The Beleaguered Sovereign: Judicial Restraints on Public Enforcement

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Looking back at the federal courts over the last generation, commentators will likely focus on their role in undermining the functioning of the regulatory state. Well-acknowledged in this story are Supreme Court decisions that have constrained administrative agencies under the newly minted "major questions" doctrine, as well as the Court's blockbuster decision overruling the longstanding Chevron *doctrine. The Court also has made it increasingly difficult for individuals—often workers and consumers, people of color, women, and those who live from paycheck to paycheck—to seek federal judicial redress for regulatory violations as private enforcers. And the Court has questioned whether certain private enforcement actions, even when authorized by Congress, unconstitutionally usurp Article II power. These trends have heightened the importance of well-resourced and conscientious government lawyers filing federal lawsuits to enforce statutory and regulatory protections—precisely the kinds of actions that the Court's "Take Care" rhetoric valorizes. Yet, as this Essay shows, there is a developing story of constraint there, as well. This Essay describes a nascent but overlooked trend of Article III courts cabining government lawyers as they seek to enforce regulatory protections. Federal courts are raising procedural and jurisdictional roadblocks in lawsuits filed by government lawyers that narrow the government's Article III standing, the scope of its litigation interests, and its opportunities to intervene in suits, and that, at times, result in dismissal of the government's suits. The trend is still developing, and we are hesitant to prognosticate how much public enforcement the Article III courts eventually will block. Nevertheless, in the instances we explore, all prior to the second Trump Administration, the Executive Branch has been increasingly beleaguered as it seeks to enforce various regulatory protections in the federal courts. The world of public enforcement is complex and judicial constraint is not always unjustified.*

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However, the cutbacks we identify run counter to foundational notions of sovereignty and federalism, upend long-accepted procedural and jurisdictional practice, and threaten to further hamstring the regulatory state's ability to deal with urgent problems.

Introduction

What will history say about the Roberts Court and, indeed, the federal courts more generally over the past generation? Undoubtedly, one of the core themes will be the Supreme Court's role in undermining marketplace regulation by making it increasingly difficult for individuals and administrative agencies to redress statutory violations and implement regulatory policy.[1] The Court's deregulatory thrust has combined elements of procedural retrenchment, administrative rollback, and constitutional activism. The examples are familiar: The Court has cut back rights of action, heightened pleading rules, and erected standing barriers that impede workers, consumers, and various other plaintiffs as they seek to bring actions in court as "private enforcers" or "private attorneys general."[2] Likewise, the Court

1. *E.g.*, Charlie Savage, *Weakening Regulatory Agencies Will Be a Key Legacy of the Roberts Court*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/politics/supreme-court-regulatory-agencies.html [https://perma.cc/7CX2-3JHE].

2. *See, e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 34, 52, 130, 180–81 (2017) (exploring the Court's "counterrevolution" against private enforcement litigation and referencing "private

has withheld authority from agencies to devise and enforce administrative rules—including clean energy rules and the Biden Administration's student-debt forgiveness plan[3]—and upended forty years of precedent when it overturned *Chevron* deference to agency interpretation in the face of statutory ambiguity.[4] At times, the Court has defended these approaches by resurrecting the nondelegation doctrine, insisting that Congress cannot delegate the Executive's enforcement power to individuals and that Congress must more clearly delegate enforcement authority to agencies.[5] And, in

enforcers" and "private attorneys general"); Brooke D. Coleman, *Endangered Claims*, 63 WM. & MARY L. REV. 345, 348 (2021) (exploring how, in response to procedural developments, some claims are going "extinct"); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015) (arguing that the Supreme Court's arbitration jurisprudence "undermines the substantive law itself"); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2811 (2015) (exploring how the Supreme Court's arbitration jurisprudence "strips individuals of access to courts to enforce state and federal rights, strips the public of its rights of audience to observe state-empowered decision makers imposing legally binding decisions, and strips the courts of their obligation to respond to alleged injuries").

3. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2615–16 (2022) (concluding that the EPA lacked clear statutory authority to adopt its Clean Power Plan under the Clean Air Act); Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023) (finding that the Secretary of the Department of Education lacked authority under the HEROES Act to cancel $430 billion of student loan principal). These trends are part of a larger gutting of U.S. administrative and regulatory governance. *See* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 119–20 (2017) (exploring how increasing privatization of regulatory governance undermines the Constitution and administrative state). And they have roots in long-standing "anti-administrativism." *See* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017) (using the term "anti-administrativism" to refer to "judicial attacks on administrative governance and administrative law doctrines").

4. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) (holding that "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the [Administrative Procedure Act]"); *see also* Kate Shaw, *The Imperial Supreme Court*, N.Y. TIMES (June 29, 2024), https://www.nytimes.com/2024/06/29/opinion/supreme-court-chevron-loper.html [https://perma.cc/5YGL-LCEB] (arguing that *Loper Bright* has "the potential to fundamentally transform major aspects of the health, safety and well-being of most Americans," especially when "viewed alongside some of the other major cases about agency power the [C]ourt has handed down . . . that have stripped agencies of power and shifted that power directly to federal courts").

5. *See, e.g.*, TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021) ("A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority." (emphasis omitted)). Scholarly treatment of standing as an Article II nondelegation doctrine appears to trace to Tara Leigh Grove. *See generally* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009) (arguing that standing principles enforce the Article II nondelegation doctrine by limiting private prosecutorial discretion). Some scholars have located limits on a private litigant's exercise of public enforcement power in the Due Process Clause. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM L. REV. 1367, 1370 (2003) (discussing the constitutional limitations afforded by the private delegation doctrine). Others have justified limits as a "structural constitutional commitment to keeping government power constitutionally accountable." Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. 585, 614 (2015); *see also* Alexander Volokh, *The New Private-*

another move seemingly valorizing Article III enforcement, the Court dealt a blow to the SEC's ability to bring enforcement actions seeking civil penalties in-house.[6] For many of these actions, commentators have critiqued the Roberts Court for being an "imperial court"[7] engaged in a "judicial power grab"[8] that, at bottom, chips away at Congress's Article I power and forecloses opportunities for self-governance.[9] Indeed, dissenting Justices have accused the Court of "judicial hubris" and of turning itself into the nation's "administrative czar."[10]

Yet this is not all of the story. By curtailing individual and administrative enforcement authority, the Court has put increasing pressure on government lawyers—in the name of the United States—to step into the remedial breach. Even more, at times, the Court has cut back on other forms of enforcement authority by purporting to protect the Executive's constitutional authority to enforce the law.[11] The result is that Article II enforcement in court is both valorized and increasingly essential.

But, as this Essay shows, the Court, together with like-minded lower federal courts, has been slowly but steadily erecting a series of barriers that make it more difficult for certain government lawyers to do their jobs. By expanding our lens beyond the Supreme Court, we identify a developing set of cases where judges are constraining federal public enforcement authority in areas that go to the core of sovereignty. These cases create a fuller picture of the perils of the conjoined phenomenon of regulatory retrenchment and judicial aggrandizement—suggesting that in certain domains, robust Article II power may not be able to fill the void that the federal judiciary has created by both impeding individual claimants' access to federal court and blocking agency rulemaking on current social and economic matters.[12]

Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges, 37 HARV. J.L. & PUB. POL'Y 931, 941–53 (2014) (discussing various doctrinal challenges to delegations of regulatory power to private parties).

6. SEC v. Jarkesy, 144 S. Ct. 2117, 2139 (2024); *see also* Noah Rosenblum, *The Supreme Court Won't Stop Dismantling the Government's Power*, THE ATLANTIC (June 28, 2024), https://www.theatlantic.com/ideas/archive/2024/06/supreme-court-jarkesy-v-sec-loper-bright-chevron-deference/678842/ [perma.cc/D22E-E277] (arguing that *Jarkesy* "continues the Court's attack on the federal government's capacity to do many of its most basic jobs").

7. *See* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 117–18 (2022) (arguing that the Roberts Court is damaging our constitutional system by usurping power and damaging its own credibility).

8. *See generally* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635 (2023) (outlining avenues in which the court has aggrandized power to itself).

9. *See id.* at 648 (noting that across the Bush, Obama, and Trump administrations, "the judiciary has not only acted so as to stymie effective congressional oversight of the executive, it has also done so using language that disparages Congress, elevates the judiciary, and suggests that the judiciary stands not only outside of the political sphere, but indeed above it").

10. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294–95 (2024) (Kagan, J., dissenting).

11. *See infra* notes 98–103 and accompanying text.

12. *See infra* subpart I(A).

Significantly, these trends have taken aim at a robust regulatory infrastructure that encompasses the Department of Justice (DOJ), independent agencies, administrative officials, and other executive staff committed to the conscientious enforcement of statutory and administrative regulations aimed at protecting workers, consumers, and other parties from injury. Our examples include judges constraining or ending enforcement actions commenced by the DOJ, Department of Labor (DOL), Federal Trade Commission (FTC), and other Executive Branch lawyers. Together these examples stake out an emerging, nascent picture of regulatory retrenchment that not only complicates the Court's valorized account of public enforcement but also threatens the viability of the Executive's judicial-enforcement authority. Indeed, in some of the instances we explore, previously existing Article II enforcement power has been extinguished by flick of the judicial pen. While we emphasize that sovereign enforcers still wield considerable power as plaintiffs, we are concerned that in the examples we elucidate, they are increasingly becoming like Prometheus, the tragic Greek hero whom Zeus bound to the rock,[13] beleaguered in their capacity to enforce laws that protect workers, consumers, and others from unlawful, unfair, or discriminatory market actions.

Yet we cannot ignore that as this Essay goes to press, a new presidential administration has issued a stream of Executive Orders designed to gut agencies, terminate federal employees, and withhold funding—actions taken under the banner of efficiency, but with the goal of dismantling the regulatory state and undermining the New Deal settlement.[14] It is thus difficult to predict what public enforcement of statutory commitments—particularly on behalf of workers, women, people of color, people with disabilities, and trans people—will look like for the next four years.[15] Nevertheless, we think the trends this Essay describes matter. First, they tell a part of the larger story of regulatory retrenchment, highlighting judicial developments that arguably have fostered distrust of government and declining faith in public institutions. Second, the trends may matter because any future administration

13. AESCHYLUS, PROMETHEUS BOUND (Paul Roche trans., Bolchazy-Carducci Publishers 1998).

14. For an overview of these changes, see David Super, *Emerging Outlines of an Executive Power Grab*, BALKINIZATION (Feb. 20, 2025), https://balkin.blogspot.com/2025/02/emerging-outlines-of-executive-power.html [https://perma.cc/Y47G-RYEJ] and *Presidential Actions*, THE WHITE HOUSE, https://www.whitehouse.gov/presidential-actions/ [https://perma.cc/3MU3-2QQN].

15. On the importance of "state capacity" to effective government, see Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. LEGAL F. 185, 186 (observing that "when democratic governments cannot deliver effectively on issues many of their members care most urgently about, that failure can lead at a minimum to distrust, alienation, withdrawal, anger, and resentment").

committed to rebuilding public enforcement and regulatory governance may face a judiciary that keeps these trends intact and perhaps furthers them.

Our concern with this nascent trend of judicial restraint of public enforcement—both now and if it continues—is in part founded on constitutional grounds. We share with other scholars the view that Article II confers broad sovereign standing on the Executive to enforce the law, shaped in part by the Take Care Clause.[16] Contrary to private-party standing doctrine, as Tara Leigh Grove has written, "Article II *requires* the Executive to assert in court the abstract, generalized interest in enforcing federal law."[17] We also believe that the Executive has standing to enforce federal law absent explicit statutory authorization, sharing with Seth Davis the view that courts should recognize a cause of action "when a public litigant sues to protect typically public interests."[18] Stemming from these same constitutional sources and arguments, we believe that federal courts should follow a default rule: Where regulatory regimes protecting public interests are silent, public enforcement is permitted.[19] Our work in this Essay is not to rehash these well-developed accounts of the constitutional and policy foundations of robust Executive litigation enforcement power, but instead, building on these foundations, to paint an emerging picture of constraint of that power.

We emphasize, however, that we do not extol public or private enforcement in all their forms. Not all private enforcement suits are consistent with democratic goals, as illustrated by Texas's delegation of enforcement power to individuals to police reproductive rights.[20] And we likewise hold a complicated view of public enforcement. To be sure, the prospect of the United States as a plaintiff to redress marketplace abuses offers significant benefits to the public. As Larry Yackle observed in the context of federal suits to enforce the Fourteenth Amendment, "[P]articipation by the United States can contribute power and prestige . . .

16. *See, e.g.*, Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1319–24 (2014) (arguing that Article II gives the Executive "affirmative authority" to bring enforcement actions in court).

17. *Id.* at 1323.

18. Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 5 (2014).

19. *See id.* at 32 (articulating a default rule for implied rights of action).

20. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting) (arguing that to avoid pre-enforcement review of abortion restrictions, Texas "delegated enforcement" of the law "to the populace at large"); *see also* Poppy Alexander & Chris McLamb, *SB8 Reveals the Difference Between a Private Vigilante Law and a Private Attorney General Statut*e, HARV. L. & POL'Y REV.: NOTICE & COMMENT (Nov. 11, 2021), https://journals.law.harvard.edu/lpr/2021/11/11/sb-8-reveals-the-difference-between-a-private-vigilante-law-and-a-private-attorney-general-statute/ [https://perma.cc/Y4X9-QHCA] (arguing that "SB 8 is not an instrument for public good, but rather a Frankenstein law engineered solely to nullify the constitutional right to an abortion").

as well as litigational advantages available only to the government . . . ."[21] Nevertheless, public enforcement is replete with its own limitations, pathologies, and capacity for democratic misalignment.[22] If on the one hand, the DOJ helped to desegregate the nation's public schools,[23] it also played a critical role in earlier efforts to break labor unions.[24] And one need only remember President Nixon's effort to control IRS audits to know that the Executive is well positioned to hijack public enforcement for self-serving or anti-democratic ends,[25] a danger that some commentators see heightened in today's hyper-partisan conditions, and that is acute given events during the opening salvos of the second Trump Administration.[26]

Rather, we theorize regulatory enforcement in the United States as a complex ecosystem that depends on private and public modalities, with each playing multiple and interrelated roles—as complements or substitutes, with synergies and tensions, but also as democratic checks on the misuse of power.[27] The judicial approaches we describe threaten to disrupt that

21. Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in* Parens Patriae, 92 NW. U. L. REV. 111, 112 (1997).

22. See *infra* notes 93–96 and accompanying text.

23. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 63 (1988) (arguing that federal support for desegregation was part of "the more central U.S. mission of fighting world communism"); *see also* David L. Norman, *The Strange Career of the Civil Rights Division's Commitment to* Brown, 93 YALE L.J. 983, 984–85 (1984) (reporting that during the first decade after *Brown*, the DOJ played a "very limited role in furthering school desegregation" and that its commitment did not resume until after enactment of the Civil Rights Act of 1964).

24. *See, e.g.*, *In re* Debs, 158 U.S. 564, 582 (1895) ("The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws."); *see also* United Steelworkers of Am. v. United States, 361 U.S. 39, 67 & n.5 (1959) (Douglas, J., dissenting) (collecting sources on "the abusive use of blanket injunctions in labor controversies"); William E. Forbath, *Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of Law*, 16 LAW & SOC. INQUIRY 1, 15 (1991) (arguing that "U.S. courts held greater sway over the interpretation, administration, and enforcement of labor laws, and they tended to nullify by hostile construction many of the reforms that they didn't strike down").

25. Chris Edwards, *Nixon and the IRS*, CATO INST.: CATO AT LIBERTY (June 27, 2014, 6:22 PM), https://www.cato.org/blog/richard-nixon-irs [https://perma.cc/M6CT-WRH8]; *see also* Jonathan Swan, Charlie Savage & Maggie Haberman, *Trump and Allies Forge Plans to Increase Presidential Power in 2025*, N.Y. TIMES (July 18, 2023), https://www.nytimes.com/2023/07/17/us/politics/trump-plans-2025.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/AXR6-8UWN] ("Mr. Trump intends to bring independent agencies—like the Federal Communications Commission, which makes and enforces rules for television and internet companies, and the Federal Trade Commission, which enforces various antitrust and other consumer protection rules against businesses—under direct presidential control.").

26. *See* Myriam Gilles, *The Private Attorney General in a Time of Hyper-Polarized Politics*, 65 ARIZ. L. REV. 337, 372 (2023) (discussing the importance of private enforcement actions as a "counterweight" during a period of hyper-polarized politics).

27. *See, e.g.*, Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 289–90 (2016) (exploring "overlapping" public and private enforcement mechanisms); David

ecosystem by selectively dismantling private enforcement and administrative action while simultaneously selectively disabling Executive litigation enforcement authority that the Court claims to be protecting. Indeed, in our view, judges are displacing valuable enforcement actions, rather than merely engaging in sorting or reining in overly zealous enforcement efforts. These interventions are part of a larger set of those placing Article III courts at the center of a neoliberal legal order that serves the Court's narrow institutional self-interest,[28] promotes corporate concentration and insulation from regulatory laws,[29] and threatens democratic commitments.[30]

This Essay proceeds in three Parts. Part I focuses on the current enforcement gap, exploring how federal courts have increasingly disempowered agencies from enforcing statutory goals through rulemaking and regulations, and prevented individuals from redressing statutory violations through federal litigation, at times justifying its approach on the availability of Article II enforcement in court. We also explore how these developments in turn shift increasing enforcement pressure onto other public actors who traditionally have shouldered judicial enforcement responsibility, whether attorneys with the DOJ, federal agencies, or state attorneys general.

Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 630–36 (2013) (discussing tradeoffs and coordination issues between public and private enforcement); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 114, 117–18 (2005) (exploring the questions of calibration involved when private enforcement interferes with public enforcement efforts); Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 979 (1997) ("In reality, private enforcement and state enforcement typically complement each other. By cooperating with officials, citizens lower the cost and increase the effectiveness of state enforcement. Conversely, the effectiveness of private enforcement increases, and its risks to private enforcers decrease, when state officials support and supplement private enforcers."); *see also* Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 941 (2022) (discussing the role of judicial review in suits by states and individuals as "counterweights" to Article II authority to enact and enforce broad policy goals).

28. *See generally* Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471 (2022) (exploring how the Supreme Court and federal courts have constructed neoliberal procedural doctrine); Luke Norris, *Procedural Political Economy*, 66 WM. & MARY L. REV. (forthcoming 2025) (on file with authors) (exploring neoliberal shifts in procedure).

29. *See, e.g.*, Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1, 11 (2023) (arguing that shifts in jurisdiction part of what is constructing the oligarchic courthouse, where courts as public institutions adjust their procedures to serve private, corporate interests at the expense of public goals, thereby fortifying and translating economic power into concentrated political power that weakens democratic governance); *see also* J. Maria Glover, *"Encroachments and Oppressions": The Corporatization of Procedure and the Decline of Rule of Law*, 86 FORDHAM L. REV. 2113, 2118 (2018) (describing the various efforts of corporations to restructure the litigation system to "reduce litigation exposure" and evade liability under statutory and regulatory requirements).

30. *See* Helen Hershkoff & Stephen Loffredo, *Standing for Democracy: Is Democracy a Procedural Right* in Vacuo*? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing*, 70 BUFF. L. REV. 523, 584–610 (2022) (exploring how shifts in standing doctrine are contributing to democratic erosion); Hershkoff & Norris, *supra* note 29, at 45–49 (same).

Part II turns to constraint, detailing a series of ways that federal courts have beleaguered public enforcers as they seek to bring and maintain suits redressing alleged violations of regulatory statutes that aim to remedy market disparities and the harms of corporate overreach. Our focus is on litigation brought by the DOJ and federal agencies, although we recognize the importance of state enforcement actions and briefly discuss patterns of judicial constraint in the state context as well. Again, we do not argue that public enforcement is always and everywhere constrained. But we also recognize the importance of Article II enforcement in the current context and in our constitutional system, and the examples we highlight are significant, pertaining to such core matters as standing and the scope of sovereign interests, as well as the government's ability to intervene in litigation and pursue certain claims.

Part III then considers the complicated question of what to make of this emerging pattern of judicial constraint on public enforcement. Most obviously, if continued, it raises the specter of even greater barriers to regulatory enforcement and an intensified gutting of democratic regulatory commitments. In addition, the trend of judicial restraint on public enforcement raises separation-of-powers and federalism concerns. But the trend also surfaces the need for looking beyond the Supreme Court and how it is able to enlist allies in its deregulatory project. The Court may be "imperial," but it does not act alone.[31] Through strategic signaling, the Court can enlist litigants ready to make arguments or press claims it will find receptive, while lower courts create a pipeline of cases for the Court's docket. And by making the government lawyer's role tougher, the Court is able to contribute to the increasingly dim view of government power and authority that drives the neoliberal legal order, serving to undermine trust, confidence, and faith in the very notion of the public interest and in capacity for effective governance. At the same time, current conditions of hyper-partisanship and one-party control make legislative overrides of the Court's statutory cutbacks unlikely, and constitutional overrides are, of course, not possible short of an amendment.

We close by placing these constraints in the larger context of a Court that has been assuming outsized power at the expense of the other branches and the people. We stress, however, the need to look beyond the Court's headline-grabbing decisions and to engage with the federal courts' broader procedures and jurisdictional doctrines that have facilitated the deregulatory turn. It is difficult in this moment to predict just how far that deregulatory turn may go. Yet we are optimistic that even with wholesale Executive efforts to dismantle state capacity, regulatory protection and public enforcement will

31. *See supra* note 7 and accompanying text.

not fall by the wayside in the future, and that the constraints we describe may well still matter.

I. The Enforcement Gap

In this Part, we set the stage by recounting how the Court has constrained private enforcement, while at the same time cutting back agency capacity to engage in rulemaking and internal enforcement. These twin judicial moves have put increasing pressure on government lawyers—in the name of the United States—to fill the remedial breach. Yet, while valorizing the Executive's "Take Care" prerogatives, the Court has nevertheless made it more difficult for government lawyers to carry out their mission of enforcing statutory and regulatory protections.

As a preview, consider pandemic-era efforts to protect workers from the ravages of the COVID-19 virus. By the end of the first Trump Administration, more than 350,000 Americans had died of COVID-19.[32] In June 2020, workers at an Amazon fulfillment center in Staten Island, New York challenged in court the company's failure to comply with pandemic-related health-and-safety measures.[33] The district court dismissed the Amazon workers' suit on the basis of "primary jurisdiction"—asserting that enforcement was the sole prerogative of the New York State Department of Labor.[34] But Executive enforcement did not fare much better in trying to make workplaces safe. In February 2021—when COVID deaths had reached nearly a half-million Americans, disproportionately impacting people who were Black or brown[35]—President Biden issued Executive Orders requiring that federal employees[36] and contractors be vaccinated.[37] In the following months, the Centers for Disease Control and Prevention (CDC) issued an

32. *2020 Final Death Statistics: COVID-19 as an Underlying Cause of Death vs. Contributing Cause*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 7, 2022), https://www.cdc.gov/nchs/pressroom/podcasts/2022/20220107/20220107.htm [https://perma.cc/SVW4-YL2P].

33. Complaint at 1, Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359 (E.D.N.Y. 2020), *aff'd in part*, *vacated in part*, 51 F.4th 491 (2d Cir. 2022) (No. 1:20-cv-02348).

34. *Palmer*, 498 F. Supp. 3d at 377 (finding that the costs of applying the doctrine of primary jurisdiction outweighed its benefits). The Second Circuit ultimately reached a different conclusion, finding that the doctrine of primary jurisdiction should not apply. But its decision came a full two years after the district court's decision—a critical period when the pandemic was raging, and the lawsuit was held in limbo. Palmer v. Amazon.com, Inc., 51 F.4th 491, 504 (2d Cir. 2022).

35. *See* Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice in the Time of COVID: Emerging Trends and Questions to Ask*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 323–27 (2021) (reporting that as of the date of publication, Black Americans had "died at three times the rate of white Americans").

36. Exec. Order No. 14043, 86 Fed. Reg. 50989 (Sept. 9, 2021).

37. Exec. Order No. 14042, 86 Fed. Reg. 50985 (Sept. 9, 2021); Jason Miller, *New Guidance on COVID-19 Workplace Safety for Federal Contractors*, OFF. OF MGMT. & BUDGET BRIEFING ROOM BLOG (Sept. 24, 2021), https://www.whitehouse.gov/omb/briefing-room/2021/09/24/new-guidance-on-covid-19-workplace-safety-for-federal-contractors/ [https://perma.cc/5A9M-L457].

Order requiring the wearing of masks by people on public transportation.[38] Later that year, the DOL and Occupational Health and Safety Administration (OSHA) issued an emergency rule requiring employers with at least 100 workers to develop and implement policies on COVID-19 testing and mask-wearing.[39] The government's orders faced court challenges and were enjoined as outside Executive power.[40]

At the time, one might have thought that the pattern described—blocking private enforcement in the name of public enforcement, while blocking public enforcement in the name of the Constitution—was unique to the pandemic, and a response to concerns about the overuse of emergency power.[41] To the contrary, this Part surfaces the broader arc of the Court's resistance to private regulatory enforcement and to forms of public enforcement of existing regulatory statutes and regulations.[42]

A. Disempowering Private and Administrative Enforcers

It is well recognized that undercutting litigation that seeks to enforce statutory protections—ranging from wage-and-hour requirements to ensuring safe consumer goods—became a core political goal of the deregulatory movement of conservative and business interests coalescing in the 1970s and 1980s.[43] As Stephen Burbank and Sean Farhang explore in *Rights and Retrenchment: The Counterrevolution Against Federal Litigation*, a half-century ago those opposing growing marketplace regulation faced an uphill political battle: They were unable to repeal regulatory statutes and largely failed in efforts to amend them to eliminate statutory incentives for private enforcement; likewise, they were unable to secure sweeping amendment of civil procedural rules to make them less

38. Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025 (Feb. 3, 2021).

39. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61511 (Nov. 5, 2021).

40. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 664–65 (2022) (per curiam) (staying the DOL and OSHA emergency rule for workplaces because "[a]pplicants are likely to succeed on the merits of their claim that the Secretary [of Labor] lacked authority to impose the mandate"); Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1153 (M.D. Fla. 2022) (concluding that public transit mask mandate rules exceeded the CDC's statutory authority); Feds for Med. Freedom v. Biden, 63 F.4th 366, 369 (5th Cir. 2023) (upholding a preliminary injunction enjoining the vaccine mandate for federal workers and contractors).

41. *See, e.g.*, Amanda L. Tyler, *Judicial Review in Times of Emergency: From the Founding Through the COVID-19 Pandemic*, 109 VA. L. REV. 489, 495 (2023) (discussing these and other pandemic-related lawsuits as an aspect of power "in times of emergency and the attendant role of the judiciary during the same").

42. For a discussion of the Executive Vesting Clause and the distinction between execution and law-making, see Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1274 (2020) (arguing that executive authority is an "empty-vessel power" that does not include "the concept of a royal residuum").

43. *E.g.*, BURBANK & FARHANG, *supra* note 2, at 25–26.

hospitable to private enforcement.[44] But much more success was found in the Article III courts, where judges—responding to a perceived litigation crisis and demands to be more managerial, among other things—were more willing to reinterpret procedural rules and statutes in ways that constrained private enforcement.[45] Civil procedure and procedural reform thus came to the center of efforts to resist the burgeoning litigation regulatory state.

This strategy took aim at a distinctive feature of U.S. governance: its use of private litigation as a mechanism of administrative regulation. The U.S. "litigation state" enlists citizens and lawyers as enforcers of statutes regulating antitrust, labor and employment, consumer protection, anti-discrimination, and much more.[46] Public and private judicial enforcement are, for better or worse, entangled in the United States, and the regulatory system is quite complex. Within the judiciary, the use of private litigation as an enforcement mechanism exists along a continuum that includes public enforcement by government lawyers in courts and often overlapping state-level enforcement.[47] In some areas, private enforcers hold a virtual monopoly on federal enforcement, as, for example, under the Worker Adjustment and Retraining Notification Act (WARN Act), a 1980s law that requires larger employers to give advance notification to workers of a "plant closing or mass layoff."[48] The WARN Act provides a private right of action for individuals to enforce the statute, but does not assign enforcement responsibility to a federal agency.[49] The federal enforcement gap has motivated some states to

44. *See id.* at 2–3, 16–21 (exploring how the movement against private enforcement achieved less success through legislation and rulemaking).

45. *See id.* at 3, 19–22, 97, 99, 130, 150, 180 (explaining that the Supreme Court, motivated in part by ideological concerns, succeeded in curtailing private enforcement of statutes through deciding procedural issues).

46. *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 10, 214, 217 (2010) ("At present, the role of private litigation in many important areas of federal policy in the United States is massive both in absolute terms and relative to enforcement by the national government."). The litigation state is not only a federal phenomenon. *See* Zachary D. Clopton & David L. Noll, The Litigation States 1, 5–6 (unpublished manuscript) (on file with author) (providing preliminary data finding more than 3,000 private rights of action in the states); Diego A. Zambrano, Neel Guha, Austin Peters & Jeffrey Xia, *Private Enforcement in the States*, 172 U. PA. L. REV. 61, 67 (2023) (offering a conservative count of 3,500 private-rights-of-action provisions identified through machine-learning techniques).

47. *See* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1152, 1171 (1990) (describing "all of the components of the administrative lawmaking system—a system defined by the complex interrelationships among Congress, administrative agencies, and the federal courts"); David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1560–62 (1995) (discussing "federal/state enforcement relationships").

48. 29 U.S.C. §§ 2102–2109.

49. *See* Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79, 120 (2022) ("[A]s with other facets of work law, the WARN Act is substantively

enact "mini-WARN" acts[50]—New York's, for example, provides for a private right of action and also authorizes the New York Department of Labor to enforce the statute on the state's behalf.[51]

In other areas, federal regulatory enforcement combines private litigation with administrative enforcement, as in statutes involving workplace discrimination, for example.[52] Here, too, states have assumed an enforcement role with respect to federal law and/or state-specific anti-discrimination statutes.[53] Moreover, when Congress passes a law that creates overlapping public and private judicial enforcement mechanisms, it does not specify the optimal level or mix of enforcement between the two. This has led to concerns about redundant public-private enforcement, and at times has led Congress to allow public enforcement to displace or take over private enforcement.[54]

Efforts to curtail private enforcement actions found a hospitable forum in the Article III courts, where, among other things, groups opposed to the litigation state nimbly exploited federal procedural rules to their own advantage.[55] The Federal Rules of Civil Procedure (Federal Rules) by design largely use flexible standards, not hard-edged rules, and the individual judge

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weak and lacks effective enforcement mechanisms."); *see also* Stephen D. Ake, *Evolving Concepts in Management Prerogatives: Plant Closures, Relocations, and Mass Layoffs*, 24 STETSON L. REV. 241, 244 n.17, 245 n.23 (1994) (discussing the WARN Act's lack of public enforcement mechanisms and the Department of Labor's refusal to take a formal position on whether WARN should be amended to assign enforcement responsibility to the agency, which suggests that it might be preferable to consider instead whether an amendment should provide incentives, such as attorney fees, to encourage private actions); *In re* APA Transp. Corp. Consol. Litig., 541 F.3d 233, 240–42 (3d Cir. 2008) (denying statutory standing to Plaintiff Funds to bring enforcement of the WARN Act and relying on Department of Labor regulations authorizing only employees, union representatives, and units of local government to bring suit).

50. *See* Noah Jennings, *Analysis: As Layoffs Rise, Employers Must Heed State WARN Laws*, BLOOMBERG L. (Dec. 12, 2022, 4:00 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-as-layoffs-rise-employers-must-heed-state-warn-laws [https://perma.cc/4Z6V-QTNY].

51. N.Y. LAB. LAW §§ 860–860-i (McKinney 2009); *see* Susan Schultz Laluk & Sharon P. Stiller, *Employment Law*, 59 SYRACUSE L. REV. 735, 751–52 (2009) (discussing the New York WARN Act's use of public-private remedial scheme).

52. *See* Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287, 290–92 (2021) (discussing the interplay of private enforcement actions and administrative enforcement by the U.S. Equal Employment Opportunity Commission, and reporting that "of the roughly 75,000 to 100,000 charges of discrimination and harassment it received in each of the past twenty years, the EEOC itself litigated only between 114 and 465 cases each year—or fewer than 0.5%").

53. *See generally* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011) (discussing federal-state enforcement regimes). For a concrete example, see Wellons v. Nw. Airlines, Inc., 165 F.3d 493, 496 (6th Cir. 1999), in which the Sixth Circuit held that an employee's state law race-discrimination claim was not preempted by federal law.

54. *See supra* note 27 and accompanying text.

55. *See supra* note 45 and accompanying text.

enjoys broad discretion in their interpretation and application.[56] This discretionary regime, which came into shape with the 1938 Federal Rules, was an intentional part of a New Deal project aimed at eliminating common law and code-based roadblocks that impeded an injured party from securing relief on the merits.[57] Groups resistant to the litigation state succeeded by upending procedural discretion as a way to shut down judicial access, and they did so without having to amend substantive law or the Federal Rules themselves.[58] Instead, the Supreme Court largely did the work, narrowly interpreting the Federal Rules and procedural statutes and eventually invoking the federal Constitution to weaken private enforcement's regulatory bite.[59]

The examples are many, familiar, and in some instances pre-date the Roberts Court. The Court has heightened pleading standards, made summary judgment motions easier for defendants to bring, restricted access to discovery, and made it harder for plaintiffs to obtain standing.[60] The federal courts have also placed a series of hurdles in the way of plaintiffs seeking to bring class actions to enforce regulatory protections,[61] and have read jurisdictional statutes to enable the removal of regulatory enforcement actions from more hospitable state courts into federal ones.[62] Importantly, the Court has also reinterpreted the Federal Arbitration Act of 1925—building,

56. *See* Samuel Issacharoff & Troy A. McKenzie, *Managerialism and Its Discontents*, 43 REV. LITIG. 1, 4 (2023) ("As originally designed, the Federal Rules were compatible with an ethos favoring broad judicial discretion to ensure that disputes were resolved on the merits and without surprises.").

57. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 5, 6, 10 (2010) (noting a retreat from the "liberal-procedure ethos of 1938).

58. *See supra* note 45 and accompanying text.

59. *See* BURBANK & FARHANG, *supra* note 2, at 133–34, 137–38, 141–43 (exploring various procedural constraints on private enforcement).

60. *See* Hershkoff & Loffredo, *supra* note 30, at 552–55 (discussing shifts in the Court's standing doctrine); Norris, *supra* note 28, at 479–80, 484–85, 493, 503, 509 (2022) (discussing shifts in summary judgment, pleading, arbitration, class actions, and discovery and their embodiment of a neoliberal ethos); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 361–64 (2010) (describing how the restrictive ethos is present in the pleading, class action, discovery, and summary judgment contexts).

61. *See* Norris, *supra* note 28, at 503–08 (cataloguing judicially imposed constraints on class actions). *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (same).

62. One example concerns removal of class actions that meet the minimal diversity requirements of 28 U.S.C. § 1332(d), which originated in the Class Action Fairness Act (CAFA). For the full act, see Class Action Fairness Act of 2005, Pub. L. No. 109–2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.). *See also* Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1869 (2008) (detailing that CAFA supporters understood the expansion of federal jurisdiction as a way to "terminate large numbers of class actions and prevent many more from ever being filed"). For other examples, see Hershkoff & Norris, *supra* note 29, at 3–4.

in the words of Justice O'Connor, "an edifice of its own creation"[63]—to allow corporations, often through contracts of adhesion, to channel suits by private enforcers out of public courts and into private fora selected by these repeat-players.[64]

Along the way, the Court also constitutionalized its deregulatory thrust in ways that significantly cut into Congress's capacity to devise new enforcement mechanisms.[65] The Court's first move was to narrow the scope of Congress' Section 5 power to enforce the Fourteenth Amendment, leading to a broadening of the immunity provided to states under the Eleventh Amendment and to a narrowing of remedies to redress discrimination.[66] The Court then trained its sights on Article I, finding that part of the Constitution to be no source for abrogation of state immunity.[67] Indeed, the Court broadly read the Eleventh Amendment to bar private enforcement actions against states that seek monetary damages even when filed in a state court—effectively putting an end, for example, to wage and hour claims against states in state court under the Fair Labor Standards Act.[68]

The weakening of Article I power then broadened, with the Court limiting Congress's ability to create new procedural rights of action, insisting that Congress can create rights redressable in federal court only if the harms

63. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

64. *See, e.g.*, Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1812–14 (2014) (critiquing the Court's preference for arbitration over adjudication); Norris, *supra* note 28, at 493 (describing how the Court's various arbitration decisions fit into the neoliberal legal order). The Court's arbitration decisions have also been critiqued for undermining the development of law, rule of law, and role of courts in U.S. democracy. *See supra* note 2 and accompanying text.

65. *See* Elizabeth Earle Beske, *The Court and the Private Plaintiff*, 58 WAKE FOREST L. REV. 1, 3 (2023) (describing how "the Court has invoked the injury-in-fact requirement as a mechanism for curtailing congressional efforts to create actionable private rights").

66. For an overview of these developments, see Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003) (explaining that the Rehnquist Court's "decisions invalidating Section 5 legislation invoke the Constitution as a document that speaks only to courts") and Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224 (2003) (explaining that the Rehnquist Court's decisions involving the Commerce Clause, the Fourteenth Amendment, and state sovereign immunity work "in tandem with . . . restrictions on the power of Congress to develop new federal rights").

67. The culmination was *Seminole Tribe*. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996).

68. *See* Alden v. Maine, 527 U.S. 706, 712 (1999) **(**holding "that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts" and that "the State of Maine ha[d] not consented to suits for overtime pay and liquidated damages" under the Fair Labor Standards Act).

are analogous to those that existed at the Founding.[69] In tandem with that view, some justices, with Justice Scalia in the lead,[70] have argued that Congress may not create rights of action that functionally delegate the Executive's enforcement power to individuals—a view that ignores history and the traditional use of relators to ferret out corrupt practices against the government on the promise of a bounty.[71] This has teed up what a group of scholars refers to as the "Article II challenge" to private enforcement, a series of judicial pronouncements calling private enforcement's constitutional bona fides into question, maintaining that it impermissibly interferes with Article II enforcement power.[72]

On a parallel path, this one outside of Article III courts, the Court has given new life to constitutional arguments aimed at gutting the capacity of administrative agencies to fulfill their regulatory role through rulemaking and other practices within their own domains.[73] As with procedural retrenchment, the path marks are clear, involving such matters as the

69. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021) (concluding that an alleged harm will constitute an injury for Article III purposes and thus provide a basis for standing in federal court only if the harm has "'a close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts" (quoting Spokeo, Inc. v. Robins, 587 U.S. 330, 341 (2016))).

70. Lujan v. Defs. of Wildlife, 504 U.S. 555, 572–73 (1992) (Scalia, J.) (calling the relator action the "unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit").

71. *See* Steven L. Winter, *What If Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENV'T. L. & POL'Y F. 155, 156 (2001) ("Private enforcement of civil penalties—as Justice Scalia has since conceded—has been a staple of Anglo-American jurisprudence since the fourteenth century."); *see also* Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1308 (1961) (arguing that "in the writ of prohibition, at least, there is overt authority for allowing anyone to initiate the proceeding," even without a showing of personal interest). A notorious example of procedural delegation involved the Fugitive Slave Act, which not only empowered individuals to enforce the law, but also required them to do so subject to criminal penalty. Fugitive Slave Act of September 18, 1850, ch. 60, § 5, 9 Stat. 462; *see also* Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 157 (2004) ("If the Constitution delegated to Congress plenary power to protect the property rights and privilege of slave owners, how can it not have delegated to Congress the same plenary power to protect the human rights and equality of all Americans?").

72. Nitisha Baronia, Jared Lucky & Diego Zambrano, Private Enforcement and Article II, 1 (Oct. 1, 2024) (unpublished manuscript) (on file with authors).

73. *See supra* note 4 and accompanying text.

President's removal power,[74] the scope of remedial authority,[75] and now the so-called major questions doctrine.[76] The demise of *Chevron*[77] and the Court's blessing of further challenges to administrative regulations also belong in the mix.[78] And, as we mentioned in the Introduction, the second Trump Administration is further gutting the administrative state, using Executive Orders and mass terminations to undermine its functioning.

We could go on.[79] The point is that regulatory enforcement combines a mix of strategies and mechanisms and involves the national government, the states, and individuals. Whatever the mix, private litigation typically plays some role.[80] The Court's constraining of private enforcement runs against Congress's decision to use multiple modes of enforcement and creates pressure on public enforcers to fill the remedial gap.[81]

B. Pressure on Public Enforcement

The Court's defenders would argue that this state of affairs is constitutionally sound and simply marks a rescue mission aimed at restoring

74. In three recent decisions, the Court has maintained that the Constitution provides the President with power to remove executive officers from agency positions. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010) (holding that "the dual for-cause limitations on the removal of Board members [in the Sarbanes Oxley Act] contravene the Constitution's separation of powers"); Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020) (holding that the "structure of the CFPB violates the separation of powers" and that the agency's director "must be removable by the President at will"); Collins v. Yellen, 141 S. Ct. 1761, 1770 (2021) (holding that the Federal Housing Finance Agency's structure, allowing the head of the agency to be removable by the President only "for cause," violates the separation of powers).

75. *See, e.g.*, AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341, 1352 (2021) (finding that § 13(b) of the Federal Trade Commission Act does not vest the FTC with the power to seek equitable monetary relief such as disgorgement or restitution).

76. *See supra* notes 4–6 and accompanying text.

77. *See supra* note 4 and accompanying text.

78. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2447 (2024) (concluding that the statutory limitations period for challenges to agency rulemaking starts running when the rule is enforced and not when the rulemaking goes into effect); *see also id.* at 2470 (Jackson, J., dissenting) ("The Court's baseless conclusion means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face. Allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilizing for both Government and businesses.").

79. *See generally, e.g.*, Hershkoff & Norris, *supra* note 29 (exploring the corporate-driven effort to manipulate jurisdictional doctrines to thwart access to the courts by individuals seeking to remedy violation of regulatory protections).

80. *See generally* FARHANG, *supra* note 46 (exploring private enforcement's policy implementation role); David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913 (2014) (evaluating private enforcement as a regulatory tool); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012) (arguing that focusing on pathology of private enforcement discounts the role of these mechanisms).

81. *See* Glover, *supra* note 80, at 1176 (commenting that "efforts to curtail private mechanisms of enforcement sweep too broadly" and may "leave in place insufficient ex post accountability").

United States governance to the system of separated powers that the Framers intended, including a Congress that stays within its substantive powers and a unitary Executive that oversees and enforces policy.[82] In this originalist understanding of separated powers, Congress has limited authority to decide how to enforce the laws that it enacts; the Executive is in the driver's seat—thus, the Article II "challenge" to private enforcement.[83]

Indeed, the Court has at times rationalized its curtailing of private enforcement on the view that public enforcement, whether by an agency or the United States, will fill the remedial gap. From this perspective, consider *Thole v. U.S. Bank N.A.*,[84] in which pensioners guaranteed a fixed payment from their retirement plan sued as private enforcers under ERISA challenging the plan's investment decisions as a breach of fiduciary duty.[85] The Eighth Circuit had affirmed the dismissal of the claims for lack of statutory standing;[86] the Court, five-to-four, likewise affirmed but did so for lack of Article III standing on the view that whether or not mismanagement took place, it did not affect payment of plaintiffs' fixed-benefit annuities, so they suffered no monetary injury needed to show constitutional injury.[87] In particular, the Court deflected arguments that if the fixed-beneficiary plaintiffs could not sue, no one could sue; after all, the Court reasoned, the DOL could step in to fill the void, since it "has a substantial motive to aggressively pursue fiduciary misconduct."[88] The government, however, had written an amicus brief expressing its concern that restraining private enforcement would create an undue public burden—asserting that "given limited resources, the Secretary of Labor cannot monitor every [ERISA] plan in the country."[89]

82. For an overview and critique of the unitary Executive theory, see generally Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83.

83. *See id.* at 83 ("Under the Constitution, the President, and no one else, has executive power. The executive is therefore 'unitary.' It follows, as the night follows the day, that Congress lacks the power to carve up the executive . . . .").

84. 140 S. Ct. 1615 (2020).

85. *Id.* at 1619.

86. Thole v. U.S. Bank, Nat'l Ass'n, 873 F.3d 617, 628 (8th Cir. 2017) (holding that fixed benefit annuitants lacked statutory standing because they did not fall "within the class of plaintiffs whom Congress has authorized . . . to bring suit claiming liability . . . for alleged breaches of fiduciary duties given that the plan was overfunded"), *aff'd sub nom.* Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020).

87. *See* Thole, 140 S. Ct. at 1619 (holding that because "the outcome" of the suit would not affect plaintiffs' future "monthly benefits that they are already slated to receive," they lacked a "concrete stake" in the suit needed to show Article III standing).

88. *Id.* at 1621.

89. Brief for the United States as Amicus Curiae Supporting Petitioners at 26, *Thole*, 140 S. Ct. 1615 (No. 17-1712). In *Alden v. Maine*, 527 U.S. 706 (1999), which extended the Eleventh Amendment to bar statutory monetary claims against a state employer, the Court emphasized the

In other contexts, federal courts have shifted enforcement patterns to administrative agencies in more subtle ways. Primary jurisdiction, with which we began this Part, is one example.[90] In a variety of cases over the past several decades, federal courts have used the doctrine of primary jurisdiction to pause or end litigation brought by private parties to give agencies a chance to address the issues through their internal processes, at times in contexts where agencies have lacked the power or will to resolve the issues in the case.[91] In these examples and others, including federal preemption of state regulatory claims, the Supreme Court and lower federal courts have winnowed the world of private enforcement power and shifted the enforcement pressure onto government lawyers. [92]

II. Constrained Public Enforcement

The judicial weakening of private enforcement in court, with its increasing pressure on public enforcement by government lawyers, arguably is troubling in its own right. Public enforcement may not be able to fill the regulatory gap, leaving legal violations unaddressed. Public enforcers may lack the information, resources, or political will to bring enforcement

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failure of the United States to participate in the action as a reason to withhold relief from state workers who did not receive statutorily owed overtime payments:

> The Solicitor General of the United States has appeared before this Court, however, and asserted that the federal interest in compensating the States' employees for alleged past violations of federal law is so compelling that the sovereign State of Maine must be stripped of its immunity and subjected to suit in its own courts by its own employees. Yet, despite specific statutory authorization, see 29 U.S.C. § 216(c), the United States apparently found the same interests insufficient to justify sending even a single attorney to Maine to prosecute this litigation.

Id. at 759.

90. *See supra* notes 33–34.

91. *See* Hershkoff & Norris, *supra* note 29, at 27–30 (discussing various uses of primary jurisdiction to suppress claims).

92. *See, e.g.*, Arthur N. Read, *Let the Flowers Bloom and Protect the Workers Too—A Strategic Approach Toward Addressing the Marginalization of Agricultural Workers*, 6 U. PA. J. LAB. & EMP. L. 525, 526 (2004) (discussing "federal preemption of effective state law" regulating treatment of agricultural workers). And there is also state preemption of local regulatory claims. *See* Dilini Lankachandra, *Enacting Local Workplace Regulations in an Era of Preemption*, 122 W. VA. L. REV. 941, 944 (2020) ("Since 2010, 16 states have preempted local minimum wage increases, 9 have preempted fair scheduling policies, 17 have preempted paid leave requirements, and another 5 have preempted local additions to a comprehensive state-wide paid sick leave law.").

actions.[93] They may be driven by political calculations.[94] And private enforcers may be more nimble and motivated to bring smaller actions to remedy wrongdoing,[95] and can leverage their direct experiences to implement and develop regulatory law.[96] The larger point is that public and private enforcement each has its own advantages and limitations, and disrupting the balance between the two may undermine the regulatory ecosystem.

But this is not the whole of the problem. Even as the judiciary hamstrings private regulatory enforcement, it has also restricted possibilities for public enforcement in lawsuits brought by public enforcers. Some of these restrictions directly constrain the government-as-plaintiff; others indirectly constrain government enforcement by enabling deregulatory challenges (a direct constraint would be narrowing the government's standing to bring suit, while an indirect constraint would be expanding a deregulator's standing to bring suit).[97] While recognizing the importance of both types of restrictions, our focus is on the first, which left unabated could produce a judicial regulatory system squeezed at both ends.

We begin in this Part by describing judicial interventions that go to the core of the government's power to bring suit—those involving standing to sue and its ability to enforce statutory programs absent explicit textual authorization. We then turn to less core, yet still significant limits on the government's intervention rights and instances of dismissals of its complaints, where the story is even more nascent but equally concerning, before briefly considering limitations on state enforcement.

A. Standing to Sue Absent Explicit Authorization

That the federal courts are narrowing Executive standing to bring enforcement actions may seem counterintuitive. A major plank in the Court's approach—as the notion of the Article II challenge evokes—has been its twin

93. *See* Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1505 (2022) ("[T]he presence of private enforcers may mean that fewer 'good cases' interpreting and enforcing regulatory commands are missed that would have been missed by public enforcers lacking the information, resources, or political will to bring those cases."); Clopton, *supra* note 27, at 308–09 (exploring how private enforcement can remedy public under-enforcement); Glover, *supra* note 80, at 1155–56 (exploring how private enforcement can mitigate agency under-enforcement).

94. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 491–92, 511–12 (2012) (highlighting how budgetary constraints and political calculations can affect public enforcement).

95. *See, e.g.*, Norris, *supra* note 93, at 1504–06 (discussing the literature on private enforcers performing structural, gap-filling roles).

96. *See id.* at 1512–14 (exploring how private enforcement plays a democratic role by permitting citizens to leverage the "expertise of experience").

97. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023) (finding state standing to sue the federal government).

valorizing of Executive enforcement power and undermining of the concept of the "private attorney general," bolstered by its refusal at times to respect Congress's policy judgment that a certain kind of enforcement mechanism is needed to carry out statutory mandates.[98] The Court has rationalized its second-guessing of democratic decisions by invoking Article III as well as Article II of the Constitution, insisting that limits on private standing are needed to protect the Executive from Congressional intrusion.[99] As Justice Scalia explained in *Lujan v. Defenders of Wildlife*,[100]

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'[101]

An earlier variant of this argument appeared in the Court's Eleventh Amendment cases; for example, Justice Kennedy in *Alden v. Maine*[102] likewise distinguished private enforcement actions against a state seeking money damages from public enforcement actions brought "in the name of the United States by those who are entrusted with the constitutional duty to 'take care that the laws be faithfully executed.'"[103] And as mentioned above, in *Thole*, the Court, in finding that private plaintiffs did not have constitutional standing to redress an alleged breach of fiduciary duty under ERISA, emphasized that the Department of Labor could fill the enforcement void,[104] a conclusion that the DOL itself questioned.[105]

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98. *See* Hershkoff & Loffredo, *supra* note 30, at 542–43, 591–92 (discussing legislative decisions about enforcement mechanisms and standing).

99. *See* Yackle, *supra* note 21, at 137 ("In this vital sense, standing doctrine has been fashioned to protect the President's prerogatives and, indeed, his ability to discharge his independent duty to execute federal law as he sees fit."). There has been related scholarly discussion of limits on Congress as a litigant. *See* Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 574 (2014) (arguing that "the Constitution precludes Congress from having a direct role in the implementation of federal law, providing instead that the executive branch 'shall take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)).

100. 504 U.S. 555 (1992).

101. *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

102. 527 U.S. 706 (1999).

103. *Id.* at 755 (quoting U.S. CONST. art. II, § 3); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 129 (1998) (Stevens, J., concurring) (considering whether Justice Scalia's majority opinion is "rooted in another separation of powers concern: that this citizen suit somehow interferes with the Executive's power to 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)).

104. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1619–21 (2020); *see supra* notes 84–88 and accompanying text.

105. *See supra* note 89 and accompanying text.

Given the Court's emphasis on the Executive's constitutional take-care duty and the important role of public enforcement, one might think that the Article III courts would step out of the way and let the United States do its job as public enforcer-in-chief. But, as this subpart shows, this is not always the case, and the Court's decisions (and lower court decisions building on them) mark a departure from precedent expressing a strong view of governmental standing to enforce the Constitution and statutes.

That view emerged in not one, but multiple cases. For example, in *United States v. American Bell Telephone Co.*,[106] decided in 1888, the Supreme Court held that the United States could bring an equitable action to cancel two patents issued to Alexander Graham Bell, even though the federal patent statute did not expressly confer "power or authority" on the Attorney General to bring such a suit.[107] American Bell Telephone had argued that there was "no power or authority in law" for the United States to bring suit.[108] The Court rejected that as a barrier to the government's action. "The essence of the right of the United States to interfere in the present case," the Court wrote, "is its obligation to protect the public from the monopoly of the patent which was procured by fraud."[109] The Court cited to numerous earlier decisions upholding the power of the United States to cancel a land grant.[110] The decision was influenced in part by an appreciation of how the government's role as law-giver (in the legislative sphere) shaped its obligations as law-enforcer (in the executive and judicial spheres): Because government actors, "acting as the agents of the people," created patent rights in federal law, they also had the "duty to correct [the] evil" that occurred when those rights were violated.[111] The fact that the patent statute did not authorize the United States to bring suit was beside the point:

> [A]lthough the legislature may have given to private individuals a more limited form of relief, by way of defence to an action by the patentee, we think the argument that this was intended to supersede the affirmative relief to which the United States is entitled, to obtain

106. 128 U.S. 315 (1888).

107. *Id.* at 356–57, 373.

108. *Id.* at 356–57.

109. *Id.* at 367. Further explaining itself, the Court stated:

> That the government, authorized both by the Constitution and the statutes to bring suits at law and in equity, should find it to be its duty to correct this evil, to recall these patents, to get a remedy for this fraud, is so clear that it needs no argument; and we think we have demonstrated that the proper remedy is one adopted by the government in this case.

Id. at 370.

110. *Id.* at 366. That same year, in *United States v. San Jacinto Tin Company*, the Court upheld the right of the United States to cancel a land deed, resting its decision, in part, on the "obligation on the part of the United States to the public." 125 U.S. 273, 285–86 (1888).

111. *Am. Bell Tel. Co.*, 128 U.S. at 370.

> a cancellation or vacation of an instrument obtained from it by fraud, an instrument which affects the whole public whose protection from such a fraud is eminently the duty of the United States, is not sound.[112]

Likewise, in *In re Debs*,[113] the Court held that the Executive could sue to vindicate legal and constitutional rights even absent express legislative or textual authority.[114] The Court there explained, "The obligations which [the government] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."[115] This approach continued for some time. For example, in *NLRB v. Nash-Finch Co.*,[116] the Court concluded that the National Labor Relations Board (NLRB), "though not granted express statutory remedies, may obtain appropriate and traditional ones to prevent frustration of the purposes" of the National Labor Relations Act.[117]

In the last generation, beginning in cases in which the plaintiff has been a federal agency, the Court has taken a different approach both to the government's Article III standing and to its statutory standing to enforce statutes that do not provide an explicit cause of action on behalf of the United States or an agency. In 1995, in *Department of Labor v. Newport News Shipbuilding & Dry Dock Co.*,[118] Justice Scalia found that the DOL did not have standing to enforce a statute absent clear legislative authority to do so,

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112. *Id.* at 373. The Court did not speak in the language of standing, but respected commentary treats *American Bell* as the "classic illustration" of the right of the United States to sue "with or without express statutory authority, to protect the public interest." CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 13B FEDERAL PRACTICE AND PROCEDURE § 3531.11 (3d ed. 2008); *see also* CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & HELEN HERSHKOFF, 14 FEDERAL PRACTICE AND PROCEDURE § 3652 (4th ed. 2015) (stating that "the interests that the United States may invoke to show standing are far broader than those of a private litigant for they encompass concerns that are sovereign, as well as proprietary or pecuniary in nature" and that the "United States in some circumstances may sue to adjudicate issues to enforce the interests of private individuals").

113. 158 U.S. 564 (1895).

114. *See id.* at 582–84 (finding implicit executive power to seek an injunction against a strike interfering with the carrying and delivery of U.S. mail); Note, *Protecting the Public Interest: Nonstatutory Suits by the United States*, 89 YALE L.J. 118, 121 n.15 (1979) ("*Debs* allowed the executive to claim standing on the basis of injuries to the public not statutorily identified by Congress as injuries to the United States."); *see also* Sanitary Dist. of Chi. v. United States, 266 U.S. 405, 425–26 (1925) (finding that the government had standing to bring suit to enjoin water diversion from Lake Michigan because it was "asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction" and that "no statute [wa]s necessary to authorize the suit").

115. *In re Debs*, 158 U.S. at 584.

116. 404 U.S. 138 (1971).

117. *Id.* at 142; *see also* Davis, *supra* note 18, at 21, 24 (gathering examples). The Court's decision in *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570 (2024)—confining Section 10(j) of the National Labor Relations Act, which authorizes the district court "to grant . . . such temporary relief . . . as it deems just and proper" during the pendency of NLRB administrative proceedings to "traditional" principles of equity—may signal retreat from this view. *Id.* at 1576.

118. 514 U.S. 122 (1995).

writing for the Court that "when an agency in its governmental capacity is meant to have standing, Congress says so."[119] In the case, the Director of the Office of Workers' Compensation Programs in the DOL had sought judicial review of an agency disability determination under the Longshore and Harbor Workers' Compensation Act that the claimant himself had declined to pursue.[120] The Court reasoned that a federal agency could not be a "person adversely affected or aggrieved" under the statute merely by asserting its policy interests in law enforcement.[121] And it clarified that "[a]gencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes."[122] The Court thus maintained that the statute's "silence regarding the Secretary's ability to take an appeal is significant when laid beside other provisions of law" expressly providing for agency standing, including labor laws vesting the Equal Employment Opportunity Commission (EEOC), Attorney General, or Secretary of Labor with judicial enforcement authority.[123]

Newport News is an unusual case, involving a dispute between two government entities—a situation that might confound even those who argue in favor of a unitary Executive.[124] But the decision has had downstream effects in the courts, which have run with its textualist approach to restrict the ability of federal as well as state agencies to litigate cases involving

119. *Id.* at 129 (emphasis omitted).

120. *Id.* at 23–25.

121. *Id.* at 130; *see also id.* at 129 ("We are aware of no case in which such a 'policy interest' by an agency has sufficed to confer standing under an 'adversely affected or aggrieved' statute or any other general review provision.").

122. *Id.* at 132.

123. *Id.* at 129–30.

124. *Compare* Tara Leigh Grove, *Justice Scalia's Other Standing Legacy*, 84 U. CHI. L. REV. 2243, 2264 (2017) (discussing standing in inter-agency suits and arguing that "Justice Scalia had good reason to be skeptical of government standing"), *with* Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1385 (2017) (arguing that inter-agency conflict "may be desirable").

benefits for the visually impaired,[125] environmental harms,[126] and other regulatory matters.[127]

Admittedly, unlike *American Bell*, *Newport News* involved the DOL and not the DOJ.[128] Nevertheless, the enforcement scenario was in significant respects the same: federal government lawyers seeking to secure compliance with a federal statute.[129] The Court in *Newport News* nowhere tried to square the decision with previous decisions finding enforcement power in the absence of express statutory authorization, and nowhere considered the separation of powers issues posed by its ostensible judicial narrowing of Executive Branch law-enforcement authority. Nor did it consider alternative explanations for why Congress sometimes expressly provides for judicial enforcement by agencies—including that Congress may affirmatively delineate public enforcement power in certain statutes to shape causes of action and direct enforcement priorities but not to deny enforcement authority under other statutes. We recognize that *Newport News*, unlike older cases, took place in a context where textualist approaches to statutory interpretation were in vogue and where Congress had been more deliberative about designing rights of action in statutes than before. Under these circumstances, a prospective rule requiring explicit authorization to sue might have made more sense, putting Congress on notice for future lawmaking, but instead, the effect of the Court's pronouncement was to read Executive enforcement authority out of a host of laws without adequate consideration of precedent or effects.

Lest one think that the DOJ would fare better than the DOL, there are reasons to doubt that it will in the future. Consider the signs emerging from

125. *See* Kentucky *ex rel.* Educ. & Workforce Dev. Cabinet v. United States, No. 5:12-CV-00132-TBR, 2014 WL 7375566, at *8 (W.D. Ky. Dec. 29, 2014) (stating with regard to the Randolph-Sheppard Act that "Congress was silent concerning the federal agencies' standing" and thus concluding that "Congress intended to withhold such standing").

126. Francis v. Recycling Sols., Inc., 695 A.2d 63, 75 (D.C. 1997) ("Nothing in the Home Rule Act, the Procurement Practices Act, the Recycling Act, or any other statute . . . suggests that a District official, other than the Director of [the Department of Administrative Services], may seek judicial review of a [Contract Appeals Board] decision."); Dep't of Nat. Res. & Env't Control v. Del. Pub. Serv. Comm'n, No. N18C-12-260, 2020 WL 888493, at *4 (Del. Super. Ct. Feb. 24, 2020) (holding that the Delaware Department of Natural Resources and Environmental Control was not a "person aggrieved" under the Delaware statute and therefore could not bring suit).

127. Off. of the Comm'r, Del. Alc. Beverage Control v. Appeals Comm'n, Del. Alc. Beverage Control, 116 A.3d 1221, 1229 (Del. 2015) (stating the Delaware Alcoholic Beverage Control Commissioner "does not have standing to appeal from decisions of the second-level reviewer, the Appeals Commission, absent express statutory authority").

128. United States v. Am. Bell Tel. Co., 128 U.S. 315, 350 (1888); Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 123 (1995).

129. *Am. Bell Tel. Co.*, 128 U.S. at 350, 370; *Newport News*, 514 U.S. at 123.

United States v. Texas.[130] This pre-*Dobbs*[131] suit involved a challenge to enjoin Texas's S.B. 8, a statute that delegates enforcement of abortion bans pre-viability to private individuals and creates bounties to incentivize the filing of suit.[132] After private individuals seeking to challenge S.B. 8 were rebuffed as plaintiffs for lack of standing and other jurisdictional defects, the United States filed suit to enjoin the law.[133] The district court entered a preliminary injunction;[134] the Fifth Circuit Court of Appeals granted a stay of the injunction;[135] and the United States filed an emergency application with the Supreme Court seeking vacatur of the stay.[136] The Supreme Court treated the stay application as a petition for certiorari, limited to one question: "May the United States bring suit in federal court and obtain injunctive or declaratory relief against the State, state court judges, state court clerks, other state officials, or all private parties to prohibit S.B. 8 from being enforced[?]"[137] At oral argument, while the Solicitor General maintained that the United States had a "manifest sovereign interest" in suing to redress the constitutional violation created by the Texas law, some Justices expressed skepticism about the DOJ's authority to bring suit.[138] The Court, however, punted and never provided an answer to the question; after oral argument, it dismissed the petition as improvidently granted.[139]

But based on the Justices' questioning, *United States v. Texas* raises the concern that the Court will be receptive to challenges to the scope of governmental standing in cases involving constitutional rights—where sovereign interests ought to be at their zenith. The case raises a series of questions: If Congress cannot delegate aspects of Executive enforcement power to private individuals, can it limit public enforcement by failing to authorize the Executive to bring suit under a particular statute?[140] And,

130. 142 S. Ct. 14 (2021); Press Release, U.S. Dep't. of Just., Justice Department Sues Texas Over Senate Bill 8 (Sept. 9, 2021), https://www.justice.gov/archives/opa/pr/justice-department-sues-texas-over-senate-bill-8#:~:text=Attorney%20General%20Merrick%20B.%20Garland,most%20abortions%20in%20the%20state [https://perma.cc/5ACV-ZXFS].

131. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

132. TEX. HEALTH & SAFETY CODE ANN § 171.208(a) (West 2021).

133. United States v. Texas, 566 F. Supp. 3d 605, 620 (W.D. Tex. 2021).

134. *Id.* at 690–91.

135. United States v. Texas, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021) (per curiam).

136. *Texas*, 142 S. Ct. at 14.

137. *Id.*

138. Transcript of Oral Argument at 4, 5, 28–30, *Texas*, 142 S. Ct. 522 (No. 21-588), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-588_i3jm.pdf [https://perma.cc/BJY9-US2N].

139. United States v. Texas, 142 S. Ct. 522, 522 (2021) (per curiam).

140. Without entering this debate, we note that scholarly discussion of the unitary Executive has not mined its implications for standing doctrine. *See, e.g.*, Steven G. Calabresi & Saikrishna B.

relatedly, can the Court treat the Executive's interest in the enforcement of law as an abstract interest outside the scope of Article III? To be sure, the conventional reading of Article III limits the kinds of actions even the United States can litigate to suits presented in an adversary form.[141] President Washington could not seek an advisory opinion from the Court to get its views about wartime neutrality;[142] likewise, the Court rebuffed as "collusive" a suit in which the United States intervened essentially seeking a declaration that wartime price controls were constitutional.[143] But the "generalized grievances" and "abstract" questions that are off limits to citizen suits surely are within the domain of Executive actions as part of the Article II power.[144] As Edward Hartnett's now classic discussion makes clear, given the Executive's accepted authority to bring criminal prosecutions, "Article III must include litigation that is based on nothing more than the 'harm to the common concern for obedience to law,' and the 'abstract . . . injury to the

Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (taking no account of a standing analysis); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 21 (1994) (stating the authors "put standing issues to one side"); *see also* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 257 (1994) ("The division of responsibility between independent agencies and the Solicitor General raises the spectre of a Solicitor General power grab of independent agency prerogatives.").

141. *But see generally* JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS (2021) (arguing that history does not support excluding nonadversarial disputes from Article III power). For commentary on Professor Pfander's work, see Robert J. Pushaw, Jr., *"Originalist" Justices and the Myth that Article III "Cases" Always Require Adversarial Disputes*, 37 CONST. COMMENT. 259, 262 (2022) ("Wholly absent in the Convention and Ratification debates, and in opinions during the Court's first century, was any mention that Article III 'Cases' required an adversarial dispute.").

142. Letter from Thomas Jefferson, Sec'y of State, to John Jay, Chief Just., and Associate Justices (July 18, 1793), *reprinted in* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50–52 (7th ed. 2015).

143. United States v. Johnson, 319 U.S. 302, 305 (1943).

144. *Compare* Davis, *supra* note 5, at 587 ("A government litigant may litigate 'generalized grievances' and need not show a personal injury-in-fact to have standing."), *with* Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1227 (2013) ("The usual rules on justiciability apply even to the United States, at least in theory."), *and* Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. 611, 613–14 (2019) (arguing that government institutions lack standing "to protect their official powers and duties").

interest in seeing that the law is obeyed.'"[145] At least some Justices have signaled their skepticism about that established view.[146]

It is also worth noting that *Newport News* and its constraining of governmental standing has created significant doctrinal confusion, including when the DOJ is prosecuting suit, in ways that beleaguer law enforcement efforts. Consider, in this regard, *United States v. Florida*.[147] In 2013, the DOJ brought suit in federal court alleging that Florida's administration of Medicaid discriminated against children with medically complex or fragile conditions in violation of Title II of the Americans with Disabilities Act (ADA).[148] That suit followed on the heels of a six-month investigation by the DOJ, triggered by individual complaints of discrimination and unsuccessful efforts to secure the state's voluntary compliance.[149] The case was consolidated with two private class actions already pending in the district.[150] Ten years later, the United States' action finally went to trial and the district court held that the United States had met its burden in proving that the state of Florida had violated the law by unjustifiably institutionalizing children with disabilities.[151] In between, the state contested the authority of the United States to bring the action, unsuccessfully moving for judgment on the

145. Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2251 (1999). Hartnett stated further:

> Despite its apparent reasonableness under current Supreme Court doctrine, I submit that no federal judge, if pressed, would seriously contend that Article III requires that the United States must suffer an injury in fact that is 'personal,' 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical' before litigation on its behalf can be brought in federal court. And no federal judge would contend that injury to the United States be more than an 'abstract . . . injury to the interest in seeing that the law is obeyed . . . .

Id. at 2245; *see also* James E. Pfander, *Triangulating Standing*, 53 ST. LOUIS U. L.J. 829, 830 (2009) (emphasizing, in the context of agency standing, that the "right of the government to bring criminal prosecutions depends not on any injury in fact to the government, but on the customary and statutory power of law enforcement officials to initiate criminal proceedings").

146. Transcript of Oral Argument, *supra* note 138, at 8, 20–21, 27–30.

147. 938 F.3d 1221, 1225, 1229–30 (11th Cir. 2019), *cert. denied*, 143 S. Ct. 89 (2022). The case illustrates the complexity of private and public enforcement schemes, the comparative advantages of each, and the role that procedure and jurisdiction play in delaying and even denying relief on meritorious claims. *See* United States v. Florida, 682 F. Supp. 3d 1172, 1186 (S.D. Fla. 2023) (discussing role of individual "Olmstead" complaints, two putative class actions, the DOJ's investigation triggered by individual filings with the department, and the government's action).

148. *Florida*, 682 F. Supp. 3d at 1182 (stating that the United States filed the action against the state of Florida "on behalf of hundreds of children described as 'medically fragile' or 'medically complex'" (quoting Complaint at 4, *Florida*, 682 F. Supp. 3d 1172 (No. 0:13-cv-61576-WJZ))).

149. *Florida*, 938 F.3d at 1224–25.

150. *Florida*, 682 F. Supp. 3d at 1186–87.

151. *Id.* at 1182, 1188 (stating that the complaint contained "a single count against the State of Florida, alleging that Florida is unjustifiably segregating institutionalized children, and that it adopted policies and practices that place other children at serious risk of similar institutionalization, in violation of Title II of the ADA").

pleadings on this ground.[152] In 2014, the case was transferred to a different judge, and proceeded for two years through discovery and substantive pretrial motions.[153] On the eve of trial, the district judge *sua sponte* raised the question of the authority of the United States to bring suit and in 2016 dismissed the action on the ground that it lacked such authority.[154]

The Florida district court's decision leaned heavily on *Newport News* and its premise that when Congress seeks to confer standing, it "says so," finding no such clear authorization in the text of Title II of the ADA.[155] Title II provides "remedies, procedures, and rights . . . to any person alleging discrimination on the basis of disability in violation" of the law,[156] and the district court found that the DOJ was not a "person" alleging discrimination, basing its ruling in part on the "longstanding interpretive presumption that 'person' does not include the sovereign."[157] The court also reasoned that Title II, unlike other parts of the statute, did not expressly confer jurisdiction on the government, and that "[w]here Congress has conferred standing on a particular actor in one section of a statutory scheme, but not in another, its silence must be read to preclude standing."[158] Separately, the district court denied class certification in the individual actions; discovery disputes ensued; individual claims became moot because of death or other reasons.[159] Along the way, the district court denied a series of motions by the United States to permit interlocutory appeal, and eventually granted summary judgment in favor of the state and closed the individual actions.[160]

Eleven months later, the United States was able to appeal, and in 2019 a divided Eleventh Circuit reversed the *sua sponte* dismissal.[161] The court began, quoting from the statute, with the premise that "Congress envisioned that, through the ADA, the Federal Government would take 'a central role in enforcing the standards established [under the law] on behalf of individuals with disabilities' . . . to 'address the major areas of discrimination faced day-to-day by people with disabilities.'"[162] The court explained, correctly in our

152. A.R. *ex rel.* Root v. Dudek, 31 F. Supp. 3d 1363, 1366 (S.D. Fla. 2014).

153. C.V. v. Dudek, 209 F. Supp. 3d 1279, 1282 (S.D. Fla. 2016), *rev'd and remanded sub nom.* United States v. Florida, 938 F.3d 1221 (11th Cir. 2019).

154. *See id.* at 1282 & n.3 ("Consistent with the plain language of the Americans With Disabilities Act, the Court finds that the Department does not have standing to sue under Title II.").

155. *Id*. at 1282 (citing Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 129 (1995)).

156. 42 U.S.C. § 12133.

157. *Dudek*, 209 F. Supp. 3d at 1284 (quoting Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 780 (2000)).

158. *Id*. at 1283–84.

159. United States v. Florida, 682 F. Supp. 3d 1172, 1189 (S.D. Fla. 2023).

160. *Id*. at 1189 & n.12.

161. United States v. Florida., 938 F.3d 1221, 1225, 1250 (11th Cir. 2019).

162. *Id*. at 1226 (quoting 42 U.S.C. § 12101(b)(3)–(4)).

view, that Title II's enforcement procedures are, "[t]hrough a series of cross-references," those of § 505(a)(2) of the Rehabilitation Act of 1973,[163] and therefore, those of Title VI of the Civil Rights Act of 1964, encompassing its "remedies, procedures, and rights"—including the power of the agency to enforce the law in court.[164] Congress thus "chose to use § 505(a)(2) of the Rehabilitation Act as the enforcement mechanism for Title II of the ADA, with full knowledge that those provisions established administrative enforcement and oversight in accordance with Title VI."[165]

Even this was not the end of the challenge to the United States' standing to bring the suit. Florida sought en banc review and two years later, the Court of Appeals denied that request, publishing an opinion and dissent.[166] Florida then petitioned for certiorari, which the Supreme Court denied.[167]

In some ways, this seems like a long-fought success for governmental statutory enforcement authority: Ten years after the United States filed its enforcement action, the Court of Appeals refused to read public enforcement power out of the statutory framework.[168] But that delay hampered governmental enforcement along the way. And during that decade, fragile children were denied the medical benefits they needed and to which they were legally entitled. Moreover, the dissenting opinion in the Court of Appeals raised the specter that the issue is not settled. Re-upping the district court's wooden textualist analysis, Judge Branch focused in his dissent on the "longstanding interpretive presumption" that the United States cannot be a "person" under federal law and its correlation with common language usage.[169] Brushing aside the majority's sophisticated reading of the ADA's text and structure, and its connection to other federal laws, the dissent hung its analysis on *Return Mail, Inc.* and the "determinative" text of Title II,[170] and provided a clear roadmap for future challenges.[171]

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163. *Id.* at 1227.

164. *Id.* (quoting 29 U.S.C. § 794a); *see also* 42 U.S.C. § 12133; 42 U.S.C. § 2000d-1.

165. *Id.* at 1241.

166. United States v. Sec'y Fla. Agency for Health Care Admin., 21 F.4th 730, 731 (11th Cir. 2021) (ordering that the case not be reheard en banc); *id.* at 747 (Newsom, J., dissenting).

167. Florida v. United States, 143 S. Ct. 89, 89 (2022).

168. *Sec'y Fla. Agency for Health Care Admin.*, 21 F.4th at 747.

169. *Id.* at 1250–51 (Branch, J., dissenting) (quoting Return Mail, Inc. v. U.S. Postal Serv., 139 S. Ct. 1853, 1861–62 (2019)).

170. *Id.* at 1250–54 ("Because the text of Title II is determinative, and because that text does not provide the Attorney General with a cause of action to enforce Title II against the State of Florida, I would affirm the order of the district court.").

171. As another example with a different political valence and involving constitutional enforcement, see *Geo Group, Inc. v. Newsom*, 50 F.4th 745, 750–51, 753–54 (9th Cir. 2022) (granting the state's petition for rehearing en banc and rejecting the state's challenge to standing of United States to enjoin California statute that phased out private detention facilities as applied to immigration detention facilities).

Finally, closely related to narrowing the government's standing are cases focused on whether statutory authorization of "persons" to bring suit includes the government. As a matter of statutory interpretation, the question typically has been context-specific,[172] turning, for example, on considerations of federalism when the government entity was a state.[173] In 2019, the Court considered this question again in *Return Mail, Inc. v. United States Postal Service*.[174] The majority concluded that the reference to "person" in the Leahy–Smith America Invests Act of 2011, without express definition, did not include the government, with the result that a federal agency could not seek review of a patent post-issuance pursuant to the administrative review proceedings established by the statute.[175] The Court's decision rested more on the interpretive presumption that a "person" does not include the sovereign than on a reading of the specific statutory text.[176] As Justice Breyer put it in his dissent, the case concerned a core question: "Are federal agencies entitled to invoke [the law's] administrative procedures on the same terms as private parties?"[177] The dissent cogently showed that the presumption that "person" does not include the sovereign—which could of course be overcome—was overcome based on the purpose, subject matter, context, and legislative history of the statute.[178] But the end result is that the Court's embrace of the interpretive presumption and its application of it in *Return Mail* make it harder for certain public enforcers to bring suit and enforce the law.

B. Statutory Interests

The question of public-enforcer standing connects to the related question of judicial treatment of the government's legitimate interests in enforcing statutory commitments. Cases like *American Bell Telephone* recognized as legitimate the government's interest in protecting the public

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172. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 787 (2000) (holding that the term "person" did not include states for purposes of *qui tam* liability).

173. *See* Daniel Schultz, *I Wish I Was a Real Boy: Why the U.S. Federal Government Should Be Treated as a "Person" Under the AIA*, 49 AIPLA Q.J. 125, 136 (2021) (reviewing the case law and concluding that "to allow the federal government to be a person would be a conflict of federalism").

174. 139 S. Ct. 1853 (2019).

175. *See id.* at 1861–62. For in-depth critiques of the decision, see Schultz, *supra* note 173, at 152–54 (questioning the Court's refusal to accord personhood to the United States and its reliance on prior cases based on inapposite concerns of federalism and remedial authorization); Artin Au-Yeung, Note, *Re-Classifying Governmental Petitioners as "Persons" in AIA Review Proceedings*, 35 BERKELEY TECH. L.J. 1003, 1004 (2020) (arguing that "the Court's decision in *Return Mail* was incorrect," and recommending that the U.S. Patent and Trademark Office promulgate "a rule allowing government agencies to petition for *ex parte* reexamination").

176. *Return Mail*, 139 S. Ct. at 1861–62.

177. *Id.* at 1868 (Breyer, J., dissenting).

178. *Id.* at 1868–70.

and enforcing the law.[179] At least some lower court decisions seem to be shifting from that position in cases questioning the nature of the government's statutory interests, on grounds that conceptually align with the earlier discussion of statutory standing.[180] Consider the Second Circuit's decision in *United States v. Bedi*.[181] The case concerned the government's effort under the Fair Debt Collection Practices Act (FDCPA) to recover over $300,000 of back wages to an employee who, the government asserted, was not paid prevailing wages as required by the government's H-1B visa program.[182] In deciding the dispute, the Second Circuit overturned *NLRB v. E.D.P. Medical Computer Systems, Inc.*,[183] a thirty-year-old precedent concerning the government's ability to bring such enforcement actions to protect the public interest.[184]

In *E.D.P. Medical Computer Systems, Inc.*, the Second Circuit had concluded that the government had collection authority under the FDCPA.[185] The law permits the United States to recover judgments on debts owed to it, and in the case, the NLRB sought to recover backpay under federal labor law.[186] The court there reasoned that when the NLRB seeks to recover backpay to remedy an unfair labor practice, it does so as a "public agency acting in the public interest."[187] The court explained:

> It is precisely because the Board acts in the public's interest and not those of private individuals that persuades us that the backpay award sought by the Board may be considered a debt to the United States under the FDCPA. The Board serves as more than a mere conduit when it initiates an action to collect a backpay award. Effective debt collection by the government is not only to fill the public coffers and lower the federal budget deficit; we should also consider the

179. United States v. Am. Bell Tel. Co., 128 U.S. 315, 373 (1888).

180. *See supra* notes 118–123 and accompanying text; *see also supra* notes 86–89 and accompanying text.

181. 15 F.4th 222 (2d Cir. 2021).

182. *See id.* at 223 (describing the enforcement action).

183. 6 F.3d 951 (2d Cir. 1993), *overruled by* United States v. Bedi, 15 F.4th 222 (2d Cir. 2021).

184. *Bedi*, 15 F.4th at 223. The court, however, overturned the precedent without considering the case en banc and without an intervening Supreme Court precedent. *Compare* United States v. Peguero, 34 F.4th 143, 158 (2d Cir. 2022) ("It is a longstanding rule that a panel of our Court is 'bound by the decisions of prior panels until such times as they are overruled either by an en banc panel of our Court or by the Supreme Court.'" (quoting United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004))), *with Bedi*, 15 F.4th at 231–32 (recognizing the same but noting that "[i]n this case, however, we have circulated our opinion to all active judges of the court prior to filing and received no objection").

185. *See E.D.P. Med. Comput. Sys., Inc.*, 6 F.3d at 957.

186. *See id.* at 952–53.

187. *Id.* at 955 (quoting Amalgamated Util. Workers v. Consol. Edison Co. of N.Y., 309 U.S. 261, 265 (1940)).

> importance of effective collection as a necessary tool for enforcement of the federal labor laws.[188]

Bedi did an about-face, voicing a far narrower view of the government's interests. It overturned *E.D.P. Medical Computer Systems, Inc.*, concluding that under the FDCPA the government must "be the holder of the debt—i.e., the one 'to whom [the] debt is owing'—such that it has a direct financial stake in the debt itself" to bring suit.[189] The Second Circuit thus joined the First and Fifth Circuits in concluding that the FDCPA did not permit the government to pursue its enforcement claims for workers under labor and immigration laws.[190] These courts rooted their analysis in a textualist reading of the FDCPA: Because the FDCPA speaks of debts owed to the United States, enforcement actions where "money collected . . . would flow to the pockets of the victimized employees and would not directly benefit the government" were not authorized by the statute.[191]

But this gloss misses the fact that the debts or monies are owed *resulting* from federal law, harkening to *American Bell Telephone*'s view of the government's reciprocal obligations as law-giver and law-enforcer.[192] As the government explained in its brief to the Second Circuit in *Bedi*, the "debt derives from the federal government's enforcement of a labor law for which the federal government has exclusive enforcement authority; it does not derive from a private contract."[193] And the statute has no language limiting debt collections to those providing financial benefit to the United States.[194] Thus, these courts' narrowing of the government's interests under the statute to pecuniary debts directly owing to the United States hamstring the government's ability to enforce its laws in court, including in labor and immigration contexts where harmed workers have no private right of action to sue.[195] And they rely on a privatized, neoliberal view of the government—only able to litigate when debts are directly owed to it as a market actor—

188. *Id.* (citation omitted).

189. *Bedi*, 15 F.4th at 227–28 (alteration in original) (quoting *Creditor*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

190. *See* United States v. Bongiorno, 106 F.3d 1027, 1039 (1st Cir. 1997) (holding that the government cannot use the FDCPA to collect restitution ordered under the Child Support Recovery Act); Sobranes Recovery Pool I, LLC v. Todd & Hughes Constr. Corp., 509 F.3d 216, 224 (5th Cir. 2007) (holding that the judgment sought to be enforced by the FDIC did not qualify as a "debt" enforceable under the FDCPA).

191. *Bongiorno*, 106 F.3d at 1038.

192. *See supra* notes 106–112 and accompanying text.

193. Brief for Appellee at 20, *Bedi*, 15 F.4th 222 (No. 20-1955).

194. *Id.*

195. *See id.* at 25 ("[U]nder both the NLRA and INA, employees lack a private right of action against employers and instead must file a complaint with the relevant government enforcement agency, which has exclusive authority to enforce employers' obligations through a comprehensive administrative scheme.").

that eschews the previous view of it as guardian of the public interest.[196] That the litigation touched on an area involving immigration—thought to be a matter of plenary power—raises further concerns about what the decision in *Bedi* might portend if extended to other fields.

C. Intervention

The first two examples we have covered go to the core of executive power—the government's standing to bring suit and very ability to enforce regulatory programs. The two examples we turn to now implicate governmental power in less core, yet still significant ways, and are in some sense more nascent stories. We begin this subpart by overviewing how the Court has reframed the government's interests in ways that constrain its ability to intervene in litigation, and how lower courts have limited the government's intervention rights in the qui tam context. In the following subpart, we focus on costs and delay, exploring how dismissals under the Court's plausibility pleading framework are burdening and trimming public enforcement actions. These examples add to the story of constraint and help to identify future areas of concern to watch.

Intervention is a procedure that allows a stranger to a lawsuit to join as a party, whether as a plaintiff or as a defendant.[197] In ordinary cases, intervention rights turn on the text of the Federal Rules of Civil Procedure. Federal Rule 24(a) provides for intervention as "of right" when a statute gives "an unconditional" right to intervene, and the United States by statute may intervene as of right in any suit in which the constitutionality of a statute is raised.[198] Federal Rule 24(b) also authorizes intervention on a permissive basis within the court's discretion; Rule 24(b)(2), as amended in 1948, specifies that intervention by government officers or agencies may be permitted if the original party's claim or defense rests on "a statute or executive order administered" by the putative official intervenor.[199] Even before the 1948 amendment, the Supreme Court took an expansive view of when a government officer or agency could intervene in a suit to protect the

196. In this way, the decision adopts a neoliberal frame, reducing the government to a market actor seeking to collect on its particularistic debts. For a broader exploration of the neoliberal turn in civil procedure and federal courts, see generally Norris, *supra* note 28.

197. FED. R. CIV. P. 24.

198. *Id.* 24(a); 28 U.S.C. § 2403; *see* 7C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1906 (3d ed. 1998) ("Section 2403 of Title 28 . . . grants an unconditional right to the United States to intervene in any proceeding in a federal court in which the constitutionality of an Act of Congress affecting the public interest is drawn in question . . . ." (citations omitted)).

199. FED. R. CIV. P. 24(b)(2).

public interest,[200] and the amendment was aimed at "avoid[ing] exclusionary constructions" by lower federal courts that kept governmental officers or agencies out of court.[201]

The Supreme Court struck a different tone in its 2018 decision *Texas v. New Mexico*,[202] a dispute between states with important regulatory consequences involving the supply and distribution of water.[203] The lawsuit, as one between states, invoked the Court's original jurisdiction and because it did not involve governmental intervention under a statute or Executive Order as envisioned by Federal Rule 24, the case gave the Court leeway to develop its own intervention standard outside the permissive context of the Federal Rules.[204] At first glance, the case may seem like a win for the ability of the government to intervene in litigation, but its constraining logic becomes clear on closer inspection. The case involved the enforcement of the Rio Grande Compact, an agreement entered into by Colorado, New Mexico, and Texas, acting with the federal government's assent and governing the delivery of water to the states from the Rio Grande.[205] The question was whether the United States could intervene in litigation brought by Texas alleging that New Mexico was defying the compact.[206] The Court initially appointed a special master in the case, who recommended that the United States not be permitted to intervene because the Rio Grande Compact did not explicitly invest the federal government with enforcement power.[207]

In deciding whether the United States could intervene, the Court noted that it has "sometimes permitted the federal government to participate in

200. WRIGHT & MILLER, *supra* note 198, § 1912 (discussing intervention by the Securities and Exchange Commission to move to dismiss a corporate reorganization arrangement proceeding even though "it had no claim in the orthodox sense of being able to institute an independent action" and its "sole interest was to settle important questions of public law"); SEC v. U.S. Realty & Improvement Co., 310 U.S. 434, 460 (1940); *see also* Note, *Federal Intervention in Private Actions Involving the Public Interest*, 65 HARV. L. REV. 319, 323 (1951) (discussing intervention by the Securities and Exchange Commission in a corporate reorganization proceeding "because it was the administrative agency directly concerned in the interpretation and enforcement of the statute").

201. FED. R. CIV. P. 24(b) advisory committee's note to 1946 amendment.

202. 138 S. Ct. 954 (2018).

203. *Id.* at 956. It is worth noting that the Court has at the same time taken a more restrictive approach to interpreting the conditions under which states can enter into compacts. *See generally* Katherine Mims Crocker, *A Prophylactic Approach to Compact Constitutionality*, 98 NOTRE DAME L. REV. 1185 (2023) ("[I]t is difficult to imagine a state agreement on which the Compact Clause would operate as a distinct constitutional requirement and obstacle.").

204. *See New Mexico*, 138 S. Ct. at 958 (explaining that original jurisdiction allows the Court to "regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice").

205. *Id.* at 956–57.

206. *See id.* at 956 ("But at this stage in the proceedings we face only a preliminary and narrow question: May the United States, as an intervenor, assert essentially the same claims Texas already has?").

207. *Id.* at 958.

compact suits to defend 'distinctively federal interests' that a normal litigant might not be permitted to pursue in traditional litigation."[208] This rhetoric of permissiveness, however, soon turned to one of constraint, with the Court next stating that "our permission should not be confused for license."[209] The Court correctly reasoned that "almost any compact between the States will touch on some concern of the national government—foreign affairs, interstate commerce, taxing and spending."[210] And it recognized that the entwinement of state compacts and federal interests was a large part of the reason that the Constitution requires congressional ratification of state compacts.[211] Despite these considerations, the Court then turned the screws: "[J]ust because Congress enjoys a special role in approving interstate agreements, it does not necessarily follow that the United States has blanket authority to intervene in cases concerning the construction of those agreements."[212]

With these foundations laid, the Court permitted intervention based on several narrow considerations present in the case, including that the federal government assumed certain duties under the Compact and played an integral role in the Compact's operation; that a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations; and that the government's claims mirrored Texas' and Texas did not object to its intervention.[213]

One does not need to stretch the imagination very far to see how, in cases lacking the particular features that the Court found justifying intervention, the United States would be blocked from intervening in litigation. Arguably, the decision departed in substance and spirit from the earlier foundations already surveyed, where the government was granted broad ability to litigate to defend its and the public's interests, and tied its intervention authority to its particularized role in the treaty schema and the fact that its duties and obligations under the treaty were affected by or implicated in the dispute, while, admittedly, acknowledging the

208. *Id.* at 958 (quoting Maryland v. Louisiana, 451 U.S. 725, 745 n.21 (1981)).

209. *Id.* at 958–59.

210. *Id.* at 959.

211. *Id.*

212. *Id.*

213. *Id.* at 959–60. The duties arose from the Compact's relationship to pre-existing compacts the United States had negotiated between New Mexico and Texas, under which it assumed a legal responsibility for water delivery to Texas. *Id.* at 959. In a subsequent decision, the Court declined to approve the states' proposed consent decree upon objections from the United States and reaffirmed its prior holding that the federal government had "distinct interests" that the decree impermissibly disposed without the government's consent. Texas v. New Mexico, 144 S. Ct. 1756, 1761 (2024) ("In our opinion [authorizing the United States to intervene], we explained that the Federal Government has its own distinct interests in holding New Mexico to its obligations under the Compact, as the Compact is 'inextricably intertwined' with the United States' operation of the Rio Grande Project.").

government's "unique federal interests" in this dispute.[214] The case is of a piece with the broader trend we have described of the federal courts making it more difficult for public enforcers to litigate to vindicate the public's regulatory interests.

Federal courts have also limited the ability of the United States to intervene under the False Claims Act, where intervention implicates the direct financial interest of the government.[215] The False Claims Act is perhaps the most prominent qui tam statute in the United States.[216] The statute establishes civil liability for those who present false claims for payment to the government and it authorizes both government lawyers and private citizens to bring suit, with the latter bringing suit "for the person and for the United States Government" and doing so "in the name of the Government."[217] The government, however, is to be provided with notice of any action and reserves the right to intervene—either within 60 days, or later upon a showing of good cause—in which case it can assume primary responsibility for prosecuting the action.[218]

In many instances, the government will require more time to complete its investigation and determine whether a false claim has been submitted and therefore whether intervention is warranted.[219] The government's reasonable investigation must often satisfy the good cause standard.[220] But recently, in *United States v. SouthEast Eye Specialists, PLLC*,[221] a federal district court denied the government's motion to intervene after its investigation.[222] The case involved allegations of Medicare and Medicaid fraud; the United States sought to intervene after the 60-day deadline had passed, in part because it needed time to complete its own ongoing investigation, which ultimately found evidence of fraud.[223] The government argued that "the public interest would be severely undermined if the United States could not continue investigating Medicare and Medicaid fraud after an intervention deadline has passed" and stressed that "protecting the integrity of government programs

214. *New Mexico*, 144 S. Ct. at 1761.

215. *See, e.g.*, United States v. Se. Eye Specialists, PLLC, No. 3:17-cv-00689, 2021 WL 790889, at *1 (M.D. Tenn. Feb. 24, 2021) (denying the government's motions to intervene), *appeal dismissed*, No. 21-5332, 2021 WL 2769220 (6th Cir. May 7, 2021).

216. 31 U.S.C. §§ 3729–3733.

217. *Id.* § 3730(b)(1).

218. *Id.* §§ 3730(b)(2)–(4).

219. *See, e.g.*, Griffith v. Conn, No. 11-157-ART-EBA, 2016 WL 3156497, at *3–4 (E.D. Ky. Apr. 22, 2016) (explaining that although the government initially declined to intervene, it continued its investigation and later found evidence causing it to seek untimely intervention).

220. *See, e.g.*, *id.* (concluding that the government had shown good cause for untimely intervention, including uncovering new evidence and vindicating the public's interest).

221. No. 3:17-cv-00689, 2021 WL 790889 (M.D. Tenn. Feb. 24, 2021), *appeal dismissed*, No. 21-5332, 2021 WL 2769220 (6th Cir. May 7, 2021).

222. *Id.* at *1.

223. *Id.* at *1, *5.

is the most important factor in determining whether to allow the United States to intervene."[224] Despite these factors and a reasoned recommendation from the magistrate judge supporting intervention, the district court summarily denied the government's motion to intervene.[225]

In other instances, courts have refused the government's requests to keep cases under seal while it completes its investigation and decides whether to intervene, complaining about the length of the government's investigation and forcing the government's hand before it is ready to make its ultimate decision regarding intervention.[226] These constraints happen as the federal courts at the same time have winnowed the ability of private citizens, acting as relators, to bring qui tam suits, including prohibiting certain suits against states[227] and permitting arbitration clauses to supplant certain qui tam actions in court.[228] Indeed, one district court recently found the relator provisions of the False Claims Act to be unconstitutional.[229] All of these constraints make it more difficult for the government to regulate fraud upon the public purse.

D. Rule 12(b)(6) Dismissals

Once in court, public enforcers face many of the same procedural hurdles that block private litigants from reaching the merits and securing relief, including the hurdles erected by the Supreme Court's plausibility pleading framework. A prominent view is that the Court's reinterpretation of Rule 12(b)(6) to move away from notice pleading and towards plausibility pleading in *Ashcroft v. Iqbal*[230] and *Bell Atlantic Corp. v. Twombly*[231] has

224. United States' Reply Brief Supporting Its Motion to Intervene at 5, *Se. Eye Specialists*, WL 790889 (No. 3:17-cv-00689).

225. *Se. Eye Specialists*, 2021 WL 790889, at *1.

226. *E.g.*, United States *ex rel.* Brasher v. Pentec Health, Inc., 338 F. Supp. 3d 396, 403–04 (E.D. Pa. 2018); United States *ex rel.* Martin v. Life Care Ctrs. of Am., Inc., 912 F. Supp. 2d 618, 623–27 (E.D. Tenn. 2012); United States *ex rel.* Costa v. Baker & Taylor, Inc., 955 F. Supp. 1188, 1190 (N.D. Cal. 1997).

227. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 787–88 (2000) (holding that actions under the False Claims Act could not be brought against a state).

228. *See generally* Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022) (finding that the enforcement structure under the California Private Attorney General Act as construed by the California Supreme Court was incompatible with the Federal Arbitration Act).

229. United States *ex rel.* Zafirov v. Fla. Med. Assocs., LLC, No. 8:19-cv-01236-KKM-SPF, 2024 WL 4349242, at *19 (M.D. Fla. Sept. 30, 2024) (finding that the Federal Claim Act's relator provision "directly defies the Appointments Clause by permitting unaccountable, unsworn, private actors to exercise core executive power with substantial consequences to members of the public"); *see also* Wis. Bell, Inc. v. United States *ex rel.* Heath, 145 S. Ct. 498, 504 n. 3 (2025) (Kavanaugh, J., concurring) (arguing that the Federal Claims Act's qui tam provisions "raise substantial constitutional questions under Article II" and that "in an appropriate case, the Court should consider the competing arguments on the Article II issue").

230. 556 U.S. 662 (2009).

231. 550 U.S. 544 (2007).

made it more difficult for private plaintiffs to prosecute claims.[232] In the words of Arthur R. Miller, the decisions "mark[] a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth."[233] But the effects are even broader: the Court's turn towards plausibility pleading has created obstacles and headaches not only for private citizens seeking to enforce the law in court but also for public enforcers.

There is, to be sure, some irony in this state of affairs. It was the DOJ, after all, that in *Iqbal* pushed to extend *Twombly*'s pleading analysis beyond its antitrust context, leading to a world where plausibility pleading's reach stretches across the statutory and common law landscape.[234] The government, of course, is not monolithic. Arguments developed by the DOJ in one case, or under one Administration, may be disfavored in another case, under another Administration, or even by another agency.

Undeniably, government lawyers pushed for plausibility pleading and now find themselves increasingly constrained by it. Under the plausibility standard, federal courts have dismissed in recent years parts or all of complaints by the DOJ and federal agency lawyers seeking to enforce the False Claims Act,[235] Anti-Kickback Act,[236] Americans with Disabilities Act,[237] Federal Trade Commission Act,[238] Sherman Antitrust Act and related

232. *See id*. at 557 (articulating the need "at the pleading stage for allegations plausibly suggesting (not merely consistent with)" liability); *Iqbal*, 556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (internal quotations omitted)). Scholars have also shown throughlines between *Iqbal* and *Twombly* and the Court's previous notice-pleading approach. *See generally*, *e.g.*, Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333 (2016) (examining such a throughline).

233. Miller, *supra* note 57, at 10.

234. *See* Brief for the Petitioners at 15, *Iqbal*, 556 U.S. 662 (No. 07-1015) (arguing for the extension of *Twombly*'s plausibility standard).

235. *E.g.*, United States *ex rel.* Osinek v. Permanente Med. Grp., Inc., 640 F. Supp. 3d 885, 892–93, 915 (N.D. Cal. 2022) (dismissing partially and granting government leave to amend filing); United States *ex rel.* Poehling v. UnitedHealth Grp., Inc., No. 16-08697-MWF, 2018 WL 1363487, at *1, *13 (C.D. Cal. Feb. 12, 2018) (dismissing partially and granting leave to amend); United States v. Kernan Hosp., 880 F. Supp. 2d 676, 677–78, 688–89 (D. Md. 2012) (dismissing without prejudice**)**; United States *ex rel.* Forcier v. Comput. Scis. Corp., 183 F. Supp. 3d 510, 513, 529 (S.D.N.Y. 2016) (dismissing partially without prejudice).

236. *E.g.*, United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 903 F. Supp. 2d 473, 478–79, 492 (E.D. Tex. 2011) (dismissing partially, with and without prejudice), *rev'd and remanded*, 727 F.3d 343 (5th Cir. 2013); United States *ex rel.* Patzer v. Sikorsky Aircraft Corp., No. 11-C-0560 14-C-1381, 2018 WL 3518518, at *12 (E.D. Wis. July 20, 2018) (dismissing partially and without prejudice).

237. *E.g.*, EEOC v. United Parcel Serv., Inc., No. 09-cv-5291, 2013 WL 140604, at *4 (N.D. Ill. Jan. 11, 2013) (dismissing partially with prejudice); EEOC v. MJC, Inc., 306 F. Supp. 3d 1204, 1224 (D. Haw. 2018) (dismissing without prejudice)**.**

238. *E.g.*, Fed. Trade Comm'n v. Facebook, Inc., 560 F. Supp. 3d 1, 4–5 (D.D.C. 2021) (dismissing with leave to amend).

antitrust laws,[239] Title VII of the Civil Rights Act of 1964,[240] and the Equal Pay Act,[241] among other laws.[242] While many of these examples are dismissals without prejudice, they nonetheless beleaguer public enforcement by sapping limited government enforcement resources, forcing the government to amend complaints, relitigate motions to dismiss, and await judicial rulings.

And, at other times, dismissals push the government to trim claims that may well have been substantiated by discovery and succeeded at trial, as with a recent federal district court's dismissal of the FTC's antitrust suit against Facebook.[243] Indeed, even when lower courts' dismissals are overturned by the courts of appeal or the Supreme Court, pleading disputes can drag on for years before the government gets a shot at discovery, sapping already limited governmental resources.[244]

E. Judicial Constraint of State Public Enforcement

As discussed above, regulatory enforcement in the United States operates as a complex ecosystem; when the federal government is unable or unwilling to use its enforcement power, states have helped to fill the remedial gap, sometimes with explicit federal authorization,[245] and sometimes relying on their own regulatory power.[246] States have taken the laboring oar in

239. *E.g.*, *id.*; District of Columbia v. Amazon, No. 2021-CA-001775-B (D.C. Super. Ct. 2022) (dismissing with leave to amend).

240. *E.g.*, EEOC v. Freeman, No. RWT 09cv2573, 2011 WL 337339, at *1 (D. Md. Jan. 31, 2011) (dismissing partially with prejudice); EEOC v. Bass Pro Outdoor World, LLC, No. 4:11-CV-3425, 2013 WL 1124063, at *11 (S.D. Tex. Mar. 18, 2013) (dismissing partially with prejudice); EEOC v. AOD Ventures, Inc., No. 4:21-CV-418-SDJ, 2022 WL 4367199, at *1 (E.D. Tex. Mar. 31, 2022) (dismissing without prejudice).

241. *E.g.*, EEOC v. Port Auth. of N.Y. & N.J., 768 F.3d 247, 259 (2d Cir. 2014) (affirming dismissal with prejudice).

242. *E.g.*, United States v. U.S. Telecom Long Distance, Inc., No. 2:17-cv-02917-JAD-NJK, 2018 WL 4566673, at *1 (D. Nev. Sept. 24, 2018) (dismissing without prejudice in an FTC action enforcing the Communications Act).

243. Fed. Trade Comm'n v. Facebook, Inc., 581 F. Supp. 3d 34, 40 (D.D.C. 2022) (dismissing without prejudice the FTC's antitrust suit against Facebook and ultimately permitting the suit to proceed after the FTC filed an amended complaint "containing significant additions and revisions").

244. *E.g.*, United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 903 F. Supp. 2d 473, 492 (E.D. Tex. 2011) (dismissing partially with prejudice), *rev'd and remanded*, 727 F.3d 343 (5th Cir. 2013); United States *ex rel.* Escobar v. Universal Health Servs., Inc., No. 11-11170-DPW, 2014 WL 1271757, at *1 (D. Mass. Mar. 26, 2014), *aff'd in part, rev'd in part*, 780 F.3d 504 (1st Cir. 2015), *vacated and remanded*, 579 U.S. 176 (2016), *rev'd and remanded*, 842 F.3d 103 (1st Cir. 2016).

245. *See, e.g.*, Hodas, *supra* note 47, at 1555 (discussing shared enforcement authority under the Clean Water Act).

246. *See, e.g.*, Cinnamon Carlarne, *Notes from a Climate Change Pressure-Cooker: Sub-Federal Attempts at Transformation Meet National Resistance in the USA*, 40 CONN. L. REV. 1351, 1356, 1365–66 (2008) (examining state and local efforts to deal with climate change using non-federal authority in the face of federal policy to "roll back" environmental laws).

challenging the tobacco industry,[247] addressing the opioid crisis,[248] and trying to mitigate climate change.[249] Some of these lawsuits might be considered examples of what Jessica Bulman-Pozen and Heather K. Gerken call "uncooperative federalism," in the sense of resisting the federal government's refusal to regulate market hazards.[250] In the last decade, changes in presidential administration have also produced an uptick in lawsuits by state attorneys general along the partisan red-state/blue-state divide.[251] State attorneys general may indeed today take a core role in challenging the actions of the second Trump Administration.[252] While the Court has enabled deregulatory challenges, as the student debt relief case illustrates, regulatory enforcement actions in lower federal courts have faced some of the same procedural and jurisdictional barriers used to block enforcement actions by federal public enforcers. [253]

Consider state standing. We saw earlier that the Supreme Court in *Thole* held that defined-benefit participants in a pension plan lacked standing to assert breach-of-fiduciary-duty claims under ERISA, and rationalized the enforcement gap on the view that the DOL could bring suit, even as the agency argued as amicus curiae it lacked the resources to monitor all plans in an effective way.[254] One might think the states should be enabled to bring suit when the rights of state citizens are in play. Yet the Second and Eleventh

247. *See* Philip C. Patterson & Jennifer M. Philpott, Note, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK. L. REV. 549, 549–50 (2000) ("Beginning in 1994, forty-eight states filed suit against the tobacco industry. . . . The Attorneys General who sued . . . acted out of frustration with the lack of political initiative . . . ."); *see also* Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859, 1862–70, 1883 (2000) (exploring how *parens patriae* actions in the tobacco industry could be applied elsewhere).

248. *See* Richard C. Ausness, *A Progress Report on Opioid Litigation*, 40 J. LEGAL MED. 429, 435 (2020) (reporting that "[e]ventually almost every state" sued opioid manufacturers).

249. *See U.S. Climate Change Litigation*, COLUM. L. SCH.: SABIN CTR. FOR CLIMATE CHANGE L., http://climatecasechart.com/us-climate-change-litigation/ [https://perma.cc/ER7P-UP47] (providing a database of climate change litigation).

250. *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1293 (2009) (discussing uncooperative federalism "as a tool to contest federal authority").

251. Alan Greenblatt, *How State AGs Became a Check on the President*, GOVERNING (Sept. 30, 2021), https://www.governing.com/now/how-state-ags-became-a-check-on-the-president [https://perma.cc/LM6P-MK45].

252. For a list of State attorney general lawsuits challenging Executive Orders and other practices of the second Trump Administration, see *Litigation Tracker: Legal Challenges to Trump Administration Actions*, JUST SEC. (Mar. 13, 2025), https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/ [https://perma.cc/BL57-22XL].

253. *See, e.g.*, Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 65–66 (discussing the states' APA challenge and the granting of standing as part of an "expertise-forcing project" by which "the Court signaled its dissatisfaction with the political accountability on which strong presidential administration relies for its legitimacy").

254. *See supra* notes 82–85 and accompanying text.

Circuits have held that states lack statutory standing under ERISA to bring suit, even when assigned claims by their residents, and the Eleventh Circuit declined to even consider whether the state's quasi-sovereign interests constitutionally supported a suit as *parens patriae*.[255] Indeed, even when a state has shown the requisite constitutional injury, some lower federal courts will block the enforcement action on the view that Congress has not explicitly authorized such a suit: When statutes are silent on *parens patriae* suits, or do not specify that a state is a party within the compass of the act, some courts—including the Seventh Circuit interpreting the Racketeering Influenced and Corrupt Organizations Act and the First Circuit interpreting ERISA—have denied states standing to bring suit.[256]

These are not the only constraints in the *parens patriae* context. In *Hawaii v. Standard Oil Co. of California*,[257] Hawaii sought to bring suit as *parens patriae* under the Clayton Act for damages to its general economy

255. Connecticut v. Physicians Health Servs. of Conn., Inc., 287 F.3d 110, 120 (2d Cir. 2002); Connecticut v. Health Net, Inc., 383 F.3d 1258, 1261–62 (11th Cir. 2004); *see also* Jonathan Cohen, *ERISA: States Lack Statutory Standing to Bring Claims on Behalf of Residents*, 30 AM. J.L. & MED. 562, 564 (2004) ("[T]he federal courts have constructed substantial barriers curtailing a state's ability to bring an ERISA suit on behalf of its citizens"). A *parens patriae* action is a form of representative suit grounded in the state's quasi-sovereign interest to protect its citizens. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982) (stating that "[i]n order to maintain [a *parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party . . . [and] must express a quasi-sovereign interest"). *Parens patriae* actions have filled an important procedural gap caused by the Court's restriction of private class actions, but have been criticized for lacking the class action's regulatory protections. *See* Lemos, *supra* note 94, at 500 ("Despite their apparent similarities, damages class actions and *parens patriae* suits are governed by markedly different procedural regimes."). Like other forms of aggregate litigation, *parens patriae* suits have the capacity to expand access to justice for individual litigants but can be subject to conflict, collusion, and corruption. *See, e.g.*, Helen Hershkoff & Judith Resnik, *Procedure, Contract, Public Authority, Autonomy, Aggregate Litigation, and Powe*r, *in* CONTRACTUALISATION OF CIVIL LITIGATION 419, 506 (Anna Nylund & Antonio Cabral eds., 2023) (raising questions about the costs and benefits of different forms of aggregated procedure and the effect of their use on "norms of transparency, accountability, and public participation").

256. *See* Illinois v. Life of Mid-Am. Ins. Co., 805 F.2d 763, 766 (7th Cir. 1986) ("[E]ven if the complaint did sufficiently allege an injury to the state in its quasi-sovereign capacity, it is not clear . . . that Congress, in enacting the RICO statute, intended to permit such a *parens patriae* proceeding."); *Physicians Health Servs.*, 287 F.3d at 121 ("Because states are not mentioned in [ERISA's civil enforcement provision], Congress—which 'carefully drafted [the] provisions' of [the statute]—did not intend for them to have the ability to bring suit . . . ."). By contrast, some lower courts have interpreted statutory ambiguity or silence to permit *parens patriae* suits in other statutes, including the Civil Rights Act of 1964 and ADA. *See, e.g.*, Vacco v. Mid Hudson Med. Grp., P.C., 877 F. Supp. 143, 146 (S.D.N.Y. 1995) ("[S]tates have frequently been allowed to sue in *parens patriae* to other enforce federal statutes that, like the ADA and Section 504, do not specifically provide standing for state attorneys general."); EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 198–99 (E.D.N.Y. 2003) ("Although these authorities do not address the precise issue of *parens patriae* standing, they do reflect a liberal standing doctrine that counsels in favor of recognizing *parens patriae* standing under Title VII.").

257. 405 U.S. 251 (1972).

and to protect its citizens and industry from the consequences of antitrust violations.[258] The Supreme Court precluded Hawaii from bringing the suit, maintaining that the state could only sue to protect its proprietary business or property interests—providing reasoning much like the Second Circuit's in *Bedi*.[259] As the dissenters maintained, the decision departed from the Court's earlier decisions framing the states' interests as *parens patriae* and winnowed the ability of the states to sue to protect their economies and vindicate the public interest.[260]

Federal courts have also constrained state-intervention rights. They have limited the ability of state regulators to intervene in securities class actions—maintaining that regulators need independent jurisdictional grounds for intervening and that intervention to protect the public's interest or influence questions of first impression is not sufficient.[261] The D.C. Circuit also declined to permit state attorneys general to intervene in litigation over the constitutionality of the leadership structure of the Consumer Financial Protection Bureau—litigation that the attorneys general maintained deeply affected state regulatory interests and responsibilities.[262]

Rule 12(b)(6) dismissals are also impacting the efforts of state attorneys general to rein in tech companies and pursue antitrust and other claims against them. In a 2023 suit by ten state attorneys general against Google alleging violations of sections 1 and 2 of the Sherman Antitrust Act, the United States District Court for the Southern District of New York dismissed a core claim about unlawful concerted activity between Facebook and Google.[263] Cribbing *Twombly*'s language, the court held that the states' allegations were not plausible because they did not account for the possibility that the companies may have been driven by a "legitimate, pro-competitive desire"[264]—engaging in precisely the kind of "armchair economics at the pleading stage" that Justice Stevens worried about in his *Twombly* dissent.[265] The United States District Court for the District of Columbia also dismissed in its entirety the complaint of forty-eight state attorneys general alleging

258. *Id.* at 253.

259. *See id.* at 262–63 (permitting Hawaii to sue in its proprietary capacity for damages it suffered but not for damages to its general economy).

260. *Id.* at 269–70 (Douglas, J., dissenting); *id.* at 271–75 (Brennan, J., dissenting).

261. Blake v. Pallan, 554 F.2d 947, 954 (9th Cir. 1977).

262. Order, 881 F.3d 75 (D.C. Cir. 2018) (per curiam).

263. *In re* Google Digit. Advert. Antitrust Litig., 627 F. Supp. 3d 346, 371 (S.D.N.Y. 2022).

264. *Id.*; *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554 (2007) (asserting that the alleged conspiracy was "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market").

265. *Twombly*, 550 U.S. at 587 (Stevens, J., dissenting).

antitrust violations by Facebook[266]—a decision that was affirmed by the D.C. Circuit.[267] Government lawyers, both state and federal, are thus increasingly bogged down by plausibility pleading.

III. Implications: "Taking Care" and the Deregulatory Project

The preceding account of judicial efforts constraining Executive Branch power to enforce regulatory protections is both a story in progress and one that belongs within the larger tale of the Supreme Court's regulatory retrenchment over the last generation. The Supreme Court, as other scholars have explored, has cut into congressional power to enact causes of action, administrative power to craft and implement regulations, state power to protect workers and consumers, and private enforcers' power to implement federal and state law.[268] And as we have shown, the Court and allied lower courts are at times now cutting into the government's power to litigate to implement many of those same laws, selectively beleaguering sovereign enforcement.[269]

To be sure, the United States as a plaintiff still wields considerable power supported in part by the Court's rhetoric favoring the Executive's "Take Care" power.[270] But limitations on standing, statutory interests, intervention, and pleading matter for government lawyers in their role as Enforcers-in-Chief. This Part considers some implications raised by these developments.

A. Separation of Powers and Federalism

One might see the overarching arc of this story as the Court accumulating and hoarding its own power to the exclusion of the Executive, just as the Court has excluded Congress from carrying out its legislative functions in other regulatory domains. To the extent the trend we describe continues to take shape, it holds effects for the constitutional principle of separation of powers, understood as avoiding one branch amassing excessive power and interfering with the ability of another to "secure its governmental

266. New York v. Facebook, Inc., 549 F. Supp. 3d 6, 49 (D.D.C. 2021). On appeal, the attorneys general argued that the district court misapplied the Court's plausibility pleading standard, failing to credit many of their plausible allegations and making inferences from information outside the complaint. Brief for Appellants at 51–52, New York v. Meta Platforms, Inc., 66 F.4th 288 (D.C. Cir. 2023) (No. 21-7078). The complaint alleged, for example, that Facebook had a policy designed to "bury" competitors in violation of Section 2 of the Sherman Act, and the court concluded that Facebook ended the policy in 2018 based on Facebook's public statements and a misreading of the FTC's allegations in its separate lawsuit against Facebook. *Id.* at 42–45.

267. *Meta Platforms*, 66 F.4th at 306.

268. *See supra* notes 1–11 and accompanying text.

269. *See supra* subpart I(A) and accompanying text.

270. *See supra* notes 101–103 and accompanying text.

objectives."[271] Indeed, in the 2024 decision *SEC v. Jarkesy*,[272] with the majority curtailing the SEC's in-house enforcement authority, Justice Sotomayor sounded the alarm bell about the "Court's repeated failure to appreciate that its decisions can threaten the separation of powers,"[273] calling its move in the case a "power grab"[274] and reflecting that "[w]hen it comes to the separation of powers, this Court tells the American public and its coordinate branches that it knows best."[275] Similarly, in dissenting from the Court's overruling of *Chevron*, Justice Kagan wrote, "In recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies," adding that the "majority disdains restraint, and grasps for power."[276] These same critiques extend to our examples. When federal judicial power determines that the Executive cannot enforce a statute absent clear legislative authorization,[277] or that it does not have sufficient statutory interests to bring a case enforcing labor and immigration law,[278] or that it cannot intervene in litigation to assert the public's interests,[279] what arguably occurs is judicial encroachment upon legitimate Executive enforcement powers. Put simply, the danger is one of federal courts winnowing the Executive's legitimate power to enforce the law and protect public interests, particularly at a time when Executive enforcement power seems all the more important.

But our account is not a simple story of displacing Executive power and relocating it to the courts. Rather, the Court is selectively curtailing Executive power to implement regulatory protections but not replacing it with other means to control marketplace wrongdoing. Nor is the Court allowing adequate constitutional space for any other substitutes.[280] Moreover,

271. JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY 42 (1987); *see also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1130 (2000) ("[S]eparation of powers is a way to prevent a single institution of government from accumulating excessive political power; the way to achieve that objective is to disperse the three governmental powers . . . among different institutions and . . . equip each department with select powers to protect itself and to police the other departments.").

272. 144 S. Ct. 2117 (2024).

273. *Id.* at 2155 (Sotomayor, J., dissenting).

274. *Id.* at 2175.

275. *Id.* at 2174.

276. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294–95 (2024) (Kagan, J., dissenting).

277. *See supra* subpart II(A).

278. *See supra* subpart II(B).

279. *See supra* subpart II(C).

280. For example, the Court has limited Congress's power to create causes of action and the scope of its statutory interests, while also disclaiming its own authority to imply causes of action as a matter of federal common law or the Constitution, and circumscribing the circumstances in which a federal common law rule of decision will be devised in disputes implicating the interests of the

whatever the formal theory of separation of powers, the branches' governmental objectives are not hermetically separated from one another; rather, these objectives require coordination and cooperation in order to devise and carry out policy.

The Court's larger deregulatory thrust is thwarting the kinds of inter-branch, federal–state collaborations needed to meet the complex problems of contemporary life. Having cut into private rights of action and administrative mechanisms, the Court's hollowing out of Executive power could reduce the strength of remaining enforcement mechanisms.[281] The trend, therefore, would not be merely a re-articulation of formal doctrine, but instead the slow and steady elimination of the functional regulatory capacity that has supported the New Deal settlement and enabled the United States to become a fairer and more egalitarian country, albeit a still deeply imperfect one.[282] This is not to say that every constraint on public enforcement is problematic or unwise; we take seriously the checking function of the Court. But that function also requires balance that is hindered by the Court's increasing disempowerment of Congress and the Executive in the new constitutional order it is constructing decision by decision. Nor in a period of hyper-polarization should we expect much bipartisan support for reforms in those areas that are within the constitutional capacity of the elected branches.[283]

Furthermore, the imposition of judicial constraints on state regulatory enforcers, which we discussed briefly above, raises similar concerns from the perspective of federalism.[284] Scholars focused on judicial aggrandizement have described how the Court has "regularly imposed new limits on the

United States. *See infra* subpart I(A); *see also* Rodriguez v. Fed. Deposit Ins. Corp., 140 S. Ct. 713, 718 (2020) ("We took this case only to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking.").

281. *See supra* subpart I(C).

282. *See, e.g.*, Laura Weinrib, *Breaking the Cycle: Rot and Recrudescence in American Constitutional History*, 101 B.U. L. REV 1857, 1866 (2021) ("Many embrace the so-called New Deal settlement, commonly associated with footnote four of *United States v. Carolene Products Co.*, which calls for deference to legislators and administrators on social and economic issues coupled with judicial enforcement of minority rights and judicial policing of the integrity of the political process.").

283. *See* Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 62 (2003) ("In a divided government, courts that are significantly more conservative than the more conservative branch . . . can follow the judges' preferences without fearing that the legislature will retaliate against the judges or overturn their decisions."). Of course, some bipartisan overrides remain possible, as shown, for example, by the 2022 enactment of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. Pub. L. No. 117-90, 136 Stat. 26 (codified as amended in scattered sections of 9 U.S.C.); *see also* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J.F. 1, 1–2 (2022) ("Although forced arbitration has long been polarizing, the measure drew bipartisan support."). But this reform pales in comparison to Congress's strong response to lower court decisions disclaiming the government's power to enforce the Fourteenth Amendment on behalf of persons with developmental disabilities.

284. *See supra* subpart II(E).

power of the states to regulate in areas they have long been able to, from public health to public safety."[285] As with separation of powers, federalism can be regarded in formal terms, marking the boundaries between the central government and the states, or it can be regarded in functional terms, relating the dispersion of authority required to meet the actual needs of democratic governance.[286] Our examples show that in shaping that dispersion of authority, the Court favors state disempowerment, but of a selective sort—sapping state regulatory capacity when it would be used to control market excess or protect consumers and workers, as the antitrust and labor examples surveyed above demonstrate.

B. The Court, Judicial Signaling, and the Public

Our examples also show how the Court does not act alone in these endeavors. Indeed, the metaphor of an imperial Court, while valuable, obscures the ways in which the Court has been able to motivate other actors to support and promote its constraining of the regulatory state—as is well exemplified by the creative lower court decisions we have surveyed. The literature on judicial signaling is useful in this respect, as it explains how judges, wielding procedural discretion, can shape their dockets by encouraging litigants to raise certain claims, present particular arguments, and mount challenges that in an earlier period might have seemed off limits.[287] We recognize that the exercise of lower-court discretion is not uni-directional and sometimes runs counter even to established precedent.[288] However, the existence of a well-funded network of conservative think tanks and advocacy centers, together with social media and the internet, has generated a well-stocked inventory of "availability entrepreneurs" able to devise lawsuits involving the specific issues that a Justice wishes to consider.[289] Moreover, Justices, by using concurring and dissenting

285. Lemley, *supra* note 7, at 109.

286. Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 KAN. L. REV. 1219, 1219–20 (1997) ("[F]ederalism should be viewed as not being about limits on any level of government, but empowering each to act to solve difficult social issues.").

287. *See* Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Docket*, 16 SUP. CT. ECON. REV. 1, 2 (2008) ("The notion that judges signal the outcome of future cases in order to actively shape their dockets stands in sharp contrast to the traditional view of judges as passive disinterested recipients of cases brought before them by independent parties.").

288. *See* Sean Farhang, *Supreme Court Oversight of the Federal Rules: A Principal–Agent Problem?*, 72 DEPAUL L. REV. 363, 367 (2023) (discussing "the threat of non-compliance by lower federal court judges with divergent preferences" from those of the Supreme Court, as expressed in decisions interpreting the Federal Rules as they pertain to pleading and discovery).

289. *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 687 (1999) (defining "availability entrepreneurs" as "[s]ocial agents who understand the dynamics of availability cascades seek to exploit their insights").

opinions,[290] can signal their "attitudes on a particular issue to lower courts, beyond or before the bounds of precedent."[291] And in a reinforcing spiral, akin to a norm cascade,[292] the Court can strategically construct ambiguity or leave questions open, encouraging litigants to challenge precedent and "embolden[ing] lower courts to circumvent [it]."[293] In many instances surveyed above, lower court decisions constraining Executive Branch law-enforcement power never make it to the Court for consideration, permitting lower courts to constrain Executive power without the Court itself weighing in.[294] Given the career goals of entry-level judges, some lower courts may be eager to demonstrate their ability to cabin regulatory litigation,[295] moving beyond the Court's precedent through such moves as ordering nationwide injunctions that block other federal courts from acting.[296] At a time when commentators are calling for major changes to the Supreme Court, including the elimination of life tenure through a constitutional amendment,[297] reformers need also to focus on the lower federal courts and their role in

290. One can see such an approach in Justice Thomas's recent concurrence in *Axon Enterprise, Inc. v. FTC*, in which he expressed "grave doubts" about the constitutionality of administrative adjudication, arguably inviting future challenges. Axon Enter., Inc. v. Fed. Trade Comm'n, 143 S. Ct. 890, 906 (2023) (Thomas, J., concurring).

291. Jacobi, *supra* note 287, at 33; *see also* Morgan L. W. Hazelton, *Seeing the Supreme Court as a Whole Institution: Law and Social Science*, 67 ST. LOUIS U. L.J. 615, 621 (2023) ("We should care about separate opinions. Research indicates that non-unanimous opinions are generally received differently by the public and lower courts, and that separate opinions influence the development of law." (citations omitted)).

292. For a canonical discussion of law and social norms, see generally Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998).

293. Jacobi, *supra* note 287, at 5 n.11; *see also* Vanessa Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183, 186 (2009) (arguing that "at least some dissents may be explained as signals from judges to litigants about how to frame future similar cases to increase the chance of success for the argument the dissenting judge supports"); Ari Ezra Waldman, *Manufacturing Uncertainty in Constitutional Law*, 91 FORDHAM L. REV. 2249, 2252 (2023) (arguing that "in fact-intensive constitutional litigation, opportunistic, partisan, or ideologically driven judges help manufacture scientific uncertainty by reframing different standards of judicial scrutiny—rational basis, strict scrutiny, and balancing tests—as demands for scientific infallibility for only one set of litigants").

294. *See supra* Part II.

295. *See* Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 S. CT. ECON. REV. 63, 64 (2005) (discussing how judges "signal that they would be appropriate candidates for elevation to a higher court").

296. *See* Richard J. Pierce, Jr., *How Should the Supreme Court Respond to the Combination of Political Polarity, Legislative Impotence, and Executive Branch Overreach?*, 127 PENN ST. L. REV. 627, 629–30 (2023) (discussing use of the nationwide injunction to bar the Executive Branch from taking action that the legislature is incapacitated to take because of hyperpolarization).

297. *See, e.g.*, R. Randall Kelso, *A Proposed Constitutional Amendment to Impose Twenty-Four-Year Term Limits on Supreme Court Justices*, 62. S. TEX. L. REV. 329, 330 (2023) (proposing a 24-year term limit to service on the Supreme Court); *see also infra* note 308 and accompanying text.

enabling and disabling democratic governance, including Executive Branch law enforcement power.[298]

It is also worth noting that this signaling process is not only internal to the Article III courts—it is directed to the nation at large. Scholars used to speak of the Court as an "educative" institution—a forum of principle that taught the nation how to become its better self.[299] Dean Eugene Rostow analogized the Court's decisions following upon *Brown v. Board of Education*[300] to a "vital national seminar," "leading public opinion and encouraging public action" to meet the challenge of racial inequality "as a constitutional—that is, as a moral—obligation."[301] This view of the Court today may seem naive or nostalgic. In particular, scholars defended this role of the Court linking it to "the excellence of its arguments" and the giving of "high quality explanations."[302] One searches in vain for a high quality explanation in the Court's one-line dismissal of petitions as improvidently granted without any discussion at all.[303] Instead, in such instances, and in the court's deregulatory decisions surveyed above, we find evasion, aimed not at opening up action by other democratic actors but rather at delaying and exhausting democratic possibilities.[304]

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298. *Cf.* Barry Cushman, *The Judicial Reforms of 1937*, 61 WM. & MARY L. REV. 995, 998, 1030, 1047 (2020) (discussing jurisdictional changes that reined in "judicial obstruction" by lower courts to New Deal policies).

299. *See, e.g.*, Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) ("The Supreme Court is, among other things, an educational body . . . ."); RALPH LERNER, *The Supreme Court as Republican Schoolmaster*, *in* THE THINKING REVOLUTIONARY 91, 136 (1987) (discussing the role of Supreme Court decisions in teaching "the notions of right fundamental to the regime"); Robin West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 103 (1990) (discussing "the educative role of Supreme Court opinions").

300. 347 U.S. 483 (1954).

301. Rostow, *supra* note 299, at 208 ("These decisions have not paralyzed or supplanted legislative and community action. They have precipitated it. They have not created bigotry. They have helped to fight it.").

302. Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 964–65 (1992) ("[T]he Court's teaching depend[s] upon the standards it invokes to decide constitutional issues.").

303. *See* Stephen I. Vladeck, *The Business of the Supreme Court: How We Do, Don't, and Should Talk About SCOTUS*, 67 ST. LOUIS U. L.J. 571, 577 (2023) (criticizing the lack of attention given by the popular and academic community to "[t]he Court's substantive and procedural disposition of the SB8 cases (including the unexplained dismissal of the federal government's relatively stronger suit and the contested remand of the providers' suit to the Fifth Circuit rather than the district court)"); Pierce, *supra* note 296, at 630 ("In some cases, the Supreme Court has allowed nationwide preliminary injunctions to remain in effect without issuing any opinion in which it explained its decision in any way.").

304. On evasion as a deviation from judicial decisionmaking and a form of "retreatism," see ROBERT A. KAGAN, REGULATORY JUSTICE: IMPLEMENTING A WAGE-PRICE FREEZE 94–96 (1978). *See also* Robert K. Merton, *Social Structure and Anomie*, 3 AM. SOCIO. REV. 672, 676–77 (1938) (coining the term "retreatism" as a form of deviance).

But the American people clearly are a part of the Court's audience; the Court's opinions not only set rules but also influence attitudes. What lessons does the public take from the Court's deregulatory jurisprudence and its weakening of Executive Branch law enforcement power? Of course, not everyone receives the Court's message in the same way. And even with polling, it is hard to measure how the Court's actions—its published decisions, shadow-docket orders, speeches, and off-the-cuff remarks—impact public beliefs and community action.[305] In retrospect, it may be that the Court's deregulatory jurisprudence will be reduced to four words lifted from President Reagan's 1981 Inaugural Address—"government is the problem"[306]—with the Court reshaping popular understandings of sovereignty in ways that discourage trust in market interventions, undermine confidence in government's capacity to solve current problems, and entrench market concentration and power.[307] In that project, constraining executive power to enforce regulatory protections may prove to be an important turning point, and one that connects to the broader undermining of regulatory governance that we are seeing the Executive undertake today.

Conclusion

This Essay has shone light on an emerging trend of federal courts cabining the enforcement power of government lawyers. In the constellation of actors that the federal courts constrain as they shoulder regulatory work—including Congress, private enforcers, states, and agencies seeking to devise regulations—one can now include various government lawyers seeking to enforce the law and protect the public from regulatory violations. Our examples are varied—ranging from pleading to intervention to standing and more—and define a nascent trend that, while still taking shape, is beginning to show a progressively more beleaguered sovereign in certain regulatory spheres.

It is difficult to say what the future will hold for increasingly muscular courts and increasingly constrained regulatory actors. We do not have the benefit of foresight, especially since the federal courts' deregulatory project

305. *See* Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000) ("[L]aw changes behavior by signaling the underlying attitudes of a community or society.").

306. Ronald Reagan, U.S. President, Inaugural Address of President Ronald Reagan (Jan. 20, 1981), *in* 17 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1, 2 (1981).

307. *See, e.g.*, N.C. State Bd. of Dental Exam'rs v. Fed. Trade. Comm'n, 574 U.S. 494, 515 (2015) ("[States are not authorized to] abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies.").

is still evolving. As more voices call for Article III reform,[308] we hope that this Essay has highlighted the importance of going beyond the Court's headline decisions to engage with the procedures and jurisdictional doctrines that have, in significant part, quietly enabled the federal judiciary's project of regulatory retrenchment to get this far.

308. There is a burgeoning literature on Supreme Court reform today. *See generally, e.g.*, William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631 (2022); Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747 (2020); Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1 (2021); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019); Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021); Daniel Epps, *Nonpartisan Supreme Court Reform and the Biden Commission*, 106 MINN. L. REV. 2609 (2022); Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077 (2023); Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, J. ECON. PERSPS., Winter 2021, at 119; Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1 (2020); Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J.F. 93 (2019); Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018); Christopher J. Sprigman, *A Constitutional Weapon for Biden to Vanquish Trump's Army of Judges*, NEW REPUBLIC (Aug. 20, 2020), https://newrepublic.com/article/158992/biden-trump-supreme-court-2020-jurisdiction-stripping [https://perma.cc/Q7KL-5K56].