky. The initial approach in most industries was to prioritize autonomy by focusing on liability after harm occurred, under the theory that firms would self-regulate.²²⁸ That laissez-faire model could be conceptualized as letting the firm choose whether to use internal employees to regulate. Over time, following incidents such as financial crises that threatened the Union’s Civil War funding in 1864,²²⁹ the death of several children from tainted vaccines in 1902,²³⁰ and a West Virginia mine explosion that killed ninety-one workers in 1940,²³¹ lawmakers concluded that ex post punishment alone was insufficient to cause businesses to take adequate precaution. Administrative agency inspections and other forms of regular monitoring came to be seen as essential in most legal arenas, despite their significant infringement on private autonomy.²³² There are limits to what major crises can say about the performance of the regulatory system.²³³ Yet there

²²⁶ Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O’Donoghue & Matthew Rabin, Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,” 151 U. Pa. L. Rev. 1211, 1232–33 (2003).

²²⁷ Metzger, *supra* note 30, at 3; see *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (noting that agencies whose powers are not meaningfully limited “pose[] a serious potential threat to liberty and to democracy” (quoting 2 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.5, at 204 (3d ed. 1994))).

²²⁸ See generally *Regulatory Breakdown: The Crisis of Confidence in U.S. Regulation* (Cary Coglianese ed., 2012) [hereinafter *Regulatory Breakdown*] (discussing regulatory crises and examining how people and policymakers respond to such crises).

²²⁹ National Bank Act of 1864, ch. 106, 13 Stat. 99, 99–100 (codified as amended at 12 U.S.C. § 1); National Banking Acts of 1863 and 1864, Fed. Rsrv. Hist. (July 31, 2022), <https://www.federalreservehistory.org/essays/national-banking-acts> [<https://perma.cc/PQ39-QCD9>].

²³⁰ Sharon B. Jacobs, Crises, Congress, and Cognitive Biases: A Critical Examination of Food and Drug Legislation in the United States, 64 *Food & Drug L.J.* 599, 601 (2009).

²³¹ Act of May 7, 1941, ch. 87, 55 Stat. 177, 177 (repealed 1969); see, e.g., WV Mine Disasters 1884 to Present, W. Va. Off. of Miners’ Health Safety & Training, <https://minesafety.wv.gov/historical-statistical-data/wv-mine-disasters-1884-to-present/> [<https://perma.cc/9ZR R-LQMT>] (last updated Mar. 28, 2016, at 14:05 ET).

²³² Van Loo, *supra* note 10, at 381.

²³³ See Cary Coglianese, Preface to *Regulatory Breakdown*, *supra* note 228, at 7, 7–8 (observing that people are quick to blame regulatory failure when there is a crisis).

is a general consensus that extreme self-regulation—the most autonomy-maximizing design—does not work in many, if not most, major industries.²³⁴

At the same time, crises have persisted well after regulatory monitoring came into existence.²³⁵ In response, lawmakers have grasped for various solutions—more monitoring authority, a minimum number of inspections per year, higher whistleblowing bounties, steeper fines, and various other tools.²³⁶ Employee enforcer policies can be seen as the product of the many historical failures to prevent harms, and the recognition that it is simply unrealistic to rely mainly on agency employees to monitor the increasingly technical work of a vast sphere of corporate conduct.²³⁷

In comparing different systems designs, the use of employee enforcers allows more private autonomy than relying on regulatory monitors to do the same work. That is true even for the most restrictive employee enforcement option—mandated law-related positions—especially because regulators generally allow businesses the autonomy to design and operate their internal system of law-related positions.²³⁸ In contrast, the main alternatives to compliance mandates would be agencies replacing compliance departments with more regulatory inspections. Thus, depending on the reference point, even compliance mandates are a form of autonomy-advancing regulation if they save the company from more intrusive on-site regulatory visits. This relative autonomy benefit may help explain the widespread industry acceptance of compliance department investments despite pervasive skepticism about their effectiveness.²³⁹

²³⁴ See, e.g., *id.* (summarizing perceptions of regulation).

²³⁵ *Id.*

²³⁶ See Van Loo, *supra* note 10, at 395, 427 (chronicling the rise of regulatory monitoring and imposition of monitoring minimums across large regulators); Introduction, *in* *Policy Shock: Recalibrating Risk and Regulation After Oil Spills, Nuclear Accidents, and Financial Crises* 1, 3–6 (Edward J. Balleisen, Lori S. Benneer, Kimberly D. Krawiec & Jonathan B. Wiener eds., 2017) (summarizing the policy responses to various crises).

²³⁷ Cf. Introduction, *supra* note 236, at 4–6 (summarizing the history of responses to policy shocks); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 *Yale L.J.* 1521, 1530–32 (2005) (summarizing the literature questioning the value of independent board members).

²³⁸ This reality is implied by some of the critiques of compliance departments as co-opted. See *supra* Section I.A. Nonetheless, regulators often have input in internal compliance systems, such as through guidance statements, inspections, or settlement orders. See *supra* Section I.A.

²³⁹ On their widespread use and criticism about effectiveness, see *supra* Section II.A.

Core employees are even more conducive than law-related employees to preserving autonomy. Mandatory trainings, ethics statements, and other policies to promote core employees as enforcers may require the company to engage in some action. Once that step is taken, however, the business and core employees can do as they like. This contrasts with compliance mandates, which necessitate a group of employees to perform an internal regulatory function on an ongoing basis.

Relying on whistleblowing to empower employees is *ex ante* more autonomy-preserving than many other approaches to conscripting core employees because, unlike mandated employee trainings and other policies aimed at core employees, whistleblower policies do not force any private actor to do anything at the outset. However, once a whistleblower has gone public, laws may prevent retaliation by requiring a company to continue to employ that individual. Choosing whom to employ is one of the most defining private decisions, since “a company is a human organization made of individuals working together in pursuit of a goal.”²⁴⁰ Consequently, restricting the choice of individuals within the company inevitably limits the firm’s autonomy in a way that is central to its existence. Yet agencies helping public-minded corporate employees to exercise their free will in some way enhances private autonomy by enabling them to speak out when they would otherwise feel impotent to do so. Thus, whistleblower protection laws can advance low-level employees’ autonomy at the expense of senior executives’ autonomy to run the corporation as they wish.

This last point underscores that advancing autonomy involves trade-offs. How does one weigh the reduced control that the firms’ owners have over the internal structure of their companies against the gains in autonomy for the public, consumers, workers, or others who might benefit from compliance system mandates? For instance, regulatory inspections of factories have been shown to reduce pollution significantly.²⁴¹

²⁴⁰ Bruce Simpson, *Leading with Purpose and Humanity: A Conversation with Hubert Joly*, McKinsey & Co. (2020), <https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/leading-with-purpose-and-humanity-a-conversation-with-hubert-joly> [<https://perma.cc/L325-GEHF>] (statement of Hubert Joly, Former Chairman & CEO, Best Buy); see also Nelson, *supra* note 36, at 872 (emphasizing that a corporation’s power is its agents).

²⁴¹ Wayne B. Gray & Jay P. Shimshack, *The Effectiveness of Environmental Monitoring and Enforcement: A Review of the Empirical Evidence*, 5 *Rev. Env’t. Econ. & Pol’y*, Winter 2011, at 3, 13–14, 22 (finding through empirical study that environmental monitoring and regulation tended to reduce violations in targeted firms, future violations in other firms by acting as general deterrents, and overall emissions).

Inspections mean less autonomy for the factory owners while granting the surrounding communities more autonomy to avoid hazardous pollution. Arguably, many regulations advance freedom because practices such as predatory mortgage home foreclosures, pollution, and the development of dangerous pharmaceutical drugs limit people's life and liberty.²⁴² Some regulatory agency ability to impinge on businesses' autonomy is therefore necessary to prevent constriction of the autonomy of workers, consumers, and members of the public.

How employee enforcers impact private autonomy thus varies greatly, is context specific, and depends on one's values.²⁴³ At a minimum, employee enforcers advance autonomy more overall compared to increased regulatory monitoring. Allowing core employees to act voluntarily also has the potential, in theory, to retain more of a company's autonomy than does a model in which businesses are coerced into hiring a significant number of law-related employees.

D. Legitimacy

From its earliest days, the administrative state faced a crisis in legitimacy.²⁴⁴ Whatever courts allow administrative agencies to do legally is an element of legitimacy,²⁴⁵ but one of the most important projects of administrative law scholars has been to consider what more—beyond legal permissibility—is desirable.²⁴⁶ Answering this question is

²⁴² Joseph William Singer, *No Freedom Without Regulation: The Hidden Lesson of the Subprime Crisis* 1–2 (2015); cf. id. at 4, 7–9 (explaining that market regulation is necessary to protect the public).

²⁴³ Further complicating the matter, different agencies might implement employee enforcers or regulatory inspectors in either a more collaborative or a more aggressive manner.

²⁴⁴ See generally James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 6–7, 10–11 (1978) (showing how the administrative state has long struggled with legitimacy).

²⁴⁵ Formal accountability measures are provided through various sources, including authorizing statutes, the Administrative Procedure Act, presidential control, and judicial review. These are in reality distinct threads, and only a few of many approaches to legitimacy. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 463–65 (2003) (providing a summary of the nuanced distinctions); Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706. The formal legal requirements are related to the question of what is perceived to be legitimate, in that lawmakers and judges are influenced by and themselves hold notions related to legitimacy.

²⁴⁶ See, e.g., Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. Chi. L. Rev. 407, 409 (1990) (arguing that understanding “the actual consequences of regulatory programs” and

challenging because “legitimacy has been a relatively empty vessel in administrative law scholarship and it continues to elude definition.”²⁴⁷ To oversimplify a vast literature, one relevant lens for assessing employee enforcers is to approach legitimacy almost as aggregate accountability, which is “a synonym for public acceptability.”²⁴⁸ A second relevant lens asks whether regulation provides “procedural justice,” not from the vantage point of the public, but through the eyes of those subject to the legal rules.²⁴⁹

1. Public Acceptability

The accountability strand of legitimacy analysis has often approached private governance with suspicion, partly because private actors are expected to pursue profit over the public interest.²⁵⁰ Although not focused on employees regulating the firm from within, one prominent argument holds that generalized suspicion of private governance is disconnected from the reality of “the diverse and pervasive roles private actors play in executing the business of governance.”²⁵¹ By this view, scholars should instead work on “imagining the means by which private actors might contribute to accountability.”²⁵² That imagining involves looking at aggregate accountability mechanisms, which include the agency’s supervision of private actors, as well as “a private decisionmaker’s internal procedural rules, its responsiveness to market pressures, its agreements or bargains with other actors, informal norms of compliance, and third-party oversight, for example.”²⁵³ One way of conceptualizing this aggregate accountability lens is public oversight and public access—even if through private and indirect channels.²⁵⁴

the “implications for legislative and administrative policy, is perhaps the principal task for administrative law in the next generation”).

²⁴⁷ Freeman, *supra* note 26, at 666.

²⁴⁸ *Id.*

²⁴⁹ See Tom R. Tyler, *Why People Obey the Law* 6–7 (1990).

²⁵⁰ See Freeman, *supra* note 26, at 563, 574 (summarizing the many reasons scholars approach private governance with suspicion).

²⁵¹ *Id.* at 675. Freeman’s legitimacy discussion was more focused on private institutional actors, such as private prisons and nursing homes funded by Medicaid. *Id.* at 599, 625.

²⁵² *Id.* at 675.

²⁵³ *Id.* at 665.

²⁵⁴ *Cf. id.* (mentioning both supervision by government actors and various means for the public to more directly access the private actors).

Viewed in such a broad manner, employee enforcers become difficult to assess in any generalizable manner. For those seeing administrative agencies as unaccountable, regulatory monitors would offer less accountability than employee enforcers doing the same work. For those more skeptical about corporations' profit motives allowing for safeguarding the public interest, the reverse would be true. In light of these competing priors, a regulatory regime with both employee enforcers and regulatory inspections would offer greater aggregate accountability than relying solely on one of these options.

Further complicating this analysis, the level of accountability will depend on how a particular agency implements a given employee enforcer policy. For instance, compliance mandates can offer more direct accountability if compliance officers must release meaningful reports publicly. Law-related employees also allow for more accountability when they provide for administrative agency monitoring of compliance activity, as many do.²⁵⁵ The more employee enforcers are subject to oversight by a strong administrative agency or public mandates, however, the more their advantages in terms of costs and autonomy would diminish.

Core employees acting voluntarily are perhaps the most removed from clear accountability mechanisms, unless they act through administrative agency regulators or whistleblowing.²⁵⁶ Policies strengthening whistleblower protections—whether for core or law-related employees— increase accountability, in that they allow all to see the governance failures of the regulator or the firm. Indeed, whistleblower policies arguably augment accountability more directly than other approaches because they provide the ultimate window for public visibility.

In short, viewed through the lens of public acceptability, employee enforcers offer means of advancing legitimacy. Doing so through public compliance reporting mandates and regulatory monitors comes with more trade-offs in terms of potentially lowering autonomy than does strengthening whistleblower laws or perhaps other ways of infusing core employees with public power.

2. Procedural Justice

The procedural justice frame views the law's legitimacy not through the lens of the public, but rather through the lens of those subject to the

²⁵⁵ See *supra* Section I.A.

²⁵⁶ See *supra* Section I.A.

law.²⁵⁷ Research suggests that people's perceptions about the legitimacy of a law are heavily influenced not just by the substantive outcome, but also by procedure.²⁵⁸ More specifically, maximizing participants' sense of procedural justice means, by one influential account, giving them an opportunity to have: (1) *voice*, in the sense of having their side of the story heard; (2) *respect*, through authorities treating them with dignity throughout the process; (3) *neutrality*, which refers to decisions being made in an unbiased manner; (4) *understanding*, so that the parties comprehend how decisions are made; and (5) *helpfulness*, meaning that authorities care about the individual's situation. Procedural justice does not mean an absence of punishment or legal authority.²⁵⁹ The procedural justice research suggests, however, that parties are more likely to view an adjudicatory system that has these five features as legitimate, which in turn makes people more likely to obey the law.²⁶⁰

Some of the employee enforcement policies respond to these features of procedural justice. For instance, mandated employee hotlines for complaints allow core employees to voice their ethical concerns.²⁶¹ Whistleblowing protection laws also give employees a greater ability to have their voices heard. And policies to create corporate cultures of compliance often emphasize trainings so that core employees can understand compliance expectations.²⁶²

Solely internal business policies risk falling short of procedural justice in several ways, however. For instance, for a corporation like Wells Fargo, in which the HR and compliance departments appear to have been

²⁵⁷ Cf. Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 Mich. L. Rev. 1817, 1818 (2007) (“[C]ompliance decisions are based at least as much on the perceived legitimacy of the law and prevailing norms in local context as any deliberate risk calculation.”).

²⁵⁸ *Id.*

²⁵⁹ Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 Am. Crim. L. Rev. 267, 268–72 (2014) (acknowledging the relationship between the existence of power and legitimacy).

²⁶⁰ Tyler, *supra* note 249. Others have posited collaborative regulation, responsive regulation, and related models that involve firms in the process for a loosely related set of benefits in terms of the payoff for compliance. See, e.g., Ayres & Braithwaite, *supra* note 18, at 3–5 (outlining a theory of regulation that responds to the specific structure and motivations of industries); Coglianese & Lazer, *supra* note 18, at 695 (“By allowing firms to make their own decisions, managers and employers are more likely to view their own organization’s rules as reasonable, and as a result there may be greater compliance than with government-imposed rules.”); Freeman, *supra* note 18, at 30 (outlining a collaborative model of governance).

²⁶¹ See *supra* Section I.B.

²⁶² See Langevoort, *supra* note 19, at 939.

subjugated to marketing goals, the processes for employee enforcers left no real objective decision-maker for employee complaints about ethics violations.²⁶³ When employees came forward, they were met with arguments about why their concerns were invalid, and many were subsequently fired.²⁶⁴ Consequently, core employees' access to adjudicators outside the corporation, such as regulators, may be crucial for core employees' perceptions of procedural justice. Such access advances procedural justice by giving employees a more neutral arbiter of their ethics concerns, rather than a potentially profit-focused corporate arbiter, such as the compliance department or board of directors.

Taken too far, however, high levels of administrative agency involvement may lessen the procedural justice lens of legitimacy. A heavy emphasis on strict surveillance, policing, and punishment can lower compliance by making employees view the rules as lacking procedural justice.²⁶⁵ Instead, appealing to people's values increases perceptions of legitimacy and subsequent rule following in for-profit businesses.²⁶⁶ Compliance officers and other law-related positions are often described as internal "police" patrolling the halls of the corporation for their colleagues' missteps.²⁶⁷ Administrative agency monitors are also sometimes seen as regulatory police.²⁶⁸ Indeed, compliance officers often struggle for legitimacy within their organizations.²⁶⁹ These insights suggest that a system relying more on core employees' ethical sense and less on compliance officers' and regulatory monitors' policing has greater potential to advance legitimacy.²⁷⁰

²⁶³ See Nelson, *supra* note 3, at 1536–37 (noting that pressure from top management allegedly pushed the opening of millions of fraudulent accounts).

²⁶⁴ *Id.* at 1537 (noting "retribution against objecting employees").

²⁶⁵ Tyler, *supra* note 259, at 289–91.

²⁶⁶ *Id.* at 291.

²⁶⁷ See, e.g., Baer, *supra* note 122, at 555 (describing compliance as "the government's delegation of the police function"); Frankel, *supra* note 122, at 173 (describing compliance officers as "internal police within large organizations").

²⁶⁸ Van Loo, *supra* note 10, at 373–75.

²⁶⁹ David Hess, *Chipping Away at Compliance: How Compliance Programs Lose Legitimacy and Its Impact on Unethical Behavior*, 14 *Brook. J. Corp. Fin. & Com. L.* 5, 9 (2020).

²⁷⁰ Compliance officers and inspectors may be deployed in ways that lessen these issues, to the extent that they are, for instance, given more of an educational rather than a policing role. Thus, to some extent, procedural justice speaks to the design of how each category of employee enforcer is implemented. However, since monitoring is a common function of compliance officers, the current system arguably overall relies too heavily on them. On the monitoring function of compliance officers, see *supra* Section I.B.

These complicated nuances in designing the system should not obscure a simple top-level insight about legitimacy and employee enforcers. If the amount of agency resources is held constant, adding employee enforcers advances legitimacy as viewed by both the aggregate accountability and procedural justice lenses. Aggregate accountability would be increased by the presence of employee enforcers because they would provide additional checks beyond whatever regulatory monitors and enforcement lawyers already provide. And giving private employees a meaningful role in public enforcement improves companies' ability to have a voice and participate actively in the compliance process. Thus, employee enforcers have the potential to advance legitimacy overall—especially when they are designed to emphasize core employees and values rather than policing.

E. A Tentative Assessment of Employee Enforcers

It is now possible to offer a preliminary normative hierarchy for employee enforcers, based on the framework outlined above. Core employees offer the most potential to improve effectiveness, efficiency, private autonomy, and—depending on which version is emphasized—legitimacy. The ideal is for core employees to spot and correct wrongdoing themselves, thereby lessening the need for more costly compliance officer monitoring or formal enforcement proceedings necessitated by the alternatives.

However, the design of the existing employee enforcement architecture mostly fails to support this normative hierarchy. Most importantly, laws do not provide core employees with adequate power. If employees are ignored when they raise ethical concerns within the corporation, their best option is to become a whistleblower. Yet that option is too personally devastating to serve as the primary endgame for a large regulatory apparatus. The perceived historical failures of core employees self-regulating have contributed to policies expanding the least-favored category of employee enforcers: law-related positions.

Indeed, in theory, a well-designed administrative state with more ability to empower core employees could reduce the system's reliance on law-related employees and thereby make regulation more effective and efficient. It would do so by shifting more of the private employee regulatory burden from law-related to core employees. That could save

corporations considerable money spent on law-related employees.²⁷¹ Thus, business-lobbying successes at isolating core employees from public power may have had the unintended consequence of authorities pushing businesses to instead rely more heavily on law-related positions.

The result is a system that almost everyone dislikes. Businesses resent the high costs of law-related positions. The public suspects businesses have captured regulators to serve as agents of profit maximization. And lawmakers are reluctant to fully support a regulatory system that is so widely disdained. In the face of these obstacles, how should policymakers proceed to improve their deployment of private employees as public regulators? We turn to these difficult questions next.

III. NORMALIZING PUBLIC SERVICE IN THE PRIVATE SECTOR

Spurred by concerns that social media platforms are threatening democracy and mental health, energy companies are degrading the environment, and businesses are gaining market power over consumers, legislators are considering a range of new legal rules that could reshape the place of the corporation within society.²⁷² History and pragmatism suggest that corporate employees will inevitably play a major role in those reform efforts.²⁷³ As Part II showed, there is theory and evidence supporting a working hypothesis that the system would benefit from leaning as heavily as possible on core rather than law-related employees.²⁷⁴ To do so, reforms should prioritize giving ethical employees more power and motivation to push their companies away from wrongdoing.

This Part explores options ranging from concrete administrative agency policies for empowering core employees to a broad societal reimagining of what it means to be a private employee. These options are not meant to be comprehensive. The overarching goal is to illustrate a

²⁷¹ There are many factors to consider in determining whether this is the case. For instance, if core employees' time and energy were diverted too extensively from their core job of producing a company's products, these shifts could prove costly in different ways.

²⁷² See, e.g., Stop Wall Street Looting Act, H.R. 3848, 116th Cong. § 503 (2019) (proposing to enhance disclosure requirements for private equity funds); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. §§ 2–4 (2021) (proposing solutions to make it easier to break up dominant technology companies).

²⁷³ See *supra* Part I.

²⁷⁴ See *supra* Part II.

range of reforms worth considering to make serving the public a normal part of private employees' work lives.

A. Normalizing Core Employee-Regulator Communications

Power is critical for governance. Yet too often the regulatory architecture relegates core employees to govern from a position of weakness. Although internal sources of power, such as frontline employee access to the board of directors, have some value,²⁷⁵ the most valuable sources are external to the corporation.²⁷⁶ As a general matter, the more authority administrative agencies have to hold corporations accountable for legal violations, the more power corporate employees will have to advocate internally for following the law—because the monetary consequences of ignoring that advocacy are increased.²⁷⁷ Nonetheless, this Section focuses on policies that would more directly give core employees greater ability to leverage whatever existing power agencies have.

Two of the main sources of external power derive from employees' ability to communicate with regulatory agencies and with the public at large. Ethical employees who lack a voice within their firm should be able to leverage these sources of external power without risking ruining their professional careers or social lives. The first step would be to build more channels of communication between administrative agency employees and business employees. Once contact is established, employees' involvement must be kept confidential. However, if employees' identities do become known, laws should move beyond protecting them from retaliation to supporting them in making a full career and financial recovery. Although state and federal legislatures can push these reforms further, agencies can implement many of the proposals below without legislators' action.²⁷⁸

²⁷⁵ Gadinis & Miazad, *supra* note 189, at 2139.

²⁷⁶ See *supra* Section II.A.

²⁷⁷ See *supra* Section II.A.

²⁷⁸ See *supra* note 245 and accompanying text. Of course, the bounds of agency discretion are in flux due to recent Supreme Court jurisprudence. See, e.g., *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). Yet much of this Section's proposals are the kind of internal administrative law that has not been the subject of such judicial review for agency discretion, and is not, at least so far, the focus of the Court's recent curtailing of agency discretion. *Id.* Thus, while the Court's future limitations on agency discretion are unknown, many if not all of the proposals in this Section would not immediately be in jeopardy.

I. Access to Agencies

Administrative agency acquisition of information is widely regarded as the “lifblood” of public governance.²⁷⁹ Businesses routinely share information at the entity level with regulators, such as safety logs, financial data, and compliance reports.²⁸⁰ Less attention has been paid, however, to how corporate employees’ ability to share information with regulators may also be key to private governance.²⁸¹ By sharing information with a regulator, even a low-level employee can harness public authority to rein in chief executive officers of the most powerful corporations.²⁸²

When agencies communicate with regulated entities, such as for inspections, they tend to defer to the business on which employee to contact.²⁸³ The business typically must simply designate a knowledgeable point of contact for the government inspector.²⁸⁴ This allows unethical managers to hide employees, as Theranos routinely did during scheduled government inspections that might have otherwise discovered the company’s illegal laboratories.²⁸⁵

Businesses also discourage regulatory contact in several ways. For instance, they widely include nondisclosure agreements (“NDAs”) in employment contracts, which state that the employee will be subject to termination and legal liability for disclosing information to anyone outside of the company.²⁸⁶ These contracts sometimes explicitly mention

²⁷⁹ Cary Coglianese, Richard Zeckhauser & Edward Parson, Seeking Truth for Power: Informational Strategy and Regulatory Policymaking, 89 Minn. L. Rev. 277, 277 (2004); see id. at 279, 281–85; Matthew C. Stephenson, Information Acquisition and Institutional Design, 124 Harv. L. Rev. 1422, 1423 (2011).

²⁸⁰ See generally Van Loo, *supra* note 10 (summarizing the many ways that businesses routinely must submit information to large regulators).

²⁸¹ This topic has usually been approached from the opposite perspective—agencies’ ability to collect information. Also, the literature has mostly focused on information collection for policymaking rather than enforcement. See Coglianese et al., *supra* note 279, at 300–01.

²⁸² This is inherent in whistleblowers’ power and past successes. See *supra* Section II.A.

²⁸³ For instance, the FTC often preserves in its enforcement settlement orders the ability to speak with willing employees, which oddly implies that it would not otherwise be able to do so. See Decision at 15, BASF SE, BASF Corp. & Diem Labs, LLC, No. C-4745, 2021 WL 2379534 (F.T.C. June 1, 2021).

²⁸⁴ For example, the SEC requires that Registered Investment Advisers “[d]esignate an individual (who is a supervised person) responsible for administering the [compliance] policies and procedures . . .” 17 C.F.R. § 275.206(4)-7(c) (2025).

²⁸⁵ Carreyrou, *supra* note 2, at 189–90.

²⁸⁶ See Orly Lobel, NDAs Are Out of Control. Here’s What Needs to Change, Harv. Bus. Rev. (Jan. 30, 2018), <https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-ch>

that the employee should not communicate with regulators,²⁸⁷ but even more general nondisclosure provisions can “have a chilling effect on communications . . . about matters of regulatory significance.”²⁸⁸ Another area of law used for similar purposes is trade secrecy, which, by some accounts, businesses have transformed into an “all-purpose seclusion doctrine.”²⁸⁹

Employers can leverage these areas of law from the first sign that a core employee may be considering revealing information to outsiders. For instance, early on, Theranos’s lawyers threatened to sue whistleblowers for violating cease-and-desist orders and divulging trade secrets.²⁹⁰ HR departments also use company policies to ensure secrecy, as illustrated by one investment fund’s training materials stating that “[e]mployees are also strictly prohibited from initiating contact with any Regulator without prior approval from the Legal or Compliance Department.”²⁹¹ In short, regulatory agencies’ passivity and businesses’ aggression combine to limit employee access to regulators.

There should not be so many barriers for ethically minded workers to share information. At a minimum, businesses should be forbidden from discouraging employees from sharing incriminating information with regulatory agencies, including through menacing nondisclosure contract language. The SEC and the Nuclear Regulatory Commission have written rules prohibiting such practices.²⁹² The SEC has actively enforced its anti-silencing rule, even when there was no evidence the company had

ange [<https://perma.cc/7BY4-2UNM>] (“New data shows that over one-third of the U.S. workforce is bound by an NDA.”).

²⁸⁷ These practices prompted the SEC to write a rule prohibiting them. 17 C.F.R. § 240.21F-17 (2025).

²⁸⁸ Preserving the Free Flow of Information to the Commission, 55 Fed. Reg. 10397, 10398 (Mar. 21, 1990); Coglianese et al., *supra* note 279, at 300.

²⁸⁹ Charles Tait Graves & Sonia K. Katyal, *From Trade Secrecy to Seclusion*, 109 *Geo. L.J.* 1337, 1337, 1365 (2021); see also Amy Kapeczynski, *The Public History of Trade Secrets*, 55 *U.C. Davis L. Rev.* 1367, 1371 (2022) (explaining the origins and abuse of trade secret laws); Christopher J. Morten, *Publicizing Corporate Secrets*, 171 *U. Pa. L. Rev.* 1319, 1322–23 (2023).

²⁹⁰ Carreyrou, *supra* note 2, at 250–51; see also Graves & Katyal, *supra* note 289, at 1341 (“A company [can] file[] a lawsuit for trade secret misappropriation when a whistleblower retains files in order to report a potential Sarbanes-Oxley Act violation.”).

²⁹¹ Guggenheim Sec., LLC at 2, Exchange Act Release No. 92237, 2021 WL 2581714 (June 23, 2021) (citation omitted).

²⁹² 10 C.F.R. § 30.7(f) (2025); 17 C.F.R. § 240.21F-17 (2025).

enforced a nondisclosure agreement.²⁹³ A recent study found that state laws weakening NDAs led to more employees sharing negative information “about legal issues and corporate social responsibility.”²⁹⁴ Agencies with existing authority should deter the silencing of employees, and broad legislation would be sensible.

Yet even without nondisclosure agreements, employees may still be unsure of what they are allowed to share and with whom without running afoul of trade secrecy laws. A stronger policy response would thus be to require businesses to actively communicate employees’ freedom to speak to regulators. Businesses might be required to clarify to employees that they are not violating NDAs or trade secrecy laws if they are reporting ethical concerns to regulators. Additionally, employment contracts should be required to specify an exemption for ethical concerns shared with regulators in any text that references confidentiality.

Agencies could also more actively solicit information from employees beyond those hand-selected by the business. To maximize participation and trust, it would be ideal to design various channels of agency communication that would give employees confidentiality and legal protection. One option would be for agencies to offer online tip portals, email addresses of agency inspectors, and hotlines. The FTC and the Consumer Financial Protection Bureau (“CFPB”), for instance, have online databases for consumers to submit complaints, but they do not solicit employee tips to help identify consumer protection violations.²⁹⁵ Solely improving regulatory access—or awareness of existing access options—has in some contexts improved detection of wrongdoing.²⁹⁶ Agencies could make complaint portals or email addresses more readily

²⁹³ Public and Private Companies Beware—Don’t 21(F)umble Your Employment and Separation Agreements, Maynard Nexsen (Oct. 2, 2023), <https://www.maynardnexsen.com/publication-public-and-private-companies-beware-dont-21-f-umble-your-employment-and-separation-agreements> [https://perma.cc/XR25-AB53].

²⁹⁴ Cameron Holstead, June Huang & Jedson Pinto, Employee Non-Disclosure Agreements and Corporate News 22–23 (Apr. 2025) (unpublished manuscript), <https://erm.ncsu.edu/wp-content/uploads/sites/41/2025/05/PAPER-2-Employee-Non-Disclosure-Agreements-and-Corporate-News-by-HOSTEAD-HUANG-PINTO.pdf> [https://perma.cc/7LDM-GTXR].

²⁹⁵ See Angela Littwin, Why Process Complaints? Then and Now, 87 Temp. L. Rev. 895, 895 (2015) (describing the CFPB’s online database for consumer complaints).

²⁹⁶ See, e.g., John F. Fullerton III, OSHA Introduces On-Line Filing Tool to Facilitate More Whistleblower Complaints, Epstein Becker Green: Workforce Bull. (Dec. 23, 2013), <https://www.workforcebulletin.com/osha-introduces-on-line-filing-tool-to-facilitate-more-whistleblower-complaints> [https://perma.cc/5F97-9GMH] (reporting a sharp increase in tips following implementation of a complaint tool and outreach).

available for employees, whether through direct contact or by asking businesses to mention access options in training materials or other internal communications.

The agency discussion so far has focused on ways to encourage employees to initiate contact with regulators. Regulatory agencies should also initiate contact with business employees. Agencies might, for instance, send anonymous surveys, giving employees the chance to identify specific issues or raise general concerns about a company's unethical culture, thereby alerting regulators to companies that need greater scrutiny.

Contact can even be cultivated by individuals within agencies, rather than as part of a systemic program. Since the core of administrative regulatory power is the frontline inspector or examiner wielding considerable discretion, one way to further integrate employees into the regulatory process would be for frontline regulatory monitors to take initiative. Inspectors might informally speak with employees upon bumping into someone in the cafeteria or elsewhere.²⁹⁷ Or they might more formally ask for lists of core employees whose work relates to the agency's mission. The inspector could then randomly select employees to ask if they might be interested in voluntary, anonymous conversations. Such conversations should probably be limited to what employees have observed others doing, in order to make employees less nervous about participating. The employer might even be enlisted to tell the employee to respond to such communications in as helpful a manner as possible. Even if most employees decline to share information, those employees with significant ethical concerns would at least have the option.

Former employees may be another valuable source of information, especially in the face of a ruthlessly unethical business. Theranos and Wells Fargo, for instance, fired employees who internally raised ethical concerns, and then used their legal departments to frighten those employees into silence.²⁹⁸ As part of routine monitoring, administrative agencies might randomly select former employees for voluntary interviews. Besides the valuable information they might yield, such programs could cause managers to reconsider firing employees for raising ethical concerns.

²⁹⁷ Interview with Former CFPB Employee (Feb. 6, 2023) (on file with author).

²⁹⁸ See Carreyrou, *supra* note 2, at 196–97, 250–51, 281; Martinez, *supra* note 45, at 290.

Thus, despite recognizing that employees are valuable sources of tips, many administrative agencies have yet to capitalize fully on that informational opportunity. Expanding the lines of communication would amplify employee enforcers' voices within the firm by making it more likely that their ethical advocacy reaches an external source of power.

2. Confidentiality

Because information from employees is so vital to regulation, and because employees risk severe repercussions for divulging information, confidentiality should be a central part of all employee disclosure programs. The current lack of confidentiality discourages people from becoming whistleblowers, with studies finding that many whistleblowers later say, "If I had to do it over again, I wouldn't."²⁹⁹ Confidentiality would thus presumably encourage more employees to share information with regulators about illegality. Moreover, since employers often fire employees who divulge information to regulators,³⁰⁰ confidentiality would have the benefit of keeping more ethical employees inside businesses.

Regulators generally understand that confidentiality is important.³⁰¹ Consequently, the Dodd-Frank Act of 2010 took the unusual step of offering complete confidentiality to employees who blow the whistle for securities fraud.³⁰² Even when paying multiple millions of dollars in rewards, the SEC has consistently protected whistleblowers' identities.³⁰³ Oddly, however, the Dodd-Frank Act did not provide the same confidentiality protections to those who might report violations of consumer financial protection laws, even though the statute covered that area as well.³⁰⁴ Many other important whistleblowing statutes—such as those covering environmental pollution—do not provide confidentiality

²⁹⁹ Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. Fin. 2213, 2216 (2010); see also Alford, *supra* note 8, at 1 (concluding that almost all whistleblowers "say they wouldn't do it again").

³⁰⁰ See Coglianesi et al., *supra* note 279, at 296.

³⁰¹ *Id.* at 299 (observing that regulators understand the importance of confidentiality).

³⁰² 15 U.S.C. § 78u-6(h).

³⁰³ See, e.g., Whistleblower Confidentiality, Nat'l Whistleblower Ctr., <https://www.whistleblowers.org/whistleblower-confidentiality> [<https://perma.cc/S9SY-D39Q>] (last visited Jan. 7, 2026) (discussing the SEC's track record of confidentiality).

³⁰⁴ See 12 U.S.C. § 5567.

protections.³⁰⁵ Without statutory protections for confidentiality, court proceedings often reveal the whistleblower's identity.³⁰⁶

The picture that emerges here is that employee enforcers will be given the greatest protection when they are helping investors—who are disproportionately wealthy.³⁰⁷ Another way of stating this is that the law incentivizes and protects whistleblowers most when they serve shareholder primacy. Yet when an employee is whistleblowing in the public interest, such as to protect the environment or consumers, they risk ruining their lives.

Moving forward, confidentiality protections should be part of laws and policies enlisting employee enforcers. To the extent that such confidentiality is not possible, agencies should also, wherever possible, seek to obtain evidence independent of the employee's tip, thus avoiding the risk that a court order will unseal an informant's identity. These practices would shift away from requiring ethical employees to choose between serving the public interest and alienating their professional community.

3. Beyond Whistleblower Protection

When it is not possible to keep the identities of employee enforcers confidential, laws should, whenever possible, insulate them from the consequences of retribution. Scholars have exhaustively covered the shortcomings of whistleblowing statutes and how to improve them, often focusing on the crucial issue of protecting workers from retaliation by employers.³⁰⁸ One main purpose of this Section is to argue that

³⁰⁵ See Christopher K. Warren, Note, *Blowing the Whistle on Environmental Law: How Congress Can Help the EPA Enlist Private Resources in the Fight to Save the Planet*, 42 B.C. Env't Affs. L. Rev. 195, 224 (2015); Occupational Safety & Health Admin., OSHA Fact Sheet: Filing Whistleblower Complaints Under the *Clean Air Act* (2015), <https://www.osha.gov/sites/default/files/publications/OSHA3784.pdf> [<https://perma.cc/627Q-D63K>] (outlining various environmental whistleblower protections but providing no confidentiality protection).

³⁰⁶ See, e.g., *Can I Remain Anonymous as a Whistleblower?*, Hagens Berman, <https://www.hbslaw.com/whistleblower/can-i-remain-anonymous-as-a-whistleblower> [<https://perma.cc/B3Q3-K368>] (last visited Jan. 7, 2026) (“The reality is that, in False Claims Act cases, a whistleblower's identity is likely to become known at some point.”).

³⁰⁷ See Karen E. Dynan, Jonathan Skinner & Stephen P. Zeldes, *Do the Rich Save More?*, 112 J. Pol. Econ. 397, 416 tbl. 3 (2004).

³⁰⁸ See, e.g., Boles et al., *supra* note 177, at 151 (showing that employees who share information about compliance violations “are often left unprotected by law and are vulnerable to retaliatory acts such as termination or demotion”); West & Bowman, *supra* note 1, at 120 (reviewing whistleblower laws and their shortcomings).

strengthening whistleblowing statutes may be even more important than commonly realized, in light of the role that whistleblowers play in the broader employee enforcer architecture outlined in this Article. The other purpose is to posit that more than simply protections are needed.

Strong whistleblowing statutes are valuable for the familiar reasons that whistleblowers are performing a vital public service and doing so will incentivize future whistleblowers.³⁰⁹ Beyond these straightforward rationales, whistleblower protections are also crucial because whistleblowing is the ultimate source of external power for core employees who simply want to get their company to do the right thing and then go on with their job.³¹⁰ Even regulators with tremendous statutory authority may fail to provide comparable power, especially since they are sometimes under-resourced and vulnerable to industry influence.

By extending public authority to private employees, whistleblower laws can make corporate managers more likely to listen when employees routinely take ethical stands. Without whistleblower protections, managers that are overly focused on profit may calculate that employees are unlikely to do anything about their concerns due to a fear of repercussions. Moreover, employees who believe their voices will be heard would be more likely to say something, creating a virtuous cycle between ethical employees' power and motivation. Thus, by improving core employees' external power, the system can greatly improve its self-governance even if it rarely comes to that point.

Although most proposals for reforming whistleblower laws focus on protecting employees from retaliation, retaliation is still prevalent, even in the face of strong anti-retaliation laws.³¹¹ Once retaliation happens, it can prove devastating to whistleblowers, even if the employee ultimately prevails in an anti-retaliation lawsuit.³¹² Additionally, in some instances it may be difficult to maintain confidentiality, such as if only a few employees know of the wrongdoing. Thus, when confidentiality is unavailable—and to provide additional support—policies should consider how to lessen the impact that retaliation has on the employee.

The most direct way to provide financial security is to offer rewards, or bounties, for whistleblowing. There is “an abundance of empirical and experimental evidence that reward programs are effective at increasing

³⁰⁹ West & Bowman, *supra* note 1, at 120, 122–23.

³¹⁰ See *supra* Section II.A.

³¹¹ See sources *supra* note 8.

³¹² See sources *supra* note 8.

detection and deterrence of wrongdoing.”³¹³ More generous rewards for employee information exposing legal violations should be considered in other areas, such as consumer protection. Rewards can be made available only once the employee has attempted to pursue internal options, but research suggests that external rewards do not undermine effective internal complaint processes.³¹⁴

There is evidence suggesting that even indirect post-whistleblowing support can make a meaningful difference. In one study, state-level increases in unemployment insurance—which lessen the costs of losing one’s job—were found to have significantly increased employees’ willingness to report workplace safety violations.³¹⁵ Moreover, the companies subsequently had fewer workplace accidents, suggesting that the employees’ increased complaints led to internal improvements in workplace safety.³¹⁶ These findings indicate that giving workers a sense that they will have additional financial security after retaliation can encourage more effective whistleblowing. Such support may be particularly important for lower- and middle-income workers with lower savings.³¹⁷

These insights indicate how administrative agencies or lawmakers might create programs to help insulate whistleblowers. For instance, agencies with job openings could actively consider hiring whistleblowers

³¹³ Theo Nyreröd & Giancarlo Spagnolo, A Fresh Look at Whistleblower Rewards, 10 *J. Governance & Regul.* (Special Issue) 248, 256 (2021); see also Jacob Raleigh, The Deterrent Effect of Whistleblowing on Insider Trading, 59 *J. Fin. & Quantitative Analysis* 3739, 3739–40, 3764 (2024); Platt, *supra* note 59, at 702, 721 (discussing the SEC’s whistleblower program); U.S. Sec. & Exch. Comm’n, *supra* note 62, at 2 (showing a seventy-six percent increase in whistleblower tips between fiscal years 2020 and 2021). However, doing so risks undermining the ethical motivations of employees. See Yuval Feldman & Orly Lobel, The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality, 88 *Tex. L. Rev.* 1151, 1155 (2010) (finding experimental evidence that paying whistleblowers might lessen motivations to come forward out of an intrinsic sense of duty); *infra* Section III.B (emphasizing and summarizing the literature on the importance of intrinsic motivations).

³¹⁴ Indeed, there is evidence that whistleblowing rewards provide incentives to improve internal processes. Wiedman & Zhu, *supra* note 174, at 2715.

³¹⁵ Jonas Heese & Gerardo Pérez-Cavazos, The Effect of Retaliation Costs on Employee Whistleblowing, 71 *J. Acct. & Econ.* 1, 2 (2021).

³¹⁶ *Id.* at 3.

³¹⁷ Protecting against retaliation and awarding bounties can help. In the case of the False Claims Act, which has anti-retaliation and financial rewards, whistleblowers are mostly able to preserve their careers. Dey et al., *supra* note 8, at 1692–93 (finding whistleblowers’ incomes were only 7.3% to 8.6% lower, and that 52% found a job better or equivalent to their previous employment).

who have lost their jobs. Agencies could also informally help ostracized whistleblowers find jobs in other government agencies or in the large sphere of private contractors that perform various government services.³¹⁸ Such policies would amount to a kind of “Private Employee Witness Protection Program,” akin to witness protection programs that have aided criminal prosecutions by inspiring government cooperation in communities otherwise “gridlocked with fear.”³¹⁹

To be clear, public whistleblowing is not without its flaws. One challenge is that the conduct is sometimes not necessarily illegal and not everyone would agree that it is unethical. Yet decades of research has shown that whistleblowers are not crackpots and are instead associated with positive traits, such as strong moral conviction, above-average performance, and high organizational commitment.³²⁰ At a minimum, when such employees come forward, it would be ideal to allow for borderline claims to be assessed by a more neutral party, such as a regulator, judge, or the public, rather than a potentially biased manager.

Another limitation of whistleblowing is that those willing to blow the whistle are often perceived as difficult to manage, at least by their employers. Yet decades of research has shown that whistleblowers, despite the extreme personal risks, tend to have extreme personalities.³²¹ One of the advantages of making whistleblowing more accessible, however, would be to make it something that more normal employees would pursue. If employees do not need to risk losing their jobs and communities, more employees without extreme personalities would potentially be willing to blow the whistle.

³¹⁸ For examples of private actors recommended by regulators, see Veronica Root Martinez, *Public Reporting of Monitorship Outcomes*, 136 *Harv. L. Rev.* 757, 768, 774–76 (2023).

³¹⁹ See Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 *Yale L.J.* 2236, 2286 (2014) (quoting Gary Gately, *Baltimore Struggles to Battle Witness Intimidation: Prosecutors Say Violence, Threats Hinder Testimony*, *Bos. Globe*, Feb. 12, 2005, at 3 (discussing witness protection programs in urban crime settings)). Some corporate cultures, like that of Wells Fargo, have similarly been described as instilling significant fear in employees of ruthless retaliation. See Chris Arnold, *Former Wells Fargo Employees Describe Toxic Sales Culture, Even at HQ*, *NPR* (Oct. 4, 2016, at 05:04 ET), <https://www.npr.org/2016/10/04/496508361/former-wells-fargo-employees-describe-toxic-sales-culture-even-at-hq> [<https://perma.cc/2VA8-JB3P>] (providing employee accounts of Wells Fargo management).

³²⁰ See, e.g., Janet P. Near & Marcia P. Miceli, *Whistle-Blowing: Myth and Reality*, 22 *J. Mgmt.* 507, 515 (1996) (“[T]here is no evidence that whistle-blowers are typically crackpots.”).

³²¹ Sebastian Oelrich & Anne Chwolka, *When Deviants Talk: The Role of Dark Triad Traits and Moral Reasoning in Whistleblowing*, 35 *J. Mgmt. Control* 333, 357–58 (2024).

Thus, despite limitations, in light of the importance of whistleblowing to the regulatory architecture, policymakers should consider investing in whistleblowing for other spheres in line with what has happened at the SEC. Multiple empirical studies have found that increased SEC bounties, confidentiality, and other whistleblower support reduced the risk of fraud, deterred insider trading, and improved detection of legal violations.³²² The proposals outlined above—access to agencies, confidentiality, and post-whistleblowing support—offer ways to strengthen the endgames of ethical employees. In so doing, they would enable the regulatory system to rely less on law-related employees by increasing core employees' day-to-day power within the firm.

B. Reviving a Public Calling in the Private Sector

Beyond concrete policies such as those explored above, an independent way to potentially increase core employees' contributions is for more of them to self-identify as meaningful actors in steering their businesses toward the public good. This identity could increase private employees' motivation to act and, secondarily, could add power by providing more of a critical mass of allies or open minds within the corporation when ethical individuals raise concerns. One challenge with widespread adoption of such an identity is the dominant concept of corporate employees as having a primary duty to shareholders, which implies an overriding duty to maximize profits. Thus, while employees could themselves decide to shift their identity, it would also help for societal norms to shift toward seeing corporate employees as having not only private, but also public duties.

A public role for corporate employees is not as radical as it may at first appear. Indeed, it arguably returns the corporation to its public service roots.³²³ Centuries ago, the first corporations set up universities, hospitals, and other institutions for the public good.³²⁴ The common law also long

³²² Wiedman & Zhu, *supra* note 174, at 2714; Philip G. Berger & Heemin Lee, Did the Dodd-Frank Whistleblower Provision Deter Accounting Fraud?, 60 *J. Acct. Rsch.* 1337 (2022) (finding that the Dodd-Frank whistleblower program led to a decrease in accounting fraud); Raleigh, *supra* note 313, at 3739–40, 3742–43.

³²³ See, e.g., George Shepherd, Not Just Profits: The Duty of Corporate Leaders to the Public, Not Just Shareholders, 23 *U. Pa. J. Bus. L.* 823, 835 (2021) (“[F]or the first decades after the U.S. was founded, corporations were required to promote the public interest.”).

³²⁴ See *id.* at 835–36; John A. Powell & Stephen Menendian, Beyond Public/Private: Understanding Excessive Corporate Prerogative, 100 *Ky. L.J.* 83, 89 (2011) (noting the corporations chartered in the colonial era “were public entities, operating to serve the public and the interests of the state”).

treated barbers, surgeons, ferry operators, innkeepers, and other occupations as having a public calling.³²⁵ That public calling meant that the law imposed a heightened “duty upon one undertaking any sort of business or activity . . . [that] invited the public trust.”³²⁶ Arguably, this public calling is at the roots of core private law doctrines of contracts and torts.³²⁷ Regardless, even as the economy shifted to rely increasingly on large corporations, throughout most of the 1900s, large companies such as General Electric saw themselves as having a civic ethos “characteristic of other non-market entities, including hospitals, universities, foundations, and even government agencies.”³²⁸

Seeing private employees as having public duties is also descriptive of today’s corporation. Law-related positions most clearly implicate public duties, with scholars comparing in-house lawyers who manage compliance programs to “[p]rivate attorneys general”³²⁹ and HR managers to “judges.”³³⁰ On a deeper level, internal business decisions shape the law, a concept known as legal endogeneity.³³¹ For instance, the practices that HR managers implement within organizations—such as the structure for handling sexual harassment complaints—can establish norms that inform how judges later apply employment laws to other companies.³³² As a descriptive matter, this means that private employees are, at times, constructing law—an archetypical public undertaking.

³²⁵ Gilad Mills, *Public Callings in the Fourth Industrial Revolution: Time-Tested Remedies for an Age of Digital Disruption*, Yale L. & Pol’y Rev. (forthcoming 2026) (manuscript at 21–22), <https://ssrn.com/abstract=5368876> [<https://perma.cc/3XV2-YJMR>]; 1 Thomas Atkins Street, *The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law 182–85* (1906); Oliver Wendell Holmes, Jr., *The Common Law* 148, 170, 183–85 (Harvard Univ. Press 2009) (1881).

³²⁶ William H. McBratney, *The Doctrine of Public Calling*, 1952 Wash. U. L.Q. 239, 240.

³²⁷ *Id.* at 240–41.

³²⁸ Nelson Lichtenstein, *Two Cheers for Vertical Integration: Corporate Governance in a World of Global Supply Chains*, in *Corporations and American Democracy* 329, 335 (Naomi R. Lamoreaux & William J. Novak eds., 2017); see also Roland Marchand, *Where Lie the Boundaries of the Corporation? Explorations in “Corporate Responsibility” in the 1930s*, 26 *Bus. & Econ. Hist.* 80, 80 (1997).

³²⁹ See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 342 (2007) (citation omitted).

³³⁰ François S. De Kock, Filip Lievens & Marise Ph. Born, *The Profile of the ‘Good Judge’ in HRM: A Systematic Review and Agenda for Future Research*, 30 *Hum. Res. Mgmt. Rev.*, June 2020, at 1, 2.

³³¹ Lauren B. Edelman, Gwendolyn Leachman & Doug McAdam, *On Law, Organizations, and Social Movements*, 6 *Ann. Rev. L. & Soc. Sci.* 653, 663 (2010).

³³² See *id.*

Finally, the growth of worker movements suggests that many employees may increasingly view themselves as having a public calling. Whereas labor strikes traditionally advocated for the workers' interests in higher pay or better working conditions, employees now advocate for their employer to refrain from engaging in harmful conduct.³³³ Employee protests at both large and small technology companies, including Amazon, Apple, and Tesla, have promoted issues ranging from environmental causes to the cessation of selling artificial intelligence to governments for use in drone strikes.³³⁴ It is a testament to the public spirit of many private sector employees that, despite lacking support from the law, they continue to try to uphold it. Thus, overall, seeing corporate employees as having a public calling has descriptive power.

Finally, a public calling increasingly fits with evolving conceptions of corporate governance. At first, a public calling may appear in tension with the notion of shareholder primacy that has dominated corporate governance for decades.³³⁵ Many, if not most, executives believe that they "have a high calling to generate shareholder wealth."³³⁶ Yet shareholder primacy has never meant that employees should break the law or allow others to do so.³³⁷ Employees advocating for legal conduct are therefore not inherently in conflict with shareholder primacy.

Still, as mentioned above, many assume that managers, aided by attack-dog lawyers, will simply pressure publicly minded employees away from society's interests.³³⁸ That assumption envisions a command-and-control corporate hierarchy driven by the CEO and senior managers.³³⁹ Those

³³³ Fan, *supra* note 24, at 1026.

³³⁴ JS Tan, Nataliya Nedzhvetskaya & Wynnie Chan, 2021: A Year of Resilience in Tech, *Collective Action in Tech* (Jan. 3, 2022), <https://collectiveaction.tech/2022/2021-a-year-of-resilience-in-tech> [<https://perma.cc/MG4K-LA27>]; Scott Shane & Daisuke Wakabayashi, 'The Business of War': Google Employees Protest Work for the Pentagon, *N.Y. Times* (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/technology/google-letter-ceo-pentagon-project.html>; David F. Larcker, Brian Tayan & Stephen A. Miles, *Protests from Within: Engaging with Employee Activists*, *Harvard L. Sch. F. on Corp. Governance* (Mar. 24, 2021), <https://corpgov.law.harvard.edu/2021/03/24/protests-from-within-engaging-with-employee-activists> [<https://perma.cc/AC9P-VL39>].

³³⁵ See, e.g., Langevoort, *supra* note 6, at 384 (summarizing the history of shareholder primacy).

³³⁶ Langevoort, *supra* note 19, at 962.

³³⁷ *Id.*

³³⁸ Cf. Langevoort, *supra* note 155, at 1698 (summarizing and questioning this view).

³³⁹ See, e.g., Michael E. Murphy, *Assuring Responsible Risk Management in Banking: The Corporate Governance Dimension*, 36 *Del. J. Corp. L.* 121, 148–49 (2011) (discussing

assumptions, if true, would suggest substantial limits to what publicly minded employees might accomplish.

There is good reason to question these assumptions, however. Much of corporate decision-making resides in economic gray areas, leaving the profit-maximizing move unclear.³⁴⁰ For instance, a business that decides to pay higher wages immediately increases costs, but may nonetheless increase profits by obtaining more loyal, motivated, and skilled employees.³⁴¹ As another example, research suggests that about half of all transactions for mergers and acquisitions fail.³⁴² The legal standard required of a corporation is also often unclear, making it difficult to know what conduct is economically wise because it avoids costly liability lawsuits.³⁴³ Additionally, the largest organizations are so vast, with multiple layers of command between the CEO and frontline employees, that they may pose management difficulties even if done with the best of intentions.³⁴⁴ Moreover, even in small firms, low- and mid-level professionals often wield considerable influence on decisions, in part due to their superior expertise and knowledge of details.³⁴⁵

Once the firm's legal, economic, and organizational indeterminacy is recognized, the notion that a firm's executives can systematically direct all employees toward the profit-maximizing, legal bare minimum becomes unrealistic. Instead, a vast domain of gray area and nonhierarchical decision-making allows for many different actors to push

regulation presuming "an older, hierarchical model of the corporation, requiring harsh regulatory discipline of corporate executives").

³⁴⁰ See, e.g., Rico Merkert & Hassan Swidan, *Flying With(out) a Safety Net: Financial Hedging in the Airline Industry*, *Transp. Rsch. Part E*, July 2019, at 206, 206 (examining complexities of balancing risk management). Entrepreneurs can exploit legal gray areas in various ways, including to reshape the law in their favor. Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 *S. Cal. L. Rev.* 383, 390 (2017).

³⁴¹ Wayne F. Cascio, *Decency Means More than "Always Low Prices": A Comparison of Costco to Wal-Mart's Sam's Club*, 20 *Acad. Mgmt. Persps.* 26, 28 (2006) (summarizing Costco's business model).

³⁴² Nicole Zadrazil, Othmar Lehner & Heimo Losbichler, *The Crucial Role of Time in M&A Activities: An Inductive Exploration*, 13 *J. Mod. Acct. & Auditing* 350, 350 (2017).

³⁴³ See, e.g., Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 *Harv. L. Rev.* 1214, 1234 (2010) (discussing the breadth of regulatory standards).

³⁴⁴ See, e.g., Jeremy C. Kress, *Solving Banking's "Too Big to Manage" Problem*, 104 *Minn. L. Rev.* 171, 190–91 (2019) (recognizing the managerial difficulties in large financial institutions).

³⁴⁵ See Evans & Silbey, *supra* note 163, at 2041.

the firm toward prosocial behavior without violating the fiduciary duty to maximize shareholder profits.³⁴⁶

The empirical literature does not allow for drawing strong conclusions about precisely what kind of social movement, organizational messaging, or professional identity would encourage corporate employees to engage in widespread prosocial behavior.³⁴⁷ The evidence does, however, offer some cause for hope.³⁴⁸ In particular, preliminary research suggests that appealing to people's values can promote compliance.³⁴⁹ Additionally, roles and narratives significantly influence individual behavior,³⁵⁰ and the narratives that employees adopt are influenced by how society perceives their roles.³⁵¹ Changing societal narratives and causing people to associate their jobs with values thus has some potential to influence behavior.

Unlike the task of empowering employee enforcers, however, encouraging a shift in societal norms has a less clear institutional path to actualization. A super-statute strengthening access, confidentiality, and protections across a wide range of industries could help to reinforce the normalcy of core employees acting in the public interest.³⁵² Yet even if

³⁴⁶ See, e.g., Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. Pa. J. Bus. L. 675, 681 (2009) (summarizing the business judgment rule's low bar).

³⁴⁷ See *supra* Section II.A.

³⁴⁸ See Langevoort, *supra* note 155, at 1697–98 (summarizing the evidence pointing in competing directions).

³⁴⁹ Tyler, *supra* note 259, at 291.

³⁵⁰ Kim, *supra* note 49, at 1029; Edelman et al., *supra* note 331, at 653; Alain Cohn, Ernst Fehr & Michel André Maréchal, *Business Culture and Dishonesty in the Banking Industry*, 516 *Nature* 86, 86 (2014); Daniel J. Benjamin, James J. Choi & Geoffrey Fisher, *Religious Identity and Economic Behavior*, 98 *Rev. Econ. Stat.* 617, 621 (2016).

³⁵¹ See Jane Collier & Rafael Esteban, *Corporate Social Responsibility and Employee Commitment*, 16 *Bus. Ethics* 19, 20 (2007); Bilal Afsar & Waheed Ali Umrani, *Corporate Social Responsibility and Pro-Environmental Behavior at Workplace: The Role of Moral Reflectiveness, Coworker Advocacy, and Environmental Commitment*, 27 *Corp. Soc. Resp. & Env't Mgmt.* 109, 109 (2020). As Sung Kim has argued, the ideologies associated with one's role "constitute nontrivial ex ante situational influences that define the universe of socially acceptable norms for that role, to whom or what the lawyer is accountable, and what degree of alignment to (or independence from) the de facto principal is socially appropriate." Kim, *supra* note 49, at 1012; see *id.* at 1026–34. For a sense of the longer tradition of exploring the role ideologies of lawyers, see Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Hum. Rts.* 1, 14 (1975).

³⁵² See *supra* Section III.A (proposing such reforms); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *Duke L.J.* 1215, 1215–16 (2001).

the political landscape allowed for such legislation,³⁵³ it is not clear that it would cause a broad conceptual shift in how society views corporate employees.

Another institutional path would be to infuse more of a public orientation into private professional associations. For instance, the certification processes for various careers, such as engineers and scientists, might emphasize more of a public duty. To some extent, this already happens through the professional associations of many privacy officers, HR managers, certified public accountants, lawyers, and other law-related employees whose professional identities are reinforced through annual conferences, licensing, and codes of ethics.³⁵⁴ Taking an oath of honesty has been shown to increase truth-telling.³⁵⁵ Declarations made as part of becoming a member of a trade association may thus hold some value. One hypothesis worth exploring would be whether core employees with greater ethical components to their education or professional associations might one day have influence more like in-house attorneys, who often add integrity to companies' decision-making.³⁵⁶

³⁵³ Although unlikely, legislation is not inconceivable since industry could see it as preferable to alternatives by lowering costs and preserving autonomy. See *supra* Sections II.B–C.

³⁵⁴ See Code of Ethics, Soc’y for Hum. Res. Mgmt., <https://www.shrm.org/about-shrm/page/s/code-of-ethics.aspx> [<https://perma.cc/CF4L-3Q9B>] (last updated Apr. 24, 2023) (calling on HR association members to “foster a trusting work environment free of harassment, intimidation, and unlawful discrimination”); see also Thomas N. Garavan & David McGuire, *Human Resource Development and Society: Human Resource Development’s Role in Embedding Corporate Social Responsibility, Sustainability, and Ethics in Organizations*, 12 *Advances Developing Hum. Res.* 487, 492–93 (2010) (emphasizing the ethical impulse and identity of many HR professionals); see, e.g., *Licensure Requirements*, Va. Bd. of Acct., <https://boa.virginia.gov/individual-cpas/initial-license/> [<https://perma.cc/29VU-LMEA>] (last visited Jan. 18, 2026) (outlining the licensing requirements for certified public accountants); L. Paige Whitaker, *Cong. Rsch. Serv.*, LSB10278, *Continuing Legal Education: What’s Required and Opportunities for Members and Staff to Satisfy Those Requirements 1* (2019), https://www.congress.gov/crs_external_products/LSB/PDF/LSB10278/LSB10278.5.pdf [<https://perma.cc/A7SS-6LBU>].

³⁵⁵ Nicolas Jacquemet, Alexander G. James, Stéphane Luchini, James J. Murphy & Jason F. Shogren, *Do Truth-Telling Oaths Improve Honesty in Crowd-Working?*, *PLOS One*, Jan. 15, 2021, at 1, 2 (2021); Tobias Beck, Christoph Bühren, Björn Frank & Elina Khachatryan, *Can Honesty Oaths, Peer Interaction, or Monitoring Mitigate Lying?*, 163 *J. Bus. Ethics* 467, 468 (2020).

³⁵⁶ Ben W. Heineman, Jr., *The Rise of the General Counsel*, *Harv. Bus. Rev.* (Sep. 27, 2012), <https://hbr.org/2012/09/the-rise-of-the-general-counsel>; Langevoort, *supra* note 155, at 1696; Nelson & Nielsen, *supra* note 222, at 460, 463; see also Jayanthi Krishnan, Yuan Wen & Wanli Zhao, *Legal Expertise on Corporate Audit Committees and Financial Reporting Quality*, 86

Reviving a public calling does not depend on any formal institutional channels, however. Another path would be through a paradigm shift at the societal level. Indeed, there is reason to think that the norm of shareholder primacy is vulnerable to being displaced, if it has not been already. Shareholder primacy is rooted in the legal opinions of Delaware judges—corporate law sermons, by one account—that hold influence well beyond any legal requirement.³⁵⁷ Yet in recent years, notions of public duties have begun to appear in those judicial sermons.³⁵⁸ Additionally, the Business Roundtable, whose members are CEOs of the largest corporations, announced in 2019 that the corporation exists “for the benefit of all stakeholders—customers, employees, suppliers, communities and shareholders.”³⁵⁹ Scholars have long called for changes in that

Acct. Rev. 2099, 2113 (2011) (finding that attorneys and auditors joining the audit committee of a publicly traded company’s board of directors increases measures of compliance by thirty-six percent); Justin J. Hopkins, Edward L. Maydew & Mohan Venkatachalam, Corporate General Counsel and Financial Reporting Quality, 61 *Mgmt. Sci.* 129, 139 (2015) (concluding that the presence of attorneys in the ranks of executives correlates with greater likelihood of securities compliance, even when the attorney is an executive compensated with considerable shares). Of course, it is difficult to know how large of a role lawyers’ mandated ethical trainings have played in such outcomes, and such trainings could be greatly improved. Bruce A. Green, Teaching Lawyers Ethics, 51 *St. Louis U. L.J.* 1091, 1095–98 (2007) (discussing various ways lawyers are taught ethics throughout their careers and suggesting improvements). Similar ethical pressures operate on other law-related professionals in the firm. Compliance officers now belong to national associations and increasingly obtain credentials for their roles emphasizing ethical obligations. See DeStefano, *supra* note 19, at 110.

³⁵⁷ Edward B. Rock, Saints and Sinners: How Does Delaware Corporate Law Work?, 44 *UCLA L. Rev.* 1009, 1016 (1997) (“These richly detailed and judgmental factual recitations, combined with explicitly judgmental conclusions, sometimes impose legal sanctions but surprisingly often do not.”).

³⁵⁸ See, e.g., *In re McDonald’s Corp. S’holder Derivative Litig.*, 289 A.3d 343, 349–50 (Del. Ch. 2023) (noting McDonald’s lack of oversight of employee harassment); Gareth McHugh, Comment, From Director Liability to Officer Liability to ESG Caremark Claims: A Natural Evolution?, 10 *Emory Corp. Governance & Accountability Rev.* 249, 252 (2023) (“Instead of a failure to oversee finances or products, *In re McDonald’s* directly addressed a corporation’s failure to oversee the ESG issues of gender and sexual harassment. *In re McDonald’s* could signal the welcome of more ESG-based *Caremark* claims in the Delaware legal system.”); Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, *Caremark* and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective *Caremark* and EESG Strategy, 106 *Iowa L. Rev.* 1885, 1896–97, 1902–03 (2021) (arguing that the *In re Caremark* decision invites ESG corporate compliance initiatives).

³⁵⁹ Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans,’ *Bus. Roundtable* (Aug. 19, 2019), [https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-t](https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans)hat-serves-all-americans [<https://perma.cc/N3TB-XQ3V>].

direction,³⁶⁰ but the chorus has grown in recent years, as poignantly illustrated by a recent proposal to adopt a corporate norm of “public primacy.”³⁶¹

Although those corporate governance worldviews focus on duties for managers,³⁶² if adopted, they would inevitably imply greater space for private employees to see themselves as having more of a public service role from within the firm. Thus, as counterintuitive as it may seem, it is not a stretch to imagine significant portions of society shifting to view corporate employees as having a public calling.

A norm that corporate employees have both public and private duties is almost implicit in some of the widespread criticism of corporations’ misconduct, since chastising bad behavior implies that better behavior is expected. Recent research also suggests that an increasing number of employees now enter the private sector motivated by a desire to improve society,³⁶³ which potentially expands the concept of what public service means. Although skepticism about the viability of a public calling is understandable, the risk in excess cynicism is that it discourages employees who might otherwise have thought to act in the public interest from joining corporate ranks or from acting in the public interest once there.³⁶⁴

Encouraging private employees to think more about the public interest is not without costs and limitations. It could distract employees at times and overall may make workforces more unwieldy. Leadership determined to stamp out public-oriented employees would have many tools to do so.

Normalizing public service within the firm might nonetheless at least help to insulate employees from normatively inferring that society expects them to maximize profits at all costs. This normalization is important because one of the reasons for employee silence is an implicit

³⁶⁰ Almost twenty years ago, Einer Elhauge argued that managers’ “obligation to make profits is not and should not be *exclusive*, but that instead managers do and should have some limited discretion to temper it in order to comply with social and moral norms.” Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733, 745 (2005).

³⁶¹ Dorothy S. Lund, *Public Primacy in Corporate Law*, 47 Seattle U. L. Rev. 365, 370 (2024).

³⁶² *Id.* at 369 (“Under public primacy, . . . management would be asked to promote the value of the corporation for the benefit of the public.”).

³⁶³ Robert K. Christensen & Bradley E. Wright, *The Effects of Public Service Motivation on Job Choice Decisions: Disentangling the Contributions of Person-Organization Fit and Person-Job Fit*, 21 J. Pub. Admin. Rsch. & Theory 723, 724 (2011).

³⁶⁴ Another risk is that it discourages progressive reforms. See William S. Laufer & Matthew Caulfield, *Wall Street and Progressivism*, 37 Yale J. on Regul. Bull. 36, 37 (2019).

assumption about the inappropriateness of speaking up.³⁶⁵ Additionally, if a public duty for all corporate employees became normalized, it could help create a more receptive audience for such messages in the sense that managers at all levels might be more inclined to see such messages as part of the job. A public calling for corporate employees could also help make work more fulfilling, thereby benefitting corporations through more motivated employees with greater retention rates.³⁶⁶ Just as it would be naïve to think that private employees can always be entrusted to do the right thing, it would be misguided to assume that societal narratives about private employees are irrelevant to business misbehavior.

In short, the appropriate norms of conduct for various professions are socially constructed. As such, they can be renovated to embody more of a public identity. How much difference that renovation would make is difficult to know, but the corporate ethos is in fluctuation. A dual vision for the corporate employee not only is descriptively accurate, but also channels necessary criticism of a profit-focused business world in a productive direction.

CONCLUSION

Administrative agencies have long worked to enlist employees to govern from the innermost depths of the business sector. However, past efforts to leverage employees have focused too much on creating compliance roles in the firm and on expecting employees to act as whistleblowers at great personal risk. A legal architecture that relies so heavily on private employees to advance the public interest at risk of great personal sacrifice is broken. A more comprehensive vision is needed on how to integrate employees into agency enforcement.

The highest policy priority is empowering core employees to advocate internally for upholding the law. By increasing reliance on core employees to regulate, policymakers have the potential to move toward a

³⁶⁵ James R. Detert & Amy C. Edmondson, *Implicit Voice Theories: Taken-for-Granted Rules of Self-Censorship at Work*, 54 *Acad. Mgmt. J.* 461, 463–64 (2011).

³⁶⁶ Cf. Adam M. Grant, *Relational Job Design and the Motivation to Make a Prosocial Difference*, 32 *Acad. Mgmt. Rev.* 393, 393–95 (2007) (summarizing and contributing to the literature). Most people have a preference for being honest, meaning that if a broad public calling meant they could be more honest, it could, in theory, improve worker satisfaction. Cf. Johannes Abeler, Daniele Nosenzo & Collin Raymond, *Preferences for Truth-Telling*, 87 *Econometrica* 1115, 1119 (2019) (“[O]ur results suggest that a preference for being seen as honest and a preference for being honest are the main motivations for truth-telling.”).

more effective, efficient, autonomy-preserving, and legitimate model of regulation. More concretely, administrative agencies should build confidential channels of communication for all corporate employees. Although the system should not rely too heavily on public whistleblowers, support for those individuals is also vital because—when corporate managers and administrative agency officials fail to act—going public is the ethical employee’s ultimate endgame. At a minimum, for policymakers seeking to improve regulation, employee enforcers offer a menu of promising options.

Regardless of whether these reforms aimed at strengthening employee enforcers ever come to fruition, future regulations will be built around the existing enforcement architecture. Since employee enforcers are a central tool of governance, their potential role as agents of ethical compliance is necessary to consider when renovating the regulatory framework. Thus, recognizing the interconnections between agencies and corporate employees has important implications for critical institutional design efforts currently underway to counter threats such as environmental degradation, economic inequality, and social media disinformation.

There are, of course, limits to what employee enforcers alone can achieve. At the same time, no plausible governmental inspection model will catch all transgressions. The question should thus be whether the current administrative architecture might improve upon the balance of regulatory actors within and outside the firm. Reforms should be designed under the assumption that a subset of morally attentive and publicly motivated business employees are already striving to navigate the complex ethical question of how to do what is right.

At its most ambitious, this Article calls for renewing the societal norm that business employees have not only private, but also public duties. Even with such an ethos in place, it would be a mistake to expect employee enforcers to systematically drive clearly unprofitable business conduct without administrative agency authority or reputational sanctions as backup. Nonetheless, perhaps the most intriguing and uncertain question in need of further study is how far beyond simply enforcing the law we can expect core employees, from a position of power, to lead the corporation. At their most promising, they could fill some of the democratic gap between voters’ interests and lawmakers’ actions on issues such as climate change. Ideally, in the process, employee enforcers would push businesses to internalize the full costs of their business operations. They could thereby help address some of the modern era’s

major governance failures. Embracing a public service mindset for employees may even be precisely what both the administrative state and the corporate sector need to resolve their interconnected crises of legitimacy.

True to democracy, any such progress will be diffused, messy, and uncertain. Yet prominent CEOs,³⁶⁷ pro-business judges,³⁶⁸ and the overwhelming majority of voters in both parties have signaled expectations that companies serve their communities rather than solely profit.³⁶⁹ Reframing the regulatory project as cultivating public service in the firm has the potential to appeal to a broad constituency and counterbalance constitutional deconstruction of the administrative state. It is also simply more accurate to describe corporate employees as having an important public role to play in their private lives. Greater support for that role, both in rhetoric and in regulation, is particularly important at a time when the world's biggest challenges will require all of society's institutions working together to uphold the public's trust.

³⁶⁷ Rakesh Khurana, *From Higher Aims to Hired Hands: The Social Transformation of American Business Schools and the Unfulfilled Promise of Management as a Profession* 3–4 (2007).

³⁶⁸ See, e.g., Strine et al., *supra* note 358, at 1896–97.

³⁶⁹ Lindsay Singleton, *We Asked 1,261 Voters About the Crackdown on ESG Investing. You'll Never Guess Which Party's Voters Are Most Opposed to It*, *Fortune* (Jan. 2, 2023, at 10:26 ET), <https://fortune.com/2023/01/02/voters-congress-crackdown-esg-investing-youll-republicans-most-opposed-free-market-politics-lindsay-singleton> [<https://perma.cc/V686-GJCY>] (finding that sixty-nine percent of Republicans and eighty-two percent of Democrats feel companies should make a positive impact in their communities).