ROTOPOOL MEMORANDUM

TO: Articles Committee
FROM: Nathan Poland
DATE: February 10, 2024
RE: Rotopool S-21006 – *The Renaissance of Private Law*

I. Synopsis

The Renaissance of Private Law addresses the rise of private law actions relative to the decline in public law and regulatory enforcement as a means of addressing major social ills. The piece does not argue that either public or private law is inherently superior, but the authors maintain that the current political conditions have raised the comparative advantage of private law actions as regulatory regimes have been stymied. The article then uses real-world examples to highlight the institutional advantages of private law in the current moment and lays out a laundry list of reasons. The article then clarifies what is politically, technologically, and socially unique about this moment in this country's history. Then the authors make a few procedural and substantive recommendations for making private law actions more effective vehicles for pursuing public goals, namely loosening restrictive standards and elements such as class certification and causation, and broadening doctrines such as cy pres and inchoate harms. Finally, the article addresses counterarguments about public law being crowded out and concerns about excess litigation.

In my view this piece should not proceed to the next stage of consideration. While the article is exceptionally well-written, clear, and easy to understand, the arguments are largely descriptive and lacking in nuance and the piece as a whole contributes little to the field. I really appreciate how well put together this article is, but its structure resembles an uncomplicated laundry list of reasons for descriptive claims that aren't hotly contested at the moment. The piece dodges critical questions about the short, medium, and long-term effects of elevating private law actions and does not offer insight into what the relationship between private and public law should look like going forward. In some ways the article feels like it is rationalizing the trends that are already visible in the field of private law rather than making a predictive or critical argument. The recommendations also strike me as underdeveloped and lacking in evidence that supports their efficacy. Perhaps I am overlooking some positive aspects of this piece, but one of the most disappointing features for me was the lack of diverse scholars being cited or referenced in the footnotes.

II. Summary

The **Introduction** describes two dueling fields of law: public law and private law. The article takes up the question of why in the face of numerous social, economic, and ecological crises private law, rather than public law, seems to be delivering more results. The author explores reasons for private law's unexpected success: (1) it is decentralized and therefore more flexible, (2) affords agency to individuals with a broad range of viewpoints, (3) individuals can operate independent of consensus, (4) the Constitution does not bind private actors, and the cases can be

litigated in courts that are less likely to be subject to industry capture. The authors explain that they seek to highlight the comparative institutional advantages of private law as a complement to regulatory frameworks and a valuable alternative in certain situations. Ultimately, the article proposes a series of legal reforms that would augment the use of private law as a vehicle for the governance of broad societal problems.

Part I discusses the institutional comparative advantage of private law. Recently, private law has been used to advance broad social causes, in areas where regulation has failed. The article argues that the special virtues of private law are structural and cannot be replicated by the regulatory systems. First, private law relies only on individual plaintiffs to initiate an action and individuals are not influenced by the same incentives as special interest groups. Second, private law is more accessible to unorganized citizens than influencing regulation, which is dominated by informational and relational capture by special interest groups. Third, the revolving door phenomenon does not apply to judges, who safeguard the independence of private law adjudications. Fourth, judges tend to be generalist relative to regulators so they are more likely to be open to diverse arguments. Fifth, large centralized regulatory agencies are more vulnerable to frontal assaults that can hamper regulation if successful. Sixth, private law's monetary award incentivizes private actors to bring forward information in a bottom-up manner. Seventh, ex post responses through private law can be more efficient and cost-saving. Eight, courts do not fall victim to the typical regulatory life-cycle that can lead to complacency. Ninth, private law is less likely to over-generalize and over-abstract the issues. Tenth, regulatory regimes, unlike private law schemes, often suffer from ossification. Finally, private law does not face the same constitutional constrains, such as the Second Amendment for example.

Part II suggests that we are in a moment where private law is particularly advantageous. The conditions that make this moment particularly ripe include rapid technological and social changes, unprecedented proliferation of information, and increasing political polarization. The authors emphasize that in this era marked by polarization, regulatory deadlock, paralysis of the political system, and legislative impasses, the effectiveness of regulatory approaches has declined. The article uses examples such as the JUUL litigation and the opioid crisis to emphasize that private law is responsive to change, adaptable, and resilient.

Part III recommends ways to alter the legal restrictions that undermine the effectiveness of private law as a means to achieve public goals. The article recommends two categories of modifications: (1) procedural enhancements to make private law institutions more efficient, and (2) substantive adjustments to make it easier to use private law to represent broad social issues. Under the first category the article recommends, loosening the stringent requirements for class action lawsuits, expanding the *qui tam* doctrine to includes claims beyond fraud against the government, and apply cy pres to seek remedies that would be granted to institutions that promote the social interest at issue. Under the second category, the authors advocate for loosening the individual harm requirement to brining a private law suit, allowing suits for inchoate harms to a limited degree, and adopting a more holistic view of the causation element.

Part IV primarily addresses counterarguments about the viability of private law and the unintended consequence of crowding our regulation. The authors disagree that public law and regulation are inherently superior to private law. Moreover, private law may be a complement to

public law and regulation, rather than a substitute. If there is any tension between regulation and private law that may lead to competition that motivates actors to optimize their approaches. Finally, the authors suggest that this situation should not be viewed as a zero-sum game since the focus is the combined effect of regulation and private action on the shared public goals. The rise of private law actions did not precipitate the decline in regulatory effectiveness, instead the decline in regulatory effectiveness may have precipitated the rise of private law actions. Again, the main focus is preventing irreversible harms through the most effective means available. The article also responds to concerns about excess litigation by emphasizing that judges will prevent unpredictability in the law through self-restraint, legislatures can always intervene, and trial rates have actually been declining.

The **Conclusion** offers a short restatement of the article's main argument.

III. Analysis

The analysis is the most important component of a Rotopool. Under each category, please provide a few sentences evaluating whether the article falls short of, satisfies, or exceeds the standard for publication. (Again, if you do not yet have a good sense of what that standard is, please focus on providing your qualitative analysis without worrying about measuring the article against some "threshold"). While it is fine to include a statement communicating your general impression, the comments should be more specific than conclusory assessments (e.g., "The article's quality of writing is good"; "The author did a mediocre job with researching sources") and supported by examples from the article when possible, using TAN or PTAN citations.

HLR is committed to promoting diverse, equitable, and inclusive scholarship. Creating a forum for underrepresented groups and marginalized communities is a perennial mission of our journal, and one where we have much to improve on. We conduct a holistic review of each article, taking into consideration both substantive and DEI factors. Some of the categories below are intended to reflect and implement our commitment.

You should not feel obligated to answer every question within a category, although you are expected to make a good faith effort to evaluate the article under each category. You may make cross-references if the same comment applies to multiple categories. For details on what each category means, please refer to **Table 1**.

Substantive Category	Comments
Quality of Writing Please consider the article's structure, readability, style, overall logic, and coherence of argument.	The article is exceptionally well-written and clear in terms of content and readability. The thesis of the article is simplistic and not particularly compelling or novel. There are very few typos, misspellings, or awkward phrasings throughout the piece, however the argument is more of a descriptive argument than a persuasive argument.

Quality of Research Please consider the nature and range of the article's sources. Are its propositions supported with appropriate sources? Does it display an awareness of relevant literature in the field?	The article draws from a wide range of sources, such as court cases, high profile recent events, and news articles. The citations are well developed and persuasive. The extent of the research is impressive; however the piece often invokes the arguments from other pieces of scholarship rather than articulating its own. The propositions are generally well-supported and the footnotes are adequately developed. The sources suggest a high level of familiarity with the field and strong awareness of relevant literature.
Breadth of Research Does the article cite sources from diverse voices (e.g., junior scholars, non-T14 schools, underrepresented groups)?	The article does not cite many scholars from underrepresented groups or non-T14 schools. I was rather disappointed that the citations often quoted the most prominent scholars in particular fields repeatedly without injecting new voices into the conversation. The breadth of the sources cited is somewhat impressive, but it would be mor impressive to see research that brought in a variety of perspectives.
Methodological Rigor What is the author's methodology? Does the methodological approach make sense given the article's overall objective?	The article mostly uses case analysis to advance its arguments and occasionally relies on popular history. This approach is fitting for the argument but contributes to the superficiality of the arguments.
Originality Does the article make a novel or interesting claim? Does it address or introduce a new concept?	On my read the article makes a fairly self-evident argument that doesn't move the needle. The article largely avoids questions of when might private law not be the best tool and counterarguments about the importance of centering public law, which I found weakened the argument. Again, the claim is not particularly provocative or incisive, and the article to some extent states the obvious without exploring the nuances of when the comparative advantages of private law and public law outweigh each other and the short, medium, and long-term consequences of relying on one or the other or a mix. As far as I can tell the article does not introduce a new concept.
Contribution to the Field Does the article add to the existing literature? Would it have any foreseeable impact in the field, either practically, doctrinally, or theoretically? If the article is primarily descriptive, does it nonetheless crystallize or reorganize existing scholarship in a useful way?	This article provides an exceptional clear description of current trends and bring together sources and narratives in a single, easy to understand piece. However, I do not foresee an impact practically or theoretically arising from the article because although the scholarship is well organized but otherwise offers few insights.

Persuasiveness Is the argument persuasive? Did the article address potential counterarguments? If the article has a prescriptive component, did you find the solution feasible?	The argument is fairly predictable and unpersuasive because the piece mostly spends time proving up its claims, which are not particularly generative or controversial. The article's logical structure increases the strength of the argument, but the content of the argument is somewhat lacking. One specific example can be found in the article's recommendations. The authors list a number of ways private law actions could be made more effective but provide little support that these modifications would have the intended effect.
Subject Matter Does it sufficiently address "the law" to have a place in our pages? Is the topic too niche or technical? Could we (potentially with some outside help) assess and edit this piece? Does the author write about a topic area that has traditionally been underrepresented in our pages? Even if the article addresses a common topic, does the author explore underrepresented viewpoints within that area?	The article engages with the law through major cases and explanations of the doctrine that does not disqualify it from our pages. The arguments in the piece seem pedantic and simplistic, despite the clear writing. Pieces on private litigation appear from time to time in the Law Review. This piece does not rise to the level of persuasiveness and robustness as other pieces. The expertise to assess and edit this piece certainly exists within our membership.
Impact Does the article address an issue or provide a solution that can help promote DEI values?	The content of the piece relates indirectly to DEI values because of the importance of public social outcomes to the article. The main focus of the piece is enabling others to use private law to potentially promote their DEI values. However, in the piece the authors undermine some of the DEI values through the lack of breadth in its citations.