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ARTICLES

ENFORCEMENT LAWMAKING AND JUDICIAL REVIEW

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ENFORCEMENT LAWMAKING AND JUDICIAL REVIEW

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It is — and has long been — well known that the Executive’s power is expanding. To date, there are two dominant analyses of the judiciary’s role in that expansion: the judiciary is intrinsically too weak to check the Executive or the judiciary has actively facilitated the Executive’s unprecedented enlargement of power. This Article challenges those views. It argues that the judiciary is very much engaged in devising techniques to check executive power. Through developments that are managerial and doctrinal, substantive and procedural, high-profile and seemingly mundane, federal courts have subjected an important set of executive actions that this Article terms “enforcement lawmaking” — the exercise of enforcement discretion in a manner that goes beyond simple policy and that shares attributes of law — to judicial oversight. Together, these developments reveal a potential shift in the structure of separation of powers. Courts have leveraged their inherent case-management powers — the procedures that shepherd lawsuits through the process of judicial review — to force transparency on the Executive and to hold it to account. This Article maps the effects of these “managerial checks,” which render the simple existence of judicial review powerful, particularly when viewed together with the extension of justiciability and remediation doctrines. Courts have authorized judicial review earlier and to greater effect by redefining when executive action is ripe for judicial review. They have created new avenues for multiparty public litigation through developments in standing doctrine. And they have increasingly deployed a muscular remedy, the nationwide injunction, to counterbalance increasingly muscular forms of executive action.

This Article argues that these developments along the entire life cycle of suits challenging enforcement lawmaking — from standing, to ripeness, to judicial recordkeeping and management, to remedies — should be viewed together and in separation-of-powers terms. The nuts and bolts of litigating these suits has led to an emerging expansion of judicial power. Courts have flexibly and responsively assimilated new assertions of executive power in ways that have restructured federal court doctrine and practice and emboldened federal courts. After documenting these changes at all levels of the federal judicial system, this Article offers a prescription for the Supreme Court. The Supreme Court should avoid prematurely dictating the boundaries of this expanded judicial power from above and instead allow district courts and courts of appeals considerable freedom to fashion the judiciary’s checking powers from below. Such an approach will avoid premature Supreme Court interventions that have the effect of subjugating judicial power to executive power.

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INTRODUCTION

Although James Madison envisioned that the separation of powers would encourage “[a]mbition . . . counteract[ing] ambition,”¹ the dominant accounts contend that Congress and the judiciary have failed in their obligation to check executive power and have even affirmatively facilitated it.² Congress, mired by partisan gridlock, has delegated sweeping authority to the President and, even when not in gridlock, has only infrequently checked the President when they share a political party.³ Courts, for their part, are viewed either as too weak to rein in the President consistently or as the creators of deferential doctrines that tip the scales of justice in the President’s favor.⁴ This Article challenges

¹ THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

² See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 4 (2011) (“We live in a regime of executive-centered government, in an age after the separation of powers . . .”); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 467 (2012) (“Congress has continued to delegate broadly even as presidential control over administration has increased.”); F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83, 83 (2018) (“Ambition, as it turns out, has not been able to counteract ambition.”); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) (“Few aspects of the founding generation’s political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers.”). However, other analyses — most notably of judicial oversight over the administrative state — complicate that narrative.

³ See SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY* 2 (2020) (“Congress, charged with making our nation’s laws, seems obsolete . . .”); Bulman-Pozen, *supra* note 2, at 467–68 (describing the ways in which “the other two branches have . . . empowered the executive,” *id.* at 467, in large part due to “party politics,” *id.* at 468); Neal Kumar Katyal, *Essay, Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2320 (2006) (“[B]ecause Congress ex ante appreciates the supermajority-override rule, its members do not even bother to try to check the President, knowing that a small cadre of loyalists in either House can block a bill.”); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 954 (2005) (“[C]ongressional abdication of legislative power to the executive is at least as much of a problem as congressional self-aggrandizement.”); Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1750 (2019) (“Congress no longer plays the starring role in setting major policies that govern everything from air quality standards to mortgage disclosure requirements. Instead, executive-branch agencies have taken center stage.” (footnote omitted)). For a comprehensive list of delegated and other emergency powers of the President, see BRENNAN CTR. FOR JUST., *A GUIDE TO EMERGENCY POWERS AND THEIR USE* 1–43 (2019), https://www.brennancenter.org/sites/default/files/2019-10/AGuideToEmergencyPowersAndTheirUse_2.13.19.pdf [<https://perma.cc/ZRF9-KHKL>]. For a different take, see generally JOSH CHAFETZ, *CONGRESS’S CONSTITUTION* 45–301 (2017), which traces the historical origins of Congress’s broad formal and informal powers. To maintain focus on the judiciary, my treatment of Congress is intentionally brief.

⁴ See, e.g., POSNER & VERMEULE, *supra* note 2, at 29–31 (arguing the judiciary is not an effective check on executive power); PRAKASH, *supra* note 3, at 2 (describing judicial checks as “sporadic resistance”); Bulman-Pozen, *supra* note 2, at 468 (“Congressional and judicial decisions to empower the executive thus highlight a deeper concern about the separation of powers: The branches are not engaged in sustained, vigorous competition.”). This view extends beyond the academy. See Jed S. Rakoff, *Don’t Count on the Courts*, N.Y. REV. (Apr. 5, 2018), <https://www.nybooks.com/articles/2018/04/05/dont-count-on-the-courts> [<https://perma.cc/6NKX-QL2M>] (“[N]ow that the courts have created, largely on their own initiative, so many doctrines that limit

those views. Through active case management and doctrinal developments big and small, the judiciary has started to take a more forceful role in countering the Executive by subjecting an increasingly prevalent practice — *enforcement lawmaking* — to meaningful judicial review. Judges have used their positions to force transparency and public accountability onto the executive branch.

Many have written of the President's ever-expanding reach over multiple dimensions of governance: foreign and domestic, administrative and criminal, and everything in between.⁵ One aspect of this reach — the President's enforcement power — has surfaced in scholarship ranging from immigration⁶ to drug policy.⁷ In the space between conflicting statutory demands, the President wields power to tailor enforcement⁸ in a way that transcends enforcement policy and mirrors law. Through systemic enforcement — and nonenforcement decisions — Presidents have reformed immigration law, changed border protections, expanded and circumscribed the rights of transgender individuals in schools and in the military, and beyond.⁹ They have done this when Congress has failed to mobilize, to countermand Congress, or simply without consulting Congress. This practice extends beyond discrete categories and merits its own shorthand. This is enforcement lawmaking.

Scholars have identified constraints on the President — beyond Congress and the courts — to provide the checks the Founders envisioned. Commentators have paid increasing attention to the states,¹⁰ to structures within the executive branch,¹¹ to politics,¹² and to the public as potential counterweights to executive power.¹³ These alternatives contemplate something of a “separation of powers 2.0”: governance has

their review of executive action, it would not be easy to change overnight.”) *But see* Hessick & Marshall, *supra* note 2, at 88–89 (crediting the Supreme Court with the ability to constrain the Executive in cases such as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *United States v. Nixon*, 418 U.S. 683 (1974), and the war-on-terror decisions). There is some recognition that courts have pushed back on presidential power, though generally through subordinates. *See, e.g.*, Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1163–65 (2020).

⁵ *See infra* notes 40–53 and accompanying text.

⁶ *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463–64 (2009). *But see* Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1205–26 (2015).

⁷ *See* Bradley E. Markano, Note, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 292–96 (2015).

⁸ *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1054–69 (2013).

⁹ *See infra* section I.A, pp. 948–56.

¹⁰ *See* Bulman-Pozen, *supra* note 2, *passim*.

¹¹ *See, e.g.*, Katyal, *supra* note 3, at 2319–42; Gillian E. Metzger, Essay, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 437–47 (2009); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1263–66 (2017).

¹² *See infra* section I.B, pp. 956–59.

¹³ *See, e.g.*, POSNER & VERMEULE, *supra* note 2, at 12–15.

evolved to permit forces other than Congress and the courts to constrain executive power. But these forces do not act alone. Indeed, this separation of powers 2.0 actually contemplates — expressly, impliedly, and sometimes surprisingly — the effectuation of checks and balances *through* federal courts. These are not pure alternatives to judicial checks, but an expanded set of power centers that can challenge executive action through litigation in partnership with a receptive judiciary. What we are seeing is not an entirely new kind of separation of powers, but an evolved form of separation-of-powers *lawsuit* that accommodates enforcement lawmaking.

Through routine orders issued mainly by district court judges — concerning everything from discovery,¹⁴ to ordinary case management,¹⁵ to the appointment of defenders¹⁶ — courts have demonstrated the extraordinary ability to force legal and public accountability onto the Executive in suits challenging enforcement lawmaking. Although case management has long been the purview of judges, such active management of suits involving the Executive is fairly new ground.¹⁷ These “managerial checks,” derived from the considerable authority judges wield in issuing rulings and orders when shepherding a case from start to finish, render the *fact* of subjecting executive action to judicial review quite powerful.¹⁸

When managerial authority is coupled with the development of judicially crafted doctrinal checks that change the timing, structure, and available remedies of judicial review, it is fortified.¹⁹ By entertaining

¹⁴ See, e.g., *New York v. U.S. Dep’t of Com.*, 333 F. Supp. 3d 282, 291–92 (S.D.N.Y. 2018) (ordering the Secretary of Commerce to sit for a deposition in suit concerning the Commerce Department’s decision to add a citizenship question to the decennial census), *vacated as moot*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019).

¹⁵ See, e.g., *New York v. U.S. Dep’t of Com.*, No. 18-CV-2921, 2019 WL 2949908, at *2 (S.D.N.Y. July 9, 2019) (denying government attorneys’ motion to withdraw from the case because of the failure to provide reasons for the motion).

¹⁶ See, e.g., *United States v. Flynn*, No. 17-232, 2020 WL 2466326, at *1 (D.D.C. May 13, 2020) (appointing amicus curiae to argue against granting DOJ’s motion to dismiss Michael Flynn’s criminal conviction), *vacated as moot sub nom. In re Flynn*, 961 F.3d 1215 (D.C. Cir.), *mandamus denied*, 973 F.3d 74 (D.C. Cir. 2020) (per curiam).

¹⁷ This is not the only area where federal judges are expanding their role. See, e.g., Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 9–20 (2021).

¹⁸ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 425–26 (1982) (making visible the substantial power that judges wield in ordinary case management).

¹⁹ A leading casebook on the subject of federal courts begins its introduction of the “judicial function” by examining questions of justiciability together:

[A] cluster of related issues that define the scope of federal judicial power through categories such as standing, ripeness, mootness, and the political question doctrine. . . . Viewed together, these doctrines help define the role of the federal courts in our constitutional structure — a goal that entails not only identifying the judicial function but also understanding how it relates to the powers of the coordinate branches in the constitutional scheme.

pre-enforcement challenges more frequently, courts routinely subject the Executive's policies to judicial review even before a formal enforcement decision is made.²⁰ Through significant developments in standing doctrine — often described as the “who” of judicial review²¹ — the judiciary has opened its doors to separation-of-powers lawsuits pursued by coalitions of states, private individuals and associations, and even Congress.²² And courts have employed a remedy more capable of constraining the Executive, namely the nationwide injunction.²³ This Article argues that we should take seriously the cumulative potential of these managerial and doctrinal checks as a counterbalancing force in the separation of powers.²⁴ Together, they can subject executive action, which could easily be unrestrained, to meaningful judicial review.²⁵

This is a judiciary that is alert, flexible, and responsive. But this side of the judiciary has largely escaped public comment because scholarly attention is too often diverted into doctrinal silos and away from the broader sweep of litigation. Focused on changes within discrete doctrines and practices — like state standing and the ubiquity of nationwide injunctions — scholars have missed the big-picture potential in the judicial function. Moreover, attention is on the Supreme Court, where the stakes are high, the players familiar, and the issues narrow and modularized. But for a story like this, the devil is in the details, and the details are in the district courts. This Article engages with those details and those district courts. It incorporates routine orders and case

RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 49 (6th ed. 2009).

²⁰ For example, challenges to President Trump's attempt to bar transgender individuals from serving in the military were brought in a pre-enforcement posture. See *Stockman v. Trump*, No. EDCV 17-1799, 2017 WL 9732572, at *2 (C.D. Cal. Dec. 22, 2017); *Karnoski v. Trump*, No. C17-1297, 2017 WL 6311305, at *6 (W.D. Wash. Dec. 11, 2017); *Stone v. Trump*, 280 F. Supp. 3d 747, 763 (D. Md. 2017); *Doe I v. Trump*, 275 F. Supp. 3d 167, 193 (D.D.C. 2017), *vacated sub nom.* *Doe II v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019).

²¹ See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1380–83 (1973) (discussing standing in the context of different plaintiffs and the private rights model).

²² See *infra* section III.B, pp. 980–89 (describing the structure of suits challenging enforcement lawmaking).

²³ Consider, for example, the order enjoining the Obama Administration from enforcing the Deferred Action for Parents of Americans (DAPA) program. See *Texas v. United States*, 86 F. Supp. 3d 591, 676 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam).

²⁴ I do not defend this as a strictly positive development. Candidly, the normative case is complicated at best. But instead of viewing these developments individually as novel judicial actions, I argue we should view them together, in their appropriate context, and as a *response* to another development — enforcement lawmaking — that is itself neither universally positive nor universally negative.

²⁵ For a robust discussion of power in public law — what it means, how to measure it, and beyond — see Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31 *passim* (2016).

management, with front-page decisions, to offer a full picture of a judiciary undergoing an important change.

This Article draws together recent developments with a focus on breadth: the breadth of managerial practices and doctrines that have been tweaked, modified, and overhauled to accommodate suits against executive power that most federal courts enthusiasts would have said were prudentially or doctrinally nonjusticiable not that long ago. This breadth, in turn, gives a new, deeper understanding of how judicial power has evolved.

Just as separation of powers has evolved, so too have the parties to and presentation of these separation-of-powers suits. The modern suit is litigated by a collection of actors together — states, private parties, and even houses of Congress — occupying various roles, from lead and secondary parties to amici. Instead of challenging individualized executive actions *ex post*, these suits frequently confront executive action *ex ante*. These suits take issue with the rationale behind and structure of the Executive's policy, not least because, as I discuss, those executive actions increasingly look like lawmaking rather than traditional enforcement.

These suits are also unique in the degree to which they foreground separation-of-powers and federalism questions.²⁶ Litigants in many of the canonical separation-of-powers cases raised the big constitutional questions incidentally to their interest in remedying their own injuries.²⁷ And courts reached those issues judiciously, invoking prudential doctrines to avoid sweeping constitutional holdings when narrower, fact-bound adjudications would do. Today, the lower courts are placing the emphasis on the *prudential* aspect of those doctrines and finding it frequently appropriate to *reach for* (rather than avoid) the hefty separation-of-powers questions.²⁸ As the circumstances have changed,

²⁶ See, e.g., *California v. Trump*, 963 F.3d 926, 934 (9th Cir. 2020) (“The States pled theories of violation of the constitutional separation of powers, violation of the Appropriations Clause, *ultra vires* action, violations of the Administrative Procedure Act . . . , and violations of the National Environmental Policy Act . . .”).

²⁷ See Z. Payvand Ahdout, Essay, “*Neutral*” *Gray Briefs*, 43 *FORDHAM INT’L L.J.* 1285, 1285 (2020) (drawing attention to the fact that canonical suits that determine the boundaries between Congress and the President as to the foreign affairs power are litigated between the Solicitor General and private parties); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 *VA. L. REV.* 1435, 1436–37 (2013) (“Judges routinely invoke principles of separation of powers or federalism that seem to adhere primarily in institutions even as they award relief to individual litigants.” (footnotes omitted)).

²⁸ The Supreme Court has taken issue with the unconsidered use of the word “prudential,” particularly when it is used together with jurisdictional terms of art. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (clarifying that the term “prudential standing” is a misnomer, particularly when referring to whether an individual’s interests fall within a statute’s zone of interest). I use “prudential” to refer to those principles and norms that inform judicial decisionmaking on the ground and that are not within the core of a jurisdictional doctrine.

the judiciary has also changed and has, accordingly, stayed relevant in the separation of powers.

Part I lays out the existing legal landscape in greater detail. It builds on the careful work of scholars who have shown just how powerful the Executive has become. Part I focuses on one particularly important set of executive practices, what I call enforcement lawmaking, that has been met by a counterbalancing judicial force. It then moves on to the functional separation-of-powers theories that others have identified and shows how those theories each contemplate a role for the judiciary.

Parts II and III — the heart of the Article — document how courts have developed doctrine and practice to subject enforcement lawmaking to judicial review. Part II introduces the concept of “managerial checking” — the ability of the judiciary to force transparency and public accountability onto the executive branch through ordinary case management.²⁹ This managerial authority is fortified by developments in foundational aspects of federal court doctrine and practice, which I explore in Part III. From standing, to ripeness, legal interpretation, judicial recordkeeping, and remedies, the judiciary is exercising a new and enlarged dimension of judicial power. Part III gives a broad picture of the emerging ways in which the judiciary — in particular, the lower courts — is responding to executive overreach. These developments are much greater than the sum of their parts. Together, we can begin to think of these developments as a new force in the separation of powers. These Parts make a methodological contribution as well, demonstrating the centrality of the lower federal courts to a robust understanding of the federal judicial system. Although the great weight of federal judicial power is exercised in the lower federal courts, our understanding of these courts in constitutional separation of powers is meager. Any effort to understand the federal judicial system — or to reform it — must include rigorous study of the lower federal courts.

Building on this frame, Part IV then turns to the prescriptive and normative. Emerging developments demonstrate the potential of the lower courts in the separation of powers and we have yet to see where exactly the judiciary will take them. Part IV thus argues that the Supreme Court should not yet resolve these cases and should instead allow the lower courts freedom to take the lead in crafting the boundaries of the new judicial power. The Supreme Court’s final say, of course, cannot be denied. But the issue now is at what point the Court should intervene.

²⁹ The word “transparency” has had different meanings and values tied to it over time. See David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 102–04 (2018). I use the term to refer to public visibility into executive decisionmaking.

* * *

At the outset, three clarifications about the scope of this Article are in order. This Article's goal is to uncover and bring attention to ways in which the judiciary — and lower courts in particular — checks executive power by subjecting it to judicial review and oversight, and the normative and structural effects of that check. First, although suits challenging enforcement lawmaking often involve politically salient issues, this Article intentionally focuses on judicial practices and doctrines and not on the real or assumed political motivations of judges. Regardless of political origins, doctrinal developments and judicial practices can become accepted tools of judicial review that will be cited and exercised for decades. Second, this Article centers on the scope and content of judicial review, not on the outcomes or doctrines that constrain the substantive merits. The Executive does not need to lose on the substantive merits in order to be “checked.” Third, this Article does not draw formalist distinctions between presidential action (for example, an executive order) and administrative action (for example, implementing that order). The practices and doctrines with which this Article engages do not depend on that line. This Article instead draws a rough boundary — which is concededly fuzzy at times — around a particular category of executive action that often uses the administrative state to effectuate its enforcement goals.

I. COURTS AND EXECUTIVE POWER

The last several decades have been marked as a time of executive power. Although Congress has enacted some significant legislation, engaged in oversight, and even impeached two Presidents, the general view is that Congress's prominence has diminished. Mired in partisan gridlock that is exacerbated by public visibility, Congress does not function as intended. At best, Congress's dysfunction has passively allowed the Executive to reach further and, in many cases, Congress has actively delegated its authority to the Executive for reasons that span from efficiency to attempting to avoid the public scrutiny that comes with making decisions.

Where in this story are the federal courts? Outside of administrative law, courts are generally viewed as too feeble to counteract executive power in any systemic way. And through deference doctrines, courts are generally viewed as facilitators of executive power.³⁰

But all is not lost of checks and balances. Commentators have identified institutional actors outside of the formal tripartite structure of government that can dull federal executive power. The states have many

³⁰ See sources cited *supra* note 4.

ways to act as a counterweight.³¹ So too, some say, can actors internal to administrative agencies — like career civil servants — press back on presidential power from within.³² Political parties, which lack a formal role in our structure of government, likewise may be able to wrest power from the President.³³ The effort to look beyond the legislature and judiciary for actors that may exercise checks against the Executive in our system of checks and balances is important. But equally important is recognizing that states, intra-executive actors, and political parties do not act in isolation. They frequently act with and through the federal courts. States can seek injunctions against executive policies in federal court, as they did in *Hawai'i v. Trump*.³⁴ Actors internal to the executive branch can undermine executive actions by refusing to fortify them against legal challenge, as many speculate the Acting Secretary of Homeland Security did in providing only “bare-bones” justification for terminating the Deferred Action for Childhood Arrivals³⁵ (DACA) program or through attorney withdrawals in the census cases.³⁶ And political parties can gain leverage against the Executive when they control one house of Congress and can use that position to press legal challenges, as they did when the House sued the Obama Administration over its implementation of the Affordable Care Act³⁷ (ACA).

Through litigation, these actors have invoked the judicial power. States, organizations, individuals, and even Congress have filed suits against the Executive, alleging — in broad terms — that the Executive has gone too far.³⁸ Receiving these cases, the federal courts have exercised new dimensions of judicial power. This new exercise of judicial power complicates the traditional narrative of the demise of Madisonian competition.

³¹ See *infra* section I.B.1, pp. 957–58.

³² See *infra* section I.B.2, pp. 958–59.

³³ See *infra* section I.B.3, p. 959.

³⁴ 245 F. Supp. 3d 1227, 1232 (D. Haw.), *aff'd in part, vacated in part*, 859 F.3d 741, 788–89 (9th Cir. 2017) (per curiam).

³⁵ See Michael D. Shear et al., *How the Trump Administration Eroded Its Own Legal Case on DACA*, N.Y. TIMES (Nov. 12, 2019), <https://www.nytimes.com/2019/11/11/us/politics/supreme-court-dreamers-case.html> [<https://perma.cc/Z2WN-74YS>]. The Supreme Court would later find that justification wanting and invalidate the agency action. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020).

³⁶ See *Kravitz v. U.S. Dep't of Com.*, No. GJH-18-1041, 2019 WL 3017097, at *1 (D. Md. July 10, 2019); *New York v. U.S. Dep't of Com.*, No. 18-CV-2921, 2019 WL 2949908, at *2 (S.D.N.Y. July 9, 2019).

³⁷ See *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 57 (D.D.C. 2015).

³⁸ When I use the term “the Executive,” I mean the President, her immediate advisors, and high-level agency officials who are motivated by the President.

This Part explains how the ground softened for a new form of separation-of-powers suit by drawing together several forces in the ecosystem of federal separation of powers. Section A explains that the Executive has expanded its use of a broad, but ultimately checkable, form of power — what I call “enforcement lawmaking.” Section B entwines the narrative about enforcement lawmaking with scholarship on power centers that can check the Executive outside the formal tripartite structure of government and discusses how each contemplates a role for the judiciary.

A. From Executive Power to Enforcement Lawmaking

In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.

— *Youngstown Sheet & Tube Co. v. Sawyer*³⁹

Labels such as “the Imperial Presidency,”⁴⁰ “the Executive Unbound,”⁴¹ and the notion of a strong “Unitary Executive” each aim to capture just how powerful the presidency is or has become.⁴² A long-running project, to which scores of scholars have contributed, describes the ways in which the President exercises authority over governance. Whether it is caused by legislative inaction juxtaposed against the need

³⁹ 343 U.S. 579, 587 (1952).

⁴⁰ ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* *passim* (1973); BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 188 (2010) (“Almost forty years ago, Arthur Schlesinger Jr. sounded the alarm in *The Imperial Presidency* (1973). Yet the presidency has become far more dangerous today.”).

⁴¹ POSNER & VERMEULE, *supra* note 2, *passim*.

⁴² See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1727 (1996) (describing the accumulation of authority in the executive branch); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. CHI. L. REV.* 123, 125 (1994); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 *COLUM. L. REV.* 515, 528–29 (2015) (“[W]hereas the Framers considered Congress the most dangerous branch, the emergence of modern administrative agencies answerable to the President signaled that the Executive was now the constitutional institution to reckon with.” (footnotes omitted)). Not all see things this way. See, e.g., Saikrishna Bangalore Prakash, *Imperial and Imperiled: The Curious State of the Executive*, 50 *WM. & MARY L. REV.* 1021, 1059–60 (2008) (arguing that the Executive has expansive powers with regard to military decisions, but far fewer executive powers in other substantive areas).

for action, or executive opportunism,⁴³ the President has exercised substantial control over both domestic and foreign policy.⁴⁴

Through “presidential administration” — the concept articulated by then–Professor Elena Kagan — the President employs centralization in the Executive Office of the White House to superintend the decisions that Congress delegates to federal agencies.⁴⁵ That term, originally referring to a narrow subset of presidential action,⁴⁶ has become capacious and is at times employed to cover ever more far-reaching presidential action.⁴⁷ The President has expanded, fortified, and changed her grasp over the administrative state by “pooling” resources allocated to different agencies, which in turn allows the President to reconfigure agencies from within.⁴⁸ Presidents appoint allies to agencies.⁴⁹ Presidents also place “acting officials” in high-level agency positions, circumventing Senate confirmation and possible removal, making more challenging

⁴³ Of course, the motivation behind executive innovation does matter in a variety of contexts, particularly when the need for action and the political inability to act converge. See, e.g., Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1609–10 (2015) (exploring innovation in the appointments process and the disconnect between political reality and formal process). For two different takes, compare David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 8 (2014), which argues that the President’s reach for creative measures to implement policy can be viewed as a form of “self help” where Congress fails to act, with Katyal, *supra* note 3, at 2321, which notes: “A Congress that conducts little oversight provides a veneer of legitimacy to an adventurist President. The President can appeal to the historic sense of checks and balances, even if those checks are entirely compromised by modern political dynamics.” Because I focus in this Article on internal changes to the judicial power, I do not disaggregate presidential motive from opportunity.

⁴⁴ For a discussion of the President’s unitary control over forming, exercising, and terminating treaty obligations, as well as over other international spheres, including customary international law, see Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1206–44 (2018).

⁴⁵ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001); see also David J. Barron, *Foreword: From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1096 (2008) (describing presidential control over the administrative state); Peter L. Strauss, *Foreword: Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702 (2007).

⁴⁶ Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 271 n.24 (2019).

⁴⁷ There is some disagreement about the “unitariness” of control over the administrative state. See, e.g., Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 394 (2016) (“Each line agency might have an agenda distinct from the President’s and may well seek to evade presidential control.”); Jennifer Nou, *Intra-agency Coordination*, 129 HARV. L. REV. 421, 429 (2015) (exploring how agency heads exercise control and agenda set from within); Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 653 (2020) (describing how executive agencies use litigation to further their own interests).

⁴⁸ See Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 216 (2015).

⁴⁹ See Bulman-Pozen, *supra* note 2, at 467 (“[T]he [administrative] bureaucracy has become increasingly politicized, with Presidents selecting greater and greater numbers of agency political appointees, most of whom are not Senate-confirmed.”). Further complicating the story, recent scholarship asserts that executive agencies themselves may assert control over the administrative state. See Shah, *supra* note 47, at 645.

Congress's oversight role.⁵⁰ The President often employs informal legal advisors, who are charged with everything from being an informal sounding board to brokering Arab-Israeli peace.⁵¹ This shadow cabinet evades Senate review but can be a critical component of presidential decisionmaking.

The President also enjoys increasing authority over legal interpretation. Consistent with departmentalism, the executive branch has always played a role in interpreting the Constitution, including with respect to its own authority.⁵² But through "porous legalism," the President chooses the preferred interpretative actor within the executive branch, and contracts the Office of Legal Counsel in issuing formal, written, interpretative opinions.⁵³ In other words, the Executive's reach is farther than ever.

I. Enforcement Lawmaking. — Although expanding executive power is well studied, the field of federal courts has not yet identified the ways in which the changed presidency has changed the federal courts. This is in part because executive power is a moving target. In this Article, I focus on the judiciary's ability to check a particular form of executive action, a practice I call "enforcement lawmaking."⁵⁴ Although enforcement lawmaking may be motivated by different causes or be executed through different means, it follows the same pattern. The President — or a high-level executive official motivated by the President — directs action in a top-down fashion intended to use enforcement discretion to enact broad policy goals, often incorporating presidential administration.⁵⁵

During the last decade or so, the President has sought out new, more creative ways of achieving policy aims through diverse channels. Employing a combination of executive orders, declarations, enforcement memoranda, and letters to high-level officials, the Executive has enacted

⁵⁰ See Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 667, 698 (2020).

⁵¹ See Matthew Lee, *Pompeo, Kushner to Mideast as US Presses Arab-Israeli Peace*, AP NEWS (Aug. 22, 2020), <https://apnews.com/article/b55ee28bo79fo2e1e2991232ffc64b5c> [<https://perma.cc/YB3P-BN6Y>].

⁵² See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 321–23 (2002) (describing the constitutional and doctrinal architecture for departmentalism).

⁵³ Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 809–10 (2017).

⁵⁴ In some cases, the actions I discuss are mere *attempts* at enforcement lawmaking because the Executive's efforts are effectively resisted by courts.

⁵⁵ Though enforcement lawmaking often deploys presidential administration, many acts of presidential administration would not properly be considered enforcement lawmaking. Then-Professor Kagan, for instance, cites President Clinton's presentation of "regulations and other agency work product, to both the public and other governmental actors, as his own [work]" as a form of presidential administration. Kagan, *supra* note 45, at 2249. A communications strategy that subordinates administration work product to the byline of the President is not enforcement lawmaking, but rather a mode of administrative governance.

broad policy changes in a manner that shares attributes of policy, law, and enforcement, but that cannot comfortably be assimilated into any one domain.⁵⁶ The Executive has attempted to use the space between conflicting obligations to exert influence or ultimately choose the governing policy. This enforcement lawmaking⁵⁷ permits the Executive to use the enforcement discretion built into legislative enactments in a way that meaningfully transforms enforcement into something more than enforcement policy.⁵⁸

Of course, the President has used enforcement authority to implement policy goals for decades.⁵⁹ And scholars identify, defend, and critique presidential enforcement discretion. Professors Jack Goldsmith and John Manning recognize that the President *must* make enforcement choices to effectuate legislation as a part of the President's "completion power."⁶⁰ And Professor Kate Andrias makes visible the considerable authority and discretion that the President has to direct enforcement power.⁶¹ Still others recognize the substantial effects of presidential enforcement — or nonenforcement⁶² — decisions in substantive areas

⁵⁶ Cf. Manheim & Watts, *supra* note 3, at 1762 ("[T]he head of the executive branch — the President of the United States — also plays a central role in the regulatory sphere, often by deploying unilateral written directives either to announce significant policies on her own or to direct government actors to help further her policy goals.").

⁵⁷ In scholarship, the word "law" is at times broad and at others narrow. In legal study, those who study executive power may refer to the President's actions — such as executive orders, proclamations, memoranda, and directives — as "law." See, e.g., Greene, *supra* note 42, at 123 ("We accept, perhaps uneasily, the delegation of substantial lawmaking power to the President, who executes the laws he makes. Of course we don't call the President's power 'lawmaking.' We have euphemisms — we call this power 'regulatory,' or 'interpretive,' or 'gap-filling.'"); Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877, 879 (2020); Katyay, *supra* note 3, at 2314 (exploring "how separation of powers can be reflected within the executive branch when that branch, not the legislature, is making much of the law today"); *id.* at 2320 (recognizing that "a presidential decree" could be "chock full of rampant lawmaking"). And they are certainly understood by the person who enacts them as laws. But the term is less neutral in the administrative law context, where the line between "policy" and "law" may distinguish permissible action from impermissible action. I use the term "law" to distinguish it from mere "policy," while recognizing that all three branches of government may permissibly enact law. Congress legislates. Courts interpret and develop common law. And the President can engage in a range of actions. The term "enforcement lawmaking" is meant to capture one form of presidential lawmaking and is not intended to suggest that presidential lawmaking is ultra vires in all forms. Some may disagree, but I use this term because I think it captures the reality on the ground.

⁵⁸ In order for the term "enforcement lawmaking" to focus our attention, several substantive domains lie beyond the scope of this Article, including criminal law, foreign affairs powers, and routine administrative action.

⁵⁹ See Manheim & Watts, *supra* note 3, at 1763–69 (tracing historical uses of presidential orders to achieve policy aims).

⁶⁰ See Jack Goldsmith & John F. Manning, Essay, *The President's Completion Power*, 115 YALE L.J. 2280, 2293–95 (2006).

⁶¹ See Andrias, *supra* note 8, at 1034.

⁶² For a discussion of presidential inaction — including nonenforcement — and its relationship with the separation of powers, see Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1207–11 (2014).

ranging from immigration⁶³ to drug policy.⁶⁴ But it is the degree to which the presidency has wielded this authority, beyond any individual domain, that has formally changed the branch, which merits a new shorthand for these actions: enforcement lawmaking.⁶⁵

Recent practice obscures the line between policy and law. The President attempts enforcement lawmaking not just to execute congressional mandates, but sometimes to countermand them. The President also attempts enforcement lawmaking when the legislative process has stalled or even when it appears it is likely to stall. The President may even attempt enforcement lawmaking simply because the method is available. Line drawing is often challenging, and whether any individual action constitutes enforcement lawmaking could be open to debate. These lines are particularly hard to draw when the President uses the administrative state to attempt enforcement lawmaking. The goal here is not to perfectly capture this form of presidential behavior, but to delineate a general category of presidential action that has prompted a general category of judicial responses.

2. *Enforcement Lawmaking: Examples.* — To illustrate, this section briefly describes five prominent examples of enforcement lawmaking that represent different variations on a theme.⁶⁶ These examples — and

⁶³ See Cox & Rodríguez, *supra* note 6, at 463–64 (recognizing that Congress has legislated conflicting obligations in the immigration space, thus delegating to the President the power to choose how to enforce deportation statutes); Margulies, *supra* note 6, at 1184–86 (discussing the legality of the President’s DAPA policy).

⁶⁴ See Markano, *supra* note 7, at 292–96 (describing the potential of more formal nonenforcement policies to permit states to deregulate marijuana).

⁶⁵ For one analysis of how the presidency came to wield the power to make law by building on actions and derelictions of prior presidents, see PRAKASH, *supra* note 3, at 215–45.

⁶⁶ Two caveats are in order. *First*, the forms of enforcement lawmaking that this piece explores include both presidential action and administrative action. Although that formal distinction matters across many spaces — including the existence of a cause of action, the process that resulted in the action, and the ultimate merits determination — it does not impact the evolving judicial power that Parts II and III document. The administrative state is a key tool that Presidents have used in enforcement lawmaking. In this space, lines between administrative law and presidential law sometimes blend together, but in ways that do not impact the doctrines and practices explored in this piece. Drawing rigid distinctions between administrative law and enforcement laws would miss part of the picture. For an interesting argument that the President’s actions should be subject to administrative law review, doctrines, and practices, see Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 98–115 (2020). *Second*, this analysis is nonpartisan. The research that supports the assertions includes suits brought by both liberals and conservatives to challenge enforcement lawmaking by both Democrats and Republicans. See PRAKASH, *supra* note 3, at 4 (recognizing that “Presidents of both parties have aggrandized themselves and the office of the presidency”). Yet, neither I nor the piece is blind to the moment: the great majority of the instances of enforcement lawmaking that this piece addresses occurred during the Trump Administration, as did the suits that have driven changes to judicial power. But this piece departs from some others by recognizing that this category of lawsuits is not limited to the Trump Administration and did not begin after the 2016 election. Several important examples predate the Trump Administration, including the challenge to the DAPA policy. And actions by the Trump Administration have emboldened presidential candidates about the actions that they would have

others — come back throughout Parts II and III. Each of these instances of enforcement lawmaking has generated multiple lawsuits.

(a) *Deferred Action for Childhood Arrivals*. — The DACA program represents a cross-administration attempt at executive action in the face of congressional inaction. Comprehensive immigration reform was an elusive goal for the Obama Administration, particularly when it came to Dreamers, those who lived in the United States without official authorization after being brought to the country as minors. President Obama implemented DACA after Congress failed to pass proposed legislation. Formally implemented by a memorandum from the Secretary of Homeland Security,⁶⁷ the policy made clear that the executive branch would use its prosecutorial discretion to avoid removing qualifying individuals who were brought to the United States as children. President Obama urged Congress to work with him, but made clear along the way that he did not need Congress to take action.⁶⁸ President Trump, in turn, attempted to terminate the DACA program with minimal administrative process⁶⁹ after failing to reach consensus with Congress on border-wall funding.

(b) *Transgender Bathroom Policy*. — The transgender bathroom policy represents an attempt to expand executive power in relation to states. During the Obama Administration, the Department of Justice

taken on “day one.” See Russell Berman, *2020 Democrats Are Already Giving Up on Congress*, THE ATLANTIC (Jan. 30, 2020), <https://www.theatlantic.com/politics/archive/2020/01/democrats-executive-power-warren-student-debt/605800> [<https://perma.cc/Y2QV-Y3JA>] (reporting that “on her first day as [P]resident,” Senator Elizabeth Warren planned to cancel student debt through broad interpretation of existing laws; Senator Bernie Sanders was considering dozens of executive orders to go around Congress, including an implementation of an immigration plan; and Senator Kamala Harris intended to enact her gun-control agenda unilaterally if Congress did not act within her first 100 days). Indeed, President Biden issued a record-making number of executive orders in his first several weeks in office, undoing many of the Trump Administration’s policies. See generally 2021 Joseph R. Biden Jr. Executive Orders, FED. REG., <https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021> [<https://perma.cc/7NGJ-6D7T>]. Executive power and judicial review will both be affected by the moment, even if the moment itself turns out to be aberrational. Judicial review will be formalized in doctrine that will be cited for years to come. And the alternative — judicial abdication — will embolden presidential action and further executive control.

⁶⁷ See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/TWN9-ERVA>].

⁶⁸ President Obama famously and proudly employed enforcement lawmaking in the face of congressional inaction, saying: “We are not just going to be waiting for legislation in order to make sure that we’re providing Americans the kind of help that they need. I’ve got a pen, and I’ve got a phone. And I can use that pen to sign executive orders and take executive actions . . . that move the ball forward . . .” Rebecca Kaplan, *Obama: I Will Use My Pen and Phone to Take on Congress*, CBS NEWS (Jan. 14, 2014, 12:44 PM), <https://www.cbsnews.com/news/obama-i-will-use-my-pen-and-phone-to-take-on-congress> [<https://perma.cc/RT92-NQ4J>].

⁶⁹ See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1903 (2020).

(DOJ) and Department of Education (DOE) sent a letter to school districts across the United States. This “Dear Colleague Letter” informed districts that they were required to “immediately allow students to use the bathrooms, locker rooms and showers of the student’s choosing, or risk losing Title IX-linked funding.”⁷⁰ The policy was not self-enforcing, but it used the specter of enforcement to nudge compliance.⁷¹

(c) *The Southern Border Wall*. — President Trump’s diversion of funds to build a southern border wall represents an attempt to use historical delegations to countermand contemporary Congresses.⁷² For example, President Trump aimed for months to have Congress fund a southern border wall. He even shut down his own government in an effort to bring it to fruition.⁷³ After thirty-five days, Congress ultimately passed spending legislation that *did not* authorize use of funds for a southern border wall.⁷⁴ And the President signed that legislation.⁷⁵ Nonetheless, in an appearance thirteen hours later, President Trump literally “declared” a national emergency in order to invoke a 1970s delegation to the President in times of national emergency.⁷⁶ Congress aimed to override the President’s declaration, but the President vetoed that attempt.⁷⁷ The President did not just superintend Congress’s policy; he created one of his own that countermanded Congress’s.⁷⁸

(d) *Sanctuary Cities*. — President Trump’s sanctuary-cities policy was also an attempt to expand executive influence over localities. “Sanctuary cities” have local policies that direct law enforcement officials *not* to turn over information to immigration officers when they learn that an individual — a victim of, witness to, or alleged perpetrator

⁷⁰ Plaintiffs’ Application for Preliminary Injunction (and Agreed Request for Expedited Consideration) at 1, *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (No. 16-CV-00054-O).

⁷¹ *Id.*

⁷² Cf. William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 539 (1992) (“Because statutes have an indefinite life, a broad delegation in 1937 (when the preferences of Congress and the President were congruent on many issues) still had important consequences in 1987 (when the political preferences of Congress and the President were very different).”).

⁷³ Natalie Andrews & Kristina Peterson, *U.S. Government Shuts Down over Border Wall Funding*, WALL ST. J. (Dec. 22, 2018, 12:01 AM), <https://www.wsj.com/articles/trump-pledges-long-government-shutdown-without-border-wall-funding-11545398044> [<https://perma.cc/3XFZ-SUPH>].

⁷⁴ Andrew Restuccia et al., *Longest Shutdown in History Ends After Trump Relents on Wall*, POLITICO (Jan. 25, 2019, 7:06 PM), <https://www.politico.com/story/2019/01/25/trump-shutdown-announcement-1125529> [<https://perma.cc/S5C3-ATZM>].

⁷⁵ *Id.*

⁷⁶ See Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> [<https://perma.cc/S2SB-YXSD>].

⁷⁷ See *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8, 11 (D.D.C. 2019), *aff’d in part, vacated in part*, 976 F.3d 1 (D.C. Cir. 2020).

⁷⁸ Liberally construing the term “national emergency,” President Trump clarified: “I didn’t need to do this, but I’d rather do it much faster.” See Baker, *supra* note 76.

of a crime — is undocumented, on the theory that cities are better able to enforce law if undocumented individuals participate in the law enforcement project without fear of immigration consequences.⁷⁹ To further its immigration goals, the Trump Administration sought to “outlaw” sanctuary cities by withholding federal funding from them. Several sources of law combined to form the sanctuary-cities policy: (1) an executive order declaring sanctuary cities ineligible to receive federal grants;⁸⁰ (2) conditions imposed by the Attorney General on the receipt of funds;⁸¹ and (3) certification of compliance with a federal statute, 8 U.S.C. § 1373, which prohibits local government and law enforcement officials from restricting the sharing of information with federal immigration authorities regarding the citizenship of any individual.

(e) *The Census Citizenship Question.* — This Article treats Secretary Wilbur Ross’s decision to add a citizenship question to the decennial census as an attempt at enforcement lawmaking. Although that decision was formalized through administrative action,⁸² through the course of the case the divide between the administrative state and the Trump Administration became increasingly clear: the administrative bureaucrats concluded that adding a citizenship question would impair the census’s accuracy, yet the political actors still wanted to include it. President Trump’s interest only started to become clear after the case was adjudicated: although the government’s lawyers represented that a printing deadline required expedited review, President Trump suggested he would pursue adding the citizenship question beyond that deadline through an addendum.⁸³ What is more, over a year after the Supreme Court’s decision, President Trump signed a presidential memorandum to the Secretary of Commerce that made clear (1) that he “instructed executive departments and agencies to share information with the Department of Commerce . . . to allow the Secretary to obtain accurate data on the number of citizens, non-citizens, and illegal aliens in the country” and (2) that “[f]or the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a

⁷⁹ Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1707–09 (2018).

⁸⁰ Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

⁸¹ See *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 937 (N.D. Ill. 2017) (explaining Attorney General Sessions’s two additional conditions on the receipt of federal funds: (1) “that local authorities provide federal agents . . . the scheduled release from . . . local correctional facilities of [those] individuals suspected of immigration violations” and (2) “that local authorities provide immigration agents with access to City detention facilities and individuals detained therein”).

⁸² See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2562 (2019).

⁸³ Michael Wines & Adam Liptak, *Trump Considering an Executive Order to Allow Citizenship Question on Census*, N.Y. TIMES (July 5, 2019), <https://www.nytimes.com/2019/07/05/us/census-question.html> [https://perma.cc/2A2X-VKLL].

lawful immigration status under the Immigration and Nationality Act.”⁸⁴

* * *

Enforcement lawmaking goes beyond individual enforcement decisions and shares attributes with legislation. Some courts even treat these forms of law similarly. In cases challenging executive enforcement laws, courts are often not conscious about the source of law that they are analyzing, improperly referring to the source of law as “statutes” or “legislation.”⁸⁵ At other times, courts are expressly aware of the source of law, and they borrow judicially crafted canons and tools of statutory interpretation.⁸⁶ Judicial reliance on the legislative canon to assess the validity of enforcement lawmaking reveals the extent to which enforcement laws share key attributes with legislation. But enforcement lawmaking is also different from legislation in important ways.⁸⁷ In practice, enforcement lawmaking is fragile and subject to reversal with a change in administration.⁸⁸ As Parts II and III explore in detail, it demands and is the subject of unique treatment in federal courts.

B. Courts in Separation-of-Powers Theories

Federal courts often decline to check executive action. They often rely on formalist, rather than functionalist, conceptions of the separation of powers.⁸⁹ They defer where war powers and national security issues

⁸⁴ Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020).

⁸⁵ See, e.g., *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 515 (N.D. Cal. 2017) (expressly using canons of statutory construction to determine content of executive order).

⁸⁶ See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018) (drawing on statutory interpretation cases when looking prophylactically to external evidence of executive motive in enacting the travel ban); Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1358 (2019) (arguing that courts generally make no distinction between legislative- and executive-branch officials in applying intent-based tests in constitutional cases involving the Executive).

⁸⁷ Scholars have explored how courts ought to engage in interpretation of presidential directives in different ways than they interpret statutes. See Grove, *supra* note 57, at 884; Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 88 (2017); Shaw, *supra* note 86, at 1372–74.

⁸⁸ See Bulman-Pozen, *supra* note 46, at 271.

⁸⁹ M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1129 (2000); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 516 (1987); see also Levinson & Pildes, *supra* note 2, at 2378; Metzger, *supra* note 43, at 1610 (“That the Court’s decisions fail to engage with current political realities is . . . troubling.”). The inverse may also be true. See Huq & Michaels, *supra* note 47, at 380 (“Litigation about the separation of powers thus occurs against a backdrop of institutional change and development that proceeds largely (albeit not entirely) independently of what the courts do.”).

are at stake.⁹⁰ They rely on the expertise of administrative agencies.⁹¹ They avoid the clearly political.⁹² And they deploy lesser-studied judicial practices, such as the presumption of regularity — which gives federal actors the benefit of the doubt, presuming that their actions are taken in good faith⁹³ — to dignify and protect executive-branch litigants.

But that is only part of the legal landscape. The legislative and judicial branches are not the only counters to the Executive. Indeed, scholars have increasingly emphasized checks that come from *outside* the traditional tripartite structure of government: external checks (states), internal checks (actors and structures within the executive branch itself), and structural checks (the party system).⁹⁴ What matters for the purposes of this Article — and what is not the focus of the careful work of those studying these actors — is the role the judiciary plays in invigorating each of these checks.⁹⁵ If these are the Executive counterweights of the future, and courts play a central role in facilitating them, the doctrinal evolution that makes that possible is of critical importance. A brief canvas of these safeguards and the power that each draws from the federal courts will set the stage for a more detailed doctrinal analysis in the next section.

I. External Checks: States. — States are one of the most robust external safeguards to the separation of powers. As Professor Jessica Bulman-Pozen shows, the federal government often charges states with carrying out federal law “concurrently” with the executive branch.⁹⁶ In that role, states can contest the Executive’s enforcement parameters by

⁹⁰ See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 3 (2007); Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1434 (2009) (arguing that courts defer to factual judgments made by the executive branch in national security litigation).

⁹¹ See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

⁹² See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (holding that partisan gerrymandering claims present political questions beyond the reach of federal courts).

⁹³ See *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

⁹⁴ These are not the only checks that scholars have identified. For instance, Professors Eric Posner and Adrian Vermeule look to the public as a constraining force on executive power. See POSNER & VERMEULE, *supra* note 2, at 15–16.

⁹⁵ There is a role that each of these checks plays in invigorating judicial power as well. As will later be explored, each of these actors has initiated or otherwise participated in suits in federal court: they have invoked judicial power, made motions, and formed the record on which judicial decisions have been based. Because this Article focuses on broad developments in judicial review, it does not give these actors — or innovative lawyers — fulsome treatment.

⁹⁶ See Bulman-Pozen, *supra* note 2, at 475 (“[W]hen Congress gives states a role in executing federal law, it tends to delegate not *exclusively* but rather *concurrently*: States may implement federal law by conforming to standards set by the federal executive; states and federal agencies may implement the same regulatory provisions or enforce the same statutes; or state officials may execute federal law under the supervision of a federal agency.”); Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1268 (2009).

“forc[ing] attention back to the underlying statute: Contending that their view is consistent with Congress’s purposes.”⁹⁷ States can do so within federal agencies or by bringing an action in the courts. Their use of the federal courts to resolve disputes with the Executive over congressional delegations has only become more common in the last decade as states have been the primary public law litigants — indeed, anchoring public law litigants — challenging executive action.⁹⁸ In the process, states have been one of the engines of change to the very fora in which they litigate.

2. *Internal Checks: Internal Separation of Powers.* — As the executive branch has grown larger and more powerful, some point to the constraining authority of the career bureaucrats and administrative processes that inhabit it. Then—Professor Neal Katyal and others advocate for administrative structures such as bureaucratic overlap, protection and promotion of civil servants, and protection of internal adjudication to empower civil servants by rendering agencies less political and therefore less susceptible to presidential overreach.⁹⁹ Professors Gillian Metzger and Kevin Stack explore some of the limitations of internal agency law and encourage reforms, such as transparency of decision-making, to render agencies more accountable.¹⁰⁰ Controls of these sort are effective, however, when the President plays not only by the rules but also by the norms.¹⁰¹ In the context of enforcement lawmaking, the President and close allies effectively displace the bureaucracy and push against regulatory norms to achieve the desired outcome.¹⁰² But career civil servants can push back in ways that involve courts.

⁹⁷ Bulman-Pozen, *supra* note 2, at 503.

⁹⁸ See Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1290 (2019) (“In theory, Congress might play the primary role in checking federal executive authority. But Congress is a gridlocked institution in times of divided government, and one too often willing to go along with the executive branch in times of unified control. State attorneys general do not have Congress’s tools of oversight, but they may have standing to call upon the federal courts to enforce federal law against the executive. As an institutional matter, state attorneys general may play this role well. At the very least, there is no reason to assume that they will be systematically less capable than private litigants in presenting cases before the federal courts.” (footnotes omitted)); Hessick & Marshall, *supra* note 2, at 84 (“In recent years, state attorneys general have become increasingly more aggressive in seeking to patrol federal executive action.”); Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1893 (2019) (“States increasingly litigate before the federal courts in lawsuits challenging national policy.”).

⁹⁹ See Katyal, *supra* note 3, at 2317; see also Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 211–12, 214. *But see* Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 231–36 (2011).

¹⁰⁰ Metzger & Stack, *supra* note 11, at 1249, 1303.

¹⁰¹ Metzger, *supra* note 11, at 441 (“Presidents have reasons to adhere to these mechanisms, they also have strong incentives to trump and evade internal checks in order to advance their political agendas and desired policy goals. Particularly in the face of a determined President, the constraining power of internal checks can be quite limited.”).

¹⁰² See *supra* section I.A.2, pp. 952–56 (providing examples of attempted enforcement lawmaking).

For example, it has been reported that Elaine Duke, then–Acting Secretary of Homeland Security, was deeply bothered by the Trump Administration’s plan to end protections for DACA recipients.¹⁰³ When asked to provide justifications for rescission of the program, she wrote a bare-bones memo providing a sole justification for DACA’s rescission: that the Attorney General believed it was unlawful.¹⁰⁴ Some have speculated that she did not want to fortify the measure against legal challenge.¹⁰⁵ That justification was later the subject of a legal challenge, in which the Supreme Court ultimately concluded the action was insufficiently supported.¹⁰⁶ In other instances, career lawyers have sought to withdraw from cases that prompted further judicial inquiry.¹⁰⁷

3. *Structural Constraints: Political Parties.* — Typically, political parties are not seen as a force for the preservation of separation of powers but an impediment to its proper functioning.¹⁰⁸ Professors Daryl Levinson and Richard Pildes convincingly argue that if Congress and the President are controlled by the same party, Congress does not constrain the President.¹⁰⁹ But the opposite premise is also true: when Congress — or a house of Congress — and the President are controlled by different parties, the party system has a role in preserving the separation of powers.¹¹⁰ Although Congress can try to check the President, it often will need to rely on the courts to effectuate those checks. During the Obama and Trump Administrations, the House of Representatives — when controlled by a different party from that of the presidency — sought to effectuate its authority through the federal courts. For example, the House has gone to the courts to enforce its subpoenas¹¹¹ and to protect its role in the appropriations process.¹¹²

¹⁰³ See Shear et al., *supra* note 35.

¹⁰⁴ See Memorandum from Elaine Duke, Acting Sec’y, on Rescission of Deferred Action for Childhood Arrivals (Sept. 5, 2017), DEP’T OF HOMELAND SEC., <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/YR45-F2KF>].

¹⁰⁵ See Shear et al., *supra* note 35. Of course, it is impossible for me to know what Acting Secretary Duke’s true motivation was.

¹⁰⁶ U.S. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1914–15 (2020).

¹⁰⁷ See *infra* section II.B.5, pp. 967–68.

¹⁰⁸ See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 443 (2012) (explaining that institutional rivalries are weak “during times of unified government”).

¹⁰⁹ See Levinson & Pildes, *supra* note 2, at 2313.

¹¹⁰ See Huq & Michaels, *supra* note 47, at 381 (arguing that political parties are a part of the “thick political surround” to the separation of powers).

¹¹¹ *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc) (holding House Committee had standing to bring suit to enforce subpoena).

¹¹² See *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 57 (D.D.C. 2015) (alleging Obama Administration’s implementation of ACA wrote the House out of the appropriations process).

II. MANAGERIAL CHECKS: ORDINARY CASE MANAGEMENT AS TRANSPARENCY AND PUBLIC ACCOUNTABILITY

Through tools of ordinary case management, judges can force transparency and public and legal accountability on the executive branch.¹¹³ Case management is a powerful authority wielded, in the main, by district courts.¹¹⁴ It is an underappreciated but powerful aspect of judicial review that renders the *simple existence* of judicial review powerful. The fact that a case is in a federal court before a federal judge brings significant oversight. Because district court judges are assigned to manage a case through all phases, they “negotiate with parties about the course, timing, and scope of both pretrial and posttrial litigation.”¹¹⁵ But judges manage cases out of direct public view, in pre- and post-trial proceedings and in scantily reasoned opinions, so the significance of managerial decisions is often obscured.¹¹⁶ Suits challenging enforcement lawmaking are no different — the systemic effects and significance of managerial decisions in these suits have escaped scholarly commentary. This Part draws together and assesses managerial practice across these important cases and argues that courts can and have been deploying their managerial authority to force transparency and reason giving on the executive branch. Although these are familiar practices, their application to separation-of-powers cases raises different issues from those in other contexts. In the seemingly mundane task of ordinary case management, courts have been exerting extraordinary managerial checks on the Executive.

One of the dominant defenses of executive control over governance is that the President is politically accountable.¹¹⁷ The President thus brings some measure of political legitimacy to decisionmaking. As the only public officer (other than the Vice President) subject to nationwide election, the argument goes, the President is politically accountable. Her decisions therefore possess political legitimacy unlike any other official decisionmaker. Federal judges, by contrast, have life tenure to insulate rulings from public influence.¹¹⁸ One might be troubled by subjecting

¹¹³ Some of the orders, rulings, and practices that this Article discusses have been or may later be modified, cabined, or vacated. This moment of lower court activity — and the power that judges believe they can validly exercise — itself justifies documentation and discussion.

¹¹⁴ In Professor Judith Resnik’s seminal piece, *Managerial Judges*, Resnik makes visible the power that judges exercise through case management. Resnik, *supra* note 18, at 425–26, 429–31 (1982). The Supreme Court has its own version of managerial authority that it primarily exercises on the shadow docket. This Part focuses on managerial judging in the lower federal courts. Part IV addresses the Supreme Court’s shadow docket.

¹¹⁵ *Id.* at 378.

¹¹⁶ *Id.*

¹¹⁷ See, e.g., Kagan, *supra* note 45, at 2332.

¹¹⁸ But see Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 470 (2018).

politically checked presidential decisionmaking to politically unaccountable judicial review. In other words, one might ask, what legitimates judicial review when it halts policies that have been enacted by a President with political accountability? But political accountability over decisionmaking is possible *through* transparency. When the Executive obscures the reasons behind decisions, the public cannot hold it to account. When judges use managerial authority to facilitate transparency, judicial review enhances the legitimacy of those decisions through public commitment to reasons.

A. Discovery

The law that is applied to manage discovery of the President (and close advisors) is far from clear.¹¹⁹ And although administrative law cases are generally confined to the administrative record, where plaintiffs make out a showing of bad faith, courts can authorize discovery beyond that record.¹²⁰ When the Executive's reasons do not quite add up, judges who are active managers can use their authority over discovery to force transparency and public accountability.

One series of lawsuits challenged Secretary of Commerce Wilbur Ross's decision to add a citizenship question to the decennial census.¹²¹ A bit of background on these suits is warranted, because they represent paradigmatic examples of managerial checking.¹²² Secretary Ross stated that he was acting at DOJ's request, which sought improved data about citizen voting age to better enforce the Voting Rights Act.¹²³ Plaintiffs in various suits alleged that this decision violated the Administrative Procedure Act (APA) and the Due Process and Equal Protection Clauses of the Fifth Amendment.¹²⁴ Shortly after Secretary Ross announced his decision, two sets of plaintiffs brought suit in the

¹¹⁹ The most recent statement by the Supreme Court on the matter is *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004), which held that the President need not invoke executive privilege before a district court is required sua sponte to narrow a discovery order, *id.* at 369, but its holding proves difficult to apply in practice. See, e.g., *Karnoski v. Trump*, 926 F.3d 1180, 1205 (9th Cir. 2019) (directing lower court on remand to "give due deference to the presidential communications privilege, but also recognize that it is not absolute").

¹²⁰ See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971) (noting that bad faith is usually required to look beyond the record, but allowing additional discovery in its absence).

¹²¹ Two suits were consolidated in the District of Maryland and two others in the Southern District of New York. See *Kravitz v. U.S. Dep't of Com.*, 382 F. Supp. 3d 393, 396 (D. Md. 2019); *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 515 (S.D.N.Y.), *aff'd in part, rev'd in part*, 139 S. Ct. 2551 (2019).

¹²² Although my focus is on the district court, Professor Benjamin Eidelson frames the Supreme Court's decision in these cases and in the DACA case, *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), as reshaping arbitrary and capricious review to serve an accountability function. See Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1748 (2021).

¹²³ See *Dep't of Com.*, 139 S. Ct. at 2562.

¹²⁴ See, e.g., *New York v. U.S. Dep't. of Com.*, 333 F. Supp. 3d 282, 285 (S.D.N.Y. 2018).

Southern District of New York, and the cases were consolidated.¹²⁵ In June 2018, the government submitted the administrative record.¹²⁶ Soon after, the Secretary submitted a supplemental memo in order to provide further context for his decision.¹²⁷ But that memo prompted more questions than it answered because the Secretary stated therein that he began considering adding a citizenship question in early 2017 and that *he asked DOJ* whether it “would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act.”¹²⁸

The New York plaintiffs filed a motion to compel production of a complete administrative record, arguing that the supplemental memo showed that the Secretary had withheld a part of it.¹²⁹ The Southern District of New York granted the motion to compel and the parties stipulated to production of 12,000 additional pages of documents.¹³⁰ This exercise of managerial authority undoubtedly shined a light on the Executive’s decisionmaking process.¹³¹ But it also established a baseline for other suits, as the District of Maryland ordered equivalent discovery shortly thereafter.¹³²

The Southern District forced still more transparency, ordering a deposition of Acting Assistant Attorney General John Gore¹³³ and, notably, of Secretary Ross himself.¹³⁴ Although such depositions are permitted in only “exceptional circumstances,”¹³⁵ the district court found those circumstances present in light of Secretary Ross’s “unique first-hand knowledge” of the claims.¹³⁶ The court exercised this exceptional discovery power expressly to force transparency on the executive branch. Given the opinion’s unusual force, it is worth quoting at length:

[T]here is something surprising, if not unsettling, about Defendants’ aggressive efforts to shield Secretary Ross from having to answer questions about his conduct in adding the citizenship question to the census questionnaire. At bottom, limitations on depositions of high-ranking officials are rooted in

¹²⁵ *Dep’t of Com.*, 139 S. Ct. at 2563.

¹²⁶ See *New York v. U.S. Dep’t of Com.*, 315 F. Supp. 3d 766, 809 (S.D.N.Y. 2018); *Dep’t. of Com.*, 333 F. Supp. 3d at 287 n.3.

¹²⁷ *Dep’t of Com.*, 315 F. Supp. 3d at 809.

¹²⁸ *Dep’t of Com.*, 139 S. Ct. at 2564.

¹²⁹ See Plaintiffs’ Fifth Letter-Motion Regarding Discovery at 1–2, *Dep’t of Com.*, 333 F. Supp. 3d 282 (No. 18-cv-2921).

¹³⁰ *Dep’t of Com.*, 139 S. Ct. at 2564.

¹³¹ The Supreme Court even recognized this use of managerial authority as proper in the circumstances. See *id.* at 2574–76.

¹³² See *La Unión del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381, 399 (D. Md. 2018).

¹³³ *New York v. U.S. Dep’t of Com.*, Nos. 18-CV-2921, 18-CV-5025, 2018 WL 5260467, at *1 (S.D.N.Y. Aug. 17, 2018).

¹³⁴ *Dep’t of Com.*, 333 F. Supp. 3d at 285.

¹³⁵ *Id.* (quoting *Lederman v. N.Y.C. Dep’t of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013)).

¹³⁶ *Id.* at 286 (quoting *Lederman*, 731 F.3d at 203).

the notion that it would be contrary to the public interest to allow litigants to interfere too easily with their important duties. The fair and orderly administration of the census, however, is arguably the Secretary of Commerce's most important duty, and it is critically important that the public have "confidence in the integrity of the process" underlying "this mainstay of our democracy." In light of that, and the unusual circumstances presented in these cases, the public interest weighs heavily in favor of both transparency and ensuring the development of a comprehensive record to evaluate the propriety of Secretary Ross's decision.¹³⁷

Although the district court made detailed findings of fact — one version of which did not rely on external evidence¹³⁸ — the government vigorously challenged these discovery orders, seeking two separate writs of mandamus from the Second Circuit¹³⁹ and a writ of mandamus from the Supreme Court, which the Court treated as a petition for certiorari and granted.¹⁴⁰

After the Supreme Court heard argument and before its decision, plaintiffs in a different district court census case sought that court's opinion on whether it would reopen discovery on the basis of newly public information concerning the source of the citizenship question.¹⁴¹ They claimed that this information entitled them to relief from judgment on their equal protection claims.¹⁴² The Fourth Circuit then remanded the case so that the district court could proceed with more fact-finding.¹⁴³ This exercise of authority — to reopen a record after judgment — is another tool judges can use to force reason giving.

The ability to use discovery to force transparency on the Executive is not limited to the census cases, and as administrations continue to use enforcement lawmaking, challenges to the processes used will continue. For example, in *Karnoski v. Trump*,¹⁴⁴ plaintiffs challenged the Trump Administration's ban on military service by transgender individuals on

¹³⁷ *Id.* at 291 (citations omitted) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment)).

¹³⁸ This is another exercise of managerial checking: the judge can insulate her opinion on review by giving multiple reasons for a particular outcome. See *infra* section II.B, pp. 964–69 (delineating other forms of judicial management).

¹³⁹ See *In re* U.S. Dep't of Com., Nos. 18-2856, 18-2857, 2018 WL 6006885, at *1 (2d Cir. Oct. 9, 2018) (denying writ of mandamus to halt deposition of Secretary Ross); *In re* U.S. Dep't of Com., Nos. 18-2652, 18-2659, 2018 WL 6006904, at *1 (2d Cir. Sept. 25, 2018) (denying writ of mandamus to halt expansion of administrative record and deposition of Acting Assistant Attorney General).

¹⁴⁰ See *In re* Dep't of Com., 139 S. Ct. 566, 566 (2018).

¹⁴¹ See *Kravitz v. U.S. Dep't of Com.*, 382 F. Supp. 3d 393, 397 (D. Md. 2019) (“[N]ew evidence shows that a longtime partisan redistricting strategist . . . played a potentially significant role in concocting the Defendants’ pretextual rationale for adding the citizenship question . . .”).

¹⁴² *Id.* at 396.

¹⁴³ *La Unión del Pueblo Entero v. Ross*, 771 F. App'x 323, 326–27 (4th Cir. 2019).

¹⁴⁴ 328 F. Supp. 3d 1156 (W.D. Wash. 2018), *vacated*, 926 F.3d 1180 (9th Cir. 2019).

constitutional grounds and sought discovery outside of the administrative record.¹⁴⁵ On its privilege log, the government claimed the deliberative process privilege as its sole basis for withholding or redacting tens of thousands of documents.¹⁴⁶ The government further claimed the ability to withhold documents on the basis of the presidential communications privilege without expressly invoking the privilege.¹⁴⁷ The district court rejected that response as inadequate, granted a motion to compel, ordered the government to provide more information on its privilege logs, and reasoned that the President must actually invoke the presidential communications privilege to receive its benefits.¹⁴⁸ The Ninth Circuit granted a writ of mandamus, vacated the district court's order, and directed the lower court to consider more fully the separation-of-powers issues at stake.¹⁴⁹ Appellate review like this shows how managerial judging is constrained within the judicial system. Other suits raise similar questions and district courts, presented with the opportunity to force transparency through discovery, will be on the front lines.

B. Case Management and Routine Orders

Courts can also use managerial authority to force transparency in other routine aspects of case management. The fact that a suit is in federal court and under judicial management means that the federal parties before these courts can be held to account.

The power to order briefing and encourage settlements forms a substantial core of management authority.¹⁵⁰ In *New York v. Wolf*,¹⁵¹ the State of New York challenged the Department of Homeland Security's (DHS) decision to disallow New Yorkers from applying for the Trusted Traveler Program ostensibly because New York placed restrictions on the sharing of information from the Department of Motor Vehicles with

¹⁴⁵ See *id.* at 1158–59.

¹⁴⁶ *Id.* at 1159.

¹⁴⁷ *Id.* at 1163.

¹⁴⁸ See *id.* at 1163–64.

¹⁴⁹ See *Karnoski*, 926 F.3d at 1203–07; see also Resnik, *supra* note 18, at 412 (noting that, in contrast to private law disputes, in public law cases “judges are constrained by the obligation to respect the autonomy of coordinate branches of government and state executives”). In another exercise of managerial authority, the district court on remand ordered discovery from Defense Secretary James Mattis and other high-ranking officials of the military, holding that the “apex doctrine” — which directs that the heads of government agencies are not normally subject to deposition — had been refuted by extraordinary circumstances. See *Karnoski v. Trump*, No. C17-1297, 2020 WL 5231313, at *2, *7 (W.D. Wash. Sept. 2, 2020). The Court reasoned that these depositions were warranted to inquire into the reasons for which a specially convened panel's recommendation not to exclude transgender individuals from military service was later rejected. *Id.* at *2, *4–6.

¹⁵⁰ See Resnik, *supra* note 18, at 376–77.

¹⁵¹ No. 20-CV-1127, 2020 WL 6047817 (S.D.N.Y. Oct. 13, 2020).

federal immigration officials.¹⁵² The two parties reached an agreement, reported publicly, whereby DHS would lift its ban and the State would amend the law that prevented sharing information with the Trusted Traveler Program.¹⁵³ That very day, the district judge haled the parties back into court with an order to advise the court of the effect of the announcement and whether the suit should be dismissed as moot.¹⁵⁴ This order is both routine and powerful. It demonstrates that a court can take notice of developments in the outside world, hale parties back into court, and hold them accountable to the judiciary. Shortly thereafter, the U.S. Attorney's Office filed a letter with the court that confessed that the reasons given by DHS to withstand arbitrary and capricious review "are inaccurate in some instances and give the wrong impression in others."¹⁵⁵ Because this suit was on the judicial docket and the district judge took an active role in managing the suit, these partial revelations came to light and have spurred further management — aimed particularly at forcing reason giving — by the court. In a letter, plaintiffs claimed that "additional discovery may be warranted regarding what the agency knew and when about the false and misleading statements it made to this Court and Plaintiffs."¹⁵⁶ The judge subsequently issued an order, in part because the federal government had not been forthright with the inaccuracies.¹⁵⁷ Commencing a limited inquiry to aid the court in "deciding later whether and to what extent a more detailed inquiry is warranted," the court ordered defendants to file a comprehensive and detailed report that, among other things, "[l]ist[ed] *any and all* inaccurate or misleading statements"; identified who was responsible; and described "who, when, and how DHS discovered that the record . . . contained inaccurate and misleading statements."¹⁵⁸ Note that this order does not fall under the court's discovery powers, but under a broader management authority. The court expressly asserted: even if the suit "must be dismissed as moot, the Court would retain jurisdiction

¹⁵² See Complaint for Declaratory and Injunctive Relief at 1–4, *Wolf*, 2020 WL 6047817 (No. 20-CV-1127).

¹⁵³ Press Release, U.S. Dep't of Homeland Sec., New York Amends Dangerous Green Light Law to Cooperate with Federal Law Enforcement on DMV Records (July 23, 2020), <https://www.dhs.gov/news/2020/07/23/new-york-amends-dangerous-green-light-law-cooperate-federal-law-enforcement-dmv> [<https://perma.cc/6GC2-Y29U>].

¹⁵⁴ See Order, *Wolf*, 2020 WL 6047817 (No. 20-CV-01127).

¹⁵⁵ See Letter to Judge Jesse M. Furman from Zachary Bannon (July 23, 2020) at 2, *Wolf*, 2020 WL 6047817 (No. 20-CV-1127).

¹⁵⁶ Letter to Judge Jesse M. Furman from Daniela L. Nogueira (July 28, 2020) at 2–3, *Wolf*, 2020 WL 6047817 (No. 20-CV-1127).

¹⁵⁷ See Memorandum Opinion and Order at 5–6, *Wolf*, 2020 WL 6047817 (No. 20-CV-1127).

¹⁵⁸ *Id.*

to pursue an inquiry [into misstatements] and take appropriate action.”¹⁵⁹ This assertion is just one more illustration of managerial authority in action.

Judicial management comes in many forms and at many stages of litigation. What is important, as the following discussion illustrates, is how judges can use the full range of managerial forms to force transparency on the executive branch.

1. *Timing.* — Judges have considerable authority over the timing of suit, which has a transparency-forcing function.¹⁶⁰ Throughout the census litigation, the government stressed the gravity of a July 1, 2019, printing deadline for the census. The district judge, exercising authority over the timing and speed of the suit, proceeded to judgment without the deposition of Secretary Ross.¹⁶¹ This quintessential exercise of case management allowed the district judge to have a fully reasoned opinion on the merits before the Supreme Court was to hear argument on the discovery issues. The government then petitioned for certiorari before judgment (in part, on timing grounds),¹⁶² which the Court granted.¹⁶³ Whether intentional or not, the district court’s speedy resolution of the suit changed the Supreme Court case from one about discovery, with the potential to limit district court discovery powers, to one about the merits. This shift forced the Executive to commit publicly to reasons on the merits.

2. *Holding Conferences.* — Judges have the opportunity to hale parties into court for conferences, a setting in which the district judge can check in with the parties and ask questions outside of a formal oral argument context.¹⁶⁴

¹⁵⁹ *Id.* at 5 n.3.

¹⁶⁰ See Resnik, *supra* note 18, at 404 (discussing speeding up the disposition of a suit and incentives to use management authority to dispose of a suit).

¹⁶¹ See *New York v. U.S. Dep’t of Com.*, 351 F. Supp. 3d 502, 517 (S.D.N.Y.), *aff’d in part, rev’d in part*, 139 S. Ct. 2551 (2019).

¹⁶² For a discussion of the relative frequency with which the Trump Administration sought this extraordinary relief, see Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 132–52 (2019).

¹⁶³ *Dep’t of Com.*, 139 S. Ct. at 2565.

¹⁶⁴ Resnik emphasizes the authority that judges are able to exercise in these informal settings. See Resnik, *supra* note 18, at 387, 390, 408. For example, in a suit in the Eastern District of New York challenging the Trump Administration’s DACA rescission, the judge questioned a public statement made by the DHS Secretary about the Supreme Court’s decision in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), having “no basis in law.” Josh Gerstein, *Judge Rebukes Feds over Statement Slamming Supreme Court’s DACA Ruling*, POLITICO (Aug. 13, 2020, 4:46 PM) <https://www.politico.com/news/2020/08/13/judge-rebukes-feds-supreme-courts-daca-ruling-395000> [<https://perma.cc/SDE8-U59Z>]. Politico reports that Judge Garaufis asked the DOJ attorney representing the United States: “I’m just wondering how a decision by the Supreme Court could be deemed by a federal agency to have no basis in law. Can you explain that to me . . . ?” *Id.* To which the DOJ lawyer responded: “Obviously, the Regents decision

3. *Judicial Notice.* — Courts can take judicial notice of an adjudicative fact that “is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”¹⁶⁵ Courts often take judicial notice of things that occur outside the formal record. Courts have both formally and informally taken notice of things outside of the traditional judicial record in determining whether pre-enforcement challenges may go forward and in evaluating whether a case is ripe for review.¹⁶⁶ As section III.A explores, this brings executive action under judicial supervision earlier, expanding the judiciary’s check over the Executive.

4. *Amicus Participation.* — Courts can shape the issues and arguments in a suit through the management of amicus participation, over which courts have considerable discretion. Ordinarily, in a case-or-controversy system, the issues and arguments in a suit are limited to those raised by the parties.¹⁶⁷ Doctrines such as waiver and forfeiture fortify this principle by placing the onus on parties to raise arguments or else lose them. In the modern public law case, amici — particularly congressional amici — participate widely, and judges can choose how much to address their arguments in their opinions. “Litigating amici”¹⁶⁸ participate more broadly than the amicus moniker alone would suggest. Part III explores the effects of this power in more detail when discussing the structure of suits challenging enforcement lawmaking.¹⁶⁹

5. *Attorney Withdrawals.* — When an attorney seeks to withdraw from a federal case, he or she will file a letter with the court, and local rules and ethics rules govern the content of such filings.¹⁷⁰ These with-

is the law. The government is complying with the Regents decision and will continue to comply . . .” *Id.*

¹⁶⁵ FED. R. EVID. 201.

¹⁶⁶ See, e.g., *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 891–92 (N.D. Cal. 2019) (taking note of President’s June 16, 2016 Presidential Announcement Speech), *aff’d*, 963 F.3d 874 (9th Cir. 2020), *vacated sub nom.* *Biden v. Sierra Club*, 142 S.Ct. 46 (2021) (mem.). The Supreme Court seems to have accepted that courts can take informal notice of other widely known facts. See *Dep’t of Com.*, 139 S. Ct. at 2575 (“Our review is deferential, but we are ‘not required to exhibit a naïveté from which ordinary citizens are free.’” (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977))).

¹⁶⁷ See *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (“[I]n both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.”).

¹⁶⁸ See, e.g., Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1244–46 (1992).

¹⁶⁹ See *infra* section III.B, pp. 980–89.

¹⁷⁰ See, e.g., S.D.N.Y. & E.D.N.Y. LOCAL R. 1.4.

drawals are routinely granted, particularly where another attorney continues the representation.¹⁷¹ Government lawyers file withdrawal motions in the ordinary course as their caseloads change, they switch divisions, or they leave government. In suits challenging enforcement lawmaking, government lawyers have intentionally and prominently withdrawn to force public accountability on the executive branch through judicial oversight. The census cases are one illustration.

In the census case in the Southern District of New York, DOJ sought to switch legal teams after the Supreme Court's decision.¹⁷² The circumstances surrounding that switch were somewhat suspect, as the request to switch was filed shortly after the President contradicted (in a tweet) representations that attorneys had previously made in court, specifically that the government would no longer seek to add a citizenship question to the census after the Supreme Court's ruling.¹⁷³ The district court judge declined the request, reasoning: "Defendants provide no reasons, let alone 'satisfactory reasons,' for the substitution of counsel."¹⁷⁴ This use of managerial authority expressly compels public commitment to reasons.

In a parallel suit in the District of Maryland, government attorneys also sought to withdraw from the case. Unlike the Southern District of New York, the District of Maryland does not have local rules requiring reasons for an attorney withdrawal.¹⁷⁵ Even without local rules compelling reason giving, the district court used its discretion to fill in the procedural gap. The court required additional assurances from the government lawyers seeking to withdraw, including being "prepared to address potential conflicts between recent developments in [the] case and positions repeatedly taken before [the] Court by the withdrawing attorneys."¹⁷⁶ It therefore denied without prejudice the withdrawal motion, so that counsel could make assurances as to the proper transitioning of the case and assure incoming counsel's ability to give reasons for seeming inconsistencies in the case.¹⁷⁷

¹⁷¹ There are some exceptions in obvious sorts of cases, such as where an attorney with special expertise has devoted significant resources and preparation and seeks to withdraw on the eve of trial.

¹⁷² See Michael Wines & Katie Benner, *Judge Rejects Justice Dept. Request to Change Lawyers on Census Case*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/2019/07/09/us/census-citizenship-question.html> [<https://perma.cc/X7AC-W53V>].

¹⁷³ See *id.*

¹⁷⁴ *New York v. U.S. Dep't of Com.*, No. 18-CV-2921, 2019 WL 2949908, at *1 (S.D.N.Y. July 9, 2019) (quoting S.D.N.Y. & E.D.N.Y. LOCAL R. 1.4). Judge Furman's order did permit two of the attorneys, who had left the Civil Division, to withdraw, underscoring that routine withdrawals are permitted. *Id.* at *1-2.

¹⁷⁵ See *Kravitz v. U.S. Dep't of Com.*, Nos. GJH-18-1041, GJH-18-1570, 2019 WL 3017097, at *1 (D. Md. July 10, 2019).

¹⁷⁶ *Id.* at *2.

¹⁷⁷ *Id.* at *3.

6. *Post-trial Management.* — Post-trial management enables judges to continue to play a role in their cases even after the suits are resolved. Injunctive orders inject the courts into the administration of a remedy, providing for continued judicial oversight of executive actions.¹⁷⁸ Section III.C discusses injunctive remedies (and nationwide injunctions in particular), but what is important to note here is that when these injunctions are permanent, their language expressly contemplates a continuing judicial oversight role.¹⁷⁹

C. *Appointment of Defenders and Reliance on Non-parties*

Managerial judging's transparency function extends beyond the enforcement lawmaking context in ways that demonstrate managerial checking's promise and power over executive overreach. Although DOJ ostensibly represents the interests of the "United States,"¹⁸⁰ when there is a clash between the executive branch and another branch of government, DOJ in practice generally represents the interests of the executive branch.¹⁸¹ Several of these clashes have arisen in the last decade, and courts have used their management prerogatives to bring others to defend the judicial and legislative powers in federal court. This process serves several functions. Most obviously, it allows the court to hear adversarial argument, a touchstone of American court systems.¹⁸² But it also forces DOJ to argue *against* the appointed defender, compelling DOJ to publicly commit to reasons in court.

1. *Intervention.* — When the Obama Administration chose to enforce, but not defend, the Defense of Marriage Act, the decision prompted a litany of questions regarding who would defend Congress's statute. The Obama Administration informed the House of its decision and suggested that the House might participate in the litigation.¹⁸³ After the House passed authorizing legislation, the Bipartisan Legal Advisory

¹⁷⁸ See Resnik, *supra* note 18, at 406.

¹⁷⁹ See, e.g., *New York v. U.S. Dep't of Com.*, No. 18-CV-2921, 2019 WL 3213840, at *1 (S.D.N.Y. July 16, 2019) ("Defendants . . . are PERMANENTLY ENJOINED from including a citizenship question on the 2020 decennial census questionnaire; from delaying the process of printing the 2020 decennial census questionnaire after June 30, 2019 for the purpose of including a citizenship question; and from asking persons about citizenship status on the 2020 census questionnaire or otherwise asking a citizenship question as part of the 2020 decennial census. . . . The Court will retain jurisdiction in this case to enforce the terms of this Order until the 2020 census results are processed and sent to the President by December 31, 2020.")

¹⁸⁰ See *United States v. Providence J. Co.*, 485 U.S. 693, 699 (1988).

¹⁸¹ See Ahdout, *supra* note 27, at 1288 (exploring how the Solicitor General almost always represents the President's interests in disputes over foreign affairs powers between the President and Congress).

¹⁸² See Resnik, *supra* note 18, at 380.

¹⁸³ Press Release, Dep't of Just., Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<https://perma.cc/2HUD-4LQY>].

Group (BLAG) filed an intervention motion in *Windsor v. United States*.¹⁸⁴ The magistrate judge found that the House had fulfilled the intervention criteria.¹⁸⁵ The government, however, argued that it would continue to litigate on behalf of the interests of the United States and requested that the House not be given authority as a party to appeal decisions and the like.¹⁸⁶ The court nonetheless granted BLAG's intervention motion as a party, which enabled BLAG to make procedural motions on its own.¹⁸⁷ This exercise of managerial authority introduced into the suit another party that would rigorously defend Congress's statute, thus forcing the government to give reasons for its decision not to defend. More than that, it pushed back against the Executive's ability to define participation in a judicial proceeding.

2. *Appointment*. — Although rare, sometimes judges use their managerial authority to appoint defenders of particular positions. The Supreme Court does this with some regularity,¹⁸⁸ but lower courts do so more sparingly. In two key suits, courts have used this authority to protect the boundaries of judicial power.

(a) *Managing Criminal Contempt*. — The criminal contempt power belongs to the courts, and the management of criminal proceedings, including contempt proceedings, belongs to the judiciary. Although the President has authority to pardon individuals for criminal contempt of court,¹⁸⁹ one question is whether that pardon, if accepted before conviction, may vacate a later order of conviction. That demarcation is the line between the judicial power and the President's pardon power.¹⁹⁰ Following a bench trial, former Maricopa County Sheriff Joe Arpaio was convicted of criminal contempt of court and was subsequently pardoned by the President.¹⁹¹ Arpaio then moved to vacate the conviction, which the district court denied, reasoning that a presidential pardon "does not erase a judgment of conviction, or its underlying legal and

¹⁸⁴ 797 F. Supp. 2d 320, 322 (S.D.N.Y. 2011).

¹⁸⁵ *Id.* at 324.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 691–93 (2012).

¹⁸⁹ See U.S. CONST. art. II, § 2, cl. 1 (authorizing the President to "grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment"); *Ex parte Grossman*, 267 U.S. 87, 112 (1925) ("[C]riminal contempts were within the understood scope of the pardoning power of the Executive . . .").

¹⁹⁰ See *United States v. Arpaio*, No. CR-16-01012-001-PHX, 2017 WL 4839072, at *2 (D. Ariz. Oct. 19, 2017) ("The power to pardon is an executive prerogative of mercy, not of judicial record-keeping." To vacate all rulings in this case would run afoul of this important distinction." (citation omitted) (quoting *United States v. Noonan*, 906 F.2d 952, 955 (3d Cir. 1990)), *aff'd*, 951 F.3d 1001 (9th Cir. 2020).

¹⁹¹ *Id.* at *1.

factual findings.”¹⁹² After the United States confirmed that it did not intend to defend the district court’s order on appeal, outside parties requested that the court appoint a special prosecutor to defend the district court’s decision.¹⁹³ In a rare move, which was likely the only one of its kind to that point,¹⁹⁴ the Court of Appeals for the Ninth Circuit appointed a special prosecutor.¹⁹⁵ In doing so, it relied on both Federal Rule of Criminal Procedure (FRCP) 42 and the judiciary’s “inherent authority to appoint a special counsel to represent a position abandoned by the United States on appeal.”¹⁹⁶ FRCP 42 gives courts the authority to appoint a special prosecutor to prosecute contempt where the government refuses,¹⁹⁷ but that power ordinarily is exercised by district courts.¹⁹⁸ Up until *United States v. Arpaio*,¹⁹⁹ it was exclusively exercised by district courts. Likely because of this rarity, Arpaio’s lawyers then sought a writ of mandamus in the Supreme Court, which the Court denied.²⁰⁰

The Ninth Circuit’s appointment of a special prosecutor both kept the suit live and set the bounds for how the suit would be litigated. In addition to the special prosecutor and Arpaio’s legal team, DOJ filed a brief and argued on the merits.²⁰¹ This, in effect, forced DOJ to give reasons publicly and commit to a position.

(b) *Integrity of Judicial Forum.* — In another exercise of management authority, the D.C. District Court sua sponte appointed amicus curiae to present arguments in opposition to the government’s motion to dismiss the prosecution of Michael Flynn.²⁰² On December 1, 2017, Flynn pleaded guilty to a one-count criminal-information charge of

¹⁹² *Id.*

¹⁹³ See *United States v. Arpaio*, 887 F.3d 979, 981 (9th Cir. 2018); *id.* at 982 (Tallman, J., dissenting).

¹⁹⁴ *Id.* at 981–82 (majority opinion) (“Our attention has not been directed to, nor have we found, a case in which a special prosecutor was appointed by a court of appeals after the government declined to oppose the contemnor’s arguments on appeal.”).

¹⁹⁵ *Id.* at 982.

¹⁹⁶ *Id.* at 981–82.

¹⁹⁷ FED. R. CRIM. P. 42(a)(2) (“The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.”).

¹⁹⁸ See *Arpaio*, 887 F.3d at 981 (“In Rule 42(a)(2)’s most common application, the district court appoints a special prosecutor to investigate and try a criminal contempt when the government declines to perform that function.”).

¹⁹⁹ 887 F.3d 979.

²⁰⁰ *In re Arpaio*, 139 S. Ct. 1620 (2019) (mem.) (denying mandamus).

²⁰¹ See Brief for the United States, *United States v. Arpaio*, 951 F.3d 1001 (9th Cir. 2020) (No. 17-10448).

²⁰² *United States v. Flynn*, No. 17-232, 2020 WL 2466326, at *1 (D.D.C. May 13, 2020), *vacated as moot sub nom. In re Flynn*, 961 F.3d 1215 (D.C. Cir.), *and mandamus denied*, 973 F.3d 74 (D.C. Cir. 2020).

making materially false statements.²⁰³ In conjunction with the plea, the government submitted a statement of offense, which recounted three sets of materially false statements. Then, in early 2020, Flynn submitted a supplemental motion that contained numerous statements contradicting his earlier sworn statements pleading guilty.²⁰⁴ And in May 2020, the government filed a motion under FRCP 48(a) to dismiss the information against Flynn with prejudice, claiming that any misstatements Flynn made were not material.²⁰⁵ It was after this development that the District of D.C. — in a one-page order pursuant to the court’s “inherent authority” — appointed an amicus curiae to “present arguments in opposition to the government’s Motion to Dismiss” and to “address whether the Court should issue an Order to Show Cause why Mr. Flynn should not be held in criminal contempt for perjury.”²⁰⁶

Flynn petitioned the D.C. Circuit for a writ of mandamus to order the District Court to grant the motion to dismiss, arguing that the district court lacked jurisdiction to do anything else.²⁰⁷ The Court of Appeals ordered the district court to respond, which provided Judge Sullivan with the ability to explain the irregular posture of the suit and the concern that both Flynn and the government had lied *to the court* on several occasions.²⁰⁸ Judge Sullivan explained in his brief that the substantial questions and lack of adversarial briefing provided him with insufficient information to evaluate the proper course.²⁰⁹ The post-plea nature of the government-initiated motion to dismiss was irregular and raised questions about the integrity of the plea proceedings, during which Flynn was placed under oath and government lawyers made representations. This procedure pitted the executive power over the enforcement of criminal laws against the judicial power of adjudicating criminal disputes or accepting pleas. By introducing adversarial briefing, the District of D.C. shone a light on the government’s motion and required it to respond publicly to the irregularity. The D.C. Circuit, in a split opinion, granted Flynn’s mandamus petition, ordering the district court to grant the government’s motion and vacate the order appointing an amicus.²¹⁰ The full D.C. Circuit then granted an en banc petition filed by Judge Sullivan, which is both a rare posture and a rare filing.²¹¹

²⁰³ United States v. Flynn, 507 F. Supp. 3d 116, 120 (D.D.C. 2020).

²⁰⁴ See *id.* at 124.

²⁰⁵ *Id.*

²⁰⁶ *Flynn*, 2020 WL 2466326, at *1.

²⁰⁷ *Flynn*, 507 F. Supp. 3d at 125.

²⁰⁸ See Brief for Judge Emmet G. Sullivan in Response to May 21, 2020 Order at 13, *In re Flynn*, 961 F.3d 1215 (D.C. Cir. 2020) (No. 20-5143).

²⁰⁹ See *id.* at 1, 16.

²¹⁰ See *In re Flynn*, 961 F.3d at 1227.

²¹¹ See *In re Flynn*, No. 20-5143, 2020 WL 4355389, at *1 (D.C. Cir. July 30, 2020) (per curiam) (granting en banc review and vacating panel opinion).

The en banc court denied mandamus, recognizing that the government's alleged separation of powers–based harms purportedly caused by the appointment of an amicus were “speculative.”²¹² The court reaffirmed longstanding precedents recognizing “the authority of courts to appoint an *amicus* to assist their decision-making.”²¹³

* * *

Managerial authority is a central component of the modern American judicial system. Judges are responsible for shepherding their cases from start to finish and sometimes beyond. The discretion that judges wield can be troubling, precisely because managerial judging evades many of the formal structural checks that diffuse judicial power — like appellate review and clear precedent.²¹⁴ But in these suits, judges can use this discretion to force reason giving and transparency on the executive branch. Unlike in private lawsuits, the public eye is drawn to managerial judging, which lessens concerns that judges will make unchecked decisions out of public view. Moreover, unlike private suits, the government can and does successfully seek review — with seasoned DOJ legal teams — of these decisions in courts of appeals and in the Supreme Court. To be sure, the stakes on the substantive merits are high in these cases, but exercises of managerial authority are potentially less problematic. Although managerial checking can be subject to judicial overreach, when it is used as a tool to counter executive overreach in the face of obfuscation, managerial checking's value is substantial.

Case management renders judicial review of enforcement lawmaking — standing alone — powerful. A court does not need to rule against the Executive on the substantive merits in order to “check” the executive branch. Being in federal court in front of a federal judge allows for specialized scrutiny by a coequal branch of government, particularly where judges are willing to exercise discretion to hold the Executive to account. Bringing suits into federal court earlier, expanding the class of cases, plaintiffs, and arguments that can come before courts, and putting into place enduring or broad injunctive remedies powerfully extends those managerial checks. The next Part argues — through developments along a range of federal court doctrines — that is exactly what has happened.

²¹² *In re Flynn*, 973 F.3d 74, 80 (D.C. Cir. 2020) (en banc) (per curiam).

²¹³ *Id.* at 81. After President Trump pardoned Flynn, the suit was dismissed as moot. *United States v. Flynn*, 507 F. Supp. 3d 116, 120 (D.D.C. 2020).

²¹⁴ See, e.g., Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 70–73, 78 (1995) (exposing separation-of-powers problems of managerial practices in civil litigation, especially through discovery).

III. DOCTRINAL CHECKS: ENFORCEMENT POSTURE, STANDING, AND REMEDIES

In the last decade or so, the lower federal courts have written a new chapter in the subject of federal courts that has changed the structure of separation-of-powers suits and, consequently, the role that federal courts play in the separation of powers. Courts have entertained pre-enforcement challenges with regularity by expanding the judicial record, interpreting presidential action during the ripeness inquiry, and redefining what is ripe for review. This has brought executive decisionmaking under judicial supervision at an earlier stage. Through standing doctrine, courts have opened their doors to multiparty public litigation. This development has introduced seasoned litigants who meet justiciability requirements into court, shaping briefing and arguments before federal courts. And courts have issued with greater frequency the nationwide injunction, a remedy tailored to executive action that often transforms district courts' role from dispute resolution to law declaration. These changes — to standing, ripeness, interpretations of presidential laws, judicial recordkeeping, and remedies — have opened the courthouse doors to suits challenging enforcement lawmaking and injected the judiciary directly into them.

This Part proceeds in three sections. Section A demonstrates how the timing of judicial review has changed and how that affects the judicial role. Courts have opened their doors to pre-enforcement challenges to executive action, altering ripeness doctrine, the scope of the judicial record, and interpretation of presidential laws and actions. Section B documents developments in standing doctrine and demonstrates how those changes have altered the form that separation-of-powers suits take. Section C draws on nationwide-injunction literature and integrates the change in the judicial remedial power into this larger picture.

A. *Pre-enforcement Challenges: How Timing Shapes Substance*

In suits challenging enforcement lawmaking, judicial review begins early. Historically, plaintiffs had a high bar to clear to demonstrate that their dispute was fit for judicial resolution before an injury occurred. But the opposition to pre-enforcement challenges began to relax²¹⁵ and, in suits challenging enforcement lawmaking, courts have further relaxed

²¹⁵ See, e.g., *Abbott Lab's v. Gardner*, 387 U.S. 136, 148–49, 152 (1967) (permitting pre-enforcement review of agency action where challenging party is a target of the regulation and must choose between the punishments of noncompliance and the substantial financial costs of compliance). The Supreme Court has, however, seemingly fortified some of these timing inquiries by reinforcing standing's imminence requirement. See, e.g., *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402, 416 (2013) (“[R]espondents cannot manufacture standing . . . based on their fears of hypothetical future harm that is not certainly impending.” *Id.* at 416.).

jurisdictional barriers. In today's suits, courts have regularly entertained pre-enforcement challenges, implicating Article III's ripeness requirement and, relatedly, the requirement that an injury be "actual or imminent" to confer standing.²¹⁶ Resolution of this issue has resulted in three comingled doctrinal effects in the federal courts. *First*, the ripeness requirement (or, the imminence requirement of an Article III injury) is satisfied almost by definition in suits challenging enforcement lawmaking, opening the door to pre-enforcement challenges in this context. *Second*, whereas courts generally interpret laws at the merits stage, courts interpret enforcement laws during the pre-merits ripeness stage, augmenting the status of legal questions over factual ones.²¹⁷ *Third*, in the course of interpreting enforcement laws, courts also take judicial notice of unconventional sources, thus altering what it is that courts actually review. This means that courts have a role in supervising the President's tweets, for instance.

Analytically, this role fortifies judicial review's effects. By entertaining pre-enforcement challenges, suits are brought under judicial management earlier, thus increasing judicial supervision and opportunities to force transparency. Moreover, these cases are decided on abbreviated records, which may shape dispositional outcomes.

Courts have found that they can appropriately review enforcement lawmaking in a pre-enforcement challenge. Enforcement lawmaking removes the uncertainty of whether an enforcement action will be brought against a particular individual, thus more easily satisfying the legal requirements for pre-enforcement review. Enforcement lawmaking employs the discretion that the Executive enjoys in enforcing statutes to chart a course aiming to influence or alter primary conduct. By contrast, when Congress legislates, the written law that ostensibly governs conduct comes up against the Executive's enforcement discretion. The Executive is constrained by resources and politics from enforcing all laws against all people and entities. Before courts assess public law legislation, there is an accompanying question of how the Executive will

²¹⁶ See Manheim & Watts, *supra* note 3, at 1782 (noting that the new public law litigation strategy has been to challenge the legality of the President's orders without waiting for final agency action to occur); *id.* at 1801 (noting that "questions of timing loom especially large in the new class of lawsuits" that directly and immediately challenge presidential orders).

²¹⁷ There is an emerging literature that seeks to fill the gap of interpreting "presidential laws." See, e.g., Grove, *supra* note 57, at 910 (arguing in favor of a textualism-based approach for interpreting presidential directives); Shaw, *supra* note 86, at 1340 ("When the President takes some action, then, or issues a legal directive, there is surprisingly little direct authority on the relevance of purpose or intent, or the means by which those might be established, either for courts evaluating the consistency of that action or directive with the requirements of the Constitution, or when it comes to the task of ordinary interpretation."). This scholarship has provided important guidance for an emergent area of law. The literature thus far assumes that just as courts employ canons of construction to interpret statutes, there needs to be a body of law to interpret presidential laws. But how and when a presidential law is interpreted in the course of litigation are different questions, as I explore in this section. These procedural differences are not yet accounted for.

enforce that legislation. The resulting specter of uncertainty can render pre-enforcement judicial intervention problematic because it may run afoul of Article III's case-or-controversy requirement. Enforcement laws often settle that uncertainty because it is the fixing of the bounds — the setting of enforcement priority or discretion — that creates the “law.” Courts are not left to guess how the law will be enforced; the Executive has made it clear.

Federal courts have with near uniformity determined that enforcement laws lack the uncertainty of enforcement that would ordinarily render a pre-enforcement challenge premature. The Northern District of Texas's evaluation of the Obama Administration's “transgender bathroom ban” is one illustration. DOJ and DOE had issued a “Dear Colleague Letter on Transgender Students” that informed districts that they must “immediately allow students to use the bathrooms, locker rooms and showers of the student's choosing or risk losing Title IX-linked funding.”²¹⁸ During the litigation, DOE took the position that the plaintiffs were not in compliance with its interpretation of Title IX.²¹⁹ DOE nonetheless argued that the pre-enforcement challenge was not ripe because DOE had not yet withheld funds from the plaintiffs.²²⁰ It is difficult to see how DOE could send such a letter seeking to urge compliance with its new interpretation of Title IX,²²¹ hold the position that the plaintiffs were not in compliance, and claim that there was some uncertainty as to whether it would choose to enforce the provision. “The only other factual development that may occur, given Defendants' conclusion Plaintiffs are not in legal compliance,” the court reasoned, “is whether Defendants actually seek to take action against Plaintiffs. But it is not clear how waiting for Defendants to actually take action would ‘significantly advance [the court's] ability to deal with the legal issues presented.’”²²²

In some cases reviewing enforcement lawmaking, courts must determine the content of the enforcement law *during* the ripeness inquiry.

²¹⁸ *Texas v. United States*, 201 F. Supp. 3d 810, 816 (N.D. Tex. 2016) (quoting Plaintiffs' Application for Preliminary Injunction (and Agreed Request for Expedited Consideration), *supra* note 70, at 1).

²¹⁹ *Id.* at 822.

²²⁰ *Id.* at 834.

²²¹ There is another issue that lies beyond the scope of this Article concerning whether any piece of enforcement lawmaking that involves the administrative state constitutes reviewable final agency action.

²²² *Texas*, 201 F. Supp. 3d at 823 (citing *Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007) (alteration in original)). For a counterexample, consider the D.C. Circuit's holding that administrative guidance does not constitute final agency action. *See Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1263 (D.C. Cir. 2018). Of course, in concluding that agency action is guidance, the court would first resolve any APA procedural challenges, thus limiting the scope of judicial review, but not eliminating it.

That is, the court must interpret the enforcement law's content, not during its merits inquiry, but during its justiciability inquiry. This reflects a peculiarity of judicial review of enforcement laws that diverges from the traditional role that courts serve when interpreting statutes. In order to determine the law's content, courts seem to agree that evidence pertaining to the Executive's motive matters. This includes statements, by the President and high-level executive officials, of intent to enforce such laws. Whether made orally,²²³ in official written statements,²²⁴ or in tweets,²²⁵ courts have looked to external evidence of executive motive to determine whether enforcement is likely and, accordingly, whether a pre-enforcement challenge is ripe for Article III purposes.²²⁶ Courts thus bring these statements into the judicial record, taking a (limited) role in reviewing statements made in the bully pulpit.

This issue was on display when courts were called on to evaluate the constitutionality of the Trump Administration's ban on transgender individuals serving in the military. In August of 2017, President Trump announced via tweet that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military."²²⁷ The President then issued a formal Presidential Memorandum on August 25, 2017.²²⁸ Prior to the issuance of this formal memo, the Department of Defense (DOD) had planned to allow transgender people to enlist in the military beginning January 1, 2018, and had prohibited discharging service members on the basis of their gender identity.²²⁹ The President's memo extended the prohibition on service indefinitely and directed the military to authorize discharging transgender service members by March 23, 2018.²³⁰ The DOD was required, by February 21, 2018, to submit a plan to implement the

²²³ See, e.g., *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 522 (N.D. Cal. 2017) (considering statements made by White House press secretary).

²²⁴ *Id.* at 520 (considering Inspector General's memorandum).

²²⁵ See, e.g., *Stockman v. Trump*, 331 F. Supp. 3d 990, 993–94 (C.D. Cal. 2018); *Stone v. Trump*, 280 F. Supp. 3d 747, 755–56 (D. Md. 2017); *Karnoski v. Trump*, No. C17-1297, 2017 WL 6311305, at *1–2 (W.D. Wash. Dec. 11, 2017).

²²⁶ Professor Kate Shaw argues that presidential statements are not informed by the same considerations of legislative history, so they are less reliable than their legislative counterparts. See Shaw, *supra* note 86, at 1384 ("Presidential statements, especially those made using platforms like Twitter or during informal speeches and interviews, also fall short of the degree of preparation and care that often attend . . . reliable form[s] of legislative history."). In the context of whether a pre-enforcement challenge is ripe, however, it is not the content of the enforcement law that matters, but the motive to enforce it. And courts have found that presidential statements — including tweets — shed light on whether the Executive has an adequate motive to enforce the law.

²²⁷ *Doe I v. Trump*, 275 F. Supp. 3d 167, 175 (D.D.C. 2017); see also *id.* at 182–83 (quoting a series of tweets from President Trump's Twitter account and cleaning up the capitalization and punctuation).

²²⁸ *Id.* at 175.

²²⁹ *Id.* at 175, 182.

²³⁰ *Id.* at 175, 183–84.

President's directives.²³¹ The Secretary of Defense promulgated interim guidance on September 14, 2017.²³²

Service members brought suits across the country, seeking to enjoin the Presidential Memorandum's directives.²³³ In *Doe I v. Trump*,²³⁴ the District of D.C. adjudicated one such challenge. Maintaining that a challenge brought by service members was premature, the Administration argued that the Presidential Memorandum did not "effect[] a definitive change in military policy" and that "any prospective injuries [were] too speculative [for] judicial intervention."²³⁵ These arguments required the court to evaluate the effect of the President's memo and the Secretary's interim guidance: What do these enforcement laws mean? Are they really open to review or do they reveal enough about how the Executive intends to enforce the law to allow for judicial review? This is an example of a court engaging in interpretation of an enforcement law at an earlier stage than one would typically expect for legislation.

To determine the meaning of an enforcement action, courts draw on familiar statutory construction tools, but tailor them to the unique context of enforcement lawmaking.²³⁶ Because the President is in control of the military, "[t]he Court *must and shall* assume that the directives of the Presidential Memorandum will be faithfully executed."²³⁷ In other words — particularly with respect to direction of the military — the plain text governs. Like statutory construction, if there is ambiguity, the court looks to other sources: "Finally, to the extent there is ambiguity about the meaning of the Presidential Memorandum, the best guidance is the President's own statements regarding his intentions with respect

²³¹ *Id.*

²³² *Id.* at 175, 185.

²³³ See, e.g., *id.* at 175–76; *Stockman v. Trump*, No. EDCV 17-1799, 2017 WL 9732572, at *1–2, *5–6 (C.D. Cal. Dec. 22, 2017); *Karnoski v. Trump*, No. C17-1297, 2017 WL 6311305, at *3 (W.D. Wash. Dec. 11, 2017); *Stone v. Trump*, 280 F. Supp. 3d 747, 757–60 (D. Md. 2017).

²³⁴ 275 F. Supp. 3d 167, *vacated sub nom.* *Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019).

²³⁵ *Id.* at 176.

²³⁶ The power to interpret law — and to develop a structure in which to interpret enforcement laws — is significant. Cf. John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 3 (2014) (recognizing the power of interpretive canons to shape "how federal power is carried out and by whom").

²³⁷ *Doe I*, 275 F. Supp. 3d at 194 (emphasis added). The District of Maryland, in adjudicating a similar challenge, engaged with a similar canon: "The Court cannot interpret the plain text of the President's Memorandum as being a request for a study to determine whether or not the directives should be implemented. Rather, it orders the directives to be implemented by specified dates." *Stone*, 280 F. Supp. 3d at 763.

to service by transgender individuals.”²³⁸ The court looked to the executive record, just as it would look at the legislative record, and included within that the President’s tweets.²³⁹

Likewise, at a similar stage of litigation involving the Trump Administration’s sanctuary-cities policy, the district court considered whether the executive order at issue was likely to be enforced.²⁴⁰ In concluding that the injury was imminent — and that the dispute was ripe — the court relied on statements made by the President himself and those made by the Attorney General and White House Press Secretary.²⁴¹ These statements — external to the documents and memoranda promulgating the Executive’s policy — were nevertheless included in the record to determine the Executive’s motivation to enforce. This, in turn, has given judges a role (albeit limited) in reviewing these statements.

Changing the timeline of judicial review has substantive and structural impacts beyond the judiciary. Pre-enforcement review provides the opportunity not only to remedy injury, but also to avoid it altogether. This is powerful individual relief. But that is not the only impact of this procedural posture. Procedure and procedural posture affect substance.²⁴² Separation-of-powers suits set law along a range of constitutional dimensions, from presidential authority, to the relationship between state and federal authority, and the scope of individual rights. Courts now fill in the content of those roles and rights pre-enforcement and on an abridged or perhaps even no factual record. That may clarify pure legal issues, or it may obscure the stakes. In some instances, as with the ban on transgender participation in the military²⁴³ or the Trump Administration’s travel ban,²⁴⁴ early judicial intervention can help to clarify the permissible scope of executive action in a time frame that can further the President’s objectives. In other instances, early intervention may thwart those objectives. These effects, which lie beyond the scope of the judiciary itself, are ripe for further study.

²³⁸ *Doe I*, 275 F. Supp. 3d at 194.

²³⁹ *Id.* at 182–83, 194. The District of Maryland engaged in similar analysis, both courts going so far as including snapshots of the President’s tweets in the *Federal Supplement*. See *id.* at 183; *Stone*, 280 F. Supp. 3d at 756.

²⁴⁰ *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 522–23 (N.D. Cal. 2017).

²⁴¹ *Id.* at 522–23, 529–30.

²⁴² See Z. Payvand Ahdout, Essay, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 165 (2021) (arguing that procedural posture affects the substance of constitutional criminal procedure rights); Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1018–27 (2008); Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 518 (1970).

²⁴³ See *Karnoski v. Trump*, 926 F.3d 1180, 1199 (9th Cir. 2019) (per curiam); *Stone*, 280 F. Supp. 3d at 771.

²⁴⁴ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2403–06, 2423 (2018).

*B. Justiciability and Article III Standing:
Structuring Suits Challenging Enforcement Lawmaking*

There is something of a formula for suits challenging enforcement lawmaking: both public and private actors participate in ways that cannot straightforwardly be categorized as party plaintiffs. Often, multiple suits will be filed against attempted enforcement lawmaking within several days of one another. Generally, a coalition of states will initiate one of these suits. One state acts as a “lead” and the others provide support: their expertise, their imprimatur, or perhaps a concrete injury for standing. Congress may participate in these suits. Although Congress often formally participates as *amicus curiae*, it is generally given argument time, and the opinions courts write often reference the arguments advanced by Congress. These suits frequently have dozens and dozens of *amici curiae* participating as early as district court adjudication. Sometimes, suits are initiated by a house of Congress. At other times, states and private individuals litigate alongside one another. They contribute their resources, experience, and — critically — injuries, to support the suit.

Traditionally, Article III’s standing requirement was a more robust barrier to these sorts of public-protecting suits, but through both modest and substantial doctrinal developments, that has changed.²⁴⁵ Often described as the “who” of federal courts,²⁴⁶ standing doctrine has complex contours, with special exceptions and subdoctrines for particular parties or substantive areas.²⁴⁷ But the core test is canonical: a plaintiff must show a concrete and particularized injury in fact, that is fairly traceable

²⁴⁵ It bears mention that standing doctrine itself has changed over time. Although sometimes referred to as the “touchstone” of Article III’s standing requirement, the phrase “injury in fact” was not used until the 1970s in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). *Id.* at 152; Huq, *supra* note 27, at 1460. There is some argument over the doctrine’s historical pedigree, but it is reasonably clear that the language has changed and the content of standing doctrine is based on that language. Some argue that the injury-in-fact requirement was meant to expand the class of persons who could bring suit, while others argue that the requirement has historical analogs. Compare Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 179–93 (1992), and Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372 n.7 (1988), with Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691–92 (2004). See also Huq, *supra* note 27, at 1460–61 & nn.105–13 (showing how the term “injury in fact” has shaped debates between Justices and arguing that it has “push[ed] courts into open-ended, free-form, and near metaphysical inquiries into the adequacy of alleged injuries,” *id.* at 1460).

²⁴⁶ See Aziz Z. Huq, *State Standing’s Uncertain Stakes*, 94 NOTRE DAME L. REV. 2127, 2147 (2019) (“At a most basic level, state standing is self-evidently about *who* can bring a case. . . . The availability of state standing . . . may also influence how the issue is framed and resolved.”).

²⁴⁷ For a comprehensive discussion of the Supreme Court’s fragmented standing doctrine across substantive domains, see Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1068–92 (2015), and Huq, *supra* note 27, at 1458–61.

to the conduct alleged, and is redressable by a judicial determination.²⁴⁸ This test's stated goal is to confine federal courts to the province of adjudicating "cases or controversies."²⁴⁹

The standing question in these multiparty, policy-oriented suits is uniquely complicated, however, because each of the actors that participates — states, private associations, individuals, and houses of Congress — has special subdoctrines that apply. There is a robust literature on standing doctrine, and scholars in the last decade have addressed the standing developments for many of these parties individually.²⁵⁰ The goal of this section is not to retread those important contributions, but to focus on the legal consequences of having this multiplicity of parties with fast-evolving standing frameworks together in litigation of separation-of-powers questions.

I. From Caution to Politics. — Courts have developed a number of doctrines that theoretically leave the doors open to political cases, but that historically have almost always kept them out. These form a protective barrier around the courts to avoid embroiling them in political controversies. For example, courts have held that standing analysis is "especially rigorous" in suits where the merits would require courts to invalidate an act of a coordinate branch, and decisions where courts have prudentially declined jurisdiction in political cases.²⁵¹ Each of these rules keeps courts from intervening in political disputes. When applied to their full extent, they are prophylactic. But each also leaves some room for intervention. Unlike the political question doctrine, these rules do not hold that courts can *never* entertain political disputes. Instead, they erect a high bar to clear before a court will entertain cases that raise the specter of politicization. In today's suits, courts have partially eroded the barrier erected by these doctrines.²⁵²

²⁴⁸ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–62 (1992). For more on the extent to which *Lexmark v. Static Control*, 572 U.S. 118 (2014), a statutory case like *Lujan*, affects standing, see Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1812–21 (2016).

²⁴⁹ See *Lujan*, 504 U.S. at 559.

²⁵⁰ For an interesting discussion concerning structural standing, see Huq, *supra* note 27. For recent scholarship concerning legislative standing, see Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845, 846–47 (2018); and Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339 (2015). For recent scholarship concerning state standing, see Davis, *supra* note 98, Tara Leigh Grove, *Foreword: Some Puzzles of State Standing*, 94 NOTRE DAME L. REV. 1883 (2019); Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851 (2016); and Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209 (2014).

²⁵¹ *Raines v. Byrd*, 521 U.S. 811, 819–20, 827–29 (1997).

²⁵² The Supreme Court's decision in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), reinforced this notion. The Court acknowledged that, historically, the judiciary has not been called on to mediate disputes over subpoenas between the executive and legislative branches. *Id.* at 2029.

(a) *Political Cases.* — One of the main ways that courts insulate themselves from the straightforwardly political is by exercising prudential doctrines of discretion that sound in something like — but short of — the political question doctrine.²⁵³ In suits challenging enforcement lawmaking, DOJ frequently invites courts to do just that.²⁵⁴ But courts have declined these invitations to exercise prudential abeyance in politically charged cases, reasoning that preserving the separation of powers counsels in favor of opening the courthouse doors.²⁵⁵ Political overtones, in other words, do not undo private injuries.

Courts use a common rhetorical tool in these cases, seemingly to depoliticize cases that they themselves recognize are political. They preface their opinions with caveats about what the case is *not* about. For example, in a private suit challenging the Trump Administration’s use of funds to construct a southern border wall, the court prefaced: “It is important at the outset for the Court to make clear what this case is, and is not, about. The case is not about whether the challenged border barrier construction plan is wise or unwise.”²⁵⁶ Far from removing them from the political fray, this type of language is an acknowledgement of how much their legal decisions affect political outcomes.²⁵⁷ Moreover, language alone cannot insulate the courts because once the suits are in court, the judges are responsible for them.²⁵⁸

(b) *Congressional Participation and Standing.* — One institution whose injuries are almost by definition political is Congress.

Those boundaries are typically negotiated. *Id.* But where the parties are unable to resolve a dispute between themselves, there is a judicial role. *Id.* at 2031.

²⁵³ The political question doctrine places certain questions beyond judicial review. *See, e.g.,* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (“[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

²⁵⁴ *See, e.g.,* *Sierra Club v. Trump*, 929 F.3d 670, 686 (9th Cir. 2019) (“Defendants have not argued that jurisdiction over this action is lacking. Nor have they asserted that Plaintiffs’ challenge . . . presents a nonjusticiable ‘political question.’ They have contended, however, that ‘[t]he real separation-of-powers concern is the district court’s intrusion into the budgeting process,’ which ‘is between the Legislative and Executive Branches — not the judiciary.’”).

²⁵⁵ *See id.* at 687 (“Nowhere does the Constitution grant Congress the exclusive ability to determine whether the Executive Branch has violated the Appropriations Clause. Nor does the Constitution leave the Executive Branch to police itself. Rather, the judiciary ‘appropriately exercises’ its constitutional function ‘where the question is whether Congress or the Executive is aggrandizing its power at the expense of another branch.’” (citations omitted) (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012) (internal quotation marks omitted))).

²⁵⁶ *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 891 (N.D. Cal. 2019); *see also, e.g.,* *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (indicating that the Supreme Court “express[ed] no view on the soundness of the policy”); *In re Border Infrastructure Env’t Litig.*, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018) (similar), *aff’d*, 915 F.3d 213 (9th Cir. 2019).

²⁵⁷ *See* Rakoff, *supra* note 4 (arguing that by framing debates to avoid the political fray, the judiciary often casts itself directly into the debate).

²⁵⁸ *See supra* Part II, pp. 960–73.

Historically, courts have been particularly reticent to have Congress²⁵⁹ participate as a party in suits.²⁶⁰ Although the general rule for congressional standing — “legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue . . . on the ground that their votes have been *completely nullified*”²⁶¹ — leaves an opening for Congress to have standing, the Supreme Court has *never* concluded that it does. Indeed, the Court has been presented with multiple opportunities to assess congressional standing, and it has assiduously avoided a direct ruling on the question.²⁶² Part of the reason is that it is impossible to obscure politics when two branches of government litigate against one another inside the third branch.²⁶³ Optically, these are among the most political cases.

It is quite extraordinary, therefore, that lower courts have held that the House itself had standing in several cases.²⁶⁴ In 2014, the House initiated its first lawsuit against the President based on a dispute over the manner of enforcement, *U.S. House of Representatives v. Burwell*.²⁶⁵

²⁵⁹ My use of the word “Congress” in the context of congressional standing not only refers to the cohesive institution but also includes each house of Congress or its members suing in their institutional capacities. Because legislative standing doctrine applies to both state and federal legislatures, I use “Congress” to distinguish federal legislators from state legislators and legislative bodies.

²⁶⁰ The House of Representatives has also presented courts with more opportunities to rule on congressional standing by bringing more cases than it had previously. See Jackson, *supra* note 250, at 846 (“As Congress’s functionality has declined, efforts by congressional actors to litigate issues in federal courts have presented federal courts many opportunities to consider legislative standing.”); Jacqueline Thomsen, “*Acrimony Between the Branches*”: *How the Trump Lawsuits Could Shape Future House Legal Fights*, NAT’L L.J. (May 25, 2020, 5:00 PM), <https://www.law.com/plc-nlj/2020/05/25/acrimony-between-the-branches-how-the-trump-lawsuits-could-shape-future-house-legal-fights> [<https://perma.cc/67DK-6YGU>] (describing the upward trend of the House’s involvement in federal lawsuits).

²⁶¹ *Raines v. Byrd*, 521 U.S. 811, 823 (1997) (emphasis added) (resolving standing question in suit brought by six individual members of Congress to challenge Line Item Veto Act).

²⁶² See generally Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPP. L. REV. 1 (2015) (documenting and finding meaning in cases in which the Court has been presented with the opportunity to rule on congressional standing, but ultimately did not).

²⁶³ Cf. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001) (“The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers.”).

²⁶⁴ See, e.g., Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 192 (D.D.C. 2019) (holding House did have standing to enforce congressional subpoena against former White House Counsel); *Windsor v. United States*, 797 F. Supp. 2d 320, 320, 323 (S.D.N.Y. 2011) (granting Bipartisan Legal Advisory Group’s intervention motion). But see *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8, 11 (D.D.C. 2019) (holding House did not have standing to challenge President Trump’s diversion of appropriated funds to construct a southern border wall), *vacated*, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020) (granting en banc rehearing).

²⁶⁵ 130 F. Supp. 3d 53 (D.D.C. 2015); see Josh Blackman, Opinion, *The Origin of House of Representatives v. Burwell*, WASH. POST (Sept. 22, 2016), <https://www.washingtonpost.com/news/voikh-conspiracy/wp/2016/09/22/the-origin-of-house-of-representatives-v-burwell> [<https://perma.cc/6WWA-DUNY>] (noting that Speaker John Boehner aimed “to file suit in the coming weeks in an effort to compel the president to follow his oath of office and faithfully execute the laws of our country”).

In one set of claims, the House alleged that the Secretaries of Health and Human Services and the Treasury illegally spent billions of dollars to support the ACA's implementation that Congress had not appropriated.²⁶⁶ Expressly recognizing the absence of on-point precedent, the district court held the House had standing.²⁶⁷ If the claims were meritorious, the court reasoned, the Executive's actions would completely nullify the House's role in the appropriations process.²⁶⁸

The en banc D.C. Circuit recognized congressional standing to enforce subpoenas in federal court.²⁶⁹ What is more, even where courts do not find the complete nullification standard has been satisfied, they fashion ways for Congress to participate in the suits, which will be explored more fully below.²⁷⁰

2. *States as Anchors.* — Through doctrinal developments that extend standing along several dimensions, lower courts have made states — and not Congress or private parties — the anchors of suits challenging enforcement lawmaking.²⁷¹ Currently, states can assert (a) common law injuries akin to those of private parties;²⁷² (b) sovereign or quasi-sovereign interests, which include the “physical and economic” well-being “of its residents in general” and certain federalism interests;²⁷³ and (c) the injuries of their citizens, typically by acting as *parens*

²⁶⁶ *Burwell*, 130 F. Supp. 3d at 57.

²⁶⁷ *Id.* at 77, 79–81.

²⁶⁸ *Id.* at 76–77. The D.C. Circuit reaffirmed this position in *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1, 14 (D.C. Cir. 2020).

²⁶⁹ Comm. on the Judiciary of the U.S. House of Representatives v. McGahn (*McGahn I*), 968 F.3d 755, 760 (D.C. Cir. 2020) (en banc); cf. Comm. on the Judiciary of the U.S. House of Representatives v. McGahn (*McGahn II*), 973 F.3d 121, 123 (D.C. Cir. 2020) (holding, on remand from *McGahn I*, that, although the House had standing, it did not have a cause of action to challenge subpoena enforcement in federal court).

²⁷⁰ See *infra* section III.B.3, pp. 987–89. One issue that arises often in suits challenging enforcement lawmaking — including suits involving a house of Congress — is whether the plaintiff has a cause of action. Some courts seem to blend the analyses of standing and causes of action. See, e.g., *Mnuchin*, 976 F.3d at 14–15 (holding that Congress had standing to litigate Appropriations Clause claim, but not APA claim); *McGahn II*, 973 F.3d at 126 (Rogers, J., dissenting). Others recognize the distinction between standing and cause of action, but have not yet dealt with the consequences of *Ex parte Young* and its impact on separation of powers. See *McGahn II*, 973 F.3d at 123 (majority opinion); see also *Make the Road N.Y. v. Wolf*, 962 F.3d 612, 631 (D.C. Cir. 2020). That is a topic beyond the scope of this Article. For a recent examination of the problem, see generally Monaghan, *supra* note 248.

²⁷¹ The Supreme Court also is more open to permitting states to challenge the President in federal court than it is to permitting Congress. Compare *Trump v. Vance*, 140 S. Ct. 2412, 2429–30 (2020) (holding Article II and the Supremacy Clause do not require a heightened standard for the issuance of a state criminal subpoena to a sitting President), with *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2036 (2020) (remanding case for lower courts to consider more fully separation-of-powers issues at stake in enforcing congressional subpoena for the President's information).

²⁷² See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 735–37 (1981).

²⁷³ *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607–08 (1982).

patriae.²⁷⁴ Courts have shown a remarkable receptivity to state standing that would have astonished traditional federal courts scholars not that long ago.²⁷⁵ Although the Supreme Court has said that states may not act formally as *parens patriae* in suits against the federal government,²⁷⁶ the Court has recognized that states have a special interest in challenging federal actions to protect their sovereignty and quasi-sovereignty, which, in certain circumstances, is functionally akin to the interest invoked in a *parens patriae* suit.²⁷⁷ Most suits challenging enforcement lawmaking involve states as parties, sometimes on both sides. States bring their resources and institutional imprimatur to these cases, often together.

(a) *Recognizing Broad Pecuniary Injuries*. — At least one state is generally in a position to assert financial injuries, because unlike private individuals, states have their hands in so many ventures and regulatory programs: states not only govern but also employ large numbers of people, they have significant budgets, and enter into public-private agreements.²⁷⁸ Courts have found that these pecuniary harms meet the formalist requirements for standing.²⁷⁹ Although some pecuniary injuries that states suffer mirror those of private individuals, others — like lost revenue for regulatory programs and government services or even the increasing costs of providing government services — do not.²⁸⁰

To illustrate, consider one of the earliest suits challenging enforcement lawmaking, *Texas v. United States*,²⁸¹ in which twenty-six states or their representatives brought suit against the Obama Administration for its DAPA policy.²⁸² Framed around the notion that states bear many of the costs of illegal immigration, Texas asserted what was in 2015 a

²⁷⁴ *Maryland*, 451 U.S. at 737.

²⁷⁵ See FALLON ET AL., *supra* note 19, at 120–29. I do not consider whether these categories represent an epistemic break with past conceptions of state standing. For more on that, see generally Davis, *supra* note 98; and Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015 (2019).

²⁷⁶ See *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923).

²⁷⁷ For a case that in some ways reads like a *parens patriae* suit, see *Massachusetts v. EPA*, 549 U.S. 497 (2007).

²⁷⁸ See, e.g., Woolhandler & Collins, *supra* note 275, at 2022 (“Whether used to bolster a sovereignty or *parens patriae* claim, or as a separate proprietary or individual basis for standing, states have little trouble alleging such concrete injuries.” (footnote omitted)).

²⁷⁹ See, e.g., *City of San Francisco v. Trump*, 897 F.3d 1225, 1236 (9th Cir. 2018) (holding that “a loss of funds promised under federal law” met the requirement for standing).

²⁸⁰ See, e.g., *id.* at 1233, 1236 (holding funds withheld under the Trump Administration’s sanctuary-cities policy constituted financial harm that met Article III’s standing requirements); *Hawaii v. Trump*, 859 F.3d 741, 765 (9th Cir.) (per curiam) (alleging pecuniary harms to public university system and “sovereign interests in carrying out its refugee policies”), *vacated as moot*, 138 S. Ct. 377 (2017).

²⁸¹ 86 F. Supp. 3d 591 (S.D. Tex. 2015).

²⁸² *Id.* at 604.

novel theory of standing: Texas provides driver's licenses at a loss.²⁸³ It would now be required to provide driver's licenses to DAPA beneficiaries, compounding its losses to an estimated several million dollars.²⁸⁴ The Court found that these pecuniary losses met Article III's requirements.²⁸⁵ The United States argued that Texas's injury was self-inflicted: Texas could reverse course and either break even or sell driver's licenses at a profit.²⁸⁶ That, however, would impinge on Texas's sovereignty interest in choosing its own prerogative. Although Texas's injury was formally pecuniary, it was a pecuniary injury that sounded in sovereignty.²⁸⁷

In addition to sovereignty-based pecuniary injuries, states have asserted pecuniary injuries that relate to the breadth of state power that courts have found meet Article III's requirements.²⁸⁸ For example, courts have held that the costs the state incurs as an employer were sufficient to challenge the Department of Labor's overtime regulations.²⁸⁹ Likewise, financial harms to public universities formed a basis for Article III standing in suits challenging President Trump's early-term travel ban.²⁹⁰

(b) *Recognizing New Sovereign Injuries.* — Courts have recognized a broad spectrum of injuries to state sovereignty, which are a more political injury than those sounding in private law harm. As in *Massachusetts v. EPA*,²⁹¹ courts have found that states can sue to protect their quasi-sovereign interest in protecting the environment and in enforcing their environmental laws. This type of injury supports suits not only against the EPA but also against Trump Administration officials diverting funds to build a southern border wall.²⁹² In a suit challenging the Trump Administration's ban on transgender service in the military, one court found that Washington State had standing where it alleged "that prohibiting transgender individuals from serving openly

²⁸³ *Id.* at 616–17.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 620 ("Plaintiffs have shown that their projected injuries are more than 'generalized grievances'; rather, Plaintiffs have demonstrated that DAPA will directly injure the proprietary interests of their driver's license programs and cost the States badly needed funds.")

²⁸⁶ *Id.* at 617.

²⁸⁷ See, e.g., Complaint for Declaratory and Injunctive Relief ¶¶ 65–77, *Nevada v. U.S. Dep't of Lab.*, 218 F. Supp. 3d 520 (E.D. Tex. 2016) (No. 16-CV-00731) (alleging plaintiff states would have to pay public employees more and also would face a reduction in tax revenue).

²⁸⁸ See generally Davis, *supra* note 98, at 1290–91.

²⁸⁹ See, e.g., *Nevada*, 218 F. Supp. 3d at 525–26 ("The State Plaintiffs face imminent monetary loss that is traceable to the Department's Final Rule." *Id.* at 526.)

²⁹⁰ *Washington v. Trump*, 847 F.3d 1151, 1159–60 (9th Cir. 2017) (per curiam).

²⁹¹ 549 U.S. 497 (2007).

²⁹² *California v. Trump*, 963 F.3d 926, 938 (9th Cir. 2020). In *Massachusetts v. EPA*, the Court seemed to write that this was a straightforward application of standing analysis to property: the state's loss of coastal property. 549 U.S. at 522–23. But in the lower courts, *Massachusetts v. EPA* has taken on a life of its own as a marker of the special status that states enjoy in standing analysis.

adversely impacts its ability to recruit and retain members of the Washington National Guard, and thereby impairs its ability to protect its territory and natural resources” and where it also had an “interest in maintaining and enforcing its anti-discrimination laws, protecting its residents from discrimination, and ensuring that employment and advancement opportunities are not unlawfully restricted based on transgender status.”²⁹³

States, moreover, allege injuries to sovereignty that are quite broad and go directly to the state’s ability to choose how to govern and regulate. For example, Nevada alleged that Obama Administration labor rules “displace[d] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require.”²⁹⁴ In the DAPA case, the states alleged a novel theory of harm — “abdication standing” — that maintains that states should automatically have standing where the federal government abdicates enforcement in an area in which it has exclusive jurisdiction.²⁹⁵ Although courts have not necessarily endorsed these grounds, they have not yet rejected them either. Indeed, courts have signaled a proclivity toward recognizing these injuries, but doing so has not been necessary because states can often frame their injuries in pecuniary terms. In the DAPA case, the Southern District of Texas noted that if abdication standing is a valid theory of state standing, then this is a “textbook” example.²⁹⁶ Although courts have not yet relied on these articulations of injury to find standing, the fact that states advance them foreshadows standing doctrine’s potential future.²⁹⁷

3. *Voice Without Standing*. — Judges act as architects of suits challenging enforcement lawmaking by creating structures that give voices to participants that cannot straightforwardly be characterized as parties. A court’s obligation to inquire into jurisdiction ends once the minimum requirements for establishing jurisdiction have been satisfied. Although courts must ensure there is standing for every claim, in practice they do

²⁹³ *Karnoski v. Trump*, No. C17-1297, 2017 WL 6311305, at *6 (W.D. Wash. Dec. 11, 2017).

²⁹⁴ Complaint for Declaratory and Injunctive Relief, *supra* note 287, ¶ 64 (quoting *Nat’l League of Cities v. Usery*, 426 U.S. 833, 847 (1976)).

²⁹⁵ *Texas v. United States*, 86 F. Supp. 3d 591, 643 (S.D. Tex. 2015).

²⁹⁶ *Id.* (“In the present case, Congress has clearly stated that illegal aliens should be removed. . . . [T]he DHS program clearly circumvents immigration laws and allows individuals that would otherwise be subject to removal to remain in the United States. . . . [T]he DHS does not seek compliance with federal law in any form, but instead establishes a pathway for non-compliance and completely abandons entire sections of this country’s immigration law. Assuming that the concept of abdication standing will be recognized in this Circuit, this Court finds that this is a textbook example.”).

²⁹⁷ See *Davis*, *supra* note 98, at 1252–57 (recognizing legal mobilization as a factor in doctrinal development within a case-or-controversy system).

not search for standing for every party.²⁹⁸ When a court finds that at least one plaintiff has established standing, it often stops.²⁹⁹ This has at least two effects. First, it entrenches the current state of the law, because courts will not entertain novel theories if they do not have to. Inversely, courts do not repudiate those novel theories either, leaving creative theories on the table for future cases. Second, in suits with multiple plaintiffs, those whose standing has not been confirmed may still participate in the suit, at least informally, because they may not be dismissed. In suits challenging enforcement lawmaking, courts have used this standing gray area together with their managerial authority to give a voice to states, institutions, and private parties that may not formally meet the standing requirements.

(a) *“Parties” Without Standing.* — Courts often conclude that just one or two of the sometimes dozens of plaintiffs that bring a suit challenging enforcement lawmaking have standing. And yet, the courts do not dismiss the other parties. For example, in *California v. Trump*³⁰⁰ — the state-led suit challenging the Trump Administration’s diversion of funds to build a southern border wall — the court held that California and New Mexico had standing to support the suit and noted that only California even alleged injuries traceable to the government’s conduct.³⁰¹ The fourteen other states that had joined California and New Mexico in bringing the suit were not dismissed because the courts did not hold that those states lacked standing.³⁰² These states without standing have a voice in the suit and bring with them their institutional imprimatur, resources, and expertise. Indeed, the suit is colloquially referred to as “the states’ suit” against the border wall.³⁰³ States work together in these cases: one state is the lead, another state satisfies the jurisdictional requirements for one claim, and yet another provides the jurisdictional injury for a second claim. Together, they satisfy jurisdiction, bring resources, and publicize the case, creating a particularly able separation-of-powers suit against the Executive.³⁰⁴

²⁹⁸ For a critique of this phenomenon, see generally Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481 (2017).

²⁹⁹ See, e.g., *United States v. Windsor*, 570 U.S. 744, 757–58 (2013).

³⁰⁰ 379 F. Supp. 3d 928 (N.D. Cal. 2019), *aff’d*, 963 F.3d 926 (9th Cir. 2020), *vacated sub nom.* *Biden v. Sierra Club*, 142 S.Ct. 46 (2021).

³⁰¹ See *id.* at 940. Likewise, in the DAPA case, twenty-six states brought suit against the Obama Administration and the court held that only Texas had standing but did not dismiss the other states. *Texas*, 86 F. Supp. 3d at 643.

³⁰² *California*, 379 F. Supp. 3d at 934, 950.

³⁰³ See Tom McCarthy, *California Leads 16-State Lawsuit over Trump’s Emergency Declaration*, THE GUARDIAN (Feb. 19, 2019, 8:31 AM) (referring to *California v. Trump* as “[t]he states’ lawsuit”), <https://www.theguardian.com/us-news/2019/feb/19/states-sue-over-trump-border-wall-emergency-declaration> [<https://perma.cc/PAP4-N3N4>].

³⁰⁴ For an exemplar of how these suits are framed by the states, see Press Release, N.Y. Att’y Gen., Attorney General James Fights Against New Trump Administration Restrictions on

(b) *Augmenting Congress's Voice*. — Suits challenging enforcement lawmaking have a greater number of amicus participants than the average case in the lower courts. Amici, importantly, are not parties. But courts have crafted a special status for Congress when it participates as amicus.³⁰⁵ Amici generally file briefs; the House Counsel not only files briefs but also is frequently given argument time.³⁰⁶ Courts have varying levels of responsiveness to briefs filed by amici;³⁰⁷ courts often cite congressional amicus briefs in their opinions.³⁰⁸ Where Congress cannot get into court as a formal party,³⁰⁹ this gives Congress a voice in the suits that may adjudicate the boundaries between legislative and executive power. And unlike historical separation-of-powers suits, where Congress would participate in this posture before the Supreme Court, Congress is being given the opportunity to participate at the inception of these suits.

* * *

Through standing doctrine — together with managerial authority — courts are able to structure suits challenging enforcement lawmaking and give actors a voice in public law litigation. Multiple stakeholders, including public, private, and institutional actors, are able to come to federal court together: sharing in resources, expertise, publicity, and even standing. Courts have opened the door for well-resourced and experienced parties to challenge enforcement lawmaking.³¹⁰ In a system in which parties shape the theories and arguments that advance,³¹¹ these attributes can impact the disposition of the suit.³¹²

Employment Authorization for Asylum Seekers (Aug. 4, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-fights-against-new-trump-administration-restrictions> [<https://perma.cc/LER7-SPAS>] (“New York Attorney General Letitia James co-led a coalition of 20 state attorneys general and 10 major cities and counties from around the nation in challenging the Trump Administration’s efforts to limit access to employment authorization for asylum seekers.”).

³⁰⁵ The House, more than ever before, has been participating in federal court litigation. Since January 2019, the House has been an amicus in fourteen cases. See Thomsen, *supra* note 260 (describing the upward trend of the House’s involvement in federal lawsuits).

³⁰⁶ See, e.g., *California v. Trump*, 963 F.3d 926, 931 (9th Cir. 2020).

³⁰⁷ Justice Ginsburg’s practice put this in perspective. She had her clerks separate the amicus briefs into three piles, and the largest pile “by far” was “skip,” one was “skim,” and then there was a “small number of briefs [her] clerks [told her] to read.” Jimmy Hoover, Analysis, *Friendly Filer: Supreme Court Clarifies Amicus Rules*, LAW360 (Oct. 18, 2019, 8:44 PM), <https://www.law360.com/articles/1210932/friendly-filer-supreme-court-clarifies-amicus-rules> [<https://perma.cc/XC9M-RTWF>].

³⁰⁸ See, e.g., *Texas v. United States*, 86 F. Supp. 3d 591, 638 (S.D. Tex. 2015) (citing Representatives’ briefs).

³⁰⁹ See *supra* section III.B.1.b, pp. 982–84 (exploring congressional standing).

³¹⁰ See Bulman-Pozen, *supra* note 2, at 493.

³¹¹ *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

³¹² See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 102–04 (1974).

C. *The Remedial Authority: The Rise of the Nationwide Injunction*

One of the richest sources of scholarship in the field of remedies in recent years has been the rise of the nationwide injunction.³¹³ The nationwide injunction is another part — more precisely, the remedial part — of the judicial response to enforcement lawmaking. The increased issuance of nationwide injunctions — whatever their merits or demerits are — demonstrates that federal courts are responsive and dynamic in applying traditional judicial remedial tools to modern structural challenges. The nationwide injunction is tailored to enforcement lawmaking.³¹⁴ To date, judges have used this remedy to enjoin only presidential or administrative action, not acts of Congress.

Today, courts use nationwide injunctions to enjoin the Executive from enforcing laws against nonparties and, sometimes, against anyone. Although this remedy has a debated historical pedigree,³¹⁵ district courts cast the nationwide injunction in its current form into public conversation during the Obama Administration, and they have reached for this remedy with even greater frequency during the Trump Administration.³¹⁶

By one count, courts issued nationwide injunctions twenty times during the Obama Administration.³¹⁷ During the Trump Administration,

³¹³ See generally, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020).

³¹⁴ At the outset, it is important to note that some of the nationwide injunctions that this section discusses were vacated or rescinded. Nonetheless, the incidence of issuance tells an important story about how district courts conceive of their authority, even if that authority is later clarified or cabined.

³¹⁵ For a history of the nationwide injunction, see generally Sohoni, *supra* note 313.

³¹⁶ Although the public debate surrounding nationwide injunctions surfaced during the Obama Administration, the practice of issuing these injunctions in their current form began with injunctions issued during the Bush II Administration, not precluding enforcement of a regulation, but ordering that certain environmental regulations be severed from the Federal Register. See, e.g., *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 1011 (E.D. Cal. 2005) (ordering the severance of certain environmental regulations from the Federal Register), *aff’d in part sub nom.* *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687 (9th Cir. 2007), *aff’d in part, rev’d in part sub nom.* *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (holding plaintiffs lacked standing to pursue claims).

³¹⁷ William P. Barr, Opinion, *End Nationwide Injunctions*, WALL ST. J. (Sept. 5, 2019, 6:37 PM), <https://www.wsj.com/articles/end-nationwide-injunctions-11567723072> [<https://perma.cc/AE83-8YSG>]. These include: *Nevada v. U.S. Dep’t of Lab.*, 218 F. Supp. 3d 520, 533–34 (E.D. Tex. 2016) (enjoining DOL overtime regulations); *Texas v. United States*, 201 F. Supp. 3d 810, 835–36 (N.D. Tex. 2016) (enjoining federal transgender bathroom policy); *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 696 (N.D. Tex. 2016) (enjoining regulation forbidding discrimination on the basis of “gender identity” and “termination of pregnancy” under ACA); *Texas v. United States*, 86 F. Supp. 3d 591, 676–77 (S.D. Tex.) (enjoining DAPA), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S.Ct. 2271 (2016) (per curiam); *Halbig v. Burwell*, 758 F.3d 390, 412 (D.C. Cir. 2014) (enjoining IRS regulation regarding healthcare exchange), *vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014) (en banc) (per curiam).

district courts employed this remedy at an even greater frequency.³¹⁸ And courts are continuing to issue such injunctions against the Biden Administration.³¹⁹ As I can attest in drafting this Article, parties are asking for and courts are issuing these injunctions with such frequency that lists quickly become out of date. The nationwide injunction is now a fixture of the modern federal judiciary's remedial practice. Not only have judges issued nationwide injunctions in a greater number of cases, but also a greater number of district court judges issued these remedies, lending further support for the proposition that the judiciary is beginning to view these injunctions as part of their standard toolkit.

Picking up on the nationwide injunction's current moment, scholars have engaged in an effort to understand this remedy's history. Some argue that nationwide injunctions fall outside of the bounds of Article III jurisdiction.³²⁰ Endorsing the dispute resolution model,³²¹ these scholars argue that federal courts must focus remedies on the parties to a dispute and that anything beyond that is *ultra vires*.³²² Another set of scholars sees things differently. Professor Mila Sohoni uncovers a longer

³¹⁸ Courts have enjoined three iterations of the Trump Administration's travel ban. See *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1160–61 (D. Haw.), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392 (2018) (reversing grant of preliminary injunction); *Washington v. Trump*, No. C17-0141, 2017 WL 462040, at *2–3 (W.D. Wash. Feb. 3, 2017); *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 632–33 (D. Md. 2017); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 565–66 (D. Md.), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir.), *vacated*, 138 S. Ct. 353 (2017); *Hawai'i v. Trump*, 245 F. Supp. 3d 1227, 1237–39 (D. Haw.), *aff'd in part, vacated in part*, 859 F.3d 741 (9th Cir. 2017); *Darweesh v. Trump*, No. 17 Civ. 480, 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017). Courts have enjoined the ban on military service by transgender individuals. See *Doe I v. Trump*, 275 F. Supp. 3d 167, 217 (D.D.C. 2017), *vacated sub nom. Doe II v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019); *Stockman v. Trump*, No. EDCV 17-1799, 2017 WL 9732572, at *16 (C.D. Cal. Dec. 22, 2017); *Karnoski v. Trump*, No. C17-1297, 2017 WL 6311305, at *10 (W.D. Wash. Dec. 11, 2017). They have enjoined the sanctuary-cities ban. See *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 540 (N.D. Cal. 2017); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951–52 (N.D. Ill. 2017). They have enjoined the rescission of DACA. See *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437–38 (E.D.N.Y. 2018), *aff'd in part, rev'd in part, vacated in part sub nom. U.S. Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020) (vacating preliminary injunction). Courts have enjoined the “public charge” rule. See *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 353 (S.D.N.Y. 2019), *aff'd*, 969 F.3d 42 (2d Cir. 2020).

³¹⁹ Mark Joseph Stern, *Conservative Judges Keep Doing This Thing They Say They Hate*, SLATE (June 16, 2021, 5:55 PM), <https://slate.com/news-and-politics/2021/06/conservative-judges-nationwide-injunction-biden.html> [<https://perma.cc/NFQ7-PZTK>].

³²⁰ Howard M. Wasserman, *“Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 359–63 (2018); see also Bray, *supra* note 313, at 419 & n.6; Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 30–31 (2019); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 623–33 (2017).

³²¹ See FALLON ET AL., *supra* note 19, at 72–76.

³²² Professor Howard Wasserman, for his part, argues that issuing party-specific injunctions *better conforms* to this view of Article III jurisdiction, not that nationwide injunctions are categorically prohibited by Article III. See Wasserman, *supra* note 320, at 359.

historical practice of issuing these injunctions at all levels of the federal judiciary.³²³ Her account lends support for the proposition that these remedies have Article III footing. Sohoni, along with others, recognizes the traditions in equity giving rise to the authority to issue nationwide injunctions.³²⁴ On this side of the debate, how courts decide to exercise their injunctive authority is a matter of prudence, not jurisdiction. I want to bracket the colloquy over the source of the judiciary's formal authority to grant nationwide injunctions and the potential problems that issuing these injunctions raise, and focus instead on the reason for the judiciary's *resort* to this particular remedy: What was the impetus for district courts to deploy their remedial authority in this way during the last decade?³²⁵

To answer that question, I look at the object enjoined in these cases, something that has not received direct treatment, though it is ever present in the background. Every modern case in which a federal court has issued a nationwide injunction involves presidential or administrative action; none includes an act of Congress. District courts have enjoined enforcement of executive orders,³²⁶ enforcement memoranda and other informal guidance,³²⁷ formal agency rulemaking,³²⁸ and combinations of these authorities. They have not issued nationwide injunctions to enjoin enforcement of statutes or ratified treaties. Indeed, judicial opinions specifically address the inherent tension of enforcement laws.

³²³ See Sohoni, *supra* note 313, at 924–26.

³²⁴ See *id.* at 927–28; Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 16–18 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1080–81 (2018); Siddique, *supra* note 313, at 2102–06; Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 79 (2019).

³²⁵ Professor Samuel Bray offers an initial theory for the advent of the nationwide injunction relating to shifting judicial ideologies. See Bray, *supra* note 313, at 449–52. First, he recognizes the ideological shift from issuing antisuit injunctions as a defensive measure for the particular parties to the suit to a broader justice move, perhaps due to the passage of the Declaratory Judgment Act. *Id.* at 449–50. Second, he notes a shift from a referee-type judicial role represented by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), to a broader guardian role for judges who “strike down” unconstitutional statutes. *Id.* at 451–52. These two shifts form part of the story, permitting the advent of the nationwide injunction, but they do not fully explain the nationwide injunction’s prominence.

³²⁶ See, e.g., *Hawai’i v. Trump*, 245 F. Supp. 3d 1227, 1237–39 (D. Haw. 2017) (enjoining enforcement of executive order).

³²⁷ See, e.g., *Karnoski v. Trump*, No. C17-1297, 2017 WL 6311305, at *10 (W.D. Wash. Dec. 11, 2017) (enjoining interim enforcement policy barring transgender individuals from military service); *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015) (enjoining enforcement of DHS enforcement memorandum pertaining to DAPA policy).

³²⁸ See, e.g., *New York v. U.S. Dep’t of Homeland Sec.*, 408 F. Supp. 3d 334, 353 (S.D.N.Y. 2019) (enjoining DHS “public charge” rule); *Nevada v. U.S. Dep’t of Lab.*, 218 F. Supp. 3d 520, 533–34 (E.D. Tex. 2016) (enjoining DOL overtime pay regulations).

In *Texas v. United States*,³²⁹ the court enjoined the Obama Administration's DAPA policy.³³⁰ The source of law at issue was a DHS enforcement memorandum,³³¹ which is generally a routine tool that sets out an enforcement policy in the face of limited enforcement resources. But the memorandum that established the DAPA policy was substantilly different from the ordinary course. The DAPA policy used enforcement discretion to impact some four million individuals. The district court saw this as difference in kind. In laying out the factual background, the opinion recounted: "For some years now, the powers that be in Washington — namely, the Executive Branch and Congress — have debated if and how to change the laws governing both legal and illegal immigration into this country."³³² "To date," the opinion continued, "neither the President nor any member of Congress has proposed legislation capable of resolving these [immigration] issues in a manner that could garner the necessary support to be passed into law."³³³ The opinion regarded this failure to reach legislative compromise as the impetus for the Obama Administration's reliance on the enforcement memorandum process to achieve the President's policy goals.³³⁴ And the court ultimately found that use of executive authority excessive and unlawful.³³⁵

And suits regularly treat congressional legislation and enforcement lawmaking differently, even when the two sources of law complement each other, as illustrated by the sanctuary-cities litigation. Recall the three sources of law that form the sanctuary-cities policy: (1) an executive order declaring sanctuary cities ineligible to receive federal grants;³³⁶ (2) conditions imposed by the Attorney General on the receipt of funds;³³⁷ and (3) certification of compliance with a federal statute, 8 U.S.C. § 1373, which prohibits local government and law enforcement officials from restricting the sharing of information regarding the citizenship of any individual with the Immigration and Naturalization Service.³³⁸ Several localities brought suit to challenge different aspects of these policies. How courts treated each one differently demonstrates

³²⁹ 86 F. Supp. 3d 591.

³³⁰ *Id.* at 677.

³³¹ *Id.* at 607.

³³² *Id.* at 608.

³³³ *Id.*

³³⁴ *Id.* at 605, 657.

³³⁵ *Id.* at 676.

³³⁶ Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

³³⁷ See *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 937 (N.D. Ill. 2017) (explaining Attorney General Sessions's two additional conditions on the receipt of federal funds: that local authorities provide federal agents with advance notice of the scheduled release from state or local correctional facilities of those individuals suspected of immigration violations and that local authorities provide immigration agents with access to city detention facilities and individuals detained therein).

³³⁸ *Id.*

judicial readiness to use the nationwide injunction to restrain enforcement lawmaking, but not congressional legislation. In *County of Santa Clara v. Trump*,³³⁹ the district court issued a nationwide injunction barring enforcement of Executive Order 13,768.³⁴⁰ But in *City of Chicago v. Sessions*,³⁴¹ the plaintiff challenged both the Attorney General's conditions and the statutory requirements.³⁴² The court upheld the statutory requirements as a valid exercise of congressional legislative authority.³⁴³ It held that the *Attorney General's* actions in imposing separate conditions on the receipt of funds were ultra vires, and therefore issued a nationwide injunction as to the enforcement of those requirements.³⁴⁴

It is unsurprising that district courts have employed their remedial authority creatively to reckon with presidential overreach.³⁴⁵ Equity's flexibility and adaptability are among its fundamental features.³⁴⁶ And fashioning remedies is within the bounds of traditional judicial competence. Analyzing an earlier wave of public law litigation relating to prison litigation reform, Professor Judith Resnik has noticed that the remedy casts judges into the center: "[T]hey are personally involved in the implementation of their decrees and in the prospective planning of posttrial relations among the parties."³⁴⁷ The nationwide injunction also changes the judicial role, casting district courts into the law declaration model of judging (as compared to pure dispute resolution). Moreover, judges are not disinterested observers; they are cast into the public debate, becoming the target of public discussion and criticism, sometimes by political figures.³⁴⁸

³³⁹ 250 F. Supp. 3d 497 (N.D. Cal. 2017).

³⁴⁰ *Id.* at 540.

³⁴¹ 264 F. Supp. 3d 933.

³⁴² *Id.* at 936–37.

³⁴³ *Id.* at 949.

³⁴⁴ *Id.* at 951.

³⁴⁵ In exploring *Ex parte Young's* origins, Professors Jim Pfander and Jacob Wentzel argue that equity's traditional reluctance to intervene in public law matters at all was driven, in the main, by perceived adequacy of common law writs. See James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1276 (2020). It was when common law avenues for oversight proved inadequate that equity evolved to intervene in public law matters. *Id.*

³⁴⁶ See *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("Equity eschews mechanical rules; it depends on flexibility.").

³⁴⁷ Resnik, *supra* note 18, at 391.

³⁴⁸ For example, when the District of Hawaii invalidated President Trump's first travel ban, Attorney General Sessions, on a radio show, expressed amazement that a "judge sitting on an island in the Pacific" could stop the President's travel ban. Laurel Wamsley, *Hawaii Tells Jeff Sessions: 'Have Some Respect'*, NPR (Apr. 21, 2017, 12:43 PM), <https://www.npr.org/sections/thetwo-way/2017/04/21/525050208/hawaii-tells-jeff-sessions-have-some-respect> [https://perma.cc/HKX8-ZDGA].

Although those who levy criticisms against nationwide injunctions portend a judiciary without restraint, the specter of conflicting obligations, and an end to “percolation,”³⁴⁹ to date, the reality has not borne out those predictions. Courts are especially sensitive to the repercussions of the remedies they issue. Perhaps this is evident when parties have asked courts to issue injunctions that are not just universal in scope, but against the President him or herself. Reasoning that an injunction against the President is an “extraordinary measure not lightly to be undertaken,” the court in *County of Santa Clara v. Trump* held that such an injunction would be inappropriate and unnecessary, as the President has no individual role in carrying out the executive order.³⁵⁰ Likewise, in *El Paso County v. Trump*³⁵¹ the district court found that President Trump’s declaration of a national emergency to secure border-wall funding was unlawful and, expressly recognizing that a preliminary injunction against such an order of the President would be extraordinary, ordered briefing on the appropriate scope of the injunction.³⁵² Following briefing, the district court’s injunction did not include the President.³⁵³

As the nationwide injunction becomes a fixture of the remedial toolbox, courts are finding ways — and developing doctrine — to address the concerns that critics have raised. Notably, the Ninth Circuit has written a general rule that these nonparty injunctions be issued within the boundaries of the Ninth Circuit, unless district judges find “a showing of nationwide impact or sufficient similarity.”³⁵⁴ For its part, the Second Circuit has also urged district courts to proceed cautiously and consider whether parallel suits are proceeding in other jurisdictions, before issuing a nationwide injunction.³⁵⁵ These are among the first doctrinal efforts at judicial self-discipline, but they are unlikely to be the last. Courts of appeals have revised the nationwide scope of injunctions

³⁴⁹ See, e.g., Wasserman, *supra* note 320, at 378; Barr, *supra* note 317; Jeff Sessions, *Nationwide Injunctions Are a Threat to Our Constitutional Order*, NAT’L REV. (Mar. 10, 2018, 12:20 PM), <https://www.nationalreview.com/2018/03/nationwide-injunctions-stop-elected-branches-enforcing-law> [https://perma.cc/CW6C-RJSC].

³⁵⁰ *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (quoting *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996)); see also *id.* at 540.

³⁵¹ *El Paso County v. Trump*, 408 F. Supp. 3d 840 (W.D. Tex. 2019), *aff’d in part, rev’d in part, vacated in part*, 982 F.3d 332 (5th Cir. 2020) (reversing grant of injunction for lack of jurisdiction).

³⁵² *Id.* at 856–57, 860–61.

³⁵³ *El Paso County v. Trump*, 407 F. Supp. 3d 655, 659, 668 (W.D. Tex. 2019), *aff’d in part, rev’d in part, vacated in part*, 982 F.3d 332 (5th Cir. 2020).

³⁵⁴ *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018).

³⁵⁵ *New York v. U.S. Dep’t of Homeland Sec.*, 969 F.3d 42, 50 (2d Cir. 2020) (affirming, but narrowing to New York, Vermont, and Connecticut, the issuance of an injunction).

or stayed their effects while litigation proceeds, and principled doctrine will likely follow in due course.³⁵⁶

Courts have also found ways to avoid conflicting obligations, because when courts evaluate whether to issue injunctions, they actively consider the possibility of conflict.³⁵⁷ For example, two suits involving DACA proceeded in parallel: one to the legality of the DACA program and another to the legality of DACA's rescission. Both DACA and its rescission were effectuated through enforcement memoranda. The likelihood of conflicting obligations is at an apex in the face of two frankly opposite lawsuits. In the suits concerning rescission, several courts had sided with the plaintiffs, and held that DACA's rescission was unlawful and issued nationwide injunctions halting restrictions.³⁵⁸ Texas, along with other states, brought a challenge to DACA itself. There, the district court — the one that had issued the initial nationwide injunction against the DAPA policy — issued an opinion stating that the plaintiffs had “clearly shown” that DACA was likely unlawful.³⁵⁹ The government had informed the court of the possibility of inconsistent obligations, urging that in “similar situations, courts have typically held that the appropriate course is for a district court to refrain from issuing a conflicting injunction.”³⁶⁰ Accordingly, the judge declined to enjoin the DACA policy, reasoning that the plaintiffs' challenge was belated and “the egg has been scrambled.”³⁶¹

This is not meant to be a defense of any particular use of the nationwide injunction, or the form that such injunctions currently take. Rather, it is meant to draw out the power and competence of courts to evolve to meet novel legal challenges, particularly within the core of traditional judicial competence. It shows what happens when a foreign object — namely, an enforcement law — comes into contact with a judicial system that is suited to fashioning remedies. Federal courts have deployed their equitable authority in different ways and are in the process of imposing self-disciplining rules and standards to calibrate the

³⁵⁶ See, e.g., *Karnoski v. Trump*, 926 F.3d 1180, 1199 (9th Cir. 2019) (vacating nationwide injunction against ban on transgender military service in light of new facts and remanding to district court for further consideration).

³⁵⁷ See Bert I. Huang, *Coordinating Injunctions*, 98 TEX. L. REV. 1331, 1331–33 (2020) (addressing the problem of coordinating injunctions and specifically addressing the DACA cases).

³⁵⁸ See *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018), *aff'd sub nom.* *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 409 (E.D.N.Y. 2018), *vacated sub nom.* *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1037 (N.D. Cal.), *aff'd*, 908 F.3d 476 (9th Cir. 2018), *rev'd in part, vacated in part*, 140 S. Ct. 1891 (2020).

³⁵⁹ *Texas v. United States*, 328 F. Supp. 3d 662, 735–36 (S.D. Tex. 2018).

³⁶⁰ See *Frost*, *supra* note 324, at 1078 (quoting government's brief in case).

³⁶¹ *Texas*, 328 F. Supp. 3d at 742.

effect that the nationwide injunction has. This is judicial dynamism in action.

* * *

With respect to the change to judicial power, the whole is greater than the sum of its parts. Courts have developed doctrines that accommodate — on a much broader scale — suits challenging enforcement lawmaking. They have changed the “who” of federal courts. They have changed the “when” of judicial review. And they have changed the “what” of remediation. These doctrines and powers are interconnected, with changes in one impacting the others and thus, subtly fortifying each other.³⁶² Although some of these changes may in the end be more enduring than others, this moment of lower court activity that has reverberated upwards through the courts is significant in its own right.³⁶³

These developments in justiciability and the available remedies reach beyond the disposition in any given suit. Whereas substantive rulings against executive power have coercive effect on the Executive, doctrines that open the doors to judicial review and shape those suits can have “expressive effects” on the Executive.³⁶⁴ In other words, the Executive may choose to modify its behaviors because of the specter of judicial review. As courts open their doors and judges probe reasons through their managerial authority, the Executive may in the future provide a more robust record of decisionmaking. We need not look too far in the future to see these expressive effects take hold. During the coronavirus pandemic, the Trump Administration sought to issue legal rules restricting international students with visas from coming to the United

³⁶² For example, the standing inquiry asks whether an injury is “redressable.” By expanding the scope of available remedies, the possibility of a nationwide injunction can be folded into the standing analysis. For more, see Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635–37 (2006), which advances two theories linking justiciability and remedies. Under the first, more modest theory, “the Remedial Influences on Justiciability Thesis,” “when the Supreme Court feels apprehensions about the availability or non-availability of remedies, it sometimes responds by adjusting applicable justiciability rules, either to dismiss the claims of parties who seek unacceptable remedies or to license suits by parties seeking relief that the Court thinks it important to award.” *Id.* at 636. Under the more expansive theory, “the Equilibration Thesis,” “courts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies.” *Id.* at 637.

³⁶³ This is not the first time that the judiciary has created a forum to adjudicate novel rights. Courts had to develop a framework to adjudicate administrative law. Although the basic contours are in the APA, courts had to fill in the gaps. *See, e.g.*, Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1282–84 (1961); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1674–81 (1975). Courts also developed a framework to adjudicate the first wave of public law suits.

³⁶⁴ *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2028 (1996).

States if they did not attend in-person instruction.³⁶⁵ After universities initiated legal challenges, the Administration quickly withdrew the policy.³⁶⁶

By relaxing jurisdictional barriers, judges have laid the groundwork for judicial checks on the Executive. Judges are active and responsive managers, structuring the timing, shape, and remedies in suits against the Executive. In other words, these suits are the field on which judicial ambition may plausibly counteract executive ambition.

IV. THE SUPREME COURT'S SUPERVISORY ROLE

It is an urgent task to determine the appropriate role for the Supreme Court to play in supervising the lower federal courts as they reshape doctrine to reckon with creative exercises of executive power. Although this Article's main focus has been on the lower federal courts, this Part briefly turns to the Supreme Court as the body at the apex of our federal judicial system.

The Supreme Court's final say cannot be denied. Yet there are real limits on the Supreme Court's supervisory role in reviewing suits challenging enforcement lawmaking. Enforcement lawmaking is fragile, often changing with the stroke of a pen from one administration to the next. DOJ may change its legal position and moot a suit pending before the Court.³⁶⁷ By the time a case arrives at the Court, it may no longer have jurisdiction to review the decisions below. In part because of these limits on the Court's supervisory role, when the Court does properly review a suit — whether on the plenary or shadow docket³⁶⁸ — the case's relevance is heightened even more than ordinary Supreme Court review.

This Part makes a counterintuitive prescription. Although lower courts have been exercising new dimensions of judicial power and have at times quite forcefully checked the Executive, the Supreme Court should *not* treat these developments with urgency. When it does, it risks

³⁶⁵ See Rachel Treisman, *ICE: Foreign Students Must Leave the U.S. If Their Colleges Go Online-Only This Fall*, NPR (July 6, 2020, 8:43 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/07/06/888026874/ice-foreign-students-must-leave-the-u-s-if-their-colleges-go-online-only-this-fa> [https://perma.cc/B8BK-GCL7].

³⁶⁶ See *U.S. Abruptly Drops New Visa Rules for International Students*, HARV. GAZETTE (July 14, 2020), <https://news.harvard.edu/gazette/story/2020/07/u-s-abruptly-drops-new-visa-rules-for-international-students> [https://perma.cc/YSY7-P5KP].

³⁶⁷ See, e.g., Motion of the Petitioners to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 2021 Argument Calendar at 3, 5, *Biden v. Sierra Club*, 141 S. Ct. 1289 (2021) (No. 20-138) (requesting the Supreme Court dismiss the “border wall” cases, because the Biden Administration did not intend to divert funds to continue building the wall); Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General*, 130 YALE L.J.F. 541, 542-43 (2021).

³⁶⁸ For more on the shadow docket, see William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015), which identifies the import of the shadow docket, and Ahdout, *supra* note 242, at 177-78, which argues that the shadow docket should be assessed rigorously when evaluating the Court's practices.

vacating these orders as aberrational exercises of judicial power and subjugating the judicial power to executive power. What is more, judges are particularly expert in case management, jurisdictional decisionmaking, legal construction, and remediation. One could think of these doctrinal areas as the antipolitical questions: issues that are particularly fit for judicial review. Although these issues arise substantively in politically salient cases (for example, can an administration add a citizenship question to the census?), these are procedurally judicial questions (for example, what is the scope of discovery in an administrative law case?). This counsels in favor of the Supreme Court's deference to lower courts in developing these doctrines.

Preserving judicial review over executive action should drive the Supreme Court's treatment of suits challenging enforcement lawmaking. Barring extraordinary circumstances, the Court should grant certiorari on procedural and structural questions only after lower courts have had an opportunity to opine first. Generally, this means that the Court should wait for a split of authority. This Part proceeds in three sections. Section A argues that such an approach would avoid the subjugation of judicial power to executive power. Section B makes a case for how the judiciary can avail itself of the benefits of diffuse decisionmaking. Section C briefly contends that the Court should be especially solicitous of lower court opinions on the quintessential judicial doctrines explored in Parts II and III.

A. Avoid the Subjugation of Judicial Power to Executive Power

Two broad models of judging have focused the theoretical discussion over the proper role for federal courts.³⁶⁹ The first is the "dispute resolution" model, under which "the Court treats its law declaration power as incidental to its responsibility to resolve concrete disputes."³⁷⁰ The second is the "law declaration" model, which directs that "federal courts (and especially the Supreme Court) have a special function of enforcing the rule of law, independent of the task of resolving concrete disputes over individual rights."³⁷¹ On the ground, the reality lies somewhere between these two, where judges are forced to navigate the uncomfortable tension created by doctrines made in each model's image.³⁷² Judges are constrained by the arguments advanced by parties and the record

³⁶⁹ See FALLON ET AL., *supra* note 19, at 72–75.

³⁷⁰ *Id.* at 73.

³⁷¹ *Id.*; see also Monaghan, *supra* note 21, at 1370–71 (finding support for the law declaration model as early as *Marbury v. Madison*).

³⁷² See FALLON ET AL., *supra* note 19, at 73; see also Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 6–8 (1984) (arguing that, in a more public-rights approach, certain concrete prerequisites must still be met).

that they form.³⁷³ But judges also exercise influence over a dispute in both overt and subtle ways, as documented in Parts II and III. Although the Supreme Court navigates the space between these two models, the Court is now — at least on its merits docket — largely a law declaration court.³⁷⁴

It is critically important, therefore, that the Court not only reach the right answers but also grant certiorari on the right questions. One tool that the Court has to identify the pressing questions that require clarity among the broad pool of cases demanding error correction is “percolation” — the concept that encourages the diffuse doctrinal development and resolution in the lower federal courts before the Court’s intervention.³⁷⁵

Doctrinal development is a slow, deliberative process of legal reasoning.³⁷⁶ It is a diffuse back-and-forth process, in which judges build on the words of those who wrote before them to extend doctrine and distinguish cases to refine doctrines. It may involve one judge in one district exercising power and another judge in another district expressing the limits of that power. Percolation generally reveals three paths on a legal issue. First, lower courts often reach consensus on legal interpretation, obviating the need for the Supreme Court’s review. Second, percolation may reveal that an issue comes up so infrequently that it does not merit the Supreme Court’s devotion of limited resources. The Court may even tolerate some measure of error among the lower federal courts.³⁷⁷ Third, lower courts may disagree, not necessarily on

³⁷³ United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020).

³⁷⁴ See generally Monaghan, *supra* note 188, at 683–85 (arguing that the Court uses its discretionary tools to resolve legal questions when it wants to reach them); Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117 (1987) (recognizing that, in light of limited resources, the Court often uses its opinions to set legal rules that lower courts can apply).

³⁷⁵ See, e.g., *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“We have in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement . . .”); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 435–41 (2004) (discussing purposes of percolation). Some are more skeptical of percolation’s benefits. See, e.g., Michael Coenen & Seth Davis, *Percolation’s Value*, 73 STAN. L. REV. 363, 366–67 (2021); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 634 (1989) (“The percolation that produces intercircuit inconsistencies and incoherence may provide intellectual stimulation for academicians, but in the world of human activity it works costly inequities.”).

³⁷⁶ Cf. Monaghan, *supra* note 21, at 1364 (“[T]he nature and form of judicial review were slowly shaped over time.”).

³⁷⁷ See Strauss, *supra* note 374, at 1095 (“[T]he Court’s awareness how infrequently it is able to review lower court decisions has led it to be tolerant, even approving, of lower court and party indiscipline in relation to existing law. The Court not only expects the lower courts to vary in their judgments, but also knows that it may not reach these unresolved conflicts for years, until they have proved their importance.”).

all applications of a particular doctrine, but on only certain applications. These potential paths clarify both the sorts of questions demanding the Supreme Court's review and also the possible answers.

In suits challenging enforcement lawmaking, the Solicitor General's litigation strategy has been, in effect, to seek out dispute resolution. The Department has petitioned for review on the shadow docket at a staggering rate, seeking extraordinary relief and, in the main, error correction.³⁷⁸ For example, in the census case, DOJ sought a writ of mandamus ordering the district court to vacate its order permitting a deposition of the Secretary of Commerce.³⁷⁹ In the border wall suits, DOJ has asked to stay multiple lower court orders that had enjoined the President's expenditure of funds.³⁸⁰

The oddity, however, is that in the course of asking the Court to intervene to resolve disputes, the Solicitor General also asks the Court for sweeping declarations in its law declaration capacity. Even more noteworthy, the Solicitor General's broad requests are not just about the *substance* of the case — that is, does the President have the authority to divert congressional funds? — but about the *fact and contours of judicial review* over the Executive. When the Court decides issues prematurely, it risks subjugating judicial power to executive power in two ways. First, by cutting short doctrinal development on the core judicial competencies of case management, justiciability, and remedies, premature decisionmaking disempowers the lower federal courts.³⁸¹ Second, premature decisionmaking obscures the stakes, which can lead to incorrect decisions that cede judicial power.

To illustrate, consider the nationwide injunction. The Solicitor General has a uniform position on the nationwide injunction: it is an impermissible exercise of the judicial power that the Supreme Court should stop.³⁸² DOJ has presented the Court with a false binary choice.

³⁷⁸ See Vladeck, *supra* note 162, at 134.

³⁷⁹ See *In re Dep't of Com.*, 139 S. Ct. 566, 566 (2018) (mem.).

³⁸⁰ *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019) (mem.).

³⁸¹ This is not meant to be a full-throated defense of percolation's value in all contexts, see Coenen & Davis, *supra* note 375, at 366–67, but a defense of its value to these doctrines in particular.

³⁸² In these suits, the Executive is particularly litigious and disputes the very fact of judicial review at every possible turn, rarely conceding anything. The Executive infuses nearly every fight with the argument that these suits are political and fall out of the purview of judicial resolution: even where the political question doctrine does not apply, the Executive attempts to erect another sub-political question hurdle in these suits. It has vociferously argued against state and congressional standing, maintaining that political suits of this nature should not be adjudicated in federal court. It has challenged ripeness doctrine, arguing that these suits — even though centered around legal questions — are not fit for judicial resolution. The Executive pursues writs of mandamus to constrain the authority of “rogue” judicial actors with a high degree of frequency. And it has argued forcefully and uniformly that judges do not have the authority to issue nationwide injunctions. It is critical to recognize that these arguments are not about the parties who bring challenges nor about the merits. They are about the forum for resolution.

It argues that the nationwide injunction limits percolation on substantive issues,³⁸³ creates mootness problems, and raises the specter of conflicting obligations.³⁸⁴ Several members of the Court have adopted the Solicitor General's black-and-white frame and have previewed their views that the issuance of nationwide injunctions exceeds the judicial power.³⁸⁵ Lower courts, by contrast, have generally agreed that they have the power to issue nationwide injunctions and that there are at least prudential limits on their issuance. As lower courts weigh in, it has become clearer that the question needing the Supreme Court's resolution is not whether nationwide injunctions are permissible, but what the appropriate limits are on their use.³⁸⁶

These distorted binary choices are not limited to the nationwide injunction context. The government successfully petitioned for certiorari in one of the earliest of the suits described in this paper, *United States v. Texas*³⁸⁷ — the first DAPA suit. There, the government argued that Texas lacked standing because it was not the target of the DAPA policy and its injury was incidental and self-inflicted by the State's decision to issue driver's licenses at a loss.³⁸⁸ To be sure, Texas's driver's license theory forged new ground. But in the five years since the Court affirmed *United States v. Texas* by an equally divided Court, lower courts have been further refining and shaping state standing doctrine to provide more tailored approaches toward state standing.³⁸⁹ Percolation in the lower federal courts not only has the potential to improve the Supreme Court's decisionmaking, but also reshapes debates about judicial power and gives judges the primary hand in crafting the limits of such power.

³⁸³ It merits clarification that I am talking about percolation's value to the remedy of the nationwide injunction; the Solicitor General's argument, by contrast, is that each nationwide injunction limits percolation on a substantive issue.

³⁸⁴ DOJ's formal position is that nationwide injunctions themselves limit percolation by precluding suits in other courts. See Memorandum from the Off. of the Att'y Gen. on Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions to Heads of Civ. Litigating Components, U.S. Att'ys 4 (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/A4C9-V4NU>].

³⁸⁵ See, e.g., Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600–01 (2020) (Gorsuch, J., concurring in the grant of stay) (contending that nationwide injunctions are likely impermissible); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (“I am skeptical that district courts have the authority to enter universal injunctions.”).

³⁸⁶ See *supra* section III.C, pp. 990–97 (outlining judicial efforts at managing potential problems caused by the issuance of nationwide injunctions).

³⁸⁷ 136 S. Ct. 2271 (2016) (per curiam) (mem.).

³⁸⁸ See Brief for the Petitioners at 20, *Texas*, 136 S. Ct. 2271 (No. 15-674) (“A plaintiff who is not himself the object of challenged government action or inaction faces a considerable burden to establish standing. That burden becomes well-nigh insurmountable when a plaintiff claims to be injured by the incidental effects of federal enforcement policies and the consequences that flow from those policies under federal law.” (citation omitted)).

³⁸⁹ See *supra* section III.B.1, pp. 981–84.

Forgoing percolation presents the question without the benefit of limits that can come only with time.

On the plenary docket, the Supreme Court has taken a defter hand with the procedural and structural issues with which this Article engages than many would have predicted. It is the substance that has driven the Court's major decisions. In *Trump v. Hawaii*,³⁹⁰ for example, the Court held the President's travel bans were permissible, but did not opine on whether Hawaii had sufficiently alleged standing.³⁹¹ Likewise, in *Department of Commerce v. New York*,³⁹² the Court addressed the administrative law question whether the Secretary's decision to add a citizenship question to the decennial census was arbitrary and capricious, but did not articulate hard limits on the district court's managerial practices.³⁹³

But on the shadow docket, the Court has been more active in issuing relief.³⁹⁴ Professor Stephen Vladeck's work shows that although the Solicitor General does not get relief in every case, "the net effect of the Court's actions in most of these cases has left the Solicitor General with most of what he has asked for, generally leaving the specific federal policy under challenge in place (or halting complained-of discovery) pending the full course of appellate litigation."³⁹⁵ Vladeck explores many of the normative consequences of the Court's shadow docket activity, but I want to focus on only one. The Court has seemingly created a special status of cases that are much more likely to gain extraordinary relief at the Court: successful challenges to executive power. This special status undermines confidence in the underlying courts issuing relief.

B. Avail Itself of the Benefits of Diffuse Decisionmaking

The prescription to allow lower courts to first define the contours of judicial power relies, at its core, on the benefits of diffuse decisionmaking. Diffusion is a central attribute of our judicial system.³⁹⁶ The Constitution does not concentrate judicial power in a single individual (the Chief Justice) nor in a single body (the Supreme Court). Instead, it vests the judicial power of the United States "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain

³⁹⁰ 138 S. Ct. 2392.

³⁹¹ *Id.* at 2416 (discussing standing for individual plaintiffs but not for Hawaii).

³⁹² 139 S. Ct. 2551 (2019).

³⁹³ *Id.* at 2569.

³⁹⁴ See Vladeck, *supra* note 162, at 152.

³⁹⁵ *Id.* at 126.

³⁹⁶ See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1203–04 (1992); Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1025 (2014) ("[T]he most obvious structural characteristic [of the federal judiciary] is the almost complete decentralization of power.").

and establish.”³⁹⁷ Congress has further subdivided judicial power — for example, by separating federal appellate courts into distinct judicial circuits.³⁹⁸ And judicial practices — such as the rule that decisions of one circuit or district court are nonbinding on its sister courts — have cemented the tradition of diffusion.³⁹⁹

Diffusion is both a bug and feature of decisionmaking. It is the bug that empowers individual district judges to make decisions that may, in some circumstances, be indefensible.⁴⁰⁰ But it is the feature that permits percolation and encourages sound decisionmaking over time. Professor Ronald Krotoszynski explores some of the benefits of diffuse decisionmaking. Drawing on social psychology research, Krotoszynski argues that diffuse decisionmaking in the judicial system leads to better decisionmaking by reducing groupthink and decisionmaking bias (for example, problems with homogenous groups and risky decisions).⁴⁰¹ When disparate decisionmakers — like the 677 district court judges — all reach the same conclusion, those decisions are likely to be more accurate and enjoy greater legitimacy.⁴⁰²

The Court can also, perhaps counterintuitively, diffuse polarization by relying on the diffuse decisions of lower court judges.⁴⁰³ Diverse groups “are less likely to polarize toward more extreme positions than individuals.”⁴⁰⁴ Diverse bodies are also less open to capture than a single juridical body is.⁴⁰⁵ And it is easy to see why. Expectations of judi-

³⁹⁷ U.S. CONST. art. III, § 1.

³⁹⁸ Krotoszynski, *supra* note 396, at 1035.

³⁹⁹ *Id.* at 1036.

⁴⁰⁰ There are many potential limits on district court authority in separation of powers cases that I do not explore in this Article, from expedited appellate review, to specialized mandamus rules in cases involving the government, to doctrinal clarification. Congress too could play a role by setting in place structures — the use of three-judge panels or the ability to appeal particular forms of non-final orders — to direct judicial checking.

⁴⁰¹ See Krotoszynski, *supra* note 396, at 1048, 1066–79 (“[I]f the same question must be decided by different decision makers, who are not bound to follow each other’s examples, the probability of a conclusion being correct should be enhanced if these independent and autonomous decision makers nevertheless reach the same conclusion.” *Id.* at 1048.).

⁴⁰² *Id.* at 1053.

⁴⁰³ My position stands in contrast to recent work by Professor Tara Grove, not on suits about the separation of powers, but in more substantively hot button areas. See Tara Leigh Grove, Essay, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1559 (2021) (arguing that when the Supreme Court leaves contentious issues — such as abortion, affirmative action, or gun rights — to the lower courts, the long-term legitimacy of the lower federal judiciary is at stake). Although the separation of powers is incredibly important for public perception, it may be that structural constitutional law rulings are not as politically salient — and therefore not as legitimacy undermining — as substantive constitutional law rulings.

⁴⁰⁴ Krotoszynski, *supra* note 396, at 1027–28 (citing Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 587 n.76 (1998)).

⁴⁰⁵ *Id.* at 1050.

cial allegiance and party affiliation are heightened as authority is concentrated further up in the judiciary.⁴⁰⁶ There is an entire punditry dedicated to understanding and predicting what Supreme Court Justices do. Justices become household names and they are labeled liberal, conservative, and “swing.” This is an additional price of elevating decisionmaking quickly to the Supreme Court: it heightens the stakes and media attention immediately. The Court’s practice of granting cases on the merits docket and issuing relief on the shadow docket has created the expectation that it will do so again in the future.

As decisional authority is diffused and shared among both conservative and liberal judges in the district and appellate courts, the judiciary’s institutional legitimacy can be preserved and restored because judicial tools — including managerial, doctrinal, and remedial tools — will be used by more actors and become less political.⁴⁰⁷ Consider once more the case of the nationwide injunction. Although the remedy permits judges to exert extraordinary authority, which can augment ideological leanings, politics alone cannot explain its issuance. During the Obama Administration, Judge Mazzant — an Obama appointee — enjoined labor rules requiring companies to pay overtime to employees.⁴⁰⁸ During the Trump Administration, more judges issued this remedy, diffusing *the remedy’s* controversy. Although litigants have control over where they file their cases, often filing in more sympathetic circuits, judges of different perceived politics have enjoined executive action. Indeed, a judge appointed by President Trump enjoined one of his Administration’s policies.⁴⁰⁹ With time — and more injunctions issued by different judges — the notion that politics drives outcomes will likely ebb.

C. Permit the Judicial Power to Evolve

In addition to the practical benefits of diverse decisionmaking, the shared nature of judicial power has theoretical implications for how the

⁴⁰⁶ See, e.g., Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [<https://perma.cc/9WFF-BP6P>].

⁴⁰⁷ See Krotoszynski, *supra* note 396, at 1027 (“[T]he popular legitimacy of a judicial act displacing the act of a democratically elected and accountable legislative body or executive officer is surely improved and enhanced when different decision makers, operating independently of each other, reach a common conclusion (whether or not on the same premises or reasoning).”). Of course, there is an endogeneity in litigation that I cannot disentangle here. Litigants will choose the fora most hospitable to their claims; it is notable that challenges to the Obama Administration’s policies were brought and adjudicated in different circuits than challenges to the Trump Administration’s policies. Even still, we see judges of different ideological backgrounds reaching for the same procedural tools.

⁴⁰⁸ See *Nevada v. U.S. Dep’t of Lab.*, 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016).

⁴⁰⁹ See *Cap. Area Immigrants’ Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 57, 60 (D.D.C. 2020) (holding that predicted surge of potential asylum seekers did not provide good cause for forgoing APA’s notice-and-comment procedures).

Court should review lower court decisions. Just as the Chief Justice does not have a monopoly on judicial power, so too the Supreme Court does not have a monopoly on judicial power: district judges, court of appeals judges, and state court judges all exercise *the* judicial power.⁴¹⁰ For those who acknowledge that the constitutional powers — executive, legislative, and judicial — are dynamic and take shape over time through constitutional negotiation, the judicial power's evolution begins in the lower courts.

It is especially important that the Court consider and incorporate the views of the lower courts in cases concerning the scope of judicial power and review, because the power also belongs to those judges in an existential sense. Judges — and district judges in particular — are experts in case management. Likewise, federal judges are especially competent to make justiciability determinations, such as ripeness and standing. Judges are also well suited to legal construction and remediation. One could think of these as the *anti*-political questions. The Supreme Court should thus be especially solicitous of lower court views on the core of judicial power.

CONCLUSION

The modern judicial power is in a time of change. That change is difficult to detect, let alone to document, because it is initiated by the lower federal courts: a diffuse collection of district courts and courts of appeals. Courts have assimilated new assertions of executive power into the traditional competencies of federal courts. They have increased transparency and public accountability of the Executive through case management. And they have created a framework for judicial review through doctrinal and remedial developments. There is enormous potential in these developments for the separation of powers. Still, there is so much to learn about the modern judicial power and the separation-of-powers suit: how each of the doctrines and practices will continue to develop, where the boundaries should and will ultimately be fixed, and how these suits interact with doctrines developed over decades that entrench executive power. This Article's effort to collect the voices of the diffuse district courts and courts of appeals to make sense of the surprising turns they have taken in the last decade is just the beginning.

⁴¹⁰ See Krotoszynski, *supra* note 396, at 1033–34 (“[T]he Chief Justice plainly enjoys only some part of the entire judicial power of the United States, which he or she must share with the other members of the Supreme Court, with the inferior federal courts (should Congress exercise its discretion to create them), and with the state courts (which, had Congress elected not to create lower federal courts, would adjudicate federal claims in the first instance and also likely decide initial appeals).”).